62nd REGULAR SESSION
March 10 -21, 2003
Rio de Janeiro, Brazil

OEA/Ser.Q
CJI/doc.119/03
20 March 2003
Orginal: Spanish

CJI/doc.119/03

THE APPLICABLE LAW AND COMPETENCY OF INTERNATIONAL JURISDICTION IN RELATION TO EXTRACONTRACTUAL CIVIL LIABILITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMMITTEE CJI/RES.50 (LXI-O/02)

The Inter-American Juridical Committee, at its 62nd Regular Session (August 5-30, 2002), issued the resolution CJI/RES.50 (LXI-O/02) entitled *The applicable law and competency of international jurisdiction in relation to extracontractual civil liability*, in which some other questions were settled as follows:

> 2. To ask the rapporteurs to complete a draft report in time for consideration by the Committee at its 62nd regular session, adhering to the following parameters:
>
> a) The report should include an enumeration of the specific categories of obligations that are encompassed within the broad category of "non-contractual obligations." ...
>
> b) The report should focus primarily on the task of identifying specific areas within the broad category of extracontractual liability which might be suitable subjects for an Inter-American instrument regulating applicable law and competency of jurisdiction. Such focus is consistent with the CIDIP resolution referenced by the Permanent Council, to be treated as a Guideline, which specifically asks the Committee to "identify specific areas revealing progressive development of regulation in this field through conflict of law solutions." ...
>
> d) The report should, as far as possible, address the approaches employed by Members States to decide the applicable law and competency of international jurisdiction with respect to particular subcategories of non-contractual obligations, to the end of fulfilling the mandate to "identify specific areas revealing progressive development of regulation in this field through conflict of law solutions." ...
>
> e) The report should also consider past and present efforts of the global, regional, and subregional organizations that have sought, and in some cases continue to seek, conflict of laws solutions in this field. ...
>
> f) With respect to the particular subcategories of non-contractual obligations that the rapporteurs regard as potentially suitable for treatment in an Inter-

> American conflict of laws instrument, the report should provide options as to the form and content of such instrument. ...

Bearing in mind the aforementioned parameters in the resolution under discussion by the Inter-American Juridical Committee, this rapporteur complements her preliminary study presented at the 61st Regular Session of the Juridical Committee under the title of R*ecommendations and possible solutions proposed to the topic related to the law applicable to international jurisdictional competence with regard to extracontractual civil responsability* (CJI/doc.97/02).

Accordingly, endeavors to identify specific areas are made where progressive development is visible on this matter by conflict of law solutions, considering the efforts by global, regional and sub-regional organizations and discussion of internal state regulations of different member States.

In the preliminary reports, Extracontractual Civil Liability refers to non-conventional obligations, arising from the degree of people's free will, such as those from manufacturing goods, road accidents, those caused by environmental pollution (offshore pollution caused by hydrocarbons, damage caused by a nuclear accident, transborder pollution, among others), and electronic commerce.

It is precisely in those areas that there has been the most progressive development of the matter, for which reason they have been used as basis for writing the report herein.

The analysis herein will refer to each specific area where this progressive development of the matter has occurred, at the level of internal state regulations as well as regulations of global, regional and sub-regional organizations. Similarly the topic will be addressed on a general basis concerning the progressive development of Extracontractual Civil Liability.

II. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A SPECIFIC CATEGORY IN THE GLOBAL, REGIONAL AND SUB-REGIONAL SPHERE

1. Road accidents

Progressive development in this specific area has been made both in the inter-American sphere and in the Conferences of the Hague on Private International Law, since it is necessary to bring the laws of the States closer, harmonize and unify them by adopting common rules, in order to provide a safety framework to guarantee solutions and harmonize decisions, with clear reasonable rules, offering the desirable predictability to whoever operates the system.

In America, in this area at a bilateral level there is the Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, article 2 of which states: "Civil liability for road accidents will be regulated by the internal law of the State Party in whose territory the accident occurs. Should people domiciled in the other State Party be solely involved in or be affected by the accident, it will be ruled by the internal law of the latter". [1]

In the sub-regional sphere of MERCOSUR the 1996 **San Luis Protocol on Civil Liability Resulting from Traffic Accidents between the MERCOSUR Member States** was approved, which has advanced significantly in legislation harmonization of this area, thereby permitting a more in-depth integration process.

This Protocol provides the utility of adopting common rules in terms of the applicable law and competent jurisdiction in cases of civil liability for accidents occurring in one State Party and affecting people domiciled in another State Party.

Article 3 of this Protocol rules the Applicable Law and expresses: "Civil liability for road accidents will be ruled by the internal law of the Member State in whose territory the accident occurs."

Should the accident solely involve or affect people domiciled in another State Party, it will be regulated by the internal law of the latter". [2]

This provision is practically the same as that in article 2 of the aforementioned Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina.

The first part of both articles in said instruments refer to the guideline of *lex loci delicti commissi* when it states that, "civil liability for road accidents will be ruled by the internal law of the State Party in whose territory the accident occurs, thereby stating as a general rule, the traditional or classic connection or the local law where the offense has been committed, but at the same time mentions as an applicable law the "Law of domicile" in the event of affecting solely people domiciled in another State Party, when in the second part of both provisions such instruments state: "should the accident involve or affect only people domiciled in another State Party, it will be regulated by the internal law of the latter", includes thereby a flexible criterion.

