Injuries to Rights of Personality

THROUGH THE INTERNET:

Jurisdiction, Applicable Law, Recognition of Foreign Judgments
Institut de Droit international

Eighth Commission

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The Tensions

Different hierarchies of values

Freedom of speech trumps protection of privacy.

Protection of privacy trumps freedom of speech.

Different jurisdictional philosophies

Focus on the defendant’s contacts with the forum.

Focus on the claim and its contacts with the forum.

Scope of the remedy

Single-publication rule

Mosaic principle

Different choice-of-law regimes

*Lex loci delicti*

*Lex loci damni*

*Favor laesi*

*Closer connection*

Ubiquity and universal reach of the Internet
A Balancing Act

Simplicity

Efficiency

Evenhandedness to parties

Treat them as equally as possible and appropriate
Simplicity and Efficiency

- (1) Preventing parallel (or subsequent) litigation, once the plaintiff files the initial action;
- (2) Rejecting the “mosaic principle” and adopting the “holistic principle,” which allows the plaintiff to sue in a single state and, if successful, obtain relief for injuries suffered in all states;
Simplicity and Efficiency, *Cont’d*

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

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

3. Defining the conditions for enforcing choice-of-court and choice-of-law agreements, thus obviating to some extent the difficulties of the jurisdictional and choice-of-law inquiries.
Once the injury occurs, the injured person knows:

1. where it can sue, and
2. what the applicable law will be.

Each option has tradeoffs, advantages, and disadvantages;

- But all of them are known or knowable in advance, with little uncertainty.
Give P four jurisdictional bases:

Two are P-connected:

- (1) P’s “most extensive injuries”
- (2) P’s home + accessibility or injury

If P sues here, D may avoid jurisdiction by successfully invoking the escape ...

If not, *lex fori* applies, but
- in (1), P may request law of state of “critical” conduct; and
- in (2), D may request law of state of “most” injury.

Two are D-connected:

- D’s home state
- D’s “critical” conduct

If P sues there, D gets no escape from jurisdiction and may not use FNC doctrine.

*Lex fori* governs; no escape.

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Plaintiff

Defendant
Jurisdictional Bases: Comparison with EU Law

- D’s home state
- D’s “critical” conduct
- P’s home + accessibility or injury
- P’s “most extensive injuries”
- P’s injury
- P’s “center of interest”
- D’s domicile
- D’s “establishment”

Escaes

No escapes

EU law

IDI
Plaintiff’s options and their outcomes
(if there is no choice-of-court or choice-of-law agreement)

D’s side:
- **D’s home state**
  - None

D’s “critical” conduct
- None

“Most extensive injuries”
- No benefits + no foreseeability

P’s side:
- **P’s home + accessibility or injury**
  - No benefits + no foreseeability

Jurisdiction
- **Lex fori**
  - None

Jurisd. avoidance
- None

Applicable law
- **Lex fori**
  - None

Escape or option
- None

but D may request

but P may request
If there is a choice-of-court agreement but no choice-of-law agreement

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

2. If the choice-of-court agreement designates a state other than the above and the action is filed there, the applicable law is the law of the state that has the “closest and most significant connection.”
Suit in the defendant’s home state or in the state of the “most critical conduct”

**Advantages**

1. Simplicity and certainty.
2. **No unfairness:**
   - Defendants may not complain (if that law is unfavorable) because that is the law of their home state or the state where they acted.
   - Plaintiff may not complain (if that law is unfavorable) because they chose to sue there.

**Applicable law**

The *lex fori*. No exceptions
The defendant may avoid jurisdiction by demonstrating 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 its conduct would cause any injury in that state.

If D does not succeed, then

The *lex fori* i.e., *lex loci damni*

Advantages: Simplicity and certainty.

Unfairness?
- This is the traditional *lex loci damni* rule.
- The jurisdictional escape mitigates any potential unfairness.
Suit in the state of “the most extensive injurious effects”
Cont’d: The Plaintiff’s Option

Applicable law

The *lex fori* i.e., *lex loci damni*

Unless the plaintiff:

- proves that the **critical conduct** occurred in another state; and
- formally requests the application of that state’s law; and
- establishes the content of that law.

In such a case, that law applies to all substantive issues.

Is this unfair to the defendant?

- D may not legitimately complain against the application of the state in which D acted,
- but P gets the **best of both worlds**---the advantage of litigating in a P-affiliated state and the favorable law of a D-affiliated state.

However:

- D may avoid this in cases covered by the jurisdictional escape; and
- This pro-P result is consistent with both the *favor laesi* principle and recent trends in PIL.
The defendant may avoid jurisdiction by demonstrating that:

(a) it did not derive any pecuniary or other significant benefit from the accessibility of the material in the forum state; \textit{and}

(b) a reasonable person could not have foreseen that the material would be accessible in the forum state or that its conduct would cause any injury in that state.

If D does not succeed, then

Applicable law

The \textit{lex fori}

- Advantages: Simplicity and certainty.

- Unfairness to D?
  - If so, the unfairness is mitigated by giving D both:
    - (1) the above jurisdictional escape, and
    - (2) the option of requesting the application of another state’s law.
Suit in the plaintiff’s “home state +”

- D’s C-o-L option

- Applicable law
  - The lex fori
  - i.e., P’s home state

Unless the **defendant**:
- proves that the most extensive injurious effects occurred in another state, **and**
- formally requests the application of that state’s law; **and**
- establishes the content of that law.

In such a case, that law applies to all substantive issues.

**Is this unfair?**

- **No.**
- P gets the advantage of litigating at home; and
- D gets a more favorable substantive law.
Jurisdictional Bases and Damages: Comparison with ILA Project

- **Jurisdiction**
  - D’s home state
  - D’s “critical” conduct
  - P’s home + accessibility + injury
  - P’s “most extensive injuries”

- **Damages**
  - All

- **ILA**
  - State “targeted” by D

- **State targeted by D**

- **Jurisdiction**
  - D’s habitual residence
  - D’s conduct “directly causing”
  - P’s “center of interest”

- **Damages**
  - All
Applicable Law: Comparison with ILA Project

Forum

D’s home state

Applicable law

Lex fori

Place of conduct

Lex fori

D’s conduct “directly causing” ...

D’s habitual residence

Applicable Law

but P may request

Lex fori*

P’s “center of interest”

but D may request

Lex fori*

State “targeted” by D

Forum

D’s “critical” conduct

Lex fori

P’s home + accessibility + injury

Lex fori

P’s “most extensive injuries”

Lex fori

but P may request

but D may request

Lex fori

ILA

ILI
Choice-of-Court and Choice-of-Law Agreements

Post-dispute agreements: No problem

Pre-dispute Agreements

- Should be subject to strict scrutiny.

A pre-dispute C–o–C agreement should be enforced only if:
  - (a) it is freely negotiated, expressed in writing, and clearly covers non-contractual obligations;
  - (b) the 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 PIL rules of the forum state, i.e. the state where the action is filed.

A pre-dispute C–o–L agreement should be subject to the similar requirements, plus the *ordre public* exception.
Structure of Resolution

I. PRELIMINARIES AND GENERAL PRINCIPLES

- Art. 1. Definitions
- Art. 2. Scope
- Art. 3. The “Holistic Principle” (One action, one law for all injuries)
- Art. 4. Localization and other factual determinations

I. JURISDICTION

- Art. 5. Jurisdiction
- Art. 6. Choice-of-court agreements

III. APPLICABLE LAW

- Art. 7. Applicable law
- Art. 8. Choice-of-law agreements

IV. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

- Art. 9. Recognition and enforcement of judgments
Thank you for listening

Ready for your questions and comments