



# **Injuries to Rights of Personality** **THROUGH THE INTERNET:**

**Jurisdiction, Applicable Law,  
Recognition of Foreign Judgments**



# Institut de Droit international

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# The Tensions

**“Conflicts  
on steroids”**

## 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**

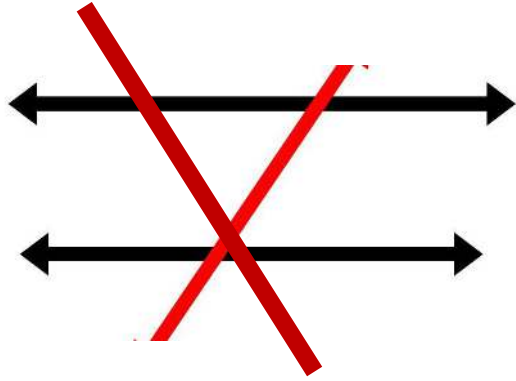
**Efficiency**

**Evenhandedness to parties**

**Treat them as equally as possible and appropriate**



# Simplicity and Efficiency



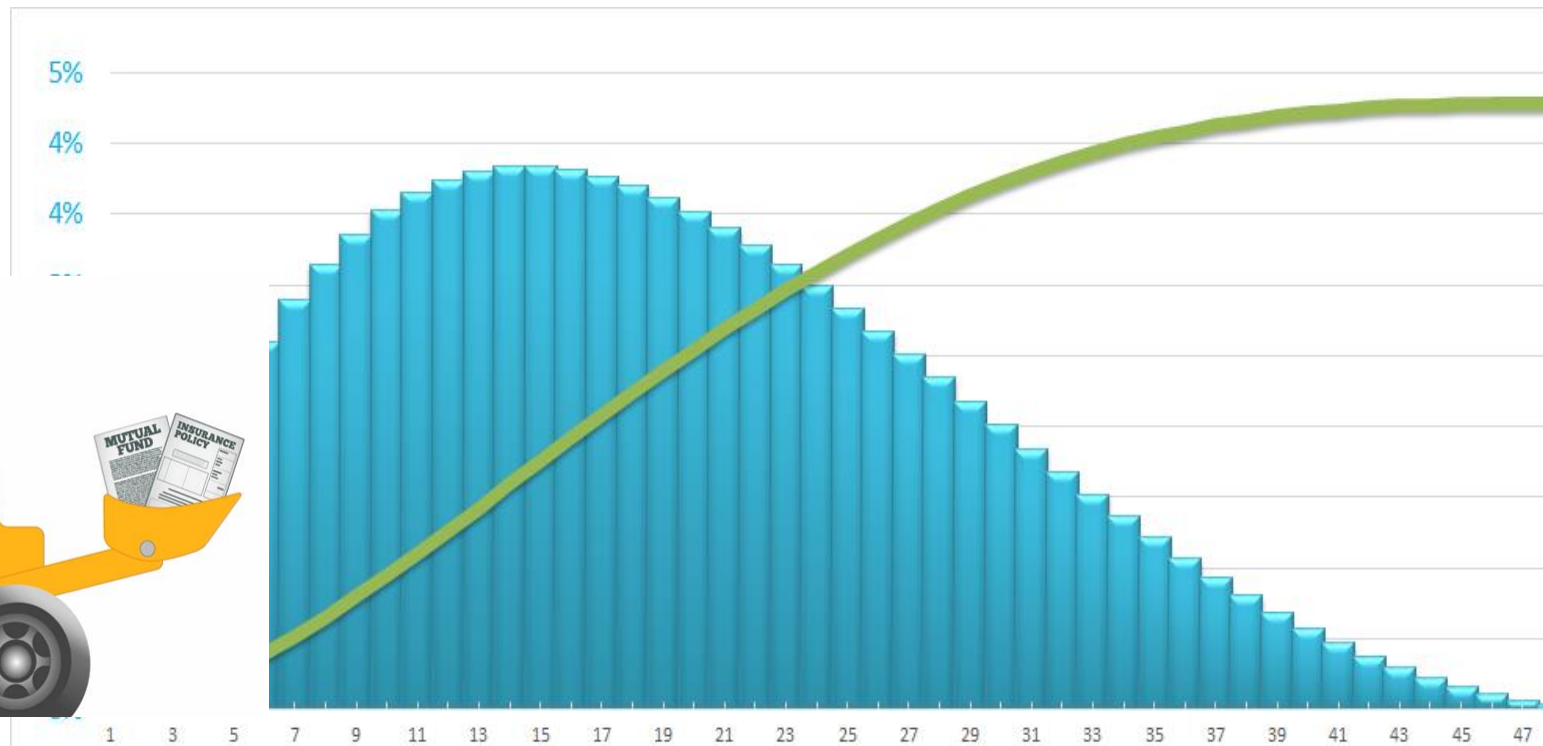
- ▶ (1) Preventing parallel (or subsequent) litigation, once the plaintiff files the initial action;
- ▶ (2) Rejecting the “**mosaic principle**” and adopting the “holistic principle,” which allows the plaintiff to sue in a single state and, if successful, obtain relief for injuries suffered in all states;