Article 6 of the San Luis Protocol states that the law applicable to Extracontractual Civil Liability will especially determine, among other aspects:

a) conditions and extent of liability;

b) causes of exoneration, and all demarcation of liability;

c) existence and nature of damages that may have redress;

d) kinds and extent of redress;

---

[1] Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina.

[2] San Luis Protocol on Civil Liability resulting from Traffic Accidents among the MERCOSUR States Parties.

e) the vehicle owner's liability for acts or deeds of his or her dependents, subordinates or any other legal user;

f) statutes of limitation and forfeiture.

The San Luis Protocol also introduces "flexible criteria" to establish competent jurisdiction, although its article 7 provides that:

To undertake actions contained in this Protocol the courts of the State Party will be competent, at the plaintiff's choice:

a) site of accident;

b) of domicile of the defendant, and

c) of the domicile of the plaintiff.

Two conventions have been approved in the sphere of **The Hague Conference on Private International Law** that regulate the problem of the law applicable to the Extracontractual Civil Liability, by adopting solutions for specific cases and not one general regulation or solution that might include all possible premises of the law applicable to the Contractual Civil Liability, since the primary purpose of The Hague Conference regarding those two Conventions was precisely to provide solutions that were accepted without any further problem for its Member States and international community.

The reason for the former was the 1967 DUTOIT Memorandum, drafted by the then Secretary of the Permanent Office of The Hague Conference, which provided that, given the diversity in this matter (Extracontractual Civil Liability) it was convenient that specific themes and not a general regulation be discussed.

Given this background, in **1971 the Convention on the Law Applicable to Traffic Accidents** was signed at The Hague Conference. This Convention generally rules on the application of the internal law of the State in whose territory the accident has occurred (article 3 of the Convention) and mentions as an exception the application of the law of the State in which the vehicle is registered, although the accident involved only one vehicle registered in a different State to the one in whose territory the accident occurred (article 4 of the Convention). This provision will be applicable to determining the liability of the driver, holder, owner, or anyone else who is entitled to the vehicle, regardless of his or her normal home address. Similarly, it will apply to a victim who is traveling as a passenger, if his or her home address is in a State other than that in whose territory the accident had occurred, and with regard to a victim who is at the accident site outside the vehicle, if his home address is in the State where the vehicle is registered.

If several victims are involved, the applicable law will be decided separately with regard to each of them (Article 4 of the Convention).

When several vehicles are involved in the accident, the internal Law of the State in which the vehicle is registered will apply if all vehicles are registered in the same State (Article 4 therein).

The applicable law pursuant to articles 3 and 4 also stipulates liability with regard to the victims referring to the goods carried in the vehicle, whether they belong to the passenger or not or are merely entrusted to the latter (Article 5 of the Convention).

Liability for damages to goods outside the vehicle and the liability in relation to the vehicle as such is regulated by the law of the State where the accident occurred (Article 5 of the Convention).

In the case of unregistered vehicles or those registered in several States, the internal law of the State where they are usually parked will substitute that of the State of registration (Article 6 of the Convention).

The Convention applies to all areas that can potentially be related to road accidents.

Pursuant to article 8 of the Convention, the law that is eventually applicable will rule to determine:

1) the basis and extend of liability;

2) the grounds for exemption from liability, any limitation of liability, and any division liability;

3) the existence and kinds of injury or damage which may have to be compensated;

4) the kinds and extent of damages;

5) the question whether a right to damages may be assigned or inherited;

6) the persons who have suffered damage and who may claim damages in their own right;

7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;

8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Concerning insurance, it regulates the victim's right to claim directly from the insurance company of the author of the damage, whenever the applicable law permits such an action and the law regulating the insurance contract also permits it (Article 9 of the Convention).

The solutions of this Convention are conceived within the Classic Conflicting Method of Private International Law but, in turn, makes serious attempts to make the *lex loci delicti commissi* more flexible, by using other "multiple connecting points".

The Conventions listed above have permitted progressive development in this specific area of "Road Accidents" and have a practical use which indicates that an Inter-American Convention can be drafted on this subject.

2. Liability for products

Progressive development in this area has occurred mainly in the sphere of The Hague Conference on Private International Law, where the 1973 **Convention on the Law Applicable to Products Liability** was signed on 2 October 1973.

In this Convention it is usual that manufacturers of goods are in different countries from their consumers, that is, that the agents and victims are in different State territories.

The Agreement is conceived to regulate both the applicable law and need for this law to respond to real links with the concrete case.

This Agreement regulates the fact that a product, due to the sharp rise in international trade, can be manufactured, sold, consumed and cause damage or loss in different States.

For this reason, and in view that there are no standard rules for regulating the civil liability of manufacturers when their goods cause damages, The Hague Conference on Private International Law harmoniously and uniformly regulates the solutions of the law applicable to some of these situations, taking into account their international scope and especially the few precedents of regulation, judicial, jurisprudence and doctrine existing on the theme.

This Convention was enforced on 1 October 1977 and applies to all cases that are outside the contractual scope.

