



COMILLAS
UNIVERSIDAD PONTIFICIA



FACULTAD DE DERECHO

PAX MOOT COURT 2024

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Derecho Internacional Privado

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Madrid

Abril 2024

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CLAIMANT'S MEMORANDUM

**Representing Ms. Saro for damages and Mr. Zupančič in the validity of the contract
[“Claimants”].**

1. Statement of the facts

- MyStream is a social media platform based in Raleigh, North Carolina, that hosts videos about university social life, commentaries on classes, student associations and related issues.
- Even though it is based in the United States, it rapidly expanded gaining popularity in Europe establishing a subsidiary, MyStream Europe, located in Tallin, Estonia.
- Due to the growing number of creators on the MyStream platform, MyStream decided to establish the MyStream Creator Program (MySCP). Thus, all European content creators who wanted to join MySCP signed an agreement with MyStream Europe.
- Giulia, born on April 26, 2006, a minor, has both Slovenian and Italian nationality through her parents Mr. Jure Zupančič (Slovenian) and Ms. Martina Marchetti (Italian). They both resided together with Giulia in Ljubljana, Slovenia. However, in 2015 they separated, without ever having been previously married.
- After the separation, they decide by mutual agreement that Giulia will go to live with her mother, maintaining regular contact with her father. This process is resolved amicably by mutual agreement without any formalization of the agreement through lawyers.
- Giulia and her mother, Ms. Marchetti resided in Ljubljana until February 2023, when they moved to Trieste, Italy. Ms. Jure Zupančič, in accordance with the decision to move, decided to continue living in Slovenia, where he still lives today.
- However, an essential point for the procedure must be taken into account: in Slovenia, parents share the primary and equal responsibility for the care, upbringing and development of their child by law. Meaning that both parents (Mr. Jure Zupančič and Ms. Martina Marchetti) have the right and obligation to intervene in decisions that affect the child they have in common.
- In March 2022, Giulia created a MyStream account for herself. She started uploading videos and quickly went viral. For this reason, MyStream Europe, due to her growing

popularity, offered her to join MySCP in order to create more videos. Her mother, Ms. Marchetti, signed the contract on her behalf, agreeing to all the clauses contained in the contract. However, Mr. Zupančič, as Giulia's father, had no say in this decision, as he was not included in the signing of the contract.

- In June 2022, Mr. Zupančič, Giulia's father, married Ms. Lydia Saro, a Slovenian athlete and famous socialite. She in turn had a contract with the sportswear brand Feline SE. This contract stipulated that Ms. Saro could only be seen at her public appearances wearing Feline SE clothing and accessories. A violation of this clause of the contract would imply a breach of contract and the termination of it.
- During her visits to her father, Giulia would record home videos with Mr. Zupančič and Ms. Saro. She would post these videos to MyStream, which received a considerable number of views due to Ms. Saro's notoriety. However, in many of these videos Ms. Saro was seen wearing clothes from brands other than Feline, leading to the decision of Feline to terminate the contract and claim damages due to breach of contract.

2. International jurisdiction on the claim for damages

Acknowledging the facts aforementioned, the court seized in this particular case, being the District Court in Ljubljana, has the international jurisdiction to hear the case of Ms. Saro on the damages.

To determine this, we have made use of the *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*. Throughout this memorandum, we will make constant mention of it, and refer to it as Brussels I bis Regulation [**“Brussels I bis”**]. However, in order to determine its application in this particular case, we need to talk about how it is applicable in more than one way. Firstly, it is necessary to distinguish between the material and spatial scope of it, and thus determine whether it is relevant to the cases that concern us.

Regarding the material scope of application, this is set in Article 1 of the Regulation. It is established that the Regulation shall only apply to private law relationships, not to public law

relationships, which in the present case would fall within these parameters¹. Moreover, in relation to the so-called spatial scope and international jurisdiction, the rules vary concerning the recognition and enforcement of foreign judgments. The rules of international jurisdiction contained in the Brussels I bis are mainly formulated around the concept of the defendant's domicile (Art. 4(1)). However, due to the non-contractual nature of one of the disputes to be dealt with, Article 7(2) relating to “delictual or quasi-delictual matters” will be mentioned.

We are faced in this case with the existence of a special forum, since Ms. Saro is suing for non-contractual damages. There is no contractual relationship between Ms. Saro and Giulia, Mrs. Marchetti or MyStream that deals with the subject matter of the litigation. The only contractual relation present in this particular case is between Ms. Saro and Feline SE, but this is not the object of this question. Therefore, we could argue that according to Private International Law, there is an existence of a special forum. Since we are dealing with a non-contractual relationship, in which there is no contract between the parties, we should abide by Article 7(2) of the Brussels I bis Regulation, which states the following: “*a person domiciled in a Member State may be sued in another Member State: [...] in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*”²

Nonetheless, this concept of “tort, delict or quasi-delict” is subject to autonomous interpretation by the Court of Justice of the European Union [“CJEU”]. This ensures that this principle is applied consistently, giving each of its addressees identical rights and obligations.

As a general rule, this article establishes that the Court of the place where the harmful event occurred shall have jurisdiction. This rationale is based on the principle of reasonable proximity. In accordance with this, it is stated that the rules of international civil jurisdiction should be drafted in such a way as to reflect a reasonable degree of proximity of the judge's jurisdiction to the legal relationship³. In this sense, the Court of Justice of the European Union has addressed this matter conveying how the principle of reasonable proximity “*is based on*

¹ Ruiz Martín, A. M., “Material scope of Brussels I Bis Regulation, unfair commercial practices (B2C) and injunctions to protect collective consumers interests: CJEU Judgement Movic BV (C-73/19)”, *Cuadernos de Derecho Transnacional*, vol. 13, n. 13, 2021, p. 1075.

² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

³ Rodríguez Jiménez, S., “La exigencia de proximidad razonable en la norma de competencia judicial civil internacional”, *Competencia Judicial Civil Internacional*, Universidad Nacional Autónoma de México, Ciudad de México, 2009, p. 47.

*the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings”.*⁴ This proximity reduces the costs of the proceedings by, for example, facilitating the taking of evidence and, consequently, contributes to a more efficient resolution of the litigation.

Regardless of the defendant's place of residence, anyone whose actions create harm in a particular location must be held accountable for that harm in this place, meaning they must face the cost of the lawsuit there too.

Having said all this, in order to determine the competent jurisdiction to analyze this case and to determine whether the District Court of Ljubljana is indeed capable of hearing the case, it is necessary to ask the following question: what is the place where the harmful event occurred?

This particular case is most certainly conflicting, as it is difficult to pinpoint exactly the place in which the harmful events and consequently the damage took place. In order to determine the place of origin, i.e., where the event that caused the damage occurred, the conduct or event that directly causes the damage must be considered, not mere preparatory or auxiliary acts. However, the case at hand is somewhat particular, since it is difficult to decipher exactly where the events that gave rise to the damage occurred.

