

Thomas Thiede, *Internationale Persönlichkeitsrechtsverletzungen* (Jan Srammek Verlag, 2010). xxiii + 398 pp. ISBN 978-3-902638-16-8. € 85.00 (paperback).

The rapid cross-border exchange of information in a globalised world increasingly propels violations of the right to privacy and personality torts into an international dimension. This situation requires a clear coordination of potentially applicable laws via private international law provisions. The EU has unified conflict of laws rules on non-contractual obligations in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 ('Rome II'), but violations of privacy rights and personality torts such as defamation have been excluded from its scope for the time being, as no consensus could be reached on this important topic.¹ Although the Rome II Regulation contains a review clause in art 30 (2) aiming at a reconsideration of this exclusion,² no uniform conflict of laws rule has yet been found and national provisions thus continue to determine the applicable law in this respect.

The topic discussed by Thomas Thiede is therefore both highly important and practically unsolved. The author suggests his own model for a pan-European conflict of laws rule based on criteria that guarantee fair and equitable outcomes. With the aim of identifying these criteria, his thoroughly structured book contains an impressively comprehensive analysis of comparative substantive law, national conflict of laws rules and draft uniform private international law rules in this field.

Thiede dedicates the first part of his book to substantive law. In his view the concepts of private international law rules regarding violations of the right to

- 1 See Art 1 (2) (g): 'The following shall be excluded from the scope of this Regulation: non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.'
- 2 Art 30 (2): 'Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to 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.' See also Comparative Study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, JLS/2007/C4/028; Final Report and the Working Document of the European Parliament, Committee on Legal Affairs, on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), PE443.025v01-00 and PE452.555v01-00.

personality must be driven by the principles and values of the substantive law. Both sets of rules therefore need to be put into context.

Consequently, Thiede first looks for a common core of national substantive provisions. He focuses on selected European legal orders (Germany, England and Wales, France and Switzerland) employing a country-by-country analysis. In addition, he examines the European Convention on Human Rights and concludes the first part of his book with a chapter evaluating and comparing his findings.

For each of the examined jurisdictions, Thiede not only presents the black letter or jurisprudential solutions, but also traces the historical background of the protection of personality rights and analyses the protected areas from constitutional and private law perspectives. Thiede notes differences in each jurisdiction and each protected domain, due to cultural, political and socio-legal reasons as well as divergent codification techniques. Codification efforts have either been pursued in the form of general clauses, open to interpretation in each individual case, or by means of a targeted protection of specific aspects of personality, either in private or in criminal law. National differences in the protection of the right to personality can also be noted on the constitutional level where either a 'general constitutional individual right to personality' is acknowledged or alternatively only selected aspects of the right are protected. Thiede places particular emphasis on the dynamic relationship between freedom of expression, especially the freedom of the press, and the individual's right to personality. Even if there might seemingly be a preference in favour of freedom of expression and freedom of the press, ultimately, the fair balancing of conflicting interests with the protection of the right to personality is always required in each individual case. This balancing of interests is the *leitmotif* of the present book. A special focus of the author's substantive law research lies on the private law protection of personality rights, that is, the rules on tort and delict. Thiede singles out four areas of protection: reputation, privacy, the right to one's own image and the protection of economic aspects of the individual's right to personality. First, he shows that the protection of reputation is structured rather similarly throughout Europe, albeit dependent on national cultural and social values, while the approach to the protection of privacy varies. Indeed, regarding this second aspect, some countries differentiate, in parallel to the constitutional protection afforded, between more or less intensively protected spheres in which the freedom of the press outweighs the right to personality to a greater or lesser extent (Germany and Switzerland); others regulate the protection of privacy via special norms (France) or subject it to piecemeal solutions (England and Wales). However, all of the examined legal orders recognise an area of privacy in which the individual can act freely without being exposed to the public. Outside that area, the protection has to cede vis-à-vis issues of significant interest to the public. Third, as to the right to one's own image, national approaches differ, but Thiede states that this

aspect is mostly dealt with as a sub-case to the protection of privacy, being only subject to specific legislation in France. The consent of the portrayed person is a key element in all national laws. Fourth, the protection of economic aspects of personality rights is in the author's view a component of the protection of reputation and privacy. This is less true in Germany, however, where commercialisation and other individual and profit-making goals are not recognised as interests worthy of protection. In conclusion and in preparation of his chapter on conflict of laws, two main areas of protection need to be differentiated: reputation and the right to privacy.