# Simplicity and Efficiency, Cont'd

- ▶ (3) Providing that, in all cases, the internal law of the forum state (the *lex fori*) will be the default law. *Lex fori*
  - 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);
- ▶ (4) 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
- ▶ (5) 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.**

# A Front-Loaded System



- 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.

# Accommodation--The Balance

Treat Ps and Ds as equally as possible and appropriate

- ▶ 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.

Plaintiff

- ▶ Two are D-connected:

D's home  
state

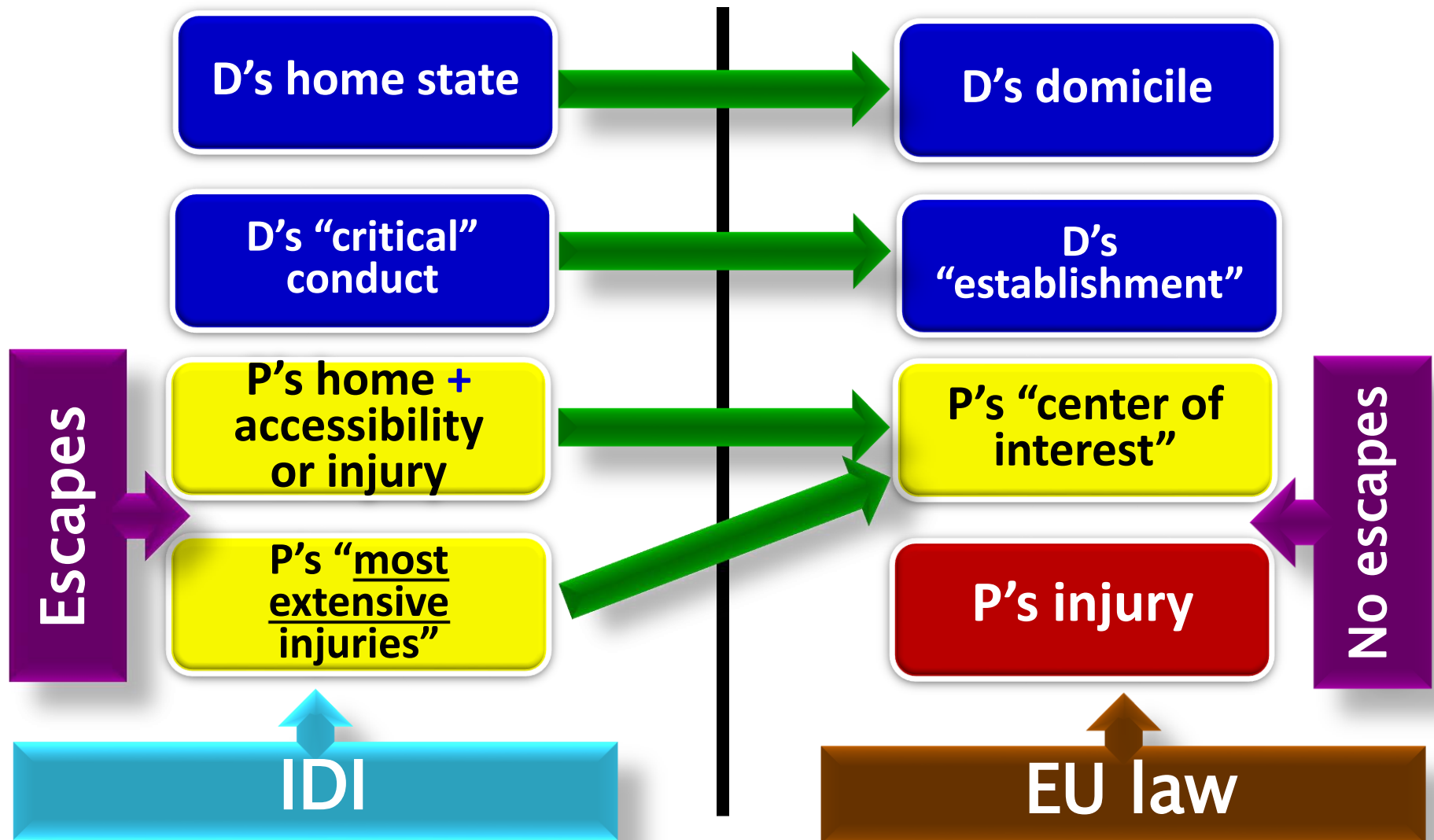
D's  
"critical"  
conduct

- ▶ If P sues there, D gets no escape from jurisdiction and may not use FNC doctrine.
- ▶ *Lex fori* governs; no escape.