We can all agree that in this case the damaging event is the uploading of the videos to the MyStream platform. This is because if Giulia had not uploaded the candid videos to the internet where the Claimant appeared, she would not have faced the consequences that later unraveled. In other words, if those videos had not been uploaded to the MyStream platform, videos in which Ms. Saro appears wearing clothes other than those of the Feline brand, this would not have given rise to the termination of the sponsorship contract and compensation for damages to which my client has been subjected. Therefore, in this case it would be necessary to differentiate the place of origin of the damage and the place of result, which are different and therefore would give rise to different jurisdictions or international jurisdiction to sue.

⁴ Judgment of the Court of Justice of the European Union C-147/12, 18 July 2013 [online version - CURIA ECLI:EU:C:2013:490].

In this regard, several rulings of the CJEU have given rise to the creation of an autonomous interpretation of the concept “place where the harmful event occurred”. This interpretation is essential in order to determine the place the damage occurred and effectively exercise international jurisdiction.

In this distinctive case due to how the damage is produced, we could determine that we are facing a case in which the same victim (Ms. Saro) has suffered the damage in several States (the video is published on the MyStream platform, which is present in more than one country) since the damage is the published recording but it is complicated to determine the exact scope of the video to decide the place where the damage has been produced.

In this regard, the Court of Justice of the European Union, in Case C-170/12 of 3 October 2013, *Peter Pickney v KDG Mediatech AG*, stated the following:

*“Thus, the alleged victim of an infringement of personality rights by means of content placed online, which is protected in all the Member States may, on the basis that the harmful event occurred there, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised. Furthermore, given that the impact which material placed online is liable to have on an individual’s personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the alleged victim may choose to bring an action in one forum in respect of all of the damage caused.”*⁵

In this case, the damage to Ms. Saro is caused by the uploading of those videos to the MyStream platform. Prior to the uploading of those videos by Giulia, there is no damage as such, because there is no video or photograph showing Ms. Saro wearing clothes other than those she is required to wear as part of her contract with Feline. The judgment C-509/09⁶ takes the same

⁵ Judgment of the Court of Justice of the European Union C-170/12, 3 October 2013 [online version - CURIA ECLI:EU:C:2013:635].

⁶ Judgment of the Court of Justice of the European Union C-509/09, 25 October 2011 [online version - CURIA ECLI:EU:C:2011:685].

position as the judgment mentioned above, claiming that the damage to the Claimant has been caused by uploading the videos to the platform and because the damage has occurred in different places, the victim can choose to sue in the place of origin of the damage (in Ljubljana, which is where we assume that the videos have been recorded when Giulia was staying with her father and Ms. Saro) or in the place of the result (each of the Member States where the result manifests itself, but only to claim damages suffered in the territory of that State).

It is for this very reason that, in accordance with the provisions of the previously mentioned judgments, it could be concluded that the Claimant is indeed correct in suing before the District Court of Ljubljana.

3. Applicable law on the claim for damages

We have already made it clear that the competent Courts to hear the litigation initiated by the Claimant for damages caused as a result of the uploading of videos on the MySpace platform are the District Court of Ljubljana. Once this is settled, it is necessary to determine which law is applicable, as just because the litigation is heard in Ljubljana does not necessarily mean that Slovenian law is applicable. There may be different reasons why a court has jurisdiction to decide the merits of a case while the law of another country is applicable.

It is for all of the reasons explained in the previous point that we would have to abide by the provisions of the *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*, or Rome II Regulation [**“Rome II”**] to determine the applicable law. This Regulation aims to establish a coherent and uniform legal system within the European Union to resolve legal disputes in cases of contractual liability with international elements. Although this Regulation has a regional scope (i.e. applicable in the European Union), its approach and principles may serve as an inspiration for similar developments within the field of Private International Law at a global level.

With this in mind, it is important to highlight the scope of the Rome II Regulation. This Regulation has a broad territorial scope and applies both to conflicts of law between countries and third countries too. This implies that it does not necessarily apply exclusively between EU

countries, but that other third countries may also be subject to the application of this Regulation. Therefore, the law designated by Rome II will be the law to be applied to a given litigation situation (in this case, the claim for damages brought by Ms. Saro), whether it is the law of a member state or the law of a third state. In all EU member states (with the exception of Denmark), Rome II is the only rule of Private International Law applicable to these cases⁷.

This is what the doctrine designates as the universal character of Rome II, which is further stipulated in Article 3 of the same, stating that “*any law specified by this Regulation shall be applied whether or not it is a law of a Member State*”. This establishes the law to be applied to a dispute between two European citizens, between two non-European citizens or even between two citizens of third States who travel to Europe to litigate, making no difference whether the damage occurred inside or outside the EU⁸.

Rome II contains a general rule and a number of special rules for certain types of damage in the field of non-contractual obligations, and in the absence of choice of the parties. Where there is no specific rule that applies, the general rule will be applied in a subsidiary manner⁹. For this reason, it is important to determine which are the special rules, listed in Rome II in Articles 5 to 9, being the following: product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights and industrial action (actions arising from a collective dispute). However, as we can see, the case in dispute does not fall into any of these categories, so we would have to resort to the general rule.

Since in this case the general rule or *lex loci damni* would apply, we would have to refer to Article 4 of Rome II, more specifically to the first point which states the following: “*Unless otherwise provided in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and*

⁷ Navarro Varona, E. y Moscoso del Prado González, L., “Foro de Actualidad: El Reglamento sobre la ley aplicable a las obligaciones extracontractuales (Roma II)”, *Revista Actualidad Jurídica Uría Menéndez*, n. 19, 2008, p. 59.

⁸ Garcimartín Alférez, F. J., *Derecho Internacional Privado* (7º ed.), Editorial Aranzadi, Pamplona, 2023, p. 412.

⁹ *Ibid*, p. 414.

irrespective of the country or countries in which the indirect consequences of that event arise"¹⁰.

In this sense, the traditional solution of the *lex loci delicti commissi* (law of the place where the delict/tort was committed) is established, a territorial connection that is distinguished by its neutrality, predictability, legal certainty¹¹, and which, as stated in Paragraph 16 of the Preamble Rome II, "*strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability*"¹². In other words, the applicable law is individualized in the country where the direct consequences of the damage occurred, that is to say, the place where the injury or damage to property took place, regardless of where the generating event occurred or where the indirect consequences took place¹³. Considering that in this case the videos were recorded when Giulia was visiting her father in Ljubljana, it makes sense that the applicable law is indeed the law of Slovenia, which is the law of the place where the damage occurred. This is a criterion that, as previously mentioned, is neutral¹⁴.

This point regarding the materialization of the damage is closely related to what was previously explained concerning the determination of the place where the damage occurred. For this, we can rely on CJEU rulings such as Case C-498/20, in which it is determined "*that the place where the damage occurred is the place where the initial damage to the persons directly affected occurs*"¹⁵. This point therefore further reaffirms that the applicable law will indeed be that of Slovenia, since the damage occurred in Ljubljana.

¹⁰ 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).

¹¹ Rodríguez Vázquez, M. A., "La ley aplicable a las obligaciones extracontractuales en el espacio europeo", *Revista Aranzadi de Derecho Patrimonial*, n. 25, 2010, p. 173.

¹² Rome II, Preamble Paragraph 16.

