READER ON THE PRIVATE INTERNATIONAL LAW APPLIED TO INTERNET RELATED CASES

IN THE FRAMEWORK OF THE PROJECT "INTERLEX"

FUNDED BY THE EUROPEAN COMMISSION FUNDAMENTAL RIGHTS&CITIZENSHIP PROGRAMME

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Private international law legislation applicable to Internet related cases

Introduction

In the last decades, the European Union has progressively developed a well-advanced group of rules in the field of judicial cooperation in civil matters having cross-border implications (the "supranational expression" for "private international law"), aimed at *i)* identifying the competent court (rules on jurisdiction), *ii)* designating the applicable law (conflict-of-laws rules) and *iii)* defining the conditions for the recognition and enforcement of the decisions (rules on recognition and enforcement).

The nature and the "shape" of such rules have significantly changed over time.

Before the Treaty of Amsterdam, thanks to which the EC first and EU then was granted direct competences to adopt measures on judicial cooperation in civil matters, uniform rules on Private International Law were the outcome of international agreements concluded between Member States (Article 220 TEC): this is the case of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, but also of the 1980 Rome Convention on the law applicable to contractual obligations.

Today, the legal basis to adopt EU measures of Private International Law is contained in the combined provisions of Articles 67 and 81 TFEU. Article 81 TFUE, in particular, underlines that the legal instruments adopted following such competence are "… based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases" and that "[s]uch cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States".

As a result of the appointment of competences to the European Union, in the context of the progressive process of "Communitarisation" first and "Europeanization" then, in the field of judicial cooperation in civil matters, the Brussels and Rome Conventions were transposed into EU regulations, which (almost entirely) substituted them (i.e. Regulation (CE) n. 44/2001 on jurisdiction and the recognition an enforcement of judgements in civil and commercial matters – so-called "Brussels I", and Regulation (CE) n. 593/2008 on the law applicable to contractual obligations – Rome I).

However, depite the exponential and sectorial development that European Private International Law (hereinafter also "EU PIL") has been undergoing since the Treaty of Amsterdam, it has been considered that the time is not yet ripe to justify the creation of a genuine "system" of European Private International Law. Scholars, in fact, have been wondering about the possibility of elaborating a legal instrument regulating the "general part" of European Private International Law: a hypothetical future – not yet scheduled – "Rome 0" Regulation. The questions around the possibility for civil and commercial matters to form the subject for such a codification in European Private International Law were addressed in the volume *Brauchen wir eine Rom 0- Verordnung?*, which collects the contributions of Private International Law scholars who participated to the conference held in Bayreuth in June 2012, devoted to this topic (but see also the debate published in *Quaderni di SIDIBlog 2014* "*Una codificazione europea del diritto internazionale privato?*", pp. 125-153; *Quelle architecture pour un code européen de droit international privé?*, edited by M. Fallon, P. Lagarde and S. Poillot Peruzzetto, including an embryon de règlement portant Code europeén de droit international privé, drafted by Prof. Paul Lagarde and published also in RabelsZ, 2011, 673 ff.; most recently, see the minutes of the meeting held in September 2019 of European

Group for Private International Law). Similarly, in December 2012, and following its previous resolution of 7 September 2010, the European Parliament published a document entitled Current gaps and future perspectives in European private international law: towards a code on private international law?

European Private International Law has been progressively eroding Member States' Private International Law systems, leaving national PIL rules a residual function: the measures adopted under Article 81 TFEU are mainly regulations, binding and directly applicable in all Member States (Article 288 TFEU).

In addition to the fruitful action of the European legislature, the "quasi-legislative" activity of the Court of Justice of the European Union (hereinafter also "CJEU") has considerably contributed to de development of EU PIL (Article 267 TFEU), also at the time of the Brussels and Rome Conventions (see at this regard the Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters - signed in Luxembourg on 3 June 1971).

The increasing role of EU PIL has also had a great impact in the development of the European Single Market and, in general, on the ongoing process of European integration.

