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THE DESIRABILITY OF PURSUING THE NEGOTIATION OF AN INTER-AMERICAN INSTRUMENT ON CHOICE OF LAW AND COMPETENCY OF INTERNATIONAL JURISDICTION WITH RESPECT TO NON-CONTRACTUAL CIVIL LIABILITY: A FRAMEWORK FOR ANALYSIS AND AGENDA FOR RESEARCH

(presented by Dr. Carlos Manuel Vázquez)

On May 1, 2002, the Permanent Council asked the Inter-American Juridical Committee to consider the desirability of embarking on the negotiation of an inter-American instrument addressing jurisdiction and choice of law in the area of non-contractual liability. The Committee has designated as rapporteurs of this topic Dr. Ana Elizabeth Villalta Vizcarra and the undersigned.

This report proposes a framework for analyzing the question posed to the Committee, as well as an agenda for the research that will have to be conducted before the Committee will be in a position to draw any conclusions. The Permanent Council has asked that the Committee's report be submitted "as soon as practicable." Given the complexity of the subject and the need for an in-depth study, the Committee should endeavor to complete its report at its 63rd regular session in August of 2003.

The question posed to the Committee should not be understood as a simple binary choice, demanding a yes-or-no answer. A great variety of options should be considered. The Committee could conclude that an instrument on jurisdiction should be pursued but not a convention on choice of law, or vice versa. It could conclude that it would be unwise to pursue a general instrument on jurisdiction or choice of law for all forms of extra-contractual liability, but that an instrument on jurisdiction or choice of law should be pursued for specific torts. It could conclude that it would be preferable to pursue a model law on one or more of these subjects, as opposed to a convention. It would be well within the scope of the mandate for the Committee to endorse any of these projects, or others. Of course, the Committee could also endorse the negotiation of a general instrument on jurisdiction and choice of law for torts, or conclude that neither a general nor a specific convention nor a model law should be pursued.

Before proceeding to propose a framework for analysis, it is necessary to clarify the nature of the question posed. The question, as I understand it, is *not* whether it would be desirable to have an inter-American convention unifying the law of jurisdiction and choice of law in non-contractual disputes within the hemisphere. Answering that question is comparatively easy. It is apparent that national laws regarding these subjects are not already uniform within the hemisphere. There appears to be no benefit to disuniformity in the fields of jurisdiction and choice of law. In this respect, it is useful to draw a distinction between the law of jurisdiction and choice of law, on the one hand, and substantive areas of law, such as

the law of torts or the law of contracts, on the other. With respect to substantive law, a lack of uniformity is not in itself necessarily a bad thing. Theories of federalism and subsidiarity are premised on the idea that it is good for people to be governed at the level of government closest to them. Disuniformity in substantive law is the price we pay for that benefit. The benefits of local governance will sometimes be outweighed by the need for uniformity in certain areas of substantive law, but assessing this trade-off will often be difficult.

Disuniformity in the law governing international jurisdiction and choice of law, however, cannot be justified as the corollary of the benefits of local governance. By definition, the law of jurisdiction and choice of law applies only when a dispute has connections with more than one State. Usually, the disputes involve people from different States. By hypothesis, at least one of the parties will not be governed by the government closest to him; he will be governed instead by foreign courts or foreign law. In short, the benefit of local governance does not provide a good justification for disuniformity in the law of jurisdiction and choice of law because, by its nature, this law applies only to non-local disputes. There appears to be no inherent benefit to disuniformity in international jurisdiction and choice of law.

On the other hand, there are significant costs to disuniformity in the law of jurisdiction and choice of law. If different States follow different approaches to determining the applicable law, and a plaintiff has the choice of more than one forum in which to litigate his claim, then the applicable law will not be known until the forum is chosen. Disuniformity in choice of law thus creates uncertainty in legal relations. Such disuniformity

> frustrates rational planning. Parties cannot know when they act what law governs their behavior, for that depends upon post-act events such as the plaintiff's choice of forum. Granted, not every act that gives rise to a lawsuit is planned in advance, but some are. Institutional actors, for example, must decide how much to invest in making their activities safer, and what activities to avoid because the liability risks exceed the benefits. And even acts that are not planned are often insured against in advance. There are significant costs when actors -- especially risk-averse actors -- are forced to make decisions without knowing what law governs their actions.[1]

Disuniformity in jurisdiction similarly produces legal uncertainty. Because States generally will enforce judgments only if the judgment was rendered by a State that, in its view, had jurisdiction over the case, disuniformity in jurisdictional rules results in judgments rendered by one State often not being enforceable in the courts of other states.

In view of the costs of disuniformity in jurisdiction and choice of law and the lack of any counterbalancing benefits, it seems evident that it would be desirable to have a uniform approach to jurisdiction and choice of law in the hemisphere.[2]

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1 GOTTESMAN, Michael. *Draining the dismal swamp: the case for federal choice of law statutes.* 80 GEO.L.J. 1, 11 (1991).

