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# RECOMMENDATIONS AND POSSIBLE SOLUTIONS PROPOSED TO THE TOPIC RELATED TO THE LAW APPLICABLE TO INTERNATIONAL JURISDICTIONAL COMPETENCE WITH REGARD TO EXTRACONTRACTUAL CIVIL RESPONSIBILITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

## I. Mandate handed down to the Inter-American Juridical Committee

In item 3, letter b of its resolution AG/RES.1846 (XXXII-O/02) entitled *Specialized Inter-American Conferences on Private International Law*, the General Assembly of the Organization of American States, OAS requested to "examine, with regard to operative paragraph 3 of resolution CIDIP-VI/RES.7/02, the report to be prepared by the Inter-American Juridical Committee pursuant to the mandate contained in resolution CP/RES.815 (1318/02)."

In this resolution the Permanent Council assigned the CIDIP topic to the Inter-American Juridical Committee, related to the International Jurisdictional Law and Competence Applicable with regard to Extracontractual Civil Responsibility and also resolved:

> "1. To instruct the Inter-American Juridical Committee to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02.
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> 2. To instruct the Inter-American Juridical Committee to issue a report on the subject, drawing up recommendations and possible solutions, all of which are to be presented to the Permanent Council as soon as practicle for its consideration and determination of future steps."

In its resolution CIDIP-VI/RES.7/02, entitled *Applicable law and competency of international jurisdiction with respect to extracontractual civil liability*, the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) resolved in item 2: "To request the Permanent Council to entrust the Inter-American Juridical Committee with examining the documentation on the subject and, bearing in mind the foregoing guidelines, with issuing a report, in drawing up recommendations and possible solutions, all of which are to be presented to a Meeting of Experts." And in item 3: "To request the General Assembly to convey a Meeting of Experts to consider, on the basis of the IAJC report the possibility of preparing an international instrument on the matter, to be presented to the OAS General Assembly at its regular session in 2003." In its resolution CJ/RES.42 (LX-O/02) issued during

its 60th regular session that approved the agenda for the 61st regular session of the Inter-American Juridical Committee to be held in Rio de Janeiro, Brazil, from August 5 through 30, 2002, it was decided to discuss under letter "A. Current topics", item "1. Extracontractual responsibility - CIDIP-VII", appointing as rapporteurs Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra."

In compliance with the mandates contained in the above-mentioned resolutions, the rapporteur of this topic presents the following report:

## II. Doctrine aspects

In the sphere of obligations, Civil Responsibility includes:

a) the Contractual, and

b) the Extracontractual

**Civil Contractual Responsibility** consists in the obligation of repairing the damage resulting from non-compliance of an obligation resulting from an Agreement.

**Extracontractual Civil Responsibility** are those obligations that do not arise from a contract but, all to the contrary, arise at the margin of the autonomy of the will expressed by the people, in other words, they originate into obligations that are born outside the conventional framework and may arise from different sources: the quasi-contractual, the illegal, the quasi-illegal and those from a legal source.

It is exactly for this reason that it regulates a very complex and wide-ranging sphere, which covers a multiplicity of suppositions of different nature, including situations such as those resulting from the damages caused by the manufacture of products, accidents caused while circulating on highways, unfair competition, as well as those related to the contribution of sea contamination by hydrocarbons, damages caused by nuclear accidents, contamination of the transborder environment, etc.

In addition to the positive aspects that modern technology can offer, it also has the capacity of generating international damages that may result in international civil responsibility, corresponding to the discipline of Private International Law. The determination of the law applicable in those cases results from obligations born without a convention.

In this respect, the obligation of repairing the damage has the purpose of protecting people against the risks caused by modern industrial society.

The notion of Extracontractual Civil Responsibility leads us to understand it as an obligation to repair a damage caused. Thus, in some legislations it is defined as "the obligation to repair a damage resulting from the guilty non-compliance of a pre-existent legal behavior or duty that, although the legislation may not determine so expressly, does in fact protect the person legally by establishing a sanction within the positive juridical legal code."

The legislations in force in the different States, as well as the Jurisprudence Doctrine, have decided in favor of several different solutions to determine the legislation applicable to the obligations that are born without a convention, as well as to determine the competent jurisdiction thereof.

Notwithstanding the above, if there is a mutual natural interconnection between the matter of an "applicable law" and the "competent jurisdiction", since in practice the legislative and jurisdictional competence are presented as indissoluble, they will be analyzed separately, although they always show the interrelation that exists between them.

