8ème commission

Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments

Internet et les atteintes à la vie privée : problèmes de conflit de lois et de juridictions

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Contents

RESUME (traduction)

Le Projet de résolution fournit les règles en matière de compétence, de droit applicable et de reconnaissance des jugements dans les affaires découlant de dommages transfrontières causés, au moyen d'internet, aux droits de la personnalité (tels que la diffamation, l'atteinte à la vie privée et tout autre préjudice similaire). Rédigée sous la forme d'une loi uniforme de droit international privé, la Résolution vise à trouver l'équilibre optimum entre, d'une part, la protection de la vie privée et des autres droits de la personnalité et, de l'autre part, la sauvegarde de la liberté d'expression, en traitant, dans la mesure du possible et s'il y a lieu, les parties au litige sur un pied d'égalité, tout en créant un système de règles qui soit efficace et facile d'application.

La Résolution autorise quatre bases de compétences, dont deux sont associées au défendeur (l'« Etat de résidence » du défendeur et l'État où le défendeur a commis le « comportement déterminant ») et deux au demandeur (l'État sur le territoire duquel sont survenus « les effets préjudiciables les plus étendus » et l'« Etat de résidence » du demandeur). Si le demandeur intente une action devant une juridiction d'un Etat associé au défendeur, le défendeur ne peut se soustraire à sa compétence et la juridiction compétente ne peut surseoir à statuer en invoquant la doctrine du *forum non conveniens*. Dans ces cas, le droit applicable est le droit interne de l'État du for (la *lex fori*).

Si le demandeur intente une action devant une juridiction de l'État associé au demandeur, le défendeur peut se soustraire à sa compétence s'il remplit les conditions requises par les deux clauses d'échappement prévues à l'article 5 (c)-(d). A défaut, le droit applicable dans les deux cas sera le droit interne de l'État du for. Le tribunal peut toutefois appliquer le droit de l'État sur le territoire duquel est survenu le « comportement déterminant » si le demandeur remplit certaines conditions prévues à l'article 7.2 ou le droit de l'État sur le territoire duquel sont survenus les « effets préjudiciables les plus étendus » si le défendeur remplit certaines conditions prévues à l'article 7.3.

La Résolution précise en outre les conditions à remplir en vue de rendre applicables les accords d'élection du for conclus avant ou après le litige, et incorpore, par renvoi, les conditions pour la reconnaissance des jugements étrangers prévues par la Convention de La Haye du 28 mai 2018 sur la reconnaissance et l'exécution des jugements étrangers.

Final Report (21 November 2018)

I. Introduction

Cross-border invasion of privacy and other conduct causing injuries to rights of personality through the Internet present some of the most intractable problems in contemporary private international law (PIL).

The first set of difficulties stems from the fact that different legal systems assign different priorities to two fundamental values—protecting privacy and other personality rights, on the one hand, and protecting freedom of expression, on the other. Accommodating these values is difficult enough within a single state; it is even more difficult in cross-border situations in which the involved states strike a different balance between these values.

The proliferation and ubiquity of the Internet is the source of the second set of difficulty or at least complexity. As the Supreme Court of Canada recently observed, "the exponential increase in multijurisdictional publications over the Internet has led to growing concerns about libel tourism and the possible assumption of jurisdiction by an unlimited number of forums." *Haaretz.com v. Goldhar*, 2018 SCC 28, §1 (Can. Sup. Ct., June 6, 2018). Commenting on the same phenomenon, the Court of Justice of the European Union distinguished "the placing online of content on a website" from the cross-border distribution of printed materials, noting that the former "is intended, in principle, to ensure the ubiquity of that content ... [which] may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's [home state] and outside of that person's control." *eDate Advertising GmbH v. X*, C 509/09 and C 161/10, EU:C:2011:685 at § 45. See also *Bolagsupplysningen v. Svensk Handel* (Case C-194/16) at § 48 (noting "the ubiquitous nature of the information and content placed online on a website" and "the fact that the scope of their distribution is, in principle, universal.").

Differences in jurisdictional and procedural regimes from one state to another pose another set of challenges. For example, in some states the jurisdictional inquiry focuses exclusively on the connection between the claim and the forum state, while in other states the focus is primarily on the defendant's purposeful contacts with the forum state. Other differences concern the proper scope of the permissible remedy, e.g., whether it should be limited to injuries sustained in the forum state or may encompass injuries sustained in other states.

Finally, wide divergences continue to exist with regard to the choice of the applicable law. The choices include the *lex loci delicti*, the *lex loci damni*, the *favor laesi* between these two laws, as well as several other choices based on soft connecting factors, such as the "closer connection."

In full awareness of these difficulties, the attached Draft Resolution attempts to strike a fair balance between these conflicting values and regimes, while at the same time aiming to craft a rule-system that is efficient and easy to apply.

II. The Balance

The Draft Resolution seeks to strike a balance between the aforementioned competing philosophies and values by striving to treat, *as equally as possible and appropriate,* the two parties to the dispute, namely the aggrieved person (plaintiff) and the person whose conduct caused or may cause the injury (defendant). The balance consists of several elements, including the following pertaining to jurisdiction and applicable law. The Draft Resolution:

(a) authorizes four jurisdictional bases, from which the plaintiff can choose one: Two of those bases are affiliated with the defendant—the defendant's "home state" and the state of the defendant's "critical conduct." See Art. 5.1(a)-(b). The other two bases are affiliated with the plaintiff—the state in which "the most extensive injurious effects" occurred, and the plaintiff's "home state." See Art. 5.1(c)-(d);

(b) provides defendants with two ways for avoiding jurisdiction in cases in which the plaintiff sues in a state affiliated with the plaintiff. See Art. 5.1(c)-(d); and

(c) mandates the application of the internal law of the state in which the plaintiff filed the action (hereinafter referred to as the "forum state") but, when that state is affiliated only with the plaintiff, it allows the defendant, and in some cases the plaintiff, to opt for the application of the law of another state under certain circumstances, as explained below. See Art. 7.2-3.

1. Suit in the states affiliated with the defendant. If the plaintiff chooses to sue in the defendant's "home state" or the state of the defendant's "critical conduct," the defendant cannot avoid jurisdiction and the court may not refuse to exercise it by invoking the doctrine of *forum non conveniens.* See Art. 5.2. In these cases, the applicable law is the internal law of the forum state (the *lex fori*). See Art. 7.1.

2. Suit in the states affiliated with the plaintiff. If the plaintiff sues in either the state in which "the most extensive injurious effects" occurred or in the plaintiff's "home state," the defendant may avoid jurisdiction by satisfying the requirements of two escape clauses provided in subparagraphs (c) and (d), respectively, of Art. 5.1. If the defendant fails

to do so, the applicable law in both cases will be the *lex fori*, but the court may apply the law of another state under certain circumstances specified in paragraphs 2 and 3 of Article 7 and described below.

a. ***Suit in the state of the "most extensive injurious effects."*** When the plaintiff sues in the state of the "most extensive injurious effects":

(1) Jurisdiction. The defendant may avoid jurisdiction by demonstrating that: (a) it took active measures to prevent access to the material in that state; and (b) a reasonable person could not have foreseen that its conduct would cause any injury in that state. See Art. 5.1(c).

(2) Applicable law. If the defendant does not object to, or fails to avoid, jurisdiction the applicable law is the law of the forum state, unless the plaintiff demonstrates that the "critical conduct" occurred in another state, establishes the content of that state's law, and formally requests its application. See Art. 7.2.

b. ***Suit in plaintiff's home state***. When the plaintiff sues in the plaintiff's home state (where the material was accessible, or the plaintiff suffered an injury):

(1) Jurisdiction. The defendant may avoid jurisdiction by demonstrating that: (a) it took active measures to prevent access to the material in that state, and (b) it did not derive any pecuniary or other significant benefit from the accessibility of the material in that state. See Art. 5.1(d).

(2) Applicable law. If the defendant fails to do so, the applicable law is the internal law of the forum state, but the defendant may avoid the application of that law by demonstrating that the "most extensive injurious effects" occurred in another state, and formally requesting the application of the law of the latter state after establishing its content. See Art. 7.3. If the defendant fails to do so, the law of the plaintiff's home state remains applicable, unless the plaintiff demonstrates that the most extensive injurious effects occurred in the plaintiff's home state, in which case the plaintiff may formally request the application of the law of the state of conduct after establishing its content. See Art. 7.2.

Tables 1 and 2, *infra*, depict the operation of Articles 5 and 7 in these two situations.

3. Choice-of-court agreements. Article 6 defines the conditions for enforcing pre-dispute and post-dispute choice-of-court agreements and provides that agreements conferring exclusive jurisdiction prevail over the jurisdictional provisions of Article 5.

4. Choice-of-law agreements. Article 8 defines the conditions for enforcing pre-dispute and post-dispute choice-of-law agreements and provides that a valid choice-of-law agreement prevails over the choice-of-law rules of Article 7.

III. The Operation of Articles 5-8

Table 1. Jurisdiction and applicable law if there is no choice-of-court or choice-of-law agreement

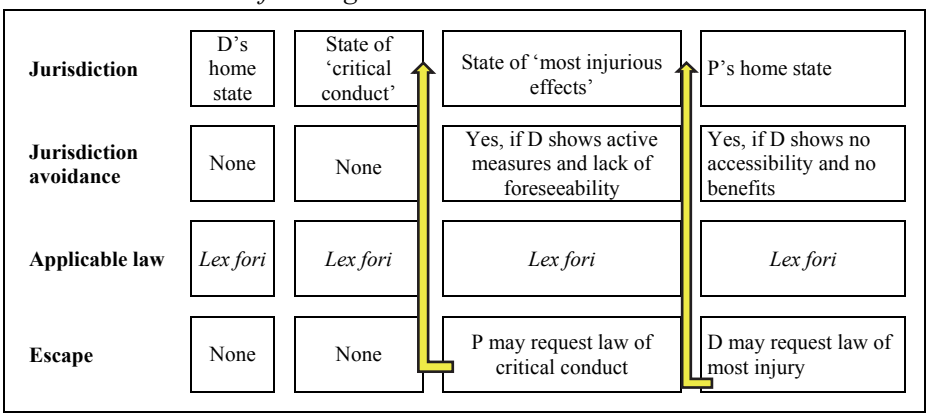
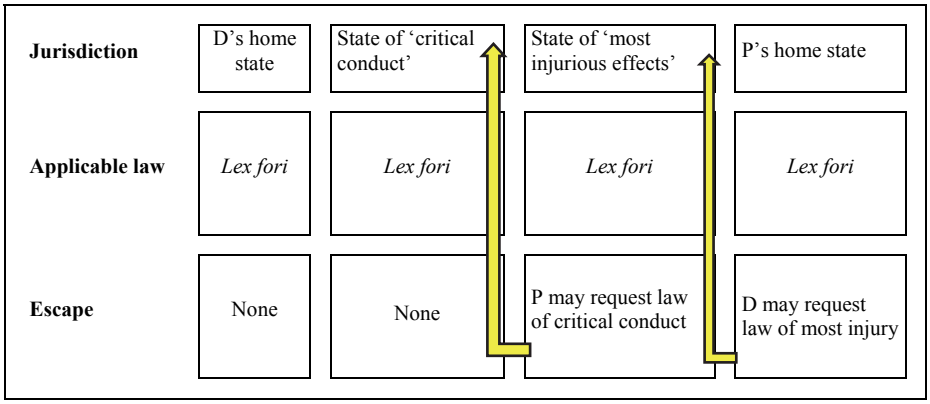


Table 2. Jurisdiction and applicable law if there is a choice-of-court agreement but no choice-of-law agreement

(a) If the choice-of-court agreement designates one of the states that would have jurisdiction under Article 5 (shown below) and the action is filed in that state, the applicable law will be the same as provided in Article 7 (shown below).



(b) If the choice-of-court agreement designates a state other than a state that would have jurisdiction under Article 5 and the action is filed in the designated state, the applicable law is the law of the state that has "the closest and most significant connection."

(c) If there is a valid choice-of-law agreement, then the law designated in the agreement displaces the law applicable under Article 7.

IV. Simplicity and Efficiency

The Resolution seeks simplicity and efficiency by, *inter alia*:

(1) Preventing parallel or subsequent litigation once the aggrieved person files the initial action (see Art. 3.2);

(2) Rejecting the "mosaic principle" and adopting the "holistic principle," which allows the aggrieved person to sue in a single state and, if successful, obtain relief for injuries suffered in all states (see Art. 3.1);

(3) Providing that, in all cases, the internal law of the forum state (the *lex fori*) will be the default law (see Art. 7), which means that the court will not have to engage in a choice-of-law analysis (which differs widely from state to state and is often labor intensive and unpredictable);

(4) Authorizing that application of non-forum law only in narrowly defined circumstances and placing the burden of persuasion (as well as the burden of proving the content of that law) on the litigant that formally requests it; and

(5) Defining the conditions for enforcing choice-of-court and choice-of-law agreements, which can obviate the difficulties of the jurisdictional and choice-of-law inquiries.

V. Format

This document is drafted in the form of a model law, with extensive comments following each article and explaining its intended meaning and operation. To the extent that this is a departure from the Institute's current practice, the model-law format can be justified by the technical nature of the subject matter and the desire to more readily contribute to the development of the law.

VI. The Chronology and Scope of this Project

The Institute authorized work on this topic at the 1999 Session in Berlin.[1] The precise title of the topic was: *La protection internationale des droits de la personnalité face au développement technologique / The International Protection of Personality Rights in the Light of Technological Development.* In 2004, the title was changed to *Internet et les atteintes à la vie privée: problèmes de conflit de lois et de juridictions / Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments.*

[1] The first reporter was Christopher G. Weeramantry (1999-2009). He was succeeded by Bernd von Hoffmann (2009-2011), and then by Erik Jayme (2011). Symeon Symeonides was appointed co-reporter in 2014.

Thus, the new title narrowed the scope of the project in two respects: (a) from "technological development" in general to the Internet in particular; and (b) from "personality rights" to "infringement of privacy."

The reasons for these changes are unknown, but the second change is problematic because, if taken literally, the term "infringement of privacy" would seem to exclude, at least in some legal systems, other injuries to personality rights, such as defamation. In most legal systems, an invasion of privacy consists of the dissemination of truthful information whereas defamation is the dissemination of false information. Because it appears unlikely that the Institute intended to exclude defamation, this Draft Resolution uses the broader umbrella term injuries to "rights of personality," which encompasses both defamation and invasion of privacy, as well as other injuries to "a person's reputation, dignity, honor, name, [and] image." Art. 1.2.

The Eighth Commission did not begin its work until 2015. Since that time, the Commission held two formal meetings, one in Tallinn (2015), and one in Hyderabad (2017). During this period, the Commission considered seven successive drafts (Working Documents Nos. 1-6) submitted by the reporters. The present document is the eighth. Excerpts from the correspondence between the reporters and Commission members regarding the first six drafts are reproduced in the *Travaux*, *infra*.

VII. The Structure and Content of this Document

This document consists of the following parts: (1) The proposed Draft Resolution, first with accompanying explanatory comments, and then the text of the Resolution without the comments, followed by a translation of the Draft Resolution in French; (2) Appendix I, providing a summary of choice-of-law rules for cross-border torts from recent PIL codifications; (3) Appendix II, reproducing certain statutory choice-of-law rules on infringement of personality rights and similar torts; (4) Appendix III, reproducing the pertinent articles of the Hague draft Convention on recognition and enforcement of foreign judgments of 28 May 2018; and (5) The *Travaux*, containing excerpts from correspondence between the reporters and Commission members. Furthermore, a summary of the report in French is provided at the beginning of this document.

DRAFT RESOLUTION (With Comments)

The Institute of International Law,

Noting that the international proliferation of Internet access has brought not only significant benefits but also some considerable

drawbacks, such as increasing the facility with which conduct in one state can cause injury in another;

Considering that various states assign different priorities to the policies of protecting freedom of expression, on the one hand, and protecting a person's privacy, reputation, honor, and other rights of personality, on the other, and thus differ on whether a particular conduct, such as a communication or other expression, is or is not wrongful;

Noting that these differences reflect strongly held societal beliefs, resulting in sharp conflicts regarding which state's courts should have jurisdiction to adjudicate the dispute, which state's law should govern the merits, and whether the resulting judgments should be recognizable in other states;

Regretting the failure of other efforts to address these difficult conflicts at an international or regional level, but *aspiring* to contribute to the emergence of an international consensus toward that end;

Believing that an essential component of such a consensus should be to seek, to the extent possible, a fair accommodation between the aforementioned policies of safeguarding freedom of expression and protecting a person's rights of personality;

Recognizing that other values, such as judicial economy, administrability, predictability, and evenhanded treatment of potential litigants are also important considerations;

Adopts this Resolution:

I. Preliminaries and General Principles

Article 1. Definitions

As used in this Resolution, the following terms have the meaning denoted below:

1. ***"Injury"* denotes an actual or impending harm to a person's rights of personality.**
2. ***"Rights of personality"* include in particular a person's reputation, dignity, honor, name, image, and privacy, as well as similar rights that, regardless of how they are called, are protected by the applicable law.**
3. ***"Posted material"* denotes material uploaded and accessible on the Internet, on which the aggrieved person bases its claim for actual or impending injury to its rights of personality.**
4. **"*Person*" includes a natural person, a legal or juridical person, and an association of persons, whether corporate or unincorporated.**

5. *"Aggrieved person"* denotes the person who claims that the posted material or other activity conducted through the Internet has caused or may cause injury to that person's rights of personality.

6. *"Person claimed to be liable"* denotes any person that the aggrieved person identifies as having engaged in conduct that has caused or may cause the injury, such as the author of the posted material and, where appropriate, the person responsible for uploading, hosting, or disseminating the material.

7. "*Conduct*" denotes, as may be appropriate, an act or a failure to act.

8. "*Critical conduct*" denotes, as may be appropriate, the authorship, uploading, hosting, or dissemination of the posted material, or any other act or omission, whichever is the principal cause of the injury.

9. "*Redress*" includes compensation or damages, preventive and corrective injunctive relief, and any other remedy available under the applicable law.

10. *"State"* denotes any country or territorial subdivision of a country if that subdivision has its own law regarding rights of personality.

11. *"Home state"* means:

(a) for natural persons, the state in which the person has its domicile or habitual residence;

(b) for persons other than natural persons, the state in which the person has its statutory seat or principal place of business, or under the law of which that person was incorporated or formed;

(c) in cases of injury to a person's professional or business interests or reputation, the state in which that person has its principal professional or business establishment.

12. "*Forum state*" means the state in which the particular proceeding is pending.

13. "*Internal law*" denotes a state's procedural and substantive law exclusive of its rules of private international law.

COMMENTS

(a) Definitions. Article 1 provides definitions of certain terms used in this Resolution. Some of these definitions are self-contained and autonomous, while other terms derive further meaning from the law applicable to the particular issue under Articles 2, 4, and 7-8, as explained below. The following comments address only those definitions that are not entirely self-explanatory.

(b) Injury. The term injury is defined as consisting of either actual or "impending" harm in order to allow the possibility of obtaining preventive relief, such as an injunction.

Whether and where an injury has occurred or may occur are factual questions, which are answered under the internal law of the forum state. When the injury occurs or may occur in more than one state, the court determines under the forum's internal law the state in which the "most extensive injurious effects" occurred or may occur. See Art. 4(c), *infra*.

Whether an injury is wrongful or tortious so as to justify a legal remedy is a legal question, which is answered by the law applicable under Articles 7-8.

(c) Rights of Personality. In the civil law world, the term "rights of personality" is a well-known umbrella term that encompasses rights such as those illustratively listed in Article 1.2. Although common law systems do not use this particular term, they do provide specific tort actions for injuries to most of the same rights, even if they do not lump them together under the common term "rights of personality." Recognizing this difference, which is largely terminological rather than substantive, this Draft Resolution defines the scope of the quoted term as including rights that are similar to rights of personality and which, "regardless of how they are called, are protected by the applicable law" under Articles 7-8. See Article 2.1, *infra*.

(d) Persons "claimed to be liable" are those who, according to the plaintiff's complaint, are legally responsible for the plaintiff's injury, such as the author of the posted material, the person responsible for uploading, hosting, or disseminating the material, and any other person whose online activity has caused or may cause injury to the plaintiff. Whether and which of these persons caused or may cause the injury are factual question to be answered by the court under the internal law of the forum state. See Art. 4(b), *infra*. If the conduct of more than one person caused the injury, the court will determine each person's fault under the same law. See *id*. Whether a person is "liable" for the injury is a legal question to be answered by the law applicable under Articles 7-8, *infra*.