2 Another reason sometimes given for preferring divergent local laws is that this permits local experimentation, and that such experimentation is necessary to permit the best solution to a particular legal problem to emerge. With respect to torts in general, there have already been centuries of experience with divergent approaches to jurisdiction and choice of law. It is unlikely that new approaches will emerge at this late date. However, with respect to particular subfields of torts, such as those occurring on the internet, there may well be a need for further experimentation at the national level.

This, however, is only a part of the question before the Committee. The question posed to the Committee is whether the OAS should embark upon the negotiation of an inter-American instrument unifying this subject, or some portion of it. This is ultimately a question of allocation of resources. If a binding instrument unifying the law of jurisdiction and choice of law in the hemisphere could be achieved at no cost, the hemisphere would almost certainly be better off with such an instrument than without one. But achieving an agreement on such an instrument is not a costless enterprise. Indeed, there is no guarantee that, once the costs are incurred, an agreement will ultimately be reached. This Committee is, of course, in no position to judge whether the effort to negotiate such an instrument is more deserving of Organization's resources than other pressing matters. We can, however, help the appropriate organs of the Organization make that judgment by examining several important questions: First, how severe is the problem attributable to the diversity of approaches currently being followed in the hemisphere concerning jurisdiction and choice of law? Second, how likely is it that this problem will be corrected, without expenditure of OAS resources, or that a satisfying solution has already been found by other entities working on the topic? Finally, if a satisfactory solution is not produced by other entities, how likely is it that a satisfactory solution will be found at the inter-American level?

What follows is an outline of the issues that will have to be examined to produce answer to those three fundamental questions. I shall begin by discussing the questions relevant to an inter-American instrument on choice of law for non-contractual obligations. Thereafter, I shall address the questions relevant to an inter-American instrument on jurisdiction in disputes about non-contractual obligations.

I. What Sorts of Legal Obligations Fall Within the Scope of "Non-Contractual Obligations"?

To assess the severity of the problem that would be addressed by an inter-American instrument on jurisdiction and choice of law in the area of non-contractual liability, and the likelihood that an agreement can be reached on a solution, the first necessary task is to consider the variety of different subjects that fall within the field of non-contractual liability. Defining of the scope of the field and examining the various types of claims that fall within it is relevant to a number of the questions that will have to be considered in reaching a conclusion about the feasibility of an instrument and about the sort of instrument that would be desirable. For example, an instrument establishing general principles broadly applicable to all claims within the field would appear to be less suitable if the field is broad and includes diverse sorts of claims. Furthermore, the negotiation of such an instrument would appear to be far more risky politically if the field includes numerous diverse sorts of claims, as the views of a very large number of interest groups would have to be taken into account and accommodated during the negotiation and ratification processes.

The field of non-contractual liability appears to be very broad indeed, covering literally all forms of liability that are not based on a contract. In a report prepared in 1967 considering the feasibility of pursuing the negotiation of a general convention on jurisdiction and choice of law in cases of non-contractual liability, The Hague Conference on Private International Law illustrated the breadth and diversity of legal claims that fall within this field by offering a partial list of the sorts of claims that it encompasses. The Hague Conference noted that, besides the well-known torts, the list of non-contractual obligations included such diverse obligations as those of fiancés and married couples towards each other, the responsibilities of

natural fathers towards their offspring (e.g., paternity actions), business torts, compensation for accidents in the workplace, claims based on accidents at sea, rail, or roads, and in the air, products liability, and claims against public officials. I might add that each of these categories itself includes a number of different sorts of claims. The category of business torts, for example, includes copyright and trademark infringement, patent infringement, theft of trade secrets, interference with contract or with prospective contractual relations, unfair competition, not to mention illegal restraints of trade and other obligations of cartels and monopolies.

The Hague Conference concluded in 1967 that a general convention addressing the law applicable to all non-contractual obligations was not feasible because of the wide diversity of subjects falling within this field. It instead pursued a series of more specific conventions on particular subcategories of non-contractual claims, such as traffic accidents and products liability.[3] Since 1967, the field has grown even more diverse. Technological advances have produced entirely new categories of torts, such as the business torts of e-commerce. The torts themselves are familiar, but the e-commerce context has required novel legal solutions. The harmonization of approaches to jurisdiction in the e-commerce field has proved to be an intractable problem. Lack of agreement with respect to this issue has almost single-handedly killed the proposed Hague Convention on Jurisdiction and Enforcement of Judgments. Although the effort continues, the most likely result will be a narrower convention covering only physical-injury torts.

In addition, there has been legislative activity in many countries producing wholly new categories of non-contractual claims. In the United States, for example, the federal and state legislatures have been active in enacting new laws imposing civil liability for discrimination on the basis of race, gender, religion, nationality, disability, and other characteristics. Statutes have also been enacted imposing civil liability for sexual harassment and other offensive workplace conduct. Other "new" torts that have emerged in the North American legal system include loss of consortium, wrongful interference with the doctor-patient relationship, pharmacy malpractice, borrower harassment, and lender liability.