Defendant

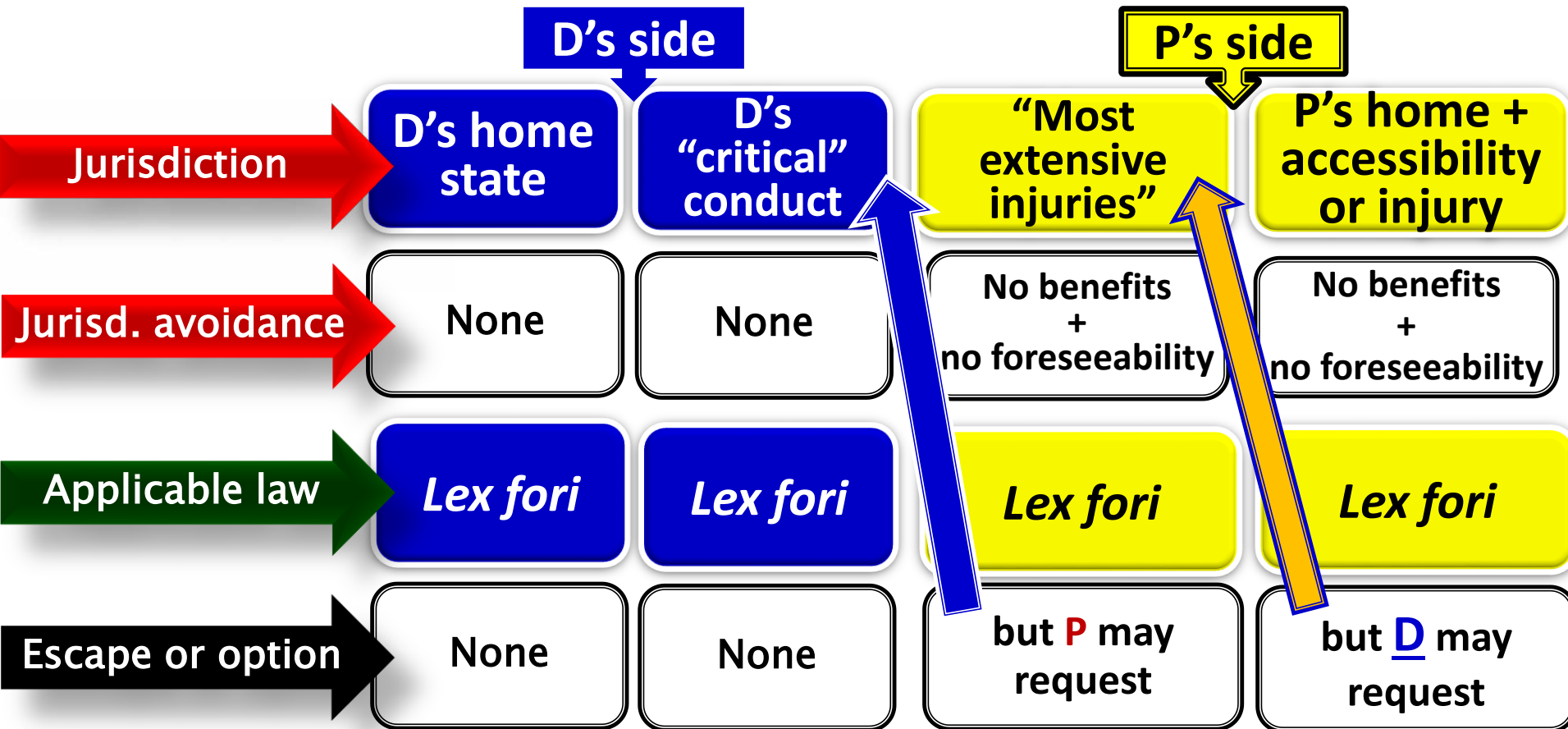


# Jurisdictional Bases: Comparison with EU Law



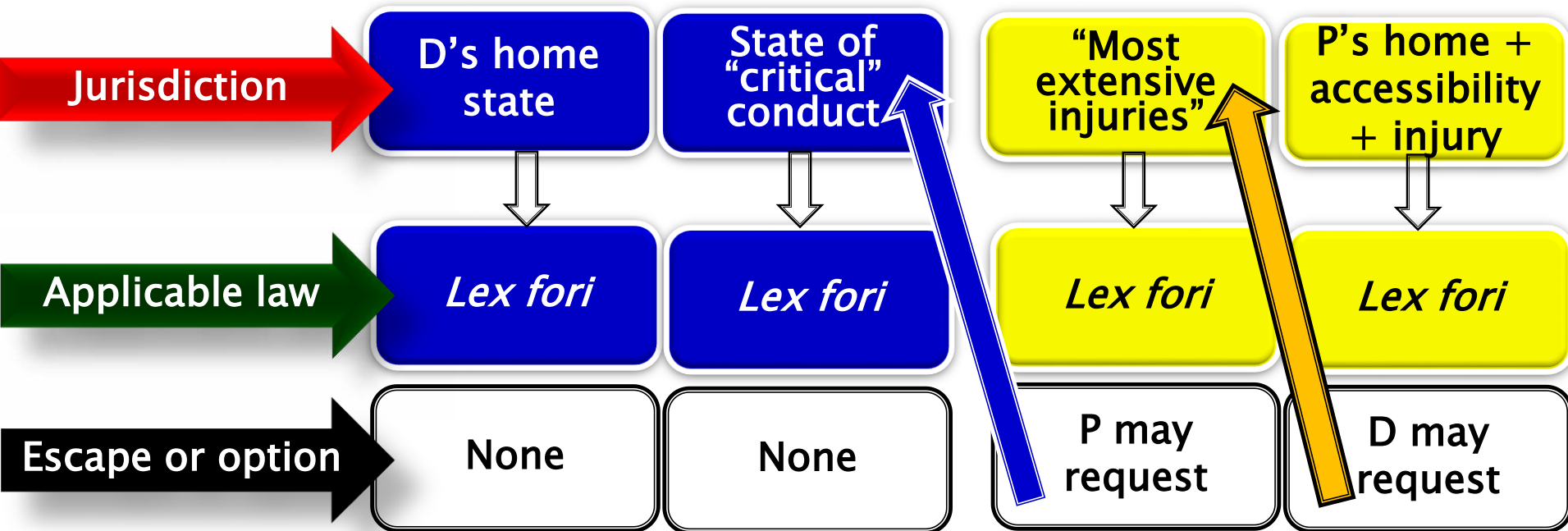
# Plaintiff's options and their outcomes

(if there is no choice-of-court or choice-of-law agreement)



# 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"

D's home  
state

State of  
"critical"  
conduct

Jurisdiction avoidance

NONE

- ▶ The defendant cannot complain, even under American law.

Applicable law

The *lex fori*. No exceptions

### 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.



“Most  
extensive  
injuries”

# Suit in the state of “the most extensive injurious effects”

“Most  
extensive  
injuries”

## Jurisdiction avoidance



▶ 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

Applicable law



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.



