Louisiana Law Review

Volume 60 | Number 4
Conflict of Laws, Comparative Law and Civil Law: A Tribute to Symeon C. Symeonides
Summer 2000

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Mathias Reimann

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While American conflicts law consists overwhelmingly of cases, continental Europe has a long and proud tradition of codifying private international law.[1] Particularly in the last two decades, Europe has witnessed a wave of national codifications and international conventions in this area. But at the turn of our century, the process of European conflicts codification is far from complete. While some areas, notably contracts, are broadly covered,[2] others, such as corporations, are still in flux.

Tort conflicts lie somewhere in the middle. While there is still no general European convention in force addressing them,[3] they have been codified in most but not all individual countries. But the last two years have brought considerable progress: Germany finally joined the countries with codified tort conflicts rules, and an international working group drafted a European Convention on the law applicable to non-contractual obligations.

I will look at the modern codification of tort conflicts rules in the national, European, and transatlantic contexts. The innermost of these three concentric circles is the 1999 German legislation; its characteristic features are interesting enough in their own right for American conflicts scholars (I). These features are then considered in their European environment; here, we see that the new German law accords with a growing regional consensus about the basics of tort conflicts (II). Finally, we will look at written tort conflicts rules in the United States and Canada; the similarities with the European texts indicate an international trend in the resolution of transboundary tort cases (III).

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* Professor of Law, University of Michigan; Dr. iur., Universität Freiburg, 1982; LL.M. University of Michigan, 1983. Thanks to Dorothee Janzen, LL.M., University of Michigan, 2000, for research assistance and many valuable comments.

1. There are some exceptions from this rule on both sides of the Atlantic. Unsurprisingly, the major exception from the American caselaw approach is Louisiana with its tradition of civil law style codification, *see* La. Civ. Code arts. 3515-3549, as amended by 1991 La. Acts No. 923. But surprisingly, the major exception from the European legislative approach is not England but France. England has recently enacted statutory choice-of-law rules on contracts and torts, *see* Contracts (Applicable Law) Act of 1990 (in force 1991), and Private International Law (Miscellaneous Provisions) Act of 1995, so that it now has more statutory conflicts provisions than does France where caselaw prevails.

2. The Convention on the Law Applicable to Contractual Obligations (Rome Convention) of 1980, 1980 O.J. (L 266), is in force throughout the European Union. Virtually all non-EU countries have statutory rules on contract conflicts as well.

3. *But see infra* Part II.B.1.

I. THE GERMAN CODIFICATION OF 1999: CHARACTERISTIC FEATURES

A. Closing the Gap

Germany's choice-of-law rules are contained in the Introductory Act to the Civil Code (BGB).[4] Originally enacted together with the Code in 1896, they were completely overhauled in 1986.[5] Yet, the rules in the reformed Act of 1986 were still fragmentary. They covered general issues (such as *renvoi* and public policy), persons, the form of legal transactions, family law, succession, and contracts, but they remained virtually silent on non-contractual obligations (such as torts),[6] property, agency, and corporations. In these areas, the government found insufficient consensus and thus left them to caselaw and scholarship for the time being.

In the long run, such incompleteness is difficult to tolerate in a legal culture committed to comprehensive codification. Nonetheless, the project to cover the remaining areas languished for almost a decade. Suddenly in 1998, the federal cabinet presented a draft to the legislature which passed it within a few months. All this happened virtually without discussion or public attention.[7] The provisions entered into force on June 1, 1999.[8]

The new legislation fills two important gaps in the German private international law statute. First, it adds choice-of-law rules governing non-contractual obligations. This category comprises not only torts (article 40) but also unjust enrichment (article 38) and management of another's affairs (article 39). Second, the legislation contains new rules on property (articles 43-46). Provisions on agency and on corporations are still lacking.

The overall approach is a moderately conservative blend of territorialism and the closest connection principle. On the one hand, the rules use mainly territorial criteria. With regard to non-contractual obligations, they point first and foremost to the law of the state in which the crucial acts and effects took place (articles 38 (2)

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4. Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB) of Aug. 18, 1896, Reichsgesetzblatt I, 604.

5. Gesetz über das internationale Privatrecht of July 25, 1986, Bundesgesetzblatt I, 1142. In practice, the choice-of-law rules, contained in the second chapter of the Act, are used like a separate statute, i.e. independently from the rest of the Act and from the Civil Code.

6. The only exceptions were former article 38, *see infra* note 30 and accompanying text, and a 1942 statute of very limited scope, *see infra* note 18.

7. The legislative process is described by Rolf Wagner, *Zum Inkrafttreten des Gesetzes zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen*, 1999 Praxis des Internationalen Privat- und Verfahrensrechts 210.

8. Gesetz zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen of May 21, 1999, Bundesgesetzblatt I, 1026. The official statement of the government's legislative intent is the Begründung (reasons) attached to the Gesetzesentwurf der Bundesregierung, 624 Verhandlungen des Deutschen Bundestages, 14. Wahlperiode (1999), Drucksache 14/343, at 6-21 (hereafter cited as Drucksache). For an overview, see Peter Hay, *From Rule Orientation to "Approach" in German Conflicts Law, The Effect of the 1986 and 1999 Codifications*, 47 Am. J. Comp. L. 653, 637-46 (1999).

and (3), 39 (1), 40 (1)); for property rights, they select primarily the law of the situs (articles 43 (1)).[9] On the other hand, the choice made by territorial criteria can be overridden if the case has a significantly closer connection with another state (articles 41, 46).

From an American perspective, some parts of the new German legislation are more interesting than others. The rules pertaining to unjust enrichment and management of another's affairs are of limited practical importance; they are also difficult to grasp for a common law lawyer who is not familiar with the dogmatic structure of the respective substantive areas of civil law. And the provisions governing property are so straightforward and so similar to their common law counterparts that they require little explication. Clearly the most intriguing aspects of the new German legislation are the provisions pertaining to tort conflicts.

B. Choosing Tort Law

The new German rules on tort conflicts are concise and general.[10] They consist of only three articles and apply to all tort cases. The government deliberately chose to limit them to the basic provisions and thus to forego special treatment of particular categories of torts (such as products liability, defamation, unfair competition, or mass accidents),[11] trusting that the general rules will prove flexible enough to accommodate the specific concerns arising in these areas.

There is no special provision about local rules of safety and conduct either. Yet, neither German courts nor scholars have ever seriously doubted that in judging the defendant's conduct, the law of the place where it occurred must be taken into account.[12] The legislature did not intend to change this rule but simply saw no need to spell it out.[13] It will thus continue to apply.

The order of the three articles on torts is peculiar and potentially confusing, at least to a civilian reader. Article 40 applies specifically to torts (only) while subsequent articles 41 and 42 apply generally to (all) non-contractual obligations (including torts). In other words, the statute proceeds from the narrower to the

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9. In both areas, there are several exceptions. Where unjust enrichment claims concern the restitution of performance made to fulfill an underlying obligation, the law governing this obligation prevails (Art. 38 (1)). Where the management of another's affairs consisted of paying a debt, the law governing the debt applies (Art. 39 (2)). In property conflicts, the most important exception pertains to means of transportation: to avoid a change of law with every border crossing, rights in aircraft, ships, and railroad vehicles are governed by the law of the state of origin (Art. 45). As to the exceptions in tort conflicts, *see infra* section I.4.

