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PRIVATE INTERNATIONAL LAW

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JURISDICTION FOR CROSS-BORDER BREACH OF PERSONALITY AND DEFAMATION: *EDATE ADVERTISING AND MARTINEZ*

A. Introduction

In the conjoined cases C-509/09 *e-Date Advertising GmbH v X* and C-161/10 *Olivier Martinez and others v MGN Ltd*,¹ the Court of Justice of the European Union (CJEU) was required to determine the scope of applicability of both Article 5(3) of Regulation EC 44/2001 (the Brussels I Regulation)² and Article 3 of Directive EC 2000/31 (the Electronic Commerce Directive). Both cases were concerned with defamation and breach of personality and image rights as a result of the publication of two newspaper articles which were accessible online via each of the defendants' websites. As readers will be fully aware, Article 5(3) of the Brussels I Regulation enables claimants to establish special jurisdiction in the case of a tort, delict or quasi-delict, in the courts of the Member State where a harmful event has occurred or may occur. The effectiveness of Article 5(3) as a ground of jurisdiction focuses on *locality of the event*. The question that arose in both cases was, essentially, where could the claimants bring proceedings for breach of personality and defamation as a result of newspaper articles published online via websites,³ when those websites were accessible in multiple jurisdictions? According to an experienced legal practitioner in the United Kingdom, 'more than 25 billion individual items of content are shared each month on Facebook alone.'⁴ There are increasing concerns regarding the dissemination of comments through the medium of 'ubiquit(ous), converged and displace(d)'⁵ Web 2.0 communications technologies. Such communications

¹ C-509/09 *e-Date Advertising GmbH v X* and C-161/10 *Olivier Martinez and others v MGN Ltd*, [2012] 3 W.L.R. 227.

² Readers will be aware that, at the time of writing, a 'recast' of the Regulation is under consideration in Brussels : COM 2010 748 FINAL COD 2010/0383, 14 December 2010.

³ P Stone, *EU Private International Law* (2nd edn, Edward Elgar 2010) 104.

⁴ A Hamer, 'Breaches in security of personal data' in K Mathieson (ed), *Privacy Law Handbook* (Reynolds Porter Chamberlain LLP/The Law Society 2010) 99.

⁵ Collins, *The Law of Defamation on the Internet* (3rd edn, OUP 2010) 33. Words modified for syntax.

increase the potential for criminal and civil consequences in numerous jurisdictions. The ability of injured parties (famous or not) to seek redress in the most appropriate forum for the purposes of protecting their private lives and reputations is acutely significant.⁶

B. Establishing Special Jurisdiction under Article 5(3) of the Brussels I Regulation

Readers will also be fully aware of the decisions of the CJEU that have underpinned the basis for Member States to establish special jurisdiction under Article 5(3) of both the Brussels Convention and the Brussels I Regulation as an alternative to general jurisdiction under Article 2. Since the initial decision in *Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA*,⁷ the CJEU has sought, and confirmed in *Jacob Handte v TMCS*⁸ and *Kalfelis v Bankhaus Schröder*,⁹ to ensure an autonomous, independent interpretation applies in determining a tort, a harmful event and the place where the harmful event occurred. The CJEU in *Kalfelis* confirmed that three basic requirements were necessary to establish a claim in tort under Article 5(3). First, a tort for the purposes of Article 5(3) is defined and interpreted as an autonomous independent¹⁰ concept which establishes the ‘liability of the defendant’¹¹ and must not be a ‘matter relating to contract’.¹² According to Collins, whilst claims for damage to reputation and breach of personality rights (‘privacy’) are mutually exclusive, concurrent claims may arise via defamation and breach of confidence proceedings respectively.¹³ It is therefore instructive to consider, by way of analogy,¹⁴ the application of Article 5(3) to claims for defamation when assessing the jurisdictional basis for breach of personality rights/privacy. In seeking a definition of the term ‘privacy’ beyond that conceived by Warren and Brandeis,¹⁵ Bigos draws on the US classification¹⁶ of the tort of breach of privacy (which may or may not be committed via the use of the Internet) as amounting to ‘intentional intrusions, disclosures of private facts and

⁶ See generally I Christie, N Moreham and M Warby (eds), *Tugendhat and Christie, The law of privacy and the media* (OUP 2010); James Tumbridge, ‘Defamation—the dilemma for bloggers and their commenters,’ (2009) 31(10) *European Intellectual Property Review* 505.

