Committee of experts on
human rights dimensions of automated data processing
and different forms of artificial intelligence
(MSI-AUT)

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

9 October 2018

MSI-AUT(2018)04

Draft study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states

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EXECUTIVE SUMMARY

(Section under development)

I) INTRODUCTION

1) The phenomenon of libel tourism

The phenomenon known as 'libel tourism' is a form of forum shopping when a plaintiff files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easiest to sue, or because the mere cost of the procedure could have a dissuasive effect on the defendant.[1]

Globalisation and digitalisation of society make information (including potentially defamatory statements) virtually accessible from anywhere, at any time. Such a state of the information society is thus likely to enhance the so-called libel tourism phenomenon.

In the current online and highly digitalised context, one should observe that anyone might be affected by defamatory statements. However, journalists and media organisations, due to their public watchdog role which notably consists of exposing scandals and high profile cases, face particular risks to be affected by libel tourism. Gaps in national defamation laws, lack of harmonised conflict-of-laws rules, diverse application of rules on jurisdiction, and varying rules on recognition and enforcement of foreign judgments may increase the risk of a chilling effect over the freedom of expression of media actors due to the libel tourism phenomenon.

At the EU level, there has been a recent call from members of the European Parliament for the EU commission to issue a proposal for an EU anti-SLAPP (strategic lawsuit against public participation) directive[2]. This call for an EU anti-SLAPP directive has notably attracted support from the Committee to Protect Journalists ("**CPJ**")[3].

Earlier in 2011, the then United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, issued a joint declaration suggesting to set up some rules and standards regarding criminal and civil liability to fight against libel tourism[4]. In 2012, forum shopping in respect of defamation was already identified by the Committee of Ministers as a major challenge to free expression, access to information, and to media pluralism and diversity.[5]

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[1] The term 'libel tourism' was coined in the Declaration by the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, adopted on 4 July 2012, pt.5. This study will use this term as defined in the Declaration.

[2] See for instance the EPP press release of 10 April 2010, « EU anti-SLAPP legislation all the more urgent », at: http://www.eppgroup.eu/press-release/EU-anti-SLAPP-legislation-all-the-more-urgent (last visited on 9/06/2018).

[3] See the press release of 22 February 2018, « CPJ welcomes call for EU directive against SLAPPs », at: https://cpj.org/2018/02/cpj-welcomes-call-for-eu-directive-against-slapps.php (last visited on 09/06/2018).

[4] The Joint Declaration is available at: http://www.osce.org/fom/78309?download=true (last visited on 09/06/2018).

[5] Declaration by the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, adopted on 4 July 2012, pts. 6-7.

Beyond the boundaries of Council of Europe (CoE) member states, the United States addressed the issue already in 2010 when the US Congress enacted the SPEECH Act (Securing the Protection of Our Enduring and Established Constitutional Heritage Act)[6]. One case often referred to in the literature which prompted the US SPEECH Act with the aim of preventing, in particular, any chilling effect on publishers is the *Ehrenfeld v. Mahfouz* case[7]. Although there have not been many cases based on the SPEECH Act so far, the provisions contained therein are very protective for persons residing in the US and facing enforcement procedures in respect of foreign defamation judgments[8].

From a Human Rights perspective, articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantee an effective right for the plaintiff to argue is or her case in court. Yet, laws that are excessively plaintiff-friendly may cause serious chilling effects on freedom of expression guaranteed by article 10 ECHR. The occurrence of libel tourism reveals the lack of harmonisation between Council of Europe member states' rules on jurisdiction and laws in relation to defamation cases. Such a lack of harmonisation tends to favour plaintiff-friendly *fora* over *fora* adopting a more balanced approach, in respect of defamation claims, between plaintiff's and defendant's respective rights.

The Committee of Ministers in its Declaration on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation[9] put forward two types of causes for libel tourism: on the one hand, libel tourism was said to be due to differences between national defamation laws (*i.e.* "factors" or juridical advantages), and on the other hand libel tourism was said to stem from differences between "special jurisdiction rules in tort (and criminal cases)" (*i.e.* private international law factors). This study will address these two aspects in turn and, given the divergence of practice in member states and the acknowledged presence of a variety of factors that may be conducive to libel tourism, the study will seek to highlight a set of good practices.

2) The scope and objectives of the study

This study will focus on private international law rules rather than on criminal law rules on jurisdiction, as rules on jurisdiction in criminal law cases contemplate connecting factors which are closely linked to the territory of a state and which would thus require an analysis from a purely territorial perspective. One should note, however, that while defamation criminal proceedings might be conducted in one state, civil proceedings for damages might still be undertaken in another state since the aim of criminal procedure (*i.e.* punishment for a

[6] Pub. L. No. 111-223, 124 Stat. 2380-84, codified at 28 U.S.C. §§ 4101-05. See Appendix 3 for a summary of key provisions of the SPEECH Act.

[7] See below at section 2(6) for further details. For a brief overview of the case, please see The New York Times, Adam Cohen, 'Libel Tourism': When Freedom of Speech Takes a Holiday, 14 September 2008, available at: https://www.nytimes.com/2008/09/15/opinion/15mon4.html.

[8] Please see section III(2)(b) for further details and discussion on this matter.