10. *See* Appendix, *New German Tort Conflicts Rules, infra.*

11. *See* Drucksache, *supra* note 8, at 7-8, 10-11. This also meant that they did not incorporate the rules of the Hague Conventions on Products Liability and on Traffic Accidents, *see infra* section II.B.2., which Germany has not ratified.

12. Judgment of the Federal Supreme Court (Bundesgerichtshof) (hereafter cited in the German style as BGHZ volume/page) of January 23, 1996. 1996 Neue Juristische Wochenschrift (hereafter cited in the German style as NJW year/page) RR 732; *see also* Gerhard Kegel, Internationales Privatrecht 552 (7th ed. 1995).

13. Drucksache, *supra* note 8, at 11.

broader provisions. This not only violates the traditional civil law canon that general rules precede specific ones, it is also inconsistent with the rest of the German conflicts statute where this canon is observed. The drafters of the new rules should have maintained the traditional order, both for the sake of internal consistency and in order to facilitate the analysis.

At their core, the new tort conflicts provisions consist of a ground rule which is subject to potential overrides on three levels. Thus it is important that the basic rule and exceptions be applied in the right order. In addition, there are special provisions limiting damages and favoring direct actions against insurers.

1. The Ground Rule: Lex Loci *with a Pro-Plaintiff Tack*

The basic rule is laid down in article 40 (1): tort claims are governed by the law of the state where the defendant acted. If the harm occurred in that state as well, as would normally be the case, the choice is clear and the result is the same as under the traditional American rule pointing to the place of the harm.[14]

If conduct and harm occur in different countries, however, German law adds a peculiar pro-recovery twist: it leaves the choice between the respective laws to the plaintiff! This "principle of favorable law" (Günstigkeitsprinzip) is not a novelty introduced by the recent legislation[15] but had long been established in German caselaw and scholarship.[16] In fact, article 40 (1) now restricts it in an important regard. Hitherto, the plaintiff could freely choose, and if he failed to do so, the court had to apply the more favorable rules *ex officio*. This forced the judge (at least theoretically) to research and evaluate the claim under both laws. Now, the court is liberated from that burden. If the plaintiff wants to opt for the law of the place of the harm, he must do so at an early stage of the procedure. If he does, the chosen law governs. If the plaintiff fails to use this option in timely manner, the law of place of conduct applies by default. In either case, the court proceeds under one law only. Thus it is now the plaintiff (or his attorney) who must research and evaluate both laws if he wants to benefit from the more favorable regime.[17]

2. Override I: The Common Home State Exception

From these essentially territorial ground rules, article 40 (2) makes a major exception: if plaintiff and defendant have their habitual residence in the same state,

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14. *See* Restatement (First) of Conflict of Laws § 377 (1934).

15. Nor is it an idiosyncrasy of German law; it exists in other countries as well, *see infra* note 52 and accompanying text.

16. It is normally justified as an effort to help injured parties to obtain compensation, *see* Karl Firsching & Bernd von Hoffmann, Internationales Privatrecht 431 (5th ed. 1997) (supplying other reasons as well).

17. *See* Drucksache, *supra* note 8, at 11. For further procedural details and implications for legal practitioners, *see* Stephan Lorenz, *Zivilprozessuale Konsequenzen der Neuregelung des Internationalen Deliktsrechts: Erste Hinweise für die anwaltliche Praxis*, NJW 1999, 215.

the law of that state takes precedence. This exception is, again, not new.[18] Article 40 (2) codifies, and to some extent clarifies, long established caselaw.[19] Where it applies, the parties' common home state law displaces the law of the place of the wrong. This result is mandatory, leaving the plaintiff no unilateral choice.

As in the United States, this departure from the *lex loci delicti* is particularly important in single car accidents in which both parties come from one state but have an accident in another.[20] Yet in contrast to the common domicile rule so popular in American courts, the German provision refers not to (technical) domiciles but, like most German choice-of-law rules, to the places where the parties normally live.[21] Note also that it does not require a pre-existing relationship between the parties but applies between strangers as well.

The main reason for the German rule is not that the common home state has the only interest in the parties. It is rather that the parties come from the same environment and that this shapes their situations and expectations. It seems preferable to treat them according to the rules of the state in which both will have to live with the consequences of the wrong rather than to subject them to the law of the place of the accident which may be fortuitous and unrelated to the rest of their lives.[22]

3. Override II: The Closer Connection Escape Clause

The specific tort rules choosing the *lex loci* or the common home state law are subject to the general override in article 41 which applies to all non-contractual obligations: if there is a "significantly closer connection" with the law of yet another state, then that state's law trumps. This escape clause resembles its counterpart in the contracts section (article 28 (5)).

The main reason for which the provision will be invoked is given by way of example in the first clause of article 41 (2): "there may be a preexisting relationship

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18. It has its roots in a 1942 Nazi statute providing for the application of German law to torts between German citizens committed abroad, Verordnung über die Rechtsanwendung bei Schädigungen deutscher Staatsangehöriger außerhalb des Reichsgebietes of Dec. 7, 1942, Reichsgesetzblatt I, 706. Oddly enough, the statute had remained in force until 1999.

19. For an overview, *see* Firsching & von Hoffmann, *supra* note 16, at 436-39.

20. The German Federal Supreme Court's (Bundesgerichtshofs) struggle with an evolving variety of fact patterns involving common and split nationalities and domiciles is reminiscent of the New York Court of Appeals' travails in the 1960s and 1970s. The leading German cases are: judgment of Nov. 23, 1971, BGHZ 57, 268; judgment of Oct. 5, 1976, NJW 1977, 496; judgment of Mar. 8, 1983, BGHZ 87, 95; judgment of Mar. 13, 1984, BGHZ 90, 295; judgment of Jan. 8, 1985, BGHZ 93, 214; judgment of July 4, 1989, BGHZ 108, 200; and judgment of July 7, 1992, BGHZ 119, 137. The best-known New York decisions are: Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963); Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965); Macey v. Rozbicki, 221 N.E.2d 380 (N.Y. 1966); Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969); and Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972).

21. For corporations, associations, or other legal persons, the principal place of business, or, where a branch office is involved, the location of that office, counts, Art. 40 (2) 2nd clause.

22. *See* Drucksache, *supra* note 8, at 12; judgment of the German Federal Supreme Court of Oct. 5, 1976, 1977 NJW 496, at 497; judgment of Mar. 8, 1983, BGHZ 87, 95, at 100; judgment of Jan. 8, 1985, BGHZ 93, 214, at 216-18; judgment of July 7, 1992, BGHZ 119, 137, at 141-42.

between the parties which links them overwhelmingly to the law of a third state." In many cases, plaintiff and defendant are partners in contract, husband and wife, or members of the same group. If the tort occurs in such a context, article 41 allows the court to extend the law governing the relationship to the tort claim as well.[23] The judge can thus avoid having two different laws govern the same act (e.g., a breach of contract also constituting a tort) which could lead to inconsistencies. The preexisting relationship does not have to be a legal one; a close factual connection between the parties, such as traveling with the same tour group, can suffice as well.[24]

Absent such a legal or factual relationship between the parties, it is difficult to imagine a case which has a significantly closer connection with a state other than that of conduct, injury, or common habitual residence. Perhaps, however, article 41 may prove useful to accommodate concerns arising in special areas of tort law, e.g., in the context of products liability (involving manufacturers, consumers, and intermediaries) or defamation cases (involving authors, publishers, readers, and victims).