(e) "Critical conduct" denotes, as may be appropriate, the authorship, uploading, hosting, or dissemination of the posted material, whichever is the principal cause of the injury. It may also consist of, or include, other acts or omissions, such as the unauthorized collection, disclosure, or misuse of personal data or other confidential information. Which of these acts or omissions constitute the "critical conduct" and where that conduct occurred are factual question to be answered by the court under the internal law of the forum. See Art. 4(a), i*nfra*.

(f) "Redress." The redress that a court may grant consists of any remedy available under the applicable law. This includes provisional measures, compensation or damages, as well as preventive or corrective action, such as ordering the removal or correction of the posted material, posting an apology, or granting the right to reply. It does not exclude punitive damages, if available under the applicable law.

(g) "Home state." For the sake of brevity, this Resolution uses the term "home state" as an umbrella term describing a person's domicile or similar affiliation with a given state and, in Article 1.11, it provides separate definitions for each category of persons. Subparagraph (a) of Article 1.11 provides a definition for natural persons, subparagraph (b) does likewise for juridical or legal persons and associations, and subparagraph (c) provides a definition of a "professional" home state for all persons. A person's home state is a jurisdictional basis for actions brought against that person under Article 5.1(a), and by that person under Article 5.1(d).

(h) "Forum state" is the state in which the particular proceeding is pending. This term has the same meaning as the term "seized forum" as used in some Hague conventions and EU Regulations.

Article 2. Scope

1. This Resolution applies to civil claims arising from injuries caused through the use of the Internet to a person's rights of personality or other similar rights as these rights and injuries are defined by the law applicable under Articles 7 and 8.

2. This Resolution does not apply:

(a) to infringements of intellectual property rights;

(b) to injuries caused by the conduct of a person or entity in the exercise of governmental authority; or

(c) to cases in which the aggrieved person and the person claimed to be liable have the same home state and in which both the critical conduct and the most extensive injurious effects occurred in that state.

COMMENTS

(a) Scope. Article 2 defines the substantive scope of this Resolution, first affirmatively in paragraph 1, and then negatively in paragraph 2 by excluding certain categories of cases. The Resolution applies to "civil claims" arising from injuries caused through the use of the Internet to a person's rights of personality as defined by Article 1.2, *supra,* and the

law applicable under Articles 7-8, *infra*. The term "civil" includes commercial claims and is used in juxtaposition to "criminal," thus ensuring that this Resolution does not apply to criminal prosecutions or administrative proceedings initiated by public authorities.

(b) Exclusions from Scope. Paragraph 2 of Article 2 excludes from the scope of this Resolution three categories of cases. Subparagraph (a) excludes infringement of intellectual property rights, such as copyrights, because various legal systems differ on whether some of those rights overlap with rights of personality, and also because of the existence of international or regional conventions and similar instruments that specifically regulate these rights. Subparagraph (b) excludes injuries caused by the conduct of a person or entity in the exercise of governmental authority because such an exercise implicates issues of sovereign immunity and other public law doctrines. Finally, subparagraph (c) excludes what one might call entirely intrastate or domestic cases, namely cases in which virtually all significant contacts are congregated in a single state. Thus, a case in which both the critical conduct and the most extensive injurious effects occurred in the home state of all parties falls outside the scope of this Resolution, even if the case has some secondary contacts with another state, such as part of the conduct or part of the injury.

Article 3. The "Holistic Principle" (One action, one law for all injuries)

1. A person who claims to have suffered or may suffer injury to its rights of personality as a result of material posted on, or other activity conducted through, the Internet may file a single action in any one of the states referred to in Articles 5 or 6 against the person claimed to be liable for the injury and to seek redress for injuries that have occurred or may occur in all states.

2. Once the aggrieved person files an action in one of the states referred to in Articles 5 or 6, all other states shall refrain from entertaining another action arising from the same conduct and filed by that person, the person against whom the action was filed, or their successors in interest, unless:

(a) the proceedings in the first state: (i) are discontinued or dismissed without prejudice; or (ii) are excessively delayed and are unlikely to be concluded within a reasonable time; or

(b) the court of that state decided not to entertain the action under Article 5.1(c) or (d), or under Article 6.

COMMENTS

(a) The "Mosaic Principle." This article and this Resolution reject the "mosaic principle," initially adopted with regard to print media by the

predecessor of the Court of Justice of the European Union (CJEU) in its 1995 judgment in *Shevill v. Presse Alliance*, C 68/93, EU:C:1995:61. According to this principle, the state of the defendant's domicile or "establishment" has jurisdiction to decide claims arising from all of the plaintiff's injuries regardless of where they occurred, but the state in which the plaintiff sustained an injury has jurisdiction *only* for claims arising from the injury sustained in that state. In its 2011 judgment in *eDate Advertising GmbH v. X*, C 509/09 and C 161/10, EU:C:2011:685, which involved defamation through the Internet, the CJEU distinguished cases involving print media from cases involving the Internet. The Court noted that "the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content ... [and] may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it[.]" *Id*. at § 45. The Court reaffirmed the principle that the state of the defendant's domicile or establishment has jurisdiction with regard to all of the plaintiff's injuries, but also granted the same jurisdictional power to the state of the plaintiff's "centre of interest," which is usually but not exclusively the plaintiff's habitual residence.[2] The Court held that the state of the plaintiff's center of interests has jurisdiction to decide claims arising from all of the plaintiff's injuries regardless of where they occurred. See *id.* at § 52. Finally, the Court also noted that a state in which the defamatory material was simply accessible (and thus where some injury may have occurred) but which did not qualify as the plaintiff's center of interest has jurisdiction only with regard to the injury that occurred in that state. *Id.*

In its 2016 judgment in *Bolagsupplysningen v. Svensk Handel* (Case C-194/16), the CJEU held that the *eDate* holding also applied to cases in which the plaintiff was a legal person and reaffirmed the principle that the state of the plaintiff's center of interests had jurisdiction with regard to all of the plaintiff's injuries, including those that occurred in other states. However, in this case, the plaintiff had its registered office in Estonia but carried out most of its activities in Sweden. The Court held that in such a case, the location of the registered office "is not … in

[2] *See id*. at § 49, noting that "The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State." This corresponds to the concept of professional "home state" as defined in Article 1.11(c) of this Resolution.

itself, a conclusive criterion." *Id.* at § 41. Instead, the court should consider all relevant factors, which in this case clearly pointed to Sweden as the plaintiff's center of interest. The Court reasoned that a legal person's center of interest "must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities." *Id*. In this case, the plaintiff's "commercial reputation" was "greater in [Sweden] than in any other [state] ... and, consequently, any injury to that reputation would be felt *most keenly* there." *Id.* at § 42 (emphasis added).[3] The Court held that, as the plaintiff's center of interest, Sweden had jurisdiction to order the "rectification" and "removal" of the offensive material from the defendant's Swedish website. However, Estonia, a state in which material was merely accessible (but which did not qualify as the plaintiff's center of interest) did not have jurisdiction to entertain an application for rectification or removal because such an application "is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation." *Id*. at § 48.

(b) The "Holistic Principle." In summary, under the CJEU's jurisprudence interpreting the Brussels I Regulation, an EU Member State has jurisdiction if that state is: (1) the defendant's domicile; (2) the defendant's "establishment"; (3) the plaintiff's center of interest; or (4) a state in which the offensive material was accessible and thus the state in which the plaintiff suffered *some* injury. The mosaic principle established in *Shevill* remains applicable only in this last category of cases. In the first three categories of cases, the applicable principle is what one may call the "holistic principle."

This Resolution adopts the holistic principle in all four categories of cases for which it authorizes jurisdiction. Under this principle, the aggrieved person may file a single action in any one of the four states referred to in Article 5, *infra*, and to seek redress for injuries that have occurred or may occur in all states. These states are:

(1) the defendant's home state (which corresponds to the defendant's domicile under EU law);

[3] Under this Resolution, Sweden would qualify either as the plaintiff's *professional* "home state" as defined in Article 1.11(c), which has jurisdiction under Article 5.1(d), or as the state of the "most extensive injurious effects" as defined in Article 4(c), which has jurisdiction under Article 5.1(c).

(2) the defendant's "critical conduct" (which usually corresponds to the defendant's "establishment");

(3) the plaintiff's "home state" (which corresponds to the plaintiff's "center of interests" in cases such as *eDate Advertising GmbH*); and

(4) the state in which the "most extensive injurious effects" occurred (which in most cases will produce the same results as in *Bolagsupplysningen v. Svensk Handel)*.

As the parenthetical phrases in the above list indicate, in many cases, this Resolution will produce similar results as the CJEU jurisprudence. However, in some cases, the results will differ. Comments (c)-(e) under Article 5, *infra*, explain both the similarities and the differences.

(c) Only One Lawsuit. As a corollary to the holistic principle, this Resolution adopts the one-lawsuit principle. Once the aggrieved person files an action in one of the states referred to in Articles 5 or 6, that person and its successors may not file another action with regard to the injuries arising from the same conduct against the defendant or its successors. Likewise, once the aggrieved person files the action, the defendant and its successors may not file in another state an action, such as an action for a declaratory judgment, with regard to the same events against the plaintiff or its successors.[4]

(d) Suit in a Second State. If the court entertains the action and renders a judgment on the merits, that judgment is res judicata and bars another action in any other state. In the meantime, however, paragraph 2 of Article 3 allows a second lawsuit in another state in the following circumstances:

(1) If the proceedings in the first state are discontinued or dismissed without prejudice. In such a case, the discontinuance or dismissal has no res judicata effect.

(2) If the proceedings in the first state are excessively delayed and are unlikely to be concluded within a reasonable time. This provision is intended to avoid the "Italian torpedo" problem.

(3) In cases filed under subparagraphs (c) or (d) of Article 5.1, if the court in the first state decides not to entertain the action because the defendant satisfies the requirements of the escape clauses provided therein; and

[4] Article 3 does not cover declaratory actions filed by potential defendants before the aggrieved person initiates litigation.

(4) In cases filed under Article 6, if the court in the first state decides not to entertain the action because the choice-of-court agreement does not meet the requirements for its validity specified in that article.

Article 4. Localization and other factual determinations

The internal law of the forum state determines the answers to the following questions:

(a) Which conduct is the principal cause of the injury ("critical conduct") and where that conduct occurred.

(b) Which person's conduct caused the injury and, if the conduct of more than one person caused the injury, the percentages of each person's fault.

(c) Whether and where the injury occurred or may occur and, in case of injury in more than one state, which is the state in which the most extensive injurious effects occurred or may occur.

COMMENTS

(a) Factual Determinations and the Lex Fori. In resolving conflicts of laws, courts answer most factual questions under the internal law of the forum state, without any choice-of-law inquiry. However, in some cases, the involved states use different standards in answering these questions. In those cases, the need for a choice-of-law inquiry is at least arguable and sometimes appropriate.

This is not the case, however, with regard to the three categories of questions listed in Article 4. To avoid uncertainty, this article expressly relieves the seized court from such an inquiry by providing that the "internal" law of the forum state, namely, its procedural and substantive law, exclusive of its rules of private international law (Art.1.12-13, *supra*), determines the answer to these questions.

The forum state is the state in which the aggrieved person files the initial action under paragraph 1 of Article 3, or in which a subsequent action is filed under paragraph 2 of Article 3, or the state designated in a choice-of-court agreement (Art. 6, *infra*) if the action is filed there.

(b) "Critical Conduct." The state in which the "critical conduct" occurred is one of the states that has jurisdiction under Article 5.1(b) and the state whose law governs the merits under paragraphs 1 and 2 of Article 7. Article 1.8 defines "critical conduct" as any act or omission that is the "principal cause" of the injury and illustratively mentions the "authorship, uploading, hosting, or dissemination of the posted material." Article 4(a) provides that the court applies the standards of its internal law in determining which of those *or any other* acts was the principal

cause of the injury and also in identifying the state in which that conduct occurred.

The court will apply the same law for determining whether the person or persons "claimed to be liable" by the plaintiff (see Art. 1.6) is in fact the person whose conduct caused the plaintiff's injury and, if the conduct of more than one person caused the injury, determining the percentages of each person's fault. (Art. 4(b)).

(c) Injury. According to Article 1.1, the term "injury" includes both an actual and an impending harm to a person's rights of personality. However, whether a harm has occurred or is likely to occur are factual questions, which the court will answer by examining the facts under the standards of the internal law of the forum state. (Art. 4(c)). In the same way, the court will identify the state in which the injury occurred or may occur and, in case of injury in more than one state, which is the state in which "the most extensive injurious effects" occurred or may occur. See Art. 5.1(c), *infra*.

(***d) Binding Effect of Factual Determinations***. Some of the factual determinations contemplated by Article 4 (such as identifying the conduct that was the principal cause of the injury or determining the location of that conduct or the location of the most extensive injurious effects) are necessary both for establishing a court's jurisdiction under Article 5 and for determining the law applicable to the merits under Article 7. The procedural law of the forum state determines whether the court's findings in the jurisdictional phase are binding on the court in the choice-of-law phase of the case.

II. Jurisdiction

Article 5. Jurisdiction

1. Subject to Articles 3 and 6, the following states have jurisdiction to adjudicate an action seeking to redress or to prevent an injury to a person's rights of personality, which is caused or may be caused by material posted on, or by other activity conducted through, the Internet:

(a) The home state of the person claimed to be liable for the injury;

(b) The state in which the critical conduct of the person claimed to be liable occurred;

(c) The state in which the most extensive injurious effects occurred or may occur, unless the person claimed to be liable demonstrates that:

(i) it took active measures to prevent access to the material in that state; and

(ii) a reasonable person could not have foreseen that its conduct would cause any injury in that state; or

(d) The home state of the person who suffered or may suffer an injury, if the posted material was accessible in that state or that person suffered injury there, unless the person claimed to be liable demonstrates that:

(i) it took active measures to prevent access to the material in that state;

(ii) it did not derive any pecuniary or other significant benefit from the accessibility of the material in that state; and

(iii) in cases of injury caused by an act or omission other than by posted material, that a reasonable person could not have foreseen that its conduct would cause any injury in that state.

2. A state that has jurisdiction under paragraph 1 may not refuse to exercise it on the sole ground that the action should be brought in another state.

COMMENTS

(a) Jurisdictional Bases. Article 5 identifies four contacts, each of which is sufficient to anchor a state's jurisdiction to adjudicate a dispute falling within the scope of this Resolution. These states are: (a) the home state of the person claimed to be liable; (b) the state in which that person's critical conduct occurred; (c) the state in which the most extensive injurious effects occurred or may occur; and (d) the home state of the injured person, if the posted material was accessible, or that person suffered injury, in that state.[5] In addition, Article 6 provides that a valid choice-of-court agreement confers jurisdiction to the designated state, which may be any one of the above four states or another state.

In many cases, a state will have more than one of the above contacts. For example, the defendant's home state is often the place of the defendant's critical conduct, while the plaintiff's home state is often the state in which most of the injuries occur. Nevertheless, even one of the above contacts is sufficient to anchor a state's jurisdiction.

[5] Of course, other states may assert jurisdiction under additional bases authorized by their national law. However, these assertions of jurisdiction and the resulting judgments fall outside the scope of this Resolution.

(b) Priority of Articles 3 and 6. Article 5 applies "[s]ubject to Articles 3 and 6." The quoted phrase signals that Articles 3 and 6 have priority over Article 5. Article 3 prohibits parallel or subsequent lawsuits by providing that the aggrieved person may file "a *single* action" in one of the states referred to in Articles 5 or 6, and that, once the action is filed, "all other states should abstain from entertaining another action," subject to certain exceptions specified in Article 3.2. Article 6 provides that, if the parties have conferred exclusive jurisdiction to the courts of a state by an agreement that meets the requirements of that article, then a lawsuit under that agreement has priority over a lawsuit filed in the states referred to in Article 5. On the other hand, a lawsuit filed under a non-exclusive choice-of-court agreement has no such priority, unless that action was filed first, and the defendant did not timely object. See Art. 6.3, *infra*.

(c) The Defendant's Home State and the State of the Critical Conduct. The first two jurisdictional bases authorized by Article 5 are non-controversial, even from the perspective of legal systems that focus primarily on the defendant's purposeful contacts with the forum state. The defendant's home state is a well-established basis for general jurisdiction in all systems.[6] For the definition of "home state," see Art. 1.11(a)-(b), *supra*.[7] The place of the defendant's critical conduct is also a well-accepted basis of jurisdiction internationally.[8] In many cases, it will correspond with what the CJEU refers to as the place of the publisher's "establishment." The Court has yet to provide a precise definition of the quoted term, but in at least one case (*Shevill*), the Court stated that the place of the publisher's establishment is "the place where the harmful event originated."[9] Accepting this notion in principle, Article 5.1(b) uses

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[6] Article 5.1(a) refers to the defendant as the "person claimed to be liable." For a definition of the quoted term, see Art.1.6, *supra*. The court applies the internal law of the forum for determining which person's conduct caused the injury and, if the conduct of more than one person caused the injury, for determining the percentages of each person's fault. See Art. 4(b), *supra*.

[7] The plaintiff may not sue additional defendants not having their "home" in the forum state, unless that state has jurisdiction over those defendants under another basis authorized by Article 5

[8] For the definition of "critical conduct," see Art. 1.8, *supra*. The court determines under the internal law of the forum: (a) which conduct qualifies as the "critical conduct"; and (b) where that conduct occurred. See Art. 4(a), *supra*. That state has jurisdiction to adjudicate claims arising from injuries in all states. See Art. 3.1, *supra*. The plaintiff may not sue additional defendants whose critical conduct did not occur in the forum state, unless that state has jurisdiction over those defendants under another basis authorized by Article 5.

[9] See *Shevill v. Presse Alliance*, C 68/93, EU:C:1995:61, at § 24 ("In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event

more precise language in identifying this basis of jurisdiction by requiring a showing that the forum state must be the state in which the "*critical* conduct" occurred.[10]

(d) The State of the "Most Extensive Injurious Effects." The third jurisdictional basis authorized by Article 5 is the state in which the "most extensive injurious effects" occurred or may occur. For the definition of the quoted phrase and the law applicable in identifying that state, see Art. 4(c), *supra*. In some countries, such as the Member States of the European Union, the state in which *any part* of the injury occurs has jurisdiction, even if the defendant lacks any contacts with that state, but that jurisdiction is limited to granting relief for the injury that occurred in the forum state. See comment (a) under Article 3, *supra*. In other countries, such as the United States, the state in which *all* of the injury occurs does not have jurisdiction unless the defendant has additional contacts with that state, such as purposefully engaging in related activity in, or targeting, that state. See, e.g., *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011).

Subparagraph (c) of Article 5.1 falls somewhere between these two positions. It authorizes jurisdiction for all of the plaintiff's injuries (including those occurring elsewhere), but only if the "most extensive injurious effects" occurred in the forum state. In *Bolagsupplysningen v. Svensk Handel* (Case C-194/16), which involved an Estonian plaintiff that carried most of its economic activities in Sweden, Sweden would qualify as the state of the "most extensive injurious effects" because, in the words of the CJEU, "any injury to [the plaintiff's] reputation would be felt *most keenly* there." *Id.* at § 42 (emphasis added).[11] However, Article 5.1(c) provides defendants with an escape that is not available under EU law. A defendant can avoid jurisdiction in the state of "the most extensive injurious effects" by demonstrating that: "(i) it took active measures to prevent access to the material in that state; and (ii) a

giving rise to the damage...can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.").

[10] For the definition of "critical conduct," see Art. 1.8, *supra*. For the law applicable in identifying that conduct, see Art. 4(a), *supra*.

[11] Similarly, in *Haaretz.com v. Goldhar*, 2018 SCC 28, §1 (Can. Sup. Ct., June 6, 2018), in which the plaintiff was domiciled in Ontario but was widely known in Israeli because he owned a popular Israeli soccer team, Israel would qualify as the state of the "most extensive injurious effects" (or, as the Canadian Supreme Court put it, the state of the "most substantial harm") because the defendant's posting, which was critical of the plaintiff's management of the team, was read by many more Israeli readers than Ontario readers.

reasonable person could not have foreseen that its conduct would cause any injury in that state."[12]

(e) The Plaintiff's Home State. The fourth jurisdictional basis authorized by Article 5 is the plaintiff's "home state," if the posted material was accessible in that state or the plaintiff suffered or may suffer an injury there. For the definition of the "home state," see Art. 1.11, *supra*. In most cases, the plaintiff's home state will also be the state of the plaintiff's "centre of interests" as the CJEU defined this term. In *eDate Advertising v. x*, Case C-509/09, in which the plaintiff was a natural person, its center of interest was in Austria, which was the plaintiff's habitual residence. In *Bolagsupplysningen v. Svensk Handel*, Case C-194/16, in which the plaintiff was an Estonian legal person that conducted most of its activities in Sweden and suffered most of its injuries there, the plaintiff's center of interest was in Sweden. The same results would follow under this Resolution. Austria would be the plaintiff's home state under Article 11(a), and Sweden would be the plaintiff's professional home state under Article 11(c).[13] In *Haaretz.com v. Goldhar*, 2018 SCC 28, §1 (Can. Sup. Ct., June 6, 2018), the Canadian Supreme Court held that Ontario, which was the plaintiff's domicile and the place where the material was accessible, had jurisdiction to entertain a defamation action against an Israeli newspaper, but ultimately dismissed the action on *forum non conveniens* grounds. Three members of the court dissented from the dismissal, reasoning as follows: "When a Canadian citizen is allegedly defamed for his Canadian business practices — in an article published online in his home province by a foreign newspaper — ... he [is] entitled to vindicate his reputation in the courts of the province where he lives and maintains his business, and where the sting of the article's comments is felt." *Id.* at §151.