“Most  
extensive  
injuries”

Suit in the state of

“Most  
extensive  
injuries”

“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.

*lex loci  
delicti*

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.

# Suit in the plaintiff's "home state +"

P's home +  
accessibility  
or injury

**Jurisdiction avoidance**

P's home +  
accessibility  
or injury



- 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**

**Applicable law**



**The *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 +"

P's home +  
accessibility  
or injury

P's home +  
accessibility  
or injury

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.

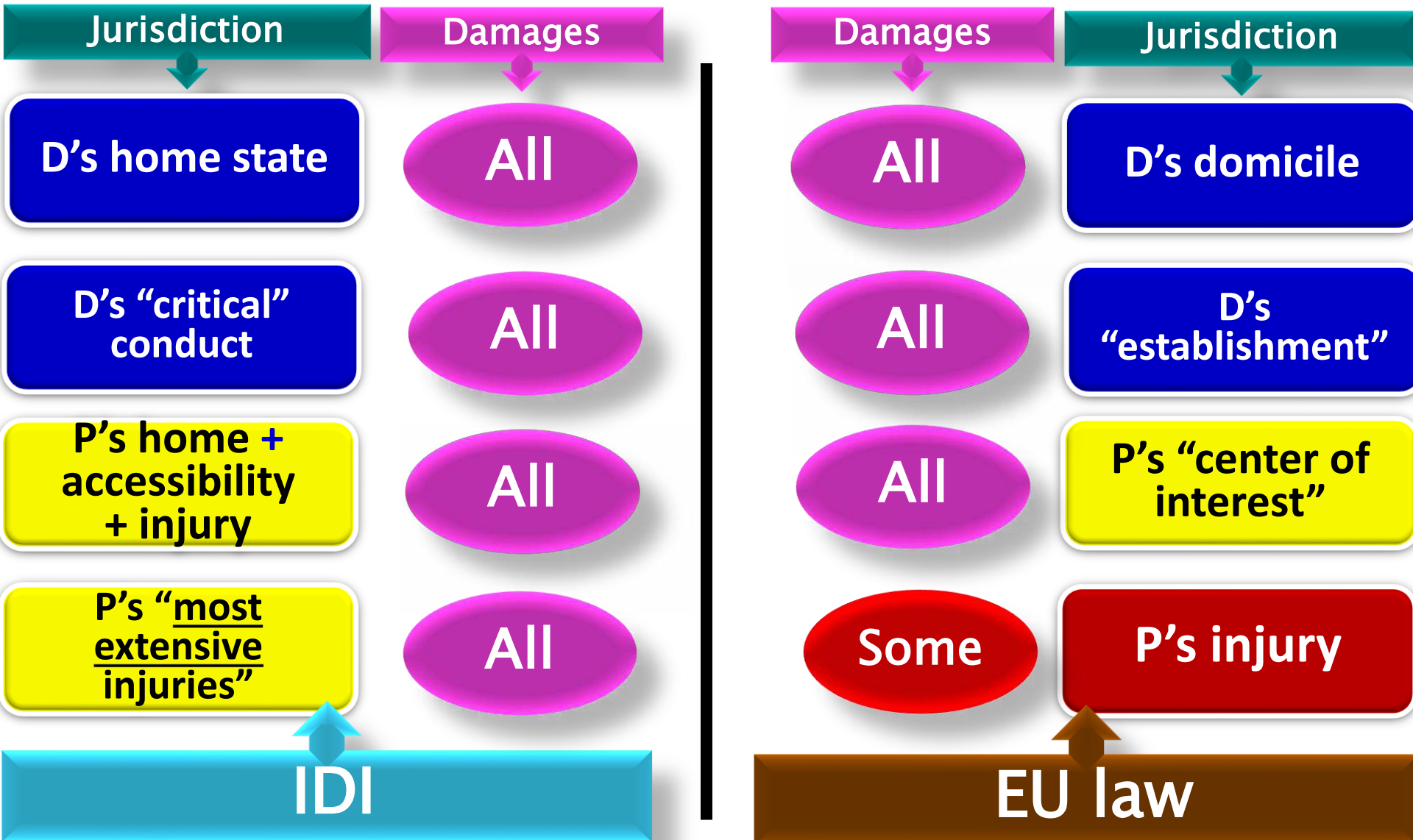
*lex loci  
damni*

Is this unfair?