For the time being, the measures currently applicable in the field of judicial cooperation in civil matters, including those concerning "family law with cross-border implications" adopted under Article 81, para. 3 TFEU, are 19 (Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction - adopted on 25 June 2019 - will be applicable as from 1 August 2022).[1] All information on the measures adopted under Article 81 of the TFEU or aimed at

[1] The measures adopted so far, and still in force, are the following: Regulation (CE) n. 44/2001 on jurisdiction and the recognition an enforcement of judgements in civil and commercial matters (called "Brussels I", only applicable to decisions rendered in proceedings started before 10 January 2015), now replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (called "Brussels II bis"); Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called "Rome III"); Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Regulation (EU) No

implementing the field of judicial cooperation in civil matters having cross-border implications, are available on the European e-Justice Portal, constantly updated by the European Commission.

Since the advent of the Internet, the new media and communication technologies have significantly developed. This has led to two interrelated consequences: the number of online social relationships and commercial transactions have increased, and so the number of online cross-border disputes.

This has deeply affected the implementation of EU PIL rules, in particular the rules on jurisdiction and conflict-of-laws rules applicable to contractual and non-contractual obligations.

In fact, the European instruments adopted so far in the field of judicial cooperation in civil matters – which were not conceived to encompass situations related with the Internet – need to be shaped or, better, "readjusted" in the light of the digital environment. On the one side, traditional EU PIL rules, designed to be applied to "offline" situations featuring one or more international elements, are geographically-oriented, as they rely on the principle of territoriality (think about the connecting factors of domicile, the habitual residence, or of *locus commissi delicti*); on the other, Internet has carried out a process of dematerialization of legal relationships. Internet gives rise to an intangible and evanescent space - the cyberspace -, which is intrinsically borderless and independent from any geographical location: it is commonly accepted, in fact, that any activity performed within the digital environment has a ubiquitous nature. The same content placed online (e.g. photographs, personal information etc.) is potentially (and simultaneously) available in the same manner worldwide, regardless of the place where the person accessing the website is located and of the type of electronic device connected to the Internet (see, among others, D. J. B. Svantesson, *Private International Law and the Internet*, Wolters Kluwer, 2016: O. Feraci, "Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements" in *Use and Misuse of New Technologies*, edited by E. Carpanelli and N. Lazzerini, Springer 2019, pp. 277-304). Therefore, the virtual and global dimension of online disputes challenges the traditional legal categories and calls for new legal solutions or, at least, for an appropriate adaptation of the existing rules, that are devised for similar situations, which occur in the physical environment.

The persistent lack of a uniform Private International Law approach on the matter determines a substantial gap in the Internet governance. The legal scenario leads to conflicts of jurisdiction and, ultimately, to legal uncertainty and instances of forum shopping. For instance, the absence of (general) EU rules on jurisdiction concerning online tort disputes has encouraged the elaboration of a prolific case law of the CJEU over the interpretation of Article 7(2) of Brussels I *bis* Regulation.

606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships; Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

The fragmentation and, therefore, the complexity of such legal framework is increased by the fact that special EU PIL rules can be found in a number of EU measures providing for the material disciplines of specific matters: this is the case, for example, of Article 77 of Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – "GDPR"), of Article 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as well as Article 24 of Regulation (EU) 2017/1001 on the European Union trade mark (which repealed Regulation (EC) n. 207/2009 on the Community trade mark).

The Court of Justice of the European Union has rendered several decisions concerning the interpretation of EU PIL instruments in relation to the digital environment. In certain cases, the CJEU directly influenced the activities of the EU legislature in matters strictly related to the Internet such as data protection or copyright: the EU legislative approach on the assertion of jurisdiction in respect of the most common forms of online torts (i.e. cross-border defamation) has in fact experienced a remarkable development in the latest years, thanks to the activism of the CJEU. This case law has aimed at adapting the traditional rules on jurisdiction provided for by the "Brussels I *bis* regime" to the new challenges posed by the cyberspace. Moreover, many principles established in rulings rendered by the Court of Justice of the European Community way before the Internet was created have been readapted to the digital environment: for example, the *ubiquity theory* (*Mines de potasse d'Alsace* - 1976), the *mosaic theory* established in the field of the rights of personality (*Shevill* - 1995), the *targeting approach* relating to consumer protection, data protection or intellectual property rights (*Google Spain*, *Pammer and Alpenhof*, *Wintersteiger*). With regard to data protection, the Court had a crucial role in clearly defining the territorial scope of application of the relevant EU legal instruments.

