

Two new resolutions by the Institut de Droit International

In its session in The Hague on 31 August 2019, the Institut de Droit International/Institute of International Law passed two highly relevant resolutions:

Firstly, the resolution on “Internet and the Infringement of Privacy” adopted by the 8th Commission (Rapporteurs: Erik Jayme and Symeon Symeonides) focuses on numerous yet unresolved issues of jurisdiction, applicable law and the enforcement of foreign judgments. For example, the Commission rejects a ‘mosaic’ approach for internet-related tortious claims. Instead, it proposes a “holistic principle” that would allow a person to seek redress for injuries in a single state even if the injuries have occurred or may occur in another state. Moreover, the resolution puts forward a rather sophisticated choice of law rule:

In the absence of a choice-of-law agreement valid under Article 8, the applicable law shall be determined as follows:

- 1. If the court’s jurisdiction is based on paragraph 1(a) of Article 5, the applicable law shall be the internal law of the forum State.*
- 2. If the court’s jurisdiction is based on paragraph 1(b) of Article 5, the applicable law shall be the internal law of the forum State. However, if, at the time of the injury, the defendant’s home is located in another state, the applicable law shall be the internal law of the state that, considering all the circumstances, has the closest and most significant connection.*
- 3. If the court’s jurisdiction is based on paragraph 1(c) of Article 5, the applicable law shall be the internal law of the forum State. However, if the aggrieved person proves that the critical conduct of the person claimed to be liable occurred in another State, the internal law of the latter State shall govern all substantive issues, provided that the*

aggrieved person formally requests the application of that law and, upon request by the court, establishes the content of that law.

4. *If the court's jurisdiction is based on paragraph 1(d) of Article 5, the applicable law shall be the internal law of the forum State. However, if the person claimed to be liable proves that the most extensive injurious effects occurred in another State, the internal law of the latter State shall govern all substantive issues, provided that that person formally requests the application of that law and, upon request by the court, establishes the content of that law.*

5. *If the court's jurisdiction is based on a valid choice-of-court agreement and that court is located in a State referred to in Article 5, the applicable law is determined as provided in paragraphs 1-4 of Article 7, whichever is applicable. If the court is located in a State other than the States referred to in Article 5, the applicable law shall be the law of the State which, considering all circumstances, has the closest and most significant connection.*

Finally, the recognition and enforcement of judgments in line with the resolution's standards shall be subject to conditions identical to the ones introduced in the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

Secondly, the 18th Commission's (Rapporteur: Campbell McLachlan) resolution on "Equality of Parties before International Investment Tribunals" deals with one of the most fundamental elements of the rule of law that ensures a fair system of adjudication. The first part of the resolution tackles issues of party equality at the stage of the establishment of the arbitral tribunal (such as access to a tribunal, the indispensable requirement of impartiality, and the tribunal's composition), the second part is devoted to equality during the proceedings (e.g., the treatment of multiple claims and counterclaims, rules on pleading and evidence, and costs).

The resolutions can be accessed [here](#).