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JURISDICTION AND CHOICE OF LAW FOR NON-CONTRACTUAL OBLIGATIONS – PART I:

HEMISPHERIC APPROACHES TO JURISDICTION AND APPLICABLE LAW FOR NON-CONTRACTUAL CIVIL LIABILITY

(presented by Carlos Manuel Vázquez)

On May 1, 2002, the Permanent Council "instructed the Inter-American Juridical Committee to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02," and "to issue a report on the subject, drawing up recommendations and possible solutions, all of which are to be presented to the Permanent Council as soon as practicable, for its consideration and determination of future steps."[1] The Juridical Committee designated as rapporteurs of this topic Committee members Ana Elizabeth Villalta Vizcarra and Carlos Manuel Vázquez. Both rapporteurs presented preliminary studies on the topic at the 61st Regular Session of the Committee in August 2002. These studies discussed some of the choice of law and jurisdictional approaches taken by OAS member states in cases of non-contractual liability, identified preliminary considerations regarding the desirability of pursuing negotiation of an Inter-American instrument addressing this subject, and outlined an agenda for further research necessary to enable Committee to develop recommendations for the Permanent Council.[2]

On the basis of the rapportuers' reports, the Committee at its 61st Regular Session adopted a resolution providing guidelines for the completion of this mandate. The Committee's resolution provided, inter alia, that the rapporteur's report should include "an enumeration of the specific categories of obligations that are encompassed within the broad category of 'non-

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1 Permanent Council Resolution, Assignment to the Inter-American Juridical Committee of the CIDIP Topic Regarding the Applicable Law and Competency of International Jurisdiction with Respect to Non-contractual Civil Liability, May 1, 2002, OEA/Ser.G CP/RES.815 (1318/02), available at http://www.oas.org/consejo/resolutions/res815.htm.

2 See Carlos M. Vázquez, The Desirability of Pursuing the Negotiation of an Inter-American Instrument on Choice of Law and Competency of Interstateal Jurisdiction With Respect to Non-Contractual Liability: A Framework for Analysis and Agenda for Research, OEA/Ser.Q CJI/doc.104/02 rev.2, Aug. 23, 2002; A.E. Villalta, Propuesta de Recomendaciones y de Posibles Soluciones al Tema Relativo a la Ley Aplicable y Competencia de la Jurisdicción Internacional Con Respecto a la Responsabilidad Civil Extra-Contractual. Study Prepared for August 2002 Meeting of Inter-American Juridical Committee.

contractual obligations,'" as well as a "survey [of] the approaches to jurisdiction and choice of law currently being employed in the hemisphere in the field on non-contractual liability." The Resolution stated that the report "should consider as well the past and ongoing efforts of global, regional, and subregional organizations that have sought, and in some cases continue to seek, conflict of laws solutions in this field." In pursuance of this mandate, the rapporteurs divided the work between them. Dr. Villalta's report examines the past and ongoing efforts of global, regional, and subregional organizations on this topic. This report enumerates the forms of non-contractual liability currently recognized in this Hemisphere and surveys the approaches currently being followed by the nations of the Hemisphere in determining jurisdiction and applicable law in suits seeking to impose non-contractual liability. Part I enumerates the major theories of non-contractual liability and compares them across the common and civil law systems. Part II surveys the major approaches taken in the Hemisphere to issues of choice of law in cases of non-contractual liability. Part III surveys the major approaches taken in the Hemisphere in determining the existence of jurisdiction in cases of non-contractual liability.

I. THE RECOGNIZED FORMS OF NON-CONTRACTUAL CIVIL LIABILITY IN THE HEMIPSHERE

In its Resolution No. 50 (LXI-O/02) of Aug. 23, 2002, the Juridical Committee resolved that the report prepared by the rapporteurs of this topic for presentation at the Committee's 62d session "include an enumeration of the specific categories of obligations that are encompassed within the broad category of 'non-contractual obligations.' Such an analysis will serve to illustrate the enormous breadth and variety of obligations that an Inter-American instrument on jurisdiction and choice of law in this field could potentially affect." [3]

This section of this report provides such an enumeration. The enumeration demonstrates that the field of non-contractual liability is very broad indeed, including a wide variety of disparate types of liability. The term "non-contractual liability covers literally all forms of liability that are not based on a contract, including but not limited to all forms of torts, quasi-contracts, delicts, quasi-delicts, and all liability arising under statutes that create private rights of action. (Although the term literally also includes liability of private individuals to the state, I have excluded that form of liability from the scope of this report on the assumption that the mandate to the Committee was not intended to reach that far.) Chart I at the end of this section confirms the wide range of theories of non-contractual liability that can be found in the national and subnational laws in both

[3] Applicable Law and Competency of International Jurisdiction with Respect to Non-contractual Civil Liability, OEA/Ser.Q CJI/RES.50 (LXI-O/02), Aug. 23, 2002.

common and civil law jurisdictions of the Hemisphere.[4] These theories are set forth in domestic legal codes and statutes, case-law, and treaties.[5]

At a general level, the nature of tort and illicit act liability in the civil and common law jurisdictions of the Hemisphere is similar. Both systems premise liability of this kind upon an act or omission that constitutes the breach of a legal duty.[6] In common law jurisdictions tort liability typically arises from a tortious act that is either intentional or negligent, or from an act subject to strict liability.[7] Similarly, in civil law jurisdictions such liability typically arises from an illegal act (*hecho ilícito* in Spanish or *ato ilícito* in Portuguese) which is either a delict (*delito*) – defined as an act committed with intent to harm – or as a quasi-delict (*quasi-delito*) – defined as an act committed without harmful intent,[8] or from an act subject to *responsabilidad objetiva* – defined as liability that does not require proof of fault, but rather only proof of damage and causation.[9] The term "non-contractual liability" also embraces numerous forms of liability not generally regarded as traditional torts – such as liability for infringement of copyright and patents as well as for discrimination based on race, gender and other impermissible classifications. Moreover, new technologies (such as the internet and genetic testing) and new scourges (such as AIDS) have required the extension of traditional torts into new contexts or the fashioning of wholly new bases of liability.

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4 The common law jurisdictions covered are Antigua & Barbuda, Bahamas, Barbados, Belize*, Canada (excl. Quebec), Dominica, Grenada, Guyana, Jamaica, St. Vincent & Grenadines, St. Kitts & Nevis, St. Lucia, Trinidad & Tobago, and the United States (excl. Louisiana and Puerto Rico). The civil law jurisdictions covered are Louisiana (U.S.)*, Puerto Rico (U.S.)*, Quebec (Canada), Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, Suriname, Venezuela, and Uruguay. However, jurisdictions noted with a * have been classified as both common and civil law.

5 Among the major treaties providing substantive liability rules are the Chicago Convention on Civil Aviation, the Convention on the Liability of Operators of Nuclear Ships 1962, Brussels, May 25, 1962, reprinted in 57 Am. J. Int'l L. 268 (as of 1997 not yet entered into force); the Convention on International Liability for Damage Caused by Space Objects; the Convention on Third Party Liability in the Field of Nuclear Energy 1960, Paris, July 29, 1960, U.K.T.S. 1968 & Supplementary Convention 1963, 2 I.L.M. 685; the Geneva Convention on Indemnification for Workplace Accidents; the Geneva Convention on Indemnification for Workplace Accidents in the Agricultural Sector; the International Convention on Civil Liability for Oil Pollution Damage 1969, Brussels, Nov. 29, 1969, 9 I.L.M. 45 & Protocols; the International Convention for the Establishment of An International Fund for Compensation for Oil Pollution Damage 1971, Brussels, Dec. 18, 1971; the Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251 (as amended by 1964 Protocol), (entered into force Apr. 1, 1968), reprinted in 55 AM.J.INT'L L. 1082 (1961), amended by the Brussels Supplementary Convention, Jan. 31, 1963, 1041 U.N.T.S. 358 (as amended by 1964 Protocol) (entered into force Dec. 4, 1974); the Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 (entered into force Nov. 12, 1977), reprinted in 2 I.L.M. 727 (1963); and the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage By Air, 137 L.N.T.S. 11.

6 In some cases liability is premised on harm or prejudice rather than breach of a duty. See ARTURO VALENCIA ZEA, DERECHO CIVIL, VOL. III, DE LAS OBLIGACIONES 201 (1974) (citing definition of illicit act in Colombian law); *see also* C.C. of Guatemala , art. 1648 (shifting burden of proof upon showing of injury to defendant to prove no fault).

7 *See generally* WILLIAM PROSSER, JOHN W. WADE & VICTOR E. SCHWARTZ, TORTS: CASES AND MATERIALS (10th ed. 2000); RESTATEMENT (SECOND) OF THE LAW OF TORTS (1965).

8 *See, e.g.,* Villalta, *supra* at 6, citing C.C. of El Salvador, art. 2035 (defining delicts and quasi-delicts).

9 *See* JORGE A. VARGAS, THE MEXICAN LEGAL SYSTEM 217 (1998) (defining objective liability as arising from the carrying out of ultrahazardous activities and treating objective liability as a class of liability distinct from non-contractual liability).

Many of the same kinds of acts are grounds for non-contractual liability in both common law and civil law jurisdictions. Chart I shows that both systems provide for liability for transportation accidents, workplace accidents, injuries caused by animals, wrongful death, battery, assault, manufacture and distribution of defective products (products liability), ultrahazardous activity, injurious acts by dangerous animals, false and misleading advertising, fraud and misrepresentation, defamation, breach of confidence, malicious falsehood, professional malpractice, loss of consortium and spousal companionship, paternity, statutory rape, discrimination, abuse of civil and criminal process, false arrest, trespass, conversion, destruction of property, expropriation, violation of intellectual property rights, conspiracy, restraint of trade and unfair competition, embezzlement, environmental damage, nuisance, unjust enrichment, and violation of securities laws. Common law quasi-contractual obligations arising from unjust enrichment and restitution[10] are also similar to the civil law quasi-delictual liability for collection of debts not owed. Further, civil law quasi-delictual liability for unauthorized agency and for injuries arising from property owned in common are also found in common law jurisdictions, though under slightly different guises of agency law and liability of property owners.

While the civil and common law regulation of non-contractual liability share certain general characteristics and many common theories of liability, the two systems also exhibit a number of significant differences. As a general matter, common law systems appear to have developed a greater variety of common bases for non-contractual liability. For example, in common law systems theories of non-contractual liability for such acts against individuals as invasions of privacy,[11] discrimination, false imprisonment,[12] sexual harassment,[13] alienation of the affections of family members,[14] and infliction of emotional distress[15] appear to be used and developed to a greater extent than in civil law countries. Some might argue that protection in common law

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10 *See* Chart 1, *infra.* for list of three most common quasi-contracts in civil law systems.

11 Although the body of law on privacy in civil law jurisdictions has not developed as robustly as in some common law jurisdictions such as the U.S., Latin American jurisdictions have been enacting laws governing data privacy in recent years. *See* Pablo A. Palzzi, Data Protection Materials in Latin American Countries Worldwide, available at http://www.ulpiano.com/DataProtection-LA-links.htm.

12 There does not appear to be a correlate basis for non-contractual liability in the civil law. Instead, the offense of *Delito Contra la Libertad Individual* is typically a basis for criminal liability. In addition, strictly speaking, this scope of this term is more broad than false imprisonment and includes such acts as kidnapping (*secuestreo*).

13 Yet theories of liability for sexual harassment are reportedly developing in Latin American countries. *See* Sandra Orihuela & Abigail Montjoy*, The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru*, 30 CAL. W. INT'L L.J. 326 (2000).

14 The recovery in civil law jurisdictions is more centered around loss to the victim rather than loss of affections toward the victim.

15 In many civil law jurisdictions, the concept of "moral damages" (non-material damages) reportedly allows for the possibility of recovery for loss to the "right of personality," including affronts to honor, reputation, feelings, or peace of mind. *See, e.g.,* Margarita Trevino Balli & David S. Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT'L L. 29, 44 (1995) (discussing role of moral damages in Mexico).

jurisdictions may also be generally greater for such commercial acts as violations of intellectual property rights and expropriation.[16] Moreover, common law torts typically brought by individuals as breach of implied covenant of fair dealing, borrower harassment, interference with the doctor-patient relationship, contract, gifts, inheritance, or water rights, as well as for wrongful pregnancy, wrongful birth, and wrongful life[17] appear to have no functional equivalents in the civil law.

These and other differences in the Hemisphere's substantive laws concerning non-contractual liability demonstrate that, in disputes having connections with more than one nation, there will often be a need to select among possibly conflicting laws. The law of one state may recognize a particular right of action while the law of another may not, or the elements of the right of action may be different under the laws of the relevant states, or the laws of the relevant states might provide for differing levels of compensation.

The great variety of types of claims encompassed within the category of "non-contractual" liability strongly supports the conclusion that an attempt to unify the Hemisphere's approaches to jurisdiction and choice of law through a general convention applicable to all forms of non-contractual liability would be an extremely difficult and complex undertaking. It is very unlikely that a single approach to choice of law would be appropriate for such diverse forms of liability as those arising from traffic accidents, defamation, theft of trade secrets, paternity, antitrust, and sexual harassment, to name just a few. Such a concern led the Hague Conference on Private International Law to decide to harmonize choice of law for particular narrow categories of non-contractual liability, such as products liability and traffic accidents.[18] Where the attempt has been made to address the entire field, such as in the ongoing efforts by the European Commission to adopt a regulation on this subject (known as "Rome II"), many forms of non-contractual liability were expressly excluded from the scope of the regulation,[19] and numerous specific provisions

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It is not clear, however, that provisions for moral damages under the civil law provides nearly the same level of recovery for emotional distress in the common law.

16 There are laws protecting against expropriation in Latin American jurisdictions. *See* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179 n.268 (2002) (citing over 1,600 expropriation cases pending in three Latin American countries alone).

17 There are no known reports that these three actions which sound in tort under U.S. law and are respectively referred to in translation as actions for *embarazo injusto, nascimiento injusto,* and *vida injusta* have been recognized as a basis for non-contractual liability in civil law countries.

18 Bernard M. Dutoit, *Mémorandum relatif aux actes illicites en droit interstateal privé (Secrétaire du Bureau Permanent).* In: ACTES ET DOCUMENTS DE LA ONZIEME SESSION, 7 AU 26 OCTOBRE 1968, t.3. La Haye: Bureau Permanent de la Conférence, 1970.