## III. Aplicable law

**In order to determine the law applicable to the obligation that arises without a convention or which are considered extracontractual, we may refer to the so-called Traditional or Classic Criteria and the Current Solutions.**

### A. Traditional or classic criteria

#### a) *Lex fori*

Defines as "Applicable Law" the law of the Court it is getting acquainted with, basing itself mainly on international public order and policy standards.

Those who support the pertinence of the *lex fori* (or the juridical order of the State of the judge who understands the case) argue that this is a common law to the parties and that it has the advantage that the judge applies its own law.

This solution has been supported by Savigny, Miaja de la Muela and Story who sustain: "that in the absence of a contrary doctrine, each country must apply its own laws."

Nevertheless, this criteria has been questioned because it ignores the pure basis of modern Private International Law and because it would lead us to a situation of absolute insecurity prior to the respect due to the rights and obligations of the interested parties.

#### b) *Lex loci delicti commissi*

Defines as the legislation applicable the "law of the place where the act occurred." Its application approach is based on: the respect of rights acquired and the sovereignty of the States; it has been seen as a natural link that unites all acts with the juridical order of the place where they occur, thus the "Court and natural judge are those where the crime was actually committed."

This traditional and classic criteria has been extremely successful in their application both as regards the law applicable and the competent jurisdiction.

Arguments have been presented in favor of this criterion as a neutral connection point, which is why it would reach a certain degree of balance regarding the rights of the individual and why its application would allow reaching predictability and uniformity of results, while safekeeping certainty and juridical security.

Nevertheless, the ***lex loci delicti commissi*** criteria have been criticized by a portion of the doctrine and jurisprudence mainly "because of its mechanical application and abstract character." The attack is directed against the traditional conflicting technique itself, traditional for the rigidity with which it only uses one sole connection point to determine the law applicable, namely, "the place where the act occurred," adopting fundamentally the "unique connection approach."

Furthermore, criticism has been made of the inconveniences arising in practice from the application of this traditional criterion, as for example:

1) When the act that generates the damage and the resulting damage itself occur in different States, it becomes more difficult to apply this point of classical connection for this case. Furthermore, it is not always easy or possible to determine where the fact or act generating the damage has been committed, of the emerging damage itself.[1]

This situation has given rise to different solutions that have nevertheless encountered difficulties in practice, for example:

If it is decided in favor of the **law of the place where the act is committed,** said law could prove to be permissive or fail to establish the sanctions necessary to respond for a given act.

The option in favor of the **law of the place where the damage is caused** could lead to an inapplicable connection because of the existence of plural States impacted by the results of the harmful act.

If an **accumulative solution** of both connections is preferred, the case in question will become more complex.

2) The connection criterion is fortuitous and removed from the socio-economic milieu of the parties.

3) The criterion is mechanical in nature, so its application may prove inconvenient when, more then one State has a significant relationship with the act or other aspects of the case, that is to say, "it fails to correspond to the true center of gravity of the various interests in play."

To conclude, the ***lex loci delicti commissi*** has not been deemed appropriate for all cases of application, since this is not always the most relevant law nor the one that has the most meaningful or closest ties to the core of the controversy.

**c)** ***Lex domicilii***

This criterion of connection determines the **Domicile Law** as the applicable law and admits two variants: one referring to the common domicile and the other defining the domicile of the injured party.

The **Common Domicile Law** consists in applying the right to the common domicile to the author of the deed and the victim.

This criterion applies and is beneficial if both parties are domiciled in the same State, since this constitutes the social context common to both and their right would take into account their own interests.

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[1] Statement of Reasons. *Draft Convention on Applicable Law and Competency of International Jurisdiction with respect to Extracontractual Civil Liability,* (presented by the Delegation of Uruguay - CIDIP-VI/doc.17/02, February 4, 2002).

The **Victim's Domicile Law** is a criterion that as a rule prevails when the interested parties do not share the same domicile, so the Victim's Domicile Law is proposed as the applicable criterion.

This criterion is more advantageous to the injured party as regards indemnity and reparation of damage.

Among the legislations that make use of these traditional criteria, we can mention the following:

The Colombian Civil Code, which regulates extracontractual liabilities by adopting the traditional classification of liabilities in: contracts, quasi contracts, felonies, quasi offenses and the law.

Accordingly, in order to solve disputes concerning extracontractual responsibility, the law of the place where the offense was committed is applied, that is to say, the traditional criterion of the *Lex loci delicti commissi.* [2]

**Article 2035** of the Civil Code of El Salvador states: "Responsibilities contracted without agreement derive either from the law or from the willful deed of one of the parties. Those deriving from the law are expressed therein".

