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PROTECTION OF PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW

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GUIDELINES ON PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW (‘LISBON GUIDELINES’) AND COMMENTARY THERE TO

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I. INTRODUCTION

1. In accordance with the mandate conferred by the International Law Association ('ILA'), the *Committee on the Protection of Privacy in Private International and Procedural Law* ('the Committee') focussed on the promotion of international co-operation and the contribution to predictability on issues of jurisdiction, applicable law, and circulation of judgments in privacy (including defamation) matters, taking into account, *i.a.*, questions of fundamental rights.

2. The Committee comprised experts from Australia, Austria, Belgium, Brazil, Croatia, France, Germany, Italy, Japan, the Republic of Korea, Luxembourg, Portugal, Spain, the United Kingdom, and the United States of America.¹

3. The Committee's resolution was submitted for adoption by the ILA at the 80th ILA Biennial Conference, convened in Lisbon (Portugal) in 2022.

A – SCOPE AND OBJECTIVES OF THE COMMITTEE

4. Ensuring effective rights to privacy has become a key issue both at the regional and international level. By reason of the remarkable and unprecedented impact brought forth by the digital age on the human and societal environments, traditional expectations for the protection of one's privacy have recently undergone fundamental changes. As a result of such innovations and of the virtually limitless range of contexts in which they operate, the dynamics and the dimension of the potential intrusions into one's personal life have been significantly transformed, bringing forth new challenges for legislators, courts, legal counsels, and – last but not least – citizens.

5. A new understanding and shaping of the right to privacy are currently being forged, giving rise to a series of questions: exploring private international and procedural law issues is of utmost significance, and recourse to general rules on torts and contracts may not necessarily provide an adequate and satisfactory solution. The *Committee on the Protection of Privacy in Private International and Procedural Law* was designed to analyse these issues in cross-border settings and to highlight the emerging questions as well as the current and potential impediments to an effective protection of privacy rights with a view to formulating proposals and solutions.

6. The Committee examined questions of jurisdiction, applicable law, recognition and enforcement of judgments, as well as of legal standing, protection of weak parties, and remedies.

7. The scope of the Committee encompassed the protection of privacy rights in both the traditional framework and the digitalized and cyber world. It encompassed the Internet, including but not limited to social media. In this context, the Committee investigated questions of private enforcement of privacy rights, including their interface with the realm of public enforcement.

¹ The Chair and the Co-Rapporteurs avail themselves of this opportunity to extend their gratitude to all the Committee Members who contributed to the Committee's work by submitting detailed National Reports and by sharing insights that shaped the Committee's discussions and outputs. Furthermore, they wish to convey their appreciation, for their valued comments, to Prof. Linda J. Silberman (New York University), Prof. Ilaria Viarengo (University of Milan), Mr. Peter Trooboff (Covington & Burling LLP), Prof. Gloria González Fuster (Vrije Universiteit Brussel), and Mr. Marco Buzzoni (MPI Luxembourg). A particular acknowledgment goes to Dr. Anna F. Bizer (University of Freiburg) for her assistance in the Committee's research and drafting activity.

8. In this framework, the Committee expanded its analysis to encompass new dimensions. For instance, it tackled the questions arising from the interface of privacy with personal data protection. It also included in its investigation emerging phenomena such as that of Strategic Litigation Against Public Participation ('SLAPP'), which raises novel questions in particular vis-à-vis the interests pursued by the parties, in general, and notably by the plaintiff.

9. The Committee identified concrete and novel issues needing to be addressed, and formulated recommendations and guidelines specifically tailored to the treatment of these matters in a cross border context, with the overarching aim of reinforcing predictability and harmonisation at a global level. While such guidelines have been drafted subsequent to a valuable comparative analysis of the solutions currently in force, both as regards substantive and private international and procedural law, they primarily pursue the objective of providing a long-term outlook and formulate proposals on the emerging questions that to date often lack proper regulation.

10. Overall, in an effort to standardize and rationalize an extensive and expanding area of the law the Committee pursued the objectives of (i) providing a set of principles/framework for regulating privacy in private international and procedural law, and (ii) developing concepts that can constitute a point of reference for legislators, the judiciary and legal counsels. Against this background, the guidelines elaborated by the Committee are based on two basic principles: notably, (i) foreseeability of jurisdiction, and (ii) parallelism between jurisdiction and applicable law.

11. Finally, the Committee has elected to draft guidelines (as opposed to black-letter rules) to promote predictability by setting out broad, and yet specifically tailored, principles of sufficient generality to command widespread assent and to meet the features that characterize the protection of privacy.

B – METHODOLOGY

12. At the outset of the investigation, two questionnaires were circulated among the Committee Members to assist focus the discussion: the first examined the concept of privacy in the national systems, while the second tackled questions of jurisdiction and choice-of-law for violations of personality rights.

13. In response to the questionnaires, twelve National Reports on substantive matters and ten National Reports on issues of jurisdiction and applicable law were submitted.²

a. The legal framework of the protection of privacy and the absence of a common definition of privacy

14. The National Reports submitted in response to the questionnaire on substantive matters indicated that privacy is afforded protection in various forms and contexts. The Reports portrayed privacy law as the result of the interplay between several sources, including international provisions, constitutional rules, State (and federal, where available) legislation in private, criminal,

² The Reports are on file with the Committee.

and administrative law, as well as national and regional case-law. They also demonstrated the strong cultural underpinnings of the protection of privacy in different legal systems.

15. A uniform concept of ‘privacy’ did not emerge from the National Reports. While most national legal systems afford statutory protection to personal privacy,³ they do not correspondingly provide a statutory definition of privacy, leaving the definition and scope of privacy (or ‘private life’) to be determined by case law.

16. With regard to scope and characterization, the definition of privacy appeared quite fluid: for instance, while some legal systems characterize defamation as falling within the scope of privacy, others do not on the grounds that the object of the claims is different (a violation of privacy rights involves the unauthorised dissemination of truthful information whereas defamation entails the dissemination of information which is tainted by some degree of falsehood).

17. Common denominators could nevertheless be identified according to which the right to privacy may be described as one’s right to preserve a (protected) domain around them, which includes all those aspects that could be identified as belonging to them, such as their image, home, body, property, thoughts, feelings, personal experiences, and identity. And while the treatment of privacy rights may differ, *e.g.* because legal systems place a different emphasis on the aspects mentioned above, the Committee took note of the fact that the underlying problems are functionally very similar.

18. From the procedural standpoint, it appeared from the National Reports that legal standing, and notably the question of the legal standing of legal persons in claims for the violation of personality rights, brings forth considerable questions and constitutes a major point of debate.⁴ Furthermore, issues of characterization of the dispute also arise to significantly affect the regulation of cross-border disputes. These issues arise, *e.g.*, in the context of disputes over the liability of Internet service providers and intermediaries, and over the protection of privacy in social networks especially with regard to contractual and non-contractual claims.⁵ Similarly, they also arise as it pertains to the characterization of a dispute as ‘consumer dispute’.⁶

b. The protection of privacy as a meeting point for countervailing constitutional values

19. As the National Reports indicated, the problems that may arise from the absence of a common (or, at least, comparable) definition of privacy rights are further intensified as a result of

³ See, *e.g.*, Sec. 12 and 22 *Bürgerliches Gesetzbuch* (BGB); Art. 9 of the *Code Civil*; *Ley Organica* No 1/1982 of 5 May 1982 (as amended first by *Ley Organica* No 15/1999 of 13 December 1999 and later by Royal decree No 1720/2007).

⁴ Cf, *e.g.*, CJEU, Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766 ruling that Art. 7(2) of Regulation (EU) No 1215/2012 is to be interpreted as meaning that a legal person alleging that its personality rights have been infringed by the publication of information on the internet can, in respect of the entirety of the harm sustained, bring proceedings before the courts of the Member State in which its centre of interests is located; ECtHR, *Saint Paul Luxembourg SA v. Luxembourg* (Application No 26419/10), para. 37: the Court rejected the notion that Art. 8 of the European Convention on Human Rights (ECHR) only protected the ‘homes’ of individuals holding that the term ‘home’ ‘should be interpreted as also including the official office of a company run by an individual, and the official office of a legal person, including subsidiaries and other business premises’.

⁵ *E.g.*, CJEU, Joined Cases C-236/08 to C-238/08, *Google France*, EU:C:2010:159 and Case C-324/09, *L’Oréal v. eBay*, EU:C:2011:474 and their progeny; ECtHR, *Delfi v. Estonia* (Application No 64569/09).

⁶ *E.g.*, CJEU, Case C-498/16, *Maximilian Schrems v. Facebook Ireland Ltd*, EU:C:2018:37.

the difference in the constitutional and cultural underpinnings of privacy rights. Such different notion and understanding entail a different level of scrutiny and balancing in the different legal systems when privacy rights are competing with countervailing interests and notably, the freedom of expression. Consequently, they may significantly affect the litigation of privacy matters at the cross-border level.

20. Overall, the Committee took note of the fact that, in spite of the differences between legal systems, constitutional values play a major role in the legal treatment of privacy. In particular, it should be borne in mind that substantial layers of public law enter into the equation of private enforcement of privacy. This notion and the limits that stem from the impact that such layers of public law forcibly have claims must be taken into due consideration with respect to the jurisdiction as well as with respect to the law applicable to these claims and bear a remarkable impact on the subsequent eligibility of privacy judgments for circulation.⁷

21. Against this background, the Committee proceeded to design a system based, in essence and subject to substantiated exceptions, on the foreseeability of jurisdiction and a principled parallelism between jurisdiction and applicable law. The latter approach has the advantage of saving time and costs, but must be balanced against the danger of *forum shopping*.⁸ In so far, the approach of the Guidelines (Article 7) distinguishes between jurisdiction based on the defendant's conduct (Article 3) and jurisdiction localized at the defendant's habitual residence (Article 4). While a defendant's conduct that is significant for establishing jurisdiction will usually also indicate a sufficiently close connection for choice-of-law purposes, the general jurisdiction at the defendant's habitual residence is rather neutral in this regard and thus complemented by a specific conflicts rule. Moreover, a necessary degree of flexibility is introduced by providing for party autonomy (Article 9) and an escape clause (Art. 8). In order to take into account that personality rights and privacy protection are rooted in constitutional values, Article 11 contains a provision on public policy and overriding mandatory rules.

⁷ On the grounds that the different balancing of such competing values renders the matters of defamation and privacy sensitive according to national legislators and affects not only on the applicable substantive law, but also the eligibility of a judgment on these matters for recognition and enforcement abroad, 'defamation' and 'privacy/unauthorised public disclosure of information relating to private life' are excluded from the scope of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 ('Judgments Convention') adopted in the framework of the Hague Conference on Private International Law (HCCH). See Art. 2(1)(k)-(l) of the Convention, available on the website of HCCH at <www.hcch.net>, under the 'Judgments' section. See further: F.J. Garcimartín Alférez and G. Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report*, The Hague Conference on Private International Law – HCCH Permanent Bureau (2020), paras 60 et seq. See also the Study of April 2018 commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee: P. De Miguel Asensio, M. Requejo Isidro, G. Cuniberti, P. Franzina, C. Heinze, The Hague Conference on Private International Law 'Judgments Convention', available at <[www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL_STU\(2018\)604954_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL_STU(2018)604954_EN.pdf)>, at para. 1.2.4 (last accessed on 2 January 2022).

⁸ See *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states*, Council of Europe study, DGI(2019)04, Rapporteur: E. Prévost.

II. GUIDELINES AND COMMENTARY

PREAMBLE

These Guidelines set forth general principles regarding the private international and procedural aspects of privacy rights.

They do not address every private international and procedural law aspect which may arise in the context of cross border litigation in civil or commercial matters and, rather, they focus on the specific aspects related to cross-border litigation on privacy rights.

They may be used to interpret, supplement or develop rules of private international law and as a model for national, regional or international instruments.

22. Although the protection of privacy has become a compelling issue in cross-border settings, most international and regional instruments on private international law do not address this matter, notably because it raises sensitive issues of conflicting rights and interests.⁹ These Guidelines are aimed at bridging this gap. The Committee is conscious of the underlying conceptual divergences in the national systems in this area of the law. However, these Guidelines shall assist lawmakers and courts to tackle cross-border privacy disputes arising out of both the traditional as well as digital and cyber setting, and to bridge conceptual divergences.

23. The Guidelines aim to encourage the development and refinement of a suitable treatment of the right to privacy in private international and procedural law, with certain innovations. Today, infringements of privacy frequently take place in the cyberspace. Therefore, the scope of the Guidelines transcends the boundaries of traditional privacy to address, also and in particular, cross-border questions of privacy in the Internet era.¹⁰ Against this background, the Committee investigated in particular whether and to which degree the occurrence of privacy rights violations

⁹ For instance, in the context of exclusions from scope, the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters addresses defamation and privacy separately at Art. 2(1)(k)-(l). F.J. Garcimartín Alférez and G. Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report*, The Hague Conference on Private International Law – HCCH Permanent Bureau (2020) identifies, at paras 60-61, the rationale for both exclusions in the fact that judicial decisions in matters of both defamation and privacy are usually based on a delicate balance between constitutional rights, and therefore is a sensitive matter for many States. See also C.M. Mariottini, ‘The Exclusion of Defamation and Privacy from the Scope of the Hague Draft Convention on Judgments’, 19 Yearbook of Private International Law 2017-2018, 475-486. At the regional level, see Art. 1(2)(g) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

¹⁰ With respect to human rights challenges relating to the right to privacy in the digital age, in 2018 the Office of the High Commissioner for Human Rights has indicated that it collected input from relevant stakeholders, including on principles, standards and best practices with regard to the promotion and protection of the right to privacy. See <www.ohchr.org/EN/Issues/DigitalAge/Pages/ReportPrivacy.aspx> (last accessed on 2 January 2022).

in the cyber context shape and potentially modify the traditional definition and articulation of contractual and non-contractual violations and related remedies.¹¹

24. While personal data protection commonly refers to the specific area of the law that regulates ‘the processing of data associated with an identifiable individual’, privacy is identified with ‘the notion of an individual’s space’.¹² Cognizant of the fact that privacy and the processing of personal data are closely adjacent areas of the law,¹³ the Committee has monitored possible areas of interaction and, to this aim, it has included data protection violations in the scope of its activity to the limited extent that they also amount to a violation of privacy rights (see also Article 2(1) *in fine*).

25. One of the objectives of the Guidelines is the acceptance of its principles in present and future private international and procedural law instruments, to advance a substantial degree of specialised harmonization of law on a national, regional, supranational and international level. As such, the Guidelines contribute to increasing predictability and facilitating access to justice.

26. The Guidelines may be used to interpret, supplement and develop rules of private international and procedural law. They may be used to explain, clarify or construe the meaning of existing rules of private international and procedural law. They may be employed for the refinement of existing rules that do not sufficiently or appropriately provide for a particular type of situation. Finally, they may be used in the shaping by legislatures or, where possible, by courts, of new rules where none existed before or effecting fundamental changes to pre-existing ones.¹⁴

¹¹ *Bundesgerichtshof* (BGH), 14 January 2016 – I ZR 65/14, *Neue Juristische Wochenschrift* (NJW) 2016, 3445-3453. See also J. von Hein and A. Bizer, ‘Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law, *International Journal of Data Science Analytics*, Special Issue 2018.

¹² D. Cooper and C. Kuner, *Data Protection Law and International Dispute Resolution*, 382 *Recueil des Cours* (Brill, 2017), at 25. On the history, policies, and future of transborder data flow regulation see esp. C. Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, 2013). See also the Modernised Convention for the Protection of Individuals with regard to the Processing of Personal Data (Convention 108) adopted in the framework of the Council of Europe in 1981 and ‘modernised’ in May 2018 (CM/Inf(2018)15-final). Convention 108 remains, to date, the only legally binding international instrument in the data protection field. It applies to all data processing carried out by both the private and public sectors.

¹³ The link between privacy and data protection rights was highlighted, i.a., by the **French Conseil Constitutionnel** in 2004 (Decision No 2004-499 DC of 29 July 2004), and by the European Court of Human Rights which consistently stated that the protection of personal data is of fundamental importance to a person’s enjoyment of their right to respect for private and family life (see *MS v. Sweden* [GC], Application No 20837/92, 1997, para. 41 and *S. and Marper v. the United Kingdom* [GC], Application Nos 30562/04 and 30566/04, 2008, para. 41). Along these lines, in Opinion 1/2008 on data protection issues related to search engines the ‘Article 29 Data Protection Working Party’, set up under Article 29 of Directive 95/46/EC, underscored the link between the right to personal data and identity as selfhood when it noted that: ‘The extensive collection and storage of search histories of individuals in a directly or indirectly identifiable form invokes the protection under Art. 8 of the European Charter of Fundamental Rights (WP 148 of 4.4.2008, at 7). An individual’s search history contains a footprint of that person’s interests, relations, and intentions. These data can be subsequently used both for commercial purposes and as a result of requests and fishing operations and/or data mining by law enforcement authorities or national security services’.¹³ In **Spain** courts have acknowledged the connection between privacy and personal data rights, but have gone further, providing a more detailed analysis of the role played by data protection. They have labeled data protection as a hybrid product that, on the one hand, guarantees other fundamental rights, particularly the right to honour and to privacy; and, on the other hand, establishes an independent right to protect individuals from the threats derived from new technologies (*Sentencia del Tribunal Constitucional* – STC 254/1993).

¹⁴ Similarly, see the Preamble to the Hague Principles on Choice of Law in International Commercial Contracts, available at <www.hccch.net> under ‘Conventions and other instruments’, paras 2 and 3.

27. The Guidelines do not have as their purpose to provide a rigid codification of the protection of privacy in private international and procedural law. To the contrary, they should be regarded both as an illustration of how a comprehensive private international and procedural law regime over privacy may be constructed and as a guide to ‘best practices’ in establishing and refining such a regime. Against this background, the use of compulsory language in the Guidelines (such as the imperative ‘shall’) is to be construed as an expression of such best practices and not as embodying a mandatory provision.¹⁵

28. The Guidelines do not have as their purpose to change the substantive law which governs matters of privacy, including the protection of personal data. Accordingly, for instance, the applicable law shall remain decisive as to whether privacy rights are accorded to a legal entity.

A – GENERAL PROVISIONS

Article 1

Scope

(1) These Guidelines apply to civil claims arising out of the actual or threatened violation of privacy rights in cross-border cases. They encompass compensatory and injunctive relief as well as provisional measures.

(2) These Guidelines apply to both non-contractual and contractual claims.

(3) The following matters are excluded from the scope of these Guidelines:

- (a) claims arising from the exercise of public authority made by or against governmental entities and agents;
- (b) intellectual property rights;
- (c) trade secrets.

29. The scope of the Guidelines is defined by reference to the underlying subject matter of the claims as opposed to by reference to causes of action. This solution is designed to ensure that a claim is characterised in a manner that is independent from a particular legal system.

30. **Article 1(1)** indicates that the Guidelines apply to the protection of privacy rights as broadly defined in Article 2. It further clarifies that the scope of the Guidelines is confined in two ways: the Guidelines apply only to civil claims, and only to cross-border cases.

31. The indication that the Guidelines apply to civil claims is intended to exclude from scope claims related to a situation where the State (including a government, a governmental agency or any person acting for a State) acted in its sovereign capacity (*acta iure imperii*). In the Committee there was consensus that the concept of civil claims is to be defined autonomously and that, to

¹⁵ For a comparison, see the text of the Hague Principles on Choice of Law in International Commercial Contracts.

assess whether a claim is ‘civil’ for the purposes of the Guidelines, it is necessary to identify the legal relationship between the parties to the dispute, and to examine the basis and the rules governing the action brought. Provided a public authority did not act in its sovereign capacity (in accordance with the criteria indicated above), the claim qualifies as ‘civil’ and falls within the scope of the Guidelines.¹⁶

32. As a result of the confinement of the scope to civil claims, both enforcement actions by public authorities and lawsuits against public authorities are excluded from scope, provided such authorities are acting in the exercise of their public powers (see also Article 1(3)(a)). By contrast, the enforcement of public values and interests by private entities is included in the scope of these Guidelines. Any limitations under public international law (such as immunities) remain unaffected.

33. The delimitation of the scope to civil claims is common in private international law instruments and is meant to overcome the discrepancies between national laws – and, in particular, to ensure that criminal proceedings, as well as constitutional, administrative and tax related matters are excluded from scope.¹⁷ However, this does not entail that claims characterized by preliminary (or incidental) issues (such as the permission of a processing activity by a data protection authority) are excluded from the scope of the Guidelines.

34. Private international law instruments often identify their scope making use of the term ‘civil and commercial’ or ‘civil or commercial’ (accompanied by both a set of autonomous definitions and a list of exclusions from scope). The inclusion of ‘and/or commercial’ is usually also meant to emphasize that the goal of the instrument is linked to facilitating cross-border business dealings. As becomes apparent by the joint reading of Article 1(1)-(2), the focus of the Committee’s activity is on non-contractual and contractual claims brought on the grounds of an alleged violation of privacy rights. Accordingly, commercial claims are included as civil claims in the scope of the Guidelines.

35. Criminal law is excluded from the notion of civil claims. However, since the focus of the Guidelines is on the nature of the cause of action rather than the type of court where the claim is brought, compensatory civil claims brought in conjunction with, or within the framework of, criminal proceedings fall within the scope of the Guidelines. Assuming the claim may be characterized as ‘civil’, the Guidelines are meant to apply regardless of the nature of the court.

¹⁶ With regard to the nature of the claim, significant questions of characterization may arise. See BGH, NJW, 1979, 1101, where the Court rejected a lawsuit for defamation brought by the Official Church of Scientology against the head of Scotland Yard. See, on the other hand, BGH, 25 October 2016 – VI ZR 678/15 qualifying as ‘civil’ the claim for the violation of personal rights brought by the wife of the retired racing driver Michael Schumacher against the website of a Swiss State-owned broadcaster. Furthermore, in this context, the question arises as to whether the defamation lawsuits filed in response to President Trump’s activity from his Twitter account should be characterized as civil or as covered by the sovereign immunity exception. While such claims at present are interstate and intrastate, they may be pictured as cross-border and provide a useful example of characterization and defamation via social media for the purposes of the commentary to this article. In this respect, see B. Hess, *The Private-Public Divide in International Dispute Resolution*, 388 *Recueil des Cours* (Brill, 2018), at 108 and esp. fn 195 stating that Mr. Trump’s tweets are/were part of the official communication of the U.S. President. Thus, they qualify as ‘public’ acts performed with the authority of the U.S. President. Consequently, individuals targeted by those tweets cannot institute litigation against Mr. Trump based on their ‘private’ nature.

