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APPLICABLE LAW AND COMPETENCE OF INTERNATIONAL JURISDICTION CONCERNING NON-CONTRACTUAL CIVIL LIABILITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

1. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMITTEE, CJI/RES.55 (LXII-0/03)

At its 62nd Regular Session (March 1-21, 2003), the Inter-American Juridical Committee approved Resolution CJI/RES.55 (LXII-0/03), called the "Applicable Law and Competence of International Jurisdiction concerning Non-contractual Civil Liability". Some of the topics decided therein were as follows: To ask the rapporteurs to submit a draft final report on the matter, bearing in mind the preliminary reports presented by both co-rapporteurs at the 61st and 62nd Regular Sessions of this Committee. Also to submit the points of view expressed by the Committee Members during the 62nd Regular Session, so that, due to the complexity of the matter and wide range of different forms of liability under the category of "non-contractual civil liability", it would be more convenient first to recommend the adoption of inter-American instruments that regulate jurisdiction and applicable law with regard to specific subcategories of non-contractual civil liability, and then, only later, when appropriate, to seek to adopt an inter-American instrument that regulates jurisdiction and applicable law concerning the full range of "non-contractual civil liability".

Similarly, The General Assembly of the Organization of American States (OAS), in its Thirty-third Regular Session, Santiago, Chile, in June 2003, under Resolution Agreement/res.1916 (XXXIII-0/03), requested the Inter-American Juridical Committee to proceed with the study on the theme on the "Applicable Law and Competence of International Jurisdiction concerning the Non-contractual Civil Liability", which was assigned to the Committee by the Permanent Council under its resolution CP/RES. 815 (1318/02).

Taking into account the aforementioned mandates, the rapporteur hereby presents the draft Final Report at this 63rd Regular Session of the Inter-American Juridical Committee, in order to merge with the draft final report of Dr. Carlos Manuel Vázquez, also joint rapporteur of this theme, so that the Committee can provide the Permanent Council with recommendations and possible solutions.

Consequently, the rapporteur hereby submits the following report:

2. RELEVANT ASPECTS OF THE FIRST REPORT FROM THIS RAPPORTEUR, IN ACCORDANCE WITH THE NEW MANDATE

The first report by the rapporteur hereof was presented at the 61st Regular Session of the Inter-American Juridical Committee, August 5-30, 2002, called "Proposed Recommendations and Possible Solutions to the theme on Applicable Law and Competence of International Jurisdiction concerning Non-contractual Civil Liability" (CJI/doc.97/02).

This first report described the doctrinal aspects of the theme, and a distinction was made between contractual civil (consisting of the obligation to repair damage caused by failing to comply with an obligation under contract) and non-contractual liability (those obligations not under contract, but, on the contrary, outside an individual's freewill. In other words, it arises from obligations beyond the scope of an agreement, and may originate from various sources: Quasi-contractual, criminal, quasi-criminal and legal source). This indicates that the latter (non-contractual) should be considered in the scope of Private International Law, since the victims are private individuals. The report also stated that the subject was fairly complex, due to the multiple connecting points that it presents.

This report, when discussing the topic of "Applicable Law" in the obligations arising without an agreement or non-contractual, resorted to the traditional or classic criteria (*lex fori, lex loci delicti commissi, lex domicilii)* and current settlements (most significant connection, multiple connection, or group of connections, more flexible methodologies, North American jurisprudence). It set out the pros and cons of each in their application, as well as corresponding criticisms of the authors of Private International Law, in both their individual and collective works.

Furthermore, an allusion was made to the fact that, in the framework of the "Conference of The Hague on Private International Law" to determine the Applicable Law in Non-contractual Civil Liability, it had resorted to the points technique of "multiple connection" or "group of connections", in both the 1971 Agreement on the Applicable Law concerning Road Transportation, and the 1973 Agreement on the Law Applicable to Liability for Goods.