The field of consumer protection has also experimented the activism of the CJEU, with reference both to conflict-of-laws rules and to rules on jurisdiction (e.g. *Verein für Konsumenteninformation v Amazon EU Sàrl*). The developing of such case law has had an important impact on the application of consumer protection law among EU Member States and has influenced the application and the adoption of EU law in different areas, such as in the field of data protection.

The legal instruments adopted so far, and which have been deemed relevant for Internet-related situations having cross-border implications (with regard to jurisdiction):

- 1968 Brussels Convention;
- Regulation n. 44/2001 ("Brussels I") and Regulation n. 1215/2012 ("Brussels I *bis*");
- 1988 and 2007 Lugano Conventions on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters;
- Directive 95/46/EC;
- Regulation 2016/679 ("GDPR");
- Regulation (EU) 2017/1001, and the previous Regulation n. 207/2009.

With regard to applicable law:

- Regulation n. 593/2008 ("Rome I") and Regulation n. 864/2007 ("Rome II").

From a case law perspective, 24 judgments rendered by the CJEU were selected to be relevant in this field.

The main areas where the CJEU has developed a fruitful case law concerning the application of EU PIL in the Internet context are: data and consumer protection, rights of personality, intellectual property rights and competition law.

CJEU case law applying European Private International Law in Internet-related situations

Several judgments, despite not related to the Internet, are included in the list as the principles established therein contributed to the development of EU PIL, and were of inspiration for several subsequent rulings concerning Internet-related situations that were rendered by the CJEU but also by Member States courts.

- *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05)

  even if it does not touch upon the Internet, however the principles established therein in the field of contractual obligations constitute a sort of North Star for judges of EU Member States for the application of EU PIL rules in the Internet-related context, especially with regard to e-commerce.

- *Johann Gruber v. Bay Wa AG* (case C-464/01)

- *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* (Joined cases C-585/08 and C-144/09)

- *Verein für Konsumenteninformation v Amazon EU Sàrl* (Case C-191/15)

- *Maximilian Schrems v Facebook Ireland Limited* (Case C-498/16)

- *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* (Case C-68/93)

- *eDate Advertising GmbH and Others v X and Société MGN LIMITED* (Joined Cases C-509/09 and C-161/10)

- *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB* (Case e C-194/16)

- *Criminal proceedings against Bodil Lindqvist* (Case C-101/01)

- *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (Case C-131/12)

- *Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság* (Case C-230/14)

- *Google LLC, successor in law to Google Inc., v Commission nationale de l'informatique et des libertés (CNIL)* (Case C-507/17)

- *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* (Case C-210/16)

- *L'Oréal SA and Others v eBay International AG and Others* (Case C-324/09)

- *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* (Case C-523/10)

- *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG* (Case C-173/11)

- *Peter Pinckney v KDG Mediatech AG* (Case C-170/12)

- *Pez Hejduk v EnergieAgentur* (Case C-441/13)

- *AMS Neve Ltd, Barnett Waddingham Trustees, Mark Crabtree v Heritage Audio SL, Pedro Rodríguez Arribas* (Case C-172/18)

- *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* (case C-21/76)

- *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* (case C-220/88)

- *Antonio Marinari v. Lloyds Bank pic and Zubaidi Trading Company* (case C-364/93)

- *Folien Fischer AG, Fofitec AG v. Ritrama SpA* (case C-133/11)

- *Melzer v. MF Global UK Ltd* (case C-228/11).