¹⁷ On the one hand, some civil law jurisdictions consider commercial matters as a sub-category of civil matters, whereas others regard them as mutually exclusive categories. On the other hand, in common law countries the term ‘civil law’ is used to distinguish civil from criminal proceedings, and constitutional, administrative and tax related matters fall within the category of ‘civil law’. See B. Hess and C. Oro Martinez, ‘Civil and Commercial Matters’, in *Encyclopedia of Private International Law* (E. Elgar, 2017), 347.

This entails that the Guidelines apply, for instance, regardless of whether the action is brought before a civil, criminal, or administrative court.

36. With regard to the inclusion in the scope of the Guidelines of cross-border cases only, such limitation is meant to exclude from scope purely domestic cases. The cross-border requisite should be interpreted broadly and as including all those cases that have a cross-border element, and not only those cases where the parties have their habitual residence in different States. For this reason, Article 2(4) of the Guidelines provides an autonomous definition of the term ‘cross border cases’.

37. In consideration of the importance of – where possible – averting (rather than providing redress for) the violation of privacy rights, pursuant to Article 1(1) the scope of the Guidelines is extended to encompass both actual and threatened violations of privacy rights. During the discussions within the Committee, it was indicated that ‘threatened’ should be construed as ‘prospective’.

38. Against this backdrop, pursuant to Article 1(1) the Guidelines apply to compensatory damages, as well as injunctive relief and provisional measures. As also epitomised at Article 6, a standalone remedy or in addition to compensatory relief, injunctions are of crucial importance in the protection of privacy rights since, by ordering the defendant to cease a specified act or behaviour and/or desist from it, they contribute to the preservation of the status quo or to the prevention of a threatened violation. Analogous considerations apply with respect to the inclusion in the scope of the Guidelines of provisional measures.

39. Pursuant to **Article 1(2)** the Guidelines apply to both non-contractual and contractual claims, in the traditional as well as in the digital and cyber framework. In fact, the Guidelines are primarily meant to cover tortious violations of privacy rights. However, they are also meant to cover violations arising in the context of contractual relations, especially between social media providers and users. On the one hand, questions of legal standing, especially with respect to non-contractual claims (respectively, between users; between users and non-users; between users and Internet/social media providers; between non-users (or potential users) and Internet/social media providers), are of particular relevance.¹⁸ On the other hand, contractual issues pertain, in particular, to the relationship between Internet providers and users: in this context, questions of party autonomy and limits thereto are compelling, and choice of court agreements are specifically addressed by the Guidelines (see Article 5).

40. By providing that claims made by, or the liability of, administrative authorities acting in the exercise of their public powers are excluded from the scope of the Guidelines, **Article 1(3)(a)** reinforces and clarifies the exclusion, provided at paragraph 1 of the same provision, of any claim other than civil claims from the scope of the Guidelines.

¹⁸ This is evidenced, for instance, by the litigation on collective redress and data protection rights: CJEU, Case C-40/17, *Fashion ID*, EU:C:2019:629; Case C-498/16, *Maximilian Schrems v. Facebook Ireland Ltd*, EU:C:2018:37, on the liability, for the processing of personal data, of the administrator fan page hosted on a social network and the concept of controller’s responsibility: CJEU, Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*, EU:C:2018:388; Case C-40/17, *Fashion ID*, EU:C:2019:629; on the unauthorised collection of data from non-users through the use of so-called ‘datr’ cookies and social plug-ins: see *Nederlandstalige Rechtbank van Eerste Aanleg Brussel*, 9 November 2015, *Debeuckelaere*, 15/57/C. Id., 16 February 2018, 2016/153/A; as well as on the ‘find friends’ feature used by Facebook to automatically generate invitations to all the contacts of a user without obtaining the recipients’ (potential-users) consent: BGH, 14 January 2016 – I ZR 65/14. NJW 2016, 3445-3453. See also J. von Hein and A. Bizer, ‘Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law, International Journal of Data Science Analytics, Special Issue 2018.

41. Personality rights and intellectual property rights are linked by an inherent contiguity. Such contiguity stems from the fact that both categories of rights protect intangible property and both contemplate a form of appropriation of one's personality. Since intellectual property rights are customarily registered in national registers, they are governed by the principle of territoriality. Consequently, **Article (1)(3)(b)** excludes registered rights from the scope of the Guidelines.¹⁹ In fact, personality rights such as privacy, while linked to the person (and to their centre of interest), are not registered. Therefore, territoriality does not provide a suitable connecting factor for the protection of these rights.²⁰

42. Finally, **Article (1)(3)(c)** excludes trade secrets from the scope of the Guidelines. Trade secrets are a subset of confidential information. However, they are closely intertwined to the effective protection of a company's intellectual assets. In fact, a trade secret is information that (i) is not generally known to the public; (ii) confers economic benefit on its holder precisely because the information is not publicly known; and (iii) the secrecy of which the holder makes efforts to maintain.²¹ In light of their specific structure and narrowly tailored objectives, Article (1)(3)(c) excludes trade secrets from the scope of the Guidelines.

43. The Committee pondered whether to also expressly comprise unfair competition in the catalogue of exclusions from scope. Cognizant of the fact that unfair competition claims may overlap with privacy claims (as is the case, for instance, with commercial disparagement) and that the solutions provided by these Guidelines may be applicable also to those situations, the Committee ultimately chose not to mark an express exclusion of unfair competition from the scope of the Guidelines.

¹⁹ See Resolution 6/2020 of the Committee on Intellectual Property and Private International Law available adopted at the 79th Conference of the International Law Association, held in Kyoto, Japan, November 29 – December 13, 2020: The Guidelines have been published - with extended commentary by Prof. Toshiyuki Kono, Prof. Pedro de Miguel Asensio and Prof. Axel Metzger - as a special issue of the Open Access journal JIPITEC: <www.jipitec.eu/issues/jipitec-12-1-2021> (last accessed on 2 January 2022). See, also, Third Committee Report (2016), Arts 1-2 of the Guidelines, outlining the scope of the Committee and defining intellectual property rights as copyright and related rights, patent, utility model, plant breeder's right, industrial design, layout-design (topography) of integrated circuits, trademark, geographical indication and similar rights. For a comment underscoring the different nature of intellectual property rights from personality rights, see *ivi*, p. 11. On the core distinction between personality and intellectual property rights see also CJEU, Case C-523/10, *Wintersteiger*, EU:C:2012:220, paras 24-25 (citing AG Cruz Villalón's Opinion in *eDate Advertising*, Joined Cases C-509/09 and C-161/10, EU:C:2011:192, para. 20, observing that, contrary to personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory) and para. 27. See also CJEU, Case C-170/12, *Pinckney*, EU:C:2013:635, paras 36-37.

²⁰ On the mosaic principle see *infra* at para. 93.

²¹ See, e.g., Art. 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), *Section 7: 'Protection of Undisclosed Information'*. Similarly, see the United States Economic Espionage Act of 1996 (18 U.S.C. § 1839(3)(A),(B) (1996)), according to which '(3) the term 'trade secret' means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information'.

Article 2

Definitions

(1) For the purposes of these Guidelines, the notion of privacy refers to a person's rights to:

- (a) image and identity;
- (b) the seclusion of personal space;
- (c) reputation;
- (d) the confidentiality of personal communications.

The processing of personal data falls in the scope of these Guidelines only insofar as a violation of the rights arising therefrom also leads to a violation of the rights identified in the first sentence of this paragraph.

(2) For the purposes of these Guidelines, the term 'person' includes natural persons, legal persons and unincorporated bodies, insofar as privacy rights are accorded to them.

(3) For the purposes of these Guidelines, 'social media' / 'platforms' are websites and applications that enable users to create and share content or to participate in social networking.

(4) For the purposes of these Guidelines, cross-border cases are cases which have connections with more than one State.

(5) Where a State comprises several territorial units, each of which has its own rules of law in respect of violations of privacy, each territorial unit should be considered a State for the purposes of identifying the law applicable under these Guidelines. However, these Guidelines are not intended to apply to conflicts solely between the laws of a State's different territorial units where such units have their own rules of law in respect of violations of privacy.

(6) The application of the law of any State specified by these Guidelines means the application of the rules of law in force in that State other than its rules of private international law.

(7) For the purposes of these Guidelines, remedies include but are not limited to:
(a) damages; (b) injunctive relief. Negative declaratory actions are excluded from the means of redress available pursuant to these Guidelines.

(8) For the purposes of these Guidelines, the habitual residence of a corporation includes:

- (a) the State of the place of incorporation;
- (b) the State of the principal place of business.

The habitual residence of a corporation includes a State other than those under subparagraphs (a) or (b) with which the corporation has essentially equivalent contacts.

(9) For the purposes of these Guidelines, a consumer is a natural person acting primarily for personal, family or household purposes.

44. **Article 2** aims to provide clarification in respect of certain terms used in the Guidelines and to avoid reference to national law or other instruments in the interpretation of such terms, to the benefit of predictability and legal certainty.

45. A uniform concept of ‘privacy’ did not emerge from the National Reports submitted by Committee members.²² Absent a common concept of privacy,²³ the provision at **Article 2(1)** endorses an open approach and puts forth an autonomous and comprehensive definition of privacy which embraces both the understanding, found in the United States, of privacy as a means to protect liberty and primarily on the protection against intrusion in one’s private space,²⁴ and the broader concept of privacy, which is characteristic of the ‘holistic’ continental legal systems and identifies privacy as a means to protect one’s dignity and personhood.²⁵ Privacy is also derived from the protection of private and family life in international human rights instruments.

²² The National Reports referred to in this document are on file with the Committee.

²³ See J.Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’, 113 Yale Law Journ. 1151 (2004). See also the ‘Summary of the Human Rights Council panel discussion on the right to privacy in the digital age’ in the Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 19 December 2014, at 6. See, finally: D.J. Solove, ‘Conceptualizing Privacy’, 90 Cal. Law Rev. 1087 (2002); Id., ‘I’ve Got Nothing to Hide’ and Other Misunderstandings of Privacy’, 44 San Diego Law Rev. 745 (2007).

²⁴ Although privacy is not protected by name in the Constitution of the **United States**, the U.S. Supreme Court has interpreted many of the amendments constituting the Bill of Rights to protect various elements of privacy. These include an individual’s right to be free from unreasonable searches and seizures by the government (*Katz v. United States*, 389 U.S. 347 (1967)); the right to make decisions about issues involving ‘fundamental’ individual liberty interests such as contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965)); abortion (*Roe v. Wade*, 410 U.S. 113 (1973)), marriage, pro-creation, child rearing, and sexual intimacy (*Lawrence v. Texas*, 539 U.S. 558 (2003)); the right not to disclose certain information to the government (*Whalen v. Roe*, 429 U.S. 589 (1977)); the right to associate free from government intrusion (*NAACP v. Alabama*, 357 U.S. 449 (1958)); and the right to enjoy one’s own home free from intrusion by the government (*Stanley v. Georgia*, 394 U.S. 557 (1969)), sexually explicit mail (*Rowan v. Post Office*, 397 U.S. 728 (1970)) or radio broadcasts (*Federal Communications Commission v. Pacifica Found*, 438 U.S. 726 (1978)) or others who would disrupt one’s solitude (*Frisby v. Schultz*, 487 U.S. 474 (1988); *Carey v. Brown*, 447 U.S. 455 (1980)).

²⁵ See, e.g., in **Germany**: *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 13, 334 = 7 NJW 1404 (1954); *Bundesverfassungsgerichts* (BVerfG) 119, 1 at para. 70 = 39 IIC 606, para. 70 (2008); see also *Marlene Dietrich*, Bundesgerichtshof 1 Blätter für Zürcherische Rechtsprechung (ZR) 49/97 (1 December 1999); in **France**: *Dumas v. Lifbert*, Cour d’appel (CA) Paris, 25 May 1867, 13 A.P.I.A.L. 247 (1867); CA Paris 8.7.1887, Ann. prop. ind. 1888, 287; *Tribunal de grande instance* (TGI) Seine (réf.) 2.11.1966, JCP 1966, II, 14875; CA Paris 7.6.1988, D. 1988, inf. rap., 224; *Conseil constitutionnel*, judgment No 94-352 DC of 18 January 1995 and judgment 99-416 DC of 23 July 1999; in **Spain** see the joint reading of Arts 10 and 18 of the Constitution and STC 53/1985. Possibly influenced by the European continental approach, Art. 5, X of the Federal Constitution in **Brazil** recognizes the right to private life, intimacy, honour and image as fundamental rights. Similarly, in the **Republic of Korea** the Constitutional Court has recognized privacy as a right which is derived from the right to private life (Art. 17) and the right to dignity and the pursuit of happiness (Art. 10).

46. The provision at Article 2 does not prejudice the question of which rights in fact exist and how these rights are viewed in the legal systems,²⁶ and leaves these issues to the underlying substantive law.

47. The right to image and identity (**Article 2(1)(a)**) includes the right of a person to control the use of the person's name, image, likeness, or other unequivocal aspects of the person's identity, including thoughts, feelings, personal experiences, geo-location information, and biometric data (including fingerprints, face and hand geometry, retina and voice recognition).

48. Notably, the increasing sophistication of facial recognition and other biometric technology is raising remarkable privacy challenges. Biometric privacy is proving to be a current subject of litigation, especially in the form of collective redress: for instance, claims have been brought under Illinois and California law, respectively, against Facebook, Google and others alleging that the companies' face-scanning practices violate Illinois and California's unique biometric privacy law (which prohibits private companies from collecting biometric identifiers, including scans of facial geometry, without obtaining people's written consent).²⁷ Similar complaints have been brought (especially in the employment context) alleging that companies failed to provide notice or obtain consent before collecting individuals' fingerprints.²⁸ Additionally, information collected using cookies (often employed to track individuals' Internet surfing habits and news reading habits for advertising or other marketing purposes) has been found to constitute private or personal information.²⁹

49. The right to image and identity is designed to protect one's legal right to control both the commercial and non-commercial use of one's identity. In this context, the right to control the commercial use of one's identity (so-called 'right of publicity') is an area where the protection of privacy may overlap with that of intellectual property rights (which are excluded from the scope

²⁶ Until fairly recent times, in **English law** there was no general tort of violation of privacy (see, e.g., *Wainwright v. Home Office* [2004] 2 AC 406; *Kaye v. Robertson* [1991] FSR 62). English courts developed and adapted the law of confidentiality and progressively shaped of a novel cause of action, i.e. the misuse of private information, to protect one aspect of invasion of privacy and to comply with the Human Rights Act 1998 (*Campbell v. MGN Limited* [2004] United Kingdom House of Lords (UKHL) 22; *Douglas v. Hello!* (No 3) [2006] Queen's Bench (QB) 125, at para. 53; *A v. B plc* [2003] QB 195 at para. 4). While it was recently ruled that misuse of private information is a civil wrong without any equitable characteristics and may be construed as a tort for jurisdictional purposes, this rule is specifically tailored to apply limited to the context of service of proceedings out of the jurisdiction. *Google Inc. v. Judith Vidal-Hall* [2015] England and Wales Court of Appeal (EWCA) Civ. 311, esp. para. 43. A similar situation occurs in **Canada**, where only recently the Ontario Superior Court decision expanded on the newly created tort claim of 'invasion of privacy' or 'intrusion upon seclusion' (see *Jones v. Tsige*, 2012 Ontario Court of Appeal (ONCA) 32 (Canadian Legal Information Institute - CanLII)) by creating a new tort of 'public disclosure of private facts'. See *Jane Doe 464533 v. N.D.*, 2016 ONSC 541 (CanLII).

²⁷ See *Patel v. Facebook*, 2018 WL 1050154 (N.D. Cal. Feb. 26, 2018); *Joseph Weiss v. Google Inc.*, No 1:16-cv-02870, N.D. Ill., 2017 U.S. Dist. LEXIS 27276; *Rivera v. Google Inc.*, 238 F.Supp.3d 1088 (N.D. Ill. 2017); *Monroy v. Shutterfly Inc.*, No 16-cv-10984 (N.D. Ill. Sept. 15, 2017); *In re Facebook Biometric Information Privacy Litigation*, 185 F.Supp.3d 1155 (N.D. Cal. 2016); *Norberg v. Shutterfly, Inc.*, No 1:15-cv-5351 (N.D. Ill. June 17, 2015); *Martinez et al. v. Snapchat Inc.*, No 2:16-cv-05182 (C.D. Cal.); *Licata v. Facebook, Inc.*, Nos. 3:15-cv-03748, 3:15-cv-03749, and 3:15-cv-03747 (N.D. Cal. 2015).

²⁸ See, e.g., *Baron v. Roundy's Supermarkets, Inc.*, No 17-03588 (N.D. Ill. May 11, 2017).

²⁹ *Google Inc. v. Judith Vidal-Hall* [2015] EWCA Civ. 311. See also *Nederlandstalige Rechtbank van Eerste Aanleg Brussel*, 9 November 2015, *Debeuckelaere*, 15/57/C. Id., 16 February 2018, 2016/153/A.

of these Guidelines according to Article 1(3)(c)).³⁰ In fact, among the legal rights that can be used to protect various aspects of a person's image and personality are those stemming from tort law and data protection law, but also from copyright and trademarks law as well as from advertising standard codes. According to the Committee's approach, the decisive difference lies in the registration of a personality right. These Guidelines only address unregistered rights.³¹

50. The right to the seclusion of personal space (Article 2(1)(b)) focuses, in particular, on the protection from unauthorised intrusions against an individual's personal space and bodily autonomy. 'Seclusion of personal space' also covers intrusions of digital property and space. Private digital space encompasses a person's private space in the cyberspace and electronic area, such as a user's Internet Protocol (IP) or cloud storage space. Governmental intrusions against an individual's personal space and bodily autonomy are in principle excluded from the scope of the Guidelines, provided the State (including a government, a governmental agency or any person acting for a State) acts in its sovereign capacity (*acta iure imperii*) (see *supra*, sub Article 1(1) and 1(3)(a)).

51. The National Reports submitted by Committee members suggest a common definition of defamation (encompassing libel and slander) as any allegation or imputation – characterized by a certain degree of falsehood – of a fact made public that diminishes the reputation of a person to whom the fact is ascribed. While some legal systems characterize defamation and the right to reputation as falling within the scope of privacy, others do not on the grounds that the object of the claims is different (a violation of privacy rights involves the unauthorised dissemination of truthful information whereas defamation entails the dissemination of information which is tainted by some degree of falsehood).³² In keeping with its desire to provide for a comprehensive protection of privacy in private international and procedural law, there was support in the Committee to adopt a broad definition of privacy and include violations to the right to reputation in the scope of the Committee's inquiry (**Article 2(1)(c)**).

52. The right to the confidentiality of personal communications (Article 2(1)(d)) is a fundamental precondition for free flow of ideas and information and for the establishment and existence of a democracy.³³ For the purposes of the Guidelines, such right is included in the notion

³⁰ In this respect see also the Committee on Intellectual Property and Private International Law, Report presented at the Washington Conference (2014), available at <www.ila-hq.org/index.php/publications/order-reports>, at 12 (last accessed on 2 January 2022).

³¹ See *supra*, para. 41.

³² A common feature portrayed by the National Reports of the continental **European States** is the steady reference to honour as being the object of protection of the laws against defamation. While in the **United Kingdom** and in the **United States** defamation is not considered to fall within the scope of privacy, the other National Reports inform that in their jurisdictions defamation is considered as both a civil and a criminal offence against one's privacy. In this framework it is noteworthy that, as relayed by the Committee Member from the United Kingdom, in the UK there is an increasing tendency for defamation disputes to result in claims under data protection law based on the argument that a publication involved an inaccurate processing of personal data. Defamation and data protection claims may even be brought in conjunction, because they are considered to protect different interests: see further *HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v. Elaph Publishing Ltd* [2017] EWCA Civ. 29, at [44]; *The Law Society v. Kordowski* [2011] EWHC 3185 (QB), at [74].

³³ For instance, see for **France** Arts 226-15 and 432-9 of the criminal code and Art. L 33-1 of the Code of postal and electronic communications; for **Germany** Sec. 1 *Grundgesetz* (GG) and Sec. 201 and 202 of the *Strafgesetzbuch* (StGB); Art. 18(3) of the **Spanish Constitution**; Art. 36 of the **Croatian Constitution**; Art. 15 of the **Italian Constitution**; Art. V of the **Brazilian Constitution**; see also Art. 8 of the European Convention on Human Rights.

of privacy and extended to all forms of communication and correspondence, including in electronic form.

53. Article 2(1), second sentence, takes into specific account the relationship of privacy with the processing of personal data, notably in light of the conceptual continuity between the two areas of the law (cf. also *supra*, para. 24). To avoid dispersions and misunderstandings and to efficiently confine the focus of the Guidelines to privacy while also ensuring comprehensiveness, in accordance with Article 2(1), second sentence, the Committee has elected to include in the scope of the Guidelines the unauthorised treatment of personal data only insofar as it also amounts to a violation of privacy rights.³⁴

54. According to **Article 2(2)**, ‘person’ includes ‘natural persons, legal persons and unincorporated bodies, insofar as privacy rights are accorded to them’. Consequently, for the purposes of the Guidelines the term ‘person’ includes legal entities, and not only natural persons. In particular, the notion of ‘person’ includes also legal entities (such as corporations) and entities that may not be legally recognized under applicable law (such as partnerships and non-profit organizations).

55. The Committee noted that domestic laws may diverge as to whether legal persons are assigned privacy rights. As the National Reports demonstrate, while most legal systems guarantee certain personality rights to legal persons (and, in particular, rights protecting the reputation), this issue lacks a uniform approach.³⁵ Nonetheless, the inclusion of legal persons in the notion of ‘person’ for the purposes of the Guidelines is justified on the grounds that the differences in the national laws should be immaterial and should not affect the conceptual provisions on jurisdiction. Namely, the Guidelines do not preclude courts from establishing jurisdiction over claims brought by legal persons for the violation of personality rights but rather, they leave the question to be decided on the merits in accordance with the law applicable to the single case.