⁷ [1976] ECR 1735 (hereafter *Bier*).

⁸ C-26/91 *Jacob Handte v TMCS* [1992] ECR I-3967.

⁹ *Kalfelis v Bankhaus Schröder* [1988] ECR 5565; L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet and Maxwell 2006) para 11-299, 416.

¹⁰ As distinct from the ‘substantive domestic law sense’; North, Fawcett and Carruthers, *Cheshire and North and Fawcetts Private International Law* (14th ed, Butterworths, 2008) 249.

¹¹ *Reichert v Dresdner Bank (No 2)* C-261/90 [1992] ECR I-2149 ; C-167/00 *Verein Fur Konsumenteninformation v K H Henkel* [2002] ECR I-8111 ; *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH* [2002] ECR I-7357.

¹² *Kalfelis* (n 8); *Cheshire, North and Fawcett* (n 9) 248.

¹³ Collins (n 5) para 23.10, 433.

¹⁴ *Cheshire, North and Fawcett*, (n 10) 254–5.

¹⁵ S Warren and L Brandeis, ‘The right to privacy’ (1890) 4 *HarvLRev* 193.

¹⁶ K Mathieson (ed), *Privacy Law Handbook* (Reynolds Porter Chamberlain LLP/The Law Society 2010) 4.

misappropriation'.¹⁷ Such a definition reflects Westin's definition of privacy, premised on an individual's right to determine how his personal information is communicated.¹⁸ In terms of the type of information capable of dissemination, Wright distinguishes between the 'secret' and the 'personal', where the 'flow of the [latter] to those with no legitimate interest in it may be restricted in order to enhance the free development of the human personality'.¹⁹ Whilst acknowledging that the political, moral and legal dimensions to privacy have contributed to a lack of consensus on the definition of the term, Rowland, Kohl and Charlesworth's analysis of the impact of developments in information technology reinforces a spectrum of privacy underpinned by a 'subjective right' of 'self-determination'.²⁰ Such a 'fundamental value attributed to personal autonomy'²¹ has only recently been accorded recognition under English law²² as a 'fundamental human right'²³ through the increasing application of Articles 8 and 10 of the European Convention on Human Rights.

Second, a harmful event must have occurred or (crucially in the case of *eDate Advertising*) there must be the threat of such an event occurring. The amendment to the Brussels Convention to include threatened wrongs²⁴ has become increasingly important for parties who have reason to believe another party may publish a defamatory statement or reveal information that breaches the innocent party's privacy (no matter the communication method used). For example, in the Scottish case *Bonnier Media Ltd v Greg Lloyd Smith*,²⁵ the threat of infringement of the pursuer's trade mark via a foreign website which was accessible—*ergo* capable of being *downloaded*—in the jurisdiction enabled Article 5(3) to apply.²⁶ Third, as far

¹⁷ O Bigos, 'Jurisdiction over cross-border wrongs on the Internet' (2005) 54 ICLQ 588–9; see eg the English case *Applause Store Productions Ltd and Firsh v Raphael* [2008] EWCH 1781 (QB).

¹⁸ A Westin, *Privacy and Freedom* (Athenaeum 1967) 7; Christie, Moreham and Warby (n 6) x.

¹⁹ Wright, *Tort Law and Human Rights* (Hart 2002) 163.

²⁰ D Rowland, U Kohl and A Charlesworth, *Information Technology Law* (4th edn, Routledge 2011) 150–1.