¹³ *Ibid.*, p. 173.

¹⁴ Garcimartín, F. J., "Derecho Internacional...", *op. cit.*, p. 416.

¹⁵ Judgment of the Court of Justice of the European Union C-498/20, 10 March 2022, para. 59 [online version - CURIA ECLI:EU:C:2022:173].

4. International jurisdiction to order the removal of the videos or issue an interim order until final judgment is given

We also request the removal of the videos uploaded by Giulia to the MyStream platform in which Ms. Saro appears, as well as an interim order until a final judgment is issued.

We rely on both paragraph 25 of the Preamble of Brussels I bis and Article 35, which make it possible to request interim measures from a court of a Member State for interim or precautionary measures provided for by the law of that Member State (in this case the law of Slovenia), even if a court of another Member State has jurisdiction to hear the merits of the case (which would not be our case). In other words, it is perfectly possible for the Claimant to request the removal of the videos from the MyStream platform as a result of the initiation of civil proceedings relating to the damages suffered as a result of the uploading of the videos to the internet.

The purpose of precautionary measures is to protect a main action. It therefore makes sense that the ability to resolve a main action should also extend to the power to adopt interim or provisional measures to ensure the effectiveness of the resolution pursued.

However, one should focus on what exactly are interim measures. Well, Brussels I bis does not contain a definition as such, so we would have to refer to other Conventions adopted by the EU in relation to this to clarify doubts about its definition. For this we could refer to the definition made by the CJEU in Case C-261/90 as follows: “*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 otherwise sought from the court having jurisdiction as to the substance of the case*”¹⁶. However, one should focus on what exactly are interim measures. Brussels I bis does not contain a definition as such, so we would have to refer to other Conventions adopted by the EU in relation to this to clarify doubts about its definition. For this we could use the definition made by the CJEU in Case C-261/90 as follows: “*measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal*

¹⁶ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 201.

situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case”¹⁷.

In relation to precautionary measures, it is essential to mention effective judicial protection, since it is the foundation on which such measures are based. The pillar of precautionary measures should not focus on the general aspect of the right to protection, but on the right to its effectiveness. For this very reason, the right to judicial protection must be able to guarantee the practical compliance of the resolution that is issued to comply with the protection of the rights that must be granted¹⁸, in this specific case, to Ms. Saro, and thus be able to effectively enforce her rights.

The principle of effective judicial protection within the European Union is based on the constitutional traditions of the Member States and has been consolidated in Articles 6 and 13 of the European Convention on Human Rights, thus guaranteeing the right to a fair trial and the right to an effective remedy for all citizens within the framework of the European Union¹⁹. Likewise, Article 47 of the Charter of Fundamental Rights of the European Union includes the right to effective judicial protection and to an impartial judge, thus guaranteeing a fair and public process to defend their rights and interests²⁰.

The need for effective judicial protection is one of the driving forces behind the creation of a European judicial area, as it allows the EU to adopt legislative instruments that promote the harmonization of national legislations, through the articulation of judicial cooperation in civil matters with cross-border repercussions, based on the principle of mutual recognition of judicial and extrajudicial decisions, which will be discussed below²¹.

Paragraph 25 of the Preamble of Brussels I bis specifies provisional and precautionary measures, but does not establish a complete definition of them, claiming the following:

¹⁷ Judgment of the Court of Justice of the European Union C-261/90, 26 March 1992, para. 34 [online version - CURIA ECLI:EU:C:1992:149].

¹⁸ Ortiz-Pradillo, J.C., “International jurisdiction and provisional measures: towards a common interim justice in European civil procedure converting on national laws”, *Cuadernos de Derecho Transnacional*, vol. 12, n. 2, 2020, p. 1338.

¹⁹ Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales (BOE 10 de octubre de 1979).

²⁰ Charter of Fundamental Rights of the European Union (BOE 30 de marzo de 2010).

²¹ Ortiz-Pradillo, J.C., *op. cit.*, p. 1339.

“The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.”²²

Having said all this, in this case we are not only interested in the concept of interim measures as such, but their applicability and the international jurisdiction of the District Court of Ljubljana in adopting them. The purpose of international jurisdiction is to determine when the Courts of a specific Member State have jurisdiction to resolve an international dispute. It is obvious to think that the same applies to international judicial protection and therefore to the application of provisional and protective measures. Here the question arises as to which Courts of the Member States (or in this case, those involved in the present case) will have jurisdiction to hear a possible application for interim measures to protect the main action of a dispute. This will be determined by their international jurisdiction.

In this case and as previously detailed in this memorandum, we are faced with the presence of a special forum, as stated in Article 7(2) of the Regulation, due to the existence of a non-contractual relationship (damages) subject to litigation. This special forum is expressly provided for in Article 35 of Brussels I bis, where, in order for the interim order to be effective, the main judge must have the capacity to apply for interim orders directly before the Courts of the place where it is to be carried out²³ (in this case, the District Court of Ljubljana).

The application of Article 35 is intended to protect a judicial matter that falls within the material scope of Brussels I bis, i.e. civil and commercial subject matter, whereby a non-contractual action for damages would fall within the material scope. The qualification is made possible by the auxiliary nature of interim orders, which can be applied to a wide variety of proceedings²⁴.

²² Brussels I bis, Preamble Paragraph 25.

²³ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 202.

²⁴ *Ibid*, p. 205.

Article 35 of the Regulation is a rule of direct reference, i.e. it explicitly states which courts have jurisdiction. The courts where the measure is carried out or where it has to take effect are the ones that have the authority to adopt these measures. Therefore, Article 35 provides the affected party with the option of applying for an interim order in an alternative manner, both before the Courts that have jurisdiction to hear the case and before the courts that have jurisdiction to carry out the measure. However, the special forum can only take precautionary measures in case of urgency and if there is a connection or proximity between the precautionary measure and the court²⁵. Therefore, it is logical that the competent court to order the (at least temporary) removal of the MyStream videos is the District Court of Ljubljana, which is the place where the main litigation has been heard, as well as the place where the damage has occurred.

This has also been reflected in the Judgment of the CJEU, as in the *Mietz Case*, Case C-99/96, where paragraph 41 states the following: “*In this regard, the Court of Justice held [...] that the court having jurisdiction to rule on the merits of a case by virtue of one of the powers provided for in the Convention also has jurisdiction to order provisional or protective measures, without such jurisdiction being subject to any other requirement*”²⁶.

Moreover, as mentioned in Article 35, not only the District Court of Ljubljana is competent to hear the request of interim measures, but it is also possible for another Court of another Member State to hear it. This is evident from the following: “*Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*”²⁷. Since the criterion that determines jurisdiction is not established, this precept has generated numerous interpretative problems, as the ability to hear a certain dispute is not necessarily linked to the competence to adopt provisional or

²⁵ Font I Segura, A., *et al.*, “Competencia judicial internacional”, *Universitat Oberta de Catalunya*, September 2019, p. 44.

²⁶ Judgment of the Court of Justice of the European Union C-99/96, 27 April 1999, para. 41 [online version - CURIA ECLI:EU:C:1999:202].