The preparation of a list of non-contractual obligations recognized in the hemisphere is thus a necessary first step. Such a list should not be too difficult to produce.

II. Choice of Law

The Permanent Council has specifically instructed the Committee to consider whether we regard it as advisable to pursue the negotiation of some instrument unifying choice of law in the hemisphere with respect to non-contractual disputes. It has also specifically asked us to "identify specific areas revealing progressive development of regulation in this field through choice of law solutions", and to conduct "a comparative analysis of national norms currently in effect". This section sets forth a framework for analyzing this set of questions and an agenda for further research.

A. The Nature and Severity of the Problem

1. How Divergent Are the Substantive Laws in the Hemisphere Regarding Non-Contractual Obligations?

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[3] DUTOIT, Bernard M. *Mémorandum relatif aux actes illicites en droit international privé (Secrétaire du Bureau Permanent).* In: Actes et documents de la Onzième session, 7 au 26 octobre 1968. t.3. La Haye: Bureau Permanent de la Conférence, 1970.

Choice of law issues can arise in disputes having connections to more than one state if the laws of the relevant states differ with respect to some aspect of the claim. Therefore, in quantifying the severity of the problem that would be addressed by an instrument unifying choice of law in the hemisphere for non-contractual disputes, the first question that presents itself is: To what extent do the laws of the hemisphere governing non-contractual liability differ? Answering this question would, of course, be an immense undertaking. Given the breadth of the category of non-contractual liability, it is probably safe to assume that there is a significant degree of divergence among the substantive laws of the hemisphere with respect to many forms of non-contractual liability. The fact that the hemisphere includes both common-law and civil law legal systems is probably sufficient to guarantee a significant degree of diversity. In fact, as those of us from federal systems can attest, there is a significant degree of diversity in the laws governing non-contractual liability even among common law and among civil law states. We should therefore proceed under the assumption that there is a significant degree of diversity among the substantive laws governing non-contractual obligations in the hemisphere.

2. How Divergent Are the Choice of Law Approaches Followed in the Hemisphere in Non-Contractual Disputes?

The next question is the extent to which the approaches to choice of law in non-contractual disputes differ within the hemisphere. An instrument unifying such law would, of course, be necessary only if there were disuniformity among Member States in the way they handle conflicts of substantive law. Here again, we can safely assume that a significant amount of disuniformity exists. Just within the United States, seven different approaches to choice of law are followed by the various sister states. Twenty two states follow the "most significant relationship" test of the Second Restatement; ten states follow the traditional *lex loci delicti rule*; five states follow the "better law" approach; three states follow interest analysis; three states follow the "significant contacts" approach; and three states apply the *lex fori*.[4] Thus, even if the choice of law approaches followed in the remainder of the hemisphere were perfectly uniform, an inter-American instrument unifying choice of law in international cases would be useful if the United States were a party if only because it would unify the choice of law approaches followed by courts in the United States in international cases. The reality, of course, is that there is significant diversity among the approaches followed by the other states of the hemisphere as well.

Nevertheless, a thorough survey of the choice of law approaches followed in the hemisphere cannot be avoided for several reasons. Such a study is required, first, because we are not merely seeking some assurance that there is enough disuniformity to make the expenditure of resources on this project worthwhile; we are also seeking assurance that the extent and nature of the diversity that exists in the hemisphere is not so great as to make it unlikely that an agreement will ultimately be reached on a uniform approach. A thorough description of the various approaches followed in the hemisphere is also necessary to give us some indication of the approaches that will be contending for adoption if and when the time comes to draft an instrument. Third, an understanding of the experience of the Member States with the approaches they have used will be important if and when the time comes to select among the contending approaches. Finally, the CIDIP resolution, which the Permanent

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[4] See SYMEONIDES, Symeon C. *Choice of law in the American courts in 2000: as the century turns.* 49 AM.J.COMP.L. 1, 13 (2001).

Council has instructed us to treat as a guideline, specifically calls for "a comparative analysis of national norms currently in effect".

For certain Member States, the survey must focus on the law of subnational units. That is the case with respect to the United States, where choice of law is generally governed by the laws of the sister states, even in international cases.

The survey should also consider the extent to which states apply different approaches to choice of law with respect to different categories of non-contractual liability. This analysis will be of central importance in examining the question whether a general convention on choice of law for non-contractual obligations is feasible. A wide divergence in the choice of law approaches employed by states for the diverse categories of non-contractual obligations would of course make it less likely that the field can be successfully addressed in a single general convention. The analysis of the choice of law approaches employed by states in the various subcategories of non-contractual liability will also be important to determining which of those subcategories is suitable for a narrower convention, should we conclude that a general convention is infeasible or otherwise inadvisable. As the Permanent Council has suggested, the suitability of a subcategory of non-contractual obligation for treatment in a choice of law instrument will depend upon the degree of harmony that has been reached among the states of the hemisphere with respect to choice of law within that subcategory. Too wide a divergence of approaches to choice of law in a given subcategory would indicate that the field is not ripe for treatment in an inter-American instrument.