56. In particular, the Committee recalled the argument whereby, rather than as an end in itself, personality rights may be understood as instrumental for the effective protection of other fundamental rights. As remarked by Advocate General (AG) *Bobek* of the Court of Justice of the European Union (CJEU) in his Opinion in *Bolagsupplysningen*, the protection of the personality rights of legal persons is instrumental to the realisation of other rights those persons enjoy, such as the right to property, or the freedom to conduct business. In this respect, ‘the violation of a company’s personality rights consisting in harm to their good name and reputation will directly

³⁴ See CJEU, Case C-131/12, *Google Spain SL*, EU:C:2014:317. Similarly, in October 2017 the Full Court of the Supreme Court of **Australia** upheld the decision that Google Inc. was liable for the defamatory content of the hyperlinks and paragraphs in search results on the claimant’s name. *Google Inc. v. Duffy* ([2017] SASFC 130). An analogous matter is pending on appeal before the High Court of Australia in *Trkulja v. Google*, case M88/2017.

³⁵ E.g., in **France**, pursuant to Law 6 January 1978, the protection of one’s privacy is limited to natural persons. *Conseil d’Etat*, 15 February 1991, No 68639, *Paris Church of Scientology*; Id., 22 May 1995, No 151288, *Midi-Pyrénées South PTT Union*. However, the law on defamation protects both legal persons and natural persons, and the right of reply may be exercised by a corporation. Act No 82-652 of 29 July. 1982, s. 6, I, para. 1; L. Dumoulin, ‘Les droits de la personnalité des personnes morales’, 1 *Revue des sociétés* 2006, point 19. In **Spain**, courts have denied a fundamental right to privacy to public legal persons (STC 107/1988, of June 8). Legal persons are afforded protection for their privacy rights in **Croatia** (see the Croatian Constitutional Court U-III – 1558/2000 of February 19, 2004). In **England**, libel and malicious falsehood re construed to protect the reputation and the economic interests of legal entities: see *Tesla Motors Ltd v. BBC* [2013] EWCA Civ. 152; *Marathon Mutual Ltd v. Waters* [2009] EWHC 1931 (QB).

impact their economic rights. Thus, the effective protection of those economic rights (that legal persons certainly enjoy) also requires the protection of their personality rights'.³⁶

57. Furthermore, to date the argument that natural persons – unlike legal persons – should benefit from the protection afforded to weaker parties is not supported, especially with regard to jurisdiction over online violations of personality rights. For instance, from a European perspective, as observed, again, by AG *Bobek* in his Opinion in *Bolagsupplysningen*, 'The Internet, for better or for worse, completely changed the rules of the game: it democratised publication. In the age of private websites, self-posting, blogs, and social networks, natural persons may very easily distribute information concerning any other person, whether they are natural or legal, or public authorities. Within such technical settings, the initial idea that might have governed the early rules on harm caused by defamatory publications, and which assumed that the claimant is likely to be a weak person whereas the defendant is a (professional) publisher, falls entirely to pieces'.³⁷ The same point is reflected in U.S. law, where jurisdiction is not based on concepts such as weaker parties and where, to the contrary, all parties involved are equally protected by constitutional guarantees.

58. **Article 2(3)** provides clarification as concerns the definition of social media and platforms for the purposes of the Guidelines by relying on the commonly and widely adopted notion in accordance to which 'social media' / 'platforms' are websites and applications that enable users to create and share content or to participate in social networking.

59. **Article 2(4)** lays down a notion of 'cross-border cases' that helps clarify the limitation of scope under Article 1(1). Some issues remain, however, open. For instance, is the mere availability of information on the Internet sufficient to satisfy the cross-border requirement? Would the case be construed as cross-border if two persons, habitually residing in Germany, communicate in German via a social media platform: one of them posts defamatory statements against the other, and comments are subsequently posted by another user from another country?³⁸ Is the cross-border requirement satisfied in an action for liability arising from the operation of an Internet site, if both the defendant's whereabouts and the location of the server hosting the Internet site in question are unknown?³⁹

60. **Article 2(5)** defines multi-State legal orders for the purposes of the Guidelines. According to the first sentence of this provision, each territory of a multi-State legal order (e.g. USA, UK, and Canada) is treated like a country for the purposes of identifying the applicable law.⁴⁰ A multi-

³⁶ Case C-194/16, *Bolagsupplysningen*, EU:C:2017:554, at paras 49 and 52 et seq.

³⁷ *Ibid.*, at para. 67. Concurring with AG *Bobek* in the same case, see CJEU, EU:C:2017:766 ruling that Art. 7(2) of Regulation (EU) No 1215/2012 is to be interpreted as meaning that a legal person alleging that its personality rights have been infringed by the publication of information on the Internet can, in respect of the entirety of the harm sustained, bring proceedings before the courts of the Member State in which its centre of interests is located.

³⁸ This was the case in *Sieben Tage in Moscow* decided by the BGH, 29 March 2011 – VIZR 111/10. NJW, 2016, 3445-3453, showing that language plays a considerable role in this context.

³⁹ See, for instance, CJEU, Case C-292/10, *G v. Cornelius de Visser*, EU:C:2012:142 indicating that such occurrence should be sufficient in order to guarantee effective access to justice.

⁴⁰ The solution to apply choice-of-law rules also with regard to States with more than one legal system instead of applying the internal conflict rules mirrors most international instruments on applicable law in the field of torts and contracts, e.g. Art. 25 Rome II Regulation, Art. 22 Rome I Regulation, Art. 12 Hague Convention on the Law Applicable to Products Liability, Art. 12 Hague Convention on the Law Applicable to Traffic Accidents. For further analysis, see F. Eichel, 'References to Non-unified legal systems', in S. Leible (ed), *General Principles of European Private International Law* (Wolters Kluwer, 2016), 275-303.

State legal order is composed of various territories that – at least partly – provide their own set of rules. It is irrelevant whether the law consists of statutory or case law. In consequence, choice-of-law agreements in the sense of Article 5 can point directly to the law of a component of a multi-State legal order. The second sentence of this provision is a familiar disconnection clause clarifying that multi-State legal orders are not required to extend the scope of these Guidelines to conflict of laws within such a state. However, it does not prevent those States from applying the Guidelines to merely internal conflicts as well, if they so wish.

61. **Article 2(6)** addresses the question commonly referred to as *renvoi*. According to the doctrine of *renvoi*, to determine the law applicable to a cross-border situation, the interpreter (court, legal counsel...) must consider the law of another State including the State's private international law rules. As a result of *renvoi*, the interpreter may refer back to the *lex fori* or refer to a third State's law.⁴¹ Article 2(6) excludes *renvoi*: hence, the substantive law of the State whose law is identified as applicable in accordance with these Guidelines is the law that governs the case at hand, to the exclusion of that State's private international law rules.⁴² Allowing *renvoi* would be counterproductive to the objective of these Guidelines of fostering international harmony of decisions by creating internationally unified conflict-of-law rules. For instance, when a court develops a tailor-made solution in an individual atypical case by applying the general escape clause (Article 8), a possible remission by the foreign legal system would contradict the effort to find the closest connection for the case at hand. When choosing the law governing their relationship pursuant to Article 9, the parties usually expect the substantive law of the State whose law they have chosen to be applied: in such case, *renvoi* would undermine the main reasons for parties to agree on the applicable law reduce predictability and legal certainty. For the very rare case that the parties expressly allow *renvoi*, an exception to this Article may be made.⁴³

62. As concerns the types of remedies and relief, **Article 2(7)** further clarifies the statement under Article 1(1) that 'compensatory and injunctive relief as well as provisional measures' fall within the scope of the Guidelines. For the purposes of these Guidelines, remedies include but are not limited to: (a) damages; (b) injunctive relief.

63. Under these Guidelines, the term 'damages' includes compensation for material and non-material losses: namely 'damages' include pecuniary damages for actual losses and moral damages (where afforded in accordance with the law governing the damages).⁴⁴ Punitive damages are not part of the list of remedies put forth at Article 2(7). In this respect, the Committee has taken note

⁴¹ Cf. J. von Hein, *Renvoi in European Private International Law*, in S. Leible (ed), *General Principles of European Private International Law* (Wolters Kluwer, 2016), 227-273.

⁴² The exclusion of the doctrine of *renvoi* is common to almost all the legal systems surveyed by the Committee. Exceptions may be found, subject to further conditions, in **Germany**, **Portugal** and in some **U.S.** states. The exclusion of *renvoi* is in keeping with most international instruments on applicable law (e.g. Art. 20 Rome I Regulation ([2008] OJ L 177/6), Art. 24 Rome II Regulation ([2007] OJ L 199/40), Art. 12 Hague Protocol on the Law Applicable to Maintenance Obligations, Art. 17 Hague Convention on the Law Applicable to Succession). See also M. Sonntag, '*Renvoi*', *Encyclopedia of Private International Law* (E. Elgar, 2017), 1541-1542.

⁴³ Cf. Art. 8 of the Principles on Choice of Law in International Commercial Contracts.

⁴⁴ It emerges from the National Reports that all the jurisdictions surveyed afford pecuniary damages for actual losses suffered as a result of privacy violations. Moral damages against privacy violations are awarded in several jurisdictions (**Brazil**, **Croatia**, **France**, **Italy**, **Spain**) to cover against distress/moral damages; in **Australia**, under the Uni form Defamation Act moral damages are capped: s 35. In **Germany**, they pursue not only the aim of compensating, but also that of gratifying the plaintiff and deterring such future demeanours by the defendant. See *Herrenreiter*, BGH - NJW1958, 82. However, in Germany moral damages do not qualify as punitive damages and they may be awarded only if the detriment is sufficiently serious and if there is no other way to compensate it.

of the fact that the treatment afforded to punitive damages may differ significantly from legal system to legal system.⁴⁵ In light of the non-exhaustive nature of the list, this exclusion is not conclusive and the recourse to such damages is simply left to the law applicable to the case. However, the question of punitive damages has been taken into account in the context of, notably, the recognition and enforcement of foreign judgments (cf *infra*, Article 13).

64. Article 2(7) includes injunctive (including provisional) relief in the remedies available under the Guidelines (cf *infra*, Article 6). This inclusion is supported by the significant role of injunctive (including provisional) relief against violations of privacy, including (but not limited to) for the purposes of granting preventive relief.⁴⁶ For instance, injunctive relief may take the form of orders to rectify or remove offensive or inaccurate information or material. Notably, it can take the form of orders of correction/rectification, removal and block usage of information. In this context it is noteworthy that many reported cases before the English courts concern applications to renew or set aside interim injunctions, often granted initially without notice to the defendant, restraining the publication of private information. Such injunctions may be granted against persons unknown, or against the world.⁴⁷

⁴⁵ With specific regard to punitive damages, the National Reports portray a heterogeneous situation. While in the U.S. courts may award punitive damages for the breach of privacy rights if the defendant's behaviour is so egregious or its resulting cost so high that the court deems it necessary to deter and sanction such behaviour, in continental Europe this option is, in principle, not granted. This is the case, e.g., in **Croatia, France, Italy, and Spain**, where the principle of full compensation is applied and punitive damages are not awarded. Nonetheless, ruling on the recognition and enforcement in Italy of a U.S. judgment that awarded, *i.a.*, punitive damages, the Italian *Corte di Cassazione* held that, alongside the 'preponderant and primary restorative compensatory function' of damages, a 'multifunctional nature is now recognised that is projected into several areas', the main ones being the preventive and punitive ones. On these premises, the Court concluded that the institution of punitive damages 'is therefore not ontologically incompatible with Italian law'. Cass. (plenary session), 5 July 2017 No 16601, in 4 *Rivista di diritto internazionale privato e processuale* (2017). As mentioned *supra*, in **Germany**, moral damages pursue not only the aim of compensating, but also that of gratifying the plaintiff and deterring such future demeanours by the defendant. See *Herrenreiter*, BGH NJW 1958, 82. However, in Germany moral damages do not qualify as punitive damages and they may be awarded only if the detriment is sufficiently serious and if there is no other way to compensate it. In general, under **English law** punitive damages are available in tort claims which involve an unlawful exercise of power by a public official, or where a tortfeasor has intentionally or recklessly profited from their wrongdoing in a way which exceeds the loss suffered by the claimant, or where otherwise authorised by statute. See *Rookes v. Barnard* (No 1) [1964] AC 1129. Either could include defamation cases, although a recent study suggests that punitive damages are (contrary to popular belief) in fact rarely awarded in defamation cases. See J. Goudkamp and E. Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *Oxford Journal of Legal Studies* 90. In English law breach of privacy, on the other hand, is closely related to breach of confidence, which is not a claim in tort but in equity, and there is authority to suggest that punitive damages are not available for such claims: see <www.bailii.org/ew/cases/EWHC/QB/2008/1777.html> (last accessed on 2 January 2022).

⁴⁶ Injunctions to prevent and/or terminate the infringement of privacy rights are commonly available in the civil law jurisdictions: cease and desist orders – along with the other provisional measures and seizures – are available in **Brazil, Belgium, Croatia, France, Germany, Italy, and Spain**. See *Practice Guidance: Interim Non-Disclosure Orders*, issued by the Master of the Rolls, [2012] 1 WLR 1003. 366. **U.S. courts**, on the other hand, appear generally hesitant to issue injunctions and issue them only to avoid irreparable injury or if monetary damages are inadequate. See, e.g., *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992) (the court reluctantly granted injunction because of difficulty of calculating money damages).

⁴⁷ *Venables v. News Group Newspapers* [2001] Fam 430; *X v. Persons Unknown* [2007] EWHC 2783 (QB); *TUV v. Person or Persons Unknown* [2010] EWHC 853 (QB). In 2010, a number of high-profile cases raised concerns about the practice of the courts of granting 'super injunctions', also restraining disclosure of the fact of grant of the injunction itself (*LNS v. Persons Unknown* [2010] EWHC 119 (QB), [2010] EMLR 16), but such injunctions are now considered only in exceptional cases as departures from the general principle of open justice.

65. With respect, in particular, to the right of removal of information, in January 2018 a case was settled in a highly publicised legal action relating to the publication of an inappropriate photograph of a Northern Irish 14 year old girl, posted on a Facebook shame page. While the case was settled and only limited information is available, Facebook maintained the position that the picture was taken down as soon as notification of the injured person's request to have the data erased was received. The injured person's right to have the offensive material removed from the Facebook shame page would no doubt have featured as an important legal point in the case, in which the plaintiff was seeking damages for the misuse of her personal data. With regard to data unlawfully collected on the Internet, in February 2018 the *Nederlandstalige Rechtbank van Eerste Aanleg Brussel* (Flemish Chamber of the Court of First Instance in Brussels) ordered Facebook to delete all the data concerning Belgian citizens obtained illegitimately through the use of so-called 'datr' cookies, which allowed Facebook to collect information also with regard to the Belgian citizens who were not Facebook users.⁴⁸ The Court ruled that Facebook's processing of personal data of both Facebook users and non-Facebook users for tracking purposes by means of cookies, social plug-ins and pixels, violates the Belgian Privacy Act and Cookie Act.⁴⁹

66. Orders to block usage of personal data are becoming increasingly frequent in connection with methods and devices used to track the online behaviour of people (users and non-users), even if they are not logged on to a given site. In fact, as the following cases illustrate, placing cookies and invisible pixels on third party web sites allows to track down a user's activity, also when the user is not logged on to the website that placed the cookie. Furthermore, depending on the 'smart device' employed, the tracking may be extended also to the online activity of non-users. For instance, this was the case in the first segment of the claim mentioned *supra* and brought before the Flemish Chamber of the Court of First Instance in Brussels: in this first part of the procedure, the Court issued a provisional measure ordering Facebook to cease collecting (and sharing with potential advertisers, and media content providers) data from non-users through the use of 'datr' cookies.⁵⁰

67. Furthermore, orders to publish judicial decisions and for an apology also provide a form of intangible redress in the context of the violation of privacy rights. The right of reply generally carries the right to defend oneself against public criticism in the same venue where it the criticism was conveyed. It is usually applied in the context of print-media (newspapers) but can also be

⁴⁸ *Nederlandstalige Rechtbank van Eerste Aanleg Brussel*, 16 February 2018, *Debeuckelaere*, 2016/153/A. See also *supra*, fn 18.

⁴⁹ A renowned ruling in the context of the right to the erasure of data is represented by the decision of the CJEU in *Google Spain* (Case C-131/12, EU:C:2014:317). After stating that Google qualifies as a 'controller' pursuant to the (then applicable) Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (now superseded by the GDPR), [1995] OJ L 281/31), the Court ruled that personal data must be retained for limited periods (namely, only for as long as it is relevant) and that, beyond such period, the data subject enjoys the right to have the data removed. In particular, the judgment requires the search engine to, under certain circumstances, block access to pages that 'appear to be inadequate, irrelevant or no longer relevant or excessive... in the light of the time that had elapsed' (CJEU, Case C-131/12, *Google Spain SL*, EU:C:2014:317, at para. 93). However, in its 2017 ruling in *Manni*, the CJEU limited this right and held that the right to be forgotten cannot be generally applied to a company register (though the Court did suggest that there may be some very limited circumstances where limitations might be imposed on access to personal data held on such a register (CJEU, Case C-398/15, *Manni*, EU:C:2017:197, esp. paras 55-56).

⁵⁰ *Nederlandstalige Rechtbank van Eerste Aanleg Brussel*, 9 November 2015, *Debeuckelaere*, 15/57/C. See also *supra*, fn 18.

applied to webpages. The right of reply is distinct from the order for an apology, which entails that the publisher itself revoke the original statement.⁵¹

68. Article 2(7) states, in its second sentence, that negative declaratory actions are excluded from the means of redress available pursuant to the Guidelines.⁵² The very purpose of a negative declaratory action is not to establish the liability of the defendant but, on the contrary, to rule out the plaintiff's liability. A negative declaratory action for liability in privacy matters does not seek a finding as to the existence of infringements of privacy rights allegedly committed by the plaintiff. To the contrary, it pursues the opposite objective of exonerating the plaintiff from any (non-contractual or contractual) wrongdoing. The purpose of a rule on jurisdiction such as the one based on conduct (see Article 3) is to take account, with a view to the efficient and sound administration of justice, of the existence of particularly close connecting factors between the dispute and the court which may be called upon to hear it. By reason of such proximity, Article 3 offers the plaintiff a choice by allowing them to seise a court situated in a State other than that in which the defendant is habitually resident (Article 4).

69. Accepting the proposition that an action for a negative declaration may be based on the grounds provided for in Article 3 could intensify the risk of torpedo actions by giving the perpetrators of potentially harmful acts or omissions the option of bringing proceedings before a court other than that of the place in which the defendant is domiciled. In fact, with respect to an action for a negative declaration the enhanced proximity postulated under Article 3 entails a significant degree of speculation and conjecture that runs counter the very purpose of ensuring predictability and a sound administration of justice. Consequently, the Committee opted for a restrictive interpretation of the scope of the Guidelines *vis-à-vis* actions for a negative declaration in non-contractual and contractual matters.

70. **Article 2(8)** provides an autonomous definition of 'habitual residence of a corporation' for the purposes of the Guidelines. Notably, under this Guideline, the place of 'habitual residence of a corporation' includes (a) the State of the place of incorporation, and (b) the State of the principal place of business. This definition of place of 'habitual residence of a corporation' is meant to accommodate the different nuances that characterize the understanding of a corporation's place of habitual residence for the purposes of establishing jurisdiction. The place of incorporation embodies a criterion which is quite stable and may not easily be changed. The notion of 'principal place of business' indicates the place where the main, *i.e.* the chief and most important, business activities are located. The Guidelines do not provide a hierarchy between such criteria: the criteria operate on an equal footing and are exhaustive. While the fact that this definition is articulated in two alternative criteria extends the competent fora, the fact that the criteria indicated in the two

⁵¹ According to the National reports, the right of reply is commonly granted in the different jurisdictions, albeit with different strength. While in **Brazil** the right of reply benefits from no less than constitutional protection, in Croatia, France and Germany it is statutorily guaranteed. In **Germany** and **Spain**, however, a reply is only allowed with in response to factual statements, whereas it is not made available with respect to value judgments or opinions. In **England**, attempts to introduce the general right of reply were unsuccessful. However, there are statutory or self-imposed rules that are similar to or require the recognition of the right of reply. In the **U.S.**, on the other hand, the right of reply is acknowledged, but it has been at times substantially curtailed and suppressed by the courts on the principle that, under the First Amendment to the U.S. Constitution, a State cannot tell a newspaper what it shall print. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁵² The Committee opted in favour of the exclusion negative declaratory actions from the means of redress available under the Guidelines during its meeting in Sydney, in August 2018.

prongs are exhaustive narrows the jurisdiction to courts of States with which the corporation has its most significant ties, to the benefit of transparency and predictability.

71. In its second sentence, Article 2(8) introduces a supplementary definition of habitual residence of a corporation. This provision, and markedly the use therein of the term ‘essentially equivalent’, aims at comprising the U.S. approach to this matter and accommodate, in particular, the wording used by the U.S. Supreme Court in its decision in *Bauman*.⁵³ Finding that considerations of comity reinforced the determination that subjecting Daimler to the jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands, in *Bauman* the U.S. Supreme Court ruled that courts may exercise jurisdiction over a defendant ‘to hear any and all claims against it’ only when the defendant’s affiliations with the forum State ‘are so constant and pervasive as to render it essentially at home in the forum State’.⁵⁴ Mindful of such wording, the supplementary definition is aimed at including in the ‘habitual residence of a corporation’ also instances that go beyond the definitions put forth in sub-paragraphs (a)-(b), provided the defendant’s contacts with the forum State are so significant and stringent that, for jurisdictional purposes, they render the forum State ‘essentially equivalent’ to the defendant’s home.⁵⁵ In so doing, the Court indicated that the fact that a corporation does substantial business in a State is not by itself sufficient to confer that State’s courts with jurisdiction over the corporation.