²⁷ Brussels I bis, Article 35.

precautionary measures. In other words, the fact that a Member State has primary jurisdiction does not mean that it cannot take provisional or protective measures in another Member State²⁸.

Having said all this, it is clear that in order to ensure the effective imposition of the interim measures as soon as possible to try to mitigate the damage caused to the Claimant, if these measures were to be requested in a Court of a Member State other than Ljubljana, it could be acknowledged too.

Both the Judgements of the CJEU and the Preamble of Brussels I bis have clarified the meaning of this provision and have answered this question indirectly, establishing how jurisdiction is delimited by the place of execution or effectiveness of the measure. In this sense, Paragraph 33 of the Preamble establishes the following: “*Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State*”²⁹.

5. International jurisdiction to hear the case over the nullity of the contract

In order to determine whether or not the District Court of Ljubljana has international jurisdiction to hear the nullity or termination of the contract between Giulia and MyStream Europe (which Ms. Marchetti signed for Giulia as she was a minor), we would have to refer to the *Council Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, [“Brussels II ter”]*. Compared to its predecessors, this relatively new Regulation aims to facilitate the application of difficult rules and, above all, to protect the best interests of the child, especially in cases of international child abduction. Together with other European Regulations related to family law, it presents a complex, fragmented and incomplete panorama³⁰.

²⁸ Garcimartín Alférez, F. J. y Sánchez, S., “El nuevo Reglamento de Bruselas I: qué ha cambiado en el ámbito de la competencia judicial”, *Revista Española de Derecho Europeo*, n. 48, 2013, p. 32.

²⁹ Brussels I bis, Preamble Paragraph 33.

³⁰ Borrás, A., “Bruselas II, Bruselas II bis, Bruselas II ter...”, *Revista Electrónica de Estudios Internacionales*, n. 38, December 2019, p. 5.

The first problem that arises in this case is the determination of affiliation. As is well known, Mr. Jure Zupančič (with Slovenian nationality) and Ms. Martina Marchetti (with Italian nationality) are Giulia's parents. Now, the problem is that the parents, not married, live together in Ljubljana, Slovenia, until their separation in 2015. In this agreement, formalized by mutual agreement without the need for lawyers, they determined that Giulia would live with her mother, maintaining regular contact with her father. In February 2023, Ms. Marchetti decides to go live with Giulia in Trieste, Italy, while her father, Mr. Zupančič, stays in Slovenia. This, however, complicates the situation since they were not married prior to the separation, thus making it difficult to determine filiation with Giulia according to Italian law.

According to Slovenian law, parents share the primary and equal responsibility for the care, upbringing, and development of their child by law. However, this differs from the Italian law, where joint parental responsibility is acquired by operation of law if parents are married, whilst unmarried parents do not automatically acquire parental responsibility by operation of law.

The European Union has tried on numerous occasions to harmonize laws within Europe to avoid causing these legal problems. The European Commission has approved a proposal for a Regulation that seeks to unify the regulations relating to Private International Law in relation to filiation at the EU level, with the best interests and rights of the child as the center of the proposal³¹. However, as it has been mentioned, it is simply a proposal without any legal connection, but it demonstrates the urgent need for homogeneous regulation within the EU regarding filiation.

Private International Law is very diverse and lacks defined models, but it agrees on two fundamental values: the importance of a particular conception of the family in the legal ties between parents and children and freedom and dignity. The complicated situation to reach consensus or to establish uniform solutions (as occurs with the Brussels II ter), is fueled by technical issues that have an impact on the accreditation titles of affiliation, which are diverse and can be contradictory too³².

³¹ European Commission, "Equality package: Commission proposes new rules for the recognition of parenthood between Member States", *European Commission*, 7 December 2022 (available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7509).

³² Álvarez González, S., "La propuesta de reglamento europeo sobre filiación. Una presentación crítica". *Revista de Derecho Civil*, vol. 10, n. 3, p. 172.

Leaving this aside and establishing how Brussels II ter is certainly ambiguous in these cases, we have to focus on whether the District Court of Ljubljana has international jurisdiction to hear about the nullity or termination of the contract between Giulia and MyStream. We would have to focus first on the relationship between Mr Zupančič and My Stream. As explained in the case, Mr Zupančič instituted legal proceedings against MyStream Europe regarding the validity of the contract. Now the problem is the following. Although there is a clause in the contract that Ms. Marchetti signed with My Stream to submit to the courts of Wake County in North Carolina, the Claimant did not sign that contract, which means he is not obliged to submit to the courts of Wake County in North Carolina. Mr Zupančič is affected by the contract since under Slovenian law, he has rights over everything that affects Giulia. However, by not signing that contract and not being a party to it, he will not be subject to the clause of choice of the Wake County courts to hear the matter.

It is necessary to briefly talk about the domicile of each of the parties, in order to determine whether the District Court of Ljubljana has jurisdiction to hear the first case. The problem that arises in this case is the following. In the case of the Claimant, we understand that since he is a natural person, his domicile is located in Ljubljana, Slovenia. It is not necessary to resort to the autonomous interpretation of the CJEU, since the domicile will be determined by the law of each State. Now, the problem that arises is with the address of MyStream Europe. As explained in the case, the legal proceedings are instituted against MyStream Europe, subsidiary of MyStream, located in Tallinn, Estonia.

It is a legal person, so it will be necessary to adhere to the autonomous interpretation of the CJEU regarding the domicile of a legal person. Article 63 of Brussels I bis states that the following legal persons shall be deemed to be domiciled wherever they have their “(a) *statutory seat*; (b) *central administration*; or (c) *principal place of business*”³³. These three criteria play as alternatives, since any of them can be invoked by the relevant actor to establish the domicile of the company³⁴. That is why it could be argued that the defendant, MyStream Europe, is domiciled in Tallinn, Estonia, thus making Brussels I bis applicable for all purposes.

³³ Brussels I bis, Article 63.

³⁴ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 95.

Likewise, and in accordance with art. 7(2) of the Brussels Regulation I bis previously mentioned in this memorandum, we are faced with a situation regulated extra-contractually. That is, Mr. Zupančič, as a non-contractual party, wants to challenge and request the nullity of a contract of which he is not a contracting party, but which affects him, since he is Giulia's father. In accordance with this article and with both the jurisprudence of the CJEU and the doctrine relating to non-contractual matters in Private International Law, we must refer to the place where the harmful event occurred.

For the application of this article, 3 essential requirements must be met. Firstly, that the dispute concerns a civil or commercial matter, requirements that in this case are met. Secondly, that it is not derived from or has not occurred within the framework of a relationship freely assumed by the parties³⁵. This is applicable since Mr. Zupančič is not one of the contracting parties of the contract that is being challenged, but rather he is affected by being the father of Giulia and not giving his consent to that contract. Thirdly and finally, non-contractual liability arises because a causal link can be established between the damage claimed by the plaintiff and the harmful event that is attributed to the tortfeasor, the defendant. This last point is arduously corroborated in Supreme Court rulings such as C-147/12, C-572/14 or C-242/20³⁶.