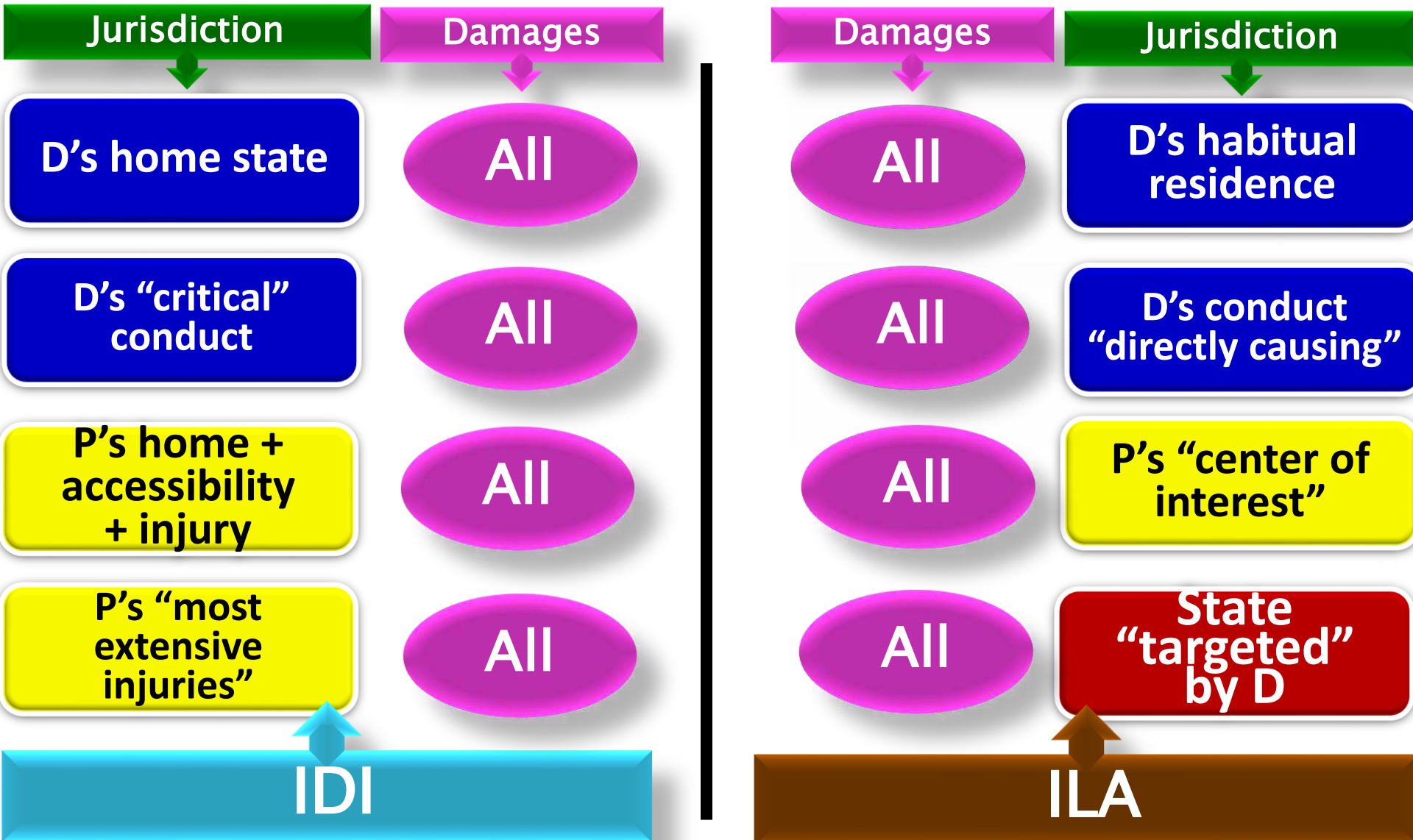
- No.
- P gets the advantage of litigating at home; and
- D gets a more favorable substantive law.



