"Libel tourism" and conflict of laws

"Libel Tourism" and Conflict of Laws

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Libel tourism is much in the news these days – so much so, that it is even the subject of a *Wikipedia* entry.[1] It is defined in *Wikipedia* as a type of forum shopping in which a claimant chooses to bring a libel action in the jurisdiction thought most likely to give a favourable result. This invariably turns out to be England. At present, there is a media campaign, originating in the United States but echoed in England, claiming that libel tourism is undermining free speech.[2] The purpose of this note is to consider whether these claims are justified. Only questions of conflict of laws will be discussed.[3]

I. THE PROBLEM

We all believe in free speech. We also believe that people should be protected from defamation. There is a potential conflict between these two values and the law has to attempt some kind of balance. In some countries, the balance tilts in favour of free speech; in others, it tilts in favour of protecting reputation. England is one of the most extreme members of the latter category: English libel law is generally regarded as the

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[1] http://en.wikipedia.org/wiki/Libel_tourism.

[2] See, for example, United Kingdom Parliament, *Hansard*, 17 December 2008: Column 69WH; *The Times* (London), 18 December 2008, p. 27; *The New York Times*, 26 May 2009 (editorial). Libel tourism is apparently being considered by the Culture, Media and Sport Committee, a standing committee of the House of Commons chaired by John Whittingdale MP.

[3] The leading treatment of the subject in England is Morse, "Rights Relating to Personality, Freedom of the Press and Private International Law: Some Common Law Comments" (2005) 58 *Current Legal Problems* 133.

most claimant-friendly in the world. Under it, the claimant has a *prima facie* case once he has established that the defendant has published a defamatory statement about him. He does not have to prove that the statement is false (though the defendant has a good défense if he can prove it is true) and he does not have to prove that the defendant acted out of malice. Damages can be high by international standards. No wonder that the rich and the famous come from the four corners of the globe to bring libel actions in England.

The problem is that if English courts assume jurisdiction in too wide a range of cases (and if they apply English law), countries that give more weight to free speech could legitimately complain that the English courts were undermining their freedoms. Our first task, therefore, is to examine English conflict-of-laws rules in libel actions in order to ascertain whether they achieve a fair balance between the competing interests.

II. THE LEGAL BACKGROUND

The problem has both a choice-of-law element and a jurisdictional element. We will consider the choice-of-law element first, though, as we shall see, jurisdiction is actually more important. Before we consider either, however, a point of terminology must be explained.

A. Terminology

In English legal terminology, each time an item is communicated to another person, there is a "publication". Each sale of a newspaper is a separate publication in English eyes; and each time a viewer watches a television program there is also a "publication".[4] The place of publication is the place where this occurs. If a French newspaper sells even a single copy in England, there is publication in England (as well as in France); the same is true if a French radio station makes a broadcast that is heard in England. Lawyers from Continental Europe usually use different terminology. They would say that the French newspaper was "published" in France and was merely "distributed" in England.[5] Readers from the Continent should be aware that English lawyers use these terms differently.

B. No "Single-Publication" Rule

Unlike the United States,[6] England does not apply a "single-publication" rule. The principle that each communication of the offending material constitutes a separate tort applies with regard to choice of law, jurisdiction and *forum non conveniens.* This means that the applicable law may be different with regard to publication in different countries and that the English courts may have jurisdiction with regard to those torts founded on publication in England, but not with regard to those torts founded on publication in other countries.

C. Choice of Law

[4] *Duke of Brunswick v. Harmer* (1849) 14 QB 185.
[5] For this reason, the European Court of Justice did not use the words, "publish", "publication", etc. in the *Shevill* case (discussed below).
[6] *Keeton v. Hustler Magazine, Inc.* 465 US 770; 104 S Ct 1473; 79 L Ed. 2d 790 (US Supreme Court, 1984).