4. Override III: Choice of Law by the Parties

Last, but not least, all these rules and exceptions are subject to article 42, which allows the parties to choose the law applicable to a non-contractual obligation. Again, this provision essentially codifies the prevailing view in caselaw and scholarship.[25] It also answers two previously debated questions. First, it clarifies that the choice can be made only after the occurrence of the liability triggering event; this is mainly to protect the injured party from giving up rights before the fact.[26] Second, article 42 does not limit the parties' choice to laws related to the event; thus, as in contract law (article 27),[27] the parties can in principle choose any law they want. Of course, the agreement itself must be valid, i.e., not result from overreaching or fraud, and it cannot affect the rights of third parties, such as fellow victims, co-defendants or insurers (article 42 2d clause).

Express *ex post facto* agreements will be rare but article 42 allows implied ones as well.[28] The crucial question then is what constitutes an implied choice. In the past, German courts have been rather quick to find tacit agreements. Most importantly, suing and defending in German court without raising the choice-

23. *See* Drucksache, *supra* note 8, at 13. In German law, this is known as "akzessorische Anknüpfung" (accessory choice).

24. *See* the example given by Firsching & von Hoffmann, *supra* note 16, at 440.

25. *See id.* at 441. For a more detailed overview and further references, *see* Bernd von Hoffmann, in J. von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen marginal notes 149-51 to article 38 EGBGB (13th ed. 1998).

26. Drucksache, *supra* note 8, at 14. Some scholars argue that the drafters of the new statute left open the question whether a choice could also be made ex ante. *See* von Hoffmann, *in* Staudinger, *supra* note 25, marginal note 146 to Art. 38 EGBGB.

27. Some restrictions apply with regard to mandatory norms (Art. 27 (3)) and for the protection of consumers (Art. 29) and employees (Art. 30).

28. *See* Drucksache, *supra* note 8, at 14.

of-law issue was considered tantamount to a mutual choice of German law, even though it was far from clear that the parties had ever thought about the issue.[29] Of course, this is an easy way for a court to justify the application of the *lex fori*. It is likely that this practice will continue under the new rules as well.

5. The Order of Analysis: Applying the Statute in Retrograde

Since the *lex loci* groundrule can be overridden by three exceptions, each trumping the previous one, applying articles 40 through 42 in their numerical order is inefficient and potentially frustrating. Every time one has determined the result under an earlier rule, one must check it against the later one and may very well find it changed. This can easily happen several times in a row. It is better to begin at the end and proceed backwards, i.e., to ask the relevant questions in the following order:

1. Have the parties determined the applicable law by an agreement valid under article 42? If the answer is yes, their choice governs, making further analysis unnecessary.
2. Does the case have a connection with a state that is significantly stronger than the connection with the place of the wrong or harm or the parties' common habitual residence? If so, that state's law applies without further ado.
3. Do the parties habitually reside in the same state? If they do, that state's law controls (article 41), regardless of the place of the wrong.
4. Did the wrongful act and injury occur in different states, and has the plaintiff chosen the law of the injury state in a timely manner? If so, the chosen law applies (article 40 (1) 2d cl.).
5. Where did the wrongful act occur? (article 40 (1)).

Once the applicable law has been determined under this five-step analysis, it might still be rejected under the general public policy clause (article 6). It is also subject to two further qualifications listed in article 40 (3) and (4).

6. Damages: Public Policy Limitations

If foreign law applies, article 40 (3) limits the damages available under it. Damage limitations have a history in German private international law. Until 1999, former article 38 prohibited the courts from awarding greater damages against a German citizen than were allowed under German law. This relic of a more nationalist past had long been under attack because it created an unwarranted privilege for German defendants, discriminated against outsiders, and violated

29. Judgment of the German Federal Supreme Court of Mar. 3, 1981, published in 1982 Praxis des internationalen Privat- und Prozeßrechts 13-14, and in NJW 1981, 1606.

European Union law. [30] Its abolition had been long overdue and eliminated an embarrassing feature of the German conflicts regime.

Under the new rules, damages available under foreign law are limited in three ways. First, they must not be significantly higher than necessary to compensate the victim. This prevents, *inter alia*, excessive damage awards for pain and suffering or other intangible harm as are sometimes awarded by courts in the United States. Second, damages are excluded where they obviously serve purposes other than compensation. Thus, a German court applying American law will not award punitive or treble damages because their purpose is, at least in part, to deter wrongdoers and to reward victims for bringing them to justice.[31] Third, the damage award must not contradict the rules of an international convention in force in Germany.[32]

Article 40 (3) is essentially a special public policy clause. Its language ("significantly higher," "obviously serving other purposes") indicates that it is not concerned with minor differences between damages under foreign and domestic law. Its limitations apply only where awards under foreign law clearly exceed German standards.[33]

7. Direct Action against Insurers: Broad Permission

If the damage limitation favors defendants, article 40 (4) helps plaintiffs: by making available direct actions against the wrongdoer's insurance on two alternative grounds. They are permitted to proceed directly against the insurer not only when allowed by the law governing the tort but also if provided by the law applicable to the contract between the tortfeasor and the carrier. This dual approach is more permissive than the previous majority opinion among courts and scholars.[34] It also expresses the general German policy in favor of direct actions against automobile liability insurers[35] and, more generally, the important role of insurance in German tort law.

8. Addendum: Beware of Renvoi!

In applying the new German rules, one must beware that, as a general matter, article 4 (1) of the German private international law statute provides for *renvoi*.

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30. *See* Firsching & von Hoffmann, *supra* note 16, at 449-50.

31. *See* judgment of the Federal Supreme Court of June 4, 1992, BGHZ 118, 312, 334-45 (refusing to recognize the punitive damage award in an American tort judgment).

32. Since Article 3(2) already establishes the supremacy of conflicts rules in international conventions ratified by Germany, Article 40 (3) 3 would seem to become relevant only with regard to conventions ratified by Germany but not by the country the law of which applies under the general choice-of-law rules, *see* Drucksache, *supra* note 8, at 12-13.

33. *See* Drucksache, *supra* note 8, at 12. The best outline of what is tolerable is provided by the judgment of the Federal Supreme Court of June 4, 1992, *supra* note 31.

34. *See* Firsching & von Hoffmann, *supra* note 16, at 442.

35. They are generally allowed under § 3 of the Gesetz über die Pflichtversicherung für KFZ-Halter of Apr. 5, 1965 (PflVG), Bundesgesetzblatt I, 213.

Since the new tort rules make no exception, it follows that in torts cases, a reference to foreign law includes conflicts rules as well, which may in turn point back at Germany or to a third country.[36] A major exception is choice of law by party agreement (article 42); under article 4 (2), such agreements pertain exclusively to substantive law.

II. THE EUROPEAN ENVIRONMENT: AN EMERGING REGIONAL CONSENSUS

Like most areas of private law today, rules on non-contractual liability must be understood and analyzed in the European context. This is true not only of substantive law,[37] it is at least equally important in the choice-of-law area. In European tort conflicts, we can observe the gradual emergence of a common basic pattern in the last two decades. This pattern is visible both in the modern national codifications and in several international conventions.