Similarly, it was established that, in view of the traditional criteria with rigid connection points, "North American Jurisprudence" has been one of the most innovative in pointing out the conflicting regulations in cases of Non-contractual Civil Liability, on everything concerning road accidents, where the application of the criterion of "*lex loci delicti commissi*" has been substituted by the criterion of "most significant connection" to the situation in question.

The most authorized North American doctrine contains three different methodologies:

a) the principle of proximity;

b) the unilateralist aim to determine the scope of material regulations based on state interests, and

c) the teleological aim to achieve desirable results in solving the problems caused by foreign traffic.

The "Center of gravity" doctrine is thus adopted, tending to adopt the law of the place that has a more significant relationship with the subject under litigation, since adopting traditional criteria may lead to unfair or abnormal results. The Anglo-Americans have called this solution The Proper Law of the Tort.

Moreover, it was mentioned that currently authors on this topic of Non-contractual Civil Liability generally establish more flexible or moderate criteria of connection, adopting the connection group technique.

Thus establishing that, in terms of applicable laws, the "classic criteria", as strictly applied and sole connections, are very often insufficient and inappropriate. It is therefore necessary to use classic regulations in a more moderate manner, that is, adopting a more flexible methodology, and incorporating alternatives

for settlement, from which the court should elect, not in an absolutely discretional form but based on alternative criteria clearly established by the legislator previously. This permits the court to act reasonably and adapt the general rule to the requirements of fundamental justice of the particular case, thereby making a more significant connection with the situation in question.

Reference is made in the report in question to authors Pierre Bourel, Juenger, Alfonsín, Uzal, Boggiano, Herbert, for example; to different laws, such as the 1978 Austrian Federal Law, 1966 Portuguese Civil Code, 1995 Law of Italian Private International Law, 1998 Law of Venezuelan Private International Law, Swiss Federal Law and Law of Quebec; at a level of international forums on the matter, reference was made to the Conference of The Hague on Private International Law, to the Inter-American Specialized Conference on Private International Law (CIDIP), and Institute of International Law; in relation to the integrated areas or integration systems, referring to the treaties of the European Union and San Luis Protocol in the MERCOSUR framework (MERCOSUR/CMC.doc.1/96).

Mention was made concerning competent jurisdiction that the most appropriate is to establish criteria, so that the actor can choose the most beneficial route, permitting a choice of the most suitable jurisdiction, facilitating its access to justice, considering that the victim has suffered injury from a deed or act of the defendant.

This first report established the convenience that Non-contractual Civil Liability in the Inter-American System was regulated, being strictly restricted to relations of a private nature (civil liability). International liability of the States is excluded and, since it involves conflict of laws, a subject inherent to Private International Law, it must be settled by determination of the Applicable Law and Competent Jurisdiction, concerning claims of private individuals.

Consequently, current settlements proposed by the doctrine, jurisprudence and comparative jurisprudence should be considered, involving more flexible or moderate classic or traditional criteria, and adopting multiple connections, which will be adopted as an alternative. The most significant connection to the case in question should also be considered, permitting the judge to adapt the general rule to the requirements of

justice supporting the particular case, acting reasonably and not arbitrarily. Thus, a more significant connection will be made to the situation in question, also considering the socioeconomic context, to which the involved parties belong.

In this first report, the rapporteur stated that it would be convenient in the Inter-American System to adopt an agreement that will regulate the subject of Non-contractual Civil Liability, in broad and general terms, taking as the foundation the Draft presented by the Delegation of Uruguay at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), signed on February 2-8, 2002, in Washington, D.C., United States of America, and that it should bear in mind the current criteria permitting further flexibilization of the connecting points, as well as ruling on the damage, which must be compensated pursuant to the modern criteria for damages.

3. SPECIFIC ASPECTS OF THE SECOND REPORT BY THE RAPPORTEUR, CONCERNING THE NEW MANDATE

The rapporteur's second report was presented at the 62nd regular session of the Inter-American Juridical Committee, March 10-21, 2003, called "Applicable Law and Competence of the International Jurisdiction in relation to Non-contractual Civil Liability" (CJI/doc.119/03).