In England, choice of law in tort was codified by the Private International Law (Miscellaneous Provisions) Act 1995; however, defamation was excluded from this statute.[7] Subsequently, choice of law in tort was almost entirely taken over by EC law,[8] but again defamation was excluded.[9] The result is that the common law still applies. Under the general common-law rule applied in England for choice of law in tort, a tort committed in a foreign country will be actionable in England if, and only if, it is actionable under the foreign law (it must be *civilly* actionable: it is not enough if is a criminal offence) *and* it is actionable as a tort under English law (the so-called "double-actionability" rule).[10] Where the tort is committed in England, on the other hand, English law alone will be applied.[11]

It follows from this, that if the claimant limits his claim to a remedy for publication in England – as he invariably does, for jurisdictional reasons if for no others – the court will apply English law alone. Foreign publication, even if much more significant than English publication, will be ignored. This is one of the consequences of the English concept of publication and the view that each publication constitutes a separate tort.

D. Jurisdiction

[7] Sections 9(3), 10 and 13.
[8] The Rome II Regulation, EC Regulation 864/2007, OJ 2007, L190/40.
[9] Article 1(2)(g).
[10] Dicey, Morris & Collins, *The Conflict of Laws* (Sweet and Maxwell, London, 14th edn, 2006 by Sir Lawrence Collins with specialist editors) (hereinafter "Dicey, Morris & Collins"), Rule 235, pp. 1957 *et seq.*
[11] Dicey, Morris & Collins, p. 1960, text to, and cases cited in, note 2.

Since there cannot be (and is not) any objection to actions being brought in England when the defendant is domiciled[12] in England or in another part of the United Kingdom, we shall focus on the position where he is domiciled outside the UK. Where he is domiciled in another EU Member State,[13] the jurisdiction of the English courts is determined by EU law (the Brussels I Regulation).[14] Where he is not domiciled in any such State, the present position is that English rules of jurisdiction apply (this may change when the Brussels I Regulation is revised). We consider each of these situations separately.

1. Defendant domiciled in a Member State

The leading case in EU law is *Shevill v. Presse Alliance SA.*[15] In this case, a claimant domiciled in England (together with her French employer) brought a libel action in England against a French newspaper. The newspaper, *France Soir*, sold approximately 200,000 copies in France; in England it sold something in the region of 250. There was no evidence that anyone who had read the article knew the claimant or her employer. The claimants, who limited their claim to damages for the copies sold in England, asserted that the English courts had jurisdiction under what is now Article 5(3) of the Brussels I

[12] In this paper, "domicile" is used in the sense in which it applies for the purpose of jurisdiction under the Brussels I Regulation. See The Civil Jurisdiction and Judgments Order 2001, SI 2001 No. 3929, paragraph 9 (individuals) and the Brussels I Regulation, Article 60 (companies). This concept is not very different from residence, or domicile as applied in the United States. It is much more flexible than the traditional English concept of domicile.

[13] The position is the same when the defendant is domiciled in a State Party to the Lugano Convention, a convention signed in the Swiss city of Lugano on 16 September 1988. The original text of the Lugano Convention may be found in OJ 1988, L 319, p. 25. The Parties to the Lugano Convention have fluctuated over time; at present the non-EU Parties (often referred to as the "Lugano States") are Iceland, Norway and Switzerland. Henceforth, references to a Member State of the EU should be regarded as including references to a Lugano State.

[14] Regulation 44/2001, OJ 2001, L 12/1.

[15] Case C-68/93, [1995] ECR I-415.

Regulation,[16] a provision which confers jurisdiction on the courts for the place where the "harmful event" occurred.

The European Court held that, in international libel cases in which jurisdiction is claimed under Article 5(3), the claimant may bring proceedings either in the courts for the place where the material is distributed or in the courts for the place where the publisher is "established". This latter concept will generally coincide with domicile and need not concern us further. Where jurisdiction is based on distribution (publication), the claim must be limited to damage flowing from the copies of the publication distributed in the territory of the forum.