Ideally, the survey should also discuss the historical experience of the various Member States whose approaches to choice of law have evolved over the years. For example, the United States' experience regarding choice of law in tort cases may be instructive:

In the United States, choice of law in torts was once governed in virtually all states by the traditional *lex loci delicti* rule, as set forth in the First Restatement of Conflict of Laws. The First Restatement approach was severely criticized in the early part of the XXth Century as being excessively formalistic and producing arbitrary and unjust results. The famous 1963 decision of the New York Court of Appeals in Babcock v. Jackson[5] initiated a choice-of-law revolution. State after state abandoned the traditional rule and adopted one or another version of interest analysis. 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 applied 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. Under one approach, the forum would always apply its own law. Under another approach, the court would apply the law of the state whose policy would be impaired

[5] 191 N.E. 2d. 179 (N.Y. 1963).

to a greater extent if it were not applied to the case. Under still another approach, the court would apply the law that it regarded as the better law on the merits.

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 the law that applies is the law of the state that has the "most significant relation" to the issue on which the laws diverge, an approach that resembles the British "proper law" approach. 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. Courts are thus given wide discretion to apply the law that they regard as most appropriate in any given case. 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 state-wide acceptance. Indeed, fewer than half of the states (22) have adopted the Second Restatement approach. A number of others apply one or another version of interest analysis, and ten states continue to adhere to the traditional *lex loci delicti* rule.

The modern approaches have been subjected to severe scholarly criticism because they provide no certainty or predictability in legal relations. Professor Michael Gottesman has succinctly described the disadvantages of this 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.[6]

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 choice of law experience in the United States illustrates not only the severity of the problem in microcosm, but also the difficulty of achieving a solution. The current situation is widely regarded as chaotic. William Prosser, the author of the famous Treatise on Tort Law, has written:

> 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

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6 GOTTESMAN, Michael. *Draining the Dismal Swam: The Case for Federal Choice of Law Statutes,* 80 GEO. L.J. 1, 11 (1991).

> mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.[7]

Prosser wrote those words before the choice of law revolution. Since that time, the situation has gotten much, much worse. Scholars have called for Congress to step in and enact a federal choice of law statute that would apply uniformly throughout the state, as it clearly has the power to do.[8] Others have called for the elaboration of a model choice of law statute, to be adopted by the state legislatures.[9] Others have argued that, at the very least, a Third Restatement should be drafted.[10] None of this has come to pass.

The reasons for this failure may be relevant to the question whether agreement can be reached at the Inter-American level. It certainly bears on whether sufficient support for a single approach can be mustered within the United States to enable the United States to adhere to such an instrument. There are a number of possible reasons for the persistence of the clearly unsatisfactory state of choice of law in the United States. Congress' failure to address the matter is no doubt caused by the great number of important matters competing for a place on its agenda. Choice of law is a relatively esoteric problem that the vast majority of voters have absolutely no cognizance of. Additionally, the failure of Congress to act may reflect the view that this field is properly left to the states, which have traditionally dealt with the subject. The explanation for the failure of the Uniform Law Commission to pursue a uniform [i.e., model] law in the area of choice of law is less obvious. It may reflect political impasse, with the trial lawyers' association fighting for a rule that helps plaintiffs, and corporations and other likely defendants fighting for a contrary approach. It may reflect the belief that the choice of law problem is intractable, and that it is accordingly more promising to tackle the problem of disuniformity by attempting to harmonize substantive laws in various fields. In any event, the reasons for the United States' failure thus far to address the problem of choice of law in torts despite the fact that it is widely regarded as a dismal swamp would appear to be relevant to the question whether the attempt to attain a general or specific inter-American instrument on the topic would be likely to succeed. The survey should thus also address the reasons for this failure.

In summary, an in-depth survey of the approaches that have been followed over the years by the various states of the hemisphere (and subnational units, where relevant), is necessary to permit us to assess the severity of the problem that would be addressed by an Inter-American instrument unifying choice of law for non-contractual disputes in the hemisphere. Such a survey would also help us determine whether agreement is likely to be reached on a uniform solution, and to identify the most promising solution.

The sort of survey that I propose here would be, without doubt, an enormous undertaking. Especially burdensome would be the attempt to describe the approaches used by the states of the hemisphere (and subnational units, where relevant) with respect to the numerous categories of non-contractual obligations. The rapporteurs would have to count on assistance from the Secretariat of Legal Affairs and perhaps others. If a survey of the

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7 PROSSER, William. *Interstate Publication,* 51 MICH L. REV. 959, 971 (1953).