Paragraph 2 of Article 5 does not allow a *forum non conveniens* dismissal. However, subparagraph (d) of Article 5(1) provides defendants with a three-prong escape clause which is not available under EU law and through which they may avoid jurisdiction in the plaintiff's home state. The first two prongs of the escape apply to cases involving injury caused by material posted on the Internet. In those cases, the defendant may avoid jurisdiction by demonstrating to the court's satisfaction that the

[12] In a case such as *Bolagsupplysningen,* the defendant was a Swedish entity who acted in Sweden and thus could not invoke this defense. However, in other cases, this defense would be available and could affect the outcome.

[13] In addition, Sweden would qualify as the state of the "most extensive injurious effects" under Art. 5.1(c).

defendant took "active measures to prevent access to the material in that state," and that the defendant "did not derive any pecuniary or other significant benefit from the accessibility of the material in that state." This requirement will help small actors, such as certain individual bloggers, but it will not be available to most commercial actors such as Google and others who derive advertising revenue from the accessibility of the material in a particular state. In turn, the fact that this defense will not be available to commercial actors means that they cannot avoid jurisdiction even if they demonstrate that they took active measures to prevent accessibility in the particular state.

The third prong of the escape applies to cases of injuries caused by actions or omissions other than the posting of material, such as the unauthorized collection, disclosure, or misuse of personal data or other confidential information. In those cases, the defendant may avoid jurisdiction in the plaintiff's home state by demonstrating to the court's satisfaction that a reasonable person "could not have foreseen that its conduct would cause any injury in that state."

(f) Available Relief. Under the holistic principle adopted by this Resolution, a court whose jurisdiction is based on Article 5.1(a) or (b) may award to a successful plaintiff compensation or damages for all the plaintiff's injuries, including those sustained outside the forum state. The court has the same power in cases in which its jurisdiction is based on Article 5.1(c) or (d) and in which the defendant did not invoke, or did not satisfy the requirements for, the escapes provided therein. In all the above cases, the court also has the power to grant other provisional or permanent relief, which may include ordering the defendant to take preventive or corrective measures consisting of doing or refraining from doing certain acts. The court may limit its order to the territory of the forum state, or it may extend it beyond that territory. Because the court has *in personam* jurisdiction over the defendant, such an order is binding on the defendant (even if it mandates action outside the forum state) and is enforceable in that state through contempt proceedings or similar means. Under Article 9, *infra*, the order or judgment is in principle eligible for recognition and enforcement in other states, subject to the exceptions and defenses authorized by that article.

(g) Forum Non Conveniens. The purpose of paragraph 2 of Article 5 is to preserve the delicate equilibrium that this Resolution establishes between the rights of plaintiffs and defendants. This equilibrium would be jeopardized if a state that has jurisdiction under paragraph 1 (for example the defendant's home state) refuses to entertain the plaintiff's action solely on the ground that it should be brought in another state (for

example, in the plaintiff's home state, or the state of injury). Paragraph 2 applies only when this is "the sole" ground for refusing to entertain the plaintiff's action (i.e., *forum non conveniens*) and not when such a refusal is also based on other grounds, such as prematurity, non-justiciability, prescription or statute of limitation.

Article 6. Choice-of-Court Agreements

1. Subject to Article 3 and notwithstanding Article 5, an agreement that the courts of a particular state shall have exclusive jurisdiction to adjudicate a dispute falling within the scope of this Resolution is enforceable if the agreement was entered into after the events giving rise to the dispute and is otherwise valid under the law applicable under the private international law rules of the forum state.

2. If the parties entered into such an agreement before the events giving rise to the dispute, the agreement is enforceable:

(a) if it was freely negotiated, expressed in writing, and clearly covers non-contractual obligations;

(b) all parties engaged in commercial or professional activity and the agreement was part of that activity; and

(c) it is otherwise valid under the law applicable under the private international law rules of the forum state.

3. An agreement conferring non-exclusive jurisdiction is enforceable if it meets the requirements of paragraphs 1 or 2, whichever is applicable, but an action filed under such an agreement has no priority over an action filed under Article 5.

COMMENTS

(a) Four Types of Choice-of-Court Agreements. This article differentiates among four types of choice-of-court agreements, namely, agreements:

(1) entered into (a) before or (b) after the events giving rise to the dispute, and

(2) conferring (a) exclusive or (b) non-exclusive jurisdiction to the courts of the designated state.

Exclusive and non-exclusive agreements must meet the same validity requirements. The difference is that an action under an exclusive agreement precludes an action filed under Article 5, whereas an action filed under a non-exclusive agreement does not have such an effect, unless that action is filed first, and the defendant does not object. Finally, actions filed under any one of the four types of choice-of-court

agreements are "[s]ubject to Article 3," namely, they are subject to the prohibition of parallel or subsequent lawsuits established by Article 3.

(b) Post-Dispute Agreements. Choice-of-court agreements entered into after the events giving rise to the dispute are unproblematic because, at that time, the parties are in an equal position to know their potential rights and liabilities and to proceed accordingly. For this reason, Article 6 does not impose any requirements on these agreements, whether they confer exclusive or non-exclusive jurisdiction, other than the general requirement that they must be valid under the applicable law, which is determined through the private international law rules of the forum state. See Art. 6.1. The "forum state" is the state in which the action is filed (sometimes referred to as the state of the "seized" court or forum) even if it is a state other than the one designated in the agreement. In all cases, however, the validity of the agreement is determined under the law applicable under that state's rules of private international law.[14] Depending on the circumstances, those rules may point to the internal law of the forum state (including any overriding mandatory rules or *lois de police*), [15] or to the internal law of another state.

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[14] For actions filed in the state designated in the choice-of-court agreement, Article 6 follows the same solution as the Hague Convention on Choice of Court Agreements of 2005. See Hague Convention, Art. 5(1), and Hartley & Dogauchi, *Explanatory Report* § 125. However, for actions filed in another court, Article 6 of this Resolution rejects the dichotomy adopted by the Convention, which calls for the application of: (1) the "whole law" of the seized court for matters of capacity and public policy; and (2) the law applicable under the private international law rules of the state designated *in the choice-of-court agreement* for other issues of nullity and enforceability. See Hague Convention, Art. 6, and Hartley & Dogauchi, *Explanatory Report* §§183-184. Because this dichotomy will lead to uncertainty and inefficiency, this Resolution rejects it and adopts instead a unitary and simple solution of referring all issues of validity to the law applicable under the private international law rules of the forum state (the seized forum), regardless of whether that state is the one designated in the agreement or another state.

[15] In some countries, the forum's overriding mandatory rules are classified as separate from its private international law (PIL) rules in the sense that the former override or displace the latter and thus apply despite rather than because of the latter. Indeed, the overriding mandatory rules of the forum state apply "directly" and "immediately" to a case falling within their scope, even if the forum's PIL rules point to the law of a foreign state. The fact remains, however, that what vests these mandatory rules with this overriding power is the forum's private international *law* or *system,* and that system consists of rules, even if they are not codified. Moreover, more than half (46 out of 84) of PIL codifications enacted in the last 50 years contain express provisions authorizing the application of the forum's overriding mandatory rules. See Symeonides, *Codifying Choice of Law Around the World,* 302-06 (Oxford 2014). For this reason, it is permissible to say that the forum's PIL rules may lead to the application of the forum's overriding mandatory rules.

(c) Pre-Dispute Agreements. On the other hand, agreements entered into before the events giving rise to the dispute are inherently problematic because the parties may be in an unequal position and unable to truly negotiate a balanced agreement. For this reason, paragraph 2 of Article 6 subjects pre-dispute agreements (whether they purport to confer exclusive or non-exclusive jurisdiction) to three requirements, the first two of which are autonomous while the third one depends on the applicable law.

The first requirement is that the agreement must be freely negotiated, expressed in writing, and must clearly cover non-contractual obligations. The second requirement is that all parties to the agreement must be engaged in commercial activity and the agreement must be part of that activity. Thus, this provision excludes agreements involving consumers or employees. The third requirement is that the agreement must be otherwise valid under the law applicable under the private international law rules of the forum state. As in Article 6.1, the "forum state" in Article 6.2(c) is the state in which the action is filed, and it may or may not be the state designated in the agreement. Depending on the circumstances, the forum's private international law rules may point to the internal law of the forum state (including any overriding mandatory rules or *lois de police*),[16] or to the internal law of another state.

III. Applicable Law

Article 7. Applicable Law

In the absence of a choice-of-law agreement valid under Article 8, the applicable law shall be determined as follows:

1. **If the court's jurisdiction is based on paragraphs 1(a) or 1(b) of Article 5, the applicable law shall be the internal law of the forum state.**
2. **If the court's jurisdiction is based on paragraph 1(c) of Article 5, the applicable law shall be the internal law of the forum state. However, if the aggrieved person proves that the critical conduct of the person claimed to be liable occurred in another state, the internal law of the latter state shall govern all substantive issues, provided that the aggrieved person formally requests the application of that law and establishes its content.**
3. **If the court's jurisdiction is based on paragraph 1(d) of Article 5, the applicable law shall be the internal law of the forum state. However, if the person claimed to be liable proves that the most**

[16] See previous footnote.

extensive injurious effects occurred in another state, the internal law of the latter state shall govern all substantive issues, provided that that person formally requests the application of that law and establishes its content.

4. **If the court's jurisdiction is based on a valid choice-of-court agreement and that court is located in a state referred to in Article 5, the applicable law is determined as provided in paragraphs 1-3 of Article 7, whichever is applicable. If the court is located in a state other than the states referred to in Article 5, the applicable law shall be the law of the state which, considering all circumstances and factors, has the closest and most significant connection.**

COMMENTS

(a) The four paragraphs. All four paragraphs of Article 7 apply in the absence of a choice-of-law agreement that is valid under Article 8. The first three paragraphs designate the applicable law when the court's jurisdiction is based directly on one of the jurisdictional bases authorized by Article 5, rather than on a choice-of-court agreement. Paragraph 4 designates the applicable law when the court's jurisdiction is based on a valid choice-of-court agreement.

(b) Suit in the Defendant's Home State or in the State of Conduct. If, as allowed by Article 5.1(a) and (b), the plaintiff sues in the defendant's home state or in the state in which the defendant engaged in the critical conduct that caused the plaintiff's injuries, the applicable law shall be the internal law of the forum state. The application of that law in these two situations offers significant advantages in terms of simplicity and administrability *without* being unfair to the defendant. Indeed, defendants have no legitimate reason to object to the application of the law of their own home state or the state in which they engaged in the critical conduct. This solution may favor plaintiffs in the sense that they will choose to sue in these two states only if their procedural or substantive laws are favorable, but this is hardly an unfair advantage.

(c) Suit in the State of the "Most Extensive Injurious Effects." If, as allowed by Article 5.1(c), the plaintiff sues in the state in which the "most extensive injurious effects" occurred, the applicable law shall be the internal law of that state. This solution offers the same advantages in terms of simplicity and administrability referred to above. It may be unfair to the defendant in some cases, such as when the defendant's conduct is considered tortious in the forum state but not in the state of the critical conduct. However, this provision is consistent with the traditional *lex loci damni* rule. Moreover, the jurisdictional escape available to the defendant under Art. 5.1(c), *supra*, mitigates that unfairness.

Paragraph 2 of Article 7 gives the plaintiff the option of requesting the application of the internal law of a state other than the forum if the plaintiff proves that the defendant's critical conduct occurred in that other state and the plaintiff establishes the content of that state's law. Of course, the plaintiff will exercise this option only when that law favors the plaintiff. Thus, this provision may appear unfair to the defendant, not because the defendant can legitimately complain against the application of the law of the state in which the defendant acted, but because the plaintiff will get both the procedural and other advantages of litigating in one state and the more favorable law of another state.

Nevertheless, this provision can be defended both in terms of the *favor laesi* principle and in terms of the interests of the state of critical conduct in policing conduct occurring within its territory. For the record, the notion of giving the plaintiff a choice between the laws of the states of conduct and injury (or directing the court to choose the law that favors the plaintiff) is not novel. It appears in more than fifty modern private international law codifications, either for all or for some cross-border torts. See Appendices I and II, *infra*; S. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* 59-65 (Oxford 2014). The advantage of giving the choice to the plaintiff rather than the court is that it avoids litigation and appeals on which law is more favorable.

(f) Suit in the Plaintiff's Home State. If, as allowed by Article 5.1(d), the plaintiff sues in the plaintiff's home state, the applicable law shall be the internal law of that state. This solution offers the same advantages in terms of simplicity and administrability referred to above, in addition to providing plaintiffs with the convenience of litigating at home. However, paragraph 3 of Article 7 gives the defendant the option of requesting the application of the internal law of a state other than the forum if the defendant proves that the "most extensive injurious effects" occurred in that other state and establishes the content of that state's law. Of course, the defendant will exercise this option only when that law favors the defendant. However, besides being consistent with the traditional *lex loci damni* rule, this solution is not unduly unfair to the plaintiff who will retain the advantage of litigating at home.[17]

[17] In *Haaretz.com v. Goldhar*, 2018 SCC 28, §1 (Can. Sup. Ct., June 6, 2018), the Canadian Supreme Court found that Ontario, which was the plaintiff's domicile and where the material was accessible, had jurisdiction to entertain a defamation action against an Israeli newspaper, but held that the action should have been dismissed on *forum non conveniens* grounds in favor of a trial in Israel, where the plaintiff's suffered most of his injuries. The Court acknowledged that the Israeli court would apply Israeli law. The Resolution would not allow *a forum non conveniens* dismissal (see Art. 5.2,

Of course, the above option will not be available if the defendant cannot demonstrate that the most extensive injurious effects occurred outside the forum state. In such a case, the law of the forum will remain applicable. However, if the plaintiff affirmatively demonstrates that the most extensive injurious effects did occur in the forum state, the plaintiff can request the application of the law of the state of critical conduct as provided in paragraph 2 of Article 7.

(e) No Dépeçage. When either the plaintiff or the defendant meets the requirements of paragraph 2 or 3, respectively, and exercises the option of requesting the application of non-forum law, the requested law "shall govern all substantive issues" between the parties. In other words, neither the plaintiff nor the defendant may engage in *dépeçage* by "picking and choosing" only some provisions of that law.

(f) Proving the Content of Non-Forum Law. One of the requirements for applying non-forum law under paragraphs 2 and 3 is that the requesting litigant must prove the content of the requested law. By placing this burden on the requesting litigant, this requirement unburdens the court from the laborious task of ascertaining foreign law, while also mitigating any imbalance this option might otherwise create. This requirement is self-evident for many common law systems in which the burden of proving the content of foreign law rests primarily with the litigants. However, it should also be welcome in civil law systems in which that burden rests with the court. Obviously, this requirement does not bind the court to accept the litigant's proof of foreign law nor does it preclude the court from undertaking its own research on foreign law.

Article 8. Choice-of-Law Agreements

1. If, after the events giving rise to a dispute, the parties agreed that the dispute will be governed by the law of a particular state, that law governs, notwithstanding Article 7.

2. If the parties entered into such an agreement before the events giving rise to the dispute, the agreement is enforceable only if:

(a) it was freely negotiated, expressed in writing, and clearly covers non-contractual obligations;

(b) all parties engaged in commercial or professional activity and the agreement was part of that activity; and

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supra), but paragraph 3 of Article 7 would allow the application of Israeli law if the defendant satisfies the requirements specified in that paragraph.

(c) the application of the chosen law is not manifestly incompatible with the public policy (*ordre public*) of the forum state or the state whose law would be applicable under Article 7.

COMMENTS

(a) Post-Dispute Agreements. Choice-of-law agreements entered into after the events giving rise to the dispute are not controversial because the parties are in a position to know of their rights and liabilities and to assess their chances of protecting their interests. If such an agreement exists, the court should apply the law designated in the agreement rather than the law applicable under Article 7. The validity of such an agreement is to be determined under the private international law rules of the forum state.

(b) Pre-Dispute Agreements. On the other hand, agreements entered into before the events giving rise to the dispute are inherently problematic because the parties may be in an unequal position and unable to truly negotiate a balanced agreement. For this reason, paragraph 2 of Article 8 subjects these agreements to three requirements, the first two of which are autonomous and parallel the requirements of Article 6.2(a)-(b), *supra,* regarding choice-of-court agreements: First, the agreement must be freely negotiated, expressed in writing, and must clearly cover non-contractual obligations; and, second, all parties to the agreement must be engaged in commercial activity and the agreement must be part of that activity. Thus, this provision excludes agreements involving consumers or employees.

The third requirement is that the application of the law chosen in the agreement must not be manifestly incompatible with the public policy (*ordre public*) of *either* the forum state *or* the state whose law would be applicable under Article 7 in the absence of a choice-of-law agreement (the *lex causae*). The "either-or" phrasing of this requirement recognizes the fact that: some states police party autonomy exclusively through the *ordre public* limits of the *lex fori*; other systems do so primarily through the public policy limits of the *lex causae* and secondarily of the *lex fori*; and other systems, such as the Rome I Regulation, follow a hybrid regime. See S. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* 59-65 (Oxford 2014); Hague Principles of Choice of Law for International Commercial Contracts, Art. 11 (2015).

IV. Recognition and Enforcement of Judgments

Article 9. Recognition and Enforcement of Judgments

A judgment rendered by a court that has jurisdiction under Articles 3, 5 or 6 and applying the law designated as applicable by Articles 7 or 8 shall be eligible for recognition and enforcement as

provided in Articles 4, 7-10, and 14-16 of The Hague Draft Convention on Recognition and Enforcement of Foreign Judgments of 28 May 2018.

COMMENTS

(a) The Hague Convention. Rather than constructing an autonomous regime of judgment recognition, Article 9 incorporates by reference the relevant articles of The Hague Draft Convention on Recognition and Enforcement of Foreign Judgments of 28 May 2018, which represents the latest expression of what may be an emerging international consensus on this subject. The only additional requirement under Article 9 is that, to be eligible for recognition, the judgment must have applied the law designated as applicable by Articles 7 or 8, supra.

(b) The Relevant Articles. The relevant provisions of the Convention are: Article 4 (General provisions); Article 7 (Refusal of recognition or enforcement); Article 9 (Severability); Article 10 (Damages); Article 14 (Procedure); Article 15 (Costs of proceedings); and Article 16 (Recognition or enforcement under national law). These articles are reproduced in Appendix III, *infra*.

(c) Grounds for Refusal of Recognition or Enforcement. Article 7 of the Convention allows six grounds for refusing to recognize or enforce a judgment. They are: insufficient or improper notice; fraud; public policy; breach of a choice-of-court agreement; and incompatibility with a judgment of the requested state or an earlier foreign judgment that is eligible for recognition.

(d) The Public Policy Exception. Article 7(c) of the Convention provides that recognition or enforcement may be refused if it would be "manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State." Thus, the public policy exception will be available for judgments falling within the scope of this Resolution. Consequently, countries such as the United States that place a higher premium on freedom of expression over privacy protection will refuse to recognize certain judgments, even if they do not have statutes (such as the SPEECH Act) that expressly prohibit recognition. Likewise, countries that strike a different balance between protecting privacy and protecting freedom of expression may invoke their public policy and refuse to recognize certain judgments that are incompatible with that policy.

(e) Damages. Article 10 of the Convention provides that recognition or enforcement of a judgment may be refused "if, and to the extent that, the

judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered." The article also provides that the court addressed "shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law, and Recognition of Foreign Judgments

DRAFT RESOLUTION (Without Comments)

The Institute of International Law,

Noting that the international proliferation of Internet access has brought not only significant benefits but also some considerable drawbacks, such as increasing the facility with which conduct in one state can cause injury in another;

Considering that various states assign different priorities to the policies of protecting freedom of expression, on the one hand, and protecting a person's privacy, reputation, honor, and other rights of personality, on the other, and thus differ on whether a particular conduct, such as a communication or other expression, is or is not wrongful;

Noting that these differences reflect strongly held societal beliefs, resulting in sharp conflicts regarding which state's courts should have jurisdiction to adjudicate the dispute, which state's law should govern the merits, and whether the resulting judgments should be recognizable in other states;

Regretting the failure of other efforts to address these difficult conflicts at an international or regional level, but *aspiring* to contribute to the emergence of an international consensus toward that end;

Believing that an essential component of such a consensus should be to seek, to the extent possible, a fair accommodation between the aforementioned policies of safeguarding freedom of expression and protecting a person's rights of personality;

Recognizing that other values, such as judicial economy, administrability, predictability, and evenhanded treatment of potential litigants are also important considerations;

Adopts this Resolution :

I. Preliminaries and General Principles

Article 1. Definitions

As used in this Resolution, the following terms have the meaning denoted below:

1. *"Injury"* denotes an actual or impending harm to a person's rights of personality.