A. National Legislation: Modern Developments

During the last quarter century, almost a dozen European countries codified their choice-of-law regimes.[38] Some, like Germany, just overhauled older laws.[39] Most, however, enacted completely new statutes (including Austria,[40]

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36. *See* Drucksache, *supra* note 8, at 8. This conclusion is supported by two further considerations. First, the majority of German courts and scholars have traditionally allowed renvoi in torts conflicts, *see* Firsching & von Hoffmann, *supra* note 16, at 450-51. Second, where the statute wants to exclude renvoi it says so, as in the contract rules (Art. 35 (1), Art. 3 (1) 2d clause).

37. There are considerable efforts to harmonize substantive tort law in Europe. For the time being, most of these efforts take place on the academic level. Several groups of scholars pursue the idea of a European tort law in a variety of forms, among them the Tilburg Group, *see* Jaap Spier & Olav Haazen, *The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law*, 1999 Zeitschrift für europäisches Privatrecht 469; and the Trento Project, *see* Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 Colum. J. Eur. L. 339, 353 (1998). Yet, the most impressive scholarly accomplishment is Christian von Bar, Gemein-Europäisches Deliktsrecht (2 vols. 1996-98). Probably the most important practical result is the harmonization of European products liability under the Council Directive 85/374 of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 29 O.J. (L 210) (Aug. 7, 1985).

38. The conflicts statutes of Germany, Greece, Italy, Austria, Poland, Portugal, Romania, Switzerland, Spain, the Czech and Slovak Republics, Turkey, and Hungary are reprinted in the original language with German translations in Wolfgang Riering (ed.), IPR-Gesetze in Europa (1997). For an earlier overview, reflecting the situation twenty years ago, see C.J.G. Moore *Choice of Law in Tort: A Comparative Study*, 32 Am. J. Comp. L. 51 (1984). The article also provides English translations of the tort conflict rules of several European countries though many of these provisions since been superseded.

39. *See supra* note 8 and text accompanying (hereafter cited as Germany). For an overview and English translation of the 1986 statute, *see* Rainer Gildeggen & Jochen Langkeit, *The Conflict of Laws Code Provisions of the Federal Republic of Germany: Introductory Comment and Translation*, 17 Ga. J. Int'l & Comp. L. 229 (1986).

40. Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (hereafter cited as Austria). For an introduction and translation, *see* E. Palmer, *The Austrian Codification of Conflict of*

Switzerland,[41] Italy,[42] Liechtenstein,[43] and several Eastern European countries.[44]) The Netherlands has prepared a draft.[45] Even England has joined the statutory bandwagon.[46] While these countries have substantially modernized their choice-of-law rules, there was no upheaval comparable to the American conflicts revolution. Instead, European legislators mostly agreed on a blend of traditional territorialism, the closest connection principle, and party autonomy.[47]

1. The Persistence of Territorialism

As in the new German law, the application of the *lex loci delicti* is still the basic rule in virtually all European countries. In this regard, tradition has been amazingly persistent. Yet, the various regimes differ in two respects.

First, most codifications make *lex loci* the ground rule but a few treat it as the residual choice. The former, like the German EGBGB, list the territorial rule first and then specify various exceptions and modifications.[48] The latter, like the Swiss statute, begin with more specific provisions and if they do not apply, resort to the law of the place of the wrong.[49] This difference will rarely affect outcomes since in both instances *lex loci* is the general choice for all cases not covered by a more particular rule.

Laws, 28 Am. J. Comp. L. 197 (1980).

41. Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987 (hereafter cited as Switzerland). For an overview and translation, *see* Symeon Symeonides, *The New Swiss Conflicts Codification*, 37 Am. J. Comp. L. 187 (1989).

42. Legge 31 maggio 1995, n.218, Riforma del sistema italiano di diritto internazionale privato (hereafter cited as Italy). For an overview and translation, *see* Alberto Monateri & Vincent Narcisi, Conflict of Laws in Italy (1997). For an extensive commentary, *see* Fausto Pocas, Commentario del Nuovo Oiritto Privato Internationale (1996).

43. Gesetz vom 19. September 1996 über das Internationale Privatrecht (hereafter cited as Liechtenstein), reprinted in 1997 Praxis des Internationalen Privat- und Verfahrensrechts 364-69.

44. Estonia: Law on the General Principles of the Civil Code of June 28, 1994 (hereafter cited as Estonia); Hungary: 1979.évi 12.törvényereju rendelet a nemzetközi maganjogrol, *reprinted* in Riering, *supra* note 38, at 364-409 (hereafter cited as Hungary); Romania: Legea nr. 105 din 22 septembrie 1992 cu privire la reglementarea raporturilor de drept international privat, *reprinted* in Riering, *supra* note 38, at 132-209 (hereafter cited as Romania).

45. Schets van een Algemene Wet betreffende het Internationaal Privatrecht, *reprinted* in Weekblad voor Privaatrecht, Notariaat & Registratie 605-11 (1993) (hereafter cited as Netherlands).

46. Private International Law (Miscellaneous Provisions) Act 1995 (hereafter cited as England).

47. They disagreed, however, on whether to enact particular rules applying to specific kinds of torts. Most recent statutes provide for special treatment of particular categories of wrongs though they still differ on whether this is true for products liability, unfair competition, or yet something else. A few modern, and most older, European choice-of-law regimes limit themselves to general provisions. Some countries have also adopted special provisions by ratifying one or both of the Hague Conventions on tort conflicts, see *infra* section I.B.

48. Austria § 48 (1); Estonia §§ 164-165; Hungary § 32, Italy Art. 62; Liechtenstein Art. 52 (1); England Sections 11-12. This is also true in several other countries with older statutes, such as Poland, Prawo prywatne micdzynarodowe 1965, *reprinted* in Riering, *supra* note 38, at 94-131 (hereafter cited as Poland) Art. 31, and Portugal, Codigo civil portugues, livro I. Parte general, *reprinted* in Riering, *supra* note 38, at 108-31 (hereafter cited as Portugal) Art. 45.

49. *See* Switzerland Art. 133, Netherlands Arts. 92-96.

Second, countries disagree on the relevant place if the wrongful act and the harm occur in different jurisdictions. Most, like Austria or Liechtenstein, look to the place of the act.[50] Others, such as Switzerland or the Netherlands, select the location of the injury.[51] Still others, Germany and Italy among them, let the plaintiff pick.[52] This difference *will* affect outcomes if the two states' laws differ in substance. Thus the shared commitment to territorialism does not in and of itself guarantee uniformity of results.

2. The Rise of the Closest Connection Principle

The principle of applying the law of the state with the closest connection has become increasingly prominent in many parts of the world[53] and, particularly in contract cases, has dominated for some time.[54] More recently, it has made major inroads in tort conflicts as well. Almost all modern European codifications displace the law of the accident state if the case has more significant ties to another country.[55] Sometimes, as in Austria, the connection principle openly dominates the whole approach, generally selecting the state with the most significant contacts (which may still be the accident state).[56] Most often, however, it simply forms the exceptions to the *lex loci delicti* rule, as the German example illustrates.[57]

In the various special provisions, the closest connection appears in all forms, shapes and sizes: as a flexible presumption or as a hard and fast rule, as an abstract principle or as a concrete fact pattern (common nationality, domicile, or habitual residence, pre-existing relationship, etc.), as a single exception or in several layers. While these provisions are variations on the same theme, some make it easier than others for a judge to justify a deviation from the *lex loci* rule.