The first part of the report summarizes the resolution of the Inter-American Juridical Committee CJI/RES.50 (LXI-0/02), which establishes the guidelines and parameters for future work on the subject, and in which other questions were also settled.

To request that the rapporteurs complete a draft report in due time, to be considered by the Committee at its 62nd regular session, adapting it to the following parameters:

a) The report must include numbering of the specific categories of obligations included under the general category of "Contractual Obligations".

b) The main focus of the report should be to identify specific areas under the general category of non-contractual liability, which would be themes adapted to an inter-American instrument on Applicable Law and Competence of International Jurisdiction. This focus is compatible with the CIDIP Resolution of "identifying specific areas that demonstrate progressive development of establishing rules and regulations in this field by means of solutions on the topic of Conflict of Laws".

d) The report must address, as far as possible, the treatment of the regulations adopted by the Member States in relation to the Applicable Law and Competence of International Jurisdiction, referring to particular subcategories of non-contractual obligations, in order to fulfill the mandate of "identifying specific areas in which a progressive development of establishing regulations on this subject can be confirmed by solutions of conflict of laws".

e) The report must also consider past and present efforts of the global, regional, and sub-regional organizations, which have found or are finding solutions for the conflict of laws in this area.

f) Concerning the particular subcategories of non-contractual obligations that the rapporteurs consider potentially appropriate for discussion in an inter-American instrument on conflict of laws, the report should facilitate alternatives regarding the form and content of such an instrument.

Taking into account such guidelines and parameters, the rapporteur's second report identified subcategories or specific areas, in which a further progressive development of this subject can be confirmed, by means of settling a conflict of laws, considering the efforts made by global, regional, and sub-regional organizations, plus the treatment of government regulations of different States, and the progressive development of the generally regulated Non-contractual Civil Liability.

These areas or specific subcategories are as follows:

- Road accidents, liability for goods, electronic commerce and environmental pollution

In the area or subcategory relating to "**road accidents**", it was mentioned that it had progressed steadily in both the inter-American sphere and in the Conferences of The Hague on Private International Law. It is necessary to approximate, harmonize and unify the laws of the States by adopting common standards that provide a framework of security guaranteeing the solutions and harmonizes the decisions, with clear logical rules, providing the desirable foresight for those operating in the system.

This second report indicated that in this area there are the following: Agreement of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, which resorts in a principle to the traditional or classic connection of the "lex loci delicti commissi" to later attenuate said criterion with the use of the *lex domicilii*. Similarly, the 1996 "San Luis Protocol in terms of Emerging Civil Liability of Road Accidents between

the MERCOSUR Member States", attenuates the criterion of *lex loci delicti commissi* "with the use of the criterion of "lex domicilii", and introduce "criteria of flexibility" to establish the competent jurisdiction.

Mention was made that also in the scope of the "Conference of The Hague on Private International Law", there had been progressive development of this specific area and that the predecessor was the 1967 Dutoit Memorandum, in which it was mentioned that given the diversity of this subject (Non-contractual Civil Liability), it was convenient to discuss it by specific themes rather than by general regulation.

Thus, in 1971, during the Conference of The Hague, the "Agreement on Applicable Law in terms of Road Accidents", in which the traditional or classic criterion of the *lex loci delicti commissi* is flexibilized by using multiple connection points.

That second report mentioned that the aforementioned Agreements had permitted a progressive development in that specific area of "road accidents, which had caused its practical use, indicating that there are suitable conditions for this specific subcategory of Non-contractual Civil Liability to adopt an inter-American instrument on this subject, which in turn regulates the Applicable Law and Jurisdiction.