²¹ M Collins, *The Law of Defamation on the Internet* (1st edn, OUP 2001) para 23-05, 273; K Mathieson (n 16) 1. See also D Wallis (Rapporteur), 'European Parliament Draft Report with Recommendations to the Commission on the Amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)' (2009/2170 (INI) 2 December 2011) 5.

²² *Douglas v Hello!* [2005] EWCA Civ 595; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; *McKennitt v Ash* [2006] EWCA Civ 1714; Collins (n 5) para 23.06 ff, 431.

²³ Rowland et al (n 20) 151.

²⁴ *Cheshire, North and Fawcett* (n 10) 252.

²⁵ 2003 SC 36; see L Edwards, 'The Scotsman, the Greek, the Mauritian company and the Internet: where on earth do things happen in cyberspace?' 2004 *Edinburgh Law Review* 99. For criticism of the 'mere accessibility' of a website in establishing jurisdiction, see N Joubert, 'Cyber-Torts and Personal Jurisdiction: The Paris Court of Appeal Takes A Stand' (2009) 58 ICLQ 476.

²⁶ *Cheshire, North and Fawcett* (n 10) 254–5. On downloading see G Smith, 'Here, there or everywhere? Cross-border liability on the internet' 2007 *CTLR* 46 who refers, inter alia to the English case *Richardson v Schwarzenegger* [2004] EWCH 2422 (QB).

as the ‘place where the harmful event occurred’, the Court of Justice in *Bier* resolved definitional ‘ambiguit(ies)’²⁷ by confirming that in addition to suing where the defendant is domiciled under Article 2, a plaintiff has a choice to sue under Article 5(3) either at the place where the damage occurred or, if distinct, at the place of the event giving rise to the damage. In *Bier*, Advocate General Darmon confirmed that Article 5(3) establishes jurisdiction in the place where the ‘event [...] entail(ed) tortuous, delictual or quasi-delictual liability [which] directly produces its harmful effects upon the person who is the immediate victim of the event’.²⁸ Two of the combined ‘objective[s] of the [then] Convention’²⁹ were to enable parties to either identify or foresee the place where such harmful effects directly occur which may lead to litigation. The objectives of ‘predictability and transparency’³⁰ persist in the current Regulation. Furthermore, it remains the case that it is not possible to establish jurisdiction at the place where economic loss or adverse consequences³¹ of a tort have occurred. So in the same way any adverse consequences as a result of breach of privacy could not be a basis to establish jurisdiction—just as AG Darmon affirmed *at the time* that this should not enable the claimant to establish jurisdiction where he or she is based. The recent decision in these cases however increases the possibility of a claimant being able to proceed under Article 5(3) in his or her own jurisdiction.

The nuance of the *Bier* decision was then adapted to apply to non-physical, ‘receipt-orientated’³² torts such as defamation.³³ The seminal case of *Shevill v Press Alliance SA*³⁴ has formed the basis for determining where a claim can be brought for libellous (defamatory) statements made in one place and distributed³⁵—either by traditional means or by forms of instantaneous communication—in or towards another jurisdiction or multiple jurisdictions. The well-known facts need not be repeated here, suffice to say that a libel claim brought in England was ultimately limited to the harm suffered there. The questions of whether an event is harmful and the extent of that harm were confirmed by the Court in *Shevill* as to be assessed by the

²⁷ P Stone, *EU Private International Law* (1st edn, Edward Elgar 2006) 90.

²⁸ *Bier*.

²⁹ Word added for syntax, given the Brussels Convention applied at the time of the *Bier* decision.

³⁰ Opinion of the AG Cruz Villalón para I, citing Preamble 11, Brussels I Regulation.

³¹ As affirmed in *Henderson v Jaouen* [2002] EWCA Civ 75; *Kronhofer v Maier* [2004] II Pr 27; *Marinari v Lloyds Bank* [1996] QB 217.

³² Y Farah, ‘Jurisdictional Aspects of Electronic Torts, in the Footsteps of *Shevill v Press Alliance SA*’ (2005) *Computer and Telecommunications Law Review* 198 ; Smith (n 26) 43, 46.