8 GOTTESMAN, Michael. *Op.cit*; BAXTER, William F. *Choice of law and the federal system.* 16 STAN. L. REV (1963).

9 E.g., KRAMER, Larry. *On the need for a uniform choice of law code*. 89 MICH.L.REV 2134 (1991).

10 E.g., SYMEONIDES, Symeon C. *The need for a third conflicts restatement (and a proposal for torts conflicts).* 75 IND. L. J. 437 (2000).

hemispheric approaches to choice of law with respect to all of the categories of non-contractual obligations is regarded as infeasible in light of resource constraints, the survey could perhaps be limited to those categories that have given rise to the greatest number of international disputes in which choice of law has been at issue. I should note, however, that, if such a broad study were infeasible, this very fact would itself be a reason for concluding that a general instrument regulating choice of law for all such categories is imprudent. It would be foolhardy to propose a general instrument regulating choice of law in all such fields if we lacked the resources or wherewithal to study how the numerous types of obligations would be affected by such an instrument. Instruments whose adoption would require a leap of faith tend not to be adopted and, if adopted, not ratified.

One the other hand, we would be justified in limiting our survey to selected categories of non-contractual obligations if we concluded after a preliminary analysis, such as that undertaken by The Hague Conference in 1968, that a general convention addressing choice of law for all non-contractual disputes would be infeasible. The enormous cost of the preparatory work that would be necessary to justify embarking on the negotiation of a general convention may itself be a sufficient reason to conclude that the negotiation of such a convention is inadvisable.

3. The Nature and Severity of the Harm Sought to Be Addressed

Finally, assessing the potential benefit of an Inter-American Convention on Choice of Law for non-contractual claims requires not just a determination of the degree of disuniformity in the existing approaches to this issue in the hemisphere, but also a judgment about the severity of the problem caused by such disuniformity. This requires, first, identification of the nature of the harms caused by disuniformity in choice of law approaches, and a judgment about how severe that harm is in the context of claims for non-contractual liability.

The costs of disuniformity in choice of law was addressed above. Such disuniformity is thought to be harmful because it produces uncertainty in legal relations. If different states apply different choice of law rules to determine the legal consequences of a given act having international connections, the persons involved cannot know in advance the extent to which such acts will give rise to liability. The law that applies cannot be known without knowing what the forum is. If more than one forum has jurisdiction, the plaintiff will determine the applicable law by choosing the forum. This produces the phenomenon of forum-shopping, which many though not all commentators regard as undesirable. For the persons involved, such a situation is thought to produce legal uncertainty. Moreover, since the plaintiff can be expected to choose the forum that will apply the most favorable law, such diversity tends to produce a trend towards more expansive liability. This trend tends to nullify the public policies of the states that favor less expansive liability.

Once the harms produced by disuniformity in choice of law are identified, the question becomes whether these problems are of concern in the field of non-contractual liability. The need for legal certainty, for example, is thought to be most important for contractual matters, as people rely on the applicable law in structuring their transactions. Because people do not generally plan to have accidents, the need for legal certainty is arguably less pressing in the field of non-contractual liability addressing liability for accidents. On the other hand, people do buy insurance to protect themselves against the risk of non-contractual liability. Insurance companies rely on the applicable law in setting their rates. The uncertainty produced by

divergent choice of law rules may produce higher insurance premiums if insurance companies structure their premiums on the assumption that disputes will be governed by the law most favorable to the claimant.

An in-depth analysis of the reasons disuniformity in choice of law is thought to be problematic, and the extent to which such harms are matters of concern in the field of non-contractual liability, is necessary not just to assess the extent of the problem that would be addressed by an inter-American instrument, but also to provide a yardstick against which to measure any proposed solution. If the problem sought to be addressed by an instrument unifying hemispheric approaches to choice of law is the uncertainty and unpredictability of legal relations produced by disuniformity, then the instrument we propose (if we decide to propose one) should adopt an approach to choice of law that offers certainty and predictability. As I mentioned above, the modern approaches to choice of law followed in the United States have been severely criticized by scholars because they dispense entirely with certainty and predictability. They are so indeterminate that it is impossible to know which law governs one's conduct until well after one has acted, when the judge decides *post hoc* which legal rule one was supposed to have complied with. If the point of law is to guide human conduct, then indeterminate choice of law rules seem fundamentally incompatible with the rule of law.

In any event, if the contemplated instrument seeks to correct the problem of disuniformity because of the lack of certainty and predictability caused by such disuniformity, then the uniform adoption of an indeterminate choice of law rule would do little or nothing to correct the problem. Indeed, the uniform adoption of an indeterminate approach to choice of law in the hemisphere could well make matters worse.

On the other hand, as already noted, determinate approaches to choice of law are often criticized because they sometimes produce arbitrary and unjust results. I suppose it is possible that an inter-American instrument might be desired not for the purpose of achieving uniformity as such, but rather for the purpose of finally getting rid of the traditional *lex loci delicti* approach to choice of law that continues to prevail in some states, and thus to eliminate the arbitrary and unjust results sometimes produced by that approach. It seems quite odd, however, to promote an international instrument unifying the law of choice of law in the hemisphere for the purpose of *decreasing* the certainty and predictability in legal relations that is so conducive to international commerce. I do not mean to suggest that fairness and justice should be entirely sacrificed for the sake of certainty and predictability. The challenge is to find a middle ground – to find an approach that offers a significant degree of certainty and predictability while providing tolerably fair and just results overall. This has been the aim of United States choice of law scholars for the past decades. After the pendulum swung from one extreme to the other, scholars (and some courts) have been seeking a middle ground, but without discernable success. Most likely, a choice will ultimately have to be made about whether the primary concern in choice of law should be promoting certainty or predictability in legal relations or enabling courts to achieve fairness and justice in individual cases.[11] In any event, the question for the Committee is whether a satisfactory middle ground is more likely