[9] Declaration by the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, adopted on 4 July 2012, pt. 5.

wrongdoing) is distinct from the aim of civil procedure (*i.e*. seeking of redress, notably through monetary compensation or other equitable measures). While, in one single state, criminal proceedings might entail a stay of civil claims for damages, this is not necessarily so internationally when criminal and civil proceedings are conducted respectively in two different states. Libel tourism might thus still be observed in respect of states that criminally prosecute defamation.

In contrast with criminal law rules on jurisdiction, relevant private international law rules (including rules on recognition and enforcement of judgments) make use of different connecting factors, with the aim of achieving a harmonised result amongst the different legal systems involved. The various connecting factors that might be used in private international law frameworks of CoE member states, as well as some material law features may nevertheless lead to a significant comparative advantage of one state's legal system over another, with the effect of attracting defamation claims that are not *prima facie* closely connected to the forum state (*i.e.* the state whose courts are seized by the plaintiff).

Since libel tourism is first and foremost a matter of forum shopping, it highly depends on the applicable rules of the forum court on international jurisdiction and recognition and enforcement of judgments and the lack of international consensus regarding supra-national or common conflict-of-law rules for defamation matters. Please note that issues relating to conflict-of-laws rules will not be specifically addressed in this study, but will be merely referred to as a possible factor leading to libel tourism.

This study intends to provide an overview of law and practice in Council of Europe member states in order to identify existing good practices for addressing the so called libel tourism phenomenon. Through legal analysis, and on the basis of some specific cases, this study will seek to:

- identify in law and practice factors that are conducive to libel tourism;
- identify gaps in clarity as to the applicable law and lack of indicators for the determination of personal and subject matter jurisdiction;
- identify and describe jurisdictional peculiarities of cases regarding online defamation;
- identify good practices in addressing the risks of libel tourism and propose any other desirable measures to the same end.

3) The methodology of the study

As this study intends to provide an overview of law and practice and to identify good practices in addressing the issue of libel tourism, a comparative analysis of various legal frameworks applicable in CoE member states was deemed necessary. The scope and material restrictions for undertaking this study would however not allow for an exhaustive comparative analysis of each of the 47 CoE member states' legal frameworks. This is the reason why peculiarities of some

legal frameworks might not have been contemplated in the present study, although the main characteristics have been addressed by grouping CoE member states as explained below.

For purposes of facilitating a comparative legal analysis and due to the existence of harmonised rules on jurisdiction within the EU, Council of Europe member states have been grouped in EU and non-EU states. In addition, when addressing defamation matters significant differences between common law and civil law systems may also be pointed out and will be punctually documented throughout the study.

Data on case-law and legislation used for the purpose of this study are data publicly available.

While this study is focused on the state of the law in CoE member states, references, where relevant, are also made to non-European legal systems (such as case-law and legislative changes in the United States or Canada for instance) where developments in addressing libel tourism may appear relevant for further legal developments in Europe.

To the extent possible, this study relies on court practice to illustrate and show the main factors that may lead to libel tourism. It is not meant to serve as a compilation of cases, but also intends to dive into more theoretical aspects of private international law that might not yet have been considered in courts, but that are deemed relevant to address related risks.

II) IDENTIFYING FACTORS CONDUCIVE TO LIBEL TOURISM

There may exist factors of different kind conducive to libel tourism. They may be closely linked to the litigation strategy of a party in bringing a defamation claim against another person. For clarity purposes, it appears necessary to distinguish between the notions of:

- "reasons" that refer to the motives or strategic advantages a plaintiff may have to start forum shopping in defamation cases; and

- "juridical advantages" that refer to objective features (in respect of both material and procedural rules) of a legal framework that may foster libel tourism (hereinafter "**Juridical Advantages**").

While one cannot purport to be exhaustive on this issue, the original reasons for forum shopping in defamation cases may be twofold:

> a) one may have no legitimate ground for starting a defamation action under the applicable law in the 'home' jurisdiction but start nevertheless such an action before a foreign[10] and unexpected forum with the hope that the defendant will not defend the case; or
>
> b) one may have a legitimate ground for starting a defamation action under the applicable law but seeks to benefit from a juridical advantage, to harm or to punish the adverse party by launching an action before a foreign and unexpected forum.

In multijurisdictional defamation litigations, the plaintiff will endeavour to avail himself of juridical advantages through a strategic use of applicable conflict-of-law rules and rules on jurisdiction. This section will seek to highlight the main juridical advantages that one may find across Council of Europe member states' legal frameworks, whereas section III will focus on the analysis of applicable private international law rules which would allow a party to make use of such juridical advantages.

The factors conducive to libel tourism may be diverse and specific to a given legal system. Whilst the scope of this study does not allow an in-depth analysis of all features of Council of Europe member states' legal frameworks, we may still highlight some of the main juridical advantages that are likely to encourage libel tourism. It should be noted that the juridical advantages that are listed below at sub-sections 1 to 7 are to some extent interrelated and that they may be found cumulatively in one legal system.

[10] For more details on this, please see below at (…).