If this willful deed is licit, it constitutes a *quasi contract.*

If the willful deed is illicit and committed with harmful intent, it constitutes an *offense* or a fault.

If the deed is illicit but committed without harmful intent, it constitutes a *quasi offense.*

This article deals only with quasi contracts derived from the willful deed of one of the parties.

**Article 2036** then states: "There are three principal quasi contracts: the officious agency, payment of what is not owed, and the community".

**Current solutions**

Concerning these traditional criteria with strict points of connection, the **Jurisprudence of the United States** has been highly innovative in pointing to conflicting provisions in cases of Extracontractual Civil Responsibility, especially those related to traffic accidents, where the application of the ***lex loci delicti commissi*** to the case has been replaced by the criterion of the **most significant connection** [3], thus permitting the application of domicile law rather than just the law of the place where the deed has occurred, that is to say, the use of more directly related connection criteria, where account is also taken of political trends.

The most prestigious United States doctrine combines three different methodologies:

a) The proximity principle;

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

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

b) Unilateral intent in determining the scope of material provisions based on state interests, and

c) The teleological attempt to reach desirable results in settling problems caused by external trade.

The doctrine of the **Center of gravity** is adopted, inclining towards the law of the place that has a more significant connection with the object of the litigation, because of the fact that applying the traditional criteria can lead to unfair and abnormal results. The Anglo-Americans call this solution ***the proper law of the tort***.

Current doctrine and jurisprudence claim that the **traditional or classic** rules or provisions of conflict that adopt a strict, mechanical application of conflicting norms are not suitable for the current concept of extracontractual civil liability, with the judges having to analyze the peculiar circumstances of the case as well as the content of the material provisions of competence to attenuate rigid application of the connection criterion opted for.

**Pierre Bourel** states on the matter:

> Extracontractual civil responsibility can not go on being treated as a homogeneous category, and although there still subsists the old rule of the *lex loci delicti commissi*, its application is not general or exclusive, and is often left aside for the benefit of other connections.

One must therefore bear in mind the most suitable or convenient solutions according to the current development of Private International Law, in order to determine both the applicable law and the competent jurisdiction.

In the light of this problem, the present doctrine of Private International Law offers other alternative solutions in Doctrine and in Comparative Law.

In this sense**, Juenger** claims that "the traditional points of connection are inconvenient if used exclusively, and it is preferable that they be incorporated into an alternative provision."[4]

**Afonsín** expresses the notion that "alternative rules presuppose that (the connection criterion) will function that favors the person or business in question." This would mean applying the law most favorable to the victim.

**Uzal** proposes that "determining the applicable law should contemplate the necessary harmonization and equilibrium between individual and common interests." [5]

**Boggiano** defends a methodology of materially oriented option. [6]

**Herbert** poses the possibility of conciliating "classical conflictualism" and the "methodological flexibilization" based on the Anglo-American criterion of *proper law of the tort*, which would lead to adoption of an alternative rule (for example, with three connection points, these being the place of the act, the place of the effects of the act, and the place of

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4 Statement of Reasons, afore mentioned.
5 Statement of Reasons, afore mentioned.
6 Statement of Reasons, afore mentioned.

domicile of the parties), guiding the criterion of option together with a substantive teleological criterion, which implies delegating ample powers to the Judge.[7]

**The Law of Private International Law in Switzerland** inclines towards a particular focus on the concrete case, thereby providing specific norms of teleological conflict on matters such as: responsibility for damage caused by products; unfair competition; contamination of the environment; highway traffic accidents; and violations of the so-called right of personality.

**The Portuguese Civil Code of 1966** and the **Federal Austrian Law of 1978** are inclined towards applying the system most closely connected to the situation in question, resorting to making the traditional rules of conflict flexible by means of multiple connection points and inclining towards the "principle of the strongest or most intense connection."

The **Montevideo Treaties of International Civil Law of 1889 and 1940** refer to the "responsibilities arising without an agreement" in the following words: "Responsibilities born without an agreement are ruled by the law of the place where the licit or illicit act in question occurred" (Art. 38 of the Treaty of 1889).

Art. 43 of the Treaty of 1940 states: "Responsibilities that arise without an agreement are ruled by the law of the place where the licit or illicit act in question occurred and in that case **by the law regulating the corresponding legal relations.**

Both provisions obey the traditional solution of the ***lex loci delecti commissi*** as being the applicable legislation.