Article 3 of the Convention expressly states who can be defendants, as follows:

1) manufacturers of a finished product or of a component part;

2) producers of natural product;

3) suppliers of a product;

4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

Articles 4, 5 and 6 of the Convention establish the applicable law. It is worth mentioning that it does not only follow the solution of *lex delicti commissi*; on the contrary, the application of this rule depends on other "connecting factors", since, when following the rule of the *Proper Law*, the Convention requires at least two material contacts in the same State, to consider which law is appropriate and which has the most significant connection, thereby considering the wishes of the victim or plaintiff, permitting them to choose between the internal law of the State wherein the potentially liable damaging agent is based and, the internal law of the State where the damages or losses occurred. [3]

The prime importance of this Convention is that it provides progressive approximation between the Anglo-Saxon system (common law) and Continental requirement (civil law), from a coded standard formulation, since it resorts to the technique of "multiple connecting points" or "connection group". This is, furthering flexibility of the traditional rule of conflict through multiple connecting points, applying the order closest to each situation, such as, for example, the law of common domicile of those involved and the law chosen by the Parties, among others.

Article 4 of the Agreement states that the applicable law will be the internal law of the State in whose territory the damage occurred, whenever this State is also:

---

[3] GUERRA,Víctor Hugo. *La responsabilidad civil extracontractual por productos en el derecho internacional privado,* 2002.

a) the place of the habitual residence of the person directly suffering damage, or

b) the principal place of business of the person claimed to be liable, or

c) the place where the product was acquired by the person directly suffering damage.

Pursuant to article 5 of the Agreement, the internal law of the State of the home address of the directly injured party will also be an applicable law, whenever the State in question is also:

a) the principal place of business of the person claimed to be liable, or

b) the place where the product was acquired by the person directly suffering damage.

Should the internal law mentioned in those articles 4 and 5 not be applicable, then the internal law of the State will be applicable, site of the main establishment of the person to whom the liability is attributed, unless the plaintiff bases his or her claim on the internal right of the State in whose territory the damage occurred (Article 6 of the Agreement).

Neither the internal law of the State in whose territory the damage occurred nor the internal law of the State where the directly injured party is resident will be applicable, if the person who is attributed liability demonstrates that he could not reasonably foresee that the product or his own products of the same kind were sold in the State in question (Article 7 of the Agreement)

Article 8 of the Convention states that the applicable law will determine:

1) the basis and extent of liability;

2) the grounds for exemption from liability, any limitation of liability and any division of liability;

3) the kinds of damage for which compensation may be due;

4) the form of compensation and its extent;

5) the question whether a right to damages may be assigned or inherited;

6) the persons who may claim damages in their own right;

7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee;

8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;

9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

As mentioned above the Agreement considers various points of contract or connection on an accumulated basis, in support of the method of grouping connections, due to looking for the most effective location of liability (Articles 4 and 5 of the Agreement).

Article 6 establishes an election in favor of the victim or injured party, whom it practically tends to benefit.

Article 7 addresses balancing the interests at stake by protecting the person of the defendant against application of a law of unreasonable predictability, when it proves that it cannot reasonably foresee that the product would be put on sale in the State in question.

REGIONAL SOLUTIONS, EUROPEAN SYSTEM

The European experience on this subject is interesting, since the same legal system rules the different legal codes of its members. So there is the **Convention relating to the extracontractual liability for defective goods with regard to personal injury and death**, known as the 1977 "Strasbourg Convention", which was the result of the work done by the Committee of Juridical Cooperation of the Council of Europe.

The Convention excludes from its field of application the problems arising from contractual liability and, consequently, establishes solutions for the extracontractual aspects, such as for example, basing liability of the manufacturers and goods in the theory of Objective Liability, framed in certain special considerations, such as restricting the time to start proceedings, foresee compensation solely in cases of personal injury and death, among others.

This specific area is also ruled by the 1985 **European Guideline relating to Goods Liability**. The European guidelines from their Community Agencies are an integral part of their regulations and addresses community solutions that leave enough room for internal regulation, under the particular circumstances of each State.

The purpose of this 1985 Guideline is to establish special juridical protection for the consumers and users in circumstances that the current scale economies can eventually produce.

This 1985 guideline on the subject of Extracontractual Civil Goods Liability states the following basic rules:

- the term producer includes: the manufacturer of the end or finished product; the producer of any material in a natural, untreated or crude state and anyone else who puts his name, trademark or another distinctive sign on the product;
- liability is based on the theory of objective liability;
- damages and losses that can be compensated include death, personal injury and destruction of the property or any other damage that the defective product has caused;
- injunctions (exceptions) that the defendant can oppose,
- rules relating to the statute of limitation of the actions.

The Guideline also states that: "the defect of the product should not be determined by the reference of its aptitude for use, but for lack of safety that the product ceases to provide the general public".

This Guideline was modified in 1995 and 1999, reaffirming in both cases that the Theory of Objective Liability is the foundation for cases of Extracontractual Civil Liability.

NORTH AMERICAN LEGAL SYSTEM

Extracontractual Liability for defective goods is referred to liability of compensation that the manufacturers and salespersons have, generally, with regard to the buyers, users and even spectators, for damages and losses that their defective goods may cause them.