19 Consultation on a preliminary draft proposal for a council regulationon the law aplicable to non-contractual obligations, May 3, 2002, art. 1 (excluding from scope non-contractual obligations relating to family relationship, succession, commercial instruments, persons charged with corporate accounting functions, exercise of government authority, and trusts) (on file with author).

addressing particular categories of non-contractual liability have been included.[20] Unlike the E.U., there is no entity in the America with authority to legislate a choice of law rule for the nations of the Hemisphere. Thus, it will be necessary to negotiate an instrument that will have to be ratified or otherwise implemented by the various nations of the Hemisphere. The need for negotiation suggests that we in the Americas should be more hesitant to seek to harmonize choice of law in the entire field of non-contractual liability. The great variety of different types of obligations encompassed in the field of non-contractual liability means that a broad range of interested parties, with divergent interests and points of view, will seek input into the process of negotiation and, later, implementation of such a Convention. The voluminous comments received by the European Commission on its proposed Rome II regulation – most of which questioned the need for any such regulation – included numerous comments by parties primarily interested in how the regulation treated a single issue, such as defamation or products liability. It will be difficult enough to attain agreement on a single approach to choice of law in a particular narrow category of non-contractual liability. Obtaining agreement on a single approach – or even a variety of approaches – for the entire field of non-contractual liability would be an overly ambitious undertaking.

[20] *See id.*, arts. 5-8 (providing special rules for product liability, unfair competition and other unfair practices, defamation, and violation of the environment).

CHART 1 – THEORIES OF NON-CONTRACTUAL LIABILITY IN COMMON AND CIVIL LAW SYSTEMS.

	Common Law	Civil Law
Acts Against the Person	Negligence[21]	Los Cuasi-delitos
	- Accidents at Sea, Rail, Air, or Road	- Las Accidentes de Tránsito o Ferrocarril, y Abordaje de Avión o Navio
	- Workplace Accidents	- Las Accidentes de Trabajo
	- Injury Caused by Domesticated Animal	- El Daño Causado Por Animal Doméstico
	- Land Occupier's for Injury to Guests	- La Responsabilidad del Ocupante por el Daño a un Huesped[22]
	- Wrongful Pregnancy or Conception	
	- Wrongful Birth	
	- Wrongful Life[23]	
	- Wrongful Death	- La Muerte Injusta
	- Infliction of Emotional Distress	- El Daño Moral
	Intentional Torts	Delitos
	- Battery and Assault	- La Agresión y el Asalto
	- False Imprisonment	- La Violación de la Libertad Individual
	- Rape	- El Estupro, Rapto o La Violación
	- Infliction of Emotional Distress	- El Daño Moral
	Strict liability	Responsabilidad Objetiva[25]
	- Defective products (products liability)	- Los Productos Defectuosos / Produtos com Defeitos (Br.)
	- Ultrahazardous activity	- La Actividad Riesgosa o Ultrapeligrosa
	- Injuries Caused by Dangerous Animals	- El Daño Causado por Animal Doméstico Feroz
	Acts Against the Consumer[26]	Formas de Daño al Consumidor
	- Products Liability	- Los Productos Defectuosos [27]
	- False and Misleading Advertising	- La Publicidad Falsa y Engañosa

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21 These are just a few examples of forms of negligence that can be caused by act or omission in violation of a duty imposed by law. Because negligence actions under U.S. law depend on the breach of a duty, and duties are context-specific, many more examples of negligence could be listed here. In addition, in some cases the theories listed here may also apply to intentional acts.

22 *See, e.g.,* C.C.D.F. de Mexico, art. 1931.

23 This cause of action is only recognized in three U.S. states.

25 These theories of liability are listed here merely as the civil law correlate of the common law strict liability theories and do not necessarily fall under the heading strict liability (*responsabilidad objetiva*) for all civil law jurisdictions. In some countries these theories are classified as *delitos* or *quasi-delitos*.

26 The theories of liability here, such as fraud and misrepresentation as well as professional malpractice, may also apply to acts against legal entities. However, they are listed here as liability for acts against the consumer because they appear to be most applicable to the consumer context.

27 In civil law systems it is reportedly often difficult to distinguish between contractual and non-contractual liability for injuries caused by products. For a discussion of this distinction under Argentine law, see ATILIO ANIBAL ALTERINI, TEMAS DE RESPONSABILIDAD CIVIL 231 et seq. (1995) (contractual liability being generally attributed to the merchant and non-contractual liability being generally attributed to the producer).

- Fraud and Misrepresentation	- El Fraude Contra el Consumidor
- Borrower Harassment	
- Interference with Dr.-Patient Relationship	
- Breach of Implied Covenant of Fair Dealing	
- Professional Malpractice[29]	- La Impericia Profesional
Defamation & Injury to Personality	El Daño Moral[30]
- Libel (perm.) & Slander (temporal) (US)	- El Libelo, La Injuria & La Difamación
- Breach of Confidence	- El Abuso de la Confianza
- Malicious Falsehood	- La Acusación Calumniosa
Interference with Family Relations	Los Daños en el Derecho de la Familia
- Alienation of Spousal Affection	
- Criminal Conversation with a Spouse	- La Seducción
- Causing Spouse to Leave and Not Return	- La Perdida de acompañante y sociedad
- Loss of Consortium	- La Perdida de Consorcio
- Paternity Suits	- Los Reclamos de Paternidad
- Alienation of Affections of Child or Parent	
- Causing Child to Leave and Not Return	
Invasion of Privacy	El Derecho de / a la Intimidad
- Violation of Data Privacy Statutes	- La Protección de Datos Personales
- Appropriation of Likeness	
- Unreasonable Intrusion	
- Publication of False Facts	
Discrimination, on basis of	La Discriminación
- race, gender, religion, stateality, disability	
- In employment or public accommodations	
Wrongful Use of Civil Legal Proceedings	El Abuso Malicioso del Proceso Legal o Derecho
Malicious Criminal Prosecution	El Abuso Malicioso del Proceso Legal o Derecho
False Arrest	La Detención Ilegal
Sexual Harassment	El Acaso Sexual/Assédio Sexual (Br.)/Hostigamiento Sexual (P.R..)

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29 *See also* actions for wrongful birth, life, pregnancy, and conception in negligence section of this chart.

30 Because this form of liability involves non-physical and defamatory damages, such as injury to an individual's feelings, affections, beliefs, honor, decorum, reputation, privacy, image, and physical appearance, the term is also listed as a correlate to the common law theory of liability for infliction of emotional distress. *See* Vargas, *supra.* at 238.

Acts Against Property		El Daño Patrimonial o Material
	Trespass	El Traspaso
	- to Land	- a La Propiedad Inmueble
	- to Chattel	- a La Propiedad Mueble
	Conversion	El Hurto
	Destruction of Property of Another	La Destrucción de Cosa Ajena
	Expropriation	La Expropiación
	Interference with Inheritance or Gift	
	Interference with Use of Water (Riparian)	
Acts Against Business		
	Passing off or infringement of	La Violación de
	- Copyright	- los Derechos del Autor
	- Trademark or Trade Name	- la Marca
	- Patent	- el Patente
	- Trade Dress	
	Theft of Trade Secrets	La Violación de Secretos Industriales
	Interference with Existing/Future Contract	
	Intimidation	
	Conspiracy / RICO	La Conspiración
	Restraint of Trade	La Represión del Comercio
	Unfair Competition / Anti-trust	La Competencia Desleal
	Injurious Falsehood/Product Disparagement	Desacreditar a un Producto
	Embezzlement	La Apropiación Indebida
Acts Against Environment	Por lo General	La Responsabilidad por Daño al Medioambiente
	- Polluter Liability	- Responsabilidad por Contaminación
	- Violation of Environmental Regulations	- Violación de Reglamentación o Protección Ambiental
	Nuisance (Public/Private)	Molestia
	Quasi-contracts/delicts[31]	Los Cuasicontratos
	- Unjust Enrichment	- El Enriquecimiento Sin Causa/[32]
		- El Cobro indebido[33]
		- La Gestión de Negocios/Agencia Oficiosa (Agency Liability)[34]
		- La Comunidad (Título en Común)[35]

[31] The most common civil law quasi-delictual obligations are included here. The laws of some jurisdictions provide for other forms of quasi-delictual obligations not included here.

[32] Unjust enrichment is not typically referred to as a quasi-contractual obligation in the civil codes of Latin America. Nonetheless, it is listed here because it corresponds to the common law cause of action for unjust enrichment, which is typically classified as a quasi-contractual obligation.

[33] *See, e.g.,* 31. L.P.R.A. §§ 5091-5127 (Puerto Rican law governing quasi-delictual obligations).

[34] *See, e.g., id.*

[35] *See, e.g., id.*

Other Forms[36]	Violation of	La Violación de
	- Health and Safety Regulation	- La Reglamentación de la Salud y Seguridad Pública
	- Securities Laws (Derivative Suits)	- La Reglamentación de Mercado de Valores
	- Trade Embargo/Export Control Laws	- El Embargo Mercantil/Reglamentación de Importaciones/Exportaciones

[36] While some of the sources of non-contractual liability listed in other categories may also be codified in a statute, this category is limited to liability which is based upon a violation of a statute that was not enacted for the primary purpose of establishing an independent source of *tort* liability.

II. GENERAL AND SPECIFIC APPROACHES TAKEN IN THE HEMISPHERE TO DETERMINING APPLICABLE LAW IN CASES OF NON-CONTRACTUAL LIABILITY

The resolutions of the Sixth Specialized Conference on Private International Law (CIDIP-VI), which the Permanent Council instructed this Committee to treat as a guideline,[22] called for "a comparative analysis of national norms currently in effect" concerning jurisdiction and choice of law in the field of non-contractual liability.[23] The Juridicial Committee called upon the rapporteurs to "survey the approaches to jurisdiction and choice of law currently being employed in the hemisphere in the field on non-contractual liability." This section of the report provides a survey of the approaches currently being employed by the nations of the Hemisphere with respect to the selection of the applicable law in cases seeking to impose non-contractual liability.

Most jurisdictions of the Hemisphere have adopted a general approach for determining the law applicable to most forms of non-contractual liability, with exceptions providing for specific approaches for certain forms of non-contractual liability. While many different general approaches are used, three are most common. The place-of-the-wrong (*lex loci delicti*) rule has long been in force in many civil law jurisdictions and remains in force in some common law jurisdictions.[24] In the later half of the 20th Century, however, many common law jurisdictions moved away from *lex loci delicti*[25] in favor of the increasingly popular most-significant-relationship approach. Finally, the double-actionability approach, received from English common law into the law of most Commonwealth Caribbean jurisdictions, is still followed by many of these jurisdictions, although its use has been decreasing.

Most jurisdictions also use specific approaches to determine the applicable law for certain categories of non-contractual liability. The use of specific approaches for certain kinds of liability varies across jurisdictions. The forms of liability subject to specific approaches include, depending upon the jurisdiction, liability arising from anti-trust violations, defective products, injury to consumers, misrepresentation, defamation,

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22 CP/RES. 815 (1318/02)

23 CIDIP-VI/RES.7/02

24 *See, e.g.,* RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 377-79 (1934) (codifying *lex loci delicti* approach).

25 Any attempt to harmonize common and civil law approaches will therefore have to take into account the likely reluctance of common law jurisdictions to retreat to an earlier approach which they have already rejected.

environmental damage, workplace accidents, transportation accidents, intellectual property violations, and quasi-contractual/delictual obligations.

One of the reasons for Hemispheric divergence in general and specific approaches to choice of law on non-contractual liability is that in a number of jurisdictions with federal systems, such as Argentina, Brazil, Canada, Mexico, and the U.S., choice of law rules are often found at the state or provincial level. In fact, divergence within federal jurisdictions was one reason why Inter-American harmonization of private international law in the Americas has historically been difficult.[26]

Some commentators claim that behind the formal diversity of approaches taken by states to choice of law there is a de facto convergence of results[27] These scholars have observed that courts in common and civil law systems alike tend to apply the law of the forum, regardless of the particular choice of law approach used,[28] whether for ease, comfort, or bias in favor of protecting a forum's own nationals.[29] However, far from offering a possible basis for agreement on a choice of law instrument, the tendency to apply forum law threatens to undermine the choice of law project. Among the important aims of choice of law rules is to produce certainty and predictability and to reduce forum shopping by providing for the applicability of a particular state's law to a dispute, regardless of the state in which the dispute is adjudicated. If the inter-American system were to countenance the application of forum law in all circumstances, it could still seek to limit forum-shopping and achieve a certain degree of certainty and predictability by limiting the forums in which disputes could potentially be brought, but the resulting instrument would not be a choice of law instrument. This possibility is discussed in Part III.

A. Choice of Laws Approaches in Common Law Jurisdictions

The different common law jurisdictions in the Hemisphere each apply different general and specific approaches. With respect to general approaches, the most-significant-relationship approach is the most common in the United States. The double-

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26 The United States rejected the Bustamante Code because it claimed that choice of law was a matter for the states. *See* Tatiana Maekelt, *Private International Law in the Americas*, in RECUEIL DES COURS 227, VOL. 177 (1982).

27 A distinguished scholar of conflicts jurisprudence in the United States explains that "seemingly disparate approaches produce results that are 'statistically indistinguishable'." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 348 (4th ed. 2001), *citing* Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 358, 367 (1992).

28 *See* P. Carter, *Rejection of Foreign Law: Some Private International Law Inhibitions*, 55 B.Y.I.L. 111 (1984); *see also* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 569 n.56 (2002).

actionability approach is the most common in the Caribbean Commonwealth. The *lex loci delicti* approach currently prevails in Canada. The specific approaches are more varied.

1. *The United States: A Variety of Approaches.*

In the United States, non-contractual liability is primarily governed by the laws of the fifty states and other sub-national jurisdictions (only two of which will be considered here, the District of Columbia and Puerto Rico). When a dispute presents a conflict between the laws of the states, or between the states and foreign jurisdictions, applicable law is determined by the choice of law rules of the states. In certain areas, however, the federal government has enacted substantive statutes establishing non-contractual obligations. Where federal law applies, it applies uniformly throughout the nation. However, conflicts can arise between federal law and the laws of foreign states. Such conflicts are resolved by federal choice of law rules, which determine the extraterritorial applicability of these statutes. In the United States, therefore, choice of law rules emanate from the federal government, the fifty states, and numerous other sub-national jurisdictions.

a. General Approaches.