72. Finally, relying on a notion which is widely and traditionally accepted in international instruments regulating private international law matters, at **Article 2(9)** the Guidelines provide a definition of consumer as ‘a natural person acting primarily for personal, family or household purposes’.⁵⁶

B – JURISDICTION

Article 3

Jurisdiction based on conduct

- (1) A defendant may be sued in the courts of the State where the act or omission directly causing the harm occurred, irrespective of where the damage arose.
- (2) A defendant may also be sued at the plaintiff’s centre of main interest, unless the defendant could not have reasonably foreseen substantial consequences of their

⁵³ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). See, in part., L.J. Silberman, ‘*Daimler v. Bauman*: A New Era for Judicial Jurisdiction in the United States’, 16 Yearbook of Private International Law 1 (2014-2015).

⁵⁴ 134 S. Ct. 751 (2014) (internal quotation marks and brackets omitted). Emphasis added.

⁵⁵ However, against this backdrop, the Committee has taken note of the Court’s statement in footnote 19 of the decision: such statement may be read to indicate that, in a case such as the one examined, jurisdiction may only be established in a place that is unique and ascertainable and that only in exceptional cases would such jurisdiction be possible outside of the paradigm basis according to which all-purpose fora are a corporation’s place of incorporation and principal place of business.

⁵⁶ See Art. 5(2) 2019 HCCH Judgments Convention; very similarly, see the Rome I Regulation at Art. 6(1).

act occurring in that State. The person's centre of main interest is presumed to be at their place of habitual residence.

(3) A defendant may also be sued in the State to which the publication in question is principally directed, taking into account, in particular,

- (a) the language of the publication;
- (b) the content of the publication;
- (c) the physical location of the intended audience.

73. **Article 3** addresses jurisdiction based on conduct. The Guidelines apply to civil claims arising out of the actual or threatened violation of privacy rights and are designed to cover both non-contractual and contractual claims (see also Article 1(2)).

74. In contrast to Article 4 (which is based on the place of the defendant's habitual residence), Article 3 recognizes the legitimacy of actions in other fora (which are characterized by a significant relationship of the claim with the forum, as further explained *infra*, e.g., para 78) where the plaintiff may bring a claim, provided such claim falls within the scope of the Guidelines and provided the specific criteria put forth in the provision are met.

75. Pursuant to **Article 3(1)** 'A person may be sued in the courts of the State where the act or omission directly causing the harm occurred, irrespective of where the damage arose'. In accordance with this provision, both acts and omissions are relevant for jurisdictional purposes.

76. An act entails the undertaking of a specific dynamic conduct: for instance, the unauthorized circulation of untruthful information on a person by releasing it to the press, or through television broadcasting or, again, by posting it on a social media platform may satisfy this requirement, as does the privacy violation arising from the unauthorised collection of data from non-users through the use of digital devices, e.g., cookies and social plug-ins.⁵⁷

77. The Committee has pondered whether to attribute relevance also to omissions for the purpose of jurisdictional (and applicable law) analysis. On the one hand, it was observed that in some legal systems omissions may not constitute sufficient constitutional contact to properly establish jurisdiction. On the other hand, it was also argued that omissions could be included, insofar as it is permissible under the applicable law. Ultimately, the Committee has chosen to include the term 'omission'. It is worth noting that the failure of the administrator of an Internet forum to remove the damning and untruthful information posted by one user against another person would amount to an omission for the purposes of this provision. An omission would also occur, for instance, when the law imposes on a person the duty to take adequate action and redact the name or personal data of a person from a given document which is meant to undergo a certain degree of circulation, but the person fails to comply with such duty.

78. For Article 3(1) to apply, the act or omission must 'directly' cause the harm. Accordingly, for the purposes of establishing jurisdiction a direct 'causal nexus' – a reasonable and direct causal

⁵⁷ See *Nederlandstalige Rechtbank van Eerste Aanleg Brussel*, 9 November 2015, *Debeuckelaere*, 15/57/C. Id., 16 February 2018, 2016/153/A. See also BGH, 14 January 2016 – I ZR 65/14. NJW 2016, 3445-3453.

relationship – must link the act or omission with the harm: in particular, the harm must directly, immediately, and naturally flow from the act or omission. For instance, the online posting of incorrect or defamatory statements is an act that may cause direct harm to a person’s reputation and business: as such, it may qualify for the purposes of this provision.

79. On the other hand, according to Article 3(1) the criterion of the State of the place where the damage arises may not be used to establish jurisdiction under the first paragraph.⁵⁸ In particular, this choice accommodates the rules adopted in some legal systems which, absent further stringent contacts, do not find it constitutionally proper to establish jurisdiction over an out-of-State defendant in the State of the place where the damage arose. For instance, in the United States recent U.S. Supreme Court cases on specific personal jurisdiction comports with due process only where ‘the defendant’s suit-related conduct’ creates ‘a substantial connection with the forum state’ and that the mere fact that the damage arose in a State fails to satisfy such requirement.⁵⁹

80. By focusing on a single jurisdictional connection and confining the jurisdiction to the State where the act or omission ‘directly’ occurred, Article 3(1) favours predictability: in fact, the defendant – with whom lies the control over the act or omission that directly gives rise to the harm – may reasonably be expected to be able to identify *ex ante* such place and may therefore foresee being sued in the courts of such place.

81. Pursuant to **Article 3(2)** a person may also be sued ‘at the plaintiff’s centre of main interest, unless the defendant could not have reasonably foreseen substantial consequences of their act occurring in that State’. This provision moves from the assumption that the State to which the holder of personality rights is more significantly connected by reason of personal and professional ties is also the place in which they suffer the most extensive and serious harm as a result of the personality right violation.⁶⁰ Notably, this provision reflects a reasonable presumption that harm typically occurs or is felt at the place of a person’s ‘centre of main interest’ and it points to the place where the courts are presumably best placed to assess and understand fully the conflict between the interests involved in the claim.

82. Article 3(2), second sentence, puts forth an autonomous concept of ‘centre of main interest’ by defining such place as that of the plaintiff’s habitual residence. In particular, the place of the

⁵⁸ However, it should be noted that the place of damage may become relevant for the purpose of establishing jurisdiction pursuant to Art. 4(2), provided that ‘the defendant could not have reasonably foreseen substantial consequences of their act occurring in that State’.

⁵⁹ See *Walden v. Fiore*, 134 S. Ct. 1115, 1121-22 (2014); cf. P.D. Trooboff, *Globalization, Personal Jurisdiction and the Internet Responding to the Challenge of Adapting Settled Principles and Precedents - General Course of Private International Law*, in *Recueil des cours*, vol 415, (Brill, 2021). See also *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion) holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the state’s laws, New Jersey lacked personal jurisdiction over the company under the due process clause, regardless of the fact that the damage was sustained in New Jersey.

⁶⁰ CJEU, Joined Cases C-509/09 and C-161/10, *eDate Advertising*, EU:C:2011:685, esp. paras 48-49. See also ECtHR, *Arlewin v. Sweden* (judgment of 1 March 2016, Application No 22302/10), para. 73 holding that Sweden had an obligation, under Art. 6 ECHR, to provide a Swedish national residing in Sweden with an effective access to court in a defamation claim over a TV program broadcasted by a London-based company, but targeting mostly, if not exclusively, a Swedish audience. See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5, available at: <www.refworld.org/docid/3ae6b3b04.html> (last accessed on 2 January 2022).

plaintiff's habitual residence is commonly the place where the plaintiff has established its most significant connections.

83. The place of the plaintiff's habitual residence is also a place where the alleged perpetrator can foresee that harm might occur as a result of their conduct and, accordingly, where they may reasonably foresee being sued. For instance, deciding on a libellous article written and edited by the defendants in Florida, the U.S. Supreme Court ruled in *Calder* that jurisdiction was proper in California based on the 'effects' of the defendants' Florida conduct in California.⁶¹ As the Court held, the defendants were in a position to reasonably foresee being sued in California on the grounds that the allegedly libellous story concerned the California activities of a California resident (a television entertainer). As the Court noted, the petitioners (both employed by the Florida-based newspaper that published the article) wrote and edited an article (for which most of the research was done in Florida) that they knew would potentially have an impact upon the plaintiff based in California, where a large percentage of readers were also located.

84. However, a party may also have the centre of their main interests in a State other than the one of habitual residence. Accordingly, in Article 3(2) the definition that identifies the plaintiff's centre of main interest in the plaintiff's place of habitual residence is drafted as a presumption and is rebuttable: the seized court will *prima facie* assume that a person's centre of main interest is located in the place of the person's habitual residence. This may be the case where factors – such as the pursuit of a professional activity in a State other than the one to which the plaintiff is linked by their most significant family ties or the one in which the plaintiff is incorporated – establish the existence of a particularly close connection with another State.⁶² This latter State may be the place

⁶¹ *Calder v. Jones*, 465 U.S. 783 (1984), esp. 786.

⁶² CJEU, Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, paras 33 and 41-43, where in an action for rectification of that information, removal of incorrect comments and compensation in respect of all the damage sustained, the center of interests of a company incorporated under Estonian law was identified by the Court in Sweden as the place where the company's commercial reputation was most firmly established and, as such, where the damage caused by online material occurred most significantly. The scope of Art. 7 no 2 of the Brussels I-bis Regulation was recently restricted *vis-à-vis* defamation claims in *Mittelbayerischer Verlag* where the Court ruled that the application of the centre of main interest criterion requires a direct reference to the plaintiff in the publication containing the alleged libel: CJEU, *Mittelbayerischer Verlag*, EU:C:2021:489. However, as AG Bobek clearly stated in his conclusions, the problem of this case was not primarily the establishment of jurisdiction under Art. 7 no 2 of the Regulation Brussels Ibis but the dismissal of the lawsuit for other grounds. AG Bobek, Opinion of 23 February 2021, case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124. According to the AG's Opinion, it was not clear whether the case amounted to an abuse of procedure (the AG did not openly address the issue). The preposterous recourse to defamation lawsuits is currently discussed in the context of Strategic Litigation Against Public Participation (SLAPP). In this respect, see a recent study of the EU Parliament (*The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, PE 694.872 – June 2021) suggesting that jurisdiction be concentrated at the domicile of the targeted person. *Sed contra*, B. Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' MPILux Research Paper Series 2021(4) [www.mpi.lu] at 9-10, observing that the proposal appears unbalanced and underscoring that '[w]hile there is indeed to effectively combat abusive litigation, there are equally many cases where victims whose privacy and personality rights are infringed need to bring a lawsuit at the place of their centre of main interest in order to get effective judicial protection'. On 27 April 2022, the European Commission adopted a package of measures to protect persons who engage in public participation from manifestly unfounded or abusive court proceedings. The measures include a proposal for a Directive (COM(2022) 177 final) and a Commission Recommendation (C(2022) 2428 final) encouraging Member States to align their national rules on SLAPP with the proposed Directive. The proposed safeguards are expected to benefit in particular journalists and persons or organisations engaged in defending fundamental rights and a variety of other rights, such as environmental and climate rights, women's rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms, but all persons engaged in public participation on matters of public interest are covered. The safeguards have been targeted

where the plaintiff suffers the most extensive and serious harm as a result of the violation, and it may embody the centre of their main interests for the purposes of the provision. In light of the plaintiff's significantly close link (and, once again, subject to the exception put forth in the second sentence of Article 3(2)), this place is also readily ascertainable by the perpetrator, who should then be in a position to foresee being sued there.

85. To strengthen foreseeability and to balance any residual unpredictability that may arise from identifying the relevant jurisdictional factor in the plaintiff's centre of main interest, the second part of the first sentence of Article 3(2) adds the condition whereby the plaintiff's centre of main interest operates as a ground to establish jurisdiction 'unless the defendant could not have reasonably foreseen substantial consequences of their act occurring in that state'. This provision is meant to capture, in particular, the foreseeability requirement that is at the core of the due process analysis in the United States. Notably, pursuant to the U.S. Supreme Court's reading of the due process clause, for jurisdiction to be constitutionally proper it is critical 'that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there'.⁶³

86. **Article 3(3)** establishes the jurisdiction of the courts of the State where the publication in question is principally directed. The term 'publication' is to be construed as any means by which a person (the defendant) makes something known to someone other than the plaintiff. This includes oral and written transmission: it covers any type of interaction that makes use of the spoken or written word, included but not limited to cyber- and digital-communications.

87. To establish jurisdiction, this provision mandates that the publication in question be 'principally directed' to the forum State. To establish an objective connection for the purposes of this provision it is not sufficient that the information be accessible from a State: to the contrary, it is necessary that a given State (and the persons therein: *i.e.*, readers/listeners/social media users and/or followers) be the principal target of the communication. Accordingly, the courts of the State in which the information is received can assert jurisdiction in accordance with this provision only if it may be inferred from the act of communicating that the act was meant to principally (but not necessarily exclusively) target recipients in that State.⁶⁴

to ensure the balance of access to justice and privacy rights with the protection of freedom of expression and information. The main elements of the proposal are:

- Early dismissal of a manifestly unfounded court proceedings – courts will be able to take an early decision to dismiss the proceedings if a case is manifestly unfounded. In such a situation, the burden of proof will be on the claimant to prove that the case is not manifestly unfounded;
- Procedural costs – it will be for the claimant to bear all the costs, including the defendant's lawyers' fees, if a case is dismissed as abusive;
- Compensation of damages – the target of SLAPP will have a right to claim and obtain full compensation for the material and immaterial damage;
- Dissuasive penalties – to prevent claimants from starting abusive court proceedings, the courts will be able to impose dissuasive penalties on those who bring such cases to the court;
- Protection against non-EU country judgments – Member States should refuse recognition of a judgment coming from a non-EU country, against a person domiciled in a Member State, if the proceedings would be found to be manifestly unfounded or abusive under the Member State's law. The target will also be able to ask for compensation of the damages and the costs in a Member State in which the person is domiciled.

⁶³ See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion); see also *Calder v. Jones*, 465 U.S. 783 (1984), esp. 786.

⁶⁴ See, for instance, BGH, 25 October 2016 – VI ZR 678/15 ruling that, pursuant to Art. 5(3) of the 2007 Lugano Convention, German courts had jurisdiction to issue an injunction for the violation of personal rights sought by the

88. In a list that is meant to be illustrative and not exhaustive, the provision states that, to assess the State to which the publication is principally directed, aspects such as the language of the publication, the content of the publication or the physical location of the audience may be taken into account. The language of the publication, especially when it is not a language commonly used in many States or at the international level, may clearly serve as an indication of intent to target a given audience. For instance, in *Sieben Tage in Moscow* the *Bundesgerichtshof* ruled that accepting jurisdiction would be improper in a case of disparaging comments posted online in Russian and in Cyrillic alphabet (thus hardly accessible to the average German reader) over events occurred in Moscow.⁶⁵ Along the same lines, the CJEU ruled in *Football Dataco Ltd* that the circumstance that data placed online by a company which provides results and other statistics relating, inter alia, to English league matches live via the Internet is accessible to Internet users in the United Kingdom in English (a language which is not the one used in the Member State from which the provider pursues its activities), might be supporting evidence for the existence of an approach targeting in particular the public in the United Kingdom.⁶⁶

89. As concerns the content of the publication, in *Sieben Tage in Moscow* the *Bundesgerichtshof* also found that the fact that the disputed post concerned events that had taken place in Moscow should be read in support of the publication being principally directed to Russia.⁶⁷

90. As regards the physical location of the audience, in *Football Dataco Ltd* the CJEU further held that the circumstance that the data available on the server included data relating to English football league matches showed an intention on the part of the provider to attract the interest of the public in the United Kingdom and may constitute evidence of targeting.⁶⁸

91. The criteria at subparagraphs (a)-(c) may also be used concurrently as was the case in *Arlewin v. Sweden*, where the European Court of Human Rights (ECtHR) ruled that requiring a Swedish national to bring defamation proceedings in the United Kingdom following an allegedly defamatory TV program broadcasted by a London-based company, but targeting mostly, if not exclusively, a Swedish audience, was not reasonable and violated Article 6(1) of the European Convention on Human Rights (ECHR). Noting that the content, production and broadcasting of the television program as well as its implications had very strong connections to Sweden and very little to the United Kingdom (the television program had been produced in Sweden, in Swedish and was sponsored by Swedish advertisers; the program was sent from Sweden via satellite to a London-based company which broadcast and transmitted it to viewers in Sweden), the Court ruled

wife of the retired racing driver Michael Schumacher, who is a German citizen residing in Switzerland, against the website of a Swiss broadcaster (namely, www.srf.ch).

⁶⁵ *Sieben Tage in Moscow*, BGH, 29 March 2011 – VIZR 111/10. NJW, 2016, 3445-3453. Cf., in particular, J. von Hein and A. Bizer, ‘Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law’, 6 International Journal of Data Science Analytics (2018), 233, at 237.

⁶⁶ CJEU, Case C-173/11, *Football Dataco Ltd*, EU:C:2012:642, para. 42. See also the CJEU in Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, para. 11, relaying that the Harju Court of First Instance in Estonia had declined jurisdiction over an action for removal and rectification of online damaging content posted on the website of a trade association incorporated under Swedish law on the grounds that the information and comments at issue were published in Swedish and, without a translation, they were incomprehensible to persons residing in Estonia. As the CJEU ultimately also found (albeit without making direct reference to the language issue) the fact that the website at issue was accessible in Estonia could not automatically justify an obligation to bring a civil case before an Estonian court.

⁶⁷ *Sieben Tage in Moscow*, BGH, 29 March 2011 – VIZR 111/10. NJW, 2016, 3445-3453.

⁶⁸ CJEU, Case C-173/11, *Football Dataco Ltd*, EU:C:2012:642, para. 40.

that Sweden had an obligation under Article 6 ECHR to provide the applicant with an effective right of access to court.⁶⁹

92. Unlike the ground of jurisdiction at Article 3(1), the ground of jurisdiction at paragraph 3 applies regardless of where the act directly causing the harm occurred. And unlike the ground put forth at paragraph 2, which focuses on the plaintiff's centre of main interest, the ground at paragraph 3 examines solely whether the defendant principally targeted its message to an audience in a given State. The ground of jurisdiction at paragraph 3 is an expression, at once, of flexibility and of a focussed approach. It is meant to introduce additional flexibility to the rigidity of the two grounds of jurisdiction established at Article 3(1)-(2). However, it 'controls' such flexibility by mandating that the publication be 'principally directed' to the forum State, as such ensuring foreseeability and fairness for the defendant. Such ground of jurisdiction is tailored to extend the jurisdiction and provide additional alternative fora to the plaintiff that has suffered damage in a forum other than the ones identified in accordance with Article 3(1)-(2). However, it controls, in particular, the potential that the Internet has to subject its users to limitless jurisdiction, or jurisdiction in every forum where the offending material can be accessed.

93. A solution such as the one put forth with the 'mosaic principle' – which was applied by the CJEU in *Shevill*⁷⁰ in an action seeking compensation for non-material damage allegedly caused by a defamatory article published in the printed press, and which states that the plaintiff may bring a claim in the State in which the plaintiff is known, but only in respect of damage caused in that State – was deemed by the majority of the Committee as unsuited to the goal of foreseeability and not fitted to the needs, in particular, of the Internet, where the dissemination of information is instantaneous and ubiquitous. Given the difficulty of limiting an injunction to a certain territory, especially *vis-à-vis* Internet violations, the majority of the Committee further observed that the 'mosaic principle' is unsuited also with respect to injunctive relief (cf Article 6).⁷¹ The exclusion of the 'mosaic principle' is also in keeping with some jurisdictions, such as the U.S., which follow the 'single publication rule'.⁷² Pursuant to the 'single publication rule', any form of mass communication, which may be repeatedly published (in various formats) after it was originally released, counts as a single publication. Therefore, the cause of action for defamation is deemed to arise on the edition's original publication date, even if the edition is printed and distributed over multiple dates. While the 'single publication rule' is substantive law and it is not a jurisdictional rule, its underlying principle is akin to the rationale that supports the exclusion of the 'mosaic principle': as such, it reinforces the Committee's choice in favour of such exclusion.

94. The Committee pondered whether there should be forum non conveniens exceptions to the general principle that the defendant should be subject to the jurisdiction of the courts of the State of the defendant's habitual residence. While there was general consensus that a cooperation /

⁶⁹ ECtHR, *Arlewin v. Sweden* (judgment of 1 March 2016, Application No 22302/10), para. 72.

⁷⁰ CJEU, Case C-68/93, *Fiona Shevill*, EU:C:1995:61, esp. paras 29-31.

⁷¹ In this regard, see CJEU, Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, para. 48, where the Court ruled that, in the light of the ubiquitous nature of the information and content placed online and the fact that the scope of their distribution is, in principle, universal, an application for the rectification of the information and the removal of the comments is a single and indivisible application and may, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage.

⁷² Restatement (Second) Torts §577A, comment a.

transfer mechanism between courts would prove beneficial, the matter was ultimately left to national law.⁷³

Article 4

Jurisdiction at the place of the defendant's habitual residence

The defendant may be subject to the jurisdiction of the courts of the State in which they are habitually resident.

95. Pursuant to **Article 4**, the courts of the State of the defendant's habitual residence may assert jurisdiction over the defendant, irrespective of whether the claims are related to the defendant's activities in the forum State. Under the Guidelines, the term 'defendant' is to be construed as a person against whom the claim or counterclaim is brought.

96. Article 4 lays down the principle whereby the defendant should be subject to the jurisdiction of the courts of the State of the defendant's habitual residence. While Article 2(8) provides an autonomous definition of 'habitual residence of a corporation' for the purposes of the Guidelines, this is not the case with regard to natural persons. Taking inspiration from the approach adopted according to regional and international instruments, where such concept is frequently left to be interpreted in accordance with the law of the forum,⁷⁴ the Committee abstained from drafting an autonomous notion of this term to avoid incurring in the rigidity that could otherwise stem from a preconceived notion in this respect. Nonetheless, the Committee is cognizant of the fact that an

⁷³ For a different approach, see the IDI 8^{ème} Commission: *Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments* (Rapporteurs: Erik Jayme and Symeon C. Symeonides) proposing the following solution (Art. 3(2) 'Holistic Principle'): 2. Once the aggrieved person files an action in one of the states referred to in Arts 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'. Art. 5(2) then proceeds to rule out the application of the doctrine of forum non conveniens.