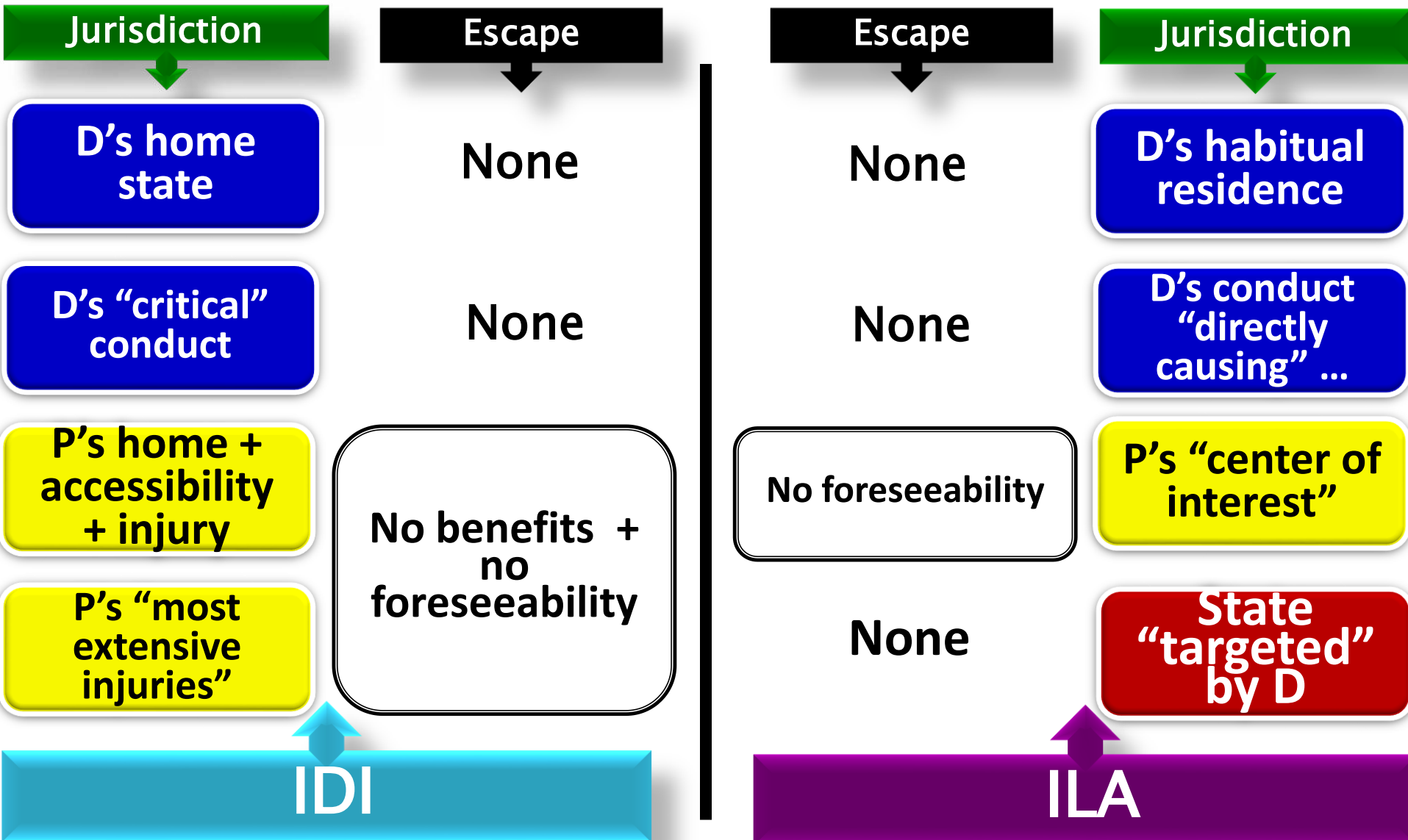
# Jurisdictional Bases and Damages: Comparison with EU Law