³³ *Cheshire, North and Fawcett* (n 10) 256.

³⁴ *Shevill v Press Alliance SA* [1995] 2 AC 18.

³⁵ *Domicrest v Swiss Bank Corpn* [1999] QB 548.

national conflict of law rules of the court seized. The CJEU subsequently confirmed that a claimant could bring proceedings either where the publisher was established or the place where the damage to the claimant's reputation occurred. Whilst such an approach still provides a claimant with a choice to sue either where the defendant is domiciled or the place where the harmful event occurred, does such a choice reflect the reasonable expectations of a claimant who has been the subject of an online publication containing either untrue statements or statements that amount to an intrusion of their private life? Given the prospect of fragmented proceedings, as AG Cruz Villalón confirmed, the ubiquity³⁶ of the Internet raises the controversy of whether the scope for establishing jurisdiction—and in particular the requirement for distribution—under Article 5(3) requires to be 'adapted'.³⁷

C. *Establishing Jurisdiction of an Online Tort: The Analogy with Defamation*

<C>I. *Determining the place where the harmful event occurred or may occur*

There are a number of discrete challenges as far as establishing the jurisdiction of an online tort is concerned. In the 'deliberate'³⁸ absence of a definition from the drafters of the original Brussels Convention, the first challenge is to determine the place (or places) where the harmful event occurred (or may occur).³⁹ Where the defamatory statement or the statement alleged to have infringed an individual's reputation or private life can be viewed via a website, is the tort committed at the place where the website is viewed (that is, where the webpage is capable of being downloaded) or where the website information is posted (conversely, where the information for the webpage is uploaded)? So as far as either negligent misstatements or 'by analogy'⁴⁰ defamatory statements are concerned, the traditional position under English law, as derived in *Duke of Brunswick v Harmer*,⁴¹ is that the place where the publication is read is the place where the harmful event occurs. In the Australian case *Gutnick v Dow Jones*,⁴² the High Court confirmed that it was 'undesirable'⁴³ for legal rules to be developed for particular technologies, it was necessary to take account of the reach of information disseminated by the Internet. The court found that the tort of defamation was committed in the jurisdiction where

³⁶ Edwards (n 25) 100.

³⁷ Opinion of AG Cruz Villalón, para 2.

³⁸; *Cheshire, North and Fawcett* (n 10) 253, Jenard Report, p.26; T Hartley, *International Commercial Litigation, Text, Cases and Materials on Private International Law* (CUP 2009) 52.

³⁹ Collins (n 21) para.3.20, 38.

⁴⁰ Collins (n 9) para 11-305, 419.

⁴¹ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

⁴² *Gutnick v Dow Jones* (2002) 201 CLR 575.

⁴³ *ibid* 631.

material was made available to the reader,⁴⁴ concluding that this occurred when the statement was viewed (for example in a newspaper) or retrieved (or downloaded, in the case of a website or webpage). Despite the suggestion of a ‘tenuous’⁴⁵ connection with England, the English Court of Appeal confirmed in *Olafsson v Gissurason (No2)*⁴⁶ that the ‘claimant had the right to proceed against the defendant in England in respect of the publication of the alleged libel on the defendant's website in England’⁴⁷ via Article 5(3) of the Lugano Convention.

<C>2. *The extent of online defamation: A single or a multiple tort?*

The second question is whether the alleged defamatory publication on the Internet will (and as far as English law is concerned, continues to)⁴⁸ be treated as a single or a multiple tort? For example, in the United States, the ‘single publication rule’ operates with the effect that only one action can be brought in the place where the forum was specifically targeted.⁴⁹ English law takes a different view, which may go some way to preserving its position as a forum of choice. In *Godfrey v Demon Internet Limited*⁵⁰ defamatory statements were posted and held on a news server. Morland J held that every time an Internet user accessed the defamatory material, there was ‘publication to that customer’.⁵¹ The multiple publication rule was subsequently affirmed by the House of Lords in *Berezovsky v Forbes Inc*⁵² and *Loutchanksy v Times Newspaper Ltd*⁵³ by the European Court of Human Rights in *Times Newspapers Ltd v United Kingdom*⁵⁴ which declined to uphold a complaint concerned with unlimited liability attached to the multiple publication rule as there had to be a reasonable time in which a claimant could (and in that case did) reasonably bring proceedings to defend his reputation.