1) The amount of damages, the availability of punitive damages and the role of a jury

The possibility of a high amount of damages may entail a detrimental chilling effect on the freedom of expression of the alleged author of the defamatory statement. As this has already been shown in previous Council of Europe studies on defamation, the lack of guidelines or limitations on the allocation of damages is likely to create a chilling effect on the freedom of expression[11]. The European Court of Human Rights ("**ECtHR**") highlighted in its *MGN Ltd v. United Kingdom* case that the high cost of proceedings may constitute a breach of the right to freedom of expression guaranteed by article 10 ECHR[12]. Similarly, an exceedingly high amount of damages may also breach article 10 ECHR and must therefore be proportionate to the harm suffered by the claimant[13].

A claimant in a defamation case may also want to bring a case before a forum where punitive damages are available to make profit from the case, or to punish the defendant[14]. In practice, there are few CoE member states that allow punitive damages to be awarded. These are mainly those with common law traditions, including Ireland.[15].[16].

Under some legislations, trial by jury may play an important role to assess not only culpability for a crime or tort but also in determining the amount of damages to be allocated to the victim. It can therefore be a key strategy for the plaintiff to a defamation case to bring proceedings before a forum where the case can be tried by jury.

All the above-mentioned features are interrelated and may result in an outcome that is generally (financially) favourable to the plaintiff, thereby potentially fostering libel tourism.

2) The availability of favourable limitation periods

Limitation periods might be defined as the timeframes for a claimant to bring his or her case before a court. In defamation cases, the longer a limitation period, the higher the risk for the author of a statement to fall victim of libel tourism. One party may indeed seek the benefit of favourable provisions applicable to limitation periods. In determining whether a case is foreclosed or not, courts usually refer either to the law of the forum state (as limitation periods might be qualified as a procedural issue), or to the law applicable to the merits (as limitation

[11] See for instance Tarlach McGonagle, *Freedom of expression and defamation*, Council of Europe, 2016.
[12] See ECtHR, Independent News and Media v. Ireland, 16 June 2005, no 55120/00 and ECtHR MGN Ltd v. United Kingdom, 18 January 2011, no 39401/04.
[13] *Ibid.*
[14] In such a case a party could receive a sum of money exceeding the harm he, she, it had suffered.
[15] See for instance the Irish Defamation Act 2009 at section 32. For more details, please also refer to the table below in Appendix 2.
[16] John Y. Gotanda, "Damages in Private International Law (Volume 326)", in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, Martinus Nijhoff, 2007, p. 334.

periods may be seen as an inherent component of the merits of the case)[17]. While limitation periods applicable to defamation cases are usually short, their length might still vary from one country to another. A claimant who would not be entitled to start defamation proceedings at the place where the statement has originally been published might thus still try to bring proceedings in another state where the statement has been accessible and where the limitation periods under the applicable law are more favourable.

3) The availability of favourable rules regarding the burden of proof

Another important factor is whether the burden of proof is on the plaintiff or on the defendant. Unlike the United-States where the so called "Reynolds defence" can be invoked, in particular, by media organisations, whereby the burden of proof is on the claimant to prove the falsity of the statement complained of, CoE member states' legal frameworks usually put the burden of proof on the defendant. It is thus for the defendant to prove that his or her statement is true. The defendant will then have a set of available defences in court and may in some circumstances reverse the onus of proof on the plaintiff. The availability of the said defences varies, however. In some states, the reversal of the onus of proof may be more difficult than in others. Such discrepancies may thus be a serious factor favouring libel tourism.

4) The general procedural costs for starting a defamation action

As already mentioned under sub-section 1, the ECtHR affirmed in its *MGN Ltd v. United Kingdom* case that the high cost of proceedings may constitute a breach of the right to freedom of expression guaranteed by article 10 ECHR[18]. Whilst legal costs of defamation proceedings had been debated in the UK prior to the enactment of the UK defamation bill in 2013, the legal costs issue has not been clearly dealt with in the UK Defamation Act 2013[19]. Legal costs of defamation proceedings can indeed constitute an important obstacle for either the plaintiff or the defendant, especially where the plaintiff or the defendant is a natural person or a small media organisation with few financial resources.

5) The availability of injunctions (the so-called "super-injunctions") and the related contempt of court sanction

In countries where the plaintiff can avail himself or herself of a super-injunction (for instance in the UK)[20], these may indeed be characterised as stringent legal measures that prevent the media from publishing reports or statements on certain topics. Where such measures are available,

[17] For further explanation on the link between conflict-of-law rules and the issue of limitation periods, please see below and section II(6).

[18] See ECtHR, Independent News and Media v. Ireland, 16 June 2005, no 55120/00 and ECtHR MGN Ltd v. United Kingdom, 18 January 2011, no 39401/04.

[19] Incident reforms have though been introduced into English law, notably in relation to the new opt-in choice for trial by jury set out under section 11 of 2013 UK Defamation Act.

[20] Please see The New York Times, Ravi Somaiya, *British Law Used to Shush Scandal Has Become One,* 26 Avril 2011, available at : https://www.nytimes.com/2011/04/27/world/europe/27britain.html.

courts may expeditiously order a media organisation not to make public some pieces of information to protect the personality rights of individuals or legal entities. Failure to comply with such court's injunction may further trigger a criminal sanction of contempt of court. The cumulative effect of easily available super-injunctions and strong contempt of court sanctions may unduly restrict freedom of expression (and undermine freedom of the media) while at the same time fostering libel tourism.