2. *"Rights of personality"* include in particular a person's reputation, dignity, honor, name, image, and privacy, as well as similar rights that, regardless of how they are called, are protected by the applicable law.

3. *"Posted material"* denotes material uploaded and accessible on the Internet, on which the aggrieved person bases its claim for actual or impending injury to its rights of personality.

4. "*Person*" includes a natural person, a legal or juridical person, and an association of persons, whether corporate or unincorporated.

5. *"Aggrieved person"* denotes the person who claims that the posted material or other activity conducted through the Internet has caused or may cause injury to that person's rights of personality.

6. *"Person claimed to be liable"* denotes any person that the aggrieved person identifies as having engaged in the conduct that caused or may cause the injury, such as the author of the posted material and, where appropriate, the person responsible for uploading, hosting, or disseminating the material.

7. "*Conduct*" denotes, as may be appropriate, an act or a failure to act.

8. "*Critical conduct*" denotes, as may be appropriate, the authorship, uploading, hosting, or dissemination of the posted material, or any other act or omission, whichever is the principal cause of the injury.

9. "*Redress*" includes compensation or damages, preventive and corrective injunctive relief, and any other remedy available under the applicable law.

10. *"State"* denotes any country or territorial subdivision of a country if that subdivision has its own law regarding rights of personality.

11. *"Home state"* means:

(a) for natural persons, the state in which the person has its domicile or habitual residence;

(b) for persons other than natural persons, the state in which the person has its statutory seat or principal place of business, or under the law of which that person was incorporated or formed;

(c) in cases of injury to a person's professional or business interests or reputation, the state in which that person has its principal professional or business establishment.

12. "*Forum state*" means the state in which the particular proceeding is pending.

13. "*Internal law*" denotes a state's procedural and substantive law exclusive of its rules of private international law.

Article 2. Scope

1. This Resolution applies to civil claims arising from injuries caused through the use of the Internet to a person's rights of personality or other similar rights as these rights and injuries are defined by the law applicable under Articles 7 and 8.

2. This Resolution does not apply:

(a) to infringements of intellectual property rights;

(b) to injuries caused by the conduct of a person or entity in the exercise of governmental authority; or

(c) to cases in which the aggrieved person and the person claimed to be liable have the same home state and in which both the critical conduct and the most extensive injurious effects occurred in that state.

Article 3. The "Holistic Principle" (One action, one law for all injuries)

1. A person who claims to have suffered or may suffer injury to its rights of personality as a result of material posted on, or other activity conducted through, the Internet may file a single action in any one of the states referred to in Articles 5 or 6 against the person claimed to be liable for the injury and to seek redress for injuries that have occurred or may occur in all states.

2. Once the aggrieved person files an action in one of the states referred to in Articles 5 or 6, all other states shall refrain from entertaining another action arising from the same conduct and filed by that person, the person against whom the action was filed, or their successors in interest, unless:

(a) the proceedings in the first state: (i) are discontinued or dismissed without prejudice; or (ii) are excessively delayed and are unlikely to be concluded within a reasonable time; or

(b) the court of that state decided not to entertain the action under Article 5.1(c) or (d), or under Article 6.

Article 4. Localization and other factual determinations

The internal law of the forum state determines the answers to the following questions:

(a) Which conduct is the principal cause of the injury ("critical conduct") and where that conduct occurred.

(b) Which person's conduct caused the injury and, if the conduct of more than one person caused the injury, the percentages of each person's fault.

(c) Whether and where the injury occurred or may occur and, in case of injury in more than one state, which is the state in which the most extensive injurious effects occurred or may occur.

II. Jurisdiction

Article 5. Jurisdiction

1. Subject to Articles 3 and 6, the following states have jurisdiction to adjudicate an action seeking to redress or to prevent an injury to a person's rights of personality, which is caused or may be caused by material posted on, or by other activity conducted through, the Internet:

(a) The home state of the person claimed to be liable for the injury;

(b) The state in which the critical conduct of the person claimed to be liable occurred;

(c) The state in which the most extensive injurious effects occurred or may occur, unless the person claimed to be liable demonstrates that:

(i) it took active measures to prevent access to the material in that state; and

(ii) a reasonable person could not have foreseen that its conduct would cause any injury in that state; or

(d) The home state of the person who suffered or may suffer an injury, if the posted material was accessible in that state or that person suffered injury there, unless the person claimed to be liable demonstrates that:

(i) it took active measures to prevent access to the material in that state;

(ii) it did not derive any pecuniary or other significant benefit from the accessibility of the material in that state; and

(iii) in cases of injury caused by an act or omission other than by posted material, that a reasonable person could not have foreseen that its conduct would cause any injury in that state.

2. A state that has jurisdiction under paragraph 1 may not refuse to exercise it on the sole ground that the action should be brought in another state.

Article 6. Choice-of-Court Agreements

1. Subject to Article 3 and notwithstanding Article 5, an agreement that the courts of a particular state shall have exclusive jurisdiction to adjudicate a dispute falling within the scope of this Resolution is enforceable if the agreement was entered into after the events giving rise

to the dispute and is otherwise valid under the law applicable under the private international law rules of the forum state.

2. If the parties entered into such an agreement before the events giving rise to the dispute, the agreement is enforceable:

(a) if it was freely negotiated, expressed in writing, and clearly covers non-contractual obligations;

(b) all parties engaged in commercial or professional activity and the agreement was part of that activity; and

(c) it is otherwise valid under the law applicable under the private international law rules of the forum state.

3. An agreement conferring non-exclusive jurisdiction is enforceable if it meets the requirements of paragraphs 1 or 2, whichever is applicable, but an action filed under such an agreement has no priority over an action filed under Article 5.

III. Applicable Law

Article 7. Applicable Law

In the absence of a choice-of-law agreement valid under Article 8, the applicable law shall be determined as follows:

1. If the court's jurisdiction is based on paragraphs 1(a) or 1(b) of Article 5, the applicable law shall be the internal law of the forum state.

2. If the court's jurisdiction is based on paragraph 1(c) of Article 5, the applicable law shall be the internal law of the forum state. However, if the aggrieved person proves that the critical conduct of the person claimed to be liable occurred in another state, the internal law of the latter state shall govern all substantive issues, provided that the aggrieved person formally requests the application of that law and establishes its content.

3. If the court's jurisdiction is based on paragraph 1(d) of Article 5, the applicable law shall be the internal law of the forum state. However, if the person claimed to be liable proves that the most extensive injurious effects occurred in another state, the internal law of the latter state shall govern all substantive issues, provided that that person formally requests the application of that law and establishes its content.

4. If the court's jurisdiction is based on a valid choice-of-court agreement and that court is located in a state referred to in Article 5, the applicable law is determined as provided in paragraphs 1-3 of Article 7, whichever is applicable. If the court is located in a state other than the states referred to in Article 5, the applicable law shall be the law of the state which, considering all circumstances and factors, has the closest and most significant connection.

Article 8. Choice-of-Law Agreements

1. If, after the events giving rise to a dispute, the parties agreed that the dispute will be governed by the law of a particular state, that law governs, notwithstanding Article 7.

2. If the parties entered into such an agreement before the events giving rise to the dispute, the agreement is enforceable only if:

(a) it was freely negotiated, expressed in writing, and clearly covers non-contractual obligations;

(b) all parties engaged in commercial or professional activity and the agreement was part of that activity; and

(c) the application of the chosen law is not manifestly incompatible with the public policy (*ordre public*) of the forum state or the state whose law would be applicable under Article 7.

IV. Recognition and Enforcement of Judgments

Article 9. Recognition and Enforcement of Judgments

A judgment rendered by a court that has jurisdiction under Articles 3, 5 or 6 and applying the law designated as applicable by Articles 7 or 8 shall be eligible for recognition and enforcement as provided in Articles 4, 7-10, and 14-16 of The Hague Draft Convention on Recognition and Enforcement of Foreign Judgments of 28 May 2018.

Les atteintes à la vie privée et aux droits de la personnalité : problèmes de compétence, de conflits de lois, de reconnaissance et des effets des jugements étrangères

PROJET DE RESOLUTION (traduction)

L'Institut de Droit international,

Tenant compte du fait que la prolifération au niveau international de l'accès à l'internet a généré des avantages significatifs mais également des inconvénients considérables, tels que le fait d'accroître la facilité avec laquelle un comportement s'étant produit dans un État peut causer un préjudice dans un autre ;

Considérant que les États accordent des priorités différentes aux politiques de protection de la liberté d'expression d'une part et, d'autre part, à celles protégeant la vie privée, la réputation et l'honneur d'une personne et les autres droits de la personnalité, il en résulte pour les États des divergences d'opinions quant à la licéité d'un comportement spécifique, tel qu'un message ou tout autre type d'expression ;

Tenant compte du fait que ces divergences sont le reflet de croyances sociales fortement ancrées, et génèrent des conflits importants quant au fait de savoir quelles juridictions nationales doivent être compétentes, quel droit national doit s'appliquer à la solution du litige et si les décisions rendues doivent être reconnues dans d'autres États ;

Déplorant l'échec des autres efforts mis en œuvre pour remédier, au niveau international ou régional, à ces conflits délicats, mais *aspirant* à contribuer à l'émergence d'un consensus international à cet effet ;

Estimant qu'un élément essentiel d'un tel consensus réside dans le fait de trouver, dans la mesure du possible, un juste compromis entre les politiques susmentionnées de sauvegarde de la liberté d'expression et celle relatives à la protection des droits de la personnalité d'une personne ;

Reconnaissant que d'autres valeurs, telles que les enjeux économiques sur le plan judiciaire, la bonne administration de la justice, la prévisibilité et le traitement équitable des justiciables potentiels, sont des considérations également importantes ;

Adopte la présente Résolution:

I. PRÉLIMINAIRES ET PRINCIPES GÉNÉRAUX

Article 1. Définitions

Dans le cadre de la présente résolution, les termes suivants sont définis comme suit :

1. « *Dommage* » : le terme désigne le préjudice effectif ou imminent portant atteinte aux droits de la personnalité d'une personne.

2. « *Droits de la personne* » : l'expression comporte notamment la réputation, la dignité, l'honneur, le nom, l'image et la vie privée d'une personne, ainsi que tout autre droit similaire qui, quel que soit son appellation, est protégé par le droit applicable pertinent.

3. « *Contenu mis en ligne* » : le terme désigne le contenu téléversé et accessible sur internet, et sur le fondement duquel la personne lésée fait reposer sa demande relative au dommage effectif ou imminent causé à ses droits de la personnalité.

4. « *Personne* » : le terme désigne une personne physique, une personne juridique ou morale, et une association de personnes, que cette dernière possède ou non la personnalité morale.

5. « *Personne lésée* » : le terme désigne la personne qui fait valoir le fait que le contenu mis en ligne ou toute autre activité menée sur internet a causé ou pourrait causer un dommage à ses droits de la personnalité.

6. « *Personne dont la responsabilité est invoquée* » : l'expression désigne toute personne que la personne lésée identifie comme ayant adopté la conduite ou ayant pris part à la conduite qui lui a causé ou qui pourrait lui causer un dommage, comme l'auteur du contenu mis en ligne ou, le cas échéant, la personne responsable du téléversement, de l'hébergement ou de la diffusion du contenu.

7. « *Comportement* » ou « *conduite* »: les termes désignent, selon les cas, toute action ou inaction.

8. « *Comportement déterminant* » : l'expression désigne, selon les cas, la qualité d'auteur, le téléversement, l'hébergement et la diffusion du contenu mis en ligne, ou toute autre action ou omission, quel que soit, parmi ces comportements, celui qui constitue la cause principale du dommage.

9. « *Réparation* » : le terme désigne toute compensation ou indemnisation, ou mesures provisoires et/ou conservatoires correctrices ou préventives, ou tout autre recours prévu par le droit applicable.

10. « *État* » : le terme désigne tout pays ou subdivision territoriale d'un pays possédant son propre droit en matière de droits de la personnalité.

11. « *État de résidence* » : l'expression désigne :

(a) pour les personnes physiques, l'État dans lequel la personne a établi son domicile ou sa résidence habituelle ;

(b) pour toutes les personnes autres que les personnes physiques, l'État dans lequel la personne a établi son siège social ou le siège

principal de son activité, ou l'État dont le droit est celui en vertu duquel la personne a été enregistrée ou constituée.

(c) en cas de dommage causé aux intérêts professionnels ou commerciaux de la personne, ou à sa réputation, l'État dans lequel la personne a son établissement professionnel ou commercial principal.

12. « *État du for* » : l'expression désigne l'État devant les juridictions duquel la procédure est pendante.

13. « *Droit interne* » : l'expression désigne le droit procédural et matériel d'un État, à l'exclusion de ses règles de droit international privé.

Article 2. Champ d'application

1. Cette Résolution s'applique à toutes les procédures en matière civile découlant de dommages causés, par l'utilisation d'internet, aux droits de la personnalité ou tout autre droit similaire d'une personne, sur la base des définitions desdits droits et dommages telles qu'elles sont prévues par le droit applicable en vertu des articles 7 et 8 de la présente résolution.

2. Cette Résolution ne s'applique pas :

(a) aux atteintes aux droits de la propriété intellectuelle ;

(b) aux dommages causés par le comportement d'une personne ou entité agissant dans l'exercice de prérogatives de puissance publique ;

(c) à tous les cas où la personne lésée et la personne dont la responsabilité est invoquée ont le même État de résidence et où le comportement déterminant et les effets préjudiciables les plus étendus sont survenus sur le territoire dudit État.

Article 3. Le « Principe holistique » (Une même action, un même droit pour tous les dommages)

1. Une personne qui déclare avoir subi ou qui risque de subir une atteinte à ses droits de la personnalité du fait d'un contenu mis en ligne ou de toute autre activité menée sur internet, peut, dans un des États prévus aux articles 5 et 6, intenter une action unique contre la personne dont la responsabilité est invoquée en vue d'obtenir réparation pour les dommages survenant ou risquant de survenir dans un de ces États.

2. Une fois que la personne lésée a intenté une action dans un des États prévus aux articles 5 et 6, tous les autres États devront s'abstenir de statuer sur toute autre action découlant du même comportement et intentée par ladite personne lésée, ou la personne contre laquelle l'action a été intentée, ou encore leurs ayants-droit en cas de décès, à moins que :

(a) les procédures dans le premier État : (i) sont abandonnées ou rejetées sans qu'il soit statué au fond ; ou (ii) sont retardées de manière excessive ou ne pourront vraisemblablement pas être conclues dans un délai raisonnable ; ou

(b) les tribunaux de cet État décident de ne pas statuer sur l'action au titre de l'article 5.1(c) ou (d), ou au titre de l'article 6.

Article 4. Localisation et autres éléments de fait

Le droit interne de l'État du for en matière d'internet fixe les réponses aux questions suivantes :

(a) La détermination du comportement qui constitue la cause principale du dommage (« comportement déterminant ») et le lieu de survenance dudit comportement.

(b) L'identification de l'auteur du comportement ayant causé le dommage et, dans le cas où il y aurait plusieurs auteurs, la détermination de la part de leur faute (en pourcentage).

(c) Dans la mesure où le dommage s'est produit ou pourrait se produire sur le territoire de plus d'un État, la détermination de l'État où les effets préjudiciables les plus étendus sont survenus ou risqueraient de survenir.

II. COMPÉTENCE

Article 5. Compétence

1. Sous réserve des articles 3 et 6, les États suivants sont compétents pour statuer sur une action en réparation ou en prévention d'une atteinte aux droits de la personnalité, causée ou qui pourrait être causée par un contenu mis en ligne, ou par toute autre activité menée sur internet :

(a) L'État de résidence de la personne dont la responsabilité est invoquée ;

(b) L'État sur le territoire duquel le comportement déterminant de la personne dont la responsabilité est invoquée est survenu ;

(c) L'État sur le territoire duquel les effets préjudiciables les plus étendus se sont produits ou risqueraient de se produire, à moins que la personne dont la responsabilité est invoquée démontre que :

(i) elle a pris des mesures actives pour empêcher l'accès au contenu dans cet État ; et qu'

(ii) une personne raisonnable ne pouvait prévoir que ce comportement puisse causer un dommage dans cet État ; ou

(d) L'État de résidence de la personne qui a subi ou qui risquerait de subir un dommage, si le contenu mis en ligne était accessible dans cet État

ou si la personne a subi un dommage dans cet État, à moins que la personne dont la responsabilité est invoquée ne démontre que :

(i) elle a pris des mesures actives pour empêcher l'accès au contenu dans cet État ; qu'

(ii) elle n'a tiré aucun avantage pécuniaire ou significatif de l'accessibilité du contenu dans cet État ; et que

(iii) dans le cas d'un dommage causé par une action ou une omission autre que par le contenu mis en ligne, une personne raisonnable ne pouvait prévoir que ce comportement puisse causer un dommage dans cet État.

2. Un État compétent au sens du premier paragraphe ne saurait refuser d'exercer sa compétence au seul motif que l'action devrait être intentée dans un autre État.

Article 6. Accords d'élection de for

1. Sous réserve de l'article 3 et nonobstant l'article 5, un accord stipulant que les tribunaux d'un État en particulier ont compétence exclusive pour statuer sur un différend couvert par la présente résolution n'est applicable que si ledit accord a été conclu après la survenance des évènements ayant donné lieu au différend et si il est par ailleurs valable au regard du droit applicable en vertu des règles de droit international privé de l'État du for.

2. Si les parties ont conclu ledit accord avant la survenance des évènements ayant donné lieu au différend, l'accord est applicable :

(a) si il a été librement négocié, formulé par écrit, et couvre explicitement des obligations non-contractuelles ; et si

(b) toutes les parties exercent une activité commerciale ou professionnelle et que l'accord se rattache à cette activité ; et si

(c) il est par ailleurs valable au regard du droit applicable en vertu des règles de droit international privé de l'État du for.

3. Un accord attributif de compétence non-exclusive est applicable s'il remplit une des conditions prévues, selon le cas, aux paragraphes premier ou deuxième, ceci nonobstant le fait qu'une action intentée sur la base d'un tel accord n'a pas priorité sur une action intentée en vertu de l'article 5.

III. DROIT APPLICABLE

Article 7. Droit applicable

En l'absence de tout accord d'élection du for valable en vertu de l'article 8, le droit applicable devra être déterminé de la manière suivante :

1. Si la compétence du tribunal relève des paragraphes 1(a) ou 1(b) de l'article 5, le droit applicable sera le droit interne de l'État du for.

2. Si la compétence du tribunal relève du paragraphe 1(c) de l'article 5, le droit applicable sera le droit interne de l'État du for. Cependant, si la personne lésée apporte la preuve que le comportement déterminant de la personne dont la responsabilité est invoquée s'est produit dans un autre État, le droit interne de ce dernier devra régir toutes les questions au fond, à condition que la personne lésée en fasse la demande formelle et établisse le contenu du droit en question.

3. Si la compétence du tribunal relève du paragraphe 1(d) de l'article 5, le droit applicable sera le droit interne de l'État du for. Cependant, si la personne dont la responsabilité est invoquée apporte la preuve que les effets préjudiciables les plus étendus se sont produits dans un autre État, le droit interne de ce dernier devra régir toutes les questions de fond, à condition que la personne lésée en fasse la demande formelle et établisse le contenu du droit en question.

4. Si la compétence du tribunal repose sur un accord d'élection du for valable et que cette cour se trouve sur le territoire d'un État dont il est fait mention à l'article 5, on déterminera le droit applicable en vertu, selon le cas, du paragraphe 1, 2 ou 3 de l'article 7. Si le tribunal choisi ne relève pas des chefs de compétence prévus à l'article 5, le droit applicable sera celui de l'État avec lequel, en tenant compte de l'ensemble des circonstances de l'espèce et des facteurs de rattachement, le litige entretient les liens les plus proches et les plus étroits.

Article 8. Clauses de choix de la loi.

1. Si, après la survenance des évènements ayant donné lieu au différend, les parties conviennent que le différend sera régi par le droit d'un État en particulier, ce droit sera alors applicable, nonobstant l'article 7.