3. The Issue of Party Autonomy

The overall picture is less clear when it comes to the question of whether European conflicts legislation allows the parties to select their own law in

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50. Austria § 48 (1) 1st cl.; Liechtenstein Art. 52 (1); *see also* Estonia § 164 (1).

51. Switzerland Art. 133 (2) (if place of injury foreseeable); Netherlands Art. 96; *see also* England § 11 (2).

52. Germany Art. 40 (1); Italy Art. 62 (1) 2d cl.; *see also* Estonia § 164 (3); in Hungary, the law more favorable to the injured party applies, § 32 (2).

53. *See generally*, Paul Lagarde, *Le principe de proximité dans le droit international privé contemporain*, 196 Recueil des cours 9 (1987).

54. *See* Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l L. 571 (1999).

55. With regard to common domicile cases, this has been duly noted by the scholar we honor with this volume, *see* Symeon Symeonides et. al, Conflict of Laws: American, Comparative, International 275-76 (1998); *see also* Eugene F. Scoles et al., Conflict of Laws 770-72 (3d ed. 2000). Among the modern statutory regimes, only Romania, Arts. 107-108, seems to stick firmly to *lex loci*. For France, *see infra* note 95.

56. Austria §§ 1, 48.

57. *See supra* section I.B.2.

transboundary tort disputes. About half of the modern conflicts statutes, like the German one, expressly permit such a choice.[58] The others are silent on the issue, probably because, in contrast to contracts, the question rarely arises in torts. Since the standard treatises do not provide any help, it is impossible to tell without in-depth research whether silence means permission or prohibition. Thus, all one can say on the basis of the statutes themselves is that party agreements are either clearly allowed or at least not forbidden.

B. International Conventions

European conflicts law is the realm not only of national codifications but also of international conventions. They completely dominate the areas of jurisdiction and judgments recognition,[59] as well as contract conflicts.[60] In tort law, conventions continue to play a somewhat smaller, though nonetheless significant, role. Here, we need consider three documents. Though the first is still only a draft, it may well become the most important torts convention since its scope is very broad. The other two have already become law in several European countries but cover only specific kinds of wrongs.

1. The European Draft Convention on Tort Conflicts ("Rome II")

When the European Community countries decided to unify core areas of choice-of-law in the 1970s, they originally envisaged and drafted a convention covering both contractual and non-contractual obligations.[61] Later, they restricted their efforts to contract conflicts and eventually concluded the Rome Convention.[62] The unification of choice of law in non-contractual obligations was postponed and remained dormant for almost two decades. In 1998, it was finally resuscitated. The European Council set up a working party to prepare a convention covering this area. At the same time, the groupe européen de droit international privé, an international association of prominent scholars, completed a proposal for a Convention on the Law Applicable to Non-Contractual Obligations[63] (informally called "Rome

58. *See* Germany Art. 42; Austria § 35 (1), (2); Liechtenstein Art. 39; Switzerland Art. 132 (choice limited to forum law), Netherlands Art. 92. Some of the older regimes allow such a choice as well, *see* Poland Art. 25; Czech and Slovac Republic, Zakon o mezinariodnim pravu soukormem a procesnim 1963, *reprinted* in Riering, *supra* note 38, at 298-337, Art. 9. For the new Italian statute, *see* Pocas, *supra* note 42, at 311 (concerning party agreements).

59. Together, two conventions cover all of Western Europe, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (Brussels Convention), and the homonymous Convention of 1988 (Lugano Convention).

60. *See supra* note 3 and accompanying text.

61. *See* Kurt Nadelmann, *The EEC Draft of a Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 21 Am. J. Comp. L. 584 (1973) (with an English translation of the text).

62. *See supra* note 2.

63. The original (French) text is reprinted in Praxis des Internationalen Privat- und Verfahrensrechts 286 (1999). For an English translation, *see* Netherlands International Law Review 465

II").[64] The draft was sent to the Secretariat General of the European Council for consideration, and a European torts convention was, once again, underway.

Like the new German legislation, the proposal covers torts as well as other non-contractual obligations, especially unjust enrichment and managing the affairs of another. It also contains various common rules applying to these categories.

The basic choice of law rules for torts are listed in Article 3. They begin with the fundamental principle to select the law of the country which has the closest connection (Article 3 Section 1). The closest connection is presumed to exist with the parties' common country of residence (Section 2), or if there is no such country, with the place of the tort, provided that conduct and harm both occurred at the same place (Section 3). An escape clause allows a court to override these presumptions if the totality of circumstances establish a closer connection with another country (Section 4); such an even closer connection is as particularly likely as the result of a pre-existing or contemplated relationship between the parties (Section 5). Finally, the parties can displace all these rules by an agreement about the applicable law made after the event (Article 8).[65]

While different in structure, these provisions are very similar to the new German legislation in actual result. In essence, they select the place of the wrong as the default choice[66] and then create several levels of more specific rules that prevail if applicable: common residence is a closer connection and thus trumps the place of the wrong; particular circumstances, such as a pre-existing relationship, may create even closer ties with a third state, thus beating common residence; finally, party choice trumps all.

The draft resembles the new German rules in other regards as well. It also favors direct actions against insurers by allowing them, alternatively, under the laws governing the tort or the insurance contract (Article 6). It requires that courts take into account the rules of conduct and safety in force at the place of the harmful event (Article 10).[67] And it contains a standard public policy escape clause (Article 14).

Yet, there are also four particularly significant differences. First, the European draft proffers a set of special provisions for some specific torts: with regard to

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(1999).

64. *See, e.g.*, Erik Jayme, *Entwurf eines EU-Übereinkommens über das auf außervertragliche Schuldverhältnisse anwendbare Recht*, Praxis des internationalen Privat- und Verfahrensrechts 298 (1999).

65. In contrast to the German rules, Article 8 requires that the parties' choice be express.

66. Strictly speaking, Article 3 §3 points to the lex loci delicti only by way of presuming the closest connection with the state where both the wrongful act and the injury occurred. This will cover the vast majority of tort actions. The draft does not specify which law applies in the rare case in which neither this nor any other presumption applies, i.e., where wrong and harm occur, the parties reside, and all other connecting factors are evenly distributed among different states. Under such circumstances, the court must make the best choice it can under the general principle of the closest connection. All other things being equal, the judge will probably have to decide between the state of the wrong and the state of the injury, depending on which of these countries is connected with the case in other ways as well.

67. The German rules presume this, *see supra* notes 12-13 and accompanying text.

invasion of privacy, unfair competition, and environmental harm, the closest connection is presumed to be the place of the harm (Article 4).[68] Second, the proposal does not allow the plaintiff to choose between the laws of the places of conduct and of injury.[69] Third, it does not specifically limit the available damages.[70] Finally, like many modern choice-of-law conventions, it excludes *renvoi* (Article 13).

2. The Hague Convention on Traffic Accidents[71]

As its title indicates, the Hague Convention on the Law Applicable to Traffic Accidents of 1971[72] is much more limited in scope than the draft of the "Rome II" convention. It is, however, more important in practice because it has already been ratified by more than a dozen European countries (though not by Germany).

