

RESOLUTION 02/2022

COMMITTEE ON THE PROTECTION OF PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW

The 80th Conference of the International Law Association, held in Lisbon, Portugal, from 19-24 June 2022:

RECOGNIZING that the cross-border enforcement of privacy rights, in the context of both traditional means of communication and the information society, raises new challenges to the traditional models of adjudicating international disputes;

APPRECIATING the importance and benefits of providing legal certainty with regard to the jurisdiction of courts and the law applicable, as well as fostering cooperation to enhance the cross-border recognition and enforcement of judgments in civil and commercial matters involving privacy claims;

BELIEVING that the adoption of model provisions on the private international law aspects of privacy claims, which may guide the interpretation and reform of national legislation as well as regional and international instruments, contributes to the building of a more reliable and predictable legal framework;

TAKING INTO ACCOUNT the development of international, regional and national rules, as well as the previous efforts to draft model provisions in this field, especially those undertaken by the Council of Europe, the American Law Institute as well as by the 8th Commission of the *Institut de droit international*;

HAVING CONSIDERED the reports of the Committee on the Protection of Privacy in Private International and Procedural Law;

ADOPTS the Lisbon Guidelines on the Protection of Privacy in Private International and Procedural Law annexed to this Resolution;

COMMENDS the Guidelines to organizations, States and interested groups that are working on national, regional or international initiatives in the field, with a view to fostering international cooperation, and achieving greater legal certainty and an adequate balance of all interests involved;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and its annex to appropriate international organizations, in particular the Hague Conference on Private International Law, the American Law Institute, the European Commission, the Council of Europe, and the *Institut de droit international*;

RECOMMENDS to the Executive Council that the Committee on the Protection of Privacy in Private International and Procedural Law, having accomplished its mandate, be dissolved.

ANNEX

GUIDELINES ON THE PROTECTION OF PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW (‘LISBON GUIDELINES’)

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.

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.

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 sub-paragraphs (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.

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 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.

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.

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.

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.

C – APPLICABLE LAW

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.

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.

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 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.

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.

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.

D – RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

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.

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.

(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.