Taking into account the information we know about this case; the damage occurs when signing the contract. All this happens in Ljubljana. This is based on the fact that the contract from what we understand is signed in March 2022, Giulia and Ms. Marchetti still lived in Ljubljana, since the move to Trieste (Italy) takes place in February 2023. Therefore, the District Court of Ljubljana will be competent to hear the nullity and termination of the contract.

³⁵ *Ibid*, p. 115.

³⁶ *Ibid*, p. 115.

6. Applicable law to the termination of the contract

Once international judicial jurisdiction has been established to determine the validity or termination of the contract, it is necessary to determine the law applicable to this dispute. Taking into account the case described previously, from the position of the Claimant we consider that the international judicial jurisdiction to hear the dispute is held by the District Court of Ljubljana, due to the arguments previously expressed. However, we are now going to focus on the applicable law, which does not necessarily have to be the same as that of the Court competent to hear the case.

There may be different reasons as to why it is appropriate to affirm the jurisdiction of a Court but resolve the substance of a matter according to a foreign law. Among others, the easiest to conceive is that if each judge applied their national law, the resolution of a dispute would depend on where it arose, which would significantly increase legal uncertainty. Meaning that, up until any sort of dispute arises, the parties are not certain about the law that governs their relationship.

We will have to refer to *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*, [**“Rome I”**], to determine the law applicable to the present case. The litigation falls within the material scope of Rome I, since according to Article 1, it is a contractual matter in the “civil and commercial” area. Although, as we have already made clear, Mr. Zupančič is not a contracting party, but in the event of termination of the contract he acts as representative of his daughter Giulia, due to the deleterious impact on her psychological well-being and broader personal development.

As mentioned in the case, according to Slovenian law, parents share the primary and equal responsibility for the care, upbringing and development of their child by law. Therefore, regarding solely the content of that contract and with the Claimant acting as legal guardian of a minor (Giulia), we could argue that he can legitimately request the termination of that contract, which is clearly harmful and acts to the detriment of Giulia. According to Article 3(1) of Rome I, the contract shall be governed by the law of the chosen parties. Even though the Claimant had no say in the contract because Ms. Marchetti signed without Mr. Zupančič’s

approval, he is acting on behalf of Giulia, therefore ultimately accepting the law of North Carolina to discuss the termination of said contract.

7. Petitum

The Claimants request the Court to: (1) accept the jurisdiction of the District Court of Ljubljana to hear the case on damages, (2) apply the law of Slovenia in the case for the damages inflicted on Ms. Saro, (3) accept the jurisdiction of the District Court of Ljubljana to order the removal of the videos and to order an interim order until the final judgment is given, (4) accept the jurisdiction of the District Court of Ljubljana to hear the case over the nullity/termination of the contract between Giulia and MyStream Europe and, (5) apply the law of Slovenia to the termination of the contract.

DEFENDANT'S MEMORANDUM

Representing Giulia, Ms. Marchetti and My Stream in the case for damages and MyStream in the case for the validity of the contract ["Defendants"].

1. Statement of the facts

- MyStream is a social media platform based in Raleigh, North Carolina, that hosts videos about university social life, commentaries on classes, student associations and related issues. Due to its growing popularity in Europe, it established a subsidiary, MyStream Europe, located in Tallin, Estonia.
- Within MyStream, as a result of the growing number of creators, it decided to establish the MyStream Creator Program (MySCP). Thus, all European content creators who wanted to join MySCP signed an agreement with MyStream Europe.
- Giulia was born on April 26, 2006, therefore, still a minor. Her parents, Mr. Jure Zupančič, a Slovenian, and Ms. Martina Marchetti, an Italian, lived together in Ljubljana, Slovenia, with Giulia, up until 2015, when they decided to separate, without ever being previously married.
- After the separation, they decided by mutual agreement that Giulia was going to live with her mother, maintaining regular contact with her father. This process is resolved amicably by mutual agreement without any formalization of the agreement through lawyers.
- Giulia lived in Ljubljana with her mother, Ms. Marchetti, until February 2023, when they relocated to Trieste, Italy. In line with the decision to relocate, Mr. Jure Zupančič made the choice to stay in Slovenia, where he still resides today.
- In Italy, where Ms. Marchetti and Giulia now live, joint parental responsibility is acquired by operation of law if parents are married. However, parental responsibility is not automatically acquired by operation law when parents are unmarried, like in the present case. Meaning therefore, that Mr. Jure Zupančič does not have automatically the right nor obligation to intervene in the decisions affecting Giulia.
- Giulia made herself a MyStream account in March 2022. She began posting videos, and they soon gained notoriety. Because of this and her growing following, MyStream Europe sent an invitation for her to join MySCP so that she could produce additional

videos. On her behalf, her mother and sole holder of parental responsibility, signed the agreement, confirming her acceptance to every provision.

- A hyperlink to the general terms and conditions, a choice of law provision, and a jurisdiction clause favoring Wake County courts in North Carolina (USA) were all included in this contract favoring North Carolina law (USA).

2. International jurisdiction on the claim for damages

As presented in the previously mentioned statement of the facts, Ms. Saro decided to file a lawsuit for damages against Giulia, Ms. Marchetti and MyStream Europe. However, as her defense, we argue that the court before which the lawsuit was filed, the District Court of Ljubljana, does not have jurisdiction to hear this case. To argue this, we will rely on *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [**“Brussels I bis”**].

The material scope of application of the aforementioned Regulation is both civil and commercial, to which the temporal and spatial scope are also added as essential requirements for its application that are met in this case as well. By temporal scope we mean that Brussels I bis entered into force on January 10th, 2015, thus replacing the previous rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters set forth in Regulation 44/2001. The facts ascertained in the present case occur as of March 2022, thus commissioning within the temporal scope of the Regulation too. On the other hand, as regards the spatial scope, as established in Article 288 of the Treaty on the Functioning of the European Union (TFEU), the Regulation “*shall have general application. It shall be binding in its entirety and directly applicable in all Member States*”³⁷. Therefore, it shall apply to all EU Member States, including Slovenia (nationality of Mr. Zupančič and Giulia), Italy (nationality of Ms. Marchetti and Giulia) and Estonia (where MyStream Europe is domiciled).

Since this is a case of non-contractual liability, we would have to follow Brussels I bis and the Judgments of the Court of Justice of the European Union [**“CJEU”**] in order to determine the

³⁷ Treaty of the Functioning of the European Union (BOE 30 March 2010).

international jurisdiction to bring this case against Giulia and MyStream Europe. As mentioned above, the Claimant has filed the lawsuit in the District Court of Ljubljana, a fact with which we do not agree with, as we consider that this is not the competent forum to hear such proceedings.

Article 7(2) of Brussels I bis is the main rule in matters of non-contractual obligations, since it establishes international and territorial jurisdiction, thus determining the competent court of the place where the harmful event occurred³⁸. In order to analyze the application of this article we have to ask two questions: what is considered as tort or quasi-criminal matter, and where does the damage occur?