2. Defendant not domiciled in a Member State

At present, English rules of jurisdiction apply when the defendant is not domiciled in a Member State. Under these, jurisdiction may be obtained either by serving a writ on the defendant during his temporary presence in England (a ground of jurisdiction that rarely applies in libel cases),[17] or by serving it outside the jurisdiction under Section IV, Part 6, of the English Civil Procedure Rules and Practice Direction 6B, rule 3(1)(9). Rule 3(1)(9), which was derived from ECJ case-law,[18] provides for jurisdiction, where the claim is made in tort, if either (a) damage was sustained within the jurisdiction, or (b) the damage

[16] At the time, the relevant provision was Article 5(3) of the Brussels Convention, which was expressed in identical terms.
[17] If there was no publication in England, the action would be stayed on the ground of *forum non conveniens*. If there was such publication, the same thing would probably happen unless the claim was limited to damages resulting from publication in England.
[18] *Bier v. Mines de Potasse*, Case 21/76, [1976] ECR 1735.

sustained resulted from an act committed within the jurisdiction. As applied to libel, it gives jurisdiction only with regard to items published (distributed) in England.[19] The result is that the jurisdictional rules are much the same under both EU law and under English law.

There is, however, one difference. Where jurisdiction is derived from English law, the doctrine of *forum non conveniens* applies.[20] Under this, English courts stay the proceedings if the courts of another country are a clearly more appropriate forum. However, if the claimant limits his claim to a remedy for publication in England, the English courts will apply *forum non conveniens* solely on the basis of such publication. [21] Publication outside England will not be taken into consideration. Since England does not have a "single-publication" rule, the English courts will not lump together all instances in which the material is communicated and apply *forum non conveniens* on that basis.[22] The result is that the courts inevitably conclude that England is the most appropriate forum for granting a remedy for publication in England.

The only exception is where the claimant has no substantial reputation in England. However, libel claimants are usually international business persons, film stars, pop singers or sportsmen: if they do not have a great deal of money they will not be able

[19] If publication in England was minimal, the court might strike out the proceedings for abuse of process: *Jameel (Yousef) v. Dow Jones & Co Inc.* [2005] QB 946; [2005] 2 WLR 1614 (CA). This remedy would probably be applicable even if the English court had jurisdiction under EC law, since it is not based on jurisdictional considerations.
[20] *Forum non conveniens* cannot apply where the jurisdiction of the English court is derived from EC law: *Owusu v. Jackson*, Case C-281/02, [2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm.) 577; [2005] 1 Lloyd's Rep 452 (ECJ).
[21] *King v. Lewis* [2004] EWCA Civ 1329 (CA).
[22] *Berezovsky v. Michaels* [2000] 1 WLR 1004; [2000] 2 All ER 986 (HL). See *per* Lord Steyn [2000] 1 WLR at pp. 1012–1013.

to afford to bring proceedings in England. Such people can usually claim to have a reputation in England. In the case of business persons, they would have to show that they had business interests in England. If they did, they would not have to show that they were widely known, simply that they were known to the particular group of business people with whom they normally carried on business.[23] For these reasons, *forum non conveniens*, though useful in some cases, has only a limited effect.

III. ASSESSMENT

We are now in a position to assess whether criticisms concerning libel tourism are justified. At first sight, it might seem that there are not. English courts claim jurisdiction only when there is publication (distribution) of the offending material in England, and the remedy must be limited to harm resulting from that material. Who could complain about that?

Unfortunately things are not so simple. The first problem concerns the concept of publication. English courts take the view that material on the Internet is published in England whenever it can be downloaded in England. There is no requirement of targeting. Since all material on the Internet can normally be downloaded anywhere, this means that *all* material on the Internet is regarded as being published in England.[24] Almost all major newspapers, news magazines, news agencies and TV networks have an

[23] Persons in the entertainment industry would have to show that they had fans in England or that their work was marketed here.
[24] *King v. Lewis* [2004] EWCA Civ 1329 (CA). A similar rule applies in the Commonwealth: *Dow Jones & Co Inc. v. Gutnick* (2003) 210 CLR 575; 77 ALJR 255; 194 ALR 433 (High Court of Australia).