<C>3. *Who is liable? The impact of the electronic commerce directive*

⁴⁴ *ibid* 581.

⁴⁵ Collins (n 5) para 26.39, 490.

⁴⁶ *Olafsson v Gissurason (No2)* [2008] 1 WLR 2016.

⁴⁷ *ibid* per Sir Anthony Clarke MR at para 35.

⁴⁸ Christie, Moreham and Warby (n 6) para 8.103, 387.

⁴⁹ *Young v New Haven Advocate* US No 02-1394; *Heathgrades.com v Northwest Healthcare Alliance* US 02-1250 ; see eg A Siddiqi, ‘Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction Over Internet Activities – Including A Critique of Suggested Approaches’ (2001) 14 *New York International Law Review* 43

⁵⁰ *Godfrey v Demon Internet Limited* [1999] 4 All ER 342.

⁵¹ *ibid* 209.

⁵² *Berezovsky v Forbes Inc* [2000] 1 WLR 1004.

⁵³ *Loutchanksy v Times Newspaper Ltd (Nos 2–5)* [2002] QB 783.

⁵⁴ *Times Newspapers Ltd v United Kingdom* [2009] EMLR 14; K Macmillan, ‘“Internet publication rule” survives’ (2009) 14(3) *Communications Law* 80.

The third question to be answered focuses on ‘responsibility’;⁵⁵ *ergo* who is liable for the defamatory statement? There are various defences under English law including the key defence that the defendant was not the publisher of the offending material. The Electronic Commerce Directive⁵⁶ provides both the basis for establishing the ‘immunity’⁵⁷ of an online intermediary, such as an Internet Service Provider, by way of a defence that operates if the intermediary acted as a host, as opposed to a publisher, of the information. The *Godfrey* case mentioned earlier confirmed that the defendant, an Internet Service Provider, was a ‘publisher’ of defamatory material. This was settled law until the subsequent case *Bunt v Tilley*⁵⁸ confirmed that Internet Service Providers are regarded as facilitators of information and not publishers. More recently, the case *Metropolitan International Schools Ltd v (1) Designtecnica Corporation (2) Google UK Ltd (3) Google Inc*⁵⁹ reiterated that the global search entity Google was not a publisher under English common law and was not therefore liable for defamatory statements contained in websites accessed through its search results.

D. Facts of e-Date Advertising GmbH v X and Olivier Martinez and Others v MGN Ltd

Both cases were concerned with torts which were alleged to have occurred as a result of information and images accessible via websites in jurisdictions distinct from where the defendants were based. The first case against *e-Date Advertising GmbH* was for injunctive relief on the basis of defamatory statements made whilst Messrs Martinez, the claimants in the second case, sought damages for breach of image and personality rights/privacy. Both cases requested clarification of the criteria upon which jurisdiction under Article 5(3) could be established over claims for breach of personality rights/privacy and image rights on the Internet in a place other than the defendant’s domicile and the place where the harmful event occurred. There were two issues at the heart of *eDate Advertising v X*. This case concerned an individual who had previously been imprisoned for life for the murder of an actor in Germany.⁶⁰ Between 1999 and 2007 the defendant’s Austrian-based website contained an article on its news pages

⁵⁵ Smith (n 26) 46.

⁵⁶ Directive EC 2000/31.

⁵⁷ Stone (n 27) 93. Cf the ability for injunctive relief against such parties remains; Christie, Moreham and Warby (n 6) para 8.97, 384 and para 12.49, 546.

⁵⁸ [2007] 1 WLR 1243.