To answer the first question, we will have to refer to the autonomous interpretation of "tort, delict or quasi-delict" made by the CJEU. This ensures that the precept is applied uniformly and that all those to whom it is addressed have the same rights and obligations. Numerous judgments have laid the foundations for this concept, such as the cases C-59/19 Wikingerhof v. Booking³⁹ or C-548/12, Marc Brogssitter v. Fabrication de Montres Normandes EURL, Karsten Fräßdorf, Karsten Fräßdorf⁴⁰. In the opinion of Advocate General in this first case, he defines the concept as follows: *"In order to come under 'matters relating to tort', that claim must be based not on a 'freely consented legal obligation', but on a 'tortious obligation', that is to say, an involuntary obligation, which exists without the defendant having intended to assume any commitment whatsoever vis-à-vis the claimant, and which arises from a harmful event consisting in breach of a duty imposed by law on everyone"*⁴¹.

Having clarified the existence of a non-contractual relationship in this case, we must analyze the concept of tort and the place where the damage occurred, in order to determine the courts with international jurisdiction in this case. The connecting factor, i.e. the place where the damage occurred, is essential to determine the forum in which the claim must be brought. In most cases, the place where the damage occurred is a real concept that presents no problem of implementation, except in two cases. Firstly, when the dissociation between the place of origin

³⁸ Garcimartín, F. J., "Derecho Internacional...", *op. cit.*, p. 114.

³⁹ Judgment of the Court of Justice of the European Union C-59/19, 24 November 2020 [online version - CURIA ECLI:EU:C:2020:950].

⁴⁰ Judgment of the Court of Justice of the European Union C-548/12, 13 March 2014 [online version - CURIA ECLI:EU:C:2014:148].

⁴¹ Opinion Advocate General, Saugmandsgaard Øe, Case C-59/19, 10 September 2020, para. 46.

of the damage and the place of the results of the materialization of the damage are different, and secondly, when the damage has been suffered in different States⁴².

However, it is complicated to determine specifically where the damage has occurred in this case, since the damage is caused by the repercussions of the video uploaded to the MyStream platform, video to which all users of this social network have access and is therefore available in all countries in which MyStream operates.

From what we have understood of the case under litigation, it could be argued that the damage as such is the uploading to the internet platform of those videos. That is to say, the damage materializes when Giulia uploads the videos in which Ms. Saro appears dressed in clothes other than the ones she is contractually required to wear (i.e. Feline SE brand clothes). We further understand that although these videos are recorded when Giulia meets her father, Mr. Zupančič, and Ms. Saro in Ljubljana, the damage has not yet occurred, as these videos have not yet been uploaded to the platform. It is understood that the videos have mostly been produced at the time when Giulia uploads the videos, i.e. in Trieste, Italy.

As Cedeño Hernán points out in his analysis of the CJEU eDate Advertising Judgment, the Court of Justice begins by recognizing the clear differences between publishing content on the Internet and publishing it in a printed medium. The territorial fragmentation of information disappears in the network because "cyberspace" has no limits and allows global communication. The temporal dimension of information also disappears because Internet content can be consulted by an indeterminate number of users all over the world (or in our case by MyStream users, which covers both the USA and Europe), regardless of the sender's intention⁴³.

The aforementioned specifications make the diffusion criterion less useful with the Internet, since its scope is universal and it is not always feasible from a technical perspective to measure diffusion with certainty and reliability in relation to a specific issuing Member State, nor to assess the damage caused only in that Member State⁴⁴.

⁴² Garcimartín, F. J., "Derecho Internacional...", *op. cit.*, p. 114.

⁴³ Cedeño Hernán, M., "Cross-border protection of personality rights in the European Union", *Cuadernos de Derecho Transnacional*, vol. 13, n. 1, p. 123 (available at <https://doi.org/10.20318/cdt.2021.5954>)

⁴⁴ *Ibid.*, p. 123

For all of this explained, the CJEU has admitted the difficulties in applying the criterion of the place of damage in the context of the internet. The conclusions of the Advocate General, Mr. Pedro Cruz Villalón, following cases C-509/09 and C-161/10, establish that in order to prevent the special forum of delictual or quasi-delictual liability in said cases from ending up coinciding with the general forum of the plaintiff's domicile, the CJEU interpreted, in accordance with the important *Mines de Potasse d'Alsace SA*⁴⁵, the possibility of two alternative forums at the plaintiff's choice: one in the place of production of the causal event, and another in the effective production of damage, also applicable to non-pecuniary damages with the *Shevill* ruling⁴⁶. That is why, according to this, it could be argued that indeed, according to the information we have about the case, the majority of Giulia's content and the most relevant videos for the present case were uploaded to the internet from Trieste, Italy. For this reason, and in accordance with everything previously explained, we could determine that the courts of Trieste are indeed competent to hear this case, and not the District Court of Ljubljana.

3. Applicable law for the claim for damages

Not only is it important to determine the jurisdiction to hear the case for damages, but it is also necessary to agree on the law that will apply in the present case. We are faced with a case of non-contractual damages, since as we have previously indicated there is no legal link or contractual relationship between the parties (Ms. Saro does not have any type of contractual relationship with Giulia, Ms. Marchetti or MyStream Europe). For this reason, and taking into account the legal regulations at the European level, the Rome II Regulation would apply. This has its normative basis in article 81 TFEU, which states the following, “*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: [...] (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.*”⁴⁷

⁴⁵ Judgment of the Court of Justice of the European Union C-21/76, 30 November 1976 [online version – CURIA ECLI:EU:C:1976:166].

⁴⁶ Opinion Advocate General Cruz Villalón, Cases C-509/09 and C-161/10, 29 March 2011, para. 34. [online version - CURIA ECLI:EU:C:2011:192].

⁴⁷ Treaty of the Functioning of the European Union (BOE 30 March 2010).

Likewise, in the present case the material scope of application of the Regulation 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**”] is met. The requirements stipulated in article 1 are met, which establishes the scope of application, thus indicating that Rome II will apply only to non-contractual obligations in civil and commercial matters, a requirement that is met in the present case. Furthermore, section 2 of said article lists a series of non-contractual obligations that will be excluded from the scope of application of the Regulation, a list in which the present case in dispute is not framed.

Also remember that Rome II has a universal scope of application, since, as established in article 3, “*Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.*”⁴⁸ This means that no specific relationship with the EU is required, with the exception of judicial jurisdiction (which is present in the case).

Taking into account that Rome II would indeed apply, it is necessary to determine what precepts would be applicable to the present litigation. Freedom of choice is the main rule for determining the law applicable to a dispute like this one, which deals with damages arising from non-contractual liability. That is, the law that the parties choose will use. However, a series of exceptions are provided for, such as the fact that the rule does not apply in the areas of intellectual property and competition law⁴⁹.

This is regulated in article 14(1) of the Rome II, which in this sense establishes the following: “*The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties*”⁵⁰.

⁴⁸ Rome II, Article 3.

⁴⁹ Navarro Varona, E. y Moscoso del Prado González, L., “Foro de Actualidad...”, *op. cit.*, p. 60.

⁵⁰ Rome II, Article 14(1).