Because federal choice of law rules apply only with respect to specific statutes, the general approaches to choice of law in the United States come from the sub-national jurisdictions only. The numerous different approaches that compete for application in the United States have led to what some commentators describe as a "rhubarb"[30] and others less forgivingly describe as a "dismal swamp."[31]

Until the middle of the Twentieth Century, almost all jurisdictions in the United States followed the place-of-the-wrong approach (*lex loci delicti*) reflected in the First Restatement of Conflict of Laws and associated with Professor Beale. This approach promised certainty, predictability, ease of application, and the avoidance of forum-shopping, as in theory the same law would govern the dispute regardless of where suit was brought. However, the approach often produced arbitrary and unjust results.

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29 *See, e.g.,* O. Kahn-Freund, *Delictual Liability and the Conflict of Laws*, in RECUEIL DES COURS 5, VOL. 124 (1968).

30 Alan Reed, *American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box*, 18 ARIZ. J. INT'L & COMP. L. 867 (2001).

31 William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."), *quoted in* Michael H.

Moreover, in practice, the certainty and predictability promised by the *lex loci delicti* rule was undermined by the tendency of judges to escape the rule's arbitrary and unjust results through escape devices such as renvoi, characterization, and the public policy exception. Moreover, determining the place of the wrong was often not a simple matter, particularly with respect to conduct causing intangible injuries. Today, only ten states follow the *lex loci delicti* approach.[32]

The first states to depart from this approach adopted in its place governmental interest analysis,[33] an approach originally advanced by Prof. Brainerd Currie.[34] The central idea behind interest analysis is that the choice-of-law issue involves, as a threshold matter, a determination of which of the various states whose laws are contending for application have an interest in having their law apply in a given case. For example, if a state's law places limits on recovery, courts engaging in interest analysis typically conclude that the state has an interest in applying such law only if the defendant is a domiciliary of that state because the purpose of a law limiting liability is to protect defendants and presumably the state only has an interest in protecting defendants who are domiciliaries. If only one state has an interest in applying its law, then we have a false conflict, and the law of the only interested state should be applied. If more than one state has an interest in applying its law, then we have a true conflict and some mechanism is required to resolve the conflict.

A number of different approaches have been proposed by scholars and adopted by states to resolve true conflicts. Prof. Currie originally proposed that, in the event of a true conflict, the forum should always apply its own law.[35] He later modified this view, urging courts faced with a true conflict to take a second look to see if, through a more restrained view of the forum's interest, the true conflict might be revealed to be a false conflict. But if the conflict persisted, then even under Currie's more restrained approach, the forum would apply its own law. Among the problems with interest analysis is its difficulty of application. It is not always clear what the policy behind a particular state's law is or whether the interest would be advanced by applying the law in a particular

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Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L. J. 1 (1991).

32 *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey* at 61 (on file with author), *citing Choice of Law in the American Courts in 2000: Fourteenth Annual Survey*, available at http://www.willamette.edu/wucl/wlo/conflicts/00survey/00survey.htm (chart of U.S. conflict of laws rules for torts).

33 *See id.* (citing New Jersey, California, and Washington, D.C.).

34 *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963).

35 *See id.* at 183-184.

situation. Courts tended to impute purposes to particular laws, often imputing parochial purposes (such as protection of domiciliaries). As proposed by Currie, interest analysis erroneously assumed that the only relevant state interest was its interest in advancing the policy of the substantive law vying for application. This, however, ignores the possibility that a state may have a broader systemic interest in promoting certainty and predictability, as well as international harmony. Another problem with Currie's approach to interest analysis is that, because the applicable law depends on where the suit is brought, the approach encourages forum shopping and exacerbates conflicts. Today, only three states follow Currie's approach to interest analysis.[36]

Other scholars accepted Currie's approach to identifying true conflicts, but rejected his recommendation that courts faced with true conflicts always apply forum law. Professor William Baxter proposed that, in the event of a true conflict, the court should apply the law of the state whose policy would be impaired to a greater extent if its law were not applied to the case.[37] This approach – known as the "comparative impairment" approach – should, in theory, avoid forum shopping because the analysis should lead to the same applicable law regardless of the forum. In practice, however, it proved quite difficult to determine the extent to which the various contending laws would be impaired if not applied. Only two states currently follow the comparative impairment approach.[38] Under still another approach, associated with Prof. Robert Leflar, a court confronted with a true conflict would apply the law that it regarded as the better law on the merits.[39] The problem with this approach is that people frequently disagree about which law is better on the merits. Indeed, that is the most likely explanation for the divergent laws. Five states currently follow this approach.[40]

In the 1970's, the American Law Institute drafted the Second Restatement of Conflict of Laws, which sets forth an eclectic approach, according to which "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[41] Contacts to be taken into account in determining

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36 *See* Symeonides, *supra.*

37 *See generally* William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

38 Symeonides, *supra* (California and Louisiana). For further discussion of Louisiana's approach, see infra at [page number to be inserted].

39 *See generally* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

40 Symeonides, *supra*.

41 RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971) [hereinafter RESTATEMENT (SECOND)].

which state has the most significant relationship include (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, and place of incorporation, and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.[42] The Second Restatement sets forth a non-exhaustive list of factors that should be taken into account by the court in determining which state has the most significant relationship: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[43] These contacts are to be evaluated according to their relative importance with respect to the particular issue.[44] The great number of "factors" and "contacts" to consider effectively give the courts wide discretion to apply the law that they regard as most appropriate in any given case. The obvious problem with this approach is that it produces very little certainty and predictability in the law. In the words of Professor Gottesman (criticizing interest analysis and the Second Restatement approach):

> The system is wasteful. In the states that have adopted one of the modern choice of law approaches, the parties may litigate at length over the application of indeterminate criteria such as the "interests" that are to control under interest analysis or the combination of interests and contacts that are to be consulted under the second Restatement .... This is both expensive and time-consuming. What is more, after the parties have expended resources litigating the issue before the trial court, and that court has ruled that the law of State *A* controls, the ensuing trial may prove wholly useless if the appellate court later determines that the choice of law was error and State *B*'s law controls.[45]

The Second Restatement approach has been popular among courts, which is not surprising, as courts can be expected to be attracted to an approach that leaves them with virtually unfettered discretion. But the Second Restatement has not achieved nation-wide acceptance. Although this is the most popular approach in the United States

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42 *Id.* § 145(2).
43 *Id.* § 6.
44 *Id.*
45 Gottesman, *supra*.

today, fewer than half of the states (22) have adopted the Second Restatement approach.

Among the remaining states, two base their choice of law determination on which jurisdiction has the most significant contacts to the case.[46] This approach functions similarly to the Second Restatement most significant relationship approach, but is the result of a more nebulous conglomeration of precedent which has not produced the kind of specification of factors or contacts found in the Second Restatement.[47] Three states take a straight *lex fori* approach.[48] Finally, four states follow what is called the "combined modern" approach, a catch-all phrase used to describe approaches which fit no standard category.[49] These approaches are varied. For example, Hawaii follows a "combination of interest analysis, the Restatement, and Leflar's choice-influencing considerations"; Massachusetts follows a combination of interest analysis and the Restatement; and Pennsylvania did likewise "but in addition draws from Cavers' principles of preference."[50]

In sum, within the United States there is far from a consensus on any single general approach for selecting the applicable law in interstate and international cases concerning non-contractual liability. The states use a variety of different approaches, none of which has been adopted in a majority of the states.

b. Specific Approaches

Even where the states have adopted a general approach for selecting the applicable law in cases of non-contractual liability, they have often adopted more specific rules to govern the choice of law issue with respect to specific torts. In addition, where a conflict arises between federal law and foreign law, the applicable law is determined by reference to federal choice of law rules, which vary depending on the federal statute involved.

Where the conflict is between federal law and foreign law, the courts view the question of applicable law to be identical to the question whether the federal law applies extraterritorially. If the intent of the legislature concerning the extraterritorial scope of the law is clear, the courts will follow that intent even if it produces a severe conflict with the

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46 *See* Symeonides, *supra.* (citing Indiana and North Dakota). The Puerto Rican approach is not included here because its approach will be discussed in the civil law section.

47 *See* Scott M. Murphy, Note, *North Dakota Choice of Law in Tort and Contract Actions: A Summary of Cases and a Critique*, 71 N.D. L. Rev. 721 (1995).

48 *See* Symeonides, *supra.* (citing Kentucky, Michigan, Nevada).

49 *See id.* (citing Hawaii, New York, Massachusetts, Oregon, Pennsylvania). The Louisiana approach is not included here because its approach will be discussed in the civil law section.

50 Symeon C. Symeonides, *Choice of Law in the American Courts in 1993 (And in the Six Previous Years)*, 42 AM. J. COMP. L. 599, 611 (1993).

laws and policies of other nations.[51] Usually, however, the legislature will not have addressed the issue of extraterritoriality. If the legislature has been silent on the issue, the courts apply a variety of approaches. The Supreme Court has said that in such situations, the strong presumption is that the law does not apply extraterritorially.[52] This approach is based on the assumption that, when Congress legislates, it typically has only domestic circumstances in mind.[53] In justifying this approach, the Supreme Court has explained as well that it minimizes conflicts with foreign laws and policies.[54]

The U.S. courts do not apply this presumption for all statutes, however. In the case of the antitrust laws, the Supreme Court originally applied the presumption against territoriality,[55] but the approach was subsequently abandoned in favor of the "effects" test, under which the antitrust laws apply as long as the challenged conduct was intended to, and did, produce a direct and substantial effect on U.S. commerce.[56] The "effects" test resulted in broad extraterritorial application of U.S. antitrust laws and produced significant international controversy. In response to this reaction, the U.S. Court of Appeals for the Ninth Circuit articulated a "jurisdictional rule of reason," under which the courts declined to apply the U.S. antitrust laws if they concluded that the dispute had a stronger connection with another nation.[57] Although this approach was widely adopted among the lower courts, the Supreme Court rejected it in favor of the "effects" test in *Hartford Fire Insurance Co. v. California*.[58] The U.S. courts also apply *sui generis* approaches to determining the extraterritorial applicability of such federal laws as those involving securities regulation,[59] torts occurring on ships,[60] and violations of intellectual property rights.[61]

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51 For example, in 1991 Congress made clear its intent that Title VII apply extraterritorially. *See* Protection of Extraterritorial Employment Amendments, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), amending definition of employee under Title VII to include employment of U.S. citizens abroad by covered employers. 42 U.S.C. § 2000e(f) ("[w]ith respect to employment in a foreign country, [the] term [employee] includes an individual who is a citizen of the United States.").

52 EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 248 (1991); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 158 (1993).

53 *Aramco*, 499 U.S. at 248.

54 *Id*.

55 American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

56 United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945). This decision was decided by the U.S. Court of Appeals for the Second Circuit as the court of last resort in the absence of a quorum in the Supreme Court. The *Alcoa* decision has since been adopted by the Supreme Court. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

57 Timberlane Lumber Co. v. Bank of America, 594 F.2d 597 (9th Cir. 1976).

58 *Hartford Fire*, 509 U.S. 764.

59 *See, e.g.,* Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998); (applying a conduct and effects test to anti-fraud provisions of securities laws); *see also* Peter J. Meyer and Patrick J. Kelleher, *Use of the Internet to Solicit the Purchase or Sale of Securities Across National Borders: Do the Anti-Fraud Provisions of the U.S. Securities Laws Apply?*, at 3 (Mar.

The states, too, often have particular choice of law rules for specific kinds of liability. While the specific rules used throughout the fifty states are as varied as the general rules and thus not amenable to brief summary here, the specific rules applied by states following the Second Restatement[62] are among the most common and can be briefly addressed. These specific rules operate as presumptions. In each case, the rule sets forth a particular contact that presumptively determines the applicable law, subject to the caveat that another state's law applies if that state has a more significant relationship to the particular issue. Thus, disputes relating to defamation and injurious falsehood are presumptively governed by the law of the state where publication occurred.[63] Invasions of privacy claims are presumptively governed by the law of the state where the invasion occurred.[64] Liability for interference with marital relations is presumptively governed by the law of the state where the conduct complained of principally occurred.[65] Malicious prosecution and abuse of process claims are presumptively governed by the law of the state where the relevant proceeding occurred.[66]

2. *The Double-Actionability Approach and More Significant Relationship Exception Received by Commonwealth Caribbean Nations*.

The Caribbean Commonwealth is comprised of twelve OAS member states: Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana[67], Jamaica, St. Kitts & Nevis, St. Lucia[68], St. Vincent & the Grenadines, and Trinidad & Tobago.[69] The general approach followed in most of the Caribbean Commonwealth is the double-actionability approach received from the English common law announced in *Phillips v. Eyre* and its progeny.[70] In *Phillips*, the English Court explained that "[a]s a

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1999) (on file with author) (observing that "[a]lthough the federal circuit courts of appeals agree that the anti-fraud provisions apply to some foreign securities transactions and conduct, they disagree over the test that should be used to determine when the anti-fraud provisions apply").

60 *See, e.g.,* Lauritzen v. Larsen, 345 U.S. 571 (1953) (deciding extraterritorial reach of Jones Act); *see also* 68 A.L.R. Fed. 360 (1984) (summarizing case law on extraterritorial applicability of Jones Act).

61 *See, e.g.,* Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (deciding extraterritorial reach of Lanham Act regulating trademarks); *see also* RESTATEMENT (SECOND) § 222 (provisions on copyright).

62 RESTATEMENT (SECOND) § 146.

63 *Id.* § 149-51.

64 *Id.* § 152.

65 *Id.* § 154.

66 *Id.* § 155.

67 The Guyanan system was also influenced by the Roman-Dutch tradition.

68 The St. Lucian system was also influenced by the French civil law tradition.

69 *See* The Commonwealth, Who We Are, available at http://www.thecommonwealth.org/dynamic/Country.asp. The legal systems of some of these countries have also been influenced by the Hindu, Muslim, and Indian legal traditions.