⁵⁹ *Metropolitan International Schools Ltd v (1) Designtecnica Corporation (2) Google UK Ltd (3) Google Inc* [2009] EWHC 1765 (QB).

⁶⁰ Decision of the Grand Chamber, para 16.

which specifically identified the claimant. Whilst the defendants eventually removed the article from their website, the claimant did not want the defendants to subsequently ‘identify him by his full name when reporting about him in connection with the crime committed’.⁶¹ He applied to the German Bundesgerichtshof for an injunction. Accordingly, the first issue was whether Article 5(3) of the Brussels I Regulation applied to establish jurisdiction and if so, whether it enabled Mr X to claim injunctive relief against the operator of the website, wherever the latter was established. The Court was also asked to determine whether the number of times a website was viewed in a particular location was indicative of the applicability of Article 5(3). The second, related, issue required the Court to determine whether German or Austrian law applied. This issue depended on the Court’s interpretation of Article 3 of the Electronic Commerce Directive and the relative impact (if any) of the country-of-origin principle on national private international law rules.

In the second case, the actor Olivier Martinez and his father raised proceedings in France against Mirror Group Newspapers regarding ‘interference with their private lives’ and breach of Olivier Martinez’s image rights⁶² in an English edition of a newspaper article which was accessible online in France. The Tribunal de grande instance de Paris referred the question of what criteria was required to establish jurisdiction under Articles 2 and 5(3) of the Brussels I Regulation in France to the CJEU. The court asked the CJEU to confirm what kind of connection was required—‘adequate, substantial or significant’ between the harmful event and the jurisdiction and how such connection could be inferred. The French court offered a number of criteria in order to establish jurisdiction. The French court asked whether, for example, it was possible to take into account the claimant’s nationality, the language used to disseminate the information connected to the alleged breach of privacy or the place where the alleged breach took place (such as the place where photographs were taken) and if not, what other criteria would be required.

E. Analysis of Advocate General Villalón’s Findings

AG Villalón acknowledged that a ‘new approach’ to establishing jurisdiction was required due to the insufficiency of existing interpretations of Article 5(3). At the core of these cases was

⁶¹ Judgment from the Grand Chamber, para 18.

⁶² The latter does not exist as a distinct right under English Law; K. Mathieson, ‘The Overlap of Privacy with Other Rights: Defamation, Copyright Freedom of Information and Protection of Sources,’ in K Mathieson (n 16) 106.

the applicability of the *Shevill* decision.⁶³ Having analysed the *Shevill* case, the AG suggested that adaptation would be required by providing an ‘additional attachment criteria based on the ‘centre of gravity of the conflict’’.⁶⁴ AG Villalón then briefly sought to distinguish between traditional media and the scope of dissemination of information via the ‘platform’⁶⁵ of the Internet. With regard to the latter, the AG identified how the capacity for information dissemination and storage as well as the ‘permanent and universal accessibility’⁶⁶ combined with the speed of such dissemination were important components of commercial decision making to publish information via the Internet. The AG confirmed that given the lack of political control of the Internet, legal rules required to take account of the ‘legitimate exercise of freedom of information’.⁶⁷ In comparison with traditional media limited in its publication and dissemination to particular geographical areas, the AG confirmed that distinct, ‘supplementary’⁶⁸ criteria would be necessary to better reflect the indeterminate distribution of information via the Internet. Having identified the victim of the alleged harmful event, the AG suggested that it would then be necessary to establish the ‘location of ‘centre of gravity of the conflict’ [as] the ‘centre of [the victim’s] interests’’.⁶⁹ This would be achieved by assessing, in AG Villalón’s view, the place at which the victim’s centre of interests correlated with the level of interest or opinion on the information published. By distinguishing the need for ‘subjective intentionality’⁷⁰ for the purposes of establishing jurisdiction under Article 15(1)(c) of the Brussels I Regulation, the AG clarified that establishing the centre of gravity for the purposes of Article 5(3) would require to be assessed instead on an objective basis. The AG suggested that in assessing the objective connection with a particular jurisdiction, the content of the information should be assessed. An example was given of a situation where information was available via a website in one Member State, it should be reasonably foreseeable that such information would, if accessible in another Member State, be capable of causing harm in that other State. Other factors that may also be considered to assess whether the ‘disputed

⁶³ AG Villalón’s Opinion, para 30.