Two particularly interesting aspects of Thiede's comparative law research should be stressed, which, in his view, have a corollary in private international law. The first relates to the basic principle that, in the case of violation of the right to personality, damage is to be compensated when and if there are sufficient criteria for its imputation to the tortfeasor, for example, because no substantial public interest can be involved that might serve as a justification therefor. The second aspect is the close link between the right to personality on the one hand and freedom of expression/freedom of the press on the other hand within the specific national, social and cultural framework to which the respective parties belong. The tortfeasor and the aggrieved party are not the only protagonists on the scene, however. Whether or not the reputation of a person is harmed depends above all on the way in which the targeted national community evaluates the situation. Also, it is not the individual 'subjective' view of the aggrieved party which needs to be taken into account in the assessment of a violation of the right to personality. Rather, it is the view of an 'objective' reasonable person from the same cultural and social context that should count.

The second part of the book goes to the heart of Thiede's topic: the conflict of laws. He provides a complete overview of all relevant issues arising in the international context: characterisation, jurisdiction, national conflict of laws rules on tort and delict and the various attempts at EU-wide harmonisation of conflict of laws rules in this area, always with reference back to the results of his substantive law analysis. Reading is facilitated by the fact that the second part of the book follows a parallel structure to the first part: after a country-by-country analysis of conflict of laws rules the author dwells on the harmonisation efforts within the EU and concludes with a comparison of the different solutions suggested for international violations of the right to personality. On the basis of his overall research, he proposes a flexible European model rule in conclusion.

Starting with characterisation, Thiede welcomes the fact that issues arising in a claim relating to the right to personality are quite uniformly seen as issues relating to tort or delict rather than the personal status of the victim. His comparative substantive law analysis shows that a violation of the right to personality always interplays with freedom of expression and freedom of the press. Hence, in his opinion, such violation cannot solely be connected with

the personal circumstances of the aggrieved person but needs to be subject to conflict of laws rules which aim at the reconciliation of conflicting interests. The author then recalls the options for jurisdiction under the Brussels I Regulation as interpreted by the European Court of Justice. Unlike the Rome II Regulation, the Brussels I regime applies to violations of the right to personality. Thiede places a special focus on the *Shevill* decision³ which extended the principle of ubiquity to defamation cases involving more than two states but restricted the scope of jurisdiction to damage sustained in the forum in order to prevent forum shopping. The author gives a very critical appraisal of the decision. For him, the judgment is an artificial perpetuation of earlier case law which rather distorts the ideas underlying Brussels I. In Thiede's view, forum shopping would be more coherently and efficiently prevented by a harmonisation of rules determining the applicable law. In his subsequent comparison of existing national and suggested European conflict of laws rules the author provides a clear and detailed picture of the current situation. Different national and harmonised solutions between the *lex loci delicti commissi* and the *lex damni* approaches have been advanced or, alternatively, states have tried to apply the *lex fori*.

In the comparative presentation of his findings from the chapters on national and suggested uniform conflict rules the author then carefully singles out all the potential connecting factors that might serve as a basis for a uniform European conflict rule. He discusses their advantages and shortcomings in a detailed and clear way, distinguishing where necessary between the two main cases of the violation of the right to personality: defamation scenarios and the violation of privacy. This is a very useful approach and assists in rendering the author's argument comprehensible. Only a few aspects of Thiede's research can be briefly discussed below.

Thiede starts the debate by focusing on the place where the damage has been sustained, that is, where the consequences of the violation of the right to privacy can be perceived. Several arguments militate against using this as a connecting factor, amongst which is that it lends itself to the danger of manipulation by the aggrieved party. As a second option Thiede discusses the place where the aggrieved party took notice of the violation of his or her rights. The author is not in favour of this option, however, largely because in defamation cases the key element of a violation of the right to personality is the moment in which third parties take notice of the defaming publication rather than when the aggrieved party notices it himself. Third, Thiede also does not support the use of the habitual residence of the aggrieved party as a general connecting factor. Even if the law of the state of habitual residence has the advantage of protecting the victim and taking into account his local cultural and moral expectations, the suitability of this connecting factor might, in Thiede's view,