In 1963 in this System the theory of Objective Liability was adopted in this System, as well as the "Institution of *dépéçage* that permits that a certain aspect of the case can be ruled by other rules of conflict.

Solutions of Private International Law in terms of *torts* (Extracontractual Civil Liability), in order to determine the applicable law may focus on two stages:

The first, based on the traditional scheme of solutions, consisting of the application of the rule *lex loci delicti*, by which the North American legal operator determined the applicable law by using the classic conflicting method, without taking into account whether the result achieved was just or unjust.

The second is the current stage and is based on the criticism against the inflexible solutions of the *lex loci delicti*, which encourages the judges to determine the law applicable to the concrete case in a more flexible manner, bearing in mind the criterion of the more significant connection to the situation in question, causing the application of the law of domicile and not only the law of the place where the deed occurred, in other words, putting to use criteria of connection that are more directly related and which also take political tendencies into account. [4]

So much so that the modern North American concepts on determining the applicable law include solutions based on "the more significant relation", "the analysis of government interests", "the best law", "the legislative policy that is more affected", or a solution that combines two or more of these criteria, for which the legal operator studies each concrete case and applies to each problem the law of the State that he considers has "the most significant relation" in order to set a balance of the parties regarding the determination of the applicable law, due to which the application of the traditional criteria can lead to an unjust and abnormal outcome.

The North American Doctrine most authorized combines three different methodologies:

a) the principle of proximity;

b) the unilateral intention to determine the scope of material rules based on state interests; and

c) the teleological attempt to reach desirable results in solving problems caused by outside traffic.

Present-day doctrine and jurisprudence has expressed that the "traditional or classic" rules or regulations of conflict that have unbending mechanical application of the conflicting

[4] FELDSTEIN DE CÁRDENAS, Sara Lídia. *Derecho internacional privado. Parte Especial*. Buenos Aires: Universidad Buenos Aires, 2000.

regulations do not adapt to the current concept of extracontractual civil liability, while the judges must analyze the circumstances of each case, as well as the content of the material regulations of competency, attenuating the inflexibility in applying the chosen criterion of connection.

There are, in this area, conditions to draft an Inter-American Convention on Liability for Goods.

3. Electronic commerce

The determination of Applicable Law and Competent Jurisdiction in terms of electronic commerce has been a complete regulation of the contractual obligations and on everything in the extracontractual obligations.

The difficulty in locating a concrete offense in the virtual world of the Internet provides that in the sphere of extracontractual obligations we find a major flaw in a uniform legal regime of compared legislation and, furthermore, the possibility that the damage is produced in different countries, which means that it is difficult to apply the classic or traditional criterion of *lex loci delicti commissi*.

Failing to find a global solution for this theme, the current trend is to continue looking for specific solutions in certain sectors.

In this sense, the judges should analyze the content of the material regulations of competency and bear in mind the most significant connection, the most directly and strongly interested party with the situation under discussion.

4. Environmental pollution

This area of Extracontractual Civil Liability has also been a theme for study and analysis by the **Conference of The Hague on Private International Law**, where it still remains prevailing on the Conference Agenda, so that in June 1992 the Permanent Office sent a note to the Commission of General Affairs and Policy of the Conference wherein there is a reference to the "Law Applicable to the Contractual Civil Liability for Damages Caused to the Environment".

In 1995, this Commission recommended the Conference of The Hague at its 18th Session to take into account the inclusion of this theme as third priority for the Agenda of the 19th Regular Session of October 2000, whenever its overrules the objections of the countries that maintain that it is a complete scenario relating to highly sensitive political questions, in which there are numerous International Agreements.

The Conference was preceded by the **Colloquy of Osnabrück** in April 1994, organized by the Institute of Comparative International Law of the University of Osnabrück and concentrated on the title "Towards a Convention on the Aspects of Private International Law for Environmental Degradation".

Discussions revolved around all fundamental aspects of that Conference and particularly on the "European Convention on Civil Liability for Damages Resulting from Activities

Hazardous to the Environment", in which its relationship with Public International Law and Private International Law was analyzed in terms of Extracontractual Civil Liability, contained in the ten points of Osnabrück.

In those discussions complaints were also discussed arising from civil liability for damages caused by polluting actions when they are in territories of more than on State and wherever it is necessary to determine applicable law and jurisdiction.

The Colloquy of Osnabrück, concerning the determination of the Applicable Law, expressed special consideration for the situation of the victim who should have the option of choosing between the law of the place of damage and the law of the place of the activity that caused it, or the law of the place of the act that caused the damage.

Moreover, it has been a theme of a study by the **Institute of International Law**, which in 1969 adopted in a general framework a resolution relating to the determinati9on of the law applicable to extracontractual obligations, referring specially to the rule of *lex loci delicti*.

The resolution did not give a unified solution in terms of Private International Law; the Institute, on the contrary, stated "that given the unequal legislative development of the different countries in the world, no circumstances were given to formulate a draft or final solution on the matter, adopting the basic principle of application of the place where the offense occurred (*lex loci delicti*)".

The resolution also provided to apply a system of exceptions to the general rule of *lex loci delicti*, such as in the application of the usual home address of the individual and the main business establishment of the company, whichever the case.

