

EIGHTH COMMISSION

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

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

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RESOLUTION

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, honour 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 towards 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 even-handed treatment of potential litigants are also important considerations,

Adopts the following Resolution:

CHAPTER 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, honour, 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 a claim for actual or impending injury to that person's 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 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 the right of personality that is the object of the action.
11. “Home State” means:
 - (a) for natural persons, the State in which that person has his or her domicile or habitual residence;
 - (b) for persons other than natural persons, the State in which that 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's principal professional or business establishment is located.

12. "Forum State" means the State in which the particular proceedings are 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 as these rights and injuries are defined by the law applicable under Articles 7 and 8.

2. This Resolution does not apply to:

- (a) infringements of intellectual property rights;
- (b) injuries caused by the conduct of a person or entity in the exercise of governmental authority; or
- (c) cases in which the aggrieved person and the person claimed to be liable have the same home State if both the critical conduct and the most extensive injurious effects occurred in that State.

3. This Resolution should be applied in conformity with obligations imposed by international law, including applicable treaties.

Article 3

The "holistic principle" and parallel litigation

1. A person who claims to have suffered or may suffer injury to 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 a court in one of the States referred to in Articles 5 or 6, all other courts 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 on grounds other than the merits;
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(2), 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 percentage 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.

CHAPTER II
JURISDICTION

Article 5

Jurisdiction

1. Subject to Articles 3 and 6 and except as otherwise provided in paragraph 2 of this Article, the courts of 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 state in which the critical conduct of the person claimed to be liable occurred;
- (b) The home state of the person claimed to be liable for the injury;
- (c) The state in which the most extensive injurious effects occurred or may occur; 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.

2. When an action is filed in a state referred to in subparagraphs (c) or (d) above, the court may not entertain the action against a defendant who demonstrates that:

- (a) it did not derive any pecuniary or other significant benefit from the accessibility of the material in the forum State; and
- (b) a reasonable person could not have foreseen that the material would be accessible in the forum State or that person's conduct would cause any injury in that State.

3. 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 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 if:

- (a) it was freely negotiated, expressed in writing and 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 above, whichever is applicable, but an action filed under such an agreement has no priority over an action filed under Article 5.

CHAPTER 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 paragraph 1(a) 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(b) of Article 5, the applicable law shall be the internal law of the forum State. However, if, at the time of the injury, the defendant's home is located in another state, the applicable law shall be the internal law of the state that, considering all the circumstances, has the closest and most significant connection.

3. 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, upon request by the court, establishes the content of that law.

4. 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, upon request by the court, establishes the content of that law.

5. 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 1–4 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, 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.

CHAPTER IV

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Article 9

Recognition and enforcement of judgments

A judgment rendered by a court that has jurisdiction under Articles 5 or 6 and applying the law designated as applicable by Articles 7 or 8 is eligible for recognition and enforcement according to the same conditions as those provided in Articles 4, 7–10 and 13–15 of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