70 A.E.J. JAFFEY, TOPICS IN CHOICE OF LAW 94 (1996).

general rule, in order to found a suit in [this country] for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in [this country] . . . Secondly, the act must not have been justifiable by the law of the place where it was done."[71] Because a claim is only cognizable if actionable under both forum law and the law of the jurisdiction where committed, this approach has come to be referred to as the "double-actionability" rule.[72] Forum law (*lex fori*) is applied to a claim whenever the claim is justifiable under the law of the jurisdiction where committed (*lex loci delicti commissi*).[73]

However, almost a century after *Phillips*, English courts recognized an exception to the double-actionability rule in the 1971 case *Boys v. Chaplin*. In *Boys*, the court decided that in certain unspecified exceptional cases "a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."[74] *Boys* was later made binding in all of the Commonwealth Caribbean countries except for Guyana through the 1994 Privy Council decision in *Red Sea Insurance Co. v. Bouygues SA*.[75] One reason why the scope of the *Boys* exception has not been clarified in the English common law is that the U.K. Private International Law (Miscellaneous Provisions) Act of 1995 expressly abrogated the double-actionability approach[76] and its progeny from the common law of England and Wales, Scotland and Northern Ireland altogether. However, the Act did not expressly abrogate the approach from the common law of the Commonwealth Caribbean jurisdictions.[77] Therefore in Commonwealth jurisdictions it remains unclear when the *Boys* exception applies.[78] To the extent the exception does apply then the approach taken by the Caribbean Commonwealth begins to resemble more closely the Restatement approach in the United States.

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71 Phillips v. Eyre (1870) LR 6 QB 1 (Ex. Ch.), pp. 28-29 (Willes J).

72 This characterization is premised upon the common interpretation of the criteria "not justifiable" as meaning not actionable, rather than merely not defensible though actionable. Another interpretation of the "not justifiable" standard is that the act must be "innocent" or not contrary to the law under the law of the foreign jurisdiction. See Machado v. Fontes [1897] 2 Q.B. 231 (CA).

73 *See* WILLIAM TETLEY, INTERNATIONAL CONFLICT OF LAWS: COMMON, CIVIL AND MARITIME 438 (1994) (discussing the broad Canadian interpretation of the "not justifiable" requirement).

74 Boys v. Chaplin [1971] A.C. 356.

75 [1995] 1 A.C. 190.

76 U.K. Private International Law (Miscellaneous Provisions) Act of 1995, Nov.8, 1995, Part III(10), available at http://www.legislation.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_1.htm.

77 *See id.*, Part IV(18)(3) (defining applicability of Part III of statute relating to choice of law in tort).

78 *See* Yeo Tiong Min, *Tort Choice of Law Beyond the Red Sea: Whither the Lex Fori?*, 1 SING. J. INT'L & COMP. L. 91, 115 (1997) (suggesting that the exception will be applied expansively).

In Dominica, the double-actionability rule was modified when in 1998 Dominica adopted the Transnational Causes of Action (Product Liability) Act, which adopts the most-significant-relationship approach found in the Second Restatement.[79]

3. *Canadian Revival of the Lex Loci Delicti Commissi Rule*.

In the same year that the British Privy Council began to restrict the scope of the double-actionability rule in the Caribbean Commonwealth, the Supreme Court of Canada abandoned the double-actionability rule which Canada had received from English common law.[80] In *Tolofson v. Jensen* the Court declared that the *lex loci delicti comissi* was the new tort conflicts rule in Canadian common law jurisdictions.[81] The Court reasoned that "'[t]he nature of our constitutional arrangements--a single country with different provinces exercising territorial legislative jurisdiction--would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favor of the *lex loci delicti* rule."[82] Although these 1994 cases involved traffic accidents, the general language of the Court's holding left little room to doubt that the new rule was applicable to other forms of non-contractual liability.[83]

The leading commentator on Canadian conflict of laws reports that specific approaches are taken in some provinces in selecting the applicable law for claims relating to products liability and traffic accidents.[84] The Yukon province has adopted the Uniform Conflict of Laws (Traffic Accidents) Act, [85] legislation based upon the Hague

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79 Transnational Causes of Action (Product Liability) Act, entered into force Jan 15, 1998 (section 7 providing that "(2) Where an action is founded in tort or delict, the right and liabilities of the parties with respect to a particular issue or the whole cause of action shall be determined by the local law of the country which, as to the issue or cause of action, has the most significant relationship to the cause of action and the parties."). This act was originally introduced in St. Lucia but not adopted there. *See* Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 187 (2001).

80 Phillips LR 6 QB 1 (Ex. Ch.), *adopted in* McLean v. Pettigrew (1945) S.C.R. 62 (holding that act at issue must be actionable under *lex fori* and not justifiable under law of place where committed).

81 *See* Tolofson v. Jensen; Lucas (Litigation Guardian Of) v. Gagnon [1994] 3 S.C.R. 1022; *see also* William Tetley, *New Development in Private International law: Tolofson v. Jensen and Gagnon v. Lucas*, 44 AM. J. COMP. L. 647 (1996). Prior to the Canadian Supreme Court decision in Tolofson, private law reform groups in Canada had urged modernization of the Canadian approach through enactment of a uniform Canadian Foreign Torts Act adopted by the Conference of Commissioners on Uniformity of Legislation in Canada at its August 1966 meeting. The Act, which takes a "most substantial connection" approach similar to the Second Restatement approach, was never enacted by any Canadian common law province or territory, however. *See* Tetley *supra*. at 438-9.

82 3 S.C.R. at 1058.

83 *See* David McClean, *A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth*, in RECEUIL DES COURS, VOL. 260 13 et seq. (1996) (confirming that following Tolofson the new Canadian general approach is *lex loci delicti*).

84 *See* J.G. CASTEL, CANADIAN CONFLICT OF LAWS 509 *et seq.* (3d ed. 1994) (discussing how the general approach applies in certain specialized torts, except for the law of traffic accidents).

85 1970 Proc. Of Unif. L. Conf. 263.

Convention on the Law Applicable to Traffic Accidents.[86] Further, New Brunswick has a statute which effectively adopts the *lex fori* for products liability, subject to certain Constitutional limitations on extraterritorial application.[87]

B. Private International Law Approaches in Civil Law Jurisdictions

With very few exceptions, the Hemisphere's civil law jurisdictions have continued to adhere to the traditional *lex loci delicti* rule. The exceptions are Venezuela, Perú, and Mexico, both of which have recently adopted private international law statutes, and the civil law subnational jurisdictions of Quebec, Louisiana, and Puerto Rico, which apply choice of law rules that significantly differ from the *lex loci delicti* approach. Civil law jurisdictions have also adopted specific choice of law rules for certain forms of liability, such as accidents at sea[88] or on the road.[89]

1. *The Dominant Latin American Approach: Lex Loci Delicti*.

Most Latin American civil law jurisdictions apply the *lex loci delicti* rule for non-contractual liability. This approach is found in the Bustamante Code (1928), the Treaties of Montevideo (1889 and 1940), many of the national and sub-national civil codes,[90] and in certain bilateral treaties between Latin nations.[91] In particular, under the Bustamante

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86 *See* Castel, *supra*.

87 *Id.*

88 *See* Argentine treaties cited *infra*.

89 *See* Protocolo de San Luis sobre Responsabilidad Civil Emergente de Accidentes de Tránsito, MERCOSUR/CMC, Dec. 1, 1996 [hereinafter MERCOSUR Protocol of San Luis], arts. 3-6 (art. 3: "La responsabilidad civil por accidentes de tránsito se regulará por el derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en otro Estado Parte, el mismo se regulará por el derecho interno de éste último"; art. 4: "La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el derecho interno del Estado Parte en el cual se produjo el hecho"; art. 5: "Cualquiera fuere el derecho aplicable a la responsabilidad, serán tenidas en cuenta las reglas de circulación y seguridad en vigor en el lugar y en el momento del accidente"; art. 6: "El derecho aplicable a la responsabilidad civil conforme a los artículos 3 y 4 determinará especialmente entre otros aspectos: a) Las condiciones y la extensión de la responsabilidad; b) Las causas de exoneración así como toda delimitación de responsabilidad; c) La existencia y la naturaleza de los daños susceptibles de reparación; d) Las modalidades y extensión de la reparación; e) La responsabilidad del propietario del vehículo por los actos o hechos de sus dependientes, subordinados, o cualquier otro usuario a título legítimo; f) La prescripción y la caducidad.").

90 *See* Maekelt *supra*. (noting influence of Joseph Story in Argentina and Paraguay, influence of Andrés Bello in Chile, Colombia, Ecuador, El Salvador, Honduras, Nicaragua, Panama, and Uruguay, and influence of Napoleonic tradition in Bolivia, Costa Rica, Haiti, and Peru)

91 *See, e.g.,* Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906) (art 37: "La responsabilidad civil proveniente de delitos o cuasi-delitos se regirá por la ley del lugar en que se hayan verificado los hechos que los constituyen."); Convenio Entre la Republica Argentina y la Republica Oriental del Uruguay en Materia de Responsabilidad Civil Emergente de Accidentes de Transito, Ley 24-106, 7 de julio de 1992, available at http://www.argentinajuridica.com/RF/ley_24_106.htm, arts. 2 & 4 (art. 2: "La responsabilidad civil por accidentes de tránsito se regulará por el Derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en el otro Estado Parte, el mismo se regulará por el Derecho interno de este último"; art. 3: "La responsabilidad civil por daños sufridos en las cosas ajenas

Code the law of the place of the act or omission (*lex loci delicti comissi*) governs both intentional acts (*delitos o faltas*)[92] and negligent acts (*quasi-delitos*).[93] The Bustamante Code assumes primary importance because it has been more widely-ratified than either of the Treaties of Montevideo. The Code only applies between parties and not between parties and non-parties.[94] While fourteen OAS Member States have ratified the Code,[95] many have not, including Argentina, Colombia, Mexico, Paraguay, and Uruguay. Even among the states that have ratified, many took reservations which potentially render the provisions of the Code unenforceable domestically. Bolivia, Chile, Costa Rica, Ecuador, and El Salvador took broad reservations subordinating the Code to provisions of domestic law in the event of a conflict between the Code and domestic law.[96] In these countries, the Code comprises only part of the approach taken to conflict of laws on non-contractual liability.[97] On the other hand, even in states such as Mexico where the Bustamante Code has not been ratified, or Brazil where the code has not been fully

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a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el Derecho interno del Estado Parte en el cual se produjo el hecho."); Convenio entre Argentina y Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach); Convención entre Argentina y Bulgaria de 7 de Octubre de 1937 Sobre Indemnizaciones de Accidentes del Trabajo, art. 4 (adopting *lex loci delicti commissi* approach).

92 *See* Bustamante Code (Inter-American Convention on Private International Law), Havana, Feb. 20, 1928, 86 L.N.T.S. 111/246 No. 1950 (1929) [hereinafter Bustamante Code], art. 167 ("Las [obligaciones] originadas por delitos o faltas se sujetan al mismo derecho que el delito o falta de que procedan" estas obligaciones). Private international law scholars conclude that under this rule acts specifically prohibited by law are subject to the laws of the place where committed. *See* José Luis Siqueiros, *La Ley Aplicable y la Jurisdicción Competente en Casos de Responsabilidad Civil Por Contaminación Transfronteriza*, InfoJus Derecho Int'l Vol. II. *Cf.* Villalta, *supra.* at 8 (similarly interpreting similar language in Treaties of Montevideo).

93 *See* Bustamante Code, art. 168: ("Las [obligaciones] que se deriven de actos u omisiones en que intervenga culpa o negligencia no penadas por la ley, se regirán por el derecho del lugar en que se hubiere incurrido en la negligencia o la culpa que las origine."). Scholars similarly conclude that under this rule negligence is governed by the laws where the negligence occurred. *See* Siqueiros, *supra*. *Cf.* Villalta, *supra.* at 8 (similarly interpreting similar language in Treaties of Montevideo).

94 *See* Tetley, *supra.* at 888 ("The Bustamante Code applies between those Latin American States which have ratified it.").

95 These countries are Bolivia (Mar. 9, 1932), Brasil (Aug. 3, 1929), Costa Rica (Feb. 27, 1930), Chile (Decreto del Ministerio de RR.EE. No. 374, Apr. 10, 1934), Dominican Republic (1929), Ecuador, El Salvador, Guatemala (1929), Haiti (Feb. 6, 1930), Honduras (1930), Nicaragua (1930), Panama (1928), Peru, and Venezuela. TRATADOS Y CONVENCIONES INTERAMERICANOS. FIRMAS, RATIFICACIONES Y DEPOSITOS 33 (2d ed. 1969), published by OAS General Secretariat.

96 *See* Inter-American Juridical Committee, Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws, CJI-21, Sept. 1954, at 34-36 (summarizing general reservations taken to the Bustamante Code); *see also* GONZALO PARRA-ARRANGÜREN, CODIFICACIÓN DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA 122, 176 (1982) (reporting that Bolivia, Cuba, Haiti, Honduras, Mexico, Peru, and Venezuela did not make and reservations to the Code).

97 A number of other countries laws leave unresolved the question of whether the provisions of the Code apply only with respect to conflicts between the laws of two countries that have adopted the Code, only with respect to conflicts between a country that has adopted the Code and one that has not, or both. *See* JÜRGEN SAMTLEBEN, DERECHO INTERNACIONAL PRIVADO EN AMERICA LATINA: TEORÍA Y PRACTICA DEL CÓDIGO BUSTAMANTE, VOL. I: PARTE GENERAL (1983) (discussing application of Bustamante Code by Latin

implemented, the choice of law approach taken in the Code has nevertheless taken hold to some extent.[98]

While less influential, the Treaties of Montevideo remain another important exemplar of the use of the *lex loci delicti* rule in civil law jurisdictions of Latin America. Five countries[99] ratified the 1889 Treaty of Montevideo and of those, three[100] ratified the 1940 Treaty of Montevideo.[101] Under the first treaty, non-contractual obligations are governed by the law of the place from which the obligations are derived,[102] which scholars have interpreted to mean the law where the act giving rise to the obligations is committed.[103] While the second treaty adds language to the end of this rule,[104] scholars still interpret the rule as a codification of the standard place-of-the-wrong approach.[105]

The *lex loci delicti* is not applicable in all cases of non-contractual liability, however. Both the Bustamante Code and the Montevideo Treaties contain specific choice of law rules for quasi-contracts and maritime collisions. Under the Bustamante Code, quasi-contracts are governed by the law of the "juridical institution from which they derive,"[106] except for illicit management of the affairs of another (*gestión de negocios*), which is

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American nations against other countries that have adopted the Code and against "third party" countries that have not adopted the Code).