In 1997 the Institute prepared a series of proposals for "International Liability and Civil Liability for environmental damages ruled by International Law", pointing out that International Liability corresponds to the States and Civil Liability to the private operators.

Concerning the former, we can maintain that environmental pollution, particularly transborder, has a relationship with Private International Law in a specific sector and is limited in the determination of the Applicable Law and Competent Jurisdiction in relation to claims from private individuals.

Private individuals do not present disputes for environmental damage, a question that occupies the States and international organizations, unless for damages to their persons or belongings or property, since they are in the sphere of Extracontractual Civil Liability and not in that of International Liability that is the duty of the States.

In relation to transborder pollution, the regulation of Extracontractual Civil Liability corresponds to Private International Law, with regard to the conflict of laws and jurisdiction.

In this vein, the Conference of the United Nations on the Environment and Development, signed in Rio de Janeiro, Brazil, in 1992 and known as the "The Rio Summit Conference", establishes in principle 3 of its Declaration the duty of the States to develop their internal legislation in the are of Liability and Compensation for victims of pollution, as well

as the obligation to cooperate in an expeditious way to draft new international laws in both sectors. [5]

Thus being differentiated, International Liability and Extracontractual Civil Liability when identifying the safeguarded legal asset, so that the environmental protection and preservation corresponds to Public International Law (International Liability of the States), while compensation for the victims corresponds to Private International Law, when damage is caused by private operators (Extracontractual Civil Liability).

Transborder environmental pollution concerns Private International Law, in the sphere of Extracontractual Civil Liability linked to the claims of private individuals, since the obligation to pay for damages is to protect the private individuals against the hazards that the modern industrial society based on a globalized economy entails, which, in conjunction with the good that it has, introduces in turn highly dangerous industrial goods and procedures, able to cause major accidents. Hence, the legal systems must not be isolated nor lag behind this modern technology, which gives rise to unlawful acts, using 21st century techniques which cannot be solved using 19th century legal solutions.

The effects of environmental damages are different from traffic accidents and goods liability, due to the losses that they cause, transcending the damages to people and their property, since they project major consequences in the world economy, even if this kind of liability in general is accidental.

The Conference of The Hague on Private International Law showed that, in fact, there is no precedent that some country has determined the Law Applicable to the Extracontractual Civil Liability for Environmental Damages, as a Specific Category.[6]

This concern was included in the Agenda of both the Conference of The Hague and the Inter-American Specialized Conference on Private International Law (CIDIP). In the Conference of The Hague, as mentioned above, the theme on the "Applicable Law in terms of Liability for Environmental Damage" was raised and, in the sphere of CIDIP, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP V), March 1994, the instance of the Uruguayan Delegation was included in the theme 4 (relating to other subjects) "the International Civil Liability for Transborder Pollution", and, accordingly, in resolution no. 8/94 of said Conference, it was recommended to the General Assembly of the Organization of American States (O.E.A.), include in the CIDIP VI Agenda the theme "International Civil Liability for Transborder Pollution, Aspects of Private International Law".

In this sense, the Delegation of Uruguay presented the document for the Meeting of Government Experts, **Bases for an Inter-American Convention on Applicable Law and Competent International Jurisdiction in case of Civil Liability for Transborder Pollution**, which regulates the Private International Law's own questions such as the Applicable Law and Competent Jurisdiction, being strictly restricted to relations of a private nature, excluding therefore liability of the States. [7]

---

5 Conflict of Laws in terms of Extracontractual Liability, with emphasis on the theme of competent jurisdiction and Applicable Laws regarding International Civil Liability for Transborder Pollution. Presented by the Delegation of the Eastern Republic of Uruguay, February 2000.

6 Minutes and documents of Conference of The Hague.

7 Afore mentioned work of the Delegation of the Eastern Republic of Uruguay.

Concerning jurisdiction, if the plaintiff is able to choose between the forum of the State in which the deed giving origin to the pollution occurred, that of the State in which occurred the damages that are subject of the complaint or that of the State where the plaintiff or defendant is domiciled, has normal home address or business establishment (article 4 of the preliminary draft Bases)

With regard to Applicable Law, a multiple connection criterion is adopted since the plaintiff (injured party or victim) is entitled to choose between the law of the State where the event causing the pollution occurred, the law of the State where the claimed damages were caused or the law of the State where the plaintiff is domiciled or has his usual home address or business establishment (Article 5 of the preliminary draft Bases)

This document was presented by the Delegation of Uruguay to the Meeting of Government Experts in preparation for the Sixth Inter-American Specialized Conference on Private International Law, held in Washington, D.C. from 14 to 18 February 2000.

In this area there already are Draft Bases for preparing an Inter-American Convention in this way, which could include the comments from the States.

III. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A GENERAL CATEGORY IN THE GLOBAL, REGIONAL AND SUB-REGIONAL FRAMEWORK

The 1889 and 1940 Treaties of Montevideo of International Civil Law, in the sub-regional framework, stated in articles 38 and 43, respectively: "that the obligations arising without a Convention are ruled by the law of the place where the lawful or unlawful act is performed from which it derives" (article 38, 1889 Treaty), adding from article 43 of the 1940 Treaty the following: "and, in its case, under the law ruling the legal relations to which it responds", thereby adopting the criterion of *lex loci delicti* or the law of the place where the unlawful act occurred, or the law of the place where the loss generating act arose.