Internet edition, available from their websites.[25] This means that, in the case of newspaper and TV reports, as well as other Internet material, the requirement of publication in England is meaningless. Moreover, most printed books are available from Internet suppliers, such as Amazon.[26] They too can be regarded as published everywhere. For these reasons, it is fair to say that the requirement of publication in England no longer constitutes a significant safeguard against exorbitant jurisdiction. Thus, for example, if one American resident puts material on the Internet that allegedly libels another American resident, the latter may sue for libel in England, provided he has a reputation there.[27]

This might still not be regarded as a problem since, under both EC and English law, the remedy must be limited to damages resulting from publication in England. The problem is that it is not possible in practice to limit the scope of the remedy so that it does not have an impact on publication in other countries. In the realm of information, the world is one unit: individual countries cannot be isolated from the rest.

The case of *Bin Mahfouz v. Ehrenfeld*[28] provides an example. Rachel Ehrenfeld was an Israeli-American who wrote books on terrorism. In one of her books, she claimed that Khalid Mahfouz, an eminent Saudi businessman, was responsible for financing international terrorism. The book was published in the US. It seems that it was not

[25] In the case of *France Soir*, it is http://www.francesoir.fr/. So if the *Shevill* case occurred today, it would not be necessary to show that *any* copies of the newspaper had been distributed in England.
[26] For the US, see http://www.Amazon.com; for England, see http://www.Amazon.co.uk; for France, http://www.Amazon.fr.
[27] *King v. Lewis* [2004] EWCA Civ 1329 (CA). In this case, the claimant, Don King, was an American boxing promoter, who had promoted boxing matches in England. This was held to be sufficient.
[28] [2005] EWHC 1156 (QB).

marketed in the United Kingdom: Ehrenfeld claimed that she and her publisher, an American firm, had never taken any steps to make it available there. However, a number of copies were sold via the Internet in England – the judgment mentioned 23 – and the first chapter was available on an American website which could be accessed in England.[29]

Mahfouz and his two sons brought proceedings in England for libel against Ehrenfeld and her publisher. Jurisdiction was based on publication in England. Ehrenfeld did not defend – she claimed she did not have the financial resources to do so[30] – and a default judgment was obtained. A declaration of falsity was made, and the claimants (Mahfouz and his two sons) were granted damages of £10,000 each. Ehrenfeld was also ordered to pay costs. The total sum is said to have been almost £115,000 (at the then exchange rate this was something in the region of $200,000, more than €135,000). In addition, an injunction was issued requiring Ehrenfeld and her publisher not to publish the material in England.

Since the damages awarded – for the distribution of just 23 copies of the book – were far greater than the likely profits from publication worldwide, the effect of the award, if known in advance, would have been to deter the author from publishing at all. Moreover, the defendants were ordered not to publish the material in England. This injunction would have required the material not to be put on the Internet and hard copies

[29] ABCNews.com.
[30] Nevertheless, she was subsequently able to bring quite lengthy proceedings against Mahfouz in New York, a jurisdiction where attorney fees do not seem to be any lower than in England. See *Ehrenfeld v. Mahfouz*, note 33*, below.

not to be sold through on-line booksellers like Amazon. This would have had a severe impact on marketing in other countries.[31] For these reasons, a remedy granted for publication in England will almost always have an impact on freedom to publish in other countries. The requirement that the remedy be limited to compensation for distribution in England is virtually meaningless.

Although the *Ehrenfeld* case resulted in legal proceedings (undefended though they were), many cases do not get that far. Defendants give in at the mere threat of a law suit. It has been said that wealthy businessmen in East European countries, including some EU Member States, have found the threat of libel proceedings in England to be an effective means of securing the removal from websites in their countries of material that reveals corrupt activities on their part.[32] If proceedings were brought, the defendants would be unable to defend themselves because they could not afford the fees charged by London lawyers. So they have no option but to back down.