3 C-68/93 *Fiona Shevill and Others v Presse Alliance SA* [1995] ECR I-415.

be questioned as the persons claiming violation of their rights often lead nomadic lifestyles and possess various residences in a range of countries. Furthermore, the substantive law concept of balancing conflicting interests between well-known persons of contemporary history on the one hand and the media on the other militates against a shift to a connecting factor which focuses on the aggrieved party alone. Again, the idea of balancing the conflicting interests drives Thiede's reasoning. Moreover, cultural and moral attitudes in the aggrieved person's state of habitual residence might clash with the standards and conventions in place at the habitual residence of the tortfeasor. The press would consequently be obliged to undertake in-depth investigations into the law of the presumed 'effective' state of habitual residence of the person on whom they wish to report. They would risk behaving illegally even if they complied with their home country standards, which would obviously pose a significant impediment to media freedom.

Predictability is another key element for Thiede which at first leads him to the assumption that the *lex loci delicti commissi* rule has some advantages. The tortfeasor should be capable of predicting and preventing a potential violation of the right to personality of another person under the law of the place where the event giving rise to the damage occurs, that is, the law of the place where the violating act was committed. The problem with this approach, however, is the difficulty in identifying the relevant 'act'. Thiede focuses on the final act (eg, in defamation cases, on the publication), which is to be localised at the seat of the media business which is responsible for it. However, he raises concerns against referring solely to the *lex loci delicti commissi* which are similar to those he identified in relation to the place of habitual residence of the injured party: this connection takes only the interests of one party into account – here, those of the alleged injurer.

In his quest for a solution that aligns the conflict of laws with the substantive law paradigm of the reconciliation of opposing interests, Thiede therefore gives preference to the place of distribution of the information violating the right to personality. He then clarifies all questions related to the definition of this place in cross-border cases. The public involved plays a crucial role here. Indeed, Thiede seems correct in suggesting that one has to refer to the place where the public has the possibility to perceive a publication as violating the right to personality of the person concerned. This is the place where the publication is distributed. This does not favour the interests of any one party and can only be manipulated by either party with difficulty.

However, even if Thiede eventually considers this place as the most appropriate basis for a conflicts provision, he does not consider it to be sufficient on its own to protect the interests involved in cases of violation of the right to personality. Thiede suggests linking it with the element of predictability for the tortfeasor. Just as substantive law requires criteria to impute a violation of rights to the tortfeasor, the conflict of laws solution needs an additional ele-

ment justifying the latter's responsibility. Again, Thiede is seeking to achieve harmony between the concepts of substantive and private international law. Significantly, he refers to the Swiss solution which contains an element of predictability. Thiede therefore suggests reference to the law of 'the place where distribution was predictable'.

Still, in his view, a solution needs to be found in cases of multiplicity of places of distribution. Thiede examines three options: the place leading to the application of the most favourable law for the aggrieved party; a 'mosaic assessment' limiting the scope of the respective applicable law only to those violations that occurred in the respective state; and the law of the state of distribution with which the case has the closest linking factor, that is, where the 'centre of gravity' of the violation of the right to personality can be localised. All the solutions present disadvantages, especially the so-called 'mosaic assessment', which leads to a fragmentation of applicable laws.

Thiede therefore advocates a flexible solution: the conflict of laws rule he suggests is based on the law of the predictable place of distribution and, in cases of multiple places of distribution, on the law of the place where the closest linking factor can be localised to avoid a fragmentation of applicable laws. To achieve greater legal certainty he further enumerates criteria to assist in determining this closest link. Regarding these criteria he identifies the predictability of the application of the law in question for the tortfeasor and the extent to which the legal order in question is objectively related to the case. The latter might depend on the perception of a neutral observer, the social network established by the person concerned – especially his or her habitual residence – and quantitative aspects of the distribution.

Albeit more detailed and flexible than classic conflict of laws rules, Thiede's solution is interesting as it takes into account the concerns of all parties involved. Whether or not his ideas for a European conflict rule will convince the reader or will be considered useful by practitioners, Thomas Thiede has produced a work of impressive precision and completeness which has the potential to serve as a work of reference for European comparative and private international law aspects of the right to personality and as a further basis for discussions on a uniform European conflict of laws rule.

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