98 *See, e.g.,* BEAT WALTER RECHSTEINER, DIREITO INTERNACIONAL PRIVADO: TEORÍA E PRÁTICA 102 (2000) (observing that while Brazilian statutory law does not formally adopt the *lex loci delicti* approach, this approach has been followed in a number of court decisions); HEE MOON JO, MODERNO DIREITO INTERNACIONAL PRIVADO 469 (2001) (noting strong preference in Brazilian doutrina for lex loci delicti commissi approach); Vargas, *supra.* at 219 (observing that in most all jurisdictions in Mexico non-contractual liability "is governed by the principles contained in the civil code of the state where the tortious act took place.").

99 According to available ratification instruments, parties of the Tratado de Derecho Civil Internacional de Montevideo de 1889 [hereinafter Montevideo Treaty I] are Argentina (Ley 3192), Bolivia, Paraguay, Peru, and Uruguay.

100 According to available ratification instruments, parties of the Tratado de Derecho Civil Internacional de Montevideo de 1940 [hereinafter Montevideo Treaty II] are Argentina (Decreto Ley 7771/56, Apr. 27, 1956), Paraguay (Ley del 14 de julio de 1950), and Uruguay (Decreto Ley No. 10272, Nov. 12, 1942).

101 *See* WERNER GOLDSCHMIDT, DERECHO INTERNACIONAL PRIVADO 35 (1970) (concluding that conflicts between the laws of Argentina, Bolivia, Peru, and Columbia are governed by the 1889 treaty and conflicts between the laws of Argentina, Uruguay, and Paraguay are governed by the 1940 treaty).

102 Montevideo Treaty I, art. 38 ("Las obligaciones que nacen sin convención se rigen por la ley del lugar donde se produjo el hecho licito o ilícito de que proceden" las obligaciones).

103 *See* Villalta, *supra.* at 8.

104 Tratado de Derecho Civil Internacional de Montevideo de 1940, art. 43 (". . ., y en su caso, por la ley que regula las relaciones jurídicas a que responden.").

105 *See* Statement of Reasons, Draft Inter-American Convention on Applicable Law and International Competency of Jurisdiction with Respect to Non-contractual Liability, OEA/Ser.K/XXI.6 CIDIP-VI/doc.17/02, Feb. 4, 2002 at 13 (explaining that the additional language added at the end of art. 43 is "redundant, since the solution it offers inevitably derives from a correct evaluation); *see also* Villalta, at 8 (explaining that the additional phrase included at the end of art. 43 of the 1940 Treaty of Montevideo "determines a question of qualification that the interpreter should resolve in the manner they see fit").

106 Bustamante Code art. 222 ("Los . . . cuasicontratos se sujetan a la ley que regule la institución jurídica que los origen.").

governed by the law of the place where the unauthorized agent acts,[107] and restitution of a sum wrongfully collected (*pago indebido*), which is governed by the personal law of the parties.[108] In the Montevideo Treaties, quasi-contracts are governed by special rules as well.

Special choice of law rules in the Bustamante Code and Montevideo Treaties also apply to collisions in territorial waters or territorial airspace. Under the Bustamante Code, collisions on national territory are governed by common flag, or if there is no common flag, then the law of the place of the collision,[109] whereas collisions on or above the high seas are governed by common flag, or if there is no common flag, then by the law of the flag of the vessel struck by an at-fault vessel. If the collision is fortuitous, each is responsible for half the damages.[110] Under the second Montevideo Treaty, watercraft collisions are governed by the law of the territory of the collision,[111] or if the collision occurs outside territorial waters, by the law of the common flag, or if there is no common flag, then each ship is governed by the law of its flag.[112]

2. *Recent Amendments to the Codes of Venezuela, Perú, and México.*

While a number of Latin American jurisdictions have considered introducing revisions to their choice of law codes in recent decades,[113] to date only Venezuela, Perú, and Mexico have enacted a significant amendments to their codes of private international law. Under the Venezuelan 1998 Private International Law Statute, illicit acts are presumed to be governed by the law of the place of the injury (*lex loci damni*), though the victim is free to elect the law of the jurisdiction where the illicit act took place (*lex loci*

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107 *Id.* art. 220 ("la gestión de negocios ajenos se regula por la ley del lugar en que se efectúa.").

108 *Id.* art. 221 ("el cobro indebido se somete a la ley personal común de las partes, en su defecto, a la del lugar en que se hizo el pago.").

109 *Id.* arts. 289-91 (art. 289: "El abordaje fortuito en aguas territoriales o en el aire nacional se somete a la ley del pabellón si fuere común"; art. 290: "En el propio caso, si los pabellones difieren, se aplica la ley del lugar"; art. 291: "La propia ley local as aplica en todo caso al abordaje culpable en aguas territoriales o aire nacional").

110 *Id.* arts. 292-94 (art. 292: "Al abordaje fortuito o culpable en alta mar o aire libre, se le aplica la ley del pabellón si todos los buques o aeronaves tuvieron el mismo"; art. 293: "En su defecto, se regulara por el pabellón del buque o aeronave abordados si el abordaje fuere culpable"; art. 294: "En los casos de abordaje fortuito en alta mar o aire libre, entre naves o aeronaves de diferente pabellón, cada uno soportara la mitad de la suma total del dano, repartida según la ley de una de ellas, y la mitad restante repartida según la ley de la otra").

111 1940 Treaty of Montevideo art. 5.

112 *Id.* art. 7.

113 Following attempts by the Inter-American Juridical Committee in the 1960s to harmonize the Montevideo Treaties and Bustamante Code, legislators in Argentina, Brazil, Peru, and Venezuela considered enactment of draft private international law codes. *See, e.g.,* Enrique Dahl, *Argentina: Draft Code of Private International Law*, 24 I.L.M. 269, 272 (1985).

delicti commissi).[114] For quasi-contracts, the traditional *lex loci delicti* applies.[115] Similarly, the Civil Code of Perú provides, in article 2097, that the law applicable to extracontractual liability shall be the law of the place where the principal acts giving rise to the dispute were performed. However, if the law of the place in which the injury was suffered would hold the defendant liable, but the law of the place of where the acts were performed would not, then the applicable law shall be the former law, provided that the defendant should have foreseen that his acts might produce injury there.[116] Until 1988, México adhered to a strictly territorialist approach, under which foreign law was never applied. In 1988, Mexico enacted amendments that altered its choice of law rules. The lex fori is still presumptively applicable, but the Code allows for the application of foreign law if a statute or treaty specifically requires it.[117]

3. *Approaches Taken by Sub-national Civil Law Jurisdictions*.

The three sub-national civil law jurisdictions in the United States and Canada – Puerto Rico, Quebec, and Louisiana – each take unique approaches to choice of law in cases of non-contractual liability.

a. Puerto Rican Adoption of the Functional Equivalent of the Second Restatement.

In 1966, the Supreme Court of Puerto Rico abandoned the strict *lex loci delicti* approach inherited from the Spanish civil law in favor of a more fluid approach which the court referred to as dominant contacts (*contactos dominantes*).[118] The U.S. courts have deemed the new approach taken under Puerto Rican common law to be equivalent to

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[114] Venezuelan Private International Law Statute (1998), art. 32, published in the Gaceta Oficial No. 36,511, Aug. 6, 1998, available at http://www.csj.gov.ve/legislacion/ldip.html, with English translation available at http://www.analitica.com/biblioteca/congreso_venezuela/private.asp 1998 (art. 32: "los hechos ilícitos se rigen por el Derecho del lugar donde se han producido sus efectos. Sin embargo, la victima puede demandar la aplicación del Derecho del Estado donde se produjo la causa generadora del hecho ilícito"; art. 33: "La gestión de negocios, el pago de lo indebido y el enriquecimiento sin causa se rigen por el Derecho del lugar en el cual se realiza el hecho originario de la obligación.").

[115] *Id.* art. 33.

[116] Código Civil de 24.7.1984, art. 2097.

[117] C.C.D.F. art. 12 (1988), Diario Oficial, Jan. 7, 1988, available at http://www.solon.org/Statutes/Mexico/Spanish/ccm.html ("Las leyes mexicanas rigen a todas las personas que se encuentren en la Republica, así como los actos y hechos ocurridos en su territorio o jurisdicción y aquellos que se sometan a dichas leyes, salvo cuando estas prevean la aplicación de un derecho extranjero y salvo, además, lo previsto en los tratados y convenciones de que México sea parte."). *See generally* Jorge Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 INT'L L 659-94 n.3 (1994) (discussing C.C.D.F. arts. 12-15).

[118] *See* Fernández Vda. De Fornaris v. American Surety Co. of New York., 93 P.R. Dec. 29, 48 (1966); *see also* Russell J. Weintraub, *At Least, To Do No Harm: Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, n.8 (1997) (characterizing *Fornaris* as abandonment of *lex loci delicti commissi* in favor of dominant contacts).

the Second Restatement most-significant-relationship test.[119] The new Puerto Rican approach has never been codified. As scholars point out, neither the Civil Code of Puerto Rico "nor any of Puerto Rico's other statutes, contain any choice-of-law rules for torts . . ."[120] A 1991 attempt to adopt a new choice of law statute in Puerto Rico was unsuccessful.[121]

b. Comparative Impairment in Louisiana.

Louisiana adopts the comparative impairment approach to choice of law for non-contractual liability. For delicts, the Louisiana rule applies "the law of the state whose policies would be most seriously impaired if its law were not applied."[122] This rule is subject to a number of exceptions, however. Conduct-regulating standards are governed by the law of the place of the conduct (*lex loci delicti commissi*).[123] Specific rules are used for issues such as products liability.[124]

c. The Quebec Hybrid Approach.

Quebec also adopts a unique approach. Under its 1991 revisions of the Civil Code of Quebec, the *lex loci delicti commissi* generally applies, though the law of the place of the injury (*lex loci damni*) can apply where the injury in the jurisdiction where the injury occurred would have been foreseeable to the party accused of causing the injury.[125] In

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119 *See* Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc., 145 F.3d 463, 478-79 (1st Cir. 1998) (observing that "[t]he courts of the Commonwealth of Puerto Rico have consistently followed the choice of law rules laid out in the Restatement (Second) of Conflict of Laws.").

120 Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COL. J. TRANSNAT'L L 413, 417-18 (1990).

121 *See generally id.* (discussing proposal drafted in the early 1990s by the Puerto Rican Academy of Jurisprudence and Legislation).

122 C.C. of Louisiana, arts. 3542, as amended by Act 923, approved July 24, 1991, in force as of Jan. 1, 1992, arts. 42-49 (West 1991) ("Except as otherwise provided in this Section, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue"). *See generally* Symeon C. Symeonides, *Louisiana's Conflicts Law: Two 'Surprises'*, 54 LA. L. REV. 494 (1994).

123 C.C. of Louisiana,. art. 3453 ("Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.
In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.
The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.").

124 *Id.* art. 3545 ("Delictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused the injury either in this state or in another state to a person domiciled in this state. ...The preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels.").

125 Québec Civil Code of 1991, art. 3126, Dec. 18, 1991, in force Jan. 1, 1994, available at http://www.droit.umontreal.ca/doc/ccq/fr/index.html & http://www.canlii.org/qc/sta/ccq/whole.html/

addition, if the injured and injuring parties share a common domicile, the law of the common domicile applies regardless of where the act or injury occurred.[126]

Specific rules are provided for liability of product manufacturers and for producers of raw materials. The victim can elect to apply either the law of the location of the manufacturer or the law of the place where the product was purchased.[127] Finally, *lex fori* applies to cases seeking civil damages for injuries resulting from exposure to raw materials originating in Quebec.[128]

C. Conclusion: The Difficulty of Pursuing a General Choice of Law Instrument For the Entire Field of Non-Contractual Liability

The foregoing examination of the approaches employed by the nations of the Hemisphere to select the applicable law in cases of non-contractual liability support the conclusion that pursuing a general inter-American instrument harmonizing choice of law for the entire category of non-contractual liability would be an overly ambitious undertaking. There are several reasons for this conclusion.

First, although the foregoing survey does reveal a significant degree of consensus in the Hemisphere concerning choice of law for non-contractual liability, the approach that is widely in force in the hemisphere is one that is highly problematic and unlikely to be appealing to the negotiators of an inter-American instrument. The most widely-followed general approach in the Hemisphere is the traditional *lex loci delicti* approach. Virtually all of the nations of Latin America adhere to this approach. Canada has recently reaffirmed its adherence to this approach. The Caribbean nations, except for Dominica, apply the *lex loci delicti* approach, with the caveat that the claim must also be actionable under forum law. In addition, ten states of the United States follow this traditional approach.

The current wide acceptance of the *lex loci delicti* approach is not a strong basis for pursuing an Inter-American conflict of laws instrument. Among scholars, *lex loci*

(English translation) (art. 3126: "The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the later country is applicable if the person who committed the injurious act should have forseeen that the damange would occur. In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies").

126 *Id.*

127 *Id.* art. 3128 ("The liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victime, (1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired").

128 *Id.* art. 3129 ("The application of the rules of this Code is imperative in matters of civil liability for damage suffered in or outside Quebec as a result of exposure to or the use of raw materials, whether processed or not, originating in Quebec.").

delicti is widely – although not universally – regarded as an unsatisfactory approach to choice of law because it often produces arbitrtary and unjust results. None of the global, regional, or subregional efforts to regulate choice of law in the area of non-contractual liability have adopted the traditional *lex loci delicti* approach in its unvarnished form. An Inter-American instrument seeking to harmonize choice of law in this field would be unlikely to adopt this approach. If so, an inter-American instrument would call for the alteration of the choice of law approaches currently in force in the great majority of nations on the hemisphere.

The most significant departure in the Hemisphere from the traditional *lex loci delicti* approach has occurred in the United States, where all but ten of the states have departed from that approach. The U.S. experience, however, does not provide a model for a general inter-American choice of law instrument. First, no agreement has been reached in the United States on an alternative approach. Second, the most widely adopted of the approaches employed in the United States – the "most significant relationship" approach of the Second Restatement, which has been adopted by 22 (less than half) of the states – also has significant problems. As discussed above, the broad discretion this approach leaves to judges results in a system that provides little certainty or predictability in the law. The point of an international instrument harmonizing choice of law would be, in large part, to provide the increased certainty and predictability in the law which is so important to advancing international transactions. It would be ironic and counterproductive to replace the current approaches followed by most countries of the hemisphere – an approach that, despite its flaws, has the virtue of producing certainty and predictability – with as indeterminate an approach as that of the Second Restatement.