With regard to the area or specific subcategory of **"Liability for Goods**", the second report mentioned that there had been progressive development in that area mainly in the scope of the Conference of The Hague on Private International Law, during which the "Agreement on the Law Applicable to Liability for Goods" was signed on October 2, 1973, and which prevails since October 1, 1977. In this Agreement, it so happens that normally goods manufacturers are found to be in different countries from their consumers, that is, that the agents and victims are found in territories of different States, regulating the fact that a product, due to the sharp increase in foreign trade, can be manufactured, sold, consumed, and also cause damage or loss in different States.

Concerning the connection criteria, the second report mentioned that in that Agreement, the attenuation of strict or traditional criteria (*lex loci delicti commissi*) applies, conditioned to other "connection factors" (group of connections), because following the rule of the proper law, the Agreement requires at least two

material contacts located in the same State, to consider which is the appropriate law and which has the more significant connection, thereby taking into consideration the wishes of the victim or defendant, permitting a choice between the internal law of the State in which the agent of the damage or whoever us potentially liable has its main business and the internal law of the State where the damages or losses occur.

It was also pointed out that the vital importance of this Agreement is that it offers the progressive approximation between the Anglo-Saxon system (common law) with the continental requirements (civil law) of coded regulations, since the "multiple connection points" or "group of connections" technique is used.

It was mentioned that in the European System, the experience in this area has been interesting, and is based on the "Agreement on Non-contractual Liability for faulty goods with regard to personal injury and death", known as the 1977 "Strasbourg Convention". The latter establishes solutions for non-contractual aspects, such as, for example, basing the liability of the manufacturers and produces on the theory of Objective Liability.

Also in this area or specific subcategory of "Liability for Goods", mentioned was also made that it is governed by the "European Guideline relating to the 1985 Liability of Goods", which establishes a series of fundamental rules to establish a special legal protection towards the consumers and users, also consisting of the "theory of objective liability", the basis of liability. Moreover the Guideline also states that: "The defect of the product should not be determined by the reference of its aptitude for use but rather for lack of the safety that the product fails to offer the general public", the Guideline was modified in 1995 and 1999.

The North American System was mentioned in that report, which in this specific area of Liability for Goods, in 1963 adopted the "theory of Objective Liability", and also instated the "*dépeçage*" to permit that a certain aspect of the case can be ruled by other conflicting regulations.

The two following stages may be established in terms of Non-contractual Civil Liability (torts):

The **First** stage, based on the traditional settlement scheme, consisting of the application of "*lex loci delicti*", by which the North American legal operator would determine the applicable law by means of the conflicting method, without taking into account whether the achieved result was fair or unfair.

The **Second**, which is practically the current stage, is based on the criticism against the rigidity of the "*lex loci delicti*" solutions, which guides the judges on how to determine the law applicable to the particular case in a more flexible manner, considering the criterion of the most significant connection to the situation in question, that is, using more directly related connection criteria.

Accordingly, the modern North American concepts on determining the applicable law consist of solutions based on: "The most significant relation", "analysis of government interests", "the best law", "the legislative policy that seems to be most affected". Or else a settlement combines two or more of those criteria, for which the legal operator studies each particular case and applies to each problem the law of the State, which considers that it has "the most significant relation", in order to establish a balance between the parties when determining the applicable law, due to which the application of the traditional criteria can lead to unfair and abnormal results. We thus have, initially, the North American system employing the "*lex loci delicti commissi*", to later adopt a more flexible connection relating to the victim's own situation in the framework of a multiple connection criterion.

Given the aforementioned, we consider that in this specific subcategory of Non-contractual Civil Liability relating to the "Liability for Goods", appropriate conditions do exist for adopting an inter-American instrument on this subject, regulating jurisdiction and the applicable law with regard to the full range of "Non-contractual Civil Liability".

In relation to the specific area on "**Electronic commerce**", the determination of the Applicable Law and competent Jurisdiction has been a complex regulation on contractual and, especially, non-contractual obligations, where we find there is a major failure of a standard legal system of comparative jurisprudence and, which should also be considered, the possibility that the damage is caused in other countries.