⁷⁴ See for instance, the 2005 HCCH Convention on Choice of Court Agreements, which defines 'residence' with regard to an entity or person other than a natural person at Art. 4(2) but leaves the definition of residence of a natural person to the *lex fori*. The text of the Convention is available at <www.hcch.net> under 'Conventions and other instruments'. Along the same lines, although with respect to the concept of 'domicile', see the Brussels I-bis Regulation (Art. 62). See also the commentary to Art. 59 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 ('2007 Lugano Convention') in the Explanatory Report by F. Pocar [2009] OJ C 319/1, para. 26, relaying that 'While it recognised the potential benefits of a common definition, the working party preferred to leave to national laws the task of defining the meaning of domicile in terms of the length of time the defendant had been in the territory, if such a definition was found to be necessary'. However, for an approach which is more inclined towards an autonomous definition, see Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ('Succession Regulation'), [2012] OJ L 201/107, esp. recitals 23-24.

autonomous definition of the habitual residence of a natural person could also enhance transparency and predictability. In particular, to determine the habitual residence of a natural person an overall assessment of the circumstances of the natural person, both before the facts of the case and at the time of the claim, should be performed, considering all the relevant factual elements, and notably the duration and regularity of the person's presence in the forum State and the conditions and reasons for that presence. In some cases, identifying the person's habitual residence may prove complex: this could be the case, for instance, where the person relocates abroad for professional or economic reasons, sometimes for a prolonged period of time, but maintains a close and stable connection with their State of origin. In such case, and depending on the circumstances of the case, the person could be considered still to have their habitual residence in their State of origin in which the centre of interests of his/her family and his/her social life is located. Other complex cases may arise where the person lives in several States alternately or travels from one State to another without settling permanently in any of them.

Article 5

Choice of court agreements

- (1) If, after the events giving rise to a dispute, the parties have agreed that a court or the courts of a State are to have jurisdiction to settle any disputes which have arisen in connection with a particular legal relationship, that court or those courts shall exercise jurisdiction, unless the agreement is null and void under the law of the chosen State.
- (2) If, before the events giving rise to a dispute, the parties have agreed that a court or the courts of a State are to have jurisdiction to settle any disputes which may arise in connection with a particular legal relationship, that court or those courts shall exercise jurisdiction, unless the agreement is null and void under the law of the chosen State, provided that all the parties engaged in commercial activity and the agreement was part of that activity.
- (3) The jurisdiction in accordance with paragraphs 1 and 2 shall be exclusive unless the parties have agreed otherwise.
- (4) The agreement conferring jurisdiction shall be either:
 - (a) concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference; or
 - (b) in a form which accords with practices which the parties have established between themselves.

97. **Article 5** allows the parties to agree – subject to the restrictions set out in the same provision – which court or courts shall have jurisdiction over disputes arising between them. This provision is premised on the notion that, by entering into a choice of court agreement, the parties oust the jurisdiction of the otherwise competent court(s) in accordance with the Guidelines.

98. With this provision, the Guidelines aim to provide greater certainty in parties engaging in cross-border activities and, consequently, to create a legal environment more amenable to such activities.⁷⁵

99. Against this background, the provision at Article 5 draws a fundamental distinction and provides a different treatment for agreements entered, respectively, after and before the events giving rise to dispute occur.

100. Notably, **Article 5(1)** regulates the case where party autonomy vis-à-vis jurisdiction is exercised ‘after the events giving rise to a dispute’: in such instance, the designated court(s) should exercise jurisdiction to settle any disputes which have arisen in connection with the parties’ particular legal relationship. It follows that, in accordance with Article 5(1), jurisdiction clauses are always permitted, regardless of the nature of the underlying relationship, provided the clause was entered after the events giving rise to a dispute. The flexibility afforded with this provision is premised on the assumption that parties will enter into a jurisdiction clause after the dispute has arisen only when it concretely benefits them and, likely, only subsequent to receiving proper legal advice.

101. Article 5(1) *in fine* establishes that the designated court(s) ‘shall exercise jurisdiction, unless the agreement is null and void under the law of the chosen State’. This provision embodies the sole generally applicable exception to the rule according to which the designated court must hear the case. The null and void character of the agreement is governed by the law of the State of the chosen court, to the exclusion of the conflict-of-law rules of that State. The ‘null and void’ clause applies only to substantive (as opposed to formal) grounds of invalidity and it is intended to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity.

102. Conversely, in accordance with **Article 5(2)** if party autonomy vis-à-vis jurisdiction is exercised ‘before the events giving rise to a dispute’, the designated court(s) shall have jurisdiction ‘provided that all the parties engaged in commercial activity and the agreement was part of that activity’. Accordingly, the relevance of choice of court agreements entered into before the dispute arises is limited in scope to disputes that arise in the context of a commercial activity.⁷⁶

103. The rationale underlying this provision is that parties – and, in particular, businesses and, *a fortiori*, businesses that operate in the online environment – may rely on their contractual power to incorporate a jurisdiction clause into the contract or standard terms that regulate their relationship with another party. In that context, it is probable that the clause would be drafted in a manner so as to designate the jurisdiction of the court(s) viewed as more favourable by the party that drew up the clause: a party’s penchant in favour of the court(s) of a given State will likely be premised on the advantages pertaining to, *e.g.*, the party’s familiarity with the legal system and the language of that State, as well as easier access and lower costs of legal advice and representation

⁷⁵ See, in particular, A. Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

⁷⁶ Similarly, see Section 4 and esp. Art. 19(1) Brussels I-bis Regulation.

in that State, all the while knowing that these very same aspects either discourage the other party from bringing their claim or increase their willingness to settle.

104. Hence, to contain the disadvantage that may ensue from the case where a consumer (identified, under Article 2(9) as ‘a natural person acting primarily for personal, family or household purposes’) enters into a jurisdiction clause, Article 5(2) limits party autonomy exercised ‘before the events giving rise to a dispute’ to those instances where ‘all the parties engaged in commercial activity and the agreement was part of that activity’. It follows from this provision that a jurisdiction agreement between a consumer and a non-consumer, as well as one between two consumers, entered into before the events giving rise to the dispute does not fall in the scope of this provision.

105. A system in which the exercise of party autonomy over forum clauses (including arbitration agreements) is limited to commercial claims is, in general terms, reflective of the standard clauses drawn up by the major online platforms and search engines. For instance, both *Facebook* and *Instagram* limit choice of forum clauses to commercial claims;⁷⁷ *Google* and *Youtube* each defer to the dispute resolution mechanisms (including ODR) of the country of residence of the user, for users who live in the European Economic Area, or Switzerland.⁷⁸ Interestingly, *Twitter*’s standard terms expressly provide as to jurisdiction in the relationship only with users that live outside the European Union, EFTA States, or the United Kingdom, including if the user lives in the United States. However, with regard to users that live in the European Union, EFTA States, or the United Kingdom, the Company’s terms only state that ‘These Terms are an agreement between you and Twitter International Company, an Irish company with its registered office... [in Dublin] Ireland’, hence establishing its registered office in Ireland and deferring to the local (be they regional or national) sets of rules on jurisdiction.⁷⁹

106. To strengthen predictability over jurisdiction, in accordance with **Article 5(3)** the jurisdiction established pursuant to Article 5(1)-(2) shall be exclusive, unless the parties have agreed otherwise. It follows that, subject to a different agreement concluded by the parties, a choice of court agreement that satisfies the requirements of Article 5(1), (2) and (4), designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the court(s) of one State to the exclusion of the jurisdiction of any other court.

107. Finally, **Article 5(4)** lays down the formal requirements with which a choice of court agreement must comply in order to fall under the Guidelines.⁸⁰ Namely, the agreement conferring jurisdiction shall be either (a) concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference; or (b) in a form which accords with practices which the parties have established between themselves. Where the agreement is in writing, its formal validity is not dependent on its being signed: other possible forms of conclusion covered by this provision are, *e.g.*, agreements concluded via electronic means of data transmission or storage, provided that the data is retrievable so that it can be referred to and understood on future occasions. The agreement – which, in accordance with Article 5(4)(b) may also rely on forms that accords with the parties’ established

⁷⁷ See, respectively, <www.facebook.com/legal/commercial_terms> and <help.instagram.com/581066165581870> (both last accessed on 2 January 2022).

⁷⁸ See, respectively, <policies.google.com/terms?hl=en-US> and <www.youtube.com/static?gl=IE&template=terms> (both last accessed on 2 January 2022).

⁷⁹ See <<https://twitter.com/en/tos>> (last accessed on 2 January 2022).

⁸⁰ The provision takes inspiration from Art. 3(c) of the HCCH 2005 Choice of Court Convention.

practices – must either be concluded in one of the forms listed in Article 5(4) or it must be documented in them.

Article 6

Provisional measures

(1) The court competent to rule on the merits of the case shall have the power to grant provisional relief in accordance with its own law.

(2) The court of another State to which the publication in question was directed shall have the power to grant provisional injunctive relief in accordance with its own law in order to support the main proceedings. However, this provisional injunctive relief shall be strictly territorial within the jurisdiction of this court.

(3) The court of the main proceedings may modify or set aside the provisional measure granted pursuant to paragraph 2. However, the decision to modify or set aside the provisional measure is subject to recognition in accordance with Articles 12 and 13.

(4) If the decision issued pursuant to paragraph 3 is not recognized, the provisional relief may be made permanent. However, the measure shall remain strictly territorial.

108. **Article 6** completes the section on jurisdiction by clarifying that the rules laid out in Articles 3 to 5 extend to applications for provisional measures and by adapting the special rule set out in Article 3(3) to cases where the claimant only seeks provisional relief. Having regard to the considerable diversity that characterizes this area of procedural law and the constantly evolving legal environment in the field of the protection of privacy, the Guidelines do not attempt to define the terms ‘Provisional measures’.⁸¹ Therefore, national courts are entitled to interpret this expression according to their domestic law, having regard to the international character of the Guidelines.

109. **Article 6(1)** restates the uncontroversial principle according to which the existence of a connecting factor that would allow a party to bring an action on the merits carries with it the right to apply for provisional relief.⁸² Hence, any court with jurisdiction to rule on the main

⁸¹ Cf the CJEU’s interpretation of the terms ‘provisional, including protective measures’ under Art. 24 of the Brussels Convention 1968 (now Regulation Brussels I-bis): ‘The expression ‘provisional, including protective, measures’ within the meaning of Art. 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter’ (CJEU, Case C-261/90, *Reichert and Kockler*, para. 34; Case C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 37; Case C-104/03, *St Paul Dairy Industries NV*, para. 13).

⁸² See e.g. CJEU’s case law under the Brussels I-bis Regulation; ILA Committee on International Civil and Commercial Litigation, ‘Principles on Provisional and Protective Measures in International Litigation’, published in ILA Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12 to 17 August 1996, p. 199 (acknowledging

proceedings under Articles 3 to 5 of the Guidelines is also competent to issue provisional measures. This solution holds true even an ordinary suit may concurrently be filed before the courts of another State having jurisdiction under the Guidelines. Where a party applies for provisional measures following Article 6(1), the Guidelines acknowledge that the kinds of relief available will depend on the law of the court seised. The Committee does not express any views as to the conditions or the scope of the measures that a competent court may be able to issue under this provision.

110. By contrast, **Article 6, paras (2) to (4)** provide more specific rules any time that a violation of privacy results from a publication. Such provisions are made necessary to avoid the difficulties of interpretation that could arise regarding the jurisdictional rules set out in Article 3(3), which provides that the defendant may be sued before the courts of a State to which such publication is ‘principally directed’. Given the nature of provisional measures, whose purpose is generally to provide quick and effective relief to parties who may otherwise suffer great and irremediable harm, it might be disproportionate to require evidence that a publication is ‘principally directed’ towards a specific jurisdiction in order for the courts of that State to grant interim relief. Hence, Article 6(2) provides that a showing that the publication in question was ‘directed’ towards a specific country is sufficient to confer jurisdiction upon the courts of that State.

111. Nevertheless, **Article 6(2)** should not be understood as a way for parties to undercut the ordinary rules on jurisdiction laid out in Articles 3 to 5 of the Guidelines. This is why the provision should not be interpreted as granting jurisdiction based on the mere accessibility of the publication. Instead, courts should have regard to the factors laid out *supra* under Article 3(3) and assess whether an objective connection exists between the alleged violation of privacy and the State of the court seised. The Committee recognizes that this solution departs both from the most recent case law of the CJEU⁸³ and from some national decisions issued in the field of internet jurisdiction.⁸⁴ This result, however, inevitably stems from the rules set out under Article 3, which provides that the mere accessibility of the publication is insufficient to confer jurisdiction on the courts of a given State and rejects the ‘mosaic approach’ as an adequate theory to allocate cases in the area of the protection of privacy. The Committee also stresses, however, that Article 6(2) imposes a lower burden of proof on the applicant compared to Article 3(3), as a party seeking provisional relief rather than initiating proceedings on the merits should not be required to prove that the publication in question principally targeted recipients in the jurisdiction of the court seised.

112. The rejection of the ‘mosaic principle’ also reverberates on the nature and scope of the powers that should be available to national courts under Article 6(2). Indeed, such rejection would be significantly undermined if a party were able to circumvent it by seeking provisional payments in every country where the publication in question is directed to compensate for damages

‘the wide jurisdiction accorded to a court properly exercising jurisdiction over substance to grant provisional and protective measures addressed to a defendant personally irrespective of the location of the defendant’s assets’); IDI Resolution, Principles on Provisional and Protective Measures in International Litigation, Hyderabad Session, 2017, para 7 (‘An international or national court or tribunal may make such orders if it has *prima facie* jurisdiction over the merits’).

⁸³ CJEU, Case C-251/20, *Gtflix Tv v. DR*, ECLI:EU:C:2021:1036. In its judgment, the Court held in fact that a plaintiff who was allegedly harmed by disparaging comments published on an online platform could file interim proceedings against the author before the courts of any State where the publication is accessible to seek/ compensation for the damages accrued within that jurisdiction.

⁸⁴ In favour of accessibility, see e.g. French *Cour de cassation*, Civ. 2, 6 November 2008, 07-17.445, Bull. Civ. II [2008], No 232.

allegedly accrued within that jurisdiction. For this reason, Article 6(2) expressly provides that provisional measures under Article 6(2) should be limited to ‘provisional injunctive relief’. Furthermore, the Committee also made clear that, since a court acting under Article 6(2) may lack jurisdiction on the merits, such relief should be exercised ‘in order to support the main proceedings’ and should, in any event, remain ‘strictly territorial’.

113. As to the first point, the Committee has taken the view that provisional measures issued under Article 6(2) should be ancillary to proceedings on the merits that may take place in another State. In doing so, the Guidelines follow the approach endorsed by the ILA Committee on International Civil and Commercial Litigation in 1996,⁸⁵ as well as by several national legal systems.⁸⁶ However, rather than providing specific rules as to how provisional measures should support the main proceedings, the Guidelines leave it to national law to define the best way to fulfil this general objective. By way of illustration, the law applicable to proceedings brought in accordance with Article 6(2) may therefore require applicants: (i) to file an action on the merits with a court having jurisdiction under Articles 3 to 5 before applying for provisional relief; (ii) to carry out within a given time frame the steps necessary to secure a judgment on the merits; (iii) to show the provisional relief is sought in contemplation of proceedings on the merits which may reasonably be expected to lead to a judgment on the merits; or (iv) to otherwise provide an undertaking or security that they would seek a decision from a court competent on the main proceedings.

114. As to the second point, Article 6(2) provides that provisional injunctive relief issued under Article 6(2) shall be ‘strictly territorial’. By imposing this requirement, the Committee acknowledges the widespread concern that in order not to infringe upon the jurisdiction of another State, the power to issue a provisional measure in cases where the court might otherwise lack jurisdiction on the merits should be subject to the existence of a strong territorial connection and should not produce any extraterritorial effect.⁸⁷ Therefore, courts exercising their jurisdiction under Article 6(2) should use all the tools available to them to ensure that provisional measures issued in response to a violation of privacy resulting from a publication directed to a given State do not hamper any potential rights that a party may hold in another jurisdiction according to foreign law. Hence, while a court seised in accordance with this provision may issue orders requiring the respondent to carry out conduct within the jurisdiction, or preventing or reducing the harm that would otherwise occur within the forum State, it may not restrict access to the publication in

⁸⁵ See ILA Committee on International Civil and Commercial Litigation, *cit.*, p. 196, principles 10-15.

⁸⁶ In this respect, see *e.g. Broad Idea International Ltd (Respondent) v. Convoy Collateral Ltd*, [2021] UKPC 24, holding that English courts may grant pre-judgment injunctions where the grant of provisional relief is ancillary to a future judgment which might become enforceable in England.

⁸⁷ On this point, see in particular CJEU, Case C-391/95, *Van Uden*, para. 40 (‘the granting of provisional or protective measures on the basis of Art. 24 [of the Brussels Convention] is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought’); ILA Committee on International Civil and Commercial Litigation, *cit.*, principle 17 (‘Where the court is not exercising jurisdiction over the substance of the matter, and is exercising jurisdiction purely in relation to grant of provisional and protective measures, its jurisdiction shall be restricted to assets located within the jurisdiction’); IDI Resolution, *cit.*, para. 8 (‘A national court may make orders for provisional measures in relation to assets or acts within its territory even if a court in another country has jurisdiction over the merits. Such provisional measures may be ordered provided that they do not infringe upon the exclusive jurisdiction of foreign courts’). *Adde*, more generally, § 404 of the Restatement (Fourth) of Foreign Relations Law (2018) (‘Courts in the United States interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary’).

another State nor take any measure intended to mitigate the harm that occurred in another jurisdiction.

115. Finally, **Article 6(3) and (4)** set out the principles governing the relations between provisional measures issued under Article 6(2) and decisions issued in another State in the course of main proceedings. In this case, the Guidelines set out a clear hierarchy in favour of the latter, except where the recognition and enforcement of these decisions may be refused under Articles 12 and 13 of the Guidelines.

116. On the one hand, in fact, **Article 6(3)** provides that once the main proceedings have been initiated before a court having jurisdiction on the merits, this court may modify or set aside the provisional measures granted under Article 6(2),⁸⁸ provided that any interested party takes the appropriate steps to have this decision recognized in the State where the provisional relief was first granted. In such a case, the authorities of the requested State should give effect to the foreign decision and modify or set aside the provisional measure in accordance with their own law. The same solution holds after the main suit has been rejected or dismissed with prejudice by a decision capable of recognition under Articles 12 and 13, as the dismissal would then jeopardize the basis for the provisional measure.

117. Conversely, **Article 6(4)** provides that, where the recognition and enforcement of a foreign decision seeking to modify or set aside a provisional measure issued under Article 6(2) is refused, the latter may be made permanent but should remain strictly territorial. This is because it would be unjust for a party who has obtained provisional relief before the courts of a State where a publication is directed to be automatically deprived of the protection of the local courts in cases where the foreign decision does not fulfil the minimum standards set out in Articles 12 and 13. Under these circumstances, therefore, the provisional relief granted in accordance with Article 6(2) may still produce its effects, albeit only within the jurisdiction of the court that first granted it.

C – APPLICABLE LAW

118. From a comparative point of view, a close relationship between jurisdiction and choice of law concerning violations of personality rights can be observed. In many legal orders, both jurisdiction and choice of law are founded on some variant of *lex loci delicti* (place of acting and/or damage).⁸⁹ Most legal systems theoretically allow for courts to apply a law that differs from

⁸⁸ In favour of this solution, see also ILA Committee on International Civil and Commercial Litigation, *cit.*, principle 14 ('There may be scope for the court exercising substantive jurisdiction to play a supervisory role, on the application of the defendant, over provisional and protective measures granted in other countries, considering in particular whether in aggregate those measures are justifiable in the light of the action as a whole, and the amount claimed in it').

⁸⁹ The Committee's survey on the national rules for jurisdiction and choice-of-law rules for violations of personality rights indicates that the basic rule in torts, which is decisive due to the lack of a specific rule for personality violations, including defamation and data protection, is to apply the *lex loci delicti* (law of the State where the event causing the damage took place). An exception among the legal systems represented in the survey is **Japan** where the basic approach is the application of the law at the victim's habitual residence. When the place of acting and the place of the damage are split – typically in cases of violation of personality rights –, the legal systems show different solutions: some favour the place of acting (**Portugal** (Art. 45(1) of the *Código Civil*), mostly by the courts in **Greece** and **Spain**), others decide depending on the circumstances of the individual case, with a tendency to prefer the *lex fori*

the substantive law of the forum. However, the observation of the courts' decisions in various States shows that it is almost always the *lex fori* that will be applied.⁹⁰

119. Although private international law in the tradition of *Savigny* is founded on the principle of the closest connection, applying the *lex fori* to violations of personality rights has several advantages: It reduces the time and costs involved in litigation, leads to a better quality of judgments and improves the foreseeability of legal results for the media. Moreover, it facilitates taking into account public policy concerns of the forum because personality rights and privacy protection are rooted in constitutional values.

120. The main disadvantage of an approach centered on the *lex fori* is that it increases the incentives for 'forum shopping' and endangers the international harmony of decisions. This problem is particularly acute where the rules on jurisdiction for violations of personality rights have been harmonized, but the pertinent choice-of-law rules are not yet uniform. This is the case in the European Union, where forum shopping in tort litigation under Brussels *Ibis* is discouraged by the conflicts rules of the Rome II Regulation in general;⁹¹ however, Rome II does not cover personality rights (Article 1(2)(g) Rome II).