[11] I should emphasize that the sort of justice to which I am referring here is not substantive justice. In other words, I am not suggesting that judges should be free to apply whatever substantive rules they believe are most fair and just. Rather, I am referring to what is known as "conflicts justice," that is, fairness with respect to which of various contending laws should govern a particular dispute. See generally JUENGER, Friedrich K. CHOICE OF LAW AND MULTISTATE JUSTICE (1993).

to be found at the inter-American level in a general convention or in a series of more specific conventions. My tentative view is that the middle ground will be achieved through somewhat different approaches in the disparate categories of non-contractual obligations and that, accordingly, narrower instruments will be more likely to achieve that goal.

B. Past and Ongoing Efforts of Other Organizations

The next task is to consider the past and ongoing efforts of global and regional organizations that have undertaken attempts to unify choice of law for non-contractual disputes. If past efforts of such organizations have failed, the reasons for their failure may prove instructive. If past efforts of global organizations have succeeded in producing instruments in this field, but states of the hemisphere have not become parties, it is necessary to determine the reasons for such lack of ratification. It may be the case that the solution to the problem is simply to urge the ratification of existing global instruments. If the states of the hemisphere have failed to ratify because they regard the instruments as unsatisfactory, it is important to know why they have been dissatisfied. If past efforts of regional organizations have succeeded, the resulting instruments might provide a useful model for an inter-American instrument. Finally, if the efforts of global organizations are ongoing, it may be prudent to await the results of such efforts before proceeding with an effort to negotiate an inter-American instrument. Many of the hemisphere's states are Members of such organizations and participate actively in their work. Even those who do not participate stand to benefit from the work of the global organizations, as the instruments they produce are generally open for signature by all states. Similarly, if other regional organizations are undertaking efforts on the same subject, the instruments they adopt might serve as useful models for an inter-American instrument; and their failure to reach agreement on any instrument might bode ill for the prospects of success in the Americas.

As already noted, The Hague Conference has studied the desirability of pursuing the negotiation of a convention on choice of law in the area of non-contractual liability. It concluded in 1968 that, given the broad diversity of subject-matter and legal claims encompassed within the field of non-contractual liability, a single general convention addressing choice of law in this field was infeasible. The Conference decided instead to pursue narrower conventions on choice of law for specific topics. In 1971, The Hague Conference adopted a Convention on the Law Applicable to Traffic Accidents, and in 1973, it adopted a Convention on the Law Applicable to Products Liability. Both Conventions are in force. Nineteen states are parties to the Convention on Traffic Accidents, and thirteen are parties to the Convention on Products Liability. However, none of the states of this hemisphere is a party to either of the two conventions. It is important to determine whether the reasons that led The Hague Conference to conclude that a general convention was infeasible at the global level are convincing and applicable as well at the inter-American level. It is also important to determine why the two specific conventions have not been ratified by any states of this hemisphere.

At the regional level, the European Union has sporadically attempted to codify choice of law with respect to non-contractual obligations. In the early 1970's, the European Community produced a Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. Articles 10-14 set forth rules on choice of law for non-contractual obligations, taking an approach that resembles that of the Second Restatement in the United States. The provisions of the draft convention relating

to contractual obligations were adapted into the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980. Work on a convention in relation to the law applicable to non-contractual obligations lay dormant until the Groupe Européen de Droit International Privé, an association of prominent scholars, completed a proposal for a Convention on the Law Applicable to Non-Contractual Obligations (which formed the basis for the Green Paper that became known as "Rome II"). The proposal was sent to the Secretariat General of the European Council, which set up a working group on the matter. After much delay, primarily attributable to controversies having to do with e-commerce, the European Council in May 2002 issued a second Green Paper seeking comments on a proposed Council Regulation on the Law Applicable to Non-Contractual Obligations. This new Rome II proposal leaves non-contractual choice of law in disputes relating to e-commerce to be governed by the rules of the EU's E-Commerce Directive. The comments on this proposal are due in September of this year. The European experience in attempting to unify choice of law for non-contractual obligations should be studied closely, as should the comments received on the Rome II proposal.

Subregionally, MERCOSUR has attempted to address the question of choice of law for non-contractual obligations, as discussed in the report by Dr. Villalta Vizcarra. These and other efforts should be closely scrutinized as well for what they might tell us about the prospect of reaching agreement on this matter at the inter-American level.