In the failure to find a global solution for this subject, the current trend is to continue looking for specific solutions in certain sectors, because the rapporteur considers that, in this specific subcategory of Non-contractual Civil Liability relating to "Electronic commerce", suitable conditions for adopting an inter-American instrument to regulate it do not exist.

In the area or specific subcategory of "**environmental pollution**", the rapporteur informed that this has been a theme involving main players, namely the Conference of The Hague on Private International Law, which has a study on "Law Applicable to Civil Liability for damages to the Environment", and the Institute of International Law, which in 1997 drafted a series of proposals for "International Liability and Liability for environmental damages regulated by International Law", pointing out that International Liability corresponds to the States, and Civil Liability to private operators. Another contribution to this theme is the 1994 "Osnabrück Colloquy", which concerns the decision of the Applicable Law, and expressed special consideration for the status of the victim, who should be given the option of choosing between the law of the place where the damage occurred, and the law of the activity that caused it, or the law of the place which originated the damage.

For this reason, environmental pollution is restricted to determining the Applicable Law and Competent Jurisdiction concerning claims of private individuals. Private individuals do not file disputes for damages to the environment, which is an issue that concerns States and international organizations, unless for damages to their person, or property or assets, since it is in the sphere of Non-contractual Civil Liability, and not in that of International Liability, which is the liability of the States.

The International Liability and Non-contractual Liability are different from each other in this way, when identifying the protected asset, so that Public International Law corresponds to the protection and preservation of the environment (International Liability of the States), while compensation to the injured parties correspond to Private International Law, when damage has been caused by private operators (Non-contractual Civil Liability).

The regulation of environmental pollution as a specific subcategory, Non-contractual Civil Liability, not only has been a concern of the Agenda of the Conference of The Hague on Private International Law, but also of the Inter-American Specialized Conference on Private International Law (CIDIP), since, in its Fifth Inter-American Specialized Conference in March 1994, when the Delegation of Uruguay included the theme 4 (any other business) "International Civil Liability for Transboundary Pollution", because in resolution no. 8/94 of the aforementioned Conference, the General Assembly of the Organization of American States (OAS), was recommended to include in the CIDIP VI Agenda, the theme: "International Civil Liability for Transboundary Pollution, Aspects of Private International Law".

Accordingly, the rapporteur informed that the Delegation of Uruguay presented to the preparatory Meeting of Government Experts for the Sixth CIDIP Conference (February 14-18,2000) a document "Grounds for an Inter-American Agreement on Applicable Law and competent International Jurisdiction in cases of Civil Liability for Transboundary Pollution". This regulates the very questions of Private International Law, such as Applicable Law and Competent Jurisdiction, and being closely confined to private relations, thus excluding the liability of the States, and establishing a multiple connection criterion for determining the Applicable Law, and in relation to competent jurisdiction, the (injured) party is given the possibility of option.

Accordingly, in this specific subcategory of Non-contractual Civil Liability, not only do proper conditions exist, but there is also a document of rules presented in the Inter-American System, regulating the Applicable Law and Competent Jurisdiction in cases of Civil Liability for transboundary pollution, which could include the comments from the States, and thereby adopt an inter-American instrument.

With regard to the **General Regulation of Non-contractual Civil Liability in the Global, Regional, Sub-regional Framework and in Internal Legislation of the States**, the second report from the rapporteur referred to the 1889 and 1940 Montevideo Treaties of International Law, and the 1928 Bustamante Code, in the Inter-American System.

In the framework of the European Union, reference is made to its Constitutional Treaty, Draft Treaty of the European Economic Community concerning the Law Applicable to contractual and non-contractual obligations, or Treaty of Rome, as well as the new Draft Agreement on the Law Applicable to Non-contractual Obligations, known as "Treaty of Rome II", which establishes as a connecting factor that of the "closest ties" or "significant connection, foreseeing as a general principle, "the application of the law with the closest links with the obligation deriving from the harmful event".