The Montevideo Treaties refer to the classic traditional solution, and the final section of article 43 of the Treaty of 1940 determines a matter of qualification that should be correctly resolved by the interpreter of same.

The **Private International Law Code of 1928** (the "Bustamante Code") rules on this type of responsibility in article 167, which establishes: "(Responsibilities) arising from offenses or faults are subject to the same law as the offense or fault that cause them," and in article 168, which states that: "(responsibilities) arising from acts or omissions involving guilt or negligence left unpunished by the law will be ruled by the law of the place where such originating guilt or negligence occurred."

In the framework of **The Hague Conference on Private International Law** to determine the applicable law in Extracontractual Civil Responsibility, the technique of multiple connection points or **accumulating connections** has been resorted to both in the Convention on the Law Applicable to Traffic Accidents of 1971 and the Convention on Law Applicable to Responsibility Derived from Products of 1973.

At present those engaged in drawing up treaties on this matter of analyzing the choice of several connection criteria in order to determine the applicable law, taking into account the situation in question, determine that if the injured party and the presumed responsible party are domiciled in different States, the law to be applied is that of the place where the damage occurred or that the place where the act that caused the damage occurred; if the victim and the presumed responsible party are domiciled in the same State, the applicable law is that of

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7 Statement of Reasons, afore mentioned.

domicile. The general principle in the matter of harmful acts is to make the criteria of connection flexible or to attenuate them through the technique of accumulating connections.

Consequently we are faced with a great deal of connection criteria that determine the law to be applied to rule on the so-called responsibilities born without convention.

These selected criteria or points of connection should cover all the elements of civil liability, including the presuppositions of responsibility, the conditions of responsibility, the fixing of the parameters for indemnity and reparation or compensation for damage.

For this reason the selected point of connection should be accompanied by subsidiary connection points for the purpose of making the rigidity of the main connection point more flexible.

The strong criticism and violent attacks suffered by Extracontractual Civil Responsibility have made it necessary for it to be reformulated with the appearance of new tendencies aimed at helping in good faith those individuals who are more vulnerable in this type of legal situation.

It is in this sense that Chapter X of the **Italian Law of Private International Law of 1945** regulates on "non-contractual liabilities," which include the responsibility for illicit acts and the extracontractual responsibility for damage to products.

So, the **Responsibility for Illicit Acts** is ruled by the law of the State where the act took place, and the injured party may request that the law of the State where the act that caused the damage be applied. If the illicit act involves only nationals of a State domiciled or resident therein, then the law of this State is applied and the **Responsibility for Damage by Products** is regulated at the discretion of the damaged party.

Chapter VI of the **Venezuelan Law of Private International Law of 1998**, entitled "On Liabilities" and which refers to illicit acts, sets forth the following:

> Illicit acts are governed by the law of the place where its effects are produced. However, the victim may demand that the law of the State where the cause that generated the illicit means be applied.
>
> In this manner the rigidity of this point of connection is attenuated.

The sensitive nature of the topic of "Extracontractual Civil Responsibility" has led to **integrated spaces** or **integration systems** occupying a particularly relevant place because people find themselves impelled to circulate more continually and frequently within their areas, which implies adopting common and uniform rules that ensure a framework of security in making decisions and finding solutions.

In this regard, the **Treaties of the European Union** establish that: "in the matter of Extracontractual Civil Responsibility, the Community must make reparation for damage caused by its Institutions or Agents in performing their functions, in compliance with the general principles common to the laws of the member States."

Within the sphere of **Mercosur**, the issue of Extracontractual Civil Responsibility is dealt with especially in the **San Luis Protocol** that rules on the question of Civil Responsibility in Traffic Accidents between the States Parties of Mercosur (Mercosur/CMC, Dec. 1/96), where it is set forth that: "the responsibility for traffic accidents will be governed

by the internal law of the State Party where the accident took place," but at the same time states that "if the accident involved or affected only people domiciled in another member State, it will be ruled by the internal law of that State" and proceeds: "whichever law is applied to responsibility, account will be taken of the regulations regarding circulation and safety in effect in that place at the moment of the accident, these being norms that by their nature cannot be supplanted by any means whatsoever."

This implies that when the parties are each domiciled in each one of the States Parties of the convention, "the internal law of the State Party in whose territory the accident took place" is applied, and when the parties are domiciled in another member State, "the internal law of that State" is applied.