121. In order to solve this dilemma, the present Guidelines plead for a differentiation between jurisdiction based on the defendant's conduct (Article 3) and jurisdiction based on the defendant's habitual residence (Article 4). In this regard, the basic methodological approach has some features in common with Article 7 of the IDI Resolution of 2019, which also distinguishes between various heads of jurisdiction and modifies the parallelism between jurisdiction and the applicable law in many ways.⁹² However, there are some important divergences that will be highlighted in the following paragraphs. As a point of clarification, the reader is advised that in

or the law more favourable to the victim (**Brazil**). In **France**, the court solves the split by applying the law of the place which is more closely connected to the individual case (Cass., 1re civ., 14 Jan 1997, No 94-16.1861, Gordon and Breach Science Publishers). According to Art. 45(2) of the **Portuguese Código Civil**, the law where the damage occurred applies provided that it finds the defendant liable, unlike the law of the place of acting, as long as the acting person should predict the occurrence of damage in that State as a consequence of his act or omission. **Spanish** courts apply Spanish law where damage arose in Spain if the claim is limited to damages suffered in Spain, the victim is Spaniard and domiciled in Spain (see *Sentencia del Tribunal Supremo* (Sala Primera, de lo Civil) 210/2016, de 5 de abril, *Sentencias Tribunal Supremo – Civil-* num. 807/2011 of 7 November 2011 – RAJ2012, 1360 – and num. 70/2014, of 24 February 2014). In **Germany** (Art. 40(1) EGBGB) and **Italy** (Art. 62(1) of Law No 218/1995), the victim may choose between the law of the place of damage and of the place of the acting. In the **United Kingdom** (England and Wales), torts are governed by Arts 11 and 12 PIL (Miscellaneous Provisions) Act 1995 (UK). Defamation claims, however, are excluded and subject to the double-actionability rule according to which the claim must be actionable under both the law of the place of the tort and under the law of the forum. In this context, the court has to determine where 'in substance' the tort occurred what requires the consideration of a range of factual connections, including the place of the wrongful act and the place of the damage. Defamation is presumed to take place where the material is received and read (*Church of Scientology of California v. Commissioner of Metropolitan Police* (1976) 120 SJ 690). If a publication is read in more than one jurisdiction, it is considered that a separate tort has occurred in each such location, potentially governed by a different system of law.

⁹⁰ For instance, it is quite rare for the **English** courts to apply foreign law to defamation claims, as most claims in the English courts relate to English publications only, and claimants often seek injunctive relief rather than compensatory damages (and thus do not try to establish the worldwide extent of the damage to their reputation). However, in theory, the double-actionability rule does not prevent courts from applying foreign rules which are more restrictive than English law.

⁹¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.

⁹² IDI 8^{ème} Commission: *Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments* (Rapporteurs: Erik Jayme and Symeon C. Symeonides).

the following paragraphs the set of Guidelines under the IDI Resolution of 2019 are taken as a term of comparison for the purposes of analysis. Against this background, the ILA Guidelines are referred to as ‘the present Guidelines’.

122. Under the present Guidelines, jurisdiction based on the defendant’s habitual residence (Article 4) does not presuppose a close connection between the substance of the dispute and the chosen court; thus, this forum may be considered ‘blank’ from a choice of law perspective. In contrast, a jurisdiction based on the defendant’s conduct (Article 3) at least indicates that there already exists some kind of significant connection between the forum and the legal question to decide. Therefore, at the heads of jurisdiction based on the defendant’s conduct (place of acting, claimant’s centre of main interests, principal direction), courts should be allowed to simply apply their own substantive law (Article 7(1)). This roughly corresponds with the starting point of Article 7 no 1, no 3 and no 4 of the IDI Resolution of 2019. However, in so far as the pertinent heads of conduct-based jurisdiction are formulated in a different way – *e.g.* with regard to the requirement of foreseeability (Article 3(2) of the present Guidelines in comparison with the mere accessibility of material required in Article 5(1)(d) IDI Resolution), or concerning the test of principal direction (Article 3(3) of the present Guidelines as compared with the effects-based test formulated in Article 5(1)(c) IDI Resolution) –, such divergences will also lead to different laws being determined as applicable. The approach adopted by the present Guidelines is also justified by the fact that plaintiffs almost never sue in a specific jurisdiction (*e.g.* the place of injury) and simultaneously plead for the application of a different law (*e.g.* the place of acting) anyway. Incentives for forum shopping are already reduced by limiting the number of available fora to three in Article 3. In addition, the present Guidelines give up the ‘mosaic principle’ (see paragraph 93), a watershed decision which further reduces incentives for forum shopping.

123. With regard to jurisdiction based on the defendant’s habitual residence (Article 4), an automatic and general parallelism between jurisdiction and the applicable law – even in cases where no relevant conduct occurred in this State – would frequently lead to a law that is unrelated to the substance of the dispute and thus would unduly favour defendants over plaintiffs. Therefore, Article 7(2) contains specific choice-of-law rules for suits brought in this jurisdiction. In this respect, the present Guidelines differ from Article 7 no 2 IDI Resolution, which refers to the *lex fori* for suits brought in the defendant’s home state as well.⁹³ Under Article 7(2) of the present Guidelines, the approach is as follows: in principle, a court having jurisdiction under Article 4 shall apply the law of the State where the act directly causing the harm occurred, irrespective of where the damage arose (Article 7(2), first sentence). Since defendants will in most cases act at their habitual residence, leaving matters there would again unduly favour defendants over plaintiffs. Therefore, this rule is combined with a restrictively framed right of the plaintiff to opt for the law at the latter’s centre of main interest, but only if the publication was principally directed to this state (Article 7(2), second sentence). This approach prevents publishers and service providers from setting up their headquarters in ‘liability oases’. In addition, it nips in the bud complaints by foreign dictators who feel insulted at their ‘centre of interest’ although the publication in question was principally directed to audiences in other, more liberal States.

124. Where parties have agreed on jurisdiction (Article 5), but failed to choose the applicable law (Article 9), the conflicts rule of Article 7(2) applies as well. A different solution is

⁹³ Art. 7 no 2, second sentence IDI Resolution introduces a certain degree of flexibility by referring to the law of the closest connection if the defendant’s home has changed between the time of the injury and the time of the lawsuit.

proposed by Article 7 no 5 IDI Resolution: if the chosen court is located in a jurisdiction that would be competent by one of the objective heads of jurisdiction found in Article 5 IDI Resolution, the respective *lex fori* should apply again. If the chosen court is situated in another jurisdiction, the IDI Resolution refers to the principle of the closest connection. However, applying the *lex fori* of a chosen court only seems appropriate if the parties have at least made a tacit choice-of-law agreement within the meaning of Article 9(3) of the present Guidelines; in this respect, an exclusive choice-of-court agreement may be a strong indicator.⁹⁴ In such a case, an objective conflicts rule is not needed. Where not even a tacit choice of law agreement may be ascertained, however, a parallelism between jurisdiction and the applicable law is not convincing and would often necessitate corrections by the principle of the closest connection. In this regard, legal certainty is probably better served by the approach underlying Article 7(2) of the present Guidelines.

125. In order to provide for a necessary degree of flexibility, Article 8(1) allows a court to displace the regular conflicts rules found in Article 7 if a manifestly closer connection with another State exists. Such a closer connection may be based, in particular, on a common habitual residence of the parties (Article 8(2)) or on a pre-existing relationship between the parties, such as a contract (Article 8(3)). In this respect, the present Guidelines offer rather more flexibility than the IDI Resolution, which only provide for applying the principle of the closest connection if the court's jurisdiction was based on either the defendant's home (Article 7 no 2 IDI Resolution) or on a choice-of-court agreement selecting a court that would otherwise not have jurisdiction (Article 7 no 5 IDI Resolution).

126. The objective conflicts rules of Articles 7 and 8 only come into play when the parties have not chosen the applicable law pursuant to Article 9 (see Article 9(2)). In this regard, the present Guidelines largely correspond with Article 8 IDI Resolution, which also gives a significant scope to party autonomy.

127. In accordance with earlier proposals by the European Commission and the European parliament, a special conflicts rule is introduced for the right of reply (Article 10), which is frequently rooted in special media laws.

128. Finally, yet importantly, one has to take into account that personality rights and privacy protection are based on constitutional values. Thus, Article 11 allows a court to displace a foreign law if it violates the forum's public policy (Article 11(1)), to apply overriding mandatory rules of the forum (Article 11(2)) and, under certain circumstances specified in Article 11(3), to give effect to foreign mandatory rules. In contrast with Article 8(2)(c) IDI Resolution, the present Guidelines do not restrict the possibility of invoking public policy to cases where the parties have chosen the applicable law, but extend it to objective conflicts rules as well.

⁹⁴ Cf. Recital 12 Rome I Regulation: 'An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.'

Article 7
General rule

(1) Subject to Articles 8 and 11(3), a court having jurisdiction under Article 3 shall apply its own law.

(2) A court having jurisdiction under Article 4 or 5 shall apply the law of the State where the act directly causing the harm occurred, irrespective of where the damage arose. However, the court shall apply the law of the State where the injured person has their centre of main interest if the injured person so requests and if the act in question was principally directed to that State.

129. **Article 7** contains two divergent objective rules for different heads of jurisdiction. The criteria for jurisdiction established by Article 3 will usually indicate a close connection between a certain state and the case at hand. This justifies the regular approach chosen in **Article 7(1)** to apply the *lex fori* because the law of this State is in most cases closely connected to the case as well. Article 4, in contrast, provides for the general jurisdictional rule *actor sequitur forum rei*; thus, applying the law of this country would not be justified by a special connection to the facts of the case. A similar situation can be found where the parties reach a choice of court agreement pursuant to Article 5 but do not – even tacitly – specify the applicable law. Consequently, a close connection between a specific legal system and the case at hand has to be found at the level of choice of law (**Article 7(2)**). Pursuant to Article 2(6), the application of the law of the forum State means the application of the rules of law in force in that State other than its rules of private international law. Thus, *renvoi* is excluded.

130. In combination with the provisions on jurisdiction, the applicable law according to Article 7(1) is the law of the State where the act directly causing the harm occurred. The comparative approach showed that in many legal systems, both jurisdiction and choice-of-law rules for personality cases were based on some variant of *lex loci delicti*. This normally leads to a parallelism of jurisdiction and choice-of-law, *i.e.* courts usually apply the *lex fori*.

131. When the claim has been brought before the courts at the defendant's habitual residence according to Article 4 and there is neither an agreement on the applicable law nor a common habitual residence, the typically closest connection is with the place where the act occurred. In this regard, the first sentence of Article 7(2) should be interpreted in accordance with Article 3(1). However, this defendant-friendly solution is balanced by allowing the plaintiff to opt for the law of the State where he or she has his or her centre of main interest to be applied instead (**Article 7(2), second sentence**). This solution prevents a circumvention of otherwise applicable laws if the act in question was principally directed to the latter State. That State must be the main aim of the publication; all other States are not relevant to the identification of the applicable law, even if the publication is directed to them as well.⁹⁵ In the – theoretically possible, but practically

⁹⁵ In this respect, the present rule is more restrictive than that proposed by T. Lutz, *Private International Law Online* (Oxford University Press, 2020), mn. 5.154, Art. 2(3): 'However, where the party claiming to be affected by the pursuit or use of the information society service is so affected in their private life, outside his or her trade or

very rare – case where there are two States that are equally the main aim of the publication, the claimant may opt for the one of them in which the victim’s centre of main interest is situated. By limiting the law that might be chosen to just one State, this approach avoids the difficulties inherent in the *Shevill* doctrine (see *supra* at paragraph 93). Article 7(2) gives an additional choice to the plaintiff to opt for its center of main interest provided the conditions of the second sentence are fulfilled. One has to take into account that the plaintiff has already the choice to opt for its center of main interest under Article 3(2) as regards jurisdiction, which will then lead to applying this State’s law under Article 7(1). Article 7(2), second sentence is meant to encourage the plaintiff to do so for the sake of procedural economy. This is a balanced choice due to the defendant-friendly provision under Article 7(2), first sentence.

132. The term ‘principally directed’ in this Article has to be interpreted in accordance with Article 3(3). For more details see *sub* Article 3(3).

133. When the claim was brought under the provisions of Article 3, however, a close connection was already created; in the case of Article 3(1) and (2), applying the *lex fori* means indirectly – by the choice of court – applying the *lex loci delicti* as well. Explicitly providing the application of the *lex fori* is a rather untypical approach in conflict of laws, but it has several advantages: it reduces the time and cost of litigation, it usually produces a judgment of higher quality because the court can apply the substantive law it is most familiar with, and it promotes foreseeability of result for defendants.⁹⁶ The disadvantage of promoting forum shopping is minimized by the harmonization of the rule on jurisdiction.

134. The main reason to directly apply the *lex fori* is that, contrary to other areas of law, personality rights are significantly influenced by constitutional values. Thus, applying the *lex fori* reduces the need to resort to the public policy of the forum.

135. Regarding the relation to Article 8 (manifestly closer connection) and Article 11(3) (third-state mandatory rules), the introductory half-sentence of Article 7(1) emphasizes that the rule *lex specialis derogat legi generali* applies. This means that the *lex fori* may be disregarded in favour of applying a law with which the dispute is wholly or partially more closely connected within the meaning of Article 8. Likewise, third-state mandatory rules that have to be given effect pursuant to Article 11(3) may displace the *lex fori*.

136. Article 7 is only applicable when the parties did not agree on the applicable law as contemplated by Article 9(2).

137. The question as to whether and to which extent a court has to take into account rules of conduct established on an online platform, for example, must be resolved under the

profession, the applicable law shall be the law of the country in which he or she has his or her habitual residence, provided that the defendant

- acted in pursuit of commercial or professional activities; and
- directed the activity in question to this member state.

Violations of privacy and rights relating to personality, including defamation, shall always [be] considered to affect the claimant in their private life.’

⁹⁶ Cf. in the context of the idea of discretionary application of conflict-of-law rules, E.-M. Kieninger, ‘Ascertaining and Applying Foreign Law’, in S. Leible (ed), *General Principles of European Private International Law* (Wolters Kluwer, 2016), 357-373, at 367 et seq. and J. von Hein, ‘The Determination and Application of Foreign Law – A Blind Spot of European Private International Law?’, in A. Bruns and M. Suzuki (eds), *Realization of Substantive Law through Legal Proceedings* (Mohr Siebeck, 2017), 35-60, at 36-39.

applicable substantive law. An explicit provision on this issue, such as Article 17 Rome II Regulation, appears superfluous.⁹⁷

Article 8

Manifestly closer connection

- (1) Where it is clear from all the circumstances that the whole or part of the dispute are manifestly more closely connected with a State other than that indicated in Article 7, the law of that other State shall apply.
- (2). A manifestly closer connection with another State may be based, in particular, on the parties' common habitual residence.
- (3) A manifestly closer connection with another State might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the obligation in question, unless such connection would amount to an evasion of Article 9.

138. The 'escape clause' in **Article 8(1)** seeks to resolve the tension between the requirement of legal certainty, on the one hand, and the need to do justice in individual cases, on the other. Article 7 determines the applicable law by identifying the typically closest connection. However, in exceptional cases, the closest connection might be the law of another country. Thus, the judge may have recourse to an escape clause in order to achieve justice in a conflict-of-law sense for the individual case. Article 8(1) should not, therefore, be understood as a point of entry for a kind of 'better law approach' that would allow a court to select a law based on its substantive preferences.⁹⁸ This approach thus creates a flexible framework of conflict-of-law rules. Moreover, it enables the court seized to treat individual cases in an appropriate manner. Contrary to Article 4(3) Rome II Regulation,⁹⁹ the closer connection need not be determined holistically for the obligation in question, but may also cover just a single issue such as loss-regulation or prescription. This is made clear by the words 'the whole or part of the dispute' in Article 8(1). In that respect, the provision allows for a different connection of conduct-regulating rules and loss-allocating rules if the peculiar circumstances of a case require such a distinction.

139. **Article 8(2) and (3)** give examples on which the assumption of a closer connection may be based: first, the parties' common habitual residence (Article 8(2)) and, secondly, a pre-existing legal relationship between the parties, such as a contract (Article 8(3)). Since these factors are only mentioned as examples, they do not compel a court to displace the regular connection

⁹⁷ The IDI Resolution is silent on this point as well; see, however, the proposal for an explicit rule on this issue made by T. Lutz, *Private International Law Online* (Oxford University Press, 2020), mn. 5.154, Art. 4.

⁹⁸ Cf. J. von Hein, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution', 82 *Tulane L Rev* (2008), 1663, at 1669-1671.

⁹⁹ See J. von Hein, 'Art. 4 Rome II', in G.-P. Calliess and M. Renner (eds) *Rome Regulations* (Wolters Kluwer, 3rd ed., 2020), mn. 51.

found in Article 7. A court may in particular apply the rules in Article 7 to cases where the parties' common habitual residence (Article 8(2)) is superseded by additional factors that lead to a closer connection to the former law.¹⁰⁰ This might be the case, for example, when the common habitual residence of the parties has been chosen for reasons unrelated to a deeper social integration (*e.g.* tax evasion) and bears no close relation to the violation of a personality right.

140. The use of the escape clause must be an exception, as made clear by the wording 'manifestly more closely connected'.¹⁰¹ Thus, a court must always start by determining the applicable law under Article 7 before exercising its discretion as to whether this law should be displaced in an exceptional case. Nevertheless, a court may, for the sake of procedural economy and common sense, leave open the issue of exactly localizing the place under Article 7 in complex scenarios when it is clear that such a place would be displaced anyway, *e.g.* because of a contract between the parties justifying a connection to the law governing this relationship (Art. 8(3)). In particular, such a connection is a valuable tool with regard to tortious claims of users against the providers of Internet services, because it makes difficult issues of localizing exactly the place of damages in cyberspace moot.

141. The common habitual residence in **Article 8(2)** is an example for a closer connection that is neither connected to the place of acting nor to the place where the harm was suffered. Rather, it is related to personal characteristics of both parties involved. Both parties will be more familiar with the law of the country in which they habitually reside than with any other law.

142. This approach is familiar to many codifications on international tort law.¹⁰² It is an expression of an economic rationale because, usually, parties who share a common habitual residence will litigate in the country where they live. This solution reduces litigation costs and fosters a more efficient court administration.

143. The habitual residence of companies and unincorporated bodies, within the meaning of Article 2(8), may encompass more than one place between which the plaintiff may choose for the purpose of establishing jurisdiction. However, a choice of law rule may require a

¹⁰⁰ Cf., with further references, J. von Hein, 'Art. 4 Rome II', in Calliess/Renner (eds) *Rome Regulations* (Wolters Kluwer, 3rd ed., 2020), mn. 44; also: R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 4th ed., 2015), mn. 18-108.

¹⁰¹ For the parallel rule in Art. 4(3) Rome II Regulation see *e.g.* R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 4th ed., 2015), mn. 18-105. Also, the Louisiana and the Oregon codifications on conflict of laws emphasize the narrowness of their escape clauses (cf. S. Symeonides, *Codifying Choice of Law around the world* (2014), p. 199-200). On the evolution of balancing the needs of certainty and flexibility in the rest of the U.S.A. as a choice-of-law system without codification, see *ibid.* p. 208-214.

¹⁰² In some legal orders, the prevalence of the common habitual residence over other objective connections is stated explicitly; *e.g.* in Art. 40 (2) of the Introductory Law to the **German** Civil Code (*Bürgerliches Gesetzbuch*, BGB), in Art. 45(3) of the **Portuguese** *Código Civil* (common nationality or common habitual residence) or in Art. 20 of the **Japanese** AGRAL. In **Italy**, Art. 62(2) of Law No 218/1995 provides that '[s]hould tortious liability concern only nationals of one State, and all are residents of that State, the law of that State shall apply'. In other legal systems, the common habitual residence may be taken into consideration in the context of the search of the proper law of the tort (**Greece**) or as part of a flexible exception (**United Kingdom**). In **Brazil**, the fact that both parties share common habitual residence may generally be relevant in the determination of applicable law, although not when personality rights are at stake. The prevalence of the common habitual residence generally for non-contractual obligations is also provided for in Art. 4(2) Rome II Regulation (which is not applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation according to Art. 1(2)(g)), but might be considered a general legal principle in European conflict of laws on non-contractual obligations.

narrower definition in order to designate a single applicable law. Unlike Article 23(1) Rome II Regulation, Article 8(2) does not refer exclusively to a corporation's central administration. Nevertheless, a court exercising its discretion under Article 8(2) may well reach the conclusion that the place of incorporation is less relevant in the context of determining the applicable law than a company's principal place of business.¹⁰³

144. With regard to natural persons, the Guidelines do not provide an autonomous interpretation of the term 'habitual residence'. Such a concept is therefore to be interpreted in accordance with the generally accepted understanding of this term.¹⁰⁴

145. A 'manifestly closer connection with another State' within the meaning of **Article 8(3)** might be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the obligation in question, unless such connection would amount to an evasion of Article 9. This is *inter alia* justified by the usual expectation of the parties especially when the applicable law to the contract is determined by a choice-of-law agreement. The main purpose of such a rule is to avoid conflicts of characterization that might arise because various substantive laws draw the line between contractual and non-contractual obligations in a different way. Apart from that, a connection within the meaning of Article 8(3) will frequently offer a unitary solution in cases where a multitude of victims is injured who do not share a habitual residence with the tortfeasor but who are linked to this person by contracts governed by the same law. The technique of a connection within the meaning of Article 8(3) is well-known and found in several codifications.¹⁰⁵

146. The connection within the meaning of Article 8(3) however, must not be used to circumvent the limitations on choice of law stated in Article 9. Thus, if a user of a social network acting for private purposes and a social media provider agreed validly on the law applicable to their contractual relations, that law cannot be automatically applied to violations of a personality right because it would constitute an *ex ante* indirect choice of law. The connection is hence

¹⁰³ The CJEU repeatedly stated in different contexts that the place of incorporation is generally of low relevance to the identification of the real geographical centre of a company due to the fact that within the EU that place can be chosen without any real activity within that Member State; see e.g. Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, para. 41; Case C-230/14, *Weltimmo*, EU:C:2015:639, para. 29.

¹⁰⁴ For a thorough discussion, see Cheshire, North & Fawcett, *Private International Law* (Oxford University Press, 15th ed., 2017), p. 175-184; P. Hay, P.J. Borchers, S.C. Symeonides & C.A. Whytock, *Conflict of Laws* (West Academic, 6th ed., 2018), § 4.14; M.-P. Weller & B. Rentsch, "Habitual Residence": A Plea for 'Settled Intention', in: S. Leible (ed), *General Principles of European Private International Law* (Wolters Kluwer, 2016), 171-187.