6) The availability of default judgments

The plaintiff may seek to act (in a deceptive way) and start defamation proceedings before an unexpected forum before which it would be difficult and costly for the defendant to appear and defend its case. Procedures where the defendant does not appear in court to defend the case are called default judgment procedures and are usually decided solely on the elements provided by the plaintiff. Such default judgments are typically available before UK courts and have already been delivered in defamation cases.

By way of an example, one may refer to the Ehrenfeld v. Mahfouz case[21], where Khalid bin Mahfouz, a Saudi businessmann, sued Rachel Ehrenfeld, an American writer, before UK courts for the statement of Rachel Ehrenfeld in her book, Funding Evil, that Mr. Mahfouz was providing funding assistance to terrorist organizations. Mahfouz won a default judgment for £110,000, including attorneys' fees, since the defendant failed to appear in court.

Furthermore, in states where default judgment procedures are available and where the servicing of proceedings abroad (*i.e.* proper notification of the defendant about the case brought against him or her) is neither guaranteed nor effective, a plaintiff might thus seek to bring a defamation case before the courts of such states to secure a favourable award without the defendant being *de facto* able to defend the case.

7) The availability of favourable conflict-of-laws rules

Conflict-of-laws rules may widely differ amongst CoE member states as, contrary to rules on jurisdiction, there are for the time being no international or supra-national conflict-of-laws rules specific to tort of defamation. At the EU level, the conflict of law rules laid down in Article 1(2)(g) of the Rome II Regulation are not applicable to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation".

Whilst the connecting factor usually retained as applicable under most of the CoE member states' legal frameworks is the *lex loci delicti commissi* (the place where the tort has been committed) rule, the *in concreto* determination of the applicable law may widely vary from one member state to another. In cases where it appears that a tortious act has been committed in one place but the harm occurred in another, at least two different laws may be applicable: either the law of the place where the event giving rise to the damage occurred or the law of the place where the damage occurred. If the victim can freely choose between those laws, in accordance with the

[21] See Queen's Bench Division, 3 May 2005, [2005] EWHC 1156 (QB).

conflict of law rules of the forum, the forum shopping phenomenon is likely to develop further. Under French conflict-of-laws rules, for instance, Courts originally affirmed that the law of the place where the damage occurred and the law of the place where the event giving rise to it occurred could both be held applicable[22]. The rule, however, was later refined by case-law to the effect that, in compliance with the proximity principle, the applicable law is the law which has the strongest connections with the tort which has been committed[23].

[22] See Cour de cassation, Civ. 1ère, 14 January 1997, D. 1997, p. 177.
[23] See Cour de cassation, Civ. 1ère, 11 May 1999, JDI 1999, p. 1048.

III) LIBEL TOURISM AND CURRENT PRIVATE INTERNATIONAL LAW RULES

If rules on jurisdiction are relatively harmonised within the EU, this is not the case for non-EU states where rules on jurisdiction and rules on recognition and enforcement of foreign judgements may largely vary from one state to the other.

For the purposes of this study, CoE member states will be distinguished into two categories with respect to applicable rules on jurisdiction in torts-related matters: on the one hand, CoE member states that are also part of the EU (1), and on the other hand, CoE member states that are not part of the EU (2).

1) Council of Europe member states that are in the EU

Applicable private international law rules may favour libel tourism from various perspectives: on the one hand, by rules on direct international jurisdiction (a), and on the other hand, by rules on recognition and enforcement of foreign judgements (b).

a) Forum shopping risks related to direct international jurisdiction rules

EU rules on direct international jurisdiction directly applicable by courts in EU member states for asserting whether they have international jurisdiction over a case have been evolving overtime through the case-law of the ECJ. The connecting factors for asserting jurisdiction, which are traditionally the place where the tort has been committed and/or the domicile (or habitual residence) of the defendant, have been adapted to new circumstances, in particular as regards torts committed online. This study thus turns to a brief explanation of the main aspects of the said evolution.

(i) The domicile of the defendant and the lex loci delicti rule

Under EU Regulations on jurisdiction and enforcement of judgments, the general rule states that defendants shall be sued before the courts and tribunals of the member state where they are domiciled[24]. It is possible to sue defendants before the courts of other member states, but only to the extent allowed by specific provisions of EU Regulations[25].

Pursuant to the Brussels Ibis regulation[26], the defendant may be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur". This rule is usually referred to as the *lex loci delicti* rule (*i.e.* rule of the place the tort was committed). This rule is common to both assertion of jurisdiction and determination of the applicable law[27].

[24] See article 4(1) of the Brussels Ibis Regulation and article 2(1) of the Brussels I Regulation.
[25] See article 5(1) of the Brussels Ibis Regulation and article 3(1) of the Brussels I Regulation.
[26] See article 7(2) of the Brussels Ibis regulation and article 5(3) of the Brussels I Regulation.
[27] See article 4(1) Rome II Regulation.

In tort cases, the plaintiff thus has a choice under EU rules between the courts of the member state where the defendant is domiciled and the courts of the place where the harmful event occurred or is likely to occur.

This basic choice between two fora for the plaintiff to bring the case before a court is, however, complicated by the fact that a harmful event may have cross-border effects in several EU member states. This kind of tort is usually called "complex tort" since it may be difficult for a court to clearly identify the location where the harmful event actually occurred.