Critics of the modern approaches prefer a more determinate rule that resembles *lex loci delicti*. On the other hand, the approaches to choice of law that produce determinate results are often criticized as producing arbitrary or unjust results. Many scholars believe that certainty and predictability in the field of choice of law can only be gained at the expense of justice and fairness in individual cases. The debate between proponents of choice of law rules that produce determinacy and defenders of choice of law approaches that produce fair and just results has been a perennial one in the United States. The debate would undoubtedly reproduce itself in the context of the negotiation of an Inter-American instrument seeking to unify choice of law.

The challenge will be to find a middle ground: an approach that produces a significant degree of certainty and predictability, while averting the arbitrary and unjust results often produced by the *lex loci delicti* approach. This has, indeed, been the aim of the global and regional organizations that have undertaken to harmonize choice of law rules with respect to various aspects of non-contractual liability. Most of the texts proposed by these entities have taken a hybrid approach – selecting the law of the place of injury as the principal rule, but establishing exceptions where, for example, the parties are both domiciliaries of a different state. If the best approach to the question of non-contractual liability is a hybrid approach, an instrument that adopts such an approach will require changes in the choice of law approaches of *all* Member states. This will place a heavy burden of persuasion on those seeking the adoption and ratification of the eventual CIDIP instrument. Agreement on an approach that would require such broad changes in the approaches currently taken would be more feasible only if the instrument were limited to a particular subcategory of non-contractual liability.

The difficulty of adopting a general convention stems in addition from the sheer number and variety of sorts of liability that fall within the rubric of "non-contractual" liability. It is unlikely that any generally-phrased test would be adequate for all such subcategories of liability. At a minimum, the instrument would have to exclude from its scope – or include special provisions addressing – those categories of non-contractual liability that are sufficiently different from the "typical" tort that they require special rules. For example, injuries caused by the internet are likely to require special treatment. The same is true for numerous other sorts of liability encompassed by the term "non-contractual liability." The European Commission's draft regulation regulating choice of law for non-contractual liability (Rome II) included specific provisions for various specific categories of non-contractual liability, and numerous of those provisions produced significant controversy among affected parties. The Inter-American process lacks a "commission" with the power to impose a choice of law rule from above; any instrument must accordingly obtain the agreement of the individual Member states. Strong opposition from interested parties is likely to derail the effort to adopt an inter-American instrument in this field. The more limited the agreement's scope, the narrower the field of affected parties whose concerns would have to be taken into account, and accordingly the better the chances of reaching agreement on a common approach.

Finally, the federal system of government in the United States makes it highly unlikely that it would be able to support or implement a convention harmonizing choice of

law for the entire area of non-contractual liability. In the United States, the federal government negotiates treaties, and, once negotiated, the treaty is binding on the states. However, as noted above, choice of law is currently regarded as primarily a matter of state law. An inter-American convention harmonizing choice of law for all cases of non-contractual liability would accordingly supersede state choice of law rules in a broad range of cases. Given the traditional division of authority between the state and federal governments, I think there would be very strong – probably insurmountable – political resistance to an instrument that would displace state law so broadly in an area traditionally governed by state law. On the other hand, if the convention were to seek to harmonize choice of law for only a narrow subcategory of non-contractual liability, adherence by the United States would not be out of the question. (The alternative would be a model law harmonizing choice of law in cases of non-contractual liability, but, even if agreement could be reached on such an instrument, it would have to be adopted by 50-plus individual states of the United States, thus making harmonization even within the United States a quite significant undertaking.)

The experience of other global and regional organizations also cautions against undertaking the project of seeking to harmonize choice of law in the entire field of non-contractual liability. The Hague Conference considered undertaking such a project in the late 1960's and decided that the sheer number and diversity of forms of liability encompassed in the category made such a project inadvisable. It accordingly decided to pursue a series of narrower choice of law instruments addressing particular subcategories of non-contractual liability. The Hague Conference's experience with respect to the Convention on Jurisdiction and Judgments currently being negotiated also cautions against pursuing an instrument seeking to harmonize jurisdiction in all cases of non-contractual liability. The negotiations are currently stalled and it appears that the most likely outcome will be a narrower instrument addressing the validity of choice of law agreements in contracts. As this outcome suggests, the major disagreements that led to the failure of the proposed broader instrument related to jurisdiction in cases of non-contractual liability.

At the regional level, the experience of the European Union is not encouraging. In the 1970's the EC sought to harmonize choice of law with respect to both contractual and non-contractual liability. This proved too difficult insofar as non-contractual liability was concerned, so the project was trimmed to include only choice of law for contractual disputes. The result was the Rome Convention. Very recently, the idea of harmonizing

choice of law with respect to non-contractual liability was revived, this time through a proposed regulation of the European Commission. A draft regulation was made available for comments in 2001, and the comments received are available in the European Commission's web site. A large majority of those submitting comments questioned the need for such a regulation. Many denied that there was a problem, and many believed that the EC's proposed solution to the non-problem would make matters worse. As noted above, many businesses and trade associations expressed grave concerns about the effects that the proposed choice of law rules would have on their particular industry. The European Commission may well eventually adopt a regulation attempting to harmonize choice of law in the entire field of non-contractual liability, but the comments suggest that they are likely to narrow the scope of the regulation significantly. In any event, as noted above, there is no similar legislative body in the Americas, so a solution that is not widely approved by Member states is unlikely to be adopted. Such approval is far more likely with a narrower instrument.

Finally, the decision to undertake the broad project of harmonizing choice of law for all non-contractual liability is inconsistent with CIDIP's raison d'etre. It is well to recall that CIDIP emerged in the 1970's after the failure of the attempt of the Inter-American Juridical Committee's attempt in the 1960's to achieve a revision of the entire Bustamante Code. This failure led the OAS to pursue instead an approach whereby the harmonization of private international law in the Hemisphere would be pursued in smaller, more manageable phases. The CIDIP conferences are the manifestation of the decision to take this incremental approach.[129] Harmonization of jurisdiction and choice of law in the field of non-contractual liability would not be quite as ambitious as revising the Bustamante Code in its entirety.[130] However, because the bases of non-contractual liability, and the contexts in which such liability is incurred, have expanded exponentially since the project of revising the Bustamante Code was abandoned in the 1960's, it is likely that, today, the effort to harmonize jurisdiction and choice of law for non-contractual liability would be a more far ambitious undertaking than the failed effort to revise the Bustamante Code was when it was abandoned in the 1960's. We would be more faithful to the incremental approach embodied in the CIDIP project if we were to

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[129] *See* The History of the CIDIP Process, OEA/Ser.K/XXI.6 CIDIP-VI/doc.11/02, Jan. 25, 2002, at 7; Maekelt, *supra*.

[130] Portions of the Bustamante Code have already been addressed in instruments adopted at CIDIP concerning choice of law for contractual obligations and general principles of private international law. But an instrument seeking to address jurisdiction and choice of law for the field of non-contractual liability would far exceed those other conventions in scope.

recommend that the harmonization of jurisdiction and/or choice of law be, if at all, only with respect to a specific narrow subcategory of non-contractual liability.

CHART 2 – CHOICE OF LAW RULES IN THE HEMISPHERE

Jurisdiction	*Type of Rule**	*Source of Choice of Law Rule*
COMMON LAW		
Antigua & Barbuda	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of	Phillips v. Eyre and related cases
Bahamas	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Barbados	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Belize	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Canada (excl. Quebec)	LLD, with exception for specific kinds of liability, including transportation accidents (maritime, air, auto)	Tolofson v. Jensen & Gagnon v. Lucas

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

Dominica	Most significant relationship	Transnational Causes of Action (Products Liability) Act
Grenada	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Guyana	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Jamaica	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
St. Vincent & Grenadines	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
St. Kitts & Nevis	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

St. Lucia	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Trinidad & Tobago	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
U.S. (excl. LA & PR)	2nd R (22)	Restatement (Second) Conflict of Laws Sects. 145-46 & 6
	LLD-I (10)	Restatement (First) Conflict of Laws Sects. 377-78
	BL (5)	Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966)
	IA (3)	BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963)
	LF (3)	
	SC (2)	
	Combined Modern (5)	
<u>*CIVIL LAW*</u>		
Argentina	LLD	Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

Bolivia	LLD	Código de DIPr (Bustamante Code) (1932) arts. 167-8 (with reservation that rules of the Code are superseded by any conflicting provisions of the Montevideo Treaty) & Montevideo Treaty (1889), art. 38
Brazil	LLD	Bustamante Code (1929) C.C. art. 9, adopted by Lei de Introdução ao Código Civil, Law 4.657, Sept. 4, 1942
Canada (Quebec)	CD, or if none, then LLD, or LLD-I if foreseeable; except for products liability (law of manufacturers location or point of sale); damage by raw materials originating from Quebec (lex fori)	Quebec Civil Code of 1991, arts. 3126; 3128-29

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

Chile	LLD	Bustamante Code (1933) arts. 167-8 (general reservation subordinating Code to conflicting domestic law) C.C. art. 14
Colombia	LLD	C.C. art. 18
Costa Rica	LLD	Bustamante Code (1930) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)
Dominican Republic	LLD	Bustamante Code (1930) arts. 167-8
Ecuador	LLD	Bustamante Code (1933) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)
El Salvador	LLD	C.C. arts. 2035-36 & Bustamante Code (1931) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

Guatemala	LLD	Bustamante Code (1929) arts. 167-8
Haiti	LLD	Bustamante Code (1929) arts. 167-8
Honduras	LLD	Bustamante Code (1930) arts. 167-8
Mexico	Lex fori, unless statute or treaty creates exception	C.C.D.F. art. 12 (1988)
Nicaragua	LLD	Bustamante Code (1930) arts. 167-8
Panama	LLD	Bustamante Code (1928) arts. 167-8
Paraguay	LLD	[cite to relevant civil code provisions and/or treaties] Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

Peru	Lex loci actus or lex damni, whichever is more favorable to the victim	C.C. arts. 2097-98.
Suriname		
Uruguay	LLD	Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43
U.S. (Louisiana)	CI, except for products liability, where either LLD or LLD-I applies	C.C. arts. 14, 3542-45, as amended by 1991 La. Sess. Law. Serv. Act 923
U.S. (Puerto Rico)	Law of place with most dominant contacts]	Widow of Fornaris v. American Surety Co. (1966)
Venezuela	LLD-I, or, at option of plaintiff, LLD	Private International Law Statute (1998), Gaceta Oficial No. 36,511, art. 32; see also Bustamante Code (Mar. 12, 1932), arts. 167-8 (referring only to LLD)

* Key: IA = governmental interest analysis, 2nd R = most significant relationship (Second Restatement), CI = comparative impairment, LLD = place of act (also referred to as lex *loci delicti commissi*, or *lex loci actus*), LLD-I = place of injury/damage (also referred to as *lex damni*), LF = forum law (also referred to as *lex fori*), BL = better law, CD = common domicile, SC = significant contacts

III. GROUNDS FOR PERSONAL JURISDICTION IN CASES OF NON-CONTRACTUAL LIABILITY

Similar to their approaches to conflict of laws, countries and states within the Hemisphere also tend to take a general approach to jurisdiction over most forms of non-contractual liability with specific rules for certain kinds of liability. The specific rules are often incorporated into treaties.[131] This Section will discuss the most common general and specific approaches, and will briefly mention doctrines relating to the mandatory and discretionary exercise of personal jurisdiction, such as the doctrines of *forum non conveniens* and *lis pendens*.

In the United States, long-arm statutes generally provide grounds for exercising personal jurisdiction over parties outside the jurisdiction who commit torts within the jurisdiction or commit foreign torts that cause injury within the jurisdiction. In Canadian common law jurisdictions, long arm jurisdiction is generally premised upon commission of a tort or suffering an injury within the jurisdiction. Meanwhile, in the civil law jurisdictions of Latin America, courts can generally exercise personal jurisdiction where the illicit act occurred and also where the defendant is domiciled. Each of the civil law sub-national jurisdictions within common law countries has also enacted a long-arm statute codifying its particular approach.

A. Jurisdictional Principles Applied in Common Law Jurisdictions.

1. *U.S. Principles Influencing the Exercise of Personal Jurisdiction*.

The law in the United States concerning jurisdiction over foreign defendants is far more unified than the law concerning choice of law. That is because the federal Constitution imposes significant limits on a state's power to exercise jurisdiction over out-of-state defendants. In general states may exercise jurisdiction over such defendants only where "he have certain minimum contacts with [the forum jurisdiction] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."[132] The constitutional limits apply equally to defendants from other states of the Union and defendants from foreign countries, except that the Supreme Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[133] The states need not exercise jurisdiction to the full extent permitted by the Constitution, but many states have

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[131] *See, e.g.,* Warsaw Convention (allowing suit against air carriers for injuries caused by accidents in the place of ordinary residence, the principal place of business, or the destination of the flight).

[132] International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

authorized their courts to do so.[134] For this reason, the constitutional limits are the relevant ones for present purposes. This section will therefore focus on those limits.[135]

U.S. law distinguishes between two types of jurisdiction: general and specific. General jurisdiction refers to situations in which the state may exercise jurisdiction over the defendant with respect to any dispute. When a state possesses general jurisdiction, there is no need to show that the particular dispute has any connection with the forum state. Under current doctrine, the courts of a state may exercise general jurisdiction over any domiciliary of the state, or against any corporation that is incorporated within the state or has its principal place of business there. In addition, current doctrine permits a state to exercise general jurisdiction over any individual or corporation that has "continuous and systematic" presence within the jurisdiction, such as maintaining a branch office there. This category of jurisdiction is referred to as "doing business" jurisdiction, and has proved to be a controversial basis of jurisdiction at the ongoing negotiations over a possible Hague Convention on Jurisdiction and Enforcement of Judgments. Even more controversial is the United States' recognition that a state may exercise general jurisdiction over any person who is served with process while physically present within the state, even if his presence in the state was transitory. Under this doctrine, sometimes referred to as "tag" jurisdiction, a person who is served with process in New York while attending a conference in that state, or perhaps even while his plane made a stop there en route to another destination, may be subjected to the jurisdiction of that state on any cause of action, however unrelated to New York or indeed to the United States as a whole.