¹⁰⁵ A connection such as the one described in Art. 12 is provided in Art. 4(3) Rome II Regulation which is not applicable to the violations of privacy and personality rights. For this area, the technique of accessory connection is explicitly provided in **Germany** (Art. 41(2) Introductory Law to the German Civil Code, *Einführungsgesetz BGB*) and **Japan** (Art. 20 AGRAL). In the **United Kingdom**, sec. 12 of the PIL (MP) Act 1995 allows the court to take into account a wide range of factors in determining whether 'it is substantially more appropriate for the applicable law' to be a law other than the law of the place of the tort. The courts have held that this includes consideration of the law governing a contract between the parties, if the claim in tort arises out of the contract (see e.g. *Trafigura Beheer BV v. Kookmin Bank Co* [2006] EWHC 1450 (Comm)). The **French Cour de cassation** decided that the law governing the pre-existing contract may also be applicable to a connected tort (Cass. com., 25 March 2014, No 12-29,534, *Sté Guerlain*). However, the cases did not involve personality rights infringements. Other legal systems do not accept a influence of a pre-existing relationship on the applicable law of non-contractual obligations (**Greece, Italy, Portugal, Spain**).

especially relevant for the relation between social media providers or publishers and victims pursuing a commercial activity.¹⁰⁶

147. In addition, a connection within the meaning of Article 8(3) may come into play between social media users if they have not made an explicit choice of law agreement pursuant to Article 9(1)(b)(ii). In this regard, the fact that the users are linked to the social media providers by contracts governed by the same law may establish at least a kind of factual relationship justifying a connection of tortious claims.¹⁰⁷

148. Article 8 is only applicable when the parties did not agree on the applicable law pursuant to Article 9(2).

Article 9

Party Autonomy

(1) The parties may agree to submit obligations arising out of violations of privacy to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred; or

(b) by an agreement concluded before the event giving rise to the damage occurred,

(i) if all the parties to this agreement are pursuing a commercial activity; or,

(ii) with regard to disputes amongst users of social media who do not have a common habitual residence in the same State, if the law chosen corresponds to that governing the contract which both parties have concluded with the same social media provider, and the obligation arises out of activities falling under this contract.

(2) To the extent that the law applicable to a obligation has not been chosen in accordance with paragraph 1, the law governing the obligation shall be determined in accordance with Articles 7 and 8.

(3) A choice of the applicable law may be made expressly or clearly demonstrated by the circumstances of the case and shall not prejudice the rights of third parties. The parties may at any time agree to subject their legal relationship to a law other than that which previously governed it. Any change in the law to be applied that is

¹⁰⁶ An example might be a dispute between a celebrity who agrees with a magazine on the publication of a ‘home story’ containing certain private information for profit. If the magazine subsequently publishes more intimate details than were agreed on, thus violating the personality rights of its contracting party in this context, an accessory connection of tortious claims to the law governing the ‘home story’ contract is justified.

¹⁰⁷ See J. von Hein and A. Bizer, ‘Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law’, 6 *International Journal of Data Science Analytics* (2018), 233, at 238.

made after the legal relationship came into existence may not prejudice its formal validity or adversely affect the rights of third parties.

(4) Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a State other than the State whose law has been chosen, the choice of the parties may not prejudice the application of provisions of the law of that other State which cannot be derogated from by agreement. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States of a Federal State or a Regional Economic Integration Organisation, the parties' choice of the law applicable other than that of a Member State may not prejudice the application of provisions of Federal or regionally unified or harmonized law which cannot be derogated from by agreement.

(5) The existence and validity of the consent of the parties as to the choice of the applicable law may be determined in accordance with the provisions of the chosen law, unless this would have the result of depriving a consumer of the protection afforded to them by mandatory provisions which, in the absence of choice, would have been applicable.

149. Party autonomy is established as a fundamental choice-of-law principle not only for contracts, but for non-contractual obligations as well, in order to respect the parties' common intentions and to foster legal certainty.¹⁰⁸ Choice-of-law agreements offer a high degree of legal certainty and can determine the applicable law independently from jurisdictional questions, provided that a State's private international law allows such agreements. The provisions on conflict of laws in these Guidelines, especially the escape clause (Article 8), can require further and complicated investigations and hence must be balanced by giving parties the possibility of quickly resolving any dispute on the applicable law.

150. **Article 9** is based on a modern and liberal approach to party autonomy, allowing a choice of the applicable law both *ex post* and, provided certain conditions are met, *ex ante*. The distinction between an *ex post* and an *ex ante* choice of law is inspired by Article 14 Rome II Regulation; the IDI Resolution makes a similar proposal in its Article 8. Although Article 9 of the present Guidelines does not explicitly provide for the possibility of choosing different laws

¹⁰⁸ Party autonomy for violations of personality rights is typically only allowed within limits in the existing choice-of-law provisions: notably, an agreement may only be concluded after the tortious event has occurred. Art. 42 of the **German** EGBGB allows an agreement on the applicable law *ex post* generally for all non-contractual obligations without any requirements regarding formality and thus appears to be the most liberal rule. In **France**, for instance, a choice *ex post* may only point to the *lex fori* (see *Cour de Cassation*, decision No 85-18.715 of 19 April 1988, *Roho*). The **Japanese** Art. 21 AGRAL allows an *ex post* agreement as long as it is not of prejudice to the rights of a third party. In the **United Kingdom**, party autonomy is not provided but a choice made by the parties could be considered relevant by the courts in deciding whether or not to apply the flexible exception of the double-actionability rule. Several jurisdictions (**Brazil, Greece, Portugal, Spain, and the United States**) do not allow party autonomy in this area of the law.

governing parts of the obligation, it is submitted that such a *dépeçage* is permissible.¹⁰⁹ In that regard, it must be kept in mind that Article 9 is not limited to non-contractual obligations, but covers contractual obligations as well (see Article 1(2)). For the latter obligations, a partial choice of law agreement has been accepted for a long time (see Article 3(1), third sentence Rome I). In addition, the escape clause (Article 8(1)) allows for a *dépeçage*.

151. The parties are free to choose any State's law without further requirements like a special connection to the tort. This liberal attitude is justified because demanding a close connection between the chosen law and the obligation would reintroduce precisely the legal uncertainty that the parties want to avoid by entering into a choice-of-law agreement. Furthermore, parties may choose a neutral law. The protection of the public interests of the forum is sufficiently guaranteed by the public policy clause (Article 11(1)). The eligible law is restricted to the law of States; thus, non-State-law, in particular rules on privacy elaborated by social media providers, may not be chosen.

152. According to **Article 9(1)(a)**, an *ex post* agreement on the applicable law is possible for all parties; weaker parties, such as consumers, are not excluded because the threat of abuse of an inferior negotiating position is minimized in case of a choice made post factum.¹¹⁰ After the tortious event has occurred, even consumers should be aware of the potentially dangerous implications of choosing the applicable law – at least, they have a strong incentive to seek competent legal advice. The notion of a consumer is understood within the meaning of Article 2(9), *i.e.* a natural person acting primarily for personal, family or household purposes.

153. It is not necessary that the agreement after the event be made before the court. For instance, the parties are allowed to agree on the applicable law in an out-of-court settlement as long as the choice is made expressly or clearly demonstrated by the circumstances of the case.

154. Parties who pursue a commercial activity may enter into a choice-of-law agreement *ex ante*, **Article 9(1)(b)(i)**. Commercial activity in the sense of this provision is not limited to persons who qualify as merchants under domestic laws but includes liberal professions (*e.g.*, doctors, lawyers) as well. The goal is to protect legally unsophisticated parties from a choice-of-law clause with unforeseeable effects. Accordingly, employees should fall in the scope of protection. On the other hand, occasional consumer-to-consumer transactions are excluded from the scope of the provision.¹¹¹ A person pursuing a commercial activity, however, is not without any protection as the laws on general terms and conditions also apply to an agreement on the applicable law. The criterion of a 'commercial activity' is related to a specific transaction and not to a personal status; thus, such criterion makes clear that even a trader or a professional is protected if he or she is acting outside the scope of his or her trade or profession. For transactions that serve both private and business purposes, an *ex ante* choice of law is only excluded if the commercial purpose is of clearly minor importance.¹¹² Moreover, a consumer who deceives the other party by

¹⁰⁹ Under Art. 14 Rome II, the question is controversial; see with further references J. von Hein, 'Art. 14 Rome II', in G.-P. Calliess and M. Renner (eds) *Rome Regulations* (Wolters Kluwer, 3rd ed., 2020), mn. 35.

¹¹⁰ See with further references J. von Hein, 'Art. 14 Rome II', in G.-P. Calliess and M. Renner (eds) *Rome Regulations* (Wolters Kluwer, 3rd ed., 2020), mn. 18.

¹¹¹ This may be the case, for instance, when two consumers agree that one of them is allowed to use pictures of the other one for his or her private profile in a social network.

¹¹² CJEU, Case C-464/01, *Gruber/BayWa*, EU:C:2005:32, para. 39-45 regarding Arts 13-15 of the Brussels Convention.

posing as a trader or a professional should not benefit from the protection commonly afforded to weaker parties and, notably, consumers.¹¹³

155. The obligation to which the chosen law shall apply must be closely connected to the commercial activity in question. If, for example, one businessman makes a defamatory statement concerning his business partner, but the content of the statement relates to completely private activities outside of their business relationship, a law chosen in a contract between them would not extend to this non-contractual obligation.

156. In the case of choice of law in a contract concluded before the event, it is advisable to include potential non-contractual obligations as well because the substantive laws of different States are characterized by significant divergences as far as the proper boundaries between tort and contract law are concerned. Thus, parties who want to avoid a protracted litigation on issues of characterization are well advised to choose the law applicable not only to their contractual obligations, but to their non-contractual obligations, too. In many cases, the law chosen for contractual obligations should already be applicable by way of an accessory connection within the meaning of Article 8(3). Such a connection, however, is subject to the court's discretion, so that only a choice of law clause that applies to non-contractual obligations, as well, can ensure an adequate degree of legal certainty.

157. **Article 9(1)(b)(ii)** reacts to the development, generally occurring in an online context and especially in social media, whereby users might violate each other's personality as equals.¹¹⁴ For the purpose of this provision, the term 'social media' includes every interactive online platform which allows users to generate and share their own content and to network with other users. In order to avoid giving preference to either the perpetrator or the victim, these Guidelines provide for a law which is neutral to both parties, *i.e.* the law governing the contract that both parties have concluded as users with the same social media provider.¹¹⁵ Provided that the social media provider chooses the same applicable law in all contracts with its users and this choice of law is valid, it may be appropriate to apply this law to any kind of litigation arising between users as well, provided that the user has made an informed choice. This approach is justified as the contract with the social media provider is the crucial precondition to access the social media platform and thus to enable users to communicate with each another. This solution might apply, for instance, in an online forum for debate; the users who wish to engage in a specific debate on the forum may agree with each other to submit all legal matters to the law which also governs all their platform contracts with one and the same social media provider.

158. This solution also enables social media providers to make sound prognoses: the provider can regulate the exchange of information knowing which legal standard to apply. In fact, social media providers have an obligation to 'police' the activity on their platforms; therefore, it is important for them to know which legal provisions to apply. A single law governing these

¹¹³ *Ibid.*, para. 51-53 regarding Arts 13-15 of the Brussels Convention; BGH VIII ZR 91/04, NJW 2005, 1045.

¹¹⁴ For a thorough discussion of the relationship between users of social networks and the implications for the identification of the applicable law on defamation cases see A. Mills, 'The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?', 7 *Journal of Media Law* (2015), 1-35.

¹¹⁵ Such a solution might be attractive, for instance, in groups serving the exchange of ideas and opinions in social networks. Users of such a group could set up rules of behaviour for the debate including a choice of law for any questions of liability between the users.

aspects reduces the problems in moderating the platform; this is also to the benefit of consumers because it increases efficiency and predictability, thus reducing the costs of litigation.

159. Even if both parties share a habitual residence in the same country, their relationship may have cross-border elements (*e.g.* German scientist X defames their fellow German scientist Y because of alleged plagiarism on an internationally read blog). However, Article 9(1)(b)(ii) only applies if the users of the social media platform do not have a common habitual residence in the same State. This is made clear by the introductory words of Article 9(1)(b)(ii). In such a case, judging the relationship between two users by a law that is alien to both of them would be inappropriate and increase the cost of litigation. In this scenario, it is not necessary to offer to the parties a law which is neutral to both claimant and defendant because both parties already have a significant relationship with the same law (that of their common habitual residence). Moreover, if both parties share their habitual residence in the same country, they will usually litigate in this State. In this scenario, a parallelism between jurisdiction and the applicable law will enhance procedural economy. Finally, agreements on the applicable law made by consumers should only be accepted in a restrictive manner, as a consumer may not foresee the consequences of such an agreement as a commercially active person may do.

160. Currently, social media providers do not offer the corresponding technical provisions to realize the approach in Article 9(1)(b)(ii) which is in conformity with the existing rules on choice of law. However, the Committee decided to provide for an innovative option to extend the possibilities that arise with communication on social media and to suggest new solutions.

161. **Article 9(2)** states the prevalence of party autonomy over objective connections.

162. **Article 9(3)** gives rules regarding how and when a choice-of-law agreement may be made. In addition, an agreement cannot prejudice third parties as they were not party to this agreement.

163. **Article 9(4)** avoids the circumvention of a State or an organization's internally mandatory laws in purely domestic cases.¹¹⁶ While the parties to an agreement may be able to 'contract out of' non-binding aspects of a State's substantive law even in such scenarios, they cannot avoid the application of internally mandatory provisions in the area of personality rights, where no substantial connection with another legal order exists. In addition, in some legal systems (such as the EU) the protection of privacy and data protection may have constitutional status, and thus not be subject to a derogation by private parties at all. An agreement on the choice of a foreign tribunal or on the applicable law does not alter the essentially domestic character of the situation.¹¹⁷ Paragraph (4) second sentence encompasses cases where the relevant factors are located not in a single, but also in more than one Member State of an organization like, for example, the European Union.

164. **Article 9(5)** ensures the predictability of the agreement's validity. An exception is necessary to protect consumers. Furthermore, recurring to the *lex fori* would endanger the goal of decisional harmony.

¹¹⁶ These provisions have been created after the models of Art. 3(3) and (4) Rome I Regulation and Art. 14 (2) and (3) Rome II Regulation.

¹¹⁷ J. von Hein, 'Art. 14 Rome II', G.-P. Calliess and M. Renner (eds) Rome Regulations (Wolters Kluwer, 3rd ed., 2020), mn. 40.

Article 10

Right of reply

The right of reply against a publisher, broadcaster or Internet service provider regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data is exclusively governed by the law of the State in which the publisher, broadcaster or Internet service provider has its habitual residence.

165. The right of reply is closely linked to a State's media law and should thus not be imposed by a foreign law, but rather be governed by the law of the State in which the publisher, broadcaster or Internet service provider has its habitual residence (**Article 10**). The European Commission had already recognized this approach in its 2003 Proposal for a Rome II Regulation, which contained a nearly identical provision in its Article 6(2).¹¹⁸ This solution was, in principle, also endorsed by the European Parliament (Article 5(2) of the Parliament's Rome II draft of 2005).¹¹⁹ In spite of the near consensus on this point, violations of personality rights were soon after excluded entirely from the Rome II Regulation (Article 1(2)(g) Rome II) because of disagreements concerning the general approach to such torts; thus, the right of reply was also not dealt with in the final Regulation. However, this approach to the right of reply was again confirmed by the European Parliament in 2012 (Art. 5a(4) of the Parliament's resolution).¹²⁰ The conflicts rule that was in principle endorsed by the European Commission and Parliament also reflects the prevailing approach in many Member States, *e.g.* Germany.¹²¹ The applicable law to a right of reply is exclusively determined by Article 10. Thus, neither party autonomy nor a common habitual residence are relevant to the right of reply.

166. The right of reply comprises the victim's right to publically defend herself or himself against the harmful publication or broadcast in the same place and form of publication like the harming one. Such relief should be granted swiftly and is interim in nature. Such rights must typically be enforced in the State of the publisher's habitual residence; thus, the enforcement can be realized easier and faster when a foreign judgment is in accordance with the law in the State of enforcement.¹²² In this regard, Article 10 rests on similar considerations as those informing the possibility of taking into account foreign mandatory rules (Article 11(3)).

¹¹⁸ Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM(2003) 427 final.

¹¹⁹ European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II') (COM(2003)0427 – C5-0338/2003 – 2003/0168(COD)), P6_TA(2005)0284.

¹²⁰ European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)), [2013] OJ C 261 E/17.

¹²¹ See A. Junker, 'Art. 40 EGBGB', in Säcker/Rixecker/Oetker/Limberg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 13, 8th ed. 2021, mn. 91, with further references.

¹²² In many States, there are no specific rules concerning the right of reply (**Greece, Italy, United States, United Kingdom**). In **Brazil**, the right of reply has special characteristics during electoral periods, depending on who is concerned, in which case it is regulated by a different piece of legislation. In **Germany**, the right of reply is a specific

167. The habitual residence is defined according to Article 8(2). For the purposes of these Guidelines, it is irrelevant whether a State classifies the right of reply as being of a private or public nature.

168. Article 10 also applies to a violation of privacy or of rights relating to the personality resulting from the handling of personal data. This also reflects the consensus that had nearly been reached with regard to the Rome II Regulation on this point (see Article 5(3) of the European Parliament's draft of 2005) before violations of personality rights were excluded entirely from the Regulation.

Article 11

Public policy and mandatory rules

(1) The application of a provision of the law of any State specified by these Guidelines may be refused only to the extent that the effects of such an application are manifestly incompatible with the public policy (*ordre public*) of the forum, in particular with its fundamental principles as regards freedom of expression and information as well as the protection of privacy and human dignity.

(2) Nothing in these Guidelines may restrict the application of the rules of the law of the forum which are regarded as crucial by the forum State for safeguarding its public interest.

(3) When applying under these Guidelines the law of a State, the court may give effect to the rules embodying fundamental principles of any State with which the dispute has a close connection. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

169. **Article 11(1) and (2)** aim to balance the multilateral approach of these Guidelines with the interest of the forum state in refusing the application of foreign law under certain circumstances or in applying fundamental principles of the law of the forum. Since the Guidelines adopt a rather liberal approach toward party autonomy in Article 9, safeguards such as the one offered in this Article become more important to avoid negative externalities. Especially in the field of protection of personality and of personal data, national laws have a high interest in applying their mandatory provisions.

170. **Article 11(1)** corresponds to the typical public policy clause in international conflict-of-law conventions and codifications.¹²³ It serves to protect the fundamental values of the

legal institution that is rooted in public laws governing the activities of the press or other publishers; thus, it must not be characterized as an ordinary tort. The ubiquity rule does not apply; the right at the publisher's seat is applicable.

¹²³ E.g. Art. 11(3) of the Principles on Choice of Law in International Commercial Contracts, Art. 17 of the **Brazilian** Introduction to the Civil Code, Art. 6 of the **German** EGBGB, Art. 33 **Greek** Civil Code, Art. 16 of the

State of the competent court. In cases of violations of personality rights, including defamation, a State's fundamental principles are often involved, which highlights the importance of this provision. In light of the fact that the Guidelines are concerned with privacy, 'human dignity' may best be understood to include one's right to one's identity and personhood. This understanding is certainly in tune with a Continental European view (cf. Article 1(1) of the German constitution). Moreover, in his opinion for the Court in *Lawrence v. Texas*, Justice Kennedy expressed his admiration for European approaches, and emphatically tried to found his opinion on ideals of both liberty and dignity vis-à-vis one's right to be part of a same-gender relationship. While the context is different, this reasoning conveys the breadth of the concept of 'human dignity'.¹²⁴ Kennedy J. recalled that, in explaining the protection afforded – in that case – by the Due Process Clause, the Court stated: 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.'

171. Public policy should not impede the aim of these Guidelines to promote harmonization and must hence be used restrictively and only where a court's decision would otherwise contradict the fundamental principles of a State's substantive law in an unbearable way.

172. The legal consequences of invoking public policy are not yet resolved in the academic discourse.¹²⁵ As this question is not specific to the violation of personality rights, it is not decided in these Guidelines.

173. **Article 11(2)** allows for the application of overriding mandatory rules of the *lex fori*. In modern European doctrine and legislation, it is commonly accepted that a court has to apply the fundamental principles of its own law irrespective of the law designated by regular conflicts rules.¹²⁶ Such unilateralism can also be seen in the U.S.-style governmental interest analysis.¹²⁷

Italian Law No 218/1995, Art. 43 of the **Japanese** AGRAL, Art. 12.3 of the Spanish Código Civil; in the **United Kingdom**, public policy is recognized in the common law and in sec. 14(3)(a)(i) of the PIL (MP) Act 1995; see also the overview of I. Thoma, 'Public Policy (*ordre public*)', *Encyclopedia of Private International Law* (E. Elgar, 2017), 1455-1456. The States surveyed by the Committee do not provide for a specific public policy clause for personality rights and data protection.

¹²⁴ See 123 S. Ct. 2472, 2483 (2003) (Kennedy, J., quoting *Casey v. Planned Parenthood* (505 U.S. at 851)).

¹²⁵ The question at stake is what the judge should apply instead of the refused foreign law. National provision typically avoid to clarify the legal consequences of invoking public policy. An exception can be found, for example, in **Italy** where Art. 16 of Law No 218/1995 regulates the public policy exception, and it provides that '1. No foreign law shall be applied whose effects are incompatible with public policy (*ordre public*). 2. In that case, the applicable law shall be determined on the basis of other connecting factors possibly provided for with respect to the same matter. In the absence of other connecting factors, Italian law applies'. Given that Law No 218/1995 usually provides for more than one connecting factor for each case, resort to *lex fori* is usually avoided in theory. On European private international law, see W. Wurmnest, 'Ordre Public (Public Policy)', in S. Leible (ed), *General Principles of European Private International Law* (Wolters Kluwer, 2016), 305 (326 ff.).

¹²⁶ M. Wilderspin, 'Overriding Mandatory Provisions', *Encyclopedia of Private International Law* (E. Elgar, 2017) 1330-1334.

¹²⁷ For an analysis focused on the Rome II Regulation, see H. Muir Watt, 'Rome II et les 'intérêts gouvernementaux': pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle',

174. Article 11(2) only applies to the fundamental principles that require their application regardless of the international connections of a case: the provision does not apply to merely internally mandatory rules, which are covered by Article 9(4). National data protection laws are an important example of internationally mandatory rules and as such embody fundamental principles.¹²⁸ The fundamental principles of the law of the forum are rules which are regarded as crucial by a country for safeguarding its public interests. The European Union's GDPR expresses its will to be applied independently from the law that is applicable in accordance with Article 3 GDPR.¹²⁹

175. Besides the internationally mandatory provisions of the *lex fori*, the court applying these Guidelines might also consider giving effect to the fundamental principles of a foreign law under **Article 11(3)**. Excluding this option would be a too narrow approach that might threaten the international harmony of decisions which is the fundamental goal of these Guidelines. The necessity to apply mandatory provisions of third States in certain instances can be seen in the CJEU's judgment in *Nikiforidis*.¹³⁰ Moreover, the fact that the courts of a State consciously ignore the fundamental principles of another State's law will lead to the non-recognition of an ensuing judgment.