2. Si les parties ont conclu un tel accord avant la survenance des évènements ayant donné lieu au différent, cet accord n'est applicable que si :

(a) il a été librement négocié, formulé par écrit, et couvre explicitement des obligations non-contractuelles ; et si

(b) toutes les parties exercent une activité commerciale ou professionnelle et que l'accord se rattache à cette activité ; et si

(c) l'application du droit choisi n'est pas manifestement incompatible avec l'ordre public de l'État du for ou avec celui de l'État dont le droit serait applicable en vertu de l'article 7.

IV. RECONNAISSANCE ET EXÉCUTION DES JUGEMENTS

Article 9. Reconnaissance et exécution des jugements

Un jugement rendu par un tribunal compétent en vertu des articles 3, 5 ou 6 et sur la base du droit applicable déterminé en vertu des article 7 ou 8 devrait faire l'objet d'une reconnaissance et d'une

exécution telles que prévu aux articles 4, 7 à 10 et 14 à 16 du projet de Convention de La Haye du 28 mai 2018 sur la reconnaissance et l'exécution des jugements étrangers.

APPENDIX I

Statutory Choice-of-Law Rules on Infringement of Personality Rights and Similar Torts

ALBANIA

Article 67 Infringement of moral rights

1. Injuries arising from infringement of personality rights are governed, at the choice of the injured person, by:

a) the law of the State where he has his habitual residence;

b) the law of the State in whose territory the injury occurred; or

c) the law of the State in which the person responsible for the injury had his habitual residence.

2. The law of the states referred to in subparagraphs "a" and "b" of paragraph 1 of this Article shall apply if the person responsible should have reasonably foreseen that the injury would occur in the territory of that State.

BULGARIA

Article 108. Violation of Rights Relating to the Personality

(1) The obligations arising out of a violation of rights relating to the personality by the mass communication media, and in particular print publications, radio, television or other means of dissemination of information, shall be governed, at the election of the person sustaining damage, by:

1. the law of the State in which the said person is habitually resident, or

2. the law of the State within whose territory the damage occurred, or

3. the law of the State of the habitual residence or the place of business of the person claimed to be liable.

(2) In the cases referred to in Items 1 and 2 of Paragraph (1), the person claimed to be liable must have reasonably foreseen that the damage would occur within the territory of the relevant State.

(3) The right of reply upon violation of rights relating to the personality by the mass communication media shall be governed by the law of the State in which the place of publication or transmission of the broadcast is situated.

(4) The provision of Paragraph (1) shall furthermore apply to obligations arising from violation of rights related to protection of personal data.

CHINA

Article 46 [Infringement of Personality Rights]

[Liability for] infringement, either via the Internet or by other means, of personality rights such as the right to respect of a person's name, image, reputation and privacy, is governed by the law of the aggrieved party's habitual residence.

CHINESE TAIPEI

Article 28. 1. The obligations resulting from a tortious act which was committed through the press, radio, television, internet or any other medium of communication shall be governed by one of the following laws which is the most closely connected with the act:

a. the law of the place where the act was committed; should it be impossible to prove such place, the law of the place where the tortfeasor has domicile;

b. the law of the place where the damage was suffered, provided that the tortfeasor could have foreseen the damage to be suffered there; or

c. the national law of the injured party whose right of personality was infringed.

2. If the tortfeasor provided in the preceding paragraph runs a business in the press, radio, television, Internet or any other medium of communication, the obligations shall be governed by the law of the place of his/her business.

CZECH REPUBLIC

§ 101 Non-contractual obligations arising out of violations of conditions of privacy and rights relating to personality, including defamation are governed by the law of the State in which the violation occurred. The affected [injured] person may, however, choose the law of the State in which

a) the affected [injured] person has its habitual residence or registered office,

b) the originator of the violation has his habitual residence or registered office, or

c) the result of the violation manifested itself, provided that the originator of the violation could have foreseen [its occurrence there].

JAPAN

Article 19 Notwithstanding Article 17, the formation and effect of claims arising from defamation against an individual or an entity shall be

governed by the law of the place of such defamed person's habitual residence (the law of the place of its principal establishment, if the defamed person is a juristic person or other association or foundation).

Article 17 The formation and effect of claims arising from a tort shall be governed by the law of the place where the results of the infringing act are produced. However, if it was not foreseeable under normal circumstances that the results would be produced at that place, the law of the place where the infringing act occurred shall apply.

LITHUANIA

Article 1.45. Law applicable to claims resulting from infringement of personal non-property rights

1. Claims for reparation of damage resulting from infringement of personal non-property rights committed by the mass media shall be governed, depending on the choice of the aggrieved person, by the law of the state where the aggrieved person is domiciled, or has his place of business, or where the infringement occurred, or by the law of the state where the person who caused the damage is domiciled or has his place of business.

2. Response to the media (denial) shall be governed by the law of the state in which the publication appeared, or the radio or television program was broadcast.

MOLDOVA

Article 1616. Liability for injury caused through mass media.

The claims regarding compensation for personal damage caused through mass media shall be governed, at the choice of the injured person, by the:

(a) national law of the injured person;

(b) Law of the State on the territory of which the injured person has his domicile or residence;

(c) Law of the State on the territory of which the damaging consequences ensued;

(d) Law of the State where the author of the damage has his domicile or residence.

MONTENEGRO

Article 55. The law applicable to obligations arising out of injury to rights of personality by way of the media, the press in particular, radio, television and other media, shall, at the choice of the injured party, be the law of the state:

1) in which he has his habitual residence;

2) in the territory of which the damage occurred; or

3) in which the person responsible has his habitual residence or domicile.

In the cases from subparagraphs 1 and 2 of paragraph 1 of this Article, the person claimed to be responsible needs to have been able to reasonably expect that the damage will occur in the state of habitual residence or in the territory of which the damage occurred.

The law applicable to the right to publish a correction in case of breach of rights of personality through the media shall be the law of the state in which the breach occurred.

Paragraph 1 of this Article shall also apply to obligations arising out of injury to rights of personality relating to the protection of personal data.

ROMANIA

Art. 2.642. Liability for infringements on personality

(1) Remedy claims alleging breach of privacy or personality, including by means of mass media or any other public source of information, are governed at the option of the alleged victim by:

(a) the law of the state of the alleged victim's habitual residence;

(b) the law of the state where damage occurred; or

(c) the law of the state where the perpetrator has habitual residence or registered office;

(2) The situations provided by paragraph (1) (a) and (b) require that the perpetrator must have reasonably foreseen that the effects of the infringement on personality would occur in one of the two states;

(3) The right of reply against an infringement of personality is subject to the law of the state where the publication was disseminated or where the show was broadcast.

SERBIA (Draft)

Article 170. Defamation through media

1. The law applicable to a non-contractual liability for the damage arising out of a defamation through mass media, particularly through press, internet, radio, tv, or other means of public information, shall be, by the choice of the person sustaining damage:

a) the law of the state where the person claimed to be liable has his habitual residence, or

b) the law of the state where the person sustaining damage has his habitual residence, provided the person claimed to be liable could reasonably foresee that the damage will occur in the territory of that county, or

c) the law of the state in which the damage occurred or is pending, provided the person claimed to be liable could reasonably foresee that the damage will or could occur in that state.

2. Regarding the right to reply, relating to a defamation made through mass media, the applicable law shall be the law of the state in which the publication was published or from which the programme has been broadcasted.

3. The law referred to in paragraph 1 of this Article shall also apply to a defamation within personal data processing, and for an infringement of the right of access to the information connected with personal data.

SWITZERLAND

Article 139. Injury to [rights of] personality

1. Claims based on an injury to rights of personality through the media, particularly through the press, radio, television or any other public medium of information are governed, at the choice of the injured party:

(a) By the law of the state in which the injured party has his habitual residence, if the tortfeasor should have foreseen that the injury would occur in that state;

(b) By the law of the state in which the author of the injury has his place of business or his habitual residence; or

(c) By the law of the state in which the result of the injurious act occurred, if the tortfeasor should have foreseen that the result would occur in that state.

2. The right to respond to the public media of a periodical character is governed exclusively by the law of the state in which the publication was issued or from which the broadcast was transmitted.

TURKEY

Article 35. Liability Arising from the Violation of Personality Rights

(1) The claims arising from the violation of personality rights via the media such as press, radio, television or via internet or other means of mass communication shall be governed by, pursuant to the choice of the damaged party:

a) the law of the habitual residence of the damaged party if the damaging party should have expected that the damage would occur in this country,

b) the law of the country where the place of business or the habitual residence of the damaging party is situated or

c) the law where the damage has occurred if the damaging party should have expected that the damage would occur in this country.

(2) The right of reply regarding the violation of personality rights shall be governed by the law of the country where the periodical is published or the program broadcasted.

(3) The first paragraph of this article shall also apply to claims arising from the violation of personality by the processing of personal data or the restriction of the right to obtain information regarding personal data.

APPENDIX II

Summary of Choice-of-Law Rules for Cross-Border Torts

A few countries (around a dozen) have enacted specific choice-of-law rules explicitly covering injuries to rights of personality or similar torts. These rules are reproduced in an Appendix, infra. However, most countries do not have such specific rules but instead resort to the general rules for tort conflicts. The text below describes the latter rules. It is excerpted and adjusted from S. Symeonides, *Codifying Choice of Law: An international Comparative Analysis* 53-67 (footnotes omitted) (Oxford 2015).

1. Lex loci delicti or damni

Despite revolutionary or evolutionary changes during the last fifty years, the majority of countries continue to follow the *lex loci delicti* rule, although many countries subject it to the exceptions, such as the "closer connection" exception or the common party affiliation exception (e.g., common domicile). Because many Internet torts arise from conduct in one state that causes injury in another, the question is where is the *locus delicti.* While some PIL codifications define it as the place of the injury as the place of injury (*lex loci damni*), many other codifications either refrain from defining it or opt for constructive ambiguity, which in turn provides flexibility. For example, at least a dozen codifications use phrases such as "the fact that gives rise" to the obligation, which arguably can be *either* the injurious conduct or the resulting injury. About a dozen codifications define the *locus delicti* as the place of conduct, and an equal number as the place of injury, although in many of those codifications the definitions leave room for contrary arguments.

2. Favor laesi

However, a plurality of recent PIL codifications avoids potentially interminable localization arguments by providing a direct *substantive* solution to this dilemma. Following the *favor laesi* principle, they directly authorize the application of the law of *either* the place of conduct or the place of injury, whichever favors the victim. They do so by either choosing the more favorable of the two laws or allowing the tort victim to

choose between them. Table 1, below, lists these codifications, and the following text provides the necessary explanations.

Table 1. The *Favor Laesi* Principle in Cross-Border Torts

For all cross-border torts (29)	Express (21)	**(a) Victim's choice:** Estonia, Germany, Italy, Lithuania, Northern Macedonia, Oregon, Tunisia, Uruguay, Venezuela (9).
		(b) Court's choice: Angola, Cape Verde, Croatia, East Timor, Georgia, Guinea-Bissau, Hungary, Macau, Mozambique, Peru, Portugal, Slovenia (12).
	Implied (6)	China, Japan, South Korea, Quebec, Russia, Switzerland (6).
	Discretionary (2)	Slovakia, Vietnam.
Express for some cross-border torts (23)	Albania, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Chinese Taipei, Czech Republic, Kazakhstan, Kyrgyzstan, Louisiana, Moldova, Poland, Puerto Rico, Romania, Rome II, Russia, Serbia, Switzerland, Tajikistan, Turkey, Ukraine, Uzbekistan.	

As the above table indicates, twenty-one recent codifications contain an express rule applicable to all cross-border torts and allowing the court or the victim to choose between the laws of the state of conduct and the state of injury. Specifically:

(a) Nine codifications directly authorize the victim to choose the applicable law. For example, the German codification provides that, although torts are generally governed by the law of the state of conduct, "[t]he injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied." The codifications of Estonia, Italy, Lithuania, Tunisia, Uruguay, and Venezuela give the tort victim the same choice. The Oregon codification gives the same choice but only if the activities of the tortfeasor were "such as to make foreseeable the occurrence of injury in that state." The codification of Northern Macedonia also subjects the victim's choice to a similar foreseeability proviso.

(b) Twelve codifications authorize the court to choose the law that is more favorable to the victim. For example, the Croatian codification provides that the law of the place of conduct or the law of place of injury governs torts, "depending on which is most favorable for the injured party." Again, there is no foreseeability proviso for the defendant. The same is true of the corresponding provisions of the codifications of Georgia, Hungary, and Slovenia. In contrast, the Peruvian codification provides that if the tortfeasor is not liable under the law of the state of conduct but is liable under the law of the state of injury, the law of the latter state governs, provided that the tortfeasor should have foreseen the occurrence of the injury in that

state as a result of his conduct. The Portuguese codification, as well as the codifications of Angola, Cape Verde, East Timor, Guinea-Bissau, Macau, and Mozambique which are based on it, contain a substantially identical provision.

In China and South Korea, the courts have interpreted the applicable statutory provisions as authorizing the application of the law most favorable to the victim.

The codifications of Japan, Quebec, Russia, and Switzerland contain a rule, also applicable to all cross-border torts, which provides that the law of the state of injury displaces the law of the state conduct, if the occurrence of the injury in the former state was objectively foreseeable. Obviously, the foreseeability proviso is meaningful only if the law of the state of injury is more favorable to the victim than the law of the state of conduct.

The Slovakian and Vietnamese codifications allow the court to choose between the laws of the state of conduct and the state of injury without specifying whether the choice must favor the victim. It would not be surprising if this factor proves determinative in most cases.

Twenty-three codifications, including the Rome II Regulation, contain an express *favor laesi* rule applicable only to the cross-border torts shown in parentheses:

Albania (environmental torts, infringement of rights of personality, and certain cases involving anti-competitive restrictions);
Austria (nuclear damage);
Azerbaijan (products liability);
Belarus (products liability);
Belgium (defamation and direct actions against insurers);
Bulgaria (defamation, environmental torts, and direct action against insurer);
Czech Republic (violation of privacy and defamation);
Kazakhstan (products liability);
Kyrgyzstan (products liability);
Louisiana (conduct-regulation issues other than punitive damages);
Moldova (injury to rights of personality and products liability);
Poland (injury to rights of personality);
Puerto Rico (conduct regulation issues);
Romania (defamation, unfair competition, and products liability);
Rome II (environmental torts, direct actions against insurers, and certain cases involving anti-competitive restrictions);
Russia (products liability);
Serbia (environmental torts and defamation);

Switzerland (injuries from emissions, injury to rights of personality, and products liability);
Chinese Taipei (products liability, unfair competition, and direct actions against tortfeasor's insurer);
Tajikistan (products liability);
Turkey (defamation, direct actions against insurer, and products liability);
Ukraine (products liability); and
Uzbekistan (products liability).

To summarize, of the 73 PIL codifications enacted in the last 50 years:

- 29 codifications follow the *favor laesi* principle for all cross-border torts; and
- 23 codifications, including Rome II, which is in force in 27 EU countries, follow the same principle in some categories of cross-border torts.
- In sum, 52 out of 73 codifications (or 71 percent) follow the *favor laesi* principle and apply whichever of the two laws favors the tort victim.

American courts have followed a similar path. As a recent comprehensive study documents, in 86% of the cases involving cross-border torts other than products liability, American courts applied the law of either the state of conduct or the state of injury, whichever favored the tort victim. The difference is that these decisions were not based on the *favor laesi* principle, at least not expressly, but rather on the policies of the involved states.

APPENDIX III

Hague Draft Convention on Recognition and Enforcement of Foreign Judgments of 28 May 2018

. . . . . CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4. *General provisions*

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. There shall be no review of the merits of the judgment in the requested State. [This does not preclude such examination as is necessary for the application of this Convention.]

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –

(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

…

Article 7. ***Refusal of recognition or enforcement***

1. Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin;

(e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State;

[(g) the judgment ruled on an infringement of an intellectual property right, applying to that [right / infringement] a law other than the internal law of the State of origin.]

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

…

Article 9. ***Severability***

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 10. ***Damages***

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

…

Article 14. ***Procedure***

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 15. ***Costs of proceedings***

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such

party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2. An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 16. ***Recognition or enforcement under national law***

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law

…

TRAVAUX

Excerpts from Correspondence between Reporters and Members of the Eighth Commission

I. Working Document No. 1, Aug. 1, 2015

… **I. SCOPE OF THE PROJECT** ***1. Material scope***… In defining the material scope of our topic, we have several options, including the following: (a) Limit it to "invasion of privacy," which we must define in a manner that takes account of the differences between various legal systems; (b) Limit it further to some invasions of privacy, such as defamation; (c) Broaden it to include all injuries to rights of personality; or (d) Broaden it even further by looking at the topic not from the perspective of the aggrieved person but rather from the perspective of the actors and the limits to their freedom of expression. Recognizing that various countries set different limits to this freedom (e.g., USA vs. Germany or France in holocaust or genocide denial cases), which country's limits should apply in cross-border communications between these countries? There are advantages and disadvantages to each of the above options. Generally speaking, the broader the topic the more difficult our project will be.

Question: *Which of the above (or any other) options should we adopt in delineating the material scope of our project?*

2. "Personal" scope ... **Questions:** *Should we differentiate between various categories of potential defendants as suggested above? Should we exclude any of them from the "personal" scope of our project?*

II. JURISDICTION ... Questions: (1**)** *Should the state of injury have jurisdiction, even when it does not have any other connections with the defendant? (2) If yes, should the exercise of jurisdiction be conditioned on satisfying other requirements, such as foreseeability? (3) Should the jurisdiction of the state of injury be limited to providing compensation or remedies only for the injuries that occurred in that state, or should it encompass injuries sustained in other states?*

III. APPLICABLE LAW ... ***2. Our starting point ...*** As a starting point of the Commission's deliberation, the rapporteurs propose for consideration the rules of the Swiss codification and the Serbian draft codification, which provide ...

3. Questions: *Does the Commission agree that the above rules should be the starting point in formulating our own rule? Specifically: (a) Does the Commission agree that the applicable law should be the law of the defendant's home state, or the defendant's conduct or the state of injury, whichever favors the victim? (b) If yes, should the court or the victim make the choice of law? (c) Should the application of the law of the state of injury be subject to a foreseeability proviso?*

IV. JUDGMENT RECOGNITION ... 3. Questions: *Should our project include recognition of foreign judgments? If yes, how should we address the six points listed in IV.1, supra?*

Comments by Jürgen Basedow, email of 8/26/2015

Preliminary observation: The general thrust of the reporters' document, i.e. a more victim-oriented approach to jurisdiction and applicable law, deserves support, particularly in light of recent case-law outlined in the Document. Years ago, the European Commission suggested, in its first Rome II draft, the general application of the law of the victim's habitual residence and got the support, among others, from the Max Planck Institute. However, the media industry in England, Germany and perhaps other Member States succeeded to unleash a campaign against this approach. In newspaper articles the whole Rome II project was narrowed down to the infringement of personality rights until the Commission finally decided to exclude this topic from the Regulation. The chances are not better now, given the financial and media power of internet service providers. Thus, the work of the Institut will be of a purely academic value.

Material scope: Although "personality rights" is a very wide concept I favour this wide approach.

Personal scope: No differentiation between various categories of defendants seems appropriate, no exclusion should be made. Everybody

who uploads information to the internet should be aware of the detrimental effect it might have for the persons whose data are concerned.

Jurisdiction: The victim should have a choice between the courts in the country of conduct (not mentioned in the question) and the country where the injury is sustained, provided this country was foreseeable for the defendant. Foreseeability is a flexible standard which allows a much more expansive affirmation of jurisdiction where the defendant is a media company or an undertaking using the internet for its commercial services, whereas a private individual might have less possibilities and abilities to foresee an injury of the defendant occurring in a specific country.

Applicable law: The impressive list of countries providing for a *favor laesi* by alternative connections is reduced when we take into consideration that some of them subject this conflict rule to the (double) actionability of the tort under the *lex fori.* It is further reduced by the very limited possibilities of ascertaining foreign law in many countries. Giving the court (or the plaintiff) the choice between two laws (one of them usually the *lex fori*) is rather meaningless where the court or that party lacks language skills and sources of information on foreign law. Thus, *favor laesi* sounds well, but comes down to the application of the *lex fori* in most cases.

In my eyes it is preferable to offer a wide choice of courts to the plaintiff and to allow these courts to apply the *lex fori,* basically to claims in respect of all losses wherever sustained. This appears particularly appropriate in the case of the internet with its worldwide reach. Where an action is brought in a country where the plaintiff has suffered only minimal loss, this rule might be subject to an exception ordering the court to confine the award to the loss suffered in the country of litigation.