The second category of jurisdiction – specific jurisdiction – is jurisdiction based on contacts between the defendant and the forum state that are related to the dispute sought to be litigated there. For example, an out-of-state defendant may be sued in a

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133 Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 115 (1987).

134 The Constitution also imposes outer limits on a state's discretion to apply its law to out of state events, but the limits imposed in this area are relatively minor. *See generally* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). Most states do not exercise their power in this regard to the full extent permitted by the Constitution.

135 The constitutional limits on the jurisdiction of the federal courts are the same in theory but different in application. Because the relevant sovereign in a suit brought in federal court is the United States as a whole, the Constitution permits federal courts to exercise jurisdiction as long as there are "minimum contacts" with the entire United States. By statute and rule, however, the jurisdiction of the federal courts is (with a minor exception) linked to the jurisdiction of the courts of the state in which the court sits. Thus, although Congress may broaden the federal court's jurisdiction, under current law the federal courts may exercise jurisdiction only if the defendant has minimum contacts with the state in which the court sits. The one exception concerns cases in which the defendant lacks minimum contacts with any single state but has minimum contacts with the United States as a whole. In such circumstances, any federal court can exercise jurisdiction over the defendant. Fed. R. Civ. P. 4(k)(2).

state if the dispute concerns a product marketed by the defendant in the forum state which foreseeably causes an injury in the forum state. On the other hand, the defendant may generally not be sued in a state in which a product causes an injury if the product was unilaterally transported to the forum state by the plaintiff or a third party and the defendant did not market the product in that state.[136]

As noted, the states are not required to exercise jurisdiction to the full extent of permitted by the Constitution. The actual scope of a state's jurisdiction over out-of-state defendants is determined by the state's statutes on the subject, known as "long-arm" statutes. The states cannot exercise jurisdiction over cases not specified in their long-arm statutes. These statutes typically allow for personal jurisdiction parties who have caused injuries in the state even if caused by an act or omission outside the state, as well as over parties causing injuries elsewhere by an act or omission inside the state.[137] Even when the jurisdiction is authorized by a state statute, the state courts must comply with the outer limits imposed by the Constitution. Some states have simplified matters by enacting statutes authorizing their courts to exercise jurisdiction to the full extent permitted by the federal Constitution.[138] Even statutes that do not say so expressly have been interpreted by the courts to authorize jurisdiction to the full extent permitted by the Constitution. For this reason, it seems reasonable to conclude that, for purposes of negotiation of an Inter-American instrument regulating jurisdiction in non-contractual disputes, the relevant U.S. rules of jurisdiction will be those emanating from the federal Constitution.

Under U.S. law, the exercise of jurisdiction over the parties is not mandatory. In most states, the courts have the discretion to dismiss a case under the doctrine of *forum non conveniens,* even if they have jurisdiction over the case under the Constitution and statute. The doctrine of *forum non conveniens* permits a court to decline to exercise jurisdiction where there is another more convenient forum in which the case can be heard and certain factors weigh in favor of hearing the case in that forum. This doctrine

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136 *See* World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) & Asahi, 480 U.S. at 112.

137 Other common grounds for long-arm jurisdiction are doing business in the forum state, owning property in the forum state, or contracting to insure a risk located in the state. *See* Uniform Procedure Act; *see also* RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 697 (3d ed. 2000).

138 Cal. Civ. Proc. Code § 410.10. If a state court has personal jurisdiction over the parties, then it will typically have subject matter jurisdiction over the dispute because state courts are courts of general subject matter jurisdiction.

has been extremely controversial in the nations of Latin America and the Caribbean, some of which have enacted retaliatory legislation.[139]

2. *Canadian Jurisdictional Principles.*

Canadian provinces have also enacted long-arm statutes. These laws typically provide for personal jurisdiction over a party who has committed a tort within the jurisdiction and over a party who allegedly caused damage incurred in the jurisdiction,[140] as well as over parties owning property located within the jurisdiction and parties domiciled or resident in the jurisdiction.[141] Similar to U.S. courts, courts in Canadian common law provinces require that jurisdiction be founded upon a "real and substantial connection" between the defendant and the forum showing that the defendant voluntarily submitted to the risk of litigation in the forum.[142] Also similar to the U.S. courts, courts in Canadian common law provinces require that personal jurisdiction over foreign defendants be exercised consistent with principles of "order and fairness."[143]

B. Personal Jurisdiction Principles Applied in Civil Law Jurisdictions.

1. *Jurisdiction Over Wrongs Committed or Defendants Domiciled Within the Jurisdiction*.

In civil law countries of Latin America, national law typically provides for jurisdiction wherever the defendant is domiciled or the wrongful act (*acto/hecho ilíicito*) occurred.[144] This approach is found in the Treaties of Montevideo[145] as well national civil codes, including the Brazilian Code of Civil Procedure.[146] The Bustamante Code also allows for jurisdiction in the additional case where the plaintiff but not the defendant is domiciled in

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139 For further discussion of forum non conveniens, see Part II

140 Castel, *supra.* at 197-98, 205.

141 *Id.* at 198-201

142 *Id.* at 8-11 (observing that minimum contact with the forum could satisfy this test), *citing* Dupont v. Taronga Holdings Ltd. (1987), 49 D.L.R. (4th) 335 & Morguard Investments Ltd. v. De Savoye, 12 Adv. Q. 489.

143 Castel, *supra.* at 9. This standard is analogous to the U.S. standard of fair play and substantial justice.

144 Anderson *supra*., at 198 (citing Guatemala C.C. art. 16: "In complaints for the compensation of damages, the judge of the place where they were caused has jurisdiction"; Costa Rica C.C. art. 28; Panama C.C. art. 267).

145 *See* Treaty of Montevideo (1889), art. 56 ("Las acciones personales deben entablarse ante los jueces del lugar a cuya ley esta sujeto el acto jurídico materia del juicio. Podrán entablarse igualmente ante los jueces del domicilio del demandado.") & Treaty of Montevideo (1940), art. 56: (adding the following phrase to end of 1889 art. 56: "[s]e permite la prorroga territorial de la jurisdicción si, después de promovida la acción, el demandado la admite voluntariamente, siempre que se trate de acciones referentes a derechos personales patrimoniales."); *see also* Additional Protocol to Treaty of Montevideo (1940) art. 5 (prohibiting contractual abrogation of Treaty of Montevideo rules on choice of law and jurisdiction).

146 C.P.C. of Brazil, art. 88 (English translation) (Brazilian courts are competent when "the defendant, of watever nationality, is domiciled in Brazil . . . [or] the cause of action arises from an event or act that took place in Brazil."), *cited in* DOING BUSINESS IN BRAZIL § 21.133.

the forum state, provided both parties have consented in fact or law to jurisdiction.[147] This rule is subject to the general reservations under which the provisions of the Code only apply to the extent consistent with domestic law. Although the Bustamante Code includes provisions relating to jurisdiction over criminal delicts or quasi-delicts,[148] there are no similar provisions for non-criminal delicts or quasi-delicts.

2. *Sub-regional Jurisdictional Norms for Specific Types of Liability.*

Some of the civil law jurisdictions in Latin America have joined other jurisdictions in adopting special sub-regional jurisdictional rules for certain categories of liability. For example, the MERCOSUR countries of Brazil, Argentina, Paraguay, and Uruguay have enacted two jurisdictional protocols, one in the area of traffic accidents and the other in the area of consumer relations. The San Luis Protocol provides special rules for jurisdiction over traffic accidents in the place of the accident, domicile of the defendant, or the domicile of the plaintiff.[149] The Santa Maria Protocol provides special rules for jurisdiction in the jurisdiction of the consumer's domicile, with exceptions for other jurisdictions upon consent of the consumer, which could include the place where goods or services are delivered and the domicile of the defendant.[150]

3. Sub-national Civil Law Jurisdictions of Common Law Nations.

a. Puerto Rican Long-Arm Statute.

Puerto Rican law provides for long-arm jurisdiction over claims against foreign defendants arising from their participation in tortuous acts within Puerto Rico, including while driving a vehicle in Puerto Rico or operating a passenger or cargo transportation operation.[151] Jurisdiction can also be grounded upon doing business in Puerto Rico or owning real property situated in Puerto Rico.[152]

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147 Bustamante Code., art. 318 ("Será en primer término juez competente para conocer de los pleitos a que dé origen el ejercicio de las acciones civiles y mercantiles de toda clase, aquel a quien los litigantes se sometan expresa o tácitamente, siempre que uno de ellos por lo menos sea nacional del Estado contratante a que el juez pertenezca o tenga en él su domicilio y salvo el derecho local contrario.").

148 Bustamante Code, art 340 (providing that "para conocer de los delitos y faltas y juzgarlos son competentes los jueces y tribunales del Estado Contratante en que se hayan cometido").

149 MERCOSUR Protocol of San Luis, art. 7 ("Que para ejercer acciones serán competentes, a elección del actor, los tribunales del Estado Parte: 1) donde se produjo el accidente; 2) del domicilio del demandado; y 3) del domicilio del demandante."). *See* Rechsteiner, *supra.* at 295 (noting that as of 2000 there was doubt as to whether Brazil had taken the necessary steps to make this protocol enter into force as domestic law).

150 MERCOSUR Protocol on International Jurisdiction in Matters Regarding Consumer Relations, 6th Meeting of Ministers, Santa Maria, Brazil, Dec. 1996, CMC, arts. 4-5.

151 *See* Rule 4.7 of the Puerto Rican Code of Civil Procedure, 32 L.P.R.A. Ap. III R. 4.7 ("(a) Cuando la persona a ser emplazada no tuviere su domicilio en Puerto Rico, el Tribunal General de Justicia de Puerto Rico tendrá jurisdicción personal sobre dicha persona, como si se tratare de un domiciliado del Estado Libre Asociado de Puerto Rico, si el pleito o reclamación surgiere como resultado de dicha

b. Quebec Long-Arm Statute.

The Quebec Civil Code provides for long-arm jurisdiction if a delict is committed in Québec, damage is suffered in Québec, or an injurious act occurred within Québec.[153] In addition, under the Code Quebec courts have exclusive jurisdiction over all actions for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec.[154] Other bases of long-arm jurisdiction are the defendant having domicile or residence in Québec, the defendant being a legal person not domiciled in Québec but having an establishment in Québec, provided that the dispute relates to the defendant's activities in Québec, and the defendant submitting to jurisdiction.[155] Courts of Quebec can also take jurisdiction over foreign defendants if the dispute has "sufficient connection to Quebec" and cannot be reasonably expected to be litigated outside of Quebec[156] or if person or property present in Quebec is threatened by emergency or serious inconvenience.[157]

c. Louisiana Long-Arm Statute.

Similar to common law U.S. states, Louisiana has adopted a long-arm statute specifying which allows Louisiana courts to assert personal jurisdiction over foreign defendants who either (1) cause injury or damage as the result of a delictual or quasi-delictual act or omission inside Louisiana, (2) cause injury or damage in Louisiana as a result of a delictual or quasi-delictual act or omission outside of Louisiana, provided that the defendant regularly does or solicits business, engages in some persistent course of conduct, or earns revenue from goods or services sold in Louisiana, or (3) manufacture

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persona: (1) Haber efectuado por si o por su agente, transacciones de negocio dentro de Puerto Rico; o (2) haber participado, por si o por su agente, en actos torticeros dentro de Puerto Rico; o (3) haberse envuelto en un accidente mientras, por si o por su agente, manejare un vehículo de motor en Puerto Rico; o (4) haberse envuelto en un accidente en Puerto Rico en la operación, por si o por su agente, de un negocio de transportación de pasajeros o carga en Puerto Rico o entre Puerto Rico y Estados Unidos o entre Puerto Rico y un país extranjero o el accidente ocurriere fuera de Puerto Rico en la operación de dicho negocio cuando el contrato se hubiere otorgado en Puerto Rico, o (5) ser dueño o usar o poseer, por si, o por su agente, bienes inmuebles sitos en Puerto Rico.").

152 *Id.*

153 Quebec C.C. art. 3148(3).

154 *Id.* art. 3151.

155 *Id.* art. 3148.

156 *Id.* art. 3136 (in Spanish translation) ("que aunque una autoridad de Quebec no sea competente para conocer en un litigio, en el caso de que resulte imposible entablar una acción en el extranjero o si no puede exigirse que ella sea introducida en el extranjero, podrá asumir competencia si la cuestión presenta un vinculo suficiente con Québec."). *See, e.g.,* Recherches Internationales Québec v. Cambior, Inc., unreported judgment of Aug. 14, 1998, Canada Superior Court, Quebec, no. 500-06-000034-971, cited by Anderson, *supra.* at 194 n.61.

157 *Id.* art. 3140. As with common law jurisdictions applying the *forum non conveniens* doctrine, Quebec courts can always decline jurisdiction if authorities in another jurisdiction are in a better position to decide. *Id.* art. 3135.

a product or component part which causes foreseeable damage in Louisiana.[158] Transacting business in Louisiana is another basis for personal jurisdiction.[159] The Louisiana long-arm statute also provides for jurisdiction in other cases so long as jurisdiction is not inconsistent with the Louisiana and U.S. Constitutions.[160]

C. Conclusions

Whether the conditions exist for the harmonization of jurisdictional principles for cases of non-contractual liability must be informed by the Hague Conference's recent experience with its proposed Convention on Jurisdiction and Enforcement of Judgments in Civil or Commercial Matters. After many years of work on the topic, the Hague Conference appears to have narrowed significantly the scope of the project. The once ambitious project has been narrowed considerably and now seeks to address just the validity of choice of forum clauses in contracts.

An Inter-American instrument harmonizing jurisdiction for cases of non-contractual liability would be narrower than the Hague Conference's original project in two respects. First, there would be fewer parties to the negotiation, as this would be a regional instrument rather than a global one. Second, the possible Inter-American instrument under discussion would cover only noncontractual obligations, rather than all civil or commercial matters. The question is whether these differences justify greater optimism for the Inter-American instrument under consideration.

The regional nature of the Inter-American instrument may make it easier to reach agreement on relevant principles. However, the principal disagreements that led to the abandonment of the broader Hague project were disagreements between the civil law nations of Europe and the common law system of the United States. Because this dichotomy is replicated in the Americas, the disagreements may well prove equally intractable in this Hemisphere.