C. Likelihood of a Successful Negotiation at the Inter-American Level

If the efforts of other organizations have failed or are likely to fail to produce agreement on a useful instrument, the next question is: How likely is it that a successful product will be negotiated at the inter-American level? Some aspects of this question have already been mentioned. As far as a general agreement on the law applicable to non-contractual liability is concerned, are the reasons that led The Hague Conference to conclude that such an agreement was infeasible at the global level applicable as well to the regional level? Europe's experience with Rome II may provide some insight into that question. If the Europeans fail to produce agreement, despite their greater degree of economic integration, the chances that agreement will be reached in the Americas may be slim.

The question here is whether there are grounds for being optimistic that we in the Americas will succeed where others before us have failed. There may be such grounds if our legal systems were more harmonious than those of others who have tried, or if our states had a stronger desire to achieve a solution to the problem and a greater willingness to compromise to that end. Although greater research is necessary, my belief is that our legal systems with respect to choice of law are at least as diverse as those of Europe, and perhaps as diverse as the states who typically participate in the Hague Conference. Moreover, it seems likely to me that our hemisphere includes numerous powerful interest groups that could effectively thwart compromise if they wished to do so. For these reasons, I believe that agreement would be very hard to reach on a convention purporting to regulate choice of law for all non-contractual disputes.

On the other hand, there might be greater reason for optimism that agreement might be reached on an instrument unifying choice of law for a specific category of non-contractual obligation. Within a narrow category, the choice of law approaches within the hemisphere

might be more harmonious, or a solution might be available that would appeal to a broader range of interested persons.

If we conclude that a choice of law agreement might be feasible with respect to a particular category of non-contractual obligation, another question must be considered: would the problem be more easily and more satisfactorily corrected through an instrument harmonizing the substantive law on the subject within the hemisphere. As noted, a choice of law problem arises only if the substantive laws on the topic differ. Disuniformity in choice of law approaches is undesirable for the reasons already described. One way to deal with such disuniformity would be to unify choice of law approaches. Another way to deal with the problem would be to harmonize the substantive laws, thus obviating the choice of law issue. Harmonizing the substantive law relating to all categories of non-contractual obligations would of course be inconceivable. Harmonizing the substantive law in one particular category of non-contractual obligations may be possible. Harmonization of substantive law may be an even more attractive solution to the problem because it produces even more certainty and predictability in cross-border legal relations. In the United States, there has been a noticeable trend towards such harmonization, either imposed by the federal government or negotiated among the states. There has been a similar trend in the Americas. Indeed, in CIDIP-VI, the only two successful projects involved the harmonization of substantive law. Thus, before recommending the negotiation of an inter-American conflict of laws instrument on a specific category of non-contractual obligations, we should consider whether it would be better to solve the problem by harmonizing the substantive law.

III. Jurisdiction

We have also been asked to consider the desirability of embarking on the negotiation of an inter-American instrument regulating jurisdiction in non-contractual disputes. My discussion of this issue will be relatively brief.

The purpose of an instrument regulating jurisdiction will depend on whether or not it is a part of an instrument that also regulates choice of law. If it is not part of an instrument regulating choice of law, the principal significance of the jurisdictional instrument would be to regulate choice of law indirectly. As we saw, disuniformity of choice of law approaches is a problem when plaintiffs have the choice of more than one forum. In such circumstances, plaintiffs can engage in forum shopping, choosing the forum that they believe will apply the most favorable law. An instrument that limits the forums that have jurisdiction over a particular case will indirectly limit choice of law by limiting the places in which the plaintiff can choose to bring his case. Usually, choice of law will be the most important consideration for plaintiffs in choosing a forum. Thus, in the absence of an instrument regulating choice of law, the principal importance for private parties of an instrument regulating jurisdiction will be its indirect regulation of choice of law.

On the other hand, if the jurisdictional instrument includes provisions regulating choice of law, and the choice of law provisions are relatively determinate, then choice of forum will not play nearly as great a role in determining the applicable law. The point of an instrument establishing a determinate choice of law rule is to provide certainty and predictability as to the applicable law by setting forth a choice of law rule that would be applied by the courts of all states that are parties to the instrument. The result would be that the applicable law would not change depending on the plaintiff's choice of forum. The same law would be applied regardless of the state in which the suit is brought. In such circumstances, the regulation of

jurisdiction plays a far less significant role. The choice of forum will still determine choice of law with respect to some issues. For example, even when the law of another state is applicable on substantive issues, the forum will apply its own procedural rules. With one major exception, however, procedural rules will not typically be very important to the litigants. Thus, jurisdictional provisions attached to a choice of law instrument which provides a determinate choice of law rule will serve primarily to guarantee the defendant a forum that is relatively convenient.

The one exception involves certain procedural rules of the United States. As is well-known, in the United States, civil suits are usually decided by a jury. Jury trials are often very attractive to plaintiffs and very frightening to defendants. Whether the trial will be before a jury or a judge is a procedural issue as to which the forum will apply its own law regardless of whether foreign law applies to the substance. Thus, plaintiffs might want to choose a court in the Untied States, even if a foreign law would be applicable to the substance of the claim, just to get the benefit of a jury trial. Jurisdictional provisions of an instrument that also regulates choice of law may thus have great significance to the outcome of a case that involves plaintiffs who wish to sue in the United States.