(ii) Complex tort issue

In order to face complex tort issues the ECJ chose to alter and adapt its approach regarding rules on jurisdiction. The ECJ stated in its *Mine de Potasse d'Alsace* case that where the place where the event occurred that may give rise to liability and the place where that event results in damage are not identical, the plaintiff shall have the choice between the courts of the state where the damage occurred and the place of the event giving rise to it. In defamation cases, this means that a plaintiff may bring his or her claim either before the competent courts of the state where the allegedly defamatory statement has been published, or before the courts of the state where the plaintiff suffered harm from such a statement, which is presumably the place of the plaintiff's habitual residence or domicile.

(iii) Complex tort issue in media/press-related matters

Complex torts are likely to happen in press-related defamation offences, since the country of publication and the country of distribution might differ. The probability to face complex tort issues is further increased in case of online defamation. The internet indeed allows for information to be accessible almost instantaneously from anywhere, thereby increasing the potential impacts of defamatory statements.

In press-related cases where there may often be multiple places/jurisdictions of distribution, the ECJ adapted the EU rules on jurisdiction so as to encompass this multijurisdictional aspect. In its ***Fiona Shevill*** case[28], the ECJ stated that "the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State (Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters) of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized". The ECJ took thus into consideration the multijurisdictional aspect of the EU rules on jurisdiction in respect of complex torts in light of the overall damage that occurred. The plaintiff would then have the choice between suing before the courts of the place of publication of an

[28] ECJ, *Fiona Shevill*, 7 March 1995, Case C-68/93, see in particular point 33.

allegedly defamatory statement for the entire amount of damages, or before the courts of each jurisdiction where harm has been suffered, including the place of habitual residence of the plaintiff, but only for a limited amount of damages corresponding to the damage suffered in this jurisdiction. This approach was later called the "mosaic approach" in light of the diversity of available fora for a plaintiff to start defamation proceedings.

(iv) Complex tort issue in online defamation cases

Having regard to the fact that defamatory statements published on the internet can be accessible in several states on a cross-border basis, the ECJ further refined its construction of the rule on jurisdiction which had been set out in its ***Fiona Shevill*** case. The ECJ established in its eDate/Martinez ruling that "in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized".

Having regard to the principle of good administration of justice, the ECJ therefore enables the applicant to choose between different fora, and in particular the courts of the State where the applicant has his or her centre of interests which does not necessarily correspond to the applicant's domicile or habitual residence[29]. The ECJ therefore reinforced its "mosaic approach" with a rule on jurisdiction applicable to torts, and the tort of defamation in particular.

Such a "mosaic approach", however, appears problematic in the sense that it enables the plaintiff to forum shop amongst EU member states' jurisdictions.

(v) Recent trend regarding the "mosaic approach"

In a recent case before the ECJ, Advocate General Bobek made a claim that the "mosaic approach" developed by the ECJ does not satisfy requirements of predictability and good administration of justice. Data put on the internet is indeed accessible virtually everywhere and almost instantly. The said "mosaic approach" could lead to the harassment of the defendant by the applicant, since it allows the latter to begin proceedings before multiple fora within the EU, thereby increasing legal costs and uncertainty for the defendant[30]. Moreover, legal uncertainty arises if several injunctions are sought before the courts of different states. How would it be

[29] The ECJ affirmed further in its *Fiona Shevill* case that "a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State".

[30] See M. Bobek conclusions in Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, in particular points 73 to 90.

possible to articulate different judgments granting injunction and/or allocating damages? The Advocate General suggested restricting the forum choice of the applicant to two possible specific fora: the courts of the state where the harmful event occurred (*i.e.* most likely the place where the publisher is established or has its domicile/ habitual residence), or the courts of the State where the applicant has his/ her/ its centre of interests[31]. Following these two criteria, and according to the rules set out in the EU Regulations on jurisdiction, the applicant could then choose to make a claim for the full allocation of damages either where the publisher had put the defamatory content online (which would be the defendant's place of habitual residence or establishment), or where the plaintiff's reputation has been the most injured, that is to say, where the plaintiff has his or her centre of interests (which will presumably correspond to the plaintiff's place of residence).

Whilst the ECJ did not follow Advocate General Bobek's opinion and reiterated its "mosaic approach", in line with its *eDate/Martinez* case-law, regarding rules on direct international jurisdiction in respect of complex tort issues, the ECJ restricted courts' jurisdiction to hear claims for removal of defamatory content and for correction of wrong information. The ECJ limited courts' jurisdiction to order removal or correction of wrong or misleading statements only to courts with jurisdiction to rule on the entirety of an application for compensation for damage[32].

(vi) The current state of EU law regarding rules on direct international jurisdiction

Under the current EU law rules on jurisdiction as construed by the ECJ, a plaintiff in a cross-border defamation case (either online or "off-line") has the choice between bringing a claim for compensation for the entire amount of damages either before the courts and tribunals of the state where the author of the allegedly defamatory statement is domiciled, or before the courts and tribunals of the member state where the plaintiff has his or her centre of interests (*i.e.* presumably the place of habitual residence), or for a limited amount of damages before the courts and tribunals of the member states where the information is or was accessible.