The Code of Private International Law or 1928 Bustamante Code in the regional sphere regulates the obligations arising without Convention (extracontractual obligations) as one general category and in the sub-regional framework, in its articles 167 and 168, that in their order provide that: "Obligations arising from crimes or offenses are under the same law as the crime or offense from which they derive" (article 167) and "Obligations deriving from acts or omissions that intervene blame or negligence not punishable by the law of the place where the negligence or blame causing them occurred" (article 168), by adopting from this framework the criterion of the classic or traditional connection of *lex loci delicti commissi*.

In the **European Union, the Extracontractual Civil Liability for lack of global solutions has also been regulated generally in this regional framework in article 215 line 2 of the Constitutional Treaty of the European Economic Community**, which states: "In terms of extracontractual liability, the Community should pay for damages caused by its institutions or agents, when exercising its functions, pursuant to the general principles common to the rights of the member States".

In 1972 in the sphere of the European Economic Community was presented the **Draft Convention of the European Economic Community relating to the Law Applicable to the Contractual and Extracontractual Obligations**, to be known later as the **Convention of Rome**.

This draft was prepared by a Working Group appointed by the European Community Commission, directed to unifying the rules relating to the determination of the applicable law in terms of contractual and extracontractual obligations.

This draft did not, at that time, satisfy the extracontractual solutions and was only approved for contractual solutions (1980), otherwise it was argued that to regulate extracontractual solutions it meant invading the very functions of the Conference of The Hague.

In 1998 amidst the European Union Council, the European Group of Private International Law presented a new Draft Convention on the Law Applicable to Extracontractual Obligations, known as "Rome II".

The general solution in this new draft is to discard the application of *lex loci delicti commissi* as a general rule, taking as a factor of connection that of the "closest bonds" or "significant connection", thus being based on factors such as home address and the place where the damages and losses occur or originate.

Accordingly, that "Rome II" foresees as a general principle "the application of the law that presents the closest bonds with the obligation deriving from the offensive act".

The following assumptions are adopted in said Convention:

a) General of maximum binding, determining as a point of connection the country of normal residence of the author of the damage and victim; or the country where the causal fact and damage occur;

b) Special, determining as a point of connection the normal residence of the victim as a place of expressing the damage.

In this sense, the crisis and problem raising the rule of *lex loci delicti commissi* must be considered in Private International Law, which is why it is convenient to elect the law that safeguards **the most significant relationship** with the situation under discussion.

IV. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A GENERAL CATEGORY IN THE INTERNAL LEGISLATION OF THE STATES

Venezuela has an internal law on Private International Law which is the **1998 Act of Venezuelan Private International Law**, which rules non-conventional obligations in two articles, one relating to unlawful acts (article 32) and the other to business administration, undue payment and unlawful enrichment (article 33), whose texts read as follows:

Article 32: Unlawful acts are ruled by the law of the place where their effects were produced. Nevertheless, the victim may demand the application of the right of the State where the generating cause of the damage was produced.

Article 33: Business administration, undue payment and unlawful enrichment is ruled by the law of the place in which the original act of the obligation begins.

In this sense, the regulation of the unlawful act includes those situations implying obligations determined by acts or omissions that, without affecting a pre-existing relationship, cause subsequent damages.

The Venezuelan law sets the unlawful act in the "place where the effects of the act were produced", although the victim is entitled to choose to apply the law of the "place where the generating cause of the damage was produced", pursuant to the current trend of Private International Law in favor of reimbursement for damages.

The determination of the Applicable Law in terms of Extracontractual Civil Liability, in Venezuela is regulated by the Bustamante Code and the 1998 Act of Private International Law.

Italy also has a special law on this matter and article 62 of this **1995 Italian Act on Private International Law** states:

Liability for an unlawful act is ruled by the law of the State in which the event occurs.

However, the victim can ask to apply the law of the State in which the damage occurred.

Chapter X of this Act regulates "Non-contractual Obligations" among which are the liability for the unlawful act and extracontractual liability for damages of products.

In the Italian Act, the "Liability for an Unlawful Act" is ruled by the law of the State in which the event occurs, while the victim may ask to apply the law of the State where the act that causes the damage occurs, and if the unlawful act involves solely nationals of a State domiciled or resident in it, the law of that State applies; and, the "Liability for damages of products", is regulated at the choice of the injured party or victim of the damage.

The **European Commission** in terms of Civil Legal Cooperation, has drawn up a "Preliminary draft of the Council's proposal to rule on the Law Applicable to the Extracontractual Obligations", which was open for consultation by the interested Parties in 2002.

The application scope of this Preliminary Draft Regulation will be in situations that imply a conflict of laws for the Extracontractual Obligations (Article 1)

Article 2 regulates the universal character of the law.

With regard to the Extracontractual Obligations deriving from a crime, it regulates goods liability, unfair trade competition and practices, slander and environmental degradation.