Judgment Recognition: According to the overall theme of the 8th Commission recognition of judgments is not covered by its mandate. I do not believe that it should be included. Where the country of recognition considers that the foreign judgment infringes its standards of free speech, it will not recognize such a judgment, either on the basis of a SPEECH Act such as the US one, or by invoking their public policy which in some countries explicitly refers to the fundamental rights enshrined in their constitutions (see § 328 (1) no. 4 German Code of Civil Procedure). The problem appears to be rooted in the different valuation of freedom of speech as compared with the protection of privacy, not in any rule of private international law.

II. Working Document No. 2, May 1, 2017

Comments by Michael Bogdan, email of May 4, 2017

… 1. Regarding your queries in footnotes 11 and 12, I think we should try to prevent the abuse by potential defendants of declaratory actions as "Italian torpedoes". One possibility would be to add to Article 3(2) a third subparagraph, pursuing to which no lis pendens effect would be given to proceedings that are unlikely to be concluded within a reasonable time (cf. Article 33(2)(b) of the EU Regulation Brussels Ia).

2. I like the text within brackets in Article 5(2)(a) of the Draft, but I suggest that the "and" in that text be replaced with "or". If the defendant cannot reasonably foresee the accessibility, he can hardly be expected to take active measures to prevent it.

3. In the same Article 5(2)(a), I suggest that "active" be replaced with "reasonable".

4. In Article 9 and footnote 31, the reference to Article 6 should be replaced by reference to Article 7.

Response from Symeon Symeondes, May 4, 2017

… 1. Regarding the Italian torpedo issue, we have considered adding something like the Brussels I provision but we decided to save this for discussion at the meeting.

2. Good suggestion, but if we replace "and" with "or" then what about the situation in which the measures taken were obviously inadequate to prevent access? As the footnote states, this is the most debatable provision of the entire draft. We expect an extensive discussion at the meeting.

3. Good suggestion again, although I don't want us to lose the word "active".

4. You are correct, of course.

Coments by Hélène Gaudemet-Tallon (HGT), 13 mai 2017 and responses from Symeon Symeonides (SCS)

HGT. …Art.1 2) il est précisé que l'emploi du mot anglais « include » signifie que la liste n'est pas exhaustive. Dans la traduction française, il serait bon de mettre « Les droits de la personnalité comprennent **notamment**… ». C'est le terme utilisé en général en français pour indiquer que l'énumération n'est pas limitative.

SCS. Agreed

HGT. 4) ne faudrait-il pas viser aussi le cas où le demandeur n'est pas la personne victime mais son représentant ? Exemple : le demandeur agit

pour un incapable (mineur ou majeur) victime d'une atteinte à ses droits de la personnalité sur internet. Mais il s'agit d'une simple précision sans conséquence pour les questions traitées.

6) Je ne comprends pas la nécessité de ne retenir que l'agissement qui est la «primary cause of the injury».

En réalité, c'est le sens de «primary» qui me pose problème : en français, cela peut viser aussi bien la cause « première », ou « principale » ou encore « directe »….et la signification est bien différente pour chacun de ces termes.

Ici, peut-être «primary» est-il employé dans le sens de cause « directe »…ce serait à préciser.

SCS. Perhaps the word « principal » is better.

HGT. 8) b) : cela signifie-t-il que le demandeur, s'il agit sur la base de l'art.5 §1 a), contre une société pourra choisir à son gré entre le lieu du siège statutaire, celui de l'administration principale, ou celui de l'incorporation ?

C'est sans doute inévitable…

SCS: Yes, the plaintiff may sue in the state of the defendant's seat, principal place of business, or incorporation.

HGT. Art.2. N'est-ce pas un peu dommage d'exclure les « personal data » alors que (v. note 8) c'est un enjeu majeur à l'heure actuelle ?

SCS. True, but that is more than we can chew in this project.

HGT. Art.3

Je suis très réservée sur ce *Holistic Principle*.

Le texte dit que la personne victime a le « droit » d'intenter une seule action (right to file a single…). J'espère que c'est un droit, c'est à dire une possibilité, mais en rien une obligation…mais je ne suis pas sûre que ce soit l'esprit du texte.

Or il me semble qu'il peut y avoir des cas dans lesquels la victime peut avoir intérêt à fractionner ses demandes et à saisir des tribunaux d'Etats différents.

Retenir un seul Etat risque de rendre difficile l'appréciation du préjudice subi dans d'autres Etats.

Et lorsque le préjudice est subi dans plusieurs Etats, il risque d'être bien difficile de déterminer l'Etat dans lequel se réalisent « most of the injurious effects » (§3) : là où il y le plus d'habitant ? là où le réseau internet est le plus dense ? là où la victime est la plus connue ?

De plus, le demandeur peut choisir d'agir dans un Etat X pour des raisons de facilités procédurales mais sachant que le préjudice subi dans

cet Etat sera mal pris en compte parce que cet Etat privilégie la liberté d'expression, et dans un Etat Y sachant que le préjudice subi dans cet Etat sera mieux pris ne compte parce que cet Etat privilégie la protection des droits de la personnalité.

Evidemment c'est plus simple d'inciter le demandeur à ne saisir qu'un seul tribunal…mais je ne suis pas sûre que cela permette toujours de déboucher sur des solutions équitables. (voyez d'ailleurs la note 15)

En droit français, comme en droit de l'UE, le demandeur peut soit porter sa demande devant les tribunaux du lieu du fait générateur et ces tribunaux ont alors compétence pour l'intégralité du préjudice. Mais le demandeur peut aussi fractionner ses demandes et agir aux divers lieux où un préjudice a été subi, les tribunaux de chacun de ces lieux n'ayant alors compétence que pour le préjudice subi en ce lieu. Je ne crois pas qu'il y ait des raisons particulières d'écarter ces solutions pour les atteintes à la vie privée commises sur internet.

SCS. Your reservations about the holistic principle are well taken. In proposing this principle, we were fully aware of the EU and French position (which we characterized as the «mosaic principle»). Obviously, there are pros and cons for each principle and choosing between them (or perhaps combining them) is a difficult policy choice to be discussed by the whole Commission.

HGT. Art.4. Si les questions procédurales stricto sensu doivent bien évidemment relever de la loi interne du for saisi, en revanche il me semble que les questions énumérées sous les chiffres 1,2 et 3 sont des questions de fond dont la solution aura une incidence directe sur la solution du litige et qu'elles seraient mieux placées à l'art.7. Ou, à tout le moins, il faudrait préciser qu'à l'art.4 ces questions ne sont prises en compte que pour déterminer la juridiction compétente au sens de l'art.5. Ce qui permettrait lors du jugement au fond de ne pas être lié par les positions adoptées au regard de la compétence judiciaire.

SCS. I agree that the questions listed in 1, 2, and 3 are substantive and that their answer is most important in determining the jurisdiction. Because of this, they should be placed in Art. 4, which precedes the article on jurisidiction.

I think it makes no reference if we place them in Art. 7 because Art. 7 also mandates the application of the law of the forum state in all cases, except when the « critical conduct » occurred in another state, etc. I think that, in that case, the determination of where that conduct occurred should be made under the law of the forum state, rather than the law of the other state. Article 3 ensures this result.

HGT. Art.7. Evidemment donner compétence à la loi du tribunal saisi est la solution la plus simple … mais ce n'est pas toujours la meilleure.

Le texte actuel permet de s'écarter de la *lex fori* seulement si le tribunal a été saisi sur la base de 5 §2 c ou d, et encore dans des conditions très restrictives (uniquement pour la loi du lieu du fait générateur).

Pourquoi ne pas admettre aussi la possibilité de s'écarter de la *lex fori* lorsque le tribunal a été saisi sur la base de 5 §2 a ou b ? Par exemple si les parties se mettent d'accord pour choisir une autre loi a priori il n'y a pas de raison de les en empêcher. Et si l'on veut encadrer ce choix : outre la loi du lieu du fait générateur, on pourrait retenir la loi du lieu où le préjudice a été subi (éventuellement le plus grand préjudice si l'on s'en tient au *Holistic Principle*). La loi du lieu du préjudice est la solution de principe retenue par le règlement Rome II, texte qui permet aussi le choix de la loi par les parties (art.4 et art.14) : pourquoi ne pas reprendre ici ces solutions qui paraissent raisonnables ?

J'avoue que je comprends mal la volonté d'entraver autant que possible ce choix de loi laissé au demandeur : en particulier pourquoi l'art.7 §3 b et c sur le sort des autres défendeurs ? Si l'on veut à tout prix qu'une seule loi soit applicable au litige alors il n'y a pas de raison de ne pas avoir la même règle pour les autres défendeurs lorsqu'il n'y a pas de choix de loi et qu'on est sous l'empire de l'art. 7 §2. Cet article 7 § 3 b me pose problème.

SCS. I agree that we should include the possibility of a choice-of-law agreement, but for pre-dispute agreements we should include safeguards for weak parties.

Whether we should give plaintiffs the option of choosing non-forum law in more than the two patterns covered by Art. 7.2-3 is more debatable. For example, in Art. 7.1, a plaintiff who sues in the defendant's home state or in the state of critical conduct (Art. 5.1(a)-(b)), which is usually not his or her home state, presumably does so because that state has a pro-plaintiff procedural and substantive law. If that is true, it may be too much to give the plaintiff the benefits of both that state's procedural law and another state's substantive law. In Art. 7.3, when the plaintiff sues in her home state or in the state of most of the injury (Art. 5.1(b)-(c)), we give her the option of requesting the application of the law of the state of critical conduct. Perhaps we should split these two patterns and provide that, when the plaintiff sues in her home state, she has the additional option of requesting the application of the state of most of the injury.

Regarding Art. 7.3(b), I should explain that my unspoken assumption was that the « critical conduct » occurs in only one state (let's say State X). With that assumption, I thought that the plaintiff should be allowed to opt only for the law of State X, and that « other defendants », i.e.,

defendants whose conduct did not occur in State X, should not be bound by the plaintiff's choice. If the above assumption is too simplistic, we could provide that the plaintiff may request the application of the law of the respective state or states in which each defendant's critical conduct occurred. This would run contrary to the holistic principle, but ... .

HGT. Art.9. Ce me semble effectivement une bonne idée de s'aligner sur le texte de La Haye, projet pour le moment…il faudra voir quel sera le texte finalement adopté.

Juste une petite remarque : il me semble que lorsqu'on a mentionné « la loi désignée comme applicable selon l'art.6… » en réalité il faut lire selon **l'article 7.**

SCS. Yes, the reference should be to article 7.

Comments by Bernard Audit, May 14, 2017

I. LE CHAMP D'APPLICATION DU PROJET

1. Matériel

En réponse à la question, j'écarterais l'option (d) pour la raison indiquée qu'un éventail trop large compliquerait beaucoup la tâche. L'option (c) l'est peut-être également. Je pencherais pour l'option (a), car (b) serait en revanche trop étroit.

Ceci laisse entière la question du droit à l'oubli, qu'il serait évidemment préférable de traiter si cela ne perturbe pas les règles envisagées.

2. Personnel

A titre liminaire, il serait peut-être utile d'éclairer plus précisément tous ceux – dont je suis – qui ont encore des hésitations sur la nature des protagonistes appelé à être défendeurs : il est question des « service providers » (fournisseurs d'accès ?) et, très fugitivement, des moteurs de recherche ; mais est-ce tout ? Je crois également que certains de ces protagonistes sont parfois difficiles à localiser : qu'en est-il ?

En ce qui concerne la question posée et en revanche, il ne me paraît pas utile de distinguer les défendeurs agissant dans le cadre d'une activité professionnelle ou lucrative des autres. Cela relève sans doute davantage du jugement des affaires au fond, c'est-à-dire l'appréciation du comportement du défendeur.

II. COMPETENCE

Je suis d'accord pour limiter la compétence du for de l'atteinte par la condition de prévisibilité.

Sur la question capitale de la mosaïque, même si je comprends les avantages de la solution proposée à l'article 3.1, j'ai un doute sur son opportunité au fond. Permettez-moi par commodité de reproduire ce que

j'ai déjà écrit sur le sujet (dans le contexte, il est vrai, des media traditionnels), et qui cite également de la jurisprudence.

On sait en particulier que pour la Cour de justice, la référence que fait ce texte au « lieu du fait dommageable » doit être interprétée comme visant aussi bien le lieu du dommage lui-même que celui de l'événement causal[18]. Et l'on a vu qu'en matière d'atteintes à la personnalité chacun de ces facteurs peut lui-même se rattacher à différents pays. On doit alors s'interroger sur l'étendue de la compétence de chacun de ces fors quant au dommage à réparer. Les décisions françaises semblent adopter une distinction, de source doctrinale[19]. Étant rappelé que le « for du délit » se justifie par la proximité qu'il entretient avec des faits à établir (fait générateur ou dommage), si le for saisi est compétent en tant que celui du fait générateur, il aurait vocation à connaître de l'entier dommage invoqué par le demandeur car chacun des dommages se rattache tout entier à cet acte[20]. S'il est saisi en tant que for de l'un des lieux du dommage, sa compétence serait limitée à la réparation du dommage local car le lien de proximité fait défaut pour apprécier celui qui est subi dans un pays étranger (sur l'application des textes européens, v. *supra* n° 541)[21].

Dans le cas d'atteinte par voie de médias, il a été reproché à cette conception de ne donner compétence pour connaître de l'ensemble du dommage qu'au tribunal du lieu de publication et non à celui du domicile, supposé distinct, obligeant la victime à intenter une multiplicité d'actions. Mais ce grief méconnaît la spécificité des atteintes à la personnalité : dans ce domaine, on peut douter que la concentration des compétences constitue un objectif prioritaire et son émiettement un mal à éviter. La voie d'une décision unique invoquée le cas échéant à l'étranger convient en matière patrimoniale. Ici, le fait pour l'intéressé d'obtenir une décision au fond dans chacun des pays où il estime avoir subi une atteinte constitue une réparation plus adéquate que l'obtention d'une décision unique dans un pays donné ; car le prononcé d'un jugement a une connotation punitive certaine et recherchée. L'argument de coût ne

[18] CJCE, 30 nov. 1976, *Mines de Potasse d'Alsace*, préc. n° 534.

[19] P. Lagarde et G. Droz, cités note suivante.

[20] En ce sens, TGI Paris, 19 juin 1974, RC 74.696, 2e esp., n. Lagarde, D. 75.638 n. Droz.

[21] En ce sens, Paris, 19 mai 1984, *C. de Monaco*, D. 85.I.R.179 obs. Audit, RC 85.141 n. Gaudemet-Tallon, confirmant TGI Paris, 27 avril 1983 ibid. ; TGI Paris, 30 juin 1984, *duchesse de Windsor*, RC 85.141, 2e esp., n. Gaudemet-Tallon ; 20 fév. 1992, JDI 94.168 obs. A. Huet ; v. cependant, TGI Paris, 18 avril 1969, delle Mitsouko, RC 71.281 n. Bourel et 23 juin 1976, *Yasmina Aga Kahn*, préc., statuant sur le dommage subi en France et sur celui subi à l'étranger. La restriction concernant la proximité du dommage apparaît pertinente lorsqu'il y a lieu d'apprécier le degré de notoriété du demandeur hors de l'État du for.

semble pas pertinent: outre que le demandeur dispose en général de moyens en rapport avec sa notoriété, chaque fois que sa demande sera jugée fondée il obtiendra normalement une compensation pour les dépenses exposées. On peut donc se demander si la meilleure solution n'est pas dans tous les cas celle de la réparation du dommage purement local, y compris devant le for de l'événement causal ; au demeurant, lorsqu'il y a diffusion d'un magazine dans plusieurs pays, chacune peut être considérée comme un fait générateur distinct, constitutive d'un dommage local. En toute hypothèse, le demandeur ne peut échapper à la nécessité d'intenter des actions distinctes chaque fois qu'il y a lieu d'obtenir des mesures de contrainte telles qu'une saisie en différents pays.

Même dans le « village global » que nous habitons aujourd'hui, il me semble assez hasardeux pour les tribunaux d'un pays donné de se prononcer sur le dommage véritablement subi par une personne dans un autre pays (ce n'est pas la même chose que d'un Etat américain aux autres) : d'une part, quant à sa notoriété, d'autre part, quant à l'impact véritable de la violation alléguée (la perception de ce qui constitue une atteinte à la vie privée, par exemple, n'est pas la même d'un pays à l'autre). Qui plus est, la solution de la mosaïque règle pratiquement la question des actions-torpille.

III. DROIT APPLICABLE (article 7)

Les observations concernant la compétence juridictionnelle sont applicables.

En référence à la note 27, dernier alinéa, dans le cas où est prévue une option de loi (article 7.3), je suis nettement favorable à ce que l'option soit exercée par le demandeur seul et non à la disposition du juge.

Je ne saisis pas bien le pourquoi de 3(b) tel qu'expliqué à la note 29.

Je placerais dans la partie III, Droit applicable, ce qui figure actuellement dans l'article 4, à l'exception de la procédure.

IV. RECONNAISSANCE DES JUGEMENTS

Je suis favorable à l'inclusion de la question dans la Résolution, même si l'on admet le principe de la mosaïque. Une décision rendue dans un Etat réparant le dommage local peut être invoquée aux fins d'exécution dans un autre.

En ce qui concerne les six points visés à la page 12 du questionnaire :

1. Pas nécessaire qu'il y ait un traité

2. Y a-t-il vraiment place pour des cas de compétence exclusive sur ce sujet ?

3. Je suis contre l'exigence d'un chef de compétence tel qu'en vigueur l'Etat requis

4. Je suis contre le fait de faire prévaloir un jugement local rendu *après* le jugement étranger invoqué, même s'il est envisageable qu'une partie s'empresse d'agir à l'étranger afin de paralyser une éventuelle action dans l'Etat requis. Mais ici encore, la question ne se pose pas si l'on accepte le principe de la mosaïque.

5. Il est difficile de se passer de la réserve de l'ordre public.

6. La révision au fond et le contrôle de la loi appliquée par le juge étranger doivent être écartés. A ce sujet, le contrôle de la loi appliquée a été éliminé en France par un arrêt de la Cour de cassation de 2007 (*Cornelissen*).

Response by Symeon Symeonides, May 15, 2017

…

II. JURISDICTION

Audit: Sur la question capitale de la mosaïque, même si je comprends les avantages de la solution proposée à l'article 3.1, j'ai un doute sur son opportunité au fond ....

Symeon: Your defense of the "mosaic principle" is well taken, as well as documented. Professor Gaudemet-Tallon also favors the mosaic principle. For now, Erik and I favor the "holistic principle", but we intend to have a full discussion of this matter before the whole Commission, at the end of which we will decide how to proceed.

III. APPLICABLE LAW

Audit: En référence à la note 27, dernier alinéa, dans le cas où est prévue une option de loi (article 7.3), je suis nettement favorable à ce que l'option soit exercée par le demandeur seul et non à la disposition du juge.

Symeon: The Resolution adopts this position.

Audit: Je ne saisis pas bien le pourquoi de 3(b) tel qu'expliqué à la note 29.

Symeon: I don't blame you. Professor Gaudement-Tallon had a similar reaction. I take all the blame and, upon further reflection, I am inclined to delete 3(b), and indeed 3(c). But, before doing so, let me try to explain with a hypothetical what 3(b) meant. Suppose that plaintiff P sues defendants A, B, and C in State X, which is the state in which "most of the injurious effects" occurred. P then proves that the "critical conduct" of defendants A and B occurred in State Y, but is unable to prove that the conduct of defendant C also occurred in State Y. In fact, C's conduct was not "critical" and it occurred in State Z. Under 3(a), P may request the application of law of State Y against defendants A and B. That leaves defendant C whom paragraph 3(b) as drafted would get off the hook. The reason for that is that we cannot subject C to the law of State Y, with

which he may not have had any connection. But this does not mean there are no other solutions. One solution is to apply to defendant C the law of the forum (State X) and also to allow P to request the application of the law of State Z to defendant C. Initially, we rejected this solution as contrary to the simplicity and spirit of the holistic principle. On second thought, this may be the better solution. So if Erik agrees, I will recommend deleting paragraphs 3(b) and 3(c).

Audit: Je placerais dans la partie III, Droit applicable, ce qui figure actuellement dans l'article 4, à l'exception de la procédure.

Symeon: These non-procedural questions are necessary for determining both jurisdiction and applicable law and in both instances they should be answered under the lex fori. I think that by placing them in Part I (Preliminaries) we ensure that they apply to both Parts II (Jurisdiction) and III (Applicable Law).

Comments by Michael Bogdan, email of May 16, 2017

…1. I must confess that I remain unconvinced about the use of "and" within the brackets in the proposed Article 5(2)(a). As it stands, Article 5(2)(a) imposes two cumulative requirements which can hardly coexist in practice: if the person claimed to be liable could not reasonably have foreseen the accessibility of the material, he or she has hardly taken active measures to prevent that accessibility. In view of the cumulation of Article 2(2)(a) and Article 2(2)(b), this means that the whole Article 5(2) risks becoming useless. Therefore, the two requirements in Article 5(2)(a) should be alternative ("or"). Symeon's objection, concerning the situation in which the measures taken were obviously inadequate, can be remedied by replacing "active measures" in Article 5(2)(a) with "active and adequate measures" or "active and reasonable measures".