As we can see, the **San Luis Protocol** takes into account the socio-economic *milieu* to which the parties belong, and there is some flexibility in the application of the points of connection.

Within the sphere of **The Hague Conference on Private International Law**, we read with regard to Extracontractual Civil Responsibility: "The Convention on the Law Applicable to Traffic Accidents" of 1971 and the Convention on the Law Applicable to Products Liability" of 1973, both of which are mentioned earlier, where the technique in both Conventions has been to resort to the "Multiple Points of Connection," that is, the technique of "accumulating connections."

Accordingly, article 3 of the **Convention on the Law Applicable to Traffic Accidents** claims that:

> The law to be applied will be the internal law of the State in whose territory the accident occurred," a standard to which the following exceptions are made, pursuant to article 4 of this Convention:
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> **Article 4**
>
> Subject to Article 5, the following exceptions are made to the provision of Article 3:
>
> *a)* Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability
>
> - towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
>
> - towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,
>
> - towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.
>
> Where there are two or more victims the applicable law is determined separately for each of them.
>
> *b)* Where two or more vehicles are involved in the accident, the provisions of *a)* are applicable only if all the vehicles are registered in the same State.
>
> *c)* Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of

*a)* and *b)* are applicable only if all these persons have their habitual residence in the State of registration.

The same is true even though these persons are also victims of the accident. [8]

In a similar light, article 4 of the **Convention on the Law Applicable to Products Liability** states:

> The legislation applicable will be the internal law of the State in whose territory the damage was done, in the case where that State is also:
>
> the State of habitual residence of the person directly harmed, or
>
> the State in which is located the main establishment of the person to whom responsibility is imputed, or
>
> the State in whose territory the product was bought by the person directly harmed.

While in **article 5** it is stated that:

> Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State 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. [9]

As shown in **The Hague Conventions**, in essence the criterion of *lex loci* has been used, attenuated by resorting to the multiple connection points when the elements of the supposition are actually connected to another different system.

All of this indicates the need to use complementary connection points, since using traditional criteria in practice presents serious difficulties, for example:

a) The elements of extracontractual responsibility are shared by territories corresponding to various States, in which case it is necessary to determine which of the co-existing legislations is the competent one,

The hypothesis of a legal act from which a sole extracontractual liability is derived involves a series of acts distributed in places corresponding to various States, in which case it can be claimed that the applicable law is that of the place where the principal activity is carried out or else that of the place of the last occurrence. Now, if the place of the extracontractual activity does not coincide with the place of the result, in this case the applicable law can be claimed to be the law of the place where the act was committed, the law of the place of the damage, and – currently - the option that the injured party has of choosing between one of the two above.

b) The act from which the extracontractual responsibility derived is found to be ruled by no legislation, as would be the case where the deed or the act from which

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8 *Recompilation of Agreements of The Hague Conference on International Private Law* (1951-1993). Translation to Spanish, ed. Marcial Pons, 1996.

9 *Recompilation of Agreements of The Hague Conference*, *op. cit*.

the extracontractual liability derives, occurs in territories not subject to the sovereignty of any State. An example of this would be a maritime boarding at high sea, in which case it is necessary to resort to a subsidiary legislative competence, such as the law of the flag flown by the vessel.

This theme of Extracontractual Civil Responsibility has also already been dealt with in several "international *fora* or meetings," including:

The **Meeting of the Institute of International Law** in Edinburgh in 1969, where it was recommended that: "the principle of the ***lex loci delicti*** should be maintained, but that this should be open to exceptions when the place of the offense is purely fortuitous, or when the social environment of the parties is different from the geographical environment of the offense."

It can be noted that the most significant contracts are privileged and that the application of the traditional criteria is flexible.

In light of the above, we draw the conclusion that in the matter of applicable legislation, the **classic criteria** such as unique and strictly applied connections often prove insufficient and unsuitable.

This makes it necessary to use the classical rules in attenuated form, that is, **by making the methodology flexible and incorporating alternative solutions**. These include the notion that the judge should not decide in an absolutely discretional fashion but rather based on (alternative) criteria that are clearly stipulated by the legislator and which enable him or her to act in a reasonable manner and to adjust the general norm to the requisites of substantive justice of the concrete case, thereby producing a connection that is more significant to the situation in question.

## IV. Competent Jurisdiction

Legislative and jurisdictional competence are in practice established "indissolubly," thereby constituting the unity that is the object of Private International Law with regard to the conflict of laws, which implies a natural mutual interconnection.