Once this has been pointed out, a series of qualifications are worth making. Firstly, the applicable law can be chosen *ex post* or *ex ante*, meaning that the parties' choice of the applicable law applies both before and after the damage. For this reason, even if the damage has already occurred, the parties may decide to apply a law different from that established by the general rule of article 4 of Rome II. However, in practice, the application of this provision will be scarce, since due to the very nature of the damage in this case, it is difficult for the parties to have the opportunity *ex ante* to choose the law applicable to truly extracontractual future damage⁵¹.

That is why we would have to resort to the general rule or *lex loci damni*, stipulated in article 4 of the Brussels Regulation I bis, in the first point in which the following is stipulated: “*Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*”⁵². As we have previously mentioned, this general rule will only be applicable when the damage is not subsumable to any of the special rules of the Regulation, that is, those stipulated in articles 5 to 9 of the Regulation. This formula attempts to resolve two types of cases: distant damages or indirect or derived damages.⁵³

We are faced with a scenario in which the place where the damage occurs is complicated by pinpoint, since while the videos are recorded in Ljubljana when Giulia meets Ms. Saro and Mr. Zupančič, the videos are mostly uploaded to the MyStream platform for later dissemination when the Defendants are in Trieste, Italy. Furthermore, as the doctrine establishes, the relevant moment to determine the residence of the parties is the moment in which the damage takes place⁵⁴. Likewise, we understand that there is not a single and concise moment in which the damage occurs, since as the Claimants allege, around fifty videos are published over an indeterminate period of time on the MyStream platform. It is for this reason that we could argue that Italian law is the applicable law in this case. In the previous point regarding international judicial jurisdiction, we have detailed and given arguments that effectively determine how the

⁵¹ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 413.

⁵² Brussels I bis, Article 4.

⁵³ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 416.

⁵⁴ Navarro Varona, E. y Moscoso del Prado González, L., “Foro de Actualidad...”, *op. cit.*, p. 60.

place of production of the harmful event is in Trieste, Italy, mentioning cases such as C-509/09 and C-161/10.

It is for this very reason that, given that the place of the harmful event that is the subject of this litigation, in addition to the court with jurisdiction to hear the case, is established in Trieste, we consider that indeed, Italian law will be applicable to the case for damages to Ms. Saro.

4. International jurisdiction to order the removal of the videos or issue an interim order until final judgment is given

The Defendants propose that the removal of the videos from the MyStream platform as requested by Ms. Saro is not necessary.

Firstly, precautionary measures are intended to protect a main action. That is to say, its purpose is the protection of the main action that is being carried out with the litigation, which in this case would be compensation for damages as a result of the loss of Ms. Saro's sponsors and the termination of the contract by part of Feline SE for breach of contract. In short, she alleges that as a result of the videos uploaded by Giulia to MyStream in which Ms. Saro appeared, damage has been caused to the latter. Now, if this is true and according to what we understand as a precautionary measure, the removal of those videos from the MyStream platform does not alter in any way the result of this, since Ms. Saro's contract with Feline SE has already been terminated and the "damage" alleged is irreversible. Therefore, we could consider that effectively removing these videos from MyStream does not constitute in itself a protection of the main action.

Likewise, mention the importance of article 35 of the Brussels Regulation in the resolution of this legal issue, which states the following: "*Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*"⁵⁵.

⁵⁵ Brussels I bis, Article 35.

Although we might think that this article promulgates against us and the Defendants, we must take into account the background of this article and its true application. This is because really, Article 35 only provides for the possibility of adopting this type of measures but does not establish any connection criteria. The jurisprudence of the CJEU has indicated two implicit conditions in compliance with this precept.

Furthermore, it is worth talking about the exclusion of *inaudita altera parte* precautionary measures. These measures are those that can be ordered by a Court or competent authority without listening to the opposing party (the Latin term “*inaudita altera parte*” translated into English would be “without having heard the other party”). They are applied in urgent situations or when there is an imminent risk of irreparable harm and are intended to protect the interests of a party or prevent serious harm while awaiting a full and fair hearing⁵⁶. These *inaudita altera parte* precautionary measures would not be applicable, since the removal of the videos from the MyStream platform would not imply a change in the procedure or a repair of damages, since those “damages” have already been done. That is to say, even if the removal of the video is ordered as a matter of urgency, the damage that is being called into question in this case is the termination of the contract between Ms. Saro and Feline SE, and even if the videos of Ms. Saro wearing clothing other than that of this Austrian brand, MyStream users have already seen those videos and the damage is irreversible.

In Brussels I bis, article 34 of Chapter III, on recognition and enforcement, establishes the prohibition of recognizing interim orders categorized as *inaudita altera parte*. However, there is a brief reference in article 2 that defines the term “resolution” and takes the opportunity to exclude *inaudita altera parte* interim orders. Although this refers mainly to the cases of recognition and execution of sentences, and not so much to the determination of the court competent to hear a case (international judicial jurisdiction), it still refers to a type of measures that certainly concern us and cannot be overlooked⁵⁷.

Regarding international jurisdiction, which is the subject of the present case, it is understood that the District Court of Ljubljana, that is, the Court in which the Claimant files the claim, is competent. This is because it is certainly logical that the Court of the place where the damage

⁵⁶ Sánchez Pos, M. V., “Las medidas cautelares inaudita parte en el sistema arbitral español”, *Anales de Derecho*, vol. 36, n. 1, p. 29.

⁵⁷ *Ibid*, p. 29.

occurred is the place too that is concerned about the interim orders to protect against damage. Likewise, the fact that these precautionary measures will have to be made effective in Italy, which is where Giulia and Ms. Marchetti reside, will be taken into account. The objective of the precautionary measures presented by Ms. Saro is that they become effectively practical and applicable in Italy.

According to article 35 of Brussels I bis mentioned previously in this memorandum, it is clearly established which Courts have jurisdiction. The authority to take these precautionary measures lies with the Courts where it is carried out or has to take effect. Therefore, it is understandable that the Court competent to order the withdrawal (temporarily until a ruling is issued) of the videos uploaded by Giulia to the MyStream platform is Ljubljana, where the main litigation was heard. Likewise, although we defend that the District Court of Ljubljana does not have the jurisdiction to hear the case for the damages caused, as established in art. 35 of the Regulation, it is not necessary that the Court of the place that hears the case be the one that orders the issuance of precautionary measures. Therefore, as Garcimartín Alférez and Sánchez point out in their analysis of the Brussels I bis Regulation, the ability to know the substance of the dispute is not necessarily linked to the ability to take precautionary or provisional measures. In other words, having the primary jurisdiction of one Member State does not mean that it cannot take precautionary or provisional measures in another Member State⁵⁸.

5. International jurisdiction to hear the case over the possible nullity or termination of the contract

The point regarding international judicial jurisdiction to hear the case of an alleged nullity or termination of the contract between Giulia and MyStream Europe is certainly controversial, since there are many key factors to take into account. To clarify facts, although they have been previously detailed in the first section, it is necessary to highlight those that would affect this case. We are talking about a contract between Giulia and MyStream Europe, in which, because the contracting party is a minor, Ms. Marchetti signs on her (Giulia) behalf. Make clear that this is completely valid and despite her opposition, the consent as such of Mr. Jure Zupančič is not necessary, which will be detailed later. Both Giulia and Ms. Marchetti currently reside in

⁵⁸ Garcimartín Alférez, F. J. y Sánchez, S., “El nuevo Reglamento...”, *op. cit.*, p. 32.