- *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (Case C-18/18)

Hypotheticals

This part is dedicated to the hypotheticals drawn from the caselaw listed in the previous parts. The hypotheticals include reference to legislation and caselaw as well as provocative questions that will be used as a trigger discussion during the residential training event.

It is important to highlight that the purpose of the hypotheticals to give the trainees a chance to critically analyze the provision of their own legal system as regards the PIL field. The scenarios presented in each of the hypotheticals may not entail a "correct" answer, rather they provide for different answers and (hopefully) trigger new questions and doubts that shall improve the level of adaptation of PIL rules to Internet cases at national as well as European level.

Hypothetical n. 1

Level I

Facts

Tizio, a Russian citizen domiciled in Italy, accesses the website www.alfa-ski.fr. The website is managed by Alpha, a company based in Germany and specialized in the marketing of Normandy apples, which are highly appreciated by local consumers: the website is in French. However, due to its popularity, the website also offers a home delivery service for all Europe.

Tizio, after becoming aware of this website thanks to a friend living in Normandy, decides to buy fifty crates of apples for himself and his family. A few days after the delivery in Italy, Tizio notes that the apples are altered by a virus that, in addition to having compromised the taste of the apples, has the potential to cause serious health problems.

Level I.A - Lawyers

Tizio consults a lawyer as regards the sue Alpha company.

You are asked to play the role of the lawyer representing Mr Angelis before the first instance court.

1. Which elements will you take into account in order to identify the court competent for the case?
2. Which legislation on private international law is applicable?
3. Which arguments will you present to justify your claim as regards the law applicable to the case?

Level I.B – Judges

You are asked to play the role of the court deciding the case at first instance *in Italy*.

Tizio presents a claim before your court claiming his rights.

1. Which elements will you take into account in order to identify the court competent for the case?
2. Which legislation on private international law is applicable?
3. Which elements will you analyse in order to support your reasoning as regards the law applicable to the case?

Level II.

In the same circumstances as above, Alpha presents as counterclaim that in the Terms and conditions of the website a clause specifies that

"Any dispute arising in relation to the contract will be subject to French law applies and the Court of Paris holds jurisdiction".

1. Is this element able to change your decision/arguments?
2. Which legislation on private international law is applicable in this case?

Hypothetical n. 2

Level I

Facts

Mario Rossi, an Italian entrepreneur resident in Milan, is unfairly accused of money laundering by Dimitri Fakis, a Greek competitor resident in Belgium. The criminal trial is held in Milan and ends with Rossi's acquittal in 2008. A few years later, Dimitri Fakis releases an interview to the popular German online newspaper www.allnews.de, owned by the German company Germanews, in which he repeats the accusations against Rossi. Afterwards, a second criminal trial, at the end of which, in June 2017, Fakis is convicted for defamation, and Germanews is ordered to remove the interview from the website.

In December 2019, the Spanish company Beta, an important client of Rossi, decides to interrupt the contractual relationship: it is also aware of interview given by Fakis on the website www.allnews.de. A few days later, the Portuguese bank Saudade informs Rossi of its decision to close his account at its Lisbon branch. The bank also claims to have made this decision after reading the Fakis interview in which Rossi was accused of money laundering.

Level I.A - Lawyers

The Italian entrepreneur decides then to take legal action against www.allnews.de to claim damages resulting from the defamatory news published online by Germanews. He consults a lawyer as regards the opportunity to present his claim.

You are asked to play the role of the lawyer representing Mr Rossi before the first instance court.

1. Which elements will you take into account in order to identify the court competent for the case?
2. Which legislation on private international law is applicable?
3. Which arguments will you present to justify your claim as regards the law applicable to the case?

Level I.B – Judges

You are asked to play the role of the court deciding the case at first instance *in Italy*.

Mr Rossi presents a claim before your court claiming his rights.

1. Which elements will you take into account in order to identify the court competent for the case?
2. Which legislation on private international law is applicable?
3. Which elements will you analyse in order to support your reasoning as regards the law applicable to the case?