In terms of Liability, the Preliminary Draft Regulation states that it should contain:

- The basis, conditions and scope of the liability;
- Causes of exoneration, as well as all restriction and sharing of liability;
- Existence and nature of damages for compensation;
- Within the restrictions of the powers attributed to the court by its procedural law, measures that the judge may adopt to guarantee prevention, cessation and compensation for damage;
- Assessment of the damage to the extent that it is regulated by legal regulations;
- Transferability of the right to compensation;
- People entitled to compensation for personal injury;
- Liability for third party acts,
- Statute of limitation and forfeiture based on the expiry of a deadline, including the beginning, interruption and suspension of deadlines. (Article 9 of preliminary draft).

The preliminary draft also regulates "unlawful enrichment", which will be ruled by the law of the country in which the enrichment has been made, and the "business administration", which will be ruled by the law of the country where administration has been performed.

Should this Regulation be approved, it will be mandatory in all its elements and directly applicable in each Member State pursuant to the Constitution Treaty of the European Community.

V. POSSIBILITY OF DRAFTING AN INTER-AMERICAN INTERNATIONAL INSTRUMENT ON THE MATTER

The report herein has identified some of the specific areas within the broad category of "Extracontractual Obligations", in which there has been progressive development of the regulations on this matter through conflict of law solutions, considering past and present efforts of the global, regional and sub-regional organizations that have endeavored or continue to endeavor to find conflict of law solutions in this field, some already having solutions by signing international conventions on certain specific areas, as those mentioned herein.

In this sense, there are conditions for an Instrument to be adopted in the Inter-American System that regulates the extracontractual obligations, whether through a General Convention (as suggested by this rapporteur in her report CJI/doc.97/02, *Proposed recommendations and possible solutions for the theme relating to the Applicable Law and competency of international jurisdiction with respect to the Extracontractual Civil Liability,* in which its point 5 included the consideration of an "International Instrument on Applicable Law and Internationally Competent Jurisdiction in terms of Extracontractual Civil Liability"), or by means of Specific Conventions regulating the specific categories on the matter.

This inter-American Instrument regulating the extracontractual obligations must find solutions common to the common law and civil law systems, by which the coding is by no means incomplete, and should contain the general institutions of Private International Law, find a balance of the Parties regarding the determination of the applicable law, and look for flexibility and security therein.

The instrument must be closely restricted to private relations that cause Extracontractual Civil Liability, excluding International Liability of the State and, since conflict of laws is a theme inherent to Private International Law, the instrument must solve by determining the Applicable Law and Competent Jurisdiction, concerning the claims of private individuals.

It is convenient for the instrument to regulate Objective Civil Liability, which imposes on the damaging factor regardless of its blame, being enough to place others at risk for there to be liability.

Consequently, the Instrument to be drafted requires inter-American solutions of Private International Law, that is, international solutions coded especially for this Continent. In this sense, there is a positive trend towards more flexible connecting factors in both common and civil law, which determine the Applicable Law through "closer bonds", because of the classic or traditional criterion of a solution based on *lex loci delicti commissi*. If facing a series of drawbacks caused by their practical application, such as, for example, when the place where the damaging act occurs far from forming a "significant bond" particularly, is a circumstantial element or, when the act or omission that causes civil liability is spread over the territory of several States, it is appropriate to choose the law that maintains "the most significant relationship" with the problem, as well as adopt multiple connections offering alternatives for the victim or injured party to choose the Applicable Law.

Consequently, the rapporteur herein considers that it is feasible to regulate Extracontractual Civil Liability by adopting a general convention or specific conventions, but there has been a certain tendency to regulate such liability more specifically, as mentioned herein. Nevertheless, serious efforts have been made to regulate a general convention at the Conference of The Hague on Private International Law, in the proposed "European Agreement on the 1998 law applicable to the extracontractual obligations or Rome Convention II", and at the Inter-American Specialized Conference on Private International Law (CIDIP), at which the Delegation of Uruguay presented to the VI Conference in February 2002 the Draft Inter-American Convention on Applicable Law and Internationally Competent Jurisdiction in terms of Extracontractual Liability.

However, the absence of these global solutions has caused the current trend to continue seeking specific solutions in certain sectors or categories, with precedents such as the Conference of The Hague on Private International Law involving two Conventions concerning: 1971 Convention on the Law to Traffic Accidents and 1973 Convention on the Law Applicable to Products Liability; and, within the MERCOSUR there is the San Luis Protocol in terms of emerging civil liability for road accidents between the States Parties of MERCOSUR.

Consequently, the tendency to continue regulating Extracontractual Civil Liability on a specific basis or by certain areas is evident in the scope of Private International Law. Its proof lies in the agendas of the International Conferences on Private International Law, such as in the Conferences of The Hague and CIDIP, which in turn implies jurisprudence development.

The solutions for all these problems caused by modern media cannot be solved using archaic procedures, that is, that the solutions cannot be those developed in the 19th century of the major codes, nor solutions given in the 1930s of the 20th century by representatives of the North American methodological revolution. The solution should rather seek an outcome based on both processes, in which the juridical operator must work closely with the parties, without casting aside their cultural, economic, political and social context, in which there must be a balance between the interests and wishes of the parties in choosing the Applicable Law.

As a result of the above, we consider that the best way to approach the theme of Extracontractual Civil Liability would be through an international convention that would rule it, either in a general way or in specific areas, where progressive development of the matter is evident. In this sense, endeavors could be made to find inter-American solutions especially in the fields of road accidents, goods liability or transborder pollution, taking into account the efforts made in the global, regional and sub-regional framework, a Convention that should be maintained in the form and content referred to herein.