2. The proposed Article 4(1-3) lists some issues/facts that are relevant both to the question of jurisdiction and to the existence of the claim. According to the procedural law of many countries, such doubly-relevant issues/facts are examined only very summarily at the stage of establishing jurisdiction, basically relying on the assertions by the claimant. This is the position of, e.g., the EU Regulation Brussels I as interpreted by the EU Court of Justice (see, for example, paras. 62-63 of the Court's judgment in the case of Kolassa, case C-375/13). The proposed Article 4 may be understood as to require a more profound examination of these issues at the jurisdictional stage. It is a complicated matter that is not specific for the invasion of privacy and I do not recall having seen it being dealt with in documents such as ours. Perhaps it would be preferable to restrict Article 4 to its two first lines?

III. Working Document No. 3, August 1, 2017

Comments by Jürgen Basedow, email of September 11, 2017

... As I mentioned already at Hyderabad, the exception of the processing of personal data under art. 2(1) is doubtful in light of the high and continuously growing importance of this activity. I would like to draw your attention to the General Data Protection Regulation of the European Union (Reg. 2016/679). Please note the definitions in art. 4 which demonstrate the overlap with the draft resolution. Art. 79 deals with jurisdiction, Art. 28 provides for damages. No rules on choice of law.

If the processing of personal data is excluded from the scope of the draft resolution there may be some unclear or contradictory or otherwise unwelcome consequences. What about the activities of a Swiss Bank's employee who downloads personal data of account holders and sells the CD containing those data to the finance minister of a foreign state and perhaps also to media? Is it covered by the exception of art. 2? If yes, would the next step, i.e. the publication of those data in the media, be also covered as a "disclosure" of personal data? Or would the respective article be considered to fall outside the exception and be covered by the resolution?

I fully approve the "holistic principle" enshrined in art. 3(1). I think that the CJEU is gradually moving into that direction. Cf. CJEU case C-509/09, where the Court allowed the aggrieved person to bring an action for the compensation of all the damage sustained not only in the place of conduct of the defendant (Shevill – mosaic theory), but also in the place where the plaintiff has his center of interest. In the case of antitrust damages claims the Court similarly held that the place where a cartel victim has its registered office is the place of the harmful event. Since the court did not limit the cognizance of the court of that place to the loss sustained in that country we can assume that the indicated court has jurisdiction for claims concerning all losses of the plaintiff, whether sustained in that country or elsewhere (CJEU case C-352/13, para. 56). This assumption is justified since the Advocate-General had explicitly referred to Shevill and the mosaic theory. There is other case-law in the field of capital market torts to the same effect.

Comments by Michael Bogdan, email of October 23, 2017

. . . I suppose you have read the new judgment of the CJEU in the case of Bolagupplysningen v. Svensk Handel (case C-194/16). It seems that the Court agrees with you and adopts the holistic approach in respect of the victim's demand that defamatory website content be rectified or removed, while retaining the mosaic approach in respect of the victim's

option to sue for monetary compensation in each EU Member State regarding the damage caused there. The Court justifies this difference by arguing that an application for rectification or removal is "single and indivisible". But is it not so that modern geotechnology makes it, in fact, possible to make certain website content accessible or inaccessible from a certain territory only? Would you care to share you opinion about this?

IV. Working Document No. 4, June 11, 2018

Comments by Michael Bogdan, email of June 22, 2018

… I propose that the second line of Article 3(2) be amended as follows: "... all other states shall refrain from entertaining another action with regard to the same injuries ...". In my opinion, the aggrieved person should have the right to sue in different countries for different injuries, for example by limiting his claims to injuries arising in a certain country. Having different causes of action, such actions have no effect of res judicata in relation to each other. I am not sure the present wording of the draft can be understood in such a way, even though comment (c) on p. 7 supports it by speaking of "another action with regard to the same injuries".

My second remark concerns jurisdiction. It may happen that the person claimed to be liable has all his assets in a country that in principle refuses to recognize and enforce foreign judgments. The aggrieved person claiming compensation should have access to the courts of that country even if the prerequisites under Article 5 are not fulfilled. Perhaps some kind of forum necessitatis? The problem would not exist if we were not working on a IDI Resolution but rather on a binding treaty, where we could rely on the combined effect of Articles 5 and 9.

Response by Symeon Symeonides, July 30, 2018

…1. The Holistic principle, res judicata, and "another action ***with regard to the same injuries***"

We have made the change you suggested in Article 3(2). We changed the phrase "another action" to "another action **arising from the same conduct** and filed **...** " As you noted, this phraseological change conforms to the intended meaning of the Article 3(2) as explained in comment (c). The new phrase:

(1) affirms that the aggrieved person is confined to a single action with regard to injuries arising from the same conduct; and

(2) clarifies that, if there are injuries resulting from a different or subsequent conduct, the previously filed action will not bar the aggrieved person from filing another action.

On the other hand, if we understand your comment correctly, you may be asking for a more drastic change when you say that "the aggrieved person should have the right to sue in different countries for different injuries, for example by limiting his claims to injuries arising in a certain country." If by "different injuries" you mean injuries arising from the same conduct but occurring in different countries, this would negate the "holistic principle," which is the basis of this Resolution. According to that principle, the aggrieved person should not have the right to file more than one action for injuries caused by the same conduct.

2. Forum necessitatis. In your second comment, you identify a real problem but it is unclear that there is a good solution for it. You refer to a country in which the defendant has all of his or her assets and which refuses to recognize foreign judgments (in violation of Article 9). You suggest that, in such a case, the aggrieved person "should have access to the courts of that country even if the prerequisites under Article 5 are not fulfilled." You correctly note that, because this is an IDI Resolution rather than a treaty, we cannot force that country to abide by either Article 9 or Article 5.

Of course, this is true. But then how can we force that country to provide access to its courts for an initial action? We assume that by "not fulfilled" you mean that, even when that country *has* the contacts of Article 5 (and let's not forget Art. 6) (i.e., it is the home state of either the plaintiff or the defendant or the state of either the critical conduct or the injury), it nevertheless refuses to take jurisdiction. If this is true, then how can we force that country to take jurisdiction on another basis, such as a forum necessitatis basis?

Again, you are correct that, because we are dealing with a Resolution rather than a treaty, we are limited in what we can do. At the same time, this is the very nature of our organization. We simply articulate what we, in good conscience, believe to be the "right" principles and put them out there in hopes that various countries will gradually begin to adopt them, in whole or in part.

A related issue is whether the Resolution should include a general provision on *forum necessitatis*, that is, for cases in which the aggrieved person *cannot* sue in any of the countries that have the contacts of Articles 5 or 6. On balance, we decided against such an inclusion, inter alia, because: (1) this scenario is exceedingly rare; (2) if we do provide for it, then we should also devise a different choice-of-law rule for that forum; and (3) this being merely a Resolution, nothing would prevent a country from providing such a forum in necessitous circumstances.

...

Comments by Michael Bogdan, email of July 31, 2018

… The change you made in article 3(2) is not exactly the change I suggested, as your change speaks of actions arising from the same conduct rather than from the same injury. I sympathize with the holistic principle, but the plaintiff may have good reasons of procedural economy to limit his action to certain injuries, for example high expenses involved in procuring evidence regarding injury arising in a distant country. And how would the holistic principle, if interpreted strictly, deal with a situation where new, additional injury is discovered after the judgment if the parties have moved in the meantime?

Regarding forum necessitatis, I did not have in mind countries that refuse to deal with a case in spite of the existence of sufficient contacts under Articles 5 and 6, but rather countries whose sole contact with the dispute is that the defendant has all his assets there and foreign judgments are not recognized/enforced. The solution can perhaps be found in footnote 3 on page 9, which implicitly confirms, "of course", the right of such states to base their jurisdiction on the presence of assets. It might be useful to move this clarification to the main text of the Resolution.

...

Response by Symeon Symeonides, July 31, 2018

… As I suspected, you were asking for a "more drastic change," i.e., to "negate the holistic principle." If we allow the plaintiff to "limit his action to certain injuries," then nothing would prevent him from suing again in another state for the rest of his injuries. This would bring back the mosaic principle, with all of its problems, including the risk of contradictory judgments. It should be noted that the holistic principle does *not compel* the plaintiff to sue for all of his injuries. It simply says that, if he chooses to sue for only some of his injuries, he may not later sue again for the rest of his injuries. Finally, if properly applied, the holistic principle would not prevent a second action for newly discovered injuries, at least when, using due diligence, those injuries could not have been discovered before the first judgment.

Regarding your second point, the plaintiff in your hypothetical has my full sympathy. However, if we provide that a state whose only contact with the case is the presence of the defendant's assets (especially unrelated ones) should have jurisdiction (albeit for the good reasons you mention), we will be adopting an exorbitant basis of jurisdiction—indeed one that is blacklisted by Brussels I. In doing so, we jeopardize any hope of attaining consensus with countries (such as the US, but not only) which look at jurisdiction from the perspective of due process to the defendant.

Finally, dear Michael, don't worry about "complicating our work." First of all, our job should be complicated because this is a complicated subject; and, Second, your comments always help us improve the final product, even with regard to points on which we happen to disagree.

...

Comments by Hélène Gaudemet-Tallon ("HGT"), July 30, 2018, and responses by Symeon Symeonides ("SCS"), July 31, 2018

.... **HGT** - il me semble que, globalement, l'équilibre est respecté entre demandeur et défendeur, et entre respect des droits de la personnalité et liberté d'expression;

SCS: I am very pleased that you think that we have achieved a fair balance between plaintiffs and defendants. Ironically, as noted below, it is precisely because we are striving to preserve this balance that we have difficulty adopting some of your suggestions. In our view, some of those suggestions would skew this balance a bit too much in favor of plaintiffs.

Nevertheless, I have thought of another way to slightly strengthen the position of plaintiffs, without appreciably disturbing this balance. I am thinking of adding a new article to protect plaintiffs against forum-non-conveniens dismissals. This article (e.g. new article 5A) will provide that a state that has jurisdiction under Article 5 may not refuse to exercise it on the ground that the case should be adjudicated in another state.

HGT - art.1 commentaire d): je suis toujours sceptique sur la notion de « primarily responsible » (voir mes observations de mai 2017) à propos de la « primary cause of the injure »)

SCS: Your skepticism regarding the term "primarily responsible" for the injury is understandable. Nevertheless, it is preferable to leave it to the court to define this term in light of the particular circumstances rather than to use a more precise term, which may prove too confining in some cases. The following examples may be helpful.

1. Suppose that a 10-page text appears under the joint authorship of A and B, but the evidence shows that the page that contains the defamatory material was actually written by A and that B was not at all involved. In such a case, A would be "primarily responsible" for the defamation.
2. Suppose that C wrote the defamatory material and posted it on a website hosted by D, which traditionally hosts material written by guests under the explicit disclaimer that it is not responsible for the opinions of its guests. C would be "primarily responsible."
3. Suppose that E wrote a nasty but confidential letter to the mayor, and that F illegally gained access to that letter and posted it on the Internet without authorization. F would be "primarily responsible."

HGT - art.2 al.2 : petit problème de rédaction : il serait plus clair de rédiger ainsi

La résolution ne s'applique pas :

a) aux atteintes aux droits de propriété intellectuelle

b) aux dommages causés par ... personal data

c) aux dommages causés par une autorité gouvernementale (ou suggestion : par une entité exerçant des prérogatives de puissance publique)

SCS: I agree. I made the change.

HGT - art.3 : sur le « holistic principle », je maintiens les réserves que j'avais exprimées en mai 2017.

Je constate que M. Bogdan pense aussi qu'il faut laisser la possibilité au plaignant de fractionner son action s'il l'estime préférable et ce quand bien même les divers dommages résulteraient de « the same conduct ». Il est vrai que c'est en quelque sorte la remise en cause du principe holistique…mais j'avoue que cela ne me gênerait pas !

SCS: Your reservations are duly noted. Other members of the Commission have already expressed support for the holistic principle. We would like to hear the views of more members.

HGT - art.4 : les « factual determinations » sont décisives pour décider ensuite de la compétence sur le fondement d'un des chefs retenus à l'art. 5 (en particulier art. 5 §1 b « critical conduct » et d « most of the injurious effects occurred ». Ma question est alors la suivante : ce qui sera décidé sur ces points pour décider de la compétence s'imposera-t-il au juge lorsqu'il devra statuer sur le fond de l'affaire. A mon avis, le juge du fond ne devrait pas être lié par ce qui a été décidé pour se prononcer sur la compétence, mais il faudrait sans doute le préciser.

SCS: The question of whether the factual determinations made in the jurisdictional phase of a case will be binding on the court when it reaches the merits of the case depends on the procedural law of the forum state. I will add a comment to that effect under Art. 4. To my knowledge, in most countries, these findings are not binding and, as a matter of policy, they should not be; but I am not sure we should intrude into the procedural law of the forum.

HGT - art.5 § 2 : le commentaire éclaire la disposition, mais le texte reste vague. On peut réfléchir à préciser les « active measures ». Au vu du dernier alinéa du commentaire à la lettre e) je me demande s'il ne serait pas plus clair de dire que la possibilité d'échapper aux compétences prévues est exclue pour les défendeurs qui exercent une activité commerciale ...

SCS: I need to do much more thinking on "active measures". I agree that we can rephrase the text to make it clearer that a defendant who derives pecuniary benefits is ineligible for the "active measures" escape.

HGT - art.6 : d'accord, mais lorsque vous écrivez que la clause doit être valable « under the applicable law »… il faudrait préciser: quel droit ? droit national du for élu ? du for saisi ? ou règle de conflit de l'un de ces fors ? D'après votre commentaire, lettre b il semble que c'est la règle de conflit du for saisi qui doit être retenue. A mon avis, il faudrait le préciser au texte même… La question n'a pas été tranchée dans Bruxelles II bis et on s'accorde à le regretter.

SCS: As stated in comment (b), the agreement must be valid under the law applicable under the choice-of-law rules of the forum state. I agree that we should add these words in the text of the article.

HGT - art.7 : il est bien que le demandeur ait le choix entre la lex fori et la loi du lieu du fait générateur. C'est lui la victime. Mais pourquoi ne pas lui offrir aussi la possibilité de choisir la loi du pays où le dommage a été subi (qui peut ne pas être celle du for, par exemple, si le demandeur a assigné le défendeur au domicile de ce dernier) ?

SCS: I sympathize with this view but, on balance, I believe that if we give this additional choice to the plaintiff, the Resolution will become too skewed in favor of plaintiffs as a class. This is especially so considering that plaintiffs already *have* the option of suing at the place of injury (Art. 5.1(d)), as well as in their home state (Art. 5.1(c)); and, if they do, then the laws of those states would be applicable under Art. 7.2.

HGT - art.8 : d'accord pour n'autoriser le choix de loi avant le litige qu'entre professionnels… même s'il peut y avoir un « déséquilibre significatif » de puissance économique entre les deux contractants…

SCS: Agreed

HGT - Enfin, ne serait-il pas utile d'avoir un article spécifique concernant les mesures provisoire à prendre en urgence : c'est souvent très important en matière d'atteintes aux droits de la personnalité de pouvoir stopper tout de suite la diffusion du contenu litigieux, avant qu'une décision au fond ne soit prise (v. d'ailleurs le commentaire sous l'art.5 lettre f.)

SCS: As presently worded, the Resolution allows the taking of provisional measures. We take under advisement the question of whether it would be helpful to add a specific article to that effect.

HGT --Et pour rebondir sur la remarque de M. Bogdan sur le forum necessitatis : je trouve qu'il ne serait pas déplacé d'avoir un article prévoyant ce forum necessitatis même s'il ne s'agit que d'une

Résolution…aucun des articles n'est contraignant ! Celui sur le for de nécessité ne le serait pas non plus, mais ce serait une utile suggestion…

SCS: I believe that adding an article on forum necessitatis would not be a good idea, for the reasons I mentioned in my response to Michael Bogdan (30 July 2018). In addition, such an article will skew the balance too much in favor of plaintiffs, who already have enough fora in which to sue under this Resolution. Moreover, if we add such an article, then an escape for defendants (such as the one in Art. 5(2)) would be even more necessary. If this is true, then the utility of a forum necessitatis article would be diminished considerably.

...

V. Working Document No. 4A, August 1, 2018

Comments by Bernard Audit, September 11, 2018

Je félicite chaleureusement les deux rapporteurs pour l'excellence du projet qu'ils ont rédigé et nous soumettent[22], sur une question dont ils notent à juste titre qu'elle présente les difficultés parmi les plus difficiles à maîtriser du droit international privé contemporain. L'on constate que la forme n'est pas celle habituelle des résolutions de l'Institut, mais celle d'un texte législatif, ce que la nouveauté du sujet peut justifier.

(a) S'agissant du choix fondamental opéré en faveur du principe « holistique », soit une action et une loi pour tous les dommages subis en tous pays dans un cas donné, le texte pourrait être amendé pour effacer une ambiguïté qui n'a pas lieu d'être. A considérer sa lettre, on pourrait penser que ceci ne correspond qu'à une faculté, puisque selon l'article 3.1, un demandeur « a le droit d'intenter une action unique » relativement au dommage subi ou pouvant être subi en tout pays. En réalité, le « droit » qui lui est reconnu d'introduire une action unique est une « faveur à laquelle il ne peut se soustraire ». Il y a bien une contradiction dans la formule selon laquelle le demandeur « shall have the *right* to file a *single* action », comme il y en aurait à écrire en français « a le droit d'intenter une action unique » ou « une seule action ». En français, le texte devrait être : « *peut intenter une action dans l'un des États visés aux articles 5 et 6* » (de même qu'en anglais il suffit de supprimer « single » pour lire « an action »). Que l'action ouverte soit impérativement unique est une question distincte de celle des juridictions devant lesquelles elle peut être exercée,

[22] Working Document no. 4A (1 August 2018)

objet premier du paragraphe 1, et ce caractère est très clairement formulé au paragraphe 2.[23]

(b) Dans de précédentes observations, j'avais exposé les arguments en faveur de la théorie de la mosaïque, qui consacre une approche territorialiste de la question. Ils tiennent essentiellement à l'adéquation de la loi ainsi appliquée aux circonstances propres au dommage allégué dans un pays donné, telles que son étendue véritable, voire sa réalité, eu égard à la notoriété ou aux activités du demandeur ou la protection à laquelle il pouvait légitimement attendre en ce lieu. Je comprends le choix opéré en faveur de l'approche inverse en raison des avantages pratiques de simplicité et d'efficacité exposés en tête du projet ; et apprécie l'effort accompli pour accommoder au plus juste les intérêts légitimes du demandeur et du défendeur dans le cadre d'une action unique, soumise à une loi unique, qui constitue le grand mérite du projet. Le parti de privilégier plutôt le demandeur, rendu nécessaire par l'impossibilité d'assurer une égalité parfaite entre eux me semble également justifié eu égard à certaines pratiques des entreprises et aux débordements constatés sur les « réseaux sociaux ». Il reste que l'unicité de juridiction, couplée à l'application du droit du for selon l'article 7, paraît susceptible, dans certains cas, d'exposer le défendeur à l'application d'une loi qui n'a qu'un titre secondaire à s'appliquer et qui lui est défavorable, en raison par exemple de l'étendue des droits protégés (v. le commentaire (c) sous l'article 1er, concernant la notion de droits de la personnalité).

Ainsi, dans le cas où le demandeur est un professionnel et qu'il saisit le for de son « home state » selon ce que prévoit l'article 5.1 (c), on appliquera par ce biais la loi de son principal établissement suivant la définition du « home state » que donne l'article 1.8 ("*its principal professional or business establishment*"). Or le dommage peut ne concerner qu'un établissement local que le demandeur exploite dans un autre pays que le sien (le défendeur a, par exemple, publié un commentaire défavorable concernant cet établissement). L'article 4 (c) prévoit, certes, que le for saisi détermine l'État où l'effet dommageable principal se fait sentir ; mais c'est néanmoins, en l'état de la rédaction de l'article 1e, 8 (c) - et sauf erreur - la loi de l'établissement *principal* du demandeur qui s'appliquera même dans ce cas. Cela peut se révéler

[23] De la même manière, la Convention de La Haye de 2005 sur les accords d'élection de for a pris pour objet de définition, dans son article 3, l' « accord exclusif d'élection de for » (lettre *a*), alors que le caractère exclusif ou non de l'accord est étranger à sa nature : il suffisait de disposer à la suite qu'un accord d'élection de for est réputé exclusif sauf si les parties en ont convenu autrement ; c'est exactement ce qui est fait au point *b* , qui suit immédiatement.

préjudiciable au défendeur, si cette loi est plus sévère que celle du lieu du dommage. La possibilité pour lui selon l'article 5.2 de convaincre le tribunal de se dessaisir en démontrant qu'il n'a tiré aucun profit de l'accessibilité du message dans l'État du dommage allégué relève d'une autre situation. Il ne semble pas y avoir, dans celle envisagée, de protection du défendeur contre l'application de la loi du principal établissement du demandeur plus favorable à celui-ci que la loi du lieu où le dommage aura été subi[24].