In practice, this has led some States to tend to hierarchize the issue of opting for a jurisdiction on the applicable law, in the understanding that the judge chosen will necessarily apply the law of the State and thereby elect law and jurisdiction at the same time.

In the light of the above and in view of the fact that both categories respond to their own principles, we nonetheless prefer to analyze them separately, seeing that it is necessary to identify both the law applicable to controversial cases and the State before whose courts the case should be presented.

In the **Montevideo Treaties** of 1889 and 1940, the issue of jurisdiction is regulated in article 56 of both. That of 1889 establishes that: "Personal cases should be presented before the judges of the place to whose law the juridical act involved in the case is subject. They may also be presented before the judges of the defendant's domicile."

In the 1940 Treaty, the matter is similarly regulated, that is, attributing competence to the judges of the State where the licit or illicit deed was carried out, while the second clause

offers the plaintiff the option of presenting the case before the judges of the defendant's domicile.

The 1940 Treaty also states that "the territorial extension of the jurisdiction is granted if after the action has been presented, the defendant admits it voluntarily, whenever it is a case of actions involving personal patrimonial laws. The defendant's will must be expressed positively rather than artificially."

The **Code of Private International Law** of 1928 (the *Bustamante Code),* sets forth in article 340 that: "to try and judge offenses and faults, the judges and courts of the Contracting State where these have been committed are competent". Article 341 of the same Code states: "Competence extends to all the other offenses and faults to which the criminal law of the State must be applied in accordance with the provisions of this Code."

Article 7 of the **San Luis Protocol**, dealing with the question of civil responsibility involved in traffic accidents among member States of Mercosur (CMC/Dec.1/96), sets forth that: "For the purpose of presenting actions, the plaintiff will choose the competent courts of the Party State:

1) where the accident took place;
2) of the defendant's domicile; and
3) of the plaintiff's domicile."

In other words, the plaintiff chooses to whom to grant competence.

Both of **The Hague Conventions** on the Law Applicable to Traffic Accidents (1971) and the Law Applicable to Products Liability (1973) establish in article 1 that legislative and jurisdictional competence constitute in practice a unity and maintain a natural interconnection.

Thus, article 1, clause 1 of the **Convention** of 1971 states that: "This Convention determines the law applicable to extracontractual civil responsibility as a result of highway traffic accidents, no matter what type of jurisdiction is assigned to try the case."

The 1973 **Convention**, also in article 1, clause 3, rules that: "This Convention will be for application independently of the jurisdiction or authority that tries and judges the litigation."

Article 19 of the 1993 **Lugano Convention on Civil Responsibility for damage as a result of activities dangerous for the environment** establishes that: "Actions for compensation will be subject to the jurisdiction of the State in which the damage was perpetrated; where the dangerous activities were carried out or where the defendant has his or her habitual abode."

Article 2 of the **Federal Law of Switzerland** declares: "The Swiss judicial or administrative authorities of the domicile of the defendant are competent, save for special provisions of the same law."

Article 3 speaks of a "**forum of necessity:**" "When the law provides for no jurisdiction in Switzerland and it is deemed impossible to conduct a procedure abroad or it can not reasonably be demanded that this procedure be carried out in another State, the Swiss judicial or administrative authorities **of the place with which the cause presents sufficient**

**connection** are competent. Authorization is granted to extend competence and the tribunal elected cannot decline it.

In the sector that regulates illicit acts, Swiss law contains a standard of a general nature and another of a particular nature. Article 129 establishes that the Swiss courts of the domicile, or in the absence of a domicile, those of the defendant's usual abode or establishment, will be competent for trying actions based on an illicit act. When the defendant has no domicile or usual abode or establishment in Switzerland, the action may be presented before the Swiss court of the place of the act or of the effect. If several defendants can be investigated in Switzerland and if the pretensions are essentially based on the same juridical deeds and motives, then the action may be presented against all before the same competent judge; the judge who first intervened will enjoy exclusive competence.

The attribution of competence in favor of the local "forum of necessity" has also been adopted by the **Law of Quebec**, whose article 3136 sets forth that: "although a Quebec authority is not competent to try a litigation, in the event of it being impossible to present an action abroad or if it cannot be demanded that the action be introduced abroad, he or she may assume competence if the question has a sufficient connection with Quebec."

That is, whenever it is impossible to set up a trial abroad, this circumstance will be considered as a sufficient connection to initiate the action before the local courts, which is what the doctrine calls the "forum of necessity" in favor of the