⁶⁴ *ibid* para 31.

⁶⁵ *ibid* B, para 42.

⁶⁶ *ibid* para 44.

⁶⁷ *ibid* para 47.

⁶⁸ *ibid* para 55.

⁶⁹ *ibid* para 59, words added and modified for syntax.

⁷⁰ As affirmed in C-585/08 *Peter Pammer v Reedere Karl Schluter GmbH & Co* and C-144/09 *Hotel Alpenhof GesmbH v Oliver Heller* [2011] OJ C55/4 and more recently by AG Villalón in C-173/11 *Football Dataco Ltd v Sportradar GmbH*, 21 June 2012, <<http://curia.europa.eu>>accessed 29 June 2012. Cf Joubert (n 25) who suggests a test (using objective criteria) similar to that of the ‘minimum contacts’ approach used in the United States to establish specific personal jurisdiction over a *contractual* dispute, to move away from mere accessibility of a website.

information is objectively relevant in a given territorial space’,⁷¹ included the level of domain name used to disseminate the information (top-level or otherwise), the language of the website, any advertising on the webpage, the manner by which the information was distinguished (subject, territory) and, to a lesser extent, the number of times a webpage was accessed. AG Villalón’s Opinion concluded that ‘[I]f the information was indeed an objectively relevant dimension in a Member State and that State was precisely where the “centre of interests” of the holder of personality rights’⁷² lay, jurisdiction could be established under Article 5(3) of the Brussels I Regulation.

The AG also dealt with the question posed by the Bundesgerichtshof on the impact upon or connectedness with the applicable law with the Electronic Commerce Directive. The AG confirmed that the Electronic Commerce Directive did not contain or reduce any rules of jurisdiction or applicable law but, through the operation of Article 3, operated a ‘neutral’ rule ensuring the mutual recognition of the freedom to be provided to information society service providers to provide such services in a Member State. The AG reinforced the point that there is ‘no conflict’⁷³ between rules of private international law and the Electronic Commerce Directive by reference to Regulation EC 864/2007 (the Rome II Regulation) which excludes choice of law rules for non-contractual obligations arising from privacy and defamation claims.

F. *The Decision of the Grand Chamber, CJEU: Is Shevill Still Good Law?*

In dealing with the preliminary issue of admissibility of the first claim, the Grand Chamber confirmed (in accordance with *Henkel*⁷⁴) that the threat of damage was sufficient to establish jurisdiction under Article 5(3). The Court then turned its attention to the distinction to be made between ‘content placed on a website [...] from the regional distribution of mediax’,⁷⁵ Given the ‘universality’⁷⁶ of information disseminated via the Internet reduces the effectiveness of distribution as a criteria for establishing jurisdiction, the Grand Chamber (accepting the Opinion of the AG) was satisfied that *Shevill* required to be ‘adapted’.⁷⁷ Furthermore, the Court was satisfied that the supplementary criteria of the claimant’s habitual residence required to

⁷¹ AG Opinion, paras 65–66.

⁷² *ibid* para 66.

⁷³ L Gillies, ‘A Review of the New Jurisdiction Rules for Electronic Consumer Contract’ Commentary, 2001(1) JILT <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/gillies/> 28 February 2001.

⁷⁴ *Henkel* (n 11).

⁷⁵ Opinion of the Grand Chamber, para 45.

⁷⁶ *ibid* para 46.

⁷⁷ *ibid* para 48.