Drawing up a Convention whether general or specific on this matter would be a challenge to the Inter-American System, which is necessary to be able to approximate, harmonize and unify the laws of the States by adopting common rules that permit a secure framework to guarantee their solutions and to provide the desired predictability to whoever operates in the System.

REFERENCES

Accidentes de Circulación por Carretera. In: Actas y documentos de la Undécima Sesión de la Conferencia de La Haya de Derecho Internacional Privado, t. III.

AGUAD, Alejandra. *Responsabilidad civil extracontractual: derecho de daños*. (Profesora de Derecho Civil, Facultad de Derecho, Universidad Diego Portales)

Anteproyecto de Propuesta de Reglamento del Consejo sobre la Ley Aplicable a las Obligaciones Extracontractuales.

BOGGIANO, Antonio. *Curso de Derecho Internacional Privado.* Argentina, 1993.

CIDIP-VI/doc.17/02. *Exposición de Motivos del Proyecto de Convención Interamericana sobre Ley Aplicable y Jurisdicción Internacionalmente Competente en Materia de Responsabilidad Civil Extracontractual* (presentado por la Delegación de Uruguay, 4 de febrero de 2002).

Código de Derecho Internacional Privado de 1928, "Código Bustamante".

Convención de Roma relativa a la Ley Aplicable a las Obligaciones Contractuales de 1980.

Convención relativa a la Responsabilidad Extracontractual por Productos defectuosos respecto a Lesiones Personales y Muerte, Consejo de Europa de 1977, "Convención de Estrasburgo".

Convención sobre Ley Aplicable a la Responsabilidad Derivada de los Productos de 1973, Conferencia de La Haya sobre Derecho Internacional Privado.

Convención sobre Ley Aplicable en Materia de Accidentes de Circulación por Carretera de 1971, Conferencia de La Haya sobre Derecho Internacional Privado.

Convenio de Responsabilidad Civil Emergente de Accidentes de Tránsito entre Uruguay y Argentina.

Directriz Europea, relativa a la Responsabilidad por Productos de 1985.

Documentos y resoluciones de la Sexta Conferencia Interamericana Especializada sobre Derecho Internacional Privado (CIDIP-VI)

Documentos y resoluciones del Comité Jurídico Interamericano, 61º período ordinario de sesiones del 5 al 30 de agosto de 2002.

DUNCKER BIGG, Federico. *Derecho Internacional Privado.* Santiago de Chile, 1967.

FELDSTEIN DE CÁRDENAS, Sara Lidia. *Derecho Internacional Privado, Parte Especial*. Buenos Aires: Universidad Buenos Aires, 2000.

GÁZQUEZ SERRANO, Laura. *La responsabilidad civil por productos defectuosos en el ámbito de la unión europea: derecho comunitario y de los Estados miembros.* Facultad de Derecho, Universidad de Granada.

GUERRA, Víctor Hugo. *La responsabilidad civil extracontractual por productos en el derecho internacional privado: estudio comparado*. Caracas: UCAB, Universidad Central de Venezuela, 2002.

GONZÁLEZ CAMPOS, Julio; BORRÁS, Alegría. *Recopilación de Convenciones de la Conferencia de La Haya de Derecho Internacional Privado.* Traducción al Castellano, Madrid: Marcial Pons, 1996.

HERNÁNDEZ BRETÓN, Eugenio. *El régimen de las obligaciones en el Proyecto Venezolano de Ley de Normas de Derecho Internacional Privado* (1963-1963).

Ley Venezolana de Derecho Internacional Privado de 1998.

Ley Italiana de Derecho Internacional Privado de 1995.

MONROY CABRA, Marco Gerardo. *Tratado de Derecho Internacional Privado.* Temis, 1999.

PARRA ARANGUREN, Gonzalo. *Curso general de derecho internacional privado: problemas selectos y otros estudios.* Fundación Fernando Parra Aranguren Editores, Reeditado por la Universidad Central de Venezuela, 1998.

PARRA RODRÍGUEZ, Carmen. *Los sistemas de uniformización del derecho europeo en materia de obligaciones y contratos*. Universidad de Barcelona.

PÉREZNIETO CASTRO, Leonel. *Derecho Internacional Privado.* México, 1991.

Protocolo de San Luís en materia de Responsabilidad Emergente de Accidentes de Tránsito entre los Estados Partes del MERCOSUR.

Proyecto de Convención de la Comunidad Económica Europea relativa a la Ley Aplicable a las Obligaciones Contractuales y Extracontractuales de 1972.

Responsabilidad por Productos. In: Actas y documentos de la Duodécima Sesión de la Conferencia de La Haya de Derecho Internacional Privado, t. III.

ROMERO, Fabiola. *Las personas jurídicas y las obligaciones en la ley de derecho internacional privado venezolana.* Publicaciones Jurídicas Venezolanas.

SÁNCHEZ DE BUSTAMANTE Y SIRVEN, Antonio. *Derecho Internacional Privado*. La Habana: Ed. Cultural, [s.d.]

Tratados de Derecho Civil Internacional de Montevideo de 1889 y 1940.

* * *