One can conclude from this that libel tourism is a genuine problem. Libel proceedings, or the threat of libel proceedings, in England can unjustifiably undermine free speech in other countries.

IV. REACTION IN THE UNITED STATES

[31] In fact, Ehrenfeld did not obey the judgment, and no attempt was made to enforce it in the United States, where it would almost certainly have been refused recognition. So Ehrenfeld and her publisher were able to continue marketing the book there. The position would have been different, however, if she or her publisher had had assets in the United Kingdom (or another EU Member State), which would be the case with most major American publishers. In any event, it is hardly a recommendation for a ground of jurisdiction that it does no harm as long as the resulting judgments are not enforced in other countries.

[32] Information supplied at a conference held at the London School of Economics on 20 January 2009.

After the proceedings in the English courts, Ehrenfeld sued in a federal court in New York (SDNY) for a declaration that, under federal and New York law, Mahfouz could not prevail on a libel claim against her based upon the statements at issue in the English action and that the English default judgment was unenforceable in the United States. Mahfouz claimed that the American courts lacked jurisdiction to hear the case. This claim was upheld by the New York Court of Appeals, to which the matter was referred by the Second Circuit: Mahfouz lacked sufficient contacts with New York to justify the assertion of jurisdiction.[33]

Her next step was to get legislation adopted by the New York State Legislature. This is rather provocatively entitled "The Libel Terrorism (*sic*) Protection Act".[34] It amends the New York legislation for the recognition of foreign judgments to provide that a foreign defamation judgment will not be recognized unless the defamation law applied by the foreign court provided at least as much protection for free speech as would be provided by the Constitutions of the United States and New York. The legislation also confers jurisdiction on the New York courts to hear actions brought by New York residents (and certain other persons) for declaratory judgments[35] against persons who have obtained defamation judgments against them in foreign countries.[36] Similar legislation has been passed in some other states.

[33] *Ehrenfeld v. Mahfouz* 9 NY 3d 501; 881 NE 2d 830; 851 NYS 2d 381 (2007).
[34] Laws of New York, 2008, Chapter 66.
[35] Including a declaration that the defamation judgment will not be recognized in New York.
[36] The constitutionality of this jurisdictional provision may be open to question.

Bills have been introduced in the US Congress for a Free Speech Protection Act.[37] If enacted as they stand, they would allow a "United States person"[38] against whom a defamation judgment has been obtained in a foreign country to bring proceedings in the United States to obtain declaratory relief, injunctions, compensatory damages and, in certain cases, treble damages against the person who brought the defamation proceedings.

V. A FAIR BALANCE

It will be seen from the above that English libel laws have given rise to an international problem. One solution would be to change the substantive law of libel in England. This may happen one day, but it is unlikely to come about as the result of international concerns. For the present time at least, a solution must be found through conflict of laws. For this, we must accept that all countries are entitled to their own views on the balance between free speech and the protection of reputation. The objective of conflict of laws is to ensure that one country does not impose its views on others. A solution could be found either through choice of law or through jurisdiction. At this point, we need not choose between them: our first task is simply to analyze the competing interests. In doing this, we will take the example of the United States as a country which gives significantly greater protection to free speech (compared with defamation) than England.[39]

[37] Similar, but not identical, bills were introduced in the House of Representatives (HR 5814) on 16 April 2008 and the Senate (S 449) on 13 February 2009.
[38] Defined, in slightly different terms, in section 6(5) of the House bill and 5(6) of the Senate bill.
[39] For this purpose, it is reasonable to regard the United States as a single unit, rather than to look at the individual US state in question, since the protection of free speech, being largely a matter of constitutional law, is a national concern. If individual states gave even greater protection, a further analysis at the state level might be necessary.

The first situation is the easiest one. If the claimant is domiciled in the United States and the defendant is domiciled in England, there is no problem. The United States has no interest in the protection of the free speech of a person domiciled in England. If English courts want to take jurisdiction and to apply English law, that does not affect American interests. There is, therefore, no need to change the law in this situation.