‘correspond in general to his centre of interests’.⁷⁸ Such criteria would ensure that the objectives of predictability and transparency of the Regulation are maintained whilst not deviating from the concept of jurisdiction premised direct harm as enunciated in *Bier*.⁷⁹ Accordingly, to satisfy a claim under Article 5(3), the claimant can sue for all the damage either where the defendant is based or where the claimant has his centre of interests. The option to raise proceedings in each of the places where damage has occurred remains, but with the extension of the *Shevill* criteria, the pursuit of fragmented proceedings is a less realistic prospect. The Grand Chamber also confirmed that the Electronic Commerce Directive is not a rule of private international law, but a set of rules designed to regulate the free movement of information society services. The Court reinforced the point that, Member States having transposed the Directive into their national laws, information society services providers should not be subject to ‘stricter requirements’ than the laws where they are established. As far as the *eDate* case was concerned, this meant that the defendants could not be subject to any stricter standards governing the provision of information society services under German law than they would be subject to in Austria (the law of their country-of-origin).⁸⁰

The heading to this concluding section posed a question: is *Shevill* still good law? The answer is, of course, yes.⁸¹ As the European Parliament affirmed in its draft report for amendment of the Rome II Regulation, the CJEU’s reasoning in these two cases followed *Shevill*⁸² by supplementing the scope for jurisdiction based on direct damage for all the harm caused by defamation or breach of privacy. A claimant can still bring proceedings for a cross-border tort in (at least) three potential locations. These options will still be relied upon where the claimant is not able to sufficiently establish by objective criteria that harm has been caused at the place where his centre of interests is based. However, the decision in these cases should alert those who post information of a potential defamatory or private nature online (as well as co-defendants) that the jurisdictional scope for jurisdiction under Article 5(3) has been supplemented to include the claimant’s centre of interests. Some may argue that such a supplementary basis for establishing jurisdiction is unnecessary (or trite) for two reasons. First,

⁷⁸ *ibid* para 49.

⁷⁹ R Brand, ‘Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention’ (1998) XXIV *BrookJIntL* 149.

⁸⁰ Opinion of the Grand Chamber (n 75) para 68.

⁸¹ P Stone, ‘The Treatment of Electronic Contract and Torts in Private International Law under European Community Legislation’ (2002) 11(2) *Information and Telecommunications Law* 133.

⁸² Wallis, n 21, 5; C. Wilkström, (Rapporteur), European Parliament Report with Recommendations to the Commission on the amendment of Regulation (EC), No.864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II) (2009/2170 (INI)) 2 May 2012.

no distinction should be made between methods of communication for the purposes of determining jurisdiction or applicable law. The response is that, unlike traditional geographically limited media, a balance must be struck when the Internet has been used to disseminate information that has or may harm an individual's reputation or breach their privacy. As a set of 'second order rules'⁸³ rules of jurisdiction should support the values⁸⁴ intrinsic in substantive tort and human rights law. If the claimant cannot establish harm at his or her centre of interests, in accordance with the conflicts rules of the court seised, he can still pursue a claim at the place giving rise to the damage or the place of direct damage. Second, given the alternatives already open to the claimant under Article 5(3) and 2, such supplementary criteria may be the antithesis of the *actor sequitur* principle and the exceptions to it. The response to this concern is that a centre of interest criteria supports foreseeability of harm and predictability of jurisdiction to the place where harm occurred, thereby limiting the risk and cost of fragmented proceedings in multiple jurisdictions for all parties. Where the claimant is able to establish harm (eg as one would expect a famous actor, domiciled in France) at the place where his centre of interests are situated (eg France), claims will be increasingly centred on that place. The CJEU has provided, at least, a 'little (more) elucidation'⁸⁵ on the scope of Article 5(3) of the Brussels I Regulation in cases brought before the courts of a Member State.

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⁸³ A Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in International Constitutional Ordering of Private Law* (CUP 2010) 18.

⁸⁴ L Gillies, 'Re-Conceptualising Conflicts Justice via the Approximation of Residual Jurisdiction in EC 44/2001', April 2012, on file with author.

⁸⁵ Collins (n 9) para 11-302, 418.

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