If the jurisdictional provisions are attached to an instrument that regulates choice of law by establishing a highly indeterminate choice of law rule, its significance would be about the same as if the instrument did not address choice of law at all. If the applicable choice of law rule is highly indeterminate, it is impossible to tell in advance how the judge will rule. As scholars have noted, however, there is a distinct tendency for judges applying such rules to apply the law of the forum. These indeterminate approaches thus have a tendency to approximate a *lex fori* approach, under which a state's courts always apply the law of that state. (Thus, while the governing law will be known as soon as the plaintiff selects the forum, it still produces uncertainty and unpredictability before the plaintiff has chosen where to sue.) Under such circumstances, the plaintiff's choice of forum will indirectly determine the choice of law, just as it would if there were no instrument regulating choice of law.

What does this analysis tell us about the likelihood of successfully negotiating an instrument regulating jurisdiction in non-contractual disputes? It suggests that agreement on jurisdictional principles will be relatively easy if they are part of an instrument that also regulates choice of law by establishing a determinate choice of law rule (except perhaps for cases in which a jury trial is a possibility). On the other hand, if agreement on a choice of law rule proves unattainable, agreement on jurisdictional provisions is likely to be difficult as well because, under such circumstances, the jurisdictional provisions would serve as an indirect regulation of choice of law (The same would be true if the instrument included choice of law provisions adopting an indeterminate rule.)

This prediction is borne out by the ongoing attempt by the Hague Conference to negotiate a convention regulating jurisdiction and enforcement of judgments (but not choice of law). The negotiations reveal that the jurisdictional rules are being treated as de facto regulations of choice of law, and have been very divisive precisely for that reason.[12] As noted, the Hague negotiations, though technically ongoing, appear to be at an impasse. Among the most intractable disagreements have involved the provisions relating to jurisdiction over torts.

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[12] *See*, e.g. Hague Conference on Private International Law, Preliminary Document no. 17, of February 2002, *The impact of the internet on the judgements project: thoughts for the future* (submitted by Avil D. Haines for the Permanent Bureau).

These provisions have raised significant concerns insofar as they would apply to certain torts, such as those relating to e-commerce. The Hague Conference's experience attempting to negotiate a global treaty on jurisdiction and enforcement of judgments over the past decade should be studied closely for the lessons it might offer. Specifically, we should try to determine the extent to which the impasse is attributable to problems relating to non-contractual obligations, and the extent to which the impasse is likely to reproduce itself in this hemisphere. Although further study is required, my research so far has suggested that the impasse has been related to the torts provisions and that, while the principal antagonists in this regard have been the United States and Europe, the Latin American states that have participated in the negotiations have tended to agree with the Europeans. If so, the prospects of an impasse at the inter-American level appears high.

In short, the answer to the question put to us concerning the desirability of embarking on the negotiation of an instrument regulating jurisdiction in non-contractual cases is directly related to the answer we give to the question concerning the desirability of an instrument concerning choice of law in such cases. If success is unlikely to be achieved in the negotiation of an instrument on choice of law establishing a determinate rule, the prospects of successfully negotiating an instrument on jurisdiction would appear to be bleak. On the other hand, if we conclude that the negotiation of such a choice of law instrument is likely to be successful, the prospects of success in the negotiation of a jurisdictional instrument would likely be high.

IV. Other Questions

If we concluded that the negotiation of some sort of instrument is worth pursuing, other questions would have to be confronted. First, and most obviously, we would have to consider the content of such an agreement. What sort of choice of law and jurisdictional rules should it establish? As noted, in the choice of law area, a debate has raged between proponents of determinate rules that produce certainty and predictability and proponents of flexible rules that permit judges to promote their notions of justice and fairness in individual cases. The proposed instrument will ultimately have to take some position on the debate. Furthermore, as noted, an instrument may be worth pursuing only if it contains relatively determinate rules. In any event, we will come closer to an answer about the content of the relevant instrument or instruments as we seek to answer the question whether an instrument, or several narrower instruments, are worth pursuing in the first place.

Additionally, there is the question whether the instrument should take the form of a convention or, instead, a model law. In the past, private international law instruments have tended to take the form of conventions, whereas attempts to harmonize substantive law have taken the form of model laws. This, however, is not a necessary correlation. I see no reason in principle why a private international law instrument cannot take the form of a model law. Whether one or the other form is preferable will turn to a significant extent on which form is more likely to succeed. Model laws have been popular because they do not require the elaborate ratification processes that often apply to treaties. In the case of the United States, model laws may be preferable as well because of federalism concerns. As noted, choice of law has traditionally been governed by the laws of the sister states. While there is no doubt that the federal government can impose on the states a single choice of law rule to be followed in international cases, there will be considerable reluctance to do so, either by way of treaty or statute. A model law may thus be preferable because it could in theory be adopted either by the federal government or by the individual states.

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