If, on the other hand, the claimant and defendant are both domiciled in the United States, the US has a great interest in protecting the free speech of the defendant and England has no interest in protecting the reputation of the claimant. So here, American interests should prevail. The only exception is that if the defendant goes out of his or her way to target England so that publication is England is clearly more significant than that in any other country of the world, England would have a legitimate interest in granting a remedy, at least if the defendant had a significant reputation in England.

A similar analysis could be made where the defendant is domiciled in the United States and the claimant is domiciled in a third country, except perhaps where a fair trial could not be expected in the claimant's country.

We now come to the most difficult situation. This is where the claimant is domiciled in England and the defendant is domiciled in the US. Here each country has a legitimate interest in protecting its own person. The United States would want to protect the free speech of the defendant; England would want to protect the reputation of the claimant. No reconciliation is possible. Provided there is publication in England, English

courts would take jurisdiction and apply English law. They cannot be criticized for that. American courts would refuse to recognize the resulting judgment (and possibly grant declarations). They cannot be criticized for that. To this extent, legislation such as that in New York is not unreasonable.[40]

What can we conclude from this analysis? It is suggested that the law applied by English courts (whether English or EU law) should be changed so as to give effect to the superior interest of foreign countries in cases where neither party is domiciled in England and the defendant has not specially targeted England.

VI. How is this to be done?

Finding a practical solution is not straightforward, since two branches of conflict of laws – choice of law and jurisdiction – are involved, and two jurisdictions – England and the European Union – might have to take action.

A. Choice of Law

[40] Treble damages, however, are another matter. Legislation along these lines would invite retaliation. The vehicle for such retaliation is already at hand. Section 6 of the Protection of Trading Interests Act 1980 contains a "claw-back" provision allowing a person who has been required to pay treble damages in another country to claim them back from the person to whom they were paid. Any such judgment would be recognized in the European Union, the Lugano States (see note 13*, above), and Australia. For the European Union, see the Brussels I Regulation, Chapter III; for the Lugano States, the equivalent provisions of the Lugano Convention (see note 13*, above); for Australia, the Foreign Proceedings (Excess of Jurisdiction) Act 1984, section 12.

At the present time, a solution based on choice of law would have to come from England, since the matter is at present governed by English law. However, the EU measure on choice of law in tort (the Rome II Regulation)[41] should in principle cover choice of law for defamation. It was excluded only because it was impossible to find a solution that was acceptable to all concerned. This is not the end of the matter, however, since the EC Commission is supposed to be undertaking a study with a view to further legislation.[42] One day, a solution might be found and incorporated into the Regulation.

It is not easy to formulate a clear-cut rule – the kind preferred by Continental conflicts lawyers – for insertion into the Rome II Regulation. Of the various possibilities originally considered, the application of the law of the claimant's domicile had some initial support. However, it proved unacceptable because of the serious problems that could result: for example, it might be impossible for the press to criticize a foreign dictator if the law of his country declared that any such criticism was *ipso facto* defamatory.

If a solution were to come from a change of English law, a more nuanced approach would be possible. Perhaps the best one could come up with would be a rule such as the following:

[41] Note 8*, above.
[42] The Commission was supposed to report by the end of 2008: see Article 30(2) of the Regulation. This did not happen and it is unlikely that a solution will be found in the near future.

> (a) The provisions of this [section] shall apply for the purpose of determining the applicable law in proceedings for defamation in which the defendant is not domiciled in any part of the United Kingdom.
>
> (b) For the purpose of this [section], all instances of publication of defamatory material anywhere in the world shall be treated as a single tort and given equal weight, even if the claim is restricted to a remedy for publication in the United Kingdom or some part thereof.
>
> (c) The applicable law for the tort of defamation shall be the law of the country with which the tort is most closely connected.

While admittedly vague, this at least requires the court to consider the worldwide picture, even if the claim is limited to publication in England. In effect, it establishes a single-publication rule for choice of law. A rule along these lines might one day be introduced by the courts, though this is far from certain. If legislation were to be adopted, it would have to be a statute, since there is no other way in which it could be done. The problem here is that the legislative timetable in Parliament is usually congested with more urgent business and "mere" law reform is often pushed to the back of the queue.