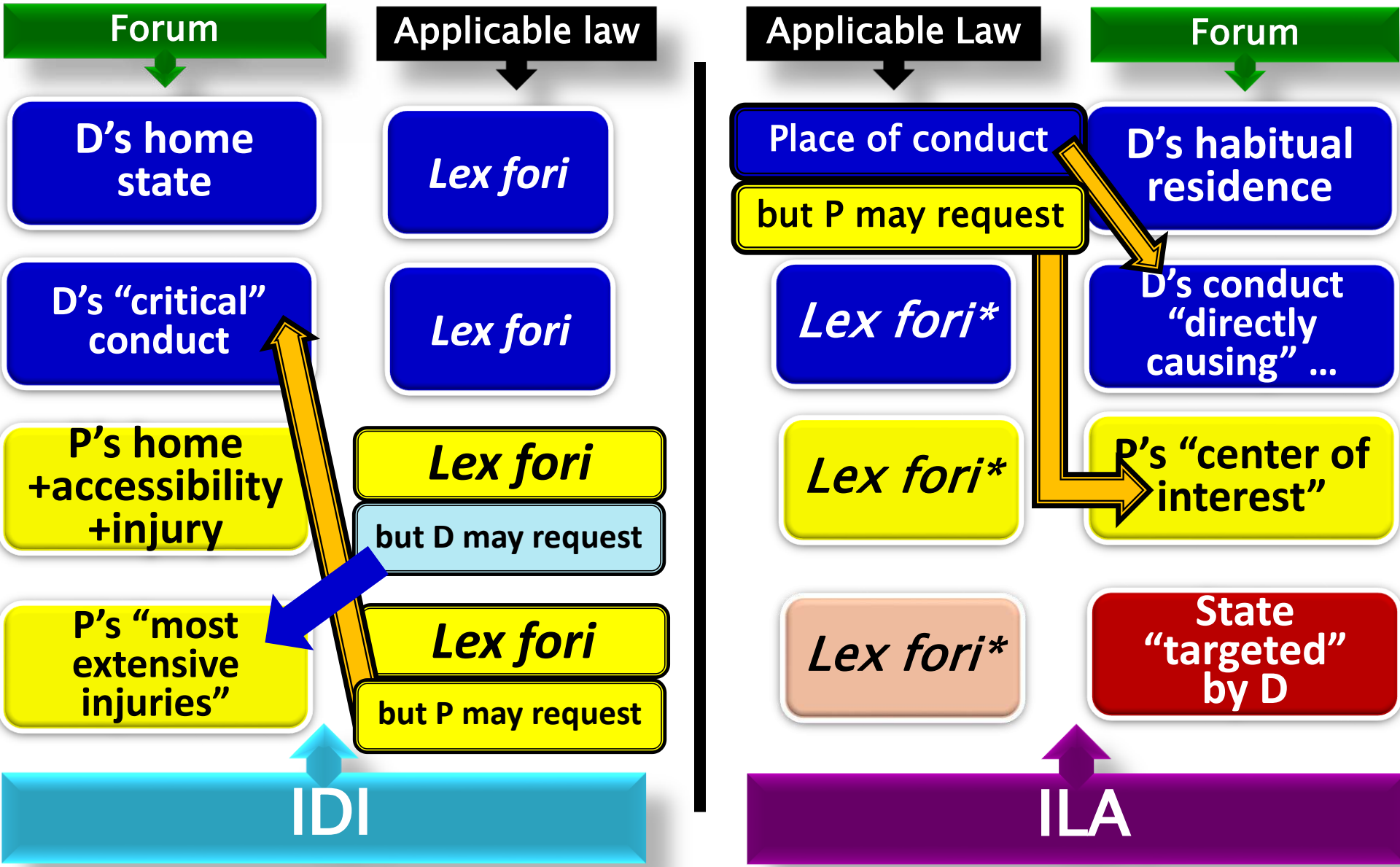
# Jurisdictional Bases and Damages: Comparison with ILA Project



# Jurisdictional Bases and Escapes: Comparison with ILA Project



# Applicable Law: Comparison with ILA Project





# Choice-of-Court and Choice-of-Law Agreements

Post-dispute agreements: No problem

Pre-dispute Agreements

- ▶ Should be subject to strict scrutiny.

Choice of Court

- ▶ 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.

Choice of Law

- ▶ 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
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**THANK  
YOU**

**FOR LISTENING**

**Ready for your questions  
and comments**