Its basic rule is that the law of the place of the accident governs (Article 3); if at least one of the vehicles involved is registered in the accident state, this choice is final. If all vehicles are registered elsewhere, the Convention creates several exceptions in favor of the law of the (common) registration state. While these exceptions are fairly complicated, they all reflect the same basic idea: registration state law trumps in situations in which this state normally has the stronger connection with the case.[73] In a sense, registration takes the place of domicile as the primary indicator of a close connection because it determines the required liability insurance. The Convention is silent on the parties' right to choose their own law but such a right is supported by scholarly and judicial authority.[74] In sum, *lex loci* applies unless it is overridden by a closer connection with the registration state which in turn can be displaced by party agreement.

Beyond these rules, the Convention resembles the new German tort rules in that it also favors direct actions against insurers,[75] takes into account the rules of conduct

68. More specifically, in invasion of privacy, the residence of the plaintiff is presumed to be the place of harm; in unfair competition, the affected market is presumed to be the place of harm; and in environmental torts, place of injury to persons or property is presumed to be the place of harm.

69. *See supra* section I.B.1.

70. The type and amount of damages available could still be limited under the general public policy clause of Art. 14.

71. Generally speaking, Hague conventions are not European because the Hague Conference consists of members from throughout the world who often accede to its conventions. Yet, the conventions considered here have in effect been limited to European countries.

72. Hague Conference on Private International Law, Collection of Conventions 142 (1997).

73. Article 4 distinguishes between single- and multi-vehicle accidents. In single car accidents, the law of registration overrides the lex loci with regard to claims by all passenger-victims (i.e., by those who are part of the vehicle environment) unless they habitually reside in the accident state; with regard to non-passenger victims (i.e., those who are part of the surroundings), the law of registration trumps only if they habitually reside in the registration state so that registration and residence point to the same law. Where two or more vehicles are involved, the law of registration can prevail only if all are registered in the same state. Similar rules govern claims for property damage under Article 5.

74. *See* Kegel, *supra* note 12, at 554 for further references.

75. Article 9 allows a direct action alternatively under the law of the place of the accident, the law of the registration state, or the law governing the insurance contract.

prevailing in the accident state (Article 7), and, of course, contains a public policy escape clause (Article 10). It differs from the German regime in that it excludes *renvoi*.[76]

3. The Hague Convention on Products Liability

The last of our triad, the Hague Convention on the Law Applicable to Products Liability of 1973,[77] is less important in practice than the agreement covering traffic accidents. Fewer states have adopted it (Germany not among them), and it is unlikely that many more will. At least within Europe, the need for unification of conflicts rules in this area has diminished because of the harmonization of substantive product liability law.

The Convention contains three complex choice-of-law provisions in Articles 4 through 6. They have been criticized as kaleidoscopic and as deviating too much from the usual tort conflicts rules.[78] While these points are well-taken, one can still detect the usual pattern in the general approach: it consists of a residual territorial rule (with a pro-plaintiff tack) in combination with overrides on several levels reflecting closer connections with other states. As a basic rule, Article 6 refers to the law of the defendant's principal place of business as the likely location of the wrongful act (design, manufacture, or release of the product into the stream of commerce) but allows the plaintiff to choose the law of the place of injury if it occurred in a different state. The first override provision is Article 4 under which the law of the country of injury prevails (mandatorily) if that country has at least one of three other significant contacts with the case.[79] Then, in Article 5, the law of the victim's home state trumps everything else if that state is the most closely connected jurisdiction, either by virtue of being also the parties' common domicile or the place where the victim purchased the product.[80]

The Convention also contains the usual reference to the rules of conduct and safety of the place of conduct (Article 9), a public policy exception (Article 10), and it excludes *renvoi*.[81]

When considering these three conventions together, one is tempted to lament the lack of uniformity among them. It is true that more consistency is desirable but one must not overlook that the major differences lie in the texts' external organization, in the contacts employed, and in the degree of specificity. Their basic

76. The Convention consistently and expressly refers only to the internal law of the chosen state.

77. Hague Conference of Private International Law, Collection of Conventions, *supra* note 72, at 192.

78. Kegel, *supra* note 12, at 558.

79. The country must be either the victim's habitual place of residence, the defendant's principal place of business, or the purchase of product by the victim.

80. In addition, Article 7 imposes a general limit: neither the law of the state of injury nor that of the state of the victim's residence may apply if the defendant "could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels."

81. *See supra* note 76.

message is the same: select the law of the state with the closest connection. More specifically, their fundamental pattern is almost identical as well: it consists of a hierarchy of choices in which the *lex loci* is at the bottom and other (variously defined) closer connections are layered above it. These fundamental features are shared not only by most modern European conflicts statutes but also by many written conflicts rules on the other side of the Atlantic.

III. THE TRANSATLANTIC CONTEXT: INDICATIONS OF AN INTERNATIONAL TREND?

When we look from Europe across the Atlantic, we are facing a situation that is somewhat different in at least two regards. First, codified choice-of-law rules are less prevalent although, in addition to the Second Restatement of Conflicts which presents choice-of-law rules in quasi-codified form, there are some comprehensive statutes as well as a few interesting drafts. Second, even where Restatement or statutory rules govern, they usually leave judges more leeway than in Europe. Many of the provisions are drafted in a more open-ended fashion, and at least some expressly invite policy analysis which tends to be more amorphous and speculative than looking to concrete contacts. Despite all these differences, there are significant similarities between the North American (quasi-) codifications and their European counterparts.

A. The Second Restatement

Despite its lack of statutory force, the Second Restatement[82] arguably contains the most important set of written conflicts rules in the United States today. Its approach to torts conflicts is by far the most popular among the States with almost half of them endorsing it.[83] Whatever judges do with its fairly loose provisions in practice,[84] the Second Restatement is the basic text for a large and growing portion of American tort conflicts decisions.

At least in personal injury cases, which account for the vast majority of tort disputes, the Second Restatement's provisions are strikingly similar to the predominant European approach. They consist of the familiar mixture of territorialism and the closest connection principle: the basic rule is to apply the law of the place of the injury but to override that choice if there is a more significant relationship with another state (§ 146). The factors that determine whether an override is warranted are familiar to Europeans as well: the location of conduct and

82. Restatement (Second) of Conflict of Laws (1971) (hereafter cited as Restatement 2d).

83. Twenty-one as of last count, *see* Symeon Symeonides, *Choice of Law in the American Courts in 1999: One More Year*, 48 Am. J. Comp. L. 143, 145-46 (2000).

84. *See* Patrick Borchers, *Courts and the Second Restatement: Some Observations and an Empirical Note*, 56 Md. L. Rev. 1232 (1997); Patrick Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357, 376-84 (1992); Symeon Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 Md. L. Rev. 1248, 1269-79 (1997).

harm, the origin (domicile, residence, etc.) of the parties, and the center of the relationship between them, if any (§ 145 (2)). The major differences are that these factors are not hierarchically ordered, that the tort rules refer to the vague considerations listed in § 6 (§ 145 (1)), and that the Restatement encourages an issue-by-issue approach rather than a wholesale choice (§ 145 (2)).

Like many European conflicts codifications, the Second Restatement is silent on the question whether the parties to a tort dispute can depart from its rules and choose their own law by agreement. And like most continental statutes, it contains special provisions governing particular categories of torts (§§ 147-155, 175-180). Yet, it also specifically addresses a host of individual issues (§§ 156-174), reflecting the common law lawyer's obsession with detail.