C) La référence dans l'article 6.1. à des « règles de conflit de lois » pour juger de la validité d'une clause attributive de juridiction (v. également commentaires (b) et (c) *in fine* sous cet article) est à mon avis inutile ou mal venue. Les règles de conflit sont peu appropriées à ces clauses, ce dont témoigne l'absence de règles internationalement reconnues[25]. Pour cette raison sans doute, on constate en droit positif la prééminence de règles matérielles, d'application directe, en général exigeant la forme écrite, cela aussi bien concernant les clauses attributives de juridiction proprement dites[26] que les clauses d'arbitrage[27]. L'article 6 du projet de résolution, au paragraphe 2 (a), en donne lui-même l'exemple, en exigeant qu'un un accord antérieur au litige ait été « librement négocié » et « constaté par écrit ». L'exigence quant au fond, d'un accord librement souscrit, formulée ici pour les accords antérieurs au litige est universelle, au point qu'elle vaut aussi bien pour les accords postérieurs (simplement, il sera rare qu'un tel accord vienne à être contesté sur ce point, pour les raisons qui sont données à propos des accords sur le droit applicable sous l'article 8, commentaire a)). Une contestation de la validité de la clause qui ne porte pas sur le défaut de consentement, ou son défaut d'intégrité, se fondera plutôt sur une loi de police (normalement du for), et le choix d'y faire droit ou non ne relève pas de la méthode de la règle de conflit. Pour toutes ces raisons, je remplacerais les derniers mots du paragraphe 1

[24] L'exception prévue au chiffre 3 de l'article 7, permettant au *demandeur* de solliciter l'application d'une autre loi que celle de son propre for, en faveur de celle du lieu où agissait le défendeur, est dans l'intérêt du demandeur.

[25] Sur leur recherche et les difficultés qu'elle soulève, H. Gaudemet-Tallon, *La prorogation volontaire de juridiction*, 1965.

[26] V. la Convention de La Haye de 2005 sur les accords d'élection de for, article 4, d (la Convention envisage par ailleurs que l'accord soit nul « selon le droit » du tribunal élu, sans plus de précision) ; les règlements européens Bruxelles I (article 23) et Bruxelles I bis (article 25) ; aux États-Unis, l'arrêt *The Bremen v. Zapata* de la Cour suprême fédérale (1972) se prononçant sur la validité des clauses attributives de juridiction sans même que le raisonnement conflictualiste soit abordé.

[27] Loi modèle CNUDCI (article 7.2 de la version d'origine); auparavant, Convention de New York de 1958 sur la reconnaissance des sentences (article II.1).

par « under the law of the forum ». Cette formulation incorpore la réserve des lois de police et elle est autrement suffisante. Si l'on souhaite réserver implicitement l'hypothèse où le for procéderait par règles de conflit et celle où il ferait droit à une loi de police étrangère, on s'exprimera cela en français par « le droit du for » plutôt que « la loi du for ».

Response by Symeon Symeonides, September 11, 2018

... ***(a) The "right" to file a single action in Art. 3.1***. You are correct in that this is both a right and a limitation. The right is expressed in paragraph 1 and the limitation in paragraph 2. We can remove or reduce the contradiction by saying in paragraph 1 that the aggrieved person "may file a single action."

(b)(1) The holistic principle. Thank you for your flexibility in accepting the holistic principle despite your initial reservations, and for recognizing our efforts to come up with a balanced and efficient scheme.

(b)(2)The problem with "home state" and state of injury. You are correct in that, if the plaintiff sues in his or her "home state,"

(1) that state has jurisdiction under Art. 5(c), "if the material was accessible" there, and even if "most of the injurious effects" occurred" in another state;

(2) the applicable law will be the law of the "home state" and not the law of the state where "most of the injurious effects" occurred;

(3) the option of applying the law of the state of conduct is an option given to the plaintiff and not the defendant; and

(4) the defendant's only defense is to avoid jurisdiction in the "home state" by invoking the exceptions of Art. 5.2 (which, you are right, may not help a for-profit company like Google).

If the above is a problem, it may even be a broader one because it can also occur in cases in which the plaintiff is a natural person, although it is more likely in cases of professionals.

How can we fix it? Here are some preliminary ideas.

(1) At the jurisdiction phase:

(a) Delete Art. 5.1(c), which means that the plaintiff's home state will not have jurisdiction at all; or

(b) Keep Art. 5.1(c) but add the requirement that the plaintiff must have "suffered injury" in that state, i.e., even if it is not "most" of the injury; OR

(2) At the choice-of-law phase: Keep the jurisdiction rules of Art. 5 as they are and amend Art. 7, as follows:

(a) when the plaintiff sues in the state of injury, he will have the option of requesting the application of the law of the state of conduct as presently; but

(b) when the plaintiff sues in her "home state," the *defendant* will get the option of requesting the application of the law of the state where "most of the injurious effects" occurred.

What do you think? We need to think more about this after soliciting more input from the Commission. Option (2) seems preferable, but perhaps a better option is not to change anything.

(c) ***What law should govern the validity of a forum selection (FS) clause?*** I agree with you that an autonomous, direct *règle matérielle* is a good idea, but I hope you also agree that such a rule cannot cover *all* aspects of a FS clause unless the rule is exceedingly long and complicated. If this is correct, then a supplemental default conflicts rule is necessary. In Article 6, we adopt such a combination. Paragraph 2 provides a règle matérielle and Paragraph 1 contains the default conflicts rule. Our disagreement (and I believe is a small one) is whether the conflicts rule should refer to the internal law of the forum or to its whole law, including its conflicts law.

I am sympathetic to your suggestion of referring this to the internal law of the forum. In fact, in a recent article, I defended the practice of American courts, which apply the internal law of the forum in the majority of cases. See attached. However, this Resolution must be as neutral as possible. We believe that the reference to the whole law of the forum state in Art. 6.1 is the most neutral solution to this issue. In choosing this solution, we took into account the two possibilities, namely that the action may be filed: (a) in the court designated in the FS clause (hereafter the "chosen" court); or (b) in another court. It seems that a *carte blanche* for the forum court to apply its own internal law can prove problematic in either or both of these situations, albeit for different reasons. Of course, by referring this issue to the conflicts law of the forum state, we do not preclude the application of the internal law of that state, if its choice-of-law rules point in that direction.

My understanding is that the Hague Convention on Choice of Court Agreements adopted a similar solution (but more circuitous and much worse), and to some extent the same is true of the Brussels I Recast. Art. 5(1) of the Hague Convention provides that, if the action is filed in the chosen court, that court "shall have jurisdiction" (i.e., the clause is enforceable) unless the clause is null and void under the "law" of the chosen state. The Hartley & Dogauchi, Explanatory Report states in § 125 that this reference to the "law" of the chosen state "includes the

choice-of-law rules of that State." For actions filed in another court, Art. 6 of the Convention calls for the application of the internal law of the forum for matters of capacity and public policy (paragraphs (b)-(d)) and the "law" of the "State of the *chosen* court" for other issues of nullity and enforceability (paragraph (a)). Again the Explanatory Report states that the reference to "law" includes choice-of-law rules of the chosen state (see Explanatory Report, §§183-184). For what is worth, my opinion is that the reference to the choice-of-law rules of the *chosen* state, when the action is filed in *another* state, is the most uncertain, most inefficient, and least desirable solution, but I understand that you are not advocating for that.

As for the Brussels Recast, the intention of the drafters was to replicate the Hague Convention. At least that was the understanding of the participants in the Council's Working Group (I was one of the participants and later chair; we tried to draft an autonomous rule but we ran out of time). Recital 20 confirms the above understanding by stating that the word "law" in the chapeau of Article 25 includes "the conflict-of-laws rules of that Member State."

On balance, we believe that the reference to the conflicts law of the *forum* state in Art. 6.1 of the Draft Resolution is the least problematic solution to this question, but we are open to changing that to the internal law of the forum if there is a strong sentiment to that effect among the members of the Commission, or later the membership of the Institute.

Again, many thanks for your thoughtful and constructive comments. I hope I have addressed all of your concerns, but I would be more than happy to try again if that is not the case ....

VI. Working Document No. 5, September 27, 2018

Comments by H. Gaudemet-Tallon (HGT) of 30 Sept. 2018 and Responses by Symeon Symeonides (SCS)

HGT J'approuve sans réserve les précisions apportées : **art. 1 3a, 5a et 8a ainsi que art. 2d.**

Sur la philosophie générale du texte, même si personnellement je reste attachée au *mosaïc principle,* je comprends que la commission est favorable au *holistic principle* et donc j'essaie d'entrer intellectuellement dans ce système.

En lisant le texte, je me suis posée une question : quid si un article posté sur le net et diffusé en France, Allemagne, Italie, Espagne (par exemple) injurie et porte atteinte aux droits de la personnalité de plusieurs personnes (par exemple du monde du spectacle, ou du monde politique), personnes ayant chacune leur domicile dans ces divers pays ?

Chacune des victimes pourra agir en utilisant les règles de notre proposition. Elles ne feront pas toutes nécessairement le même choix : certaines choisissant d'agir dans l'Etat de leur domicile, d'autres d'assigner l'auteur de l'article à son domicile. Les lois appliquées seront éventuellement différentes aussi. Le *holistic principle* est mis à mal car il s'agit d'un même fait délictueux mais qui donnera lieu (légitimement) à plusieurs actions. Certes, chaque victime est différente et pour chacune le *holistic principle* sera respecté, mais il y aura quand même plusieurs actions pour un même fait délictueux.

Ne faudrait-il pas que notre texte envisage aussi cette hypothèse et précise que, en ce cas, chaque victime a les mêmes droits que si elle était la seule victime du délit ?

SCS. We agree. This is implicit in the text, and we could reiterate it in the comments. If necessary, we can add a sentence at the end of Article 3.

HGT. Revenons maintenant au texte proposé et aux modifications telles qu'elles figurent dans la dernière version.

-art. 3 : oui, j'approuve le « may » file a single action…cela suit la suggestion de Bernard Audit et je suis d'accord.

-art. 4 : d'accord pour soumettre ces « factual determinations » à la loi interne du for…mais de quel for s'agit-il ? Le for saisi de l'action. Le texte français devra bien mentionner for « saisi » (et ne pas traduire « forum state » par for de l'Etat) car ce ne sera pas forcément le for compétent en vertu de l'art.5.

SCS. We agree that the "forum state" is not necessarily a state that has jurisdiction under Art. 5. Indeed, whether a state has jurisdiction will largely depend on these factual determinations (although they will also be important in deciding the merits). The term "seized court" is not used in English (except in the stilted Hague and Brussels texts), but we can use it, if we must. We will have to say "the internal law of *the state* of the court seized".

HGT. art. 5 : je suis d'accord avec le nouveau texte (et donc je réponds oui à vos questions 1,2 et 3)

art. 6 : je ne partage pas l'option consistant à soumettre l'accord d'élection de for aux règles de conflits de lois du for saisi. Ces règles sont le plus souvent inexistantes…Il serait préférable de désigner le droit matériel du for saisi (ce qui n'empêcherait pas d'appliquer d'éventuelles lois de police de ce for…et peut-être même de « tenir compte » de lois de police étrangère si le droit du for l'autorise).

SCS. In my previous response to Bernard Audit, I stated my personal preference for applying the internal law of the forum. However, I also explained that, on balance, the application of the conflicts law of the

forum (which does not preclude the application of the internal law of the forum) is the most neutral solution, besides being consistent with the solutions of the Hague Choice of Court Convention and the Brussels I recast. For your convenience, I reproduce part of that response at the end of this document. If the Commission prefers the application of the internal law of the forum, we can do that, as long as it is understood that the forum could be either the forum designated in the choice-of-court agreement or *another* court.

HGT. Art.7 : là j'ai plus de réserves.

D'abord, il faudrait numéroter autrement cet article et mettre 1) en l'absence d'élection de for…a) b) c) (à la place des 1,2 et 3 actuels)

Puis mettre en 2) en présence d'une élection de for: a) et b) ce qui figure actuellement au 4 et 5.

SCS. These are good suggestions and I will try to find a way to implement them without being too repetitive. As presently drafted, paragraphs 1-5 apply in the absence of a choice-of-law agreement, while paragraphs 4-5 apply in the absence of both a choice-of-law and a choice-of-court agreement

HGT. Ensuite sur le fond : l'extrême complexité de cet article montre bien la difficulté qu'il y a à vouloir à tout prix lier compétence judiciaire et compétence législative. Cela devient très artificial :

SCS. You are right that the article is complex, but we think that it is that very complexity that produces simple solutions: allowing the forum to apply its own law whenever possible is the simplest and least error-prone solution. True enough, this is not always the fairest solution, but we guard against that by allowing other choices.

HGT. - au 1 actuel : pourquoi lier compétence judiciaire et législative dans ces deux hypothèses : le demandeur peut parfaitement choisir d'agir au domicile du défendeur et souhaiter l'application de la loi du lieu de l'événement causal, ou celle du dommage subi. C'est lui la victime, il faut qu'il puisse choisir la loi applicable (avec peut-être seulement une exception : le défendeur pourrait contester la loi du pays du dommage subi s'il prouve qu'il ne pouvait absolument pas prévoir qu'il y aurait un dommage dans ce pays).

SCS Of course, these are very reasonable suggestions. We have considered them, and we should continue to do so. There are reasons to be cautious. The idea of giving victims a choice is relatively new and, if we give too many choices, we may risk rejection of the whole Resolution. (We face this risk with the Third Restatement). In the two cases of par. 1, if the victim chooses to go through the expenses of suing in the defendant's home state or the state of conduct (i.e., away from the

victim's home state), it is likely because the substantive law of the forum state favors the victim. If so, the victim will not need to ask for the law of another state. If not, it is probably because the procedural law of the forum favors the victim, but the substantive law does not. In that case, would it not be too much to allow the victim to have the best of both worlds (i.e., the procedural law of the forum and the substantive law of another state)?

HGT. - Et, dans la logique de protection de la victime, je ne suis pas d'accord pour donner au défendeur l'option que vous prévoyez au 2;

SCS. We got this idea from Bernard's comments. Admittedly, the idea of giving a choice to the defendant is not popular, but it is not as bad as it sounds, because in most cases the victim's home state will also be the state where most of the injury occurred, and hence this choice will not be available to the defendant. When this is not the case, the victim would still get the convenience of litigating at home, so it is not unreasonable to give the defendant such a fairly narrow choice.

HGT. - à mon avis les options qui figurent au 2 et au 3 doivent être laissées au demandeur victime. (Ainsi vous voyez que je réponds plutôt négativement à vos questions 3 et 4)

SCS. See my answer above.

HGT. Le *holistic principle* risque déjà d'être très gênant pour la victime. Il importe donc que sa protection soit assurée au maximum par les règles adoptées au sein de ce principe.

SCS. We are not sure that the holistic principle is très gênant for the victim. In some cases, it can be très gênant for the defendant.

HGT. Petite observation à propos des 2 et 3 actuels : pourquoi préciser que le plaideur concerné doit établir le contenu de la loi dont il demande l'application ? Il me semble que cette question de charge de preuve de la loi appartient au droit procédural de chaque Etat ; par exemple, en France, il est maintenant admis que la recherche du contenu de la loi étrangère dont l'application est revendiquée incombe aussi bien au juge qu'au plaideur.

SCS. It is true that in most civil law countries, courts must ascertain *ex officio* the content of the applicable law. However, it also true that in most of those countries, courts are not used to have one litigant choose a foreign law as a matter of right and then sit back and wait for the court to carry that burden. Now that we give this right to one litigant, it seems a good idea to place on that litigant the burden of proving the content of the requested foreign law. This will also ensure that the choosing litigant will have to do her homework before exercising the option, that the choice

will be non-appealable, and will also help with the overall balance between the parties.

HGT. - sur le 5 actuel : la référence aux « liens les plus étroits » n'est pas très satisfaisante, car bien vague…mais il est sans doute difficile de trouver une meilleure solution (loi du for saisi ? loi du lieu de l'événement causal ? loi du lieu du préjudice subi ?) ...difficile de choisir même si la tendance générale en droit international privé (Rome II et divers droits nationaux) est plutôt en faveur de la lex damni (loi du lieu où le préjudice a été subi).

SCS. We need to think further on this. The closest connection is the most ubiquitous residual connecting factor. If it is too uncertain, that's not too bad in this case because it would be good to discourage choice-of-court agreements that do *not* choose one of the states listed in Art. 5 and instead choose a state that is unrelated to both the plaintiff and the defendant.

HGT. Je reprends, au risque de me répéter, ce que j'avais formulé dans de précédentes observations : il est regrettable qu'il n'y ait pas un article spécifique pour les mesures provisoires qui peuvent être particulièrement utiles en ce domaine, et pour lesquelles il faudrait peut-être prévoir un for fondé sur l'urgence…

SCS. The Draft provides for provisional measures in the definitions, which provide for "preventive or corrective injunctive relief" and in article 5, which provides that the court has jurisdiction to adjudicate and action seeking to ... "*prevent"* an injury. The comments reiterate this point. If necessary, we can add one paragraph in Art. 5, saying that a court that has jurisdiction under paragraph 1 also has jurisdiction to order provisional measures.

HGT. Et pourquoi toujours garder le silence sur un éventuel for de nécessité ?

SCS. I believe we have addressed this topic in previous exchanges. I will add one point. We do not see why, in a system that grants jurisdiction to the *plaintiff*'s home state (subject only to the accessibility of the material in that state, which will always be satisfied) needs an article on forum necessitatis.

HGT. Enfin, en ce qui concerne **l'art. 9**, ne suffirait-il pas de renvoyer à la future convention de La Haye ? Pourquoi exiger que le juge de l'Etat d'origine ait été compétent selon notre texte et ait appliqué la loi désignée par notre texte ?

Il me semble que cela va à l'encontre de la tendance mondiale à libéraliser la reconnaissance des décisions, ce qui implique un très léger contrôle de la compétence du juge d'origine (v. ce que prévoit le projet 2018 de La Haye) et l'abandon du contrôle de la loi appliquée.

SCS. The key in article 9 is the word “shall.” If the judgment meets these conditions, it “shall” be eligible for recognition. If it does not meet the conditions that this draft requires, then we cannot require its recognition. But, of course, we do not prevent it either ....

Comments by Michael Bogdan, email of October 2, 2018

... Thank you for the new version. Right now I have only one small remark. Imagine that a jurisdictional objection is made in a Swedish court on the ground of an alleged choice-of-court agreement assigning exclusive jurisdiction to a court in Mexico. There are two possible literal interpretations of the new added words in Article 6(1), but I assume that the draft has in mind Mexico's (and not Sweden's) choice-of-law rules (see Art. 25 of Brussels Ia Regulation and Art. 6 of the Hague Convention). If I am right, I suggest that the words "the forum's" in the text be replaced with "the chosen forum's" ....

Response by Symeon Symeonides, October 2, 2018

... In your hypothetical, the Swedish court will determine the validity of the choice-of-court agreement under the law applicable under Swedish (not Mexican) choice-of-law rules. It would be too laborious, uncertain, and potentially circular (renvoi?) to require the Swedish court to apply the Mexican choice-of-law rules. It is true, of course, that paragraph **(a)** of Article 6 of the Hague Convention adopts this solution for some issues of validity, while paragraphs **(b)** and **(c)** refer to the choice-of-law rules of the "court seised" (i.e., the Swedish court) for other issues of validity and enforceability (e.g., capacity and "manifest injustice").

Our Article 6 adopts the latter solution for all issues of validity and enforceability. If we were to use the terminology of the Hague Convention, we would say "the law applicable under the choice-of-law rules of the court **seised**." In your hypothetical, this would be the Swedish court if the action is filed in Sweden, and the Mexican court if the action was filed in Mexico (as provided in Art. 5.1 of the Hague Convention) ...

Comments by Michael Bogdan, October 10, 2018

…Thank you for your prompt reaction. I understand your arguments and do not object to your solution, but your draft's Art. 6(1) can give rise to a misunderstanding in this respect, especially as both the Hague Convention (in principle) and the Brussels I Regulation prefer the opposite approach. In order to avoid such misunderstanding, I would indeed prefer "the court seised" or some equivalent formulation ....