Concerning internal legislation of the States, the rapporteur referred to the 1998 Law of the Venezuelan Private International Law, and to the 1995 Italian Law, since both demonstrate further development on this matter.

4. CONCLUSION

Considering the Resolution of the Inter-American Juridical Committee CJI/RES.55 (LXII-0/03), the preliminary reports submitted herewith, and the points of view expressed by the Members of the Inter-American Juridical Committee at their 61st and 62nd Regular Sessions, it is estimated that some of the areas or specific subcategories of Civil Liability have been identified. Progressive development of the regulations on this subject has been noted therein, considering the past and present efforts of the global, regional and sub-regional organizations to find solutions for conflict of laws in those areas. Some of them have already arrived at solutions by signing international agreements in certain specific subcategories, as mentioned herein.

In this sense, the rapporteur considers that suitable conditions do exist for the recommendation in the Inter-American System to first of all adopt inter-American instruments that govern Jurisdiction and Applicable Law with regard to specific subcategories of Non-contractual Civil Liability, for example, Road Accidents, Liability for Goods, Environmental Pollution, since there is major progressive development in those areas.

These international instruments, which may be adopted to regulate those specific subcategories of non-contractual obligations, must find common solutions to the legal systems of Common and Civil Law,

because its codification task will continue to be complex, since a balance must be found for the parties in order to determine an applicable law, and to find flexibility and security therein.

The inter-American instruments to be adopted must be closely confined to private relations, giving rise to Non-contractual Civil Liability, excluding International Liability of the States and, since conflict of laws is a theme inherent to Private International Law, the instruments must settle it by deciding the Applicable Law and Competent Jurisdiction, concerning the claims of private individuals.

It is also convenient to regulate, in those instruments, that on the matter of objective Civil Liability, which is imposed on who causes the damage, regardless of blame, and the mere fact that others are endangered implies liability.

The inter-American instruments adopted in this field should have solutions of Inter-American Private International Law, for which it should be borne in mind the agreed trend towards more flexible connection factors, both in the common law and civil law systems, determining the Applicable Law through the "closest ties", due to which the classic or traditional settlement criterion based on "*lex loci delicti commissi*", has been compared to a series of setbacks arising from its practical application. An example is when the place, where the damaging deed occurs, far from creating a "significant link" with the private case, is a circumstantial element, or else, when the action or omission causing the Non-contractual Civil Liability is distributed in the territory of a number of States, which makes it convenient to choose the law that holds "the most significant relationship" with the problem, as well as adopting multiple connections so that the victim or injured party has alternative choices of the applicable law.

The solutions made in the corresponding adopted inter-American instruments in relation to this problem caused principally by the modern media, cannot be resolved using archaic procedures. In other words, solutions cannot be the same as those adopted during the 19th century, when the major codes were created, nor the solutions offered during the 1930s. So the solution must be resolved based on both processes, where the legal operator should act closely with the parties, without discarding its cultural, economic, political

and social context, in which a balance should exist between the interests and wishes of the parties in the choice of the applicable law.

Accordingly, we repeat that suitable conditions do exist for recommending the adoption of inter-American instruments in those aforementioned specific subcategories of Non-contractual Civil Liability, which regulate the competent jurisdiction and applicable law. Their drafting would not only be a threat but also a challenge to the Inter-American System, which makes it necessary to approximate, harmonize and unify the laws of the States, by adopting common regulations to provide a safe framework that guarantees their solutions, as well as the desirable foresight for those operating in the System.

Consequently, the rapporteur is of the opinion that the Inter-American Specialized Conference on Private International Law (CIDIP) could address the negotiation, and later adopt inter-American instruments in those areas or specific subcategories under reference. Later, if the proper conditions exist, it could endeavor to adopt an inter-American instrument to regulate the Jurisdiction and Applicable Law concerning the full range of "Non-contractual Civil Liability".

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