B. Choice-of-Law Statutes

In 1991, Louisiana codified its choice-of-law regime by amending its Civil Code,[85] thus becoming the only State of the Union with a full-fledged conflicts codification. Its basic tort rules share significant characteristics with the European texts considered above. At first glance, such a statement seems bold.[86] After all, the lodestar of the new Louisiana regime is the idea of comparative impairment (Article 3515 (1)), which is virtually unknown in Europe. Yet, this lodestar does not signify a commitment to California-style interest analysis at all.[87] Instead, the new Louisiana rules contain a healthy dose of territorialism mixed with criteria reminiscent of the closest connection principle. Like the Second Restatement, it expressly looks to contacts, especially the place of conduct and injury, the domiciles or businesses of the parties, and the center of a relationship between them (Article 3542 (2)). As would be expected, the basic rule for issues of conduct and safety is to select the law of the place of the tort (Article 3543). But even in matters of loss distribution, the ground rule is the same: apply the *lex loci* (Article 3544 (2)).[88] This choice is trumped by the law of the parties' common domicile, which in turn may be displaced in exceptional cases under an escape clause (Article 3547). The statute has no provision on party autonomy, but it does contain special rules for products liability (Article 3545) and punitive damages (Article 3546). The codification's overall approach is more policy oriented than European statutes, but its hierarchy of rules and the criteria it employs betray the European training of its author.

The similarities with Europe are even stronger in the other major conflicts codification in North America. In Quebec's choice-of-law rules, which entered into

85. *See supra* note 1.

86. It is particularly dangerous in a volume dedicated to the scholar who, as their principal draftsman, is more familiar with the new Louisiana rules than anyone else.

87. *See* Symeon Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 691-92 (1992).

88. If conduct and injury occur in different states, one or the other is preferred, depending on the circumstances, *see* Arts. 3543 (2), (3), 3544 (2).

force in 1991 as part of its new Civil Code,[89] Article 3126 contains the basic provisions for torts. Section 1 is the territorial ground rule: normally, the law of the country in which the "injurious act" takes place applies, though if the harm foreseeably occurred somewhere else, the law of the injury state governs. Section 2 provides the classic exception in favor of the law of the parties' common domicile. All of this is subject to Article 3082, which allows a court to override the choices in specific cases if there is a much closer connection with the law of another country. Like the Louisiana rules, the Quebec Civil Code does not say whether the parties can select their own law, though there is some indication that this would be allowed.[90] It also contains a special rule on products liability in Article 3128.

C. Two Recent Drafts

When we look beyond established rules to some recent drafts, we find similar patterns. The *Projet* for the Codification of Puerto Rican Private International Law[91] subscribes to the most-significant-connection principle but also relies heavily on territorial factors. Tort issues of conduct and safety are normally governed by the law of the state where the conduct occurred (Article 46). Loss distribution between the parties is determined by the *lex loci delicti* as well[92] unless a common domicile overrides this choice (Article 47). In the last instance, all these rules are subject to the "general and residual" principle of applying the law of the state with the most significant connection (Articles 2, 45) which is determined by the usual factors. There is a special provision for products liability (Article 48), but no rule about party autonomy.

Even the American Law Institute's Draft of Complex Litigation Rules for Mass Torts[93] reflects many by-now familiar ideas. It is true that its primary approach is a form of interest analysis: if the traditional contacts listed in § 6.01 (b) show that only one state's policy would be furthered, that state's law applies (§ 6.01 (c)). This would be a so-called "false conflict" and will be very rare in multi-state litigation involving parties and laws from many states which are likely to have an interest in seeing their rules applied. In all multi-interest cases, i.e., in the vast majority of complex tort disputes, the ALI draft also resorts to a mix of territorialism and the significant-relationship approach. Here, it establishes a hierarchy of choices. The primary rule is soundly territorial: if conduct and injury occur in the same state, its

89. Quebec Civil Code (as amended in 1994).

90. The last clause of Article 3082 refers to a choice by party agreement ("through a juridical act"); since this Article is contained in the General Provisions applying in all specific areas, it is plausible to infer that the parties are free to choose their own law in torts as well, at least within reasonable limits.

91. Puerto Rican Academy of Jurisprudence and Legislation, A *Projet* for the Codification of Puerto Rican Private International Law (Symeon Symeonides & Arthur T. von Mehren Rapporteurs 1991).

92. If conduct and injury occurred in different states, this may mean the place of the injury under certain conditions defined in Art. 47(b)(2).

93. A.L.I., Complex Litigation Project (Proposed Final Draft) (May 13, 1993).

law invariably governs. Otherwise, the common-domicile rule takes over. Where neither conduct and injury nor the parties' domiciles point to a single state, the place of the injury or of the conduct provides the law, depending on the circumstances (§ 6.01 (c) (1)-(4)).[94]

IV. CONCLUSION

The 1999 German legislation is part of a larger trend in modern choice-of-law codifications, particularly in Europe but also on this side of the Atlantic. Comparing the German basic principles with other recent conflicts statutes suggests a growing international consensus. At its core lie three fundamental rules. First, as a general matter, torts are governed by the law of the place of the wrong. Second, the *lex loci delicti* yields to the law of the state which has a closer relationship to the dispute, normally because it is the parties' common home state, but sometimes for other reasons such as a pre-existing relationship. Third, issues of conduct and safety are decided under, or at least in consideration of, the law of the place where the wrongdoer acted. To be sure, none of these rules are new or surprising; especially in the United States, they are rather old hats. What is new is that they now prevail in the vast majority of modern (quasi-) codifications on both sides of the Atlantic as well. Of course, this does not mean that we are approaching complete uniformity in the world of tort choice of law. Such a contention is not the point of this brief essay. It would be particularly inappropriate because my survey was limited in at least three ways.

First, as indicated by the title, we have considered only codified rules, albeit in the larger sense, encompassing national, state, or provincial statutes, international conventions, restatements, and drafts. Yet, vast portions of tort conflicts are governed by pure caselaw, not only in the common law orbit but in continental Europe as well. In this caselaw, we find a considerable variety of rules and approaches, ranging from the solid territorialism of France[95] and Canada[96] to the policy oriented regimes of New York and California. To be sure, many leading

94. For further analysis and a critique, *see* Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 La. L. Rev. 907 (1994).

95. The French Cour de cassation has adhered to the lex loci rule since its Latour decision in 1948, Cass. Civ. 25 mai 1948, D. 1948.357 though some lower courts and scholars have differed. For an overview in English, *see* Moore, *supra* note 38, at 52-56. For the attitudes in the lower courts, *see* Lagarde, *supra* note 53, at 103. For scholarship favoring exceptions, *see* Yvon Loussouarn & Pierre Bourel, Droit international privé, 457 (marginal number 403) (5th ed. 1996) and, *see generally*, Pierre Bourel, Les conflits de lois en matière d'obligations extracontractuelles (Paris 1961). It is noteworthy, however, that the Cour de cassation's rigid territorialism is tempered by two factors. First, France has ratified the Hague Conventions on traffic accidents and products liability, both providing for deviations from the lex loci rule, *see supra* sections II.B.2. and 3. Second, the parties can choose their own law after the accident, Cass. Civ. I, Apr. 19, 1988 (affaire Roho), Revue critique de droit international privé 69 note Batiffol (1989).

