

“Libel tourism” and private international law
Trevor C Hartley

Reaction of Francisco J. Garcimartín Alférez

Dear Trevor,

Just a quick reaction. I agree with you and Michael on the relevance of the problem. As you all know, during the negotiations on Rome II, it was impossible to reach an agreement on this issue, mainly due to the different views among Member State. As you explain in your paper, libel problems entail the conflict of two fundamental or constitutional rights and very likely each judge is going to balance these two rights under his own constitutional parameters. Hence, and since a constitutional analysis is almost always unavoidable, I am inclined to think that at the end of the day it is very difficult to escape from the application of the *lex fori*. This means that the rules on jurisdiction play a key role. In this sense, and with regard to your proposal, I would like to make a couple of comments:

(1) Letter (a): The domicile of the claimant as connecting factor without further qualifications can be very dangerous. At least, I would concretize it at the moment when the defamatory statement is made. This guarantees some predictability of the forum to the defendant. I would also add, as you suggest in the text of your paper, that some part of the offending material must have been distributed in that country.

(2) Letter (b): I guess that the expression "has targeted that country more than any other" is very difficult to apply in practice and can provoke a significant procedural cost. I think it is enough to require that a "significant or substantive" part of the activity of the defendant is targeted that country. The test of "directly and substantially" employed in article 6 of Rome II can be a useful reference.

(3) One additional question. I understand that letter (a) and (b) of your proposal are alternative criteria of jurisdiction, and both can be invoked to claim for the whole amount of the damages (i.e. the damages suffered in the forum and abroad). Is it right? If so, why do not maintain the Shevill approach as long as the activities of the defendant are targeted directly and substantially to more than one country?.

In conclusion, I would prefer a provision with two alternative connecting factors: (a) The domicile of the claimant with two additional conditions, i.e. at the moment of the defamatory statement is made and insofar as a relevant part of the offending material has been distributed in that country or is accessible from that country. This court has universal jurisdiction (it has competence over the whole damages at global level). (b) The country of the place where the damages are suffered insofar as the defendant has targeted his activities to that country "directly and substantially". This court has territorial jurisdiction (i.e. it has competence only over the damages suffered in that country)

I hope these thoughts result useful to your analysis. Anyway, congratulations on your paper.

Best regards.

Paco

Francisco J. Garcimartín Alférez

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