In addition, a solution through choice of law gives rise to other difficulties. The first is that, in a field such as defamation, values and attitudes are often as important as the black-letter rule. Moreover, English judges might be unwilling to apply some aspects of US law on public-policy grounds. For these reasons, US law applied by an English court might be significantly different from US law applied by an American court.

A second problem is that the vague and open-ended character of the rule could give rise to extensive litigation. Many defendants might be unable to afford this. If a foreign defendant is financially unable to defend a case on the merits, he or she is unlikely to be able to fight a series of appeals on choice-of-law issues. For these reasons, a solution through choice of law is unlikely to prove satisfactory.

B. Jurisdiction

At present, EU law (the Brussels I Regulation)[43] applies only when the defendant is domiciled in an EU Member State. So a change here would not do much to help defendants from the US or other non-European countries. However, there is a plan to extend its scope to cover at least some situations in which the defendant is domiciled outside the EU. If this happens, EU law may become the main focus of attention for finding a solution to the problem of libel tourism.

1. EU law

If a change to EU law were contemplated, it would not be possible to find a solution through *forum non conveniens*, since its unpredictability makes it unacceptable to EU lawyers. Nor would a flexible jurisdictional rule be acceptable. Something clear-cut and precise would have to be devised. As was said above, there are two provisions that could apply to defamation proceedings. The first, Article 2(1), gives jurisdiction to the Member

[43] Note 14*, above.

State in which the defendant is domiciled. Since this causes no problems, it does not have to be changed.

The second is Article 5(3), which was discussed above.[44] This gives jurisdiction to the courts for the place where the "harmful event" occurred. This should be retained, but it should be limited in the case of defamation. The following is a possibility:

> In the case of non-contractual obligations[45] arising out of violations of privacy and rights relating to personality, including defamation,[46] Article 5(3) shall apply only if –
>
> (a) the claimant is domiciled in the territory of the forum; or
>
> (b) the defendant has taken significant steps to make the offending material available in the country of the forum and has targeted that country more than any other.

This would apply in addition to jurisdiction based on the domicile of the defendant.

2. English law

Under English law, a solution could be found either through a change in the way in which *forum non conveniens* is applied, or by a change in the rules of jurisdiction. As regards *forum non conveniens*, the problem is that, if the claim is limited to a remedy for publication

[44] See text to note 16.*
[45] "Non-contractual obligations" is the term used in EU law. Its main component is tort, though it covers other matters as well.
[46] This is the definition used in the Rome II Regulation for the purpose of excluding libel actions. See note 9* above and the text thereto.

in England, the courts take into account only such publication.[47] What is needed is some kind of single-publication rule for this purpose. This might be introduced through a change in case law: the present rule rests on decisions of the House of Lords and the Court of Appeal;[48] these could be overruled by the House of Lords. If legislation were to be adopted, this could probably be done through an amendment to the Civil Procedure Rules, something that would be much easier to do than to pass a statute. As regards a change in the rules of jurisdiction, an amendment could be made to Practice Direction 6B, rule 3(1)(9),[49] perhaps along the lines of the proposed amendment to Article 5(3) of the Brussels I Regulation.[50]

VII. CONCLUSIONS

What has been said shows that a reasonable solution to the problem is possible. However, it is unlikely that legislation would be introduced either in England or in the European Union unless there is a clearly felt need to do so. This is unlikely to be the case unless those affected make out a case on the political level.

[47] See text to notes 20–23*, above.
[48] *Berezovsky v. Michaels* [2000] 1 WLR 1004; [2000] 2 All ER 986 (HL) (especially *per* Lord Steyn [2000] 1 WLR at pp. 1012–1013); *King v. Lewis* [2004] EWCA Civ 1329 (CA).
[49] See text to notes 17 and 18*, above.
[50] See text to notes 44–47*, above.