176. The decision to give effect to foreign the fundamental principles is at the court's discretion and should take into account the objectives of these Guidelines. Cases of violation of personality rights, including defamation, often occur on the Internet. Frequently, the place where the allegedly infringing publication is stored might not coincide with the place whose law is applicable according to the provisions of these Guidelines. Giving effect, for example, to the data laws of the State where the data is stored can increase the harmony of decisions; this is especially the case when the defendant brings parallel proceedings in that third State under data protection law.

in *Le Règlement Communautaire 'Rome II' sur la loi applicable aux obligations non contractuelles*, in S. Corneloup and N. Joubert (eds) (Litec, 2008) 129.

¹²⁸ E.g. Administrative Court of Schleswig (Germany), 14 February 2013 – 8 B 60/12; M. Brkan, 'Data Protection and Conflict-of-Laws', 2 *European Data Protection L. Rev.* (2016), 324 (333-336).

¹²⁹ C. Kohler, 'Conflict of Law Issues in the 2016 Data Protection Regulation of the European Union', *Rivista di diritto internazionale privato e processuale* (2016), 653 (661-662); J.D. Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts', 117 *Zeitschrift für Vergleichende Rechtswissenschaft* (2018), 50 (73-74); M. Melcher, 'Es lebe das Territorialitätsprinzip?', in *Politik und Internationales Privatrecht* (Gössl et. al. (eds) (Mohr Siebeck, 2017), 129 (139); P.A. de Miguel Asensio, 'Competencia y derecho aplicable en el reglamento general sobre protección de datos de la Unión Europea', 69 *Revista Española de Derecho Internacional* (2017), 75 (104).

¹³⁰ CJEU, case C-135/15, *Nikiforidis*, EU:C:2016:774. The European lawmaker originally included overriding mandatory provisions of third States in the draft for the Rome I Regulation but finally refrained from this option (see draft report of the European Parliament on the proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 2005/0261(COD), p. 15). Hence, the CJEU decided that courts may not give effect to internationally mandatory provisions of states other than the ones mentioned in Art. 9 (2) and (3) Rome I (para. 49). However, the CJEU held that 'Art. 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation' (para. 51).

D – RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

177. To date, the recognition and enforcement of a foreign judgment on privacy rights is a matter primarily governed by national law.¹³¹ Section D of the Guidelines designs a system for the recognition and enforcement of foreign privacy judgments that pursues consistency and continuity (see esp. Article 12) with the previous sections of the Guidelines while also taking into account the characteristic objections to and obstacles that in many instances preclude the circulation of judgments that fall in the scope of the Guidelines (Article 13).

178. It should be noted that in this Section the Committee specifically focused on issues that are peculiar to the circulation of privacy, including defamation, judgments. Aspects that pertain more in general to the recognition and enforcement of foreign judgments (*e.g.*, questions of *lis pendens* in the recognition and enforcement of judgments, procedural public policy, due process, inconsistency with earlier judgments, prohibition of review on the merits) are not included in the text of the provisions.

Article 12

Recognition and enforcement of foreign judgments

(1) Subject to Article 13, a judgment rendered in a State shall be recognized and enforced in another State if it meets the requirements on jurisdiction provided at Section B of these Guidelines.

(2) A judgment (including an injunction) eligible for enforcement under these Guidelines shall be given the same effect it has in the State of origin. If the judgment (including an injunction) provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

(3) A judgment which orders a payment by way of a penalty is eligible for recognition and enforcement only if the amount of the payment has been determined by the court of origin.

179. Relying on the areas of commonality established by the Guidelines with respect to jurisdiction, **Article 12** lays down the bases for recognition and enforcement of foreign judgments that fall in the scope of the Guidelines.

180. Pursuant to **Article 12(1)**, the judgments that satisfy the requirements on jurisdiction laid down in Section B of the Guidelines are eligible for recognition and enforcement in another State. The synchronization between the grounds of direct and indirect jurisdiction established with this provision facilitates the prognosis as to whether the resulting judgment will

¹³¹ It is worth reminding that, as a result of the sensitive nature of privacy, including defamation, judgments, Art. 2(1)(k)-(l) of the HCCH 2019 Judgments Convention treats defamation and privacy as matters excluded from its scope. See also *supra*, fn 7.

be eligible for recognition and enforcement and may exert a dual normative effect. On the one hand, it may exert an influence on where the plaintiff chooses to bring an action because they can expect that the resulting judgment is capable of recognition and enforcement in other States that implement the Guidelines. On the other hand, for analogous reasons it may assist the defendant in making an informed decision about whether they need to file an appearance on the basis of the likelihood (*vel non*) that the resulting judgment be eligible for recognition and enforcement.

181. It should be noted that this provision does not mandate that, for the purposes of circulation of the judgment, the court of origin actually establish its jurisdiction on the basis of one of the grounds provided under Section B. On the contrary, for the foreign judgment to be eligible to circulate it is sufficient that the judgment meet the requirements on jurisdiction put forth pursuant to the Guidelines. This condition enhances the circulation of judgments while also satisfying the quest for foreseeability.

182. However, eligibility for recognition and enforcement pursuant to Article 12(1) finds a limit in Article 13: Article 12(1) is in fact without prejudice to the possibility that recognition or enforcement be refused on the grounds of Article 13 (see *infra*, *sub* Article 13).

183. Pursuant to **Article 12(2)**, in the event that the law of the requested State does not provide the relief granted by the court of origin, it shall provide a relief that has substantively equivalent effects (as opposed to relief that is merely formally equivalent to the one granted by the court of origin), and give effect to the judgment to the fullest extent permissible under its national law.¹³²

184. Notably, Article 12(2) tackles two separate situations: on the one hand, it addresses the instance where the requested State does not know the relief granted in the court of origin. On the other hand, it tackles the instance where the requested State does know a relief which, however, is only formally, but not substantively, equivalent to the one granted with the judgment. In either of these instances, in accordance with Article 12(2) the court addressed: (i) is not required to provide relief that is not available under its national law; (ii) has the obligation to adapt the relief to a measure known in accordance with its *lex fori*; and (iii) has the obligation to not go beyond the effects of the relief under the law of the State of origin. The objective of this provision is to enhance the practical effectiveness of judgments and to ensure that the judgment creditor receives meaningful relief.

185. In some jurisdictions, penalty orders may be included in the original judgment as a ‘subsidiary’ or ‘conditional’ obligation, with the purpose of securing compliance with the main court obligations. It follows that a judgment which imposes – monetary or injunctive – obligations may also contain provisional / conditional ‘subsidiary’ monetary penalties or fines in anticipation of (or for subsequent) non-compliance.¹³³ The underlying rationale of a penalty is not about

¹³² The provision at Art. 13(2) is drawn from Art. 66 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final. The provision in its original wording was not adopted; however, a similar provision is found at Art. 54 of the Brussels I-bis Regulation.

¹³³ Since some penalty orders are payable to courts or States, the question arises as to whether such orders fall in the scope of civil and commercial matters. The question whether these orders can circulate under the Brussels I Regulation was clarified by the CJEU in *Realchemie Nederland BV v. Bayer*, EU:C:2011:668: the case concerned the enforcement in The Netherlands of six German court orders in relation to an alleged patent infringement. Having found that Realchemie failed to comply with the above orders, the German court ordered Realchemie to pay a fine of 20,000 euros (*Ordnungsgeld*) pursuant to Art. 890 of the German Code of Civil Procedure (ZPO), which was to be

compensation: to the contrary, it is about sanctioning a party's lack of compliance with an injunction. Hence, ensuring the enforcement of penalties is of particular importance – especially in the cross-border setting – with a view to the ultimate compliance with the original judgment and with the ultimate satisfaction of the judgment creditor. It follows that, in principle, penalty orders circulate under the Guidelines. Against this backdrop, **Article 12(3)** limits the eligibility for recognition and enforcement of a judgment which orders a payment by way of a penalty to the instance where the amount of the payment has been determined by the court of origin: to facilitate cross-border enforcement courts should, in fact, be encouraged to fix the amount of the penalty even in those instances where this is not the case in accordance with national law.

Article 13

Refusal of recognition and enforcement

(1) Recognition or enforcement may be refused if the judgment fails to meet the requirements on jurisdiction provided at Section B of these Guidelines and it satisfies only one of the following requirements as to jurisdiction:

- a) jurisdiction was founded solely on the document instituting the proceedings having been served on the defendant during their temporary presence in the State of origin; or
- b) jurisdiction was founded solely on the basis of the nationality of the plaintiff; or
- c) jurisdiction was founded solely on the basis of the location in the State of origin of assets belonging to the defendant.

(2) Recognition or enforcement may be refused if recognition or enforcement would be manifestly incompatible with the public policy of the requested State.

paid to the court, and a periodic payment of 15,000 euros (*Zwangsgeld*) pursuant to Art. 888 of the ZPO. Bayer brought an enforcement proceeding in The Netherlands to enforce and collect these fines from Realchemie. Finding that although the fine at issue in the main proceedings was punitive, the dispute was between two private persons. The question arose as to the nature of such penalties. The CJEU found that the action qualifies as 'civil and commercial' within the meaning of the Brussels I-bis Regulation since it was intended to protect private rights and did not involve the exercise of public powers by one of the parties to the dispute. See esp. paras 31 and 34. Similarly, see U.S. Court of Appeals for the Ninth Circuit in *De Fontbrune v. Wofsy*, 838 F.3d 992 (9th Cir. 2016): having looked into the nature of the French *astreinte* and the process of rendering the such order, the Ninth Circuit found that the French *astreinte* was similar to civil contempt: its purpose was not to punish a harm against the public but to vindicate de Fontbrune's personal interest in having his copyright respected, and to deter further infringement by Wofsy. In addition, the *astreinte* awarded was payable to de Fontbrune, the proceedings were before a civil court, and the award was not a mandatory fine in the sense that the amount to be paid was freely determined by the French judge. Based on these findings, the court held that the French remedy of *astreinte* for copyright infringement awarded to de Fontbrune was not a 'fine or other penal' award but a judgment that '[g]rants... a sum of money' within the meaning of the California Uniform Recognition Act: as such, it was eligible for recognition and enforcement in California. Furthermore, in *SEC v. Credit Bancorp Ltd*, the French *Cour de cassation* ruled that a financial penalty imposed by a U.S. court for non-compliance with an injunction was civil in nature, and could thus be declared enforceable: *Cour de cassation*, Arrêt n°65 du 28 janvier 2009 (07-11.729).

(3) Recognition or enforcement of a judgment may be refused also 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 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.

186. While Article 12 lays down the bases for recognition and enforcement of foreign judgments, Article 13 sets out grounds for refusal of recognition and enforcement of those judgments.

187. The provision at **Article 13** is discretionary in nature. This is evidenced in the part of the provision where it is stated that ‘recognition or enforcement *may* be refused’ (emphasis added). It ensues that this provision does not require that the recognition or enforcement of judgments be refused even in case one of the grounds under Article 13(1) is satisfied. To the contrary, this provision sets out the grounds on which recognition and enforcement of such judgments may be refused in other States. In this case, the Guidelines’ requirements on recognition and enforcement set a minimum standard that does not displace the ability of the national law of the requested State to ultimately recognize the judgment. With this provision, the Guidelines aim to expand the possibility for a judgment to be recognised and enforced when the judgment falls beyond the limits laid down in the Article 13(1), subject to the national law of the requested State.

188. By opting in favour of this wording the Guidelines establish a system of grounds for indirect (and direct, to some extent) jurisdiction: in particular, the jurisdictional filters referred to in Article 12 (*i.e.*, those under Section B of the Guidelines) qualify as belonging to a white list. Those listed under **Article 13(1)** qualify as belonging to a ‘black list’ as a result of the fact that they may signify the expression (or the exercise) of excessive national jurisdiction. Those that fall in neither list tacitly qualify as belonging to a grey area and are acceptable subject to the national law of the requested State.

189. In particular, **Article 13(1)(a)** identifies a ground for refusal of recognition and enforcement in the fact that the court of origin established jurisdiction over the dispute on the basis of the so-called ‘tag jurisdiction’. The cursory nature of the defendant’s presence in the territory of the State of origin fails to satisfy the requirement of a proper connection between the defendant and the State of origin, and between the dispute and the State of origin. Especially in disputes over privacy rights, where a strong connection between the facts of the case and the court is paramount *vis-à-vis* jurisdiction (and applicable law), a purely occasional and fleeting relationship of the defendant with the forum State fails to satisfy the need for foreseeability and linkage. Accordingly, this ground for indirect jurisdiction may fail to establish a proper and sufficient connection for the purposes of the circulation of the ensuing judgment.

190. **Article 13(1)(b)** identifies a ground for refusal of recognition and enforcement in the fact that the court of origin based its jurisdiction on the fact that the plaintiff is a national of the forum State. The unilateral and unpredictable nature of this ground of jurisdiction conflicts with a widely acknowledged sentiment of natural justice whereby jurisdiction should satisfy preconditions of predictability and/or on a strong connection between the case and the forum. Consequently, it may be construed as unsuited to establish a proper and sufficient connection for the purposes of the circulation of the ensuing judgment.

191. **Article 13(1)(c)** states that a foreign judgment may be refused recognition and enforcement if the jurisdiction of the court of origin is established solely on the basis of the location in the State of origin of assets belonging to the defendant. The fortuitous fact that assets of the defendants are located in the forum State does not qualify as a foreseeable or strong connection to the forum State. Consequently, it is construed as unsuited to establish a proper jurisdiction over a defendant for the purposes of the Guidelines.

192. The recognition or enforcement of privacy, including defamation, judgments usually entails a delicate balancing exercise between fundamental – and often constitutional – values and is often refused if granting it would violate the fundamental principles of the requested State’s law. **Article 13(2)**, in particular, reflects this status quo by providing that recognition or enforcement may be refused if it would be manifestly incompatible with the public policy of the requested State to do so. The precondition that the incompatibility of the foreign judgment be manifest is the result of what is commonly understood as a mitigated effect (*effet atténué*) of public policy at the enforcement stage. However, as also illustrated by the examples in the paragraphs below, it is doubtful whether such mitigation may be construed as appropriate in privacy cases.¹³⁴

193. Diverging views on the balance between the right to privacy and the freedom of expression may (and do) lead to relying on the public policy ground for refusal of recognition and enforcement in cases involving violations of privacy rights. This area of the law is so sensitive that conflicts may arise also in the relations between States that share, to a significant extent, a common understanding of procedural law and of fundamental values, as is the case of continental EU Member States. This possibility is illustrated, for instance, by a decision of July 2018 where the German Supreme Court (*Bundesgerichtshof* – BGH) refused to recognize and enforce a Polish judgment under the Brussels I Regulation (before the recast) arguing that enforcement would violate German public policy, and notably freedom of speech and freedom of the press as embodied in the German Constitution.¹³⁵ In particular, in its decision the BGH held that, pursuant to Article 45 of the Brussels I Regulation, to require that the defendant publish a text drafted by someone else (in the instant case, an apology drafted by the court of origin) as its own opinion would violate the defendant’s fundamental rights under Article 5(1) of the German Constitution. This case exemplifies how a conflict between fundamental rights may arise and may affect the circulation of judgments even between legal systems (such as those of Germany and the Poland) that share a holistic approach to privacy as expression of personhood (cf *supra*, para. 27) and are bound by a qualified degree of mutual trust.

194. The reaction to the phenomenon known as ‘libel tourism’ and arising from plaintiffs’ attempts to bring defamation claims in the courts of the State that provides for the application of a more favorable law, and often on tenuous jurisdictional grounds, further substantiates the impact of the requested State’s public policy on the circulation of foreign privacy judgments. This phenomenon became so recurrent (especially, but not only, in the relations between the United States and the United Kingdom) that in 2010 the United States Congress unanimously passed the Securing the Protection of our Enduring and Established Constitutional

¹³⁴ In this sense, referring to human rights violations more in general, see also T. Domej, ‘Recognition and enforcement of judgments (civil law)’, in J. Basedow, G. Rühl, F. Ferrari and P.A. de Miguel Asensio (eds), *Encyclopedia of Private International Law* (E. Elgar, 2017) 1471-1479, esp. 1476.

¹³⁵ BGH, 19 July 2018 - IX ZB 10/18; BAG, 05.12.2019 – 2 AZR 240/19. Cf also AG *Bobek*, Opinion of 23 February 2021, Case C-800/19, *Mittelbayerischer Verlag*, EU:C:2021:124, esp. paras 82-85, emphasizing the individual nature and content of the notion of privacy and its interface with public policy.

Heritage Act (hereinafter, the ‘2010 SPEECH Act’), a federal law that is codified at 28 U.S.C. §§ 4101-4105.¹³⁶ Under the 2010 SPEECH Act, both federal and State U.S. courts are precluded from recognizing or enforcing a foreign defamation judgment unless such judgment is proven to be consistent with the First Amendment to the United States Constitution – which embodies and protects the freedom of expression and of the press in the United States – and with § 230 of the Communications Act of 1934.¹³⁷ In addition, the 2010 SPEECH Act makes available to the judgment debtor a novel pre-emptive cause of action for declaratory judgment relief against the recognition of a foreign defamation judgment which conflicts with the First Amendment to the United States Constitution.¹³⁸

195. Acknowledging the problem of libel tourism, in 2013 the Parliament of the United Kingdom passed the Defamation Act 2013. Among other things, the Defamation Act 2013 curtailed the possibility for English and Welsh courts to assert jurisdiction in cross-border libel cases.¹³⁹ Namely, s. 9(2) of the Defamation Act 2013 states that a court does not have jurisdiction over defendants not domiciled in the UK to hear and determine a defamation action ‘unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement’. However, while the Defamation Act 2013 certainly offers a constructive and proactive response to the problem of libel tourism, the response is nevertheless partial and only applies in England and Wales,¹⁴⁰ thus leaving the issues surrounding libel tourism partly unsolved.

196. The provision at **Article 13(2)** should be construed as encompassing also the case of the judgment’s incompatibility with fundamental principles of procedural fairness of the

¹³⁶ The history of the bill is available at: 111th Congress, 2d Session, Senate, Report 111-224, Hon. P. Leahy, 19.7.2012, paras 5-6. It is noteworthy that the 2010 SPEECH Act is the first, and to date only, U.S. federal legislative act on recognition and enforcement of foreign judgments. See L.J. Silberman: ‘Some Judgments on Judgments: A View from America’, 19 *King’s Law Journal* 2008, 235; *Ead.*, ‘The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments’ in P.B. Stephan (ed), *Foreign Court Judgments and the United States Legal System – 26th Sokol Colloquium* (Brill, 2014), p. 101; S.B. Burbank, ‘Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States’, 2 *Journal of Private International Law* 2006, 287; *Id.* ‘A Tea Party at The Hague?’, 18 *Southwestern Journal of International Law* 2012, 101. In particular, on ‘cooperative federalism’ see D.P. Stewart, ‘Implementing the Hague Choice of Court Convention: The Argument in Favor of ‘Cooperative Federalism’’, in P. Stephan, *Foreign Court Judgments and the United States Legal System – 26th Colloquium* (Brill, 2014), 147.

¹³⁷ Communications Act of 1934 (Pub. L. 73-416, 48 Stat. 1064), classified to 47 U.S.C.A. § 230.

¹³⁸ C.M. Mariottini, ‘Freedom of Speech and Foreign Defamation Judgments: From *New York Times v. Sullivan* via *Ehrenfeld* to the 2010 SPEECH Act’, in B. Hess and C.M. Mariottini (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments* (Nomos-Ashgate, 2015) 115-168; *Ead.*, ‘The 2010 SPEECH Act and Comity in the Recognition and Enforcement of Foreign Defamation Judgments in the United States’, *Anuario español de Derecho internacional privado*, t. XVII, 2017, 903-914.

¹³⁹ The Defamation Act 2013 applies to causes of action occurring after its commencement on 1.1.2014. On the Defamation Act 2013 and its legislative history see: W. Bennett, ‘New Developments in the United Kingdom: The Defamation Act 2013’, 14 *Yearbook of Private International Law* 2012-2013, 173; T. Hartley: ‘Libel Tourism – A solution...’, *loc. cit.*, esp. 94-95; T. Sanchez, ‘London, Libel Capital No Longer?: The Draft Defamation Act 2011 and the Future of Libel Tourism’, 9 *University of New Hampshire Law Review* 2011, 469. See also Defamation Act 2013, ch. 26, Explanatory Notes, <www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpgaen_20130026_en.pdf> (last accessed on 2 January 2022).

¹⁴⁰ The Defamation Act 2013 applies to England and Wales only, however ss. 6 and 7(9) and 15 and 17 and, in so far as it relates to ss. 6 and 7(9), s. 16(5), also apply to Scotland. See the Defamation Act 2013, ss. 17(2) and (3).

requested State.¹⁴¹ Such ground lays down a very general standard that may be subject to different understandings. However, this reading of the provision accommodates those States that have a relatively narrow concept of public policy (and treat procedural fairness and natural justice as distinct from public policy) and want to make sure that there is some language about procedural fairness. An additional reason in support of the emphasis placed on procedural fairness is to acknowledge that in some States fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.

197. **Article 13(3)** allows the court addressed to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered.¹⁴² Some States may be reluctant to recognise judgments awarding damages that go beyond the actual loss of the plaintiff. However, this concern cannot always be addressed by means of the public policy exception since some jurisdictions adopt a limited concept of public policy. To accommodate these concerns, Article 13(3) 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.

¹⁴¹ See P. Kinsch, 'The Impact of Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments – A Survey of the Cases Decided by the European Human Rights Institutions', in T. Einhorn and K. Siehr (eds), *Essays in Memory of Peter E. Nygh* (T.M.C. Asser Press, 2004), 197-227, esp. 218-228.

¹⁴² This provision is inspired to Art. 11 of the 2005 Hague Choice of Court Convention. See esp. the T. Hartley and M. Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report*, The Hague Conference on Private International Law – HCCH Permanent Bureau (2007), at paras 203-204.