In respect of other types of legal actions, such as actions to seek injunctions to remove defamatory content or to correct some inaccurate or wrong information, only courts and tribunals that have jurisdiction for the entirety of damages can render a judgment.

b) Facing forum shopping risks related to recognition and enforcement rules

EU and non-EU States possess different sets of rules governing the recognition and enforcement of judgments. EU rules on recognition and enforcement of judgments are defined in the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which has later been amended by the Brussels I Regulation and the Brussels I bis Regulation (recast). The applicability of these EU regulations follows the same conditions as

[31] See M. Bobek conclusions in Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16.

[32] ECJ, 17 October 2017, Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, in particular points 44 and 47-49. As regards EJC case-law on the matter, please see above for more details.

have been detailed above and the rules have been devised in accordance with the general principle of trust and "mutual recognition" between EU member states. Under the Brussels I bis regulation, and contrary to the previous Brussel I regulation, there is no recognition and enforcement procedure ("*exequatur procedure*") for judgments rendered by courts of another EU member state[33]. Parties to a defamation case can, however, still invoke a limited number of reasons to fight recognition and enforcement of a EU judgment.

(i) The public order exception

Under EU rules on recognition and enforcement of foreign judgements, the first legal basis to refuse recognition and enforcement of a judgment is the public order exception[34]. It has to be noted that the ECtHR's case law and the Council of Europe standards have an impact on the content of the public order exception in matters of recognition and enforcement of judgments.

In defamation cases, such a public order exception may be used to refuse to recognise or enforce decisions allowing the applicant an excessive amount of damages, *a fortiori* if such damages are "punitive damages". The public order exception could also play the same role if the judgment grants an injunction that manifestly violates defendant's fundamental rights. The public order exception can further be put into motion if procedural rights of one of the parties have been violated before foreign courts (for example if the defendant was not allowed to prove the truth of his or her statement in a defamation case because of procedural limitations).

In any case, and bearing in mind that the content of the public order exception may evolve overtime, the assessment of whether a foreign judgment is contrary or not to the public order of the addressed state shall be done *in concreto* in light of the circumstances of the case and may not be applied to the rules on jurisdiction, except for where exclusive rules on jurisdiction and weak parties' specific rules[35] on jurisdiction are concerned. It should however be highlighted that where EU law rules don't apply, the public order exception provided for under national law could apply to the rules on jurisdiction. In particular, if the rules on jurisdiction and procedural requirements are framed in such a way as to bar the defendant's access to court or to violate the defendant's procedural rights, the recognition or enforcement of the decision might be held contrary to the other State's public order[36].

(ii) The res judicata exception

As a general principle of law, if the decision recognition or enforcement of which is sought before the addressed state appears to be irreconcilable with another decision from another EU member state or from a third country involving the same cause of action and between the same

[33] Please note however that national rules on enforcement and recognition of foreign judgement however remain applicable in respect of judgements rendered by non-EU courts.
[34] Please see article 45 of the Brussel Ibis Regulation.
[35] Under EU law, specific provisions exist to protect weak parties' rights, which are deemed to be insureds, workers and consumers.
[36] For further details and discussion on this issue, please see below at section III(2)(b).

parties, such decision shall not be recognised nor enforced in the addressed State. The *res judicata* exception may play an important role if the "mosaic approach" is applied resulting in different or even contradictory decisions in several states. The *res judicata* exception whether under EU law rules or national rules can therefore play an important role in the fight against forum shopping in defamation cases.

(iii) The hypothesis of fraudulent behaviour.

The general principle of law *fraus omnia corrumpit* (*i.e.* fraudulent behaviour invalidates the acquired legal right that would otherwise be legitimate) may also be applied in conflict of law and conflict of jurisdiction cases. An applicant may indeed seek to start proceedings before a court (for example by moving his or her domicile or centre of interests) which would have jurisdiction to try a case in light of its rules on jurisdiction and which would apply a law that would be more favourable to the applicant. It should therefore be recognised as fraudulent behaviour when a party intentionally makes an illicit use of rules on jurisdiction in order to attain a result that could not have been obtained otherwise. At the stage of recognition and enforcement of judgments, the exception of fraudulent behaviour may however be encompassed under the more general public order exception.

While not being directly related to fraud, the fact that a defendant is not properly served with proceedings (*i.e.* the defendant is not properly and in due time informed of the case against him or her) in case of default proceedings, is a formal reason to refuse recognition and enforcement of a foreign judgment under EU regulation[37].

2) Council of Europe member states that are not in the EU

Amongst non-EU Council of Europe member states, a further distinction should be made between those that are part of the Lugano Convention[38] (a) and those that are not (b). Under the Lugano Convention regime, the rules on jurisdiction are indeed similar to those applicable pursuant to EU regulations, whereas national rules on jurisdiction may still differ significantly from one state to another.

a) Non-EU member states of the Council of Europe parties to the Lugano Convention

The Lugano Convention of 16 September 1988 was replaced in 2007 by the "new" Lugano Convention which entered into force on 1st January 2010. The objective of the Convention is to unify the rules on jurisdiction in civil and commercial matters and expand the applicability of the Brussels I regulation[39] to relations between the EU Member States and Norway, Iceland and Switzerland. The rules under the Lugano Convention are very similar to those laid down by EU

[37] Please see article 45(1)(b) of the Brussel Ibis Regulation.

