Bettina Heiderhoff, Transnationaler Schutz der Privatsphäre im internationalen Privatrecht, in: Freiheit und Regulierung in der Cyberwelt – Rechtsidentifikation zwischen Quelle und Gericht, Berichte DGIR Bd. 47, Heidelberg 2016.

Summary

zum Referat von Prof. Dr. Bettina Heiderhoff

I. Contract

1. The violation of privacy can occur within a contractual relationship. For example, the contractual partner might use the personal data committed to him outside the specified purposes – e.g. by publishing data from a cloud or by transmitting the data to commercial partners. Interesting legal problems arise in particular around the use of standard contract terms. In most cases, the consent of the customer is necessary before the contractual partner may use personal data. Many service providers use a clause within their standard contract terms, which states that the contractual partner is giving his or her consent to the use of the data by concluding the contract.

2. If the contract is international, the law applicable to the contract and, in particular, to the standard contract terms must be determined. It is important to observe that the Rome I Regulation will often be overruled by specific rules in the data protection act (§ 1 sec. 5 BDSG – transforming article 4 Directive 95/46/EC) and the tele-media act (§ 3 TMG – transforming article 3 Directive 2000/31/EC).

§ 1 sec. 5 BDSG stipulates that the law of the country of origin is applicable for data controllers from an EU member state. Under § 3 TMG the substantive law of the country of origin of the service providers must be applied (at least where it is in their favor).

3. In many cases, there will be a choice of law agreement. Its validity must be controlled under the chosen law (articles 3, 10 Rome I Regulation). Only in consumer contracts the impact of a choice of law is generally restricted by the preferential law approach (article 6 sec. 2 Rome I Regulation). A choice of law overrides the rules of the TMG, but § 1 No. 5 BDSG is considered to be mandatory.

4. Where a consumer association takes collective action, article 6 Rome II Regulation must be applied additionally. The actual review of the standard contract terms will, however, remain subject to article 6 Rome I Regulation.

II. Torts

1. Where privacy is violated outside a contractual relationship, German law provides for a general right to injunction and a right to compensation. Whether the violation of privacy is relevant is determined by balancing the constitutional rights of the victim and of the tortfeasor. Other legal positions, such as the information interest of the public, must also be taken into consideration.

2. As the Rome II Regulation does not comprise claims deriving from violation of personality rights, the German national rules (articles 40, 41 EGBGB) remain applicable. For infringements of personality rights, the place in which the event giving rise to liability occurs and the place where that event results in damage are often not identical. In such cases, German law allows the victim to choose between the law of the place where the event occurs and the law of the place where it results in damage. Often, there are several places where the damage occurs, because the text/information will usually be accessible from many countries, or, rather, from any place in the world. It does,

therefore, seem necessary to many German authors and the courts to further define the relevant locations.

Concerning article 7 No. 1 lit. c Brussels I Regulation, the ECJ has decided that the place where the infringed person has his or her center of interest may be used as a forum for the whole damage. This judgment is convincing and the idea should be transferred to the German private international law, so that the victim may opt for the application of the law of the place where he or she has his or her center of interest. Additionally, there should remain the option to choose the law of any state in which the event results in damage in respect of the harm caused in that state (mosaic principle).

3. As far as claims for compensation based on infringements of personality rights under tort law are concerned, it is difficult to determine the impact of the data protection rules (§ 1 sec. 5 BDSG). The prevailing opinion in Germany assumes that § 1 sec. 5 BDSG does not comprise these compensation claims. § 3 TMG, on the other hand, covers these claims, so that the country-of-origin-principle will have a corrective effect on the substantive law level. In consequence, infringements of personality rights by service providers from the EU are only subject to the law of the country of origin of the provider.

III. Task of the conflict of laws rules

Currently the private international law concerning infringements of personality rights on the internet shows shortcomings. There are various laws which often contain rules that deviate a lot from one another and, moreover, have no clearly defined scope. It is essential to lead a focused discussion on the aims that should be achieved by private international law. It seems preferable, to create a zone of mutual trust within the EU on the one side and to grant a strong impact of the EU-standards for international cases by means of private international law on the other side.