The fact that the possible Inter-American instrument would cover only non-contractual liability also offers little basis for optimism. As discussed above, the category of non-contractual obligations is quite broad. In both Europe and the Americas, choice

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158 13 La. R.S. art 3201.
159 *Id.* art. 3135.

of law conventions were much easier to conclude with respect to contractual than non-contractual obligations. It is likely that the same would be true for an instrument seeking to harmonize the bases for jurisdiction. The fact that the Hague Conference has narrowed its project to encompass only choice of law clauses in contracts suggests that the principal problem concerned noncontractual obligations. The most intractable problems that arose during the negotiations of the Hague Conference concerned certain categories of non-contractual liability – namely those involving intangible business injury. As with choice of law, the best strategy for an Inter-American instrument addressing jurisdiction for cases of non-contractual liability is to begin with a specific subcategory of this broad field, preferably not involving intangible business injury, and to expand gradually to other categories.[*]

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[160] *Id.*

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b. *Specific Countries*

i. *Canada*

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ii. *United States*

- *Primary Sources*

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iii. *México*

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2. Caribbean

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b. *Specific Jurisdictions*

i. *Bahamas*

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ii. *Dominica*

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3. Central America

a. *Costa Rica*

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b. *El Salvador*

- *Primary Sources*

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c. *Guatemala*

C.C. art. 1646 (providing for recovery for damages caused by pollution).

d. *Honduras*

C.C. art. 2236 (providing for recovery fro damages caused by pollution).

e. *Nicaragua*

C.C. arts. 1837-38, 1864 & 2509 (providing for recovery for damages caused by pollution).

f. *Panama*

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C.C. arts. 1629-52 (English translation) (providing causes of action for obligations arising outside of contract; art. 1644 providing that “one who causes harm to another person whether by acting or refraining from acting is liable for such harm and must compensate the plaintiff for the injuries and damages suffered.”).

4. South America

a. *Argentina*

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b. *Bolivia*

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c. *Brazil*

- *Primary Sources*

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d. *Chile*

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f. *Ecuador*

JUAN LARREA H., DERECHO INTERNACIONAL PRIVADO 279 (2d ed. 1976) (observing that there are no provisions on quasi-contracts in the domestic law of Ecuador); *but see id.* (quoting treaty between Colombia and Ecuador governing choice of law for quasi-delicts).

g. *Guatemala.*

C.C. of Guatemala , art. 1648 (shifting burden of proof upon showing of injury to defendant to prove no fault).

h. *Paraguay*

C.C. arts. 1833-71 (Title VII on civil liability).

i. *Peru*

- *Primary Sources*

C.C. arts. 1969-88 (governing extracontractual liability).

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j. *Uruguay*

- *Primary Sources*

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II. CHOICE OF LAW RULES ON EXTRACONTRACTUAL LIABILITY

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1. North America

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b. *United States*

- *Primary Sources*

31 L.P.R.A. § 5091-5127 (Puerto Rican law governing quasi-delictual obligations).

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[161] Two caveats are in order regarding the primary sources listed here. First, the primary sources listed here represent only those sources that are widely-cited. There are doubtless many treaties and special provisions of law relating to private international law on extracontractual liability which have not been included here. Second, the sources included here, while widely-cited, may have been superseded or never fully implemented. Their inclusion here does not in any way imply that they carry full force of law in their respective countries.

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Peter J. Meyer and Patrick J. Kelleher, *Use of the Internet to Solicit the Purchase or Sale of Securities Across National Borders: Do the Anti-Fraud Provisions of the U.S. Securities Laws Apply?*, at 3 (Mar. 1999) (on file with author) (observing that "[a]lthough the federal circuit courts of appeals agree that the anti-fraud provisions apply to some foreign securities transactions and conduct, they disagree over the test that should be used to determine when the anti-fraud provisions apply").

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c. *Mexico*

- *Primary Sources*

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2. Caribbean

a. *General*

- *Primary Sources*

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b. *Specific Countries*

i. *Barbados*

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ii. *Dominica*

- *Primary Sources*

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iii. *Dominican Republic*

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 908 citing LLD as dominant rule in DR; noting influence of French Civil and Comm'l Code on DR law).

iv. *Jamaica*

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3. Central America

a. Panama

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 956 citing LLD as general rule, with special rules in areas such as maritime tort: law of ship's flag governs).

4. South America

a. *General*

Montevideo Treaty I.

Montevideo Treaty II.

Protocolo de San Luis sobre Responsabilidad Civil Emergente de Accidentes de Tránsito, MERCOSUR/CMC, Dec. 1, 1996, arts. 3-6 (art. 3: “La responsabilidad civil por accidentes de tránsito se regulará por el derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en otro Estado Parte, el mismo se regulará por el derecho interno de éste último”; art. 4: “La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el derecho interno del Estado Parte en el cual se produjo el hecho”; art. 5: “Cualquiera fuere el derecho aplicable a la responsabilidad, serán tenidas en cuenta las reglas de circulación y seguridad en vigor en el lugar y en el momento del accidente”; art. 6: “El derecho aplicable a la responsabilidad civil conforme a los artículos 3 y 4 determinará especialmente entre otros aspectos: a) Las condiciones y la extensión de la responsabilidad; b) Las causas de exoneración así como toda delimitación de responsabilidad; c) La existencia y la naturaleza de los daños susceptibles de reparación; d) Las modalidades y extensión de la reparación; e) La responsabilidad del propietario del vehículo por los actos o hechos de sus dependientes, subordinados, o cualquier otro usuario a título legítimo; f) La prescripción y la caducidad.”).

b. *Jurisdiction Specific*

i. *Argentina*

- *Primary Sources*

C.C. art. 8 (“Los actos, los contratos hechos y los derechos adquiridos fuera del lugar del domicilio de la persona, son regidos por las leyes del lugar en que se han verificado.”).

Convenio con Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach).

Convención con Bulgaria de 7 de Octubre de 1937 Sobre Indemnizaciones de Accidentes del Trabajo, art. 4 (adopting *lex loci delicti commissi* approach).

Convenio Entre la Republica Argentina y la Republica Oriental del Uruguay en Materia de Responsabilidad Civil Emergente de Accidentes de Transito, Ley 24-106, 7 de julio de 1992, available at http://www.argentinajuridica.com/RF/ley_24_106.htm, arts. 2 & 4 (art. 2: “La responsabilidad civil por accidentes de tránsito se regulará por el Derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en el otro Estado Parte, el mismo se regulará por el Derecho interno de este último”; art. 3: “La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el Derecho interno del Estado Parte en el cual se produjo el hecho.”); Convenio entre Argentina y Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach).

Decreto Ley 7771/56, Apr. 27, 1956) (ratifying Montevideo treaty).

Ley 20.094, arts. 605 et seq. (concerning collisions between watercrafts).

- *Secondary Sources*

Enrique Dahl, *Argentina: Draft Code of Private International Law*, 24 I.L.M. 269, 272 (1985) (citing criticism of the U.S. governmental interest analysis because it leads to "unexpected" results).

Jacob Dolinger, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, in 283 RECUEIL DES COURS (2000) (citing art. 2622 of new draft Civil Code which takes the approach taken in the 1991 amendments to the Civil Code of Quebec).

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 871 citing LLD as standard rule, as applied in 1926 Wolthusen case).

ii. *Bolivia*

JAIME PRUDENCIO C., CURSO DE DERECHO INTERNACIONAL PRIVADO (5th ed. 1997).

iii. *Brazil*

- *Primary Sources*

Introductory Law to Civil Code, Law 4.657, Sept. 4, 1942, art. 9 ("Para qualificar e reger as obrigaçoes, aplicar-se-a a lei do pais em que se constituirem. Sec. 1. Destinando-se a obrigação a ser executada no Brasil e dependendo de forma esencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrinsicos do ato . . .").

- *Secondary Sources*

Jacob Dolinger, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, in 283 RECUEIL DES COURS (2000) (citing art. 9 of Introductory Law and explaining that its reference to "obligations" generally has been construed to include torts).

PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 50 (1959) (citing *lex loci delicti* as Brazilian choice of law rule).

iv. *Chile*

ALFREDO ETCHEBERRY O., AMERICAN-CHILEAN PRIVATE INTERNATIONAL LAW 61 (1960) (stating that no special choice of law rules for torts exist under Chilean law and that *lex loci delicti* is the most common approach).

v. *Colombia*

- *Primary Sources*

Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906) (art 37: “La responsabilidad civil proveniente de delitos o cuasi-delitos se regirá por la ley del lugar en que se hayan verificado los hechos que los constituyen.”).

- *Secondary Sources*

MARCO GERARDO CALVA, TRATADO DE DERECHO INTERNACIONAL PRIVADO 46 (2d ed. 1973) (confirming that Colombia had signed the 1889 Treaty of Montevideo but that the treaty is not in effect in Colombia).

PHANOR J. EDER, AMERICAN-COLOMBIAN PRIVATE INTERNATIONAL LAW 77 (1956) (stating that Colombian law does not provide specific choice of law rules for tort and that the general rules of private international law therefore apply to torts).

WILLIAM TETLEY, INT’L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 894 citing LLD and place of injury rules).

vi. *Ecuador*

Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906).

vii. *Paraguay*

C.C. art. 21 (“Los buques y aeronaves están sometidos a la ley del pabellón en todo que respecta a su adquisición, enajenación y tripulación. A los efectos de los derechos y obligaciones emergentes de sus operaciones en aguas o espacios aéreos no nacionales, se rigen por la ley del Estado en cuya jurisdicción se encontraren”).

Ley del 14 de julio de 1950) (ratifying Montevideo treaty).

viii. *Peru*

C.C. arts. 2097-98, adopted by Decreto Legislativo 295, 1984 (Title III on choice of law, art. 2097: “Extra-contractual liability is governed by the law of the country where the principal activity which gave rise to the damage took place. In case of liability arising from an omission, the law of the place where the offender should have acted shall be applied. If the agent is liable under the law of the place where the damage arose but not under the law of the place where the act or omission occurred, the former law shall be applied if the agent should have foreseen that the damage would have occurred in that place as a result of his act or omission”; art. 2098: “Obligations arising by operation of law, the management of another's affairs without authorization (gestión de negocios), unjust enrichment, and payment of a thing not due (pago indebido) are governed by the law of the place where the fact giving rise to the obligation happened or should have happened.”) *reprinted at* 24 I.L.M. 997 (1985) (English translation).

ix. *Uruguay*

C.C. art. 2399 (“Los actos juridicos se rigen, en cuanto a su existencia, naturaleza, validez y efectos, por la ley del lugar de su cumplimiento.”).

Decreto Ley No. 10272, Nov. 12, 1942) (ratifying Montevideo treaty).

x. *Venezuela*

Venezuelan Private International Law Statute (1998), published in the Gaceta Oficial No. 36,511, Aug. 6, 1998, available at http://www.csj.gov.ve/legislacion/ldip.html, with English translation available at http://www.analitica.com/biblioteca/congreso_venezuela/private.asp 1998.

III. JURISDICTION

A. GENERAL

Bustamante Code., art. 318 & 340.

B. JURISDICTION SPECIFIC

1. North America.

a. *Canada*

Quebec C.C. art. 3135-36 & 3148(3)-51.

Recherches Internationales Québec v. Cambior, Inc., unreported judgment of Aug. 14, 1998, Canada Superior Court, Quebec, no. 500-06-000034-971.

b. *United States*

- Primary Sources

13 La. R.S. art 3201.

Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 115 (1987).

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

Cal. Civ. Proc. Code § 410.10.

Fed. R. Civ. P. 4(k)(2).

International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

Rule 4.7 of the Puerto Rican Code of Civil Procedure, 32 L.P.R.A. Ap. III R. 4.7.

Uniform Procedure Act.

World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

- Secondary Sources

RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 697 (3d ed. 2000).

c. *Mexico*

2. Caribbean.

Dupont v. Taronga Holdings Ltd. (1987), 49 D.L.R. (4th) 335.

Morguard Investments Ltd. v. De Savoye, 12 Adv. Q. 489.

Rules of the Supreme Court.

Societé Nationale Industrielle Aerospatiale v. Lee Kui Jak [1987] 1 App. Cas. 871 (Eng. P.C.), [1987] 3 All E.R. 510.

Transnational Causes of Action (Product Liability) Act.

3. Latin America.

a. *General Sources*

MERCOSUR Protocol of San Luis, art. 7.

MERCOSUR Protocol on International Jurisdiction in Matters Regarding Consumer Relations, 6th Meeting of Ministers, Santa Maria, Brazil, Dec. 1996, CMC, arts. 4-5.

SANDRO SCHIPANI & ROMANO VACCARELLA, UN 'CODICE TIPO' DI PROCEDURA CIVILE PER L'AMERICA LATINA (1988).

Treaty of Montevideo (1889), art. 56 ("Las acciones personales deben entablarse ante los jueces del lugar a cuya ley esta sujeto el acto jurídico materia del juicio. Podrán entablarse igualmente ante los jueces del domicilio del demandado.") & Treaty of Montevideo (1940), art. 56: (adding the following phrase to end of 1889 art. 56: "[s]e permite la prorroga territorial de la jurisdicción si, después de promovida la acción, el demandado la admite voluntariamente, siempre que se trate de acciones referentes a derechos personales patrimoniales."); *see also* Additional Protocol to Treaty of Montevideo (1940) art. 5 (prohibiting contractual abrogation of Treaty of Montevideo rules on choice of law and jurisdiction).

b. *Jurisdiction Specific Sources*

i. *Argentina*

C.C. arts. 612-21 (relating to maritime disputes).

ii. *Bolivia*

C.P.C. art. 10(1).

iii. *Brazil*

C.P.C. of Brazil, art. 88 (English translation) (Brazilian courts are competent when "the defendant, of watever nationality, is domiciled in Brazil . . . [or] the cause of action arises from an event or act that took place in Brazil."), *cited in* DOING BUSINESS IN BRAZIL § 21.133.

Decree-Law 4.657.

Law 5.869 of Jan. 11, 1973.

iv. *Costa Rica*

C.C. art. 28.

v. *Colombia*

- *Primary Sources*

Const. Title XV.

Code of Judicial Org/CP Law 105 of 1931.

vi. *Guatemala*

C.C. art. 16 ("In complaints for the compensation of damages, the judge of the place where they were caused has jurisdiction")

vii. *Panama*

C.C. art. 267.