[38] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16 September 1988, as amended in 2007 by a "new" Lugano Convention that entered into force on 1st January 2010. The objective of the Convention is to unify the rules on jurisdiction in civil and commercial matters and expand the applicability of the Brussels I regulation to the relations between the EU Member States and Norway, Iceland and Switzerland.

[39] Brussels I Regulation 44/2001.

law. Article 2 of the Lugano Convention provides that "persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State". Article 5(3) provides for special rules on jurisdiction and stipulates that in matters of tort, delict or quasi-delict, a defendant can be brought before the court of the place where the harmful event occurred or may occur. Bearing in mind that, according to its Protocol 2 on the uniform interpretation of the Convention, the Lugano Convention must be construed in light of EU law, instruments on jurisdiction, and national courts must apply the rules on jurisdiction enshrined in the Lugano Convention, taking into account the ECJ's case-law, the considerations above under section III (1) about complex torts, and defamation cases are also relevant in respect of the Lugano Convention regime.

b) Non-EU member states of the Council of Europe not parties to the Lugano Convention

(Section under development)

IV) GOOD PRACTICES FOR THE LIMITATION OF LIBEL TOURISM

There is a set of legal tools already available in most of Council of Europe jurisdictions that may be further enhanced to reduce risks libel tourism carries for the freedom of expression. Some member states have already enacted changes in their national laws with the aim of striking a fair balance between the need to guarantee access to court in defamation cases and the necessity of preventing any abuses which are to the detriment of defendants' rights.

Without purporting to be exhaustive, one may observe some substantial differences in defamation laws of various Council of Europe member states aiming at striking a fair balance between the respective rights of the plaintiff and the defendant. Taking stock of current rules and practices across some Council of Europe member states (within the scope of this study, as indicated above at section (…), and as specified below where relevant), one may try to set forth a set of good practices that would allow reducing the risks of libel tourism and, most importantly, the risk of a chilling effect on the freedom of expression that it produces.

1° Good practices regarding limitation periods

By way of example, the United-Kingdom enacted the Defamation Act 2013 to bring about changes aiming at addressing criticism raised by the formerly applicable defamation law. The main changes that may be particularly relevant in respect of the libel tourism issue are summarised below in the table in Appendix 1.

It should be noted that while the limitation period in relation to defamation claims was shortened to one year (in contrast to the generally applicable 6-years limitation period for torts) as from the date of publication of an alleged defamatory statement since UK Defamation Act 1996, concerns were raised regarding the date of publication, since not only the first publication of a statement may constitute the starting point of an action in defamation, but also any and each instance when the statement is (re-)published or downloaded. These concerns accrued because of the growing role of the internet which makes information virtually always and at any time accessible from various locations. The Defamation Act 2013 thus introduced a single publication rule which states that the limitation period for a defamation action before UK courts and tribunals is due to start only from the date of first publication (*i.e.* subsequent publications are not to be considered relevant in this respect), except where subsequent publications substantially differ from the initial publication. To be more specific, the said single publication rule would allow preventing any defamation action from being brought in the UK when a contested statement initially published in another state has been re-published some time later in the UK. The absence of such single publication rule may indeed potentially lead to multiple and multijurisdictional litigations over time.

UK Defamation Act 2013 nevertheless allows for some flexibility in the application of the said limitation periods, since UK courts and tribunals retain their discretionary powers to lift limitation periods if this is justified in light of the circumstances of a case. Indeed, a plaintiff might not become immediately aware of or might not immediately have sufficient evidence of a defamatory statement, especially if it has been published abroad. The possibility for courts and tribunals to lift such limitation periods appears appropriate for striking a balance between the necessity to fight against defamation and the obligation to protect the freedom of expression.

In view of the above, the following good practices may be highlighted:

> **Good Practice 1:** Specific and reasonably short limitation periods for defamation actions.
>
> **Good Practice 2:** A single publication rule clearly determining the starting date of defamation-specific limitation period to avoid multiple and multijurisdictional litigation.
>
> **Good Practice 3:** Courts and tribunals should maintain the right to lift limitation periods upon request by one of the parties, provided that some objective and clearly defined conditions are met.

2° Good practices regarding the burden of proof

Unlike the United States, the legal frameworks of CoE member states generally place the burden of proof on the defendant to establish that the contested statement is true. CoE member states should nevertheless ensure that their laws are not excessively plaintiff-friendly and efficiently guarantee equality of arms of the parties, failing which, this may lead to a serious chilling effect on the freedom of expression.

> **Good Practice 4:** Where the burden of proof is on the defendant, available defences should not be of the kind to impede reversal of the onus of proof or to make such reversal unreasonably difficult.

3° Good practices regarding the kind and the amount of damages

In line with the ECHR and as developed in the ECtHR case-law (see above), the amount of any damages should be reasonable and proportionate to the harm suffered. In states where trial by jury is available for defamation cases, one should note that proper guidance for the jury in that respect should be guaranteed so as to avoid any unreasonable and disproportionate amount of damages to be awarded. A good example regarding legal systems allowing for trial by jury in defamation cases may be found in the Irish legal system following the Irish 2009 Defamation Act, where a specific provision sets out the obligation for courts and tribunals to provide the jury with proper guidance as to the kind and the level of damages that may be awarded.