96. *See* Tolofson v. Jensen, Lucas v. Gagnon (1995), 100 B.C.L.R. 2d 1 (S.C.C.).

cases, especially in the United States, can easily be explained in terms of the three consensus rules mentioned above,[97] but many cannot.

Second, in looking at written rules, I have emphasized their similarities rather than their differences. We must not forget the considerable diversity we have found below the level of the elementary principles. Some statutes let the parties pick their own law while others are silent on this point. Many codifications contain elaborate rules for specific torts, while others are restricted to general provisions. In defining the place of the wrong, some look to conduct, others to injury. Several European regimes let the plaintiff choose between the laws of both, provide for *renvoi*, and favor direct actions against insurers, while such idiosyncrasies are by and large foreign to the American conflicts universe.

Third, we have looked only at part of the world. It is true that Western Europe and the United States have been the trend setters in shaping private international law while most other countries have followed, and the pattern noted here is by no means limited to the North-Atlantic region.[98] Still, a more complete picture would have to take other economically or politically important regions and nations into account. As the example of China and Japan indicates, it is likely that we would find a fair degree of variety among their laws.[99]

But even if we must be careful not to overstate the case, the recent international convergence in codified tort conflicts rules is remarkable. It is reason to hope that at least the routine cases will be treated more and more alike in more and more countries so that the rewards of forum shopping will be accordingly diminished. As the increasing mobility of people and goods causes a growing number of transboundary torts, this is a salutary trend.

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97. *See* Symeonides, *supra* note 87, at 715 (Louisiana's rules finding sufficient consensus among American courts to speak of a "common-domicile rule," i.e., as an exception to lex loci delicti). In fact, where a court ignores the basic rules mentioned above in their entirety and applies neither the lex loci nor the common domicile law, the constitutionality of its choice is open to serious doubt, as *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct 633 (1981), illustrates.

98. A casual perusal of conflicts statutes form other parts of the world shows that many countries follow the same approach; *see* the statutes collected in Jan Kropholler et al., Au Bereuropäische IPR-Gesetze (1999) from *Angola*, *id.* 36 at 56-58; *Kasachstan*, *id.* 396 at 402; *Mongolia*, *id.* 538 at 554; *Mocambique*, *id.* 566 at 590; *Tunesia*, *id.* 854 at 902; and *Vietnam*, *id.* 1034 at 1044.

99. Art. 146 of the Chinese Common Principles of Civil Law follows the modern trend by recognizing a common-domicile or common-nationality exception to the territorial groundrule, *see* Tung-Pi Chen, *Private International Law of the People's Republic of China, An Overview*, 35 Am. J. Comp. L. 445, 469-70 (1987). In contrast, Art. 11 (1) of the Japanese Horei invariably selects the law of place of the wrong, *see* Chin Kim, *New Japanese Private International Law: The 1990 Horei*, 40 Am. J. Comp. L. 1, 7 (1992).

APPENDIX

The New German Tort Conflicts Rules[100]

Artikel 40 Unerlaubte Handlung	Article 40 Torts
(1) Ansprüche aus unerlaubter Handlung unterliegen dem Recht des Staates, in dem der Ersatzpflichtige gehandelt hat. Der Verletzte kann verlagen, daß anstelle dieses Rechts das Recht des Staates angewandt wird, in dem der Erfolg eingetreten ist. Das Bestimmungsrecht kann nur im ersten Rechtszug bis zum Ende des frühen ersten Termins oder dem Ende des schriftlichen Vorverfahrens ausgeübt werden.[101]	(1) Tort claims are subject to the law of the state in which the liable party has acted. The injured party can demand that instead of this law, the law of the state in which the injury occurred is applied. The option can be used only in the first instance court until the conclusion of the pre-trial conference or until the end of the written preliminary procedure.
(2) Hatten der Ersatzpflichtige und der Verletzte zur Zeit des Haftungsereignisses ihren gewöhnlichen Aufenthalt in demselben Staat, so ist das Recht dieses Staates anzuwenden. Handelt es sich um Gesellschaften, Vereine oder juristische Personen, so steht dem gewöhnlichen Aufenhalt der Ort gleich, an dem sich die Hauptverwaltung oder, wenn eine Niederlassung beteiligt ist, an dem sich diese befindet.	(2) If, at the time of the event underlying the liability, the liable party and the injured party had their habitual residences in the same state, the law of that state applies. In case of companies, associations, or legal persons, habitual residence means the place where the main office, or if a branch office is involved, that branch office is located.
(3) Ansprüche, die dem Recht eines anderen Staates unterliegen, können nicht geltend gemacht werden, soweit sie	(3) Claims governed by the law of another [scil. foreign] state cannot be made as far as they

100. *See supra* note 8 and accompanying text. The translation here is my own.

101. In German civil procedure in the first instance courts, the judge can prepare the main hearing (Code of Civil Procedure § 278) in two ways. One is to meet with the parties (or their lawyers) in a pre-trial conference in order to discuss the case and to tease out the issues (§ 275). The other is a preliminary written procedure during which the parties exchange briefs (§ 276).

1. wesentlich weiter gehen als zur angemessenen Entschädigung des Verletzten erforderlich,

2. offensichtlich anderen Zwecken als einer angemessenen Entschädigung des Verletzten dienen oder

3. haftungsrechtlichen Regelungen eines für die Bundesrepublik Deutschland verbindlichen Übereinkommens widersprechen.

4. Der Verletzte kann seinen Anspruch unmittelbar gegen einen Versicherer des Ersatzpflichtigen geltend machen, wenn das auf die unerlaubte Handlung anzuwendende Recht oder das Recht, dem der Versicherungsvertrag unterliegt, dies vorsieht.

1. go significantly further than is necessary for an adequate compensation of the injured party,

2. obviously serve purposes other than an adequate compensation of the injured party or

3. conflict with liability rules under a convention in force in the Federal Republic of Germany.

4. The injured party can make his claim directly against an insurer of the liable party if that is provided for either under the law applicable to the tort or under the law governing the insurance contract.

Artikel 41
Wesentlich engere Verbindung

(1) Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 38 bis 40 Abs. 2 maßgebend wäre, so ist jenes Recht anzuwenden

(2) Eine wesentlich engere Verbindung kann sich insbesondere ergeben

Article 41
Significantly Closer Connection

(1) If there is a significantly closer connection with the law of a state other than the law which would apply under articles 38 through 40 sec. 2, then that law is to be applied.

(2) A significantly closer connection may result especially

1. aus einer besonderen rechtlichen oder tatsächlichen Beziehung zwischen den Beteiligten im Zusammenhang mit dem Schuldverhältnis oder

2. [betrifft nicht-deliktsrechtliche, außervertrag-liche Schuldverhältnisse]

1. from a particular legal or factual relationship between those involved in connection with the obligation or

2. [concerns non-contractual obligations other than torts]

Artikel 42
Rechtswahl

Nach Eintritt des Ereignisses, durch das ein außervertragliches Schuldverhältnis entstanden ist, können die Parteien das Recht wählen, dem es unterliegen soll. Rechte Dritter bleiben unberührt.

Article 42
Choice of Law by the Parties

After the occurrence of the event which gives rise to a non-contractual obligation, the parties may chose the law by which it shall be governed. Rights of third parties remain unaffected.