Trieste, Italy, so the laws of Slovenia regarding the determination of parental responsibility will not apply to them, but those of Italy.

Furthermore, this is not the only relevant thing, since we have to keep in mind that in the contract that Ms. Marchetti signed with MyStream by virtue of her daughter Giulia, a hyperlink to the general conditions was included, with a jurisdiction clause in favor of the courts of Wake County in North Carolina (USA), as well as a choice of law in favor of North Carolina (USA). That is why once it has been determined that the contract concluded is effectively valid, it is worth highlighting and focusing on the validity of the District Court of Ljubljana to hear this case.

To effectively conclude the validity of the Wake County courts to hear the case, we would have to refer to the *Convention of June 30, 2005, on Choice of Court Agreements*, [**“2005 Hague Convention”**]. It came into force in the European Union on October 1, 2015, and aims to ensure the validity and effectiveness of these clauses throughout the world. This Convention establishes, among others, the conditions of validity of a choice of court agreement (art. 3); establishes the effectiveness of agreements with regard to their prerogative and derogatory dimension (articles 5 and 6) and guarantees the recognition and execution of the decisions of the courts chosen by the parties (articles 8 to 15)⁵⁹. Both the United States and Slovenia are contracting states of this Convention, which makes them subject to its provisions.

First of all, establishing as in accordance with article 1 regarding the scope of application is perfectly valid and the agreement between Giulia and MyStream effectively falls within this validity, since it is an exclusive choice of forum agreement that is celebrated in civil and commercial matters⁶⁰.

Article 3(a) of this Convention provides a definition of this type of agreement. The following conditions are included in the definition, which stipulate the following. First of all, there must be an agreement between two or more parties. Secondly, the formal conditions of section c) must be met. Third, the agreement must designate the Courts of a State, or one or more specific

⁵⁹ Garcimartín, F., “Competencia judicial internacional y autonomía de la voluntad”, *Almacén de Derecho*, 2 August 2017 (available at <https://almacenederecho.org/competencia-judicial-internacional-autonomia-la-voluntad>).

⁶⁰ 2005 Hague Convention, Article 1.

Courts of a State, to the exclusion of any other court. Fourth, the designated court(s) must be located in a Contracting State, and fifth, the designation must have the objective of resolving disputes that have arisen or may arise from a specific legal relationship⁶¹.

If a clause designates the Courts of a State Party, whether those of its jurisdiction or those of a specific place within that State, the choice of forum agreement is presumed exclusive, but will not be exclusive if it leaves open the possibility to the parties to sue in any other competent Court⁶². As already mentioned, the contract, which Ms. Marchetti signed in which it clearly specified in the general terms and conditions that she read, the jurisdiction of Wake County courts of North Carolina (USA) to hear any litigation arising from the contract.

The contract signed between Ms. Marchetti (representing Giulia) and MyStream is completely valid, since at no time was it specified the need for both parents to sign the contract on Giulia's behalf. Ms. Marchetti, by clicking on the hyperlink that led to the general terms and conditions, accepted this jurisdiction clause in favor of Wake County Courts, on behalf of Giulia. That is why the Claimant has no say in this matter and the contract is perfectly valid, thus the Court established in the contract is competent to hear this matter.

6. Applicable law to the claim on the validity of the contract

In relation to the applicable law in relation to the validity or termination of the contract between Giulia and MyStream Europe, we would have to take into account that as in the determination of international judicial jurisdiction, or in other words, the applicable forum, we must adhere to what is established by the parties in the contract. As previously explained, the contract that Ms. Marchetti signed as Giulia's legal representative with MyStream is valid, and Ms. Marchetti acted as a responsible mother without the need to consult with Mr. Zupančič, in accordance with the laws that govern in Italy.

Now, just as there was in the contract that Ms. Marchetti signed with MyStream a clause of submission to the Wake County courts in case of litigation; the same happened regarding the applicable law. That is, Ms. Marchetti signed with MyStream the submission to North Carolina

⁶¹ 2005 Hague Convention, Article 3.

⁶² Vargas Gómez-Urrutia, M., "Choice-of-court agreements and protection of its effectiveness in the Hague Convention 2005", *Revista Perspectiva Jurídica, Universidad Panamericana*, n°6, 2016, p. 7.

law in case of conflict between the parties, as part of the general conditions of the contract. For this reason, the applicable law to determine the validity or termination of the contract is that of North Carolina, USA.

To clarify any type of doubts, we would have to submit to the regime of *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, [“Rome I”]*. This Regulation is applicable to contractual obligations in civil and commercial matters, when there are situations that imply a conflict of laws.

The principal rule of the Regulation is the autonomy of will, that is, that contracts are subject to the law chosen by the parties. The autonomy of the conflictual will or the right of the contracting parties to choose the law that applies to the substance of the international matter is known as the principle of autonomy of the parties, which is essential in this case⁶³. This is expressed in Article 3(1) of the aforementioned regulation when it states the following: “*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract*”⁶⁴.

From the application of this article to the real practice we can understand that the parties can not only choose the law that will be applied to an international contract (as occurs in this case), they can also “exclude” in a certain way the legal systems that will not be applicable to them. applicable to your contract (so-called negative *Rechtswahl*). In this case, in the absence of the autonomy of the will, the governing law of the contract will be determined using the objective criteria established by Rome I to determine the *lex contractus*⁶⁵. In short, conflict autonomy, that is, the possibility that the parties can subject their contract to any state law in the world, is only admitted by the legislator in international contracts, therefore applicable to the present case⁶⁶.

Based on what was previously mentioned and based primarily on what is stipulated in article 3(1) of Rome I, applicable to this case, in order to determine the validity or termination of the

⁶³ Calvo Caravaca, A., “El Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas”, *Cuadernos de Derecho Transnacional*, vol. 1, n° 2, October 2009, p. 58.

⁶⁴ Rome I, Article 3.

⁶⁵ Calvo Caravaca, A., “El Reglamento Roma I...”, *op. cit.*, p. 58.

⁶⁶ Garcimartín, F. J., “Derecho Internacional...”, *op. cit.*, p. 376.

contract, the law of North Carolina will be applicable, a clause which Ms. Marchetti accepted through signing the contract on behalf of her minor daughter, Giulia. She did so in accordance with Italian law and having previously accepted the general terms and conditions established clearly in the hyperlink before signing said contract.

7. Petitum

The Defendants request the Court to: (1) dismiss the claim of the Claimants to carry out the proceedings in the District Court of Ljubljana for the case on damages, (2) apply the law of Italy in the case of damages for the uploading of the videos on the MyStream platform, (3) dismiss the claim of the defendants to carry out the proceedings in the District Court of Ljubljana for the case over the nullity or termination of the contract between Giulia and MyStream Europe and accept the jurisdiction of Wake County courts (North Carolina, USA) as established in the contract and, (5) apply the law of North Carolina (USA) as established as agreed to discuss the validity or termination of the contract.

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