The following set of good practices may thus be devised:

> **Good Practice 5:** The amount of damages should be strictly necessary and proportionate to the harm suffered. Aggravated damages may be allowed only if some strict and clearly defined conditions are met.
>
> **Good Practice 6:** Council of Europe member states should refrain from allowing punitive or exemplary damages.
>
> **Good Practice 7:** Appeals limited to the amount of damages should be allowed and should not involve any form of trial by jury.

4° Good practices regarding conflict-of-law rules

Since the applicable substantive law provisions are determined in accordance with the applicable conflict of law rules of the forum state, such conflict of law rules themselves may be seen as a factor leading to libel tourism insofar as a party may choose a specific forum whose conflict of law rules (or their specific interpretation by the forum state) are favourable to the plaintiff's case.

In particular, a party could try to forum shop with a view to the law applicable to the limitation period issue (length of the period, opposability, start of the delay). If, according to the conflict-of-laws rules of the forum court, the limitation period is determined by the *lex fori* (*i.e.* the law of the seized court), it could be a reason for the plaintiff to choose the forum whose law on limitations is the most favourable. It is usually deemed in common law countries that, the limitation period being seen as a procedural law issue, the *lex fori* should apply. However, in other legal traditions, the limitation period is generally considered to be a substantive law issue, and should therefore be governed by the *lex causae* (*i.e.* the law applicable to the merits); that is to say, in tort cases, the *lex loci delicti*[40]. Whatever the position adopted in a specific legal system, a distinction between the law applicable to limitation periods and the law applicable to the merits should be avoided in defamation cases.

Having regard to the general criteria applied under national and international law for the determination of the law applicable to a defamation case, a strict application of the proximity principle (*i.e.* the principle that the law applicable is the law which is the most closely connected to the facts of a case) should ensure a fair and internationally coherent way to determine the applicable law.

> **Good Practice 8:** Application of the proximity principle should be ensured when determining the law applicable to a defamation case.

[40] For instance, this has been clearly established under French private international law since the case Cour de Cassation, 1re civ., 8 janv. 1985, Gaz. Pal. 1985. 2. panor. 166.

Good Practice 9: A difference between the law applicable to limitation periods and the law applicable to the merits of a defamation case should be avoided.

5° Good practices regarding assertion of jurisdiction

While the most common criteria resorted to by courts and tribunals to assert international jurisdiction are usually the place of domicile (or habitual residence) of the defendant and/ or the place where a tort has been committed, defamation cases, and especially online defamation cases, depending on specific circumstances of the case, may require a more flexible approach that focuses on a strong and reasonable link between the defamation case and the forum state. In that respect, where applicable, the mosaic approach to the tort of defamation should be restricted to the extent necessary to ensure that a specific case would not lead to contradictory decisions or to various decisions whose cumulative effect would be unreasonably onerous for one of the parties.

In line with such an approach, where the *forum non conveniens* doctrine may be applicable, courts and tribunals should take into account the place where the most harm has been suffered by the plaintiff in order to assert their international jurisdiction[41]. Due account of the intent of the plaintiff to narrow the scope of his claim should also be taken for the purposes of a *forum non conveniens* analysis. A plaintiff should thus be allowed to limit its claim for damages to the damages which occurred in one particular jurisdiction.

In order to impede forum shopping in defamation cases, courts and tribunals should further ensure before rendering any default judgment that the defendant has been properly serviced and informed about the defamation proceedings against him or her. If courts and tribunals fail to comply with such requirement, a specific ground for refusal of enforcement or recognition of a foreign judgment should be made available.

Good Practice 10: Courts and tribunals should have jurisdiction if there is a strong and reasonable link between the case and the state they belong to.

Good Practice 11: Courts and tribunals should be able to deliver default judgments only if proper servicing of international proceedings is effectively guaranteed.

Good Practice 12: Where applicable, courts and tribunals should make use of the *forum non conveniens* doctrine only as a measure of last resort in order to impede any manifest forum shopping in defamation cases. The

[41] For further details and discussion in the *forum non conveniens* analysis in defamation cases, please see Appendix 4.

place where the most harm has been suffered may be retained by courts and tribunals as a relevant criterion for *forum non conveniens* analysis.

6° Good practices regarding recognition and enforcement of foreign judgments

While in EU member states, the *exequatur* (enforcement) procedure as such might not exist anymore, EU regulations as well as national rules still contemplate the public order (*ordre public*) or public policy exception as a ground for courts and tribunals to refuse recognition or enforcement of foreign judgments. While the content of the public order exception may vary overtime, it appears essential for CoE member states to strive for a coherent approach regarding the use of the public order exception to refuse recognition or enforcement of foreign judicial awards in defamation cases. In the same line, courts and tribunals should recognise and enforce foreign judgments that are declaratory (*i.e.* judgments defining the rights and status of litigants that do not require any action to be taken) insofar as such judgements clearly aim at preventing or stopping abuse of legal procedure or any other action by the plaintiff that could be qualified as libel tourism.

Good Practice 13: Courts and tribunals should endeavour to develop objective criteria in applying public order exception to refuse to recognition or enforcement of foreign judgments that are manifestly a result of libel tourism.

Good Practice 14: Courts and tribunals should recognise and enforce foreign declaratory judgements whose manifest objective was to fight against forum shopping or abuse of legal procedure in defamation matters.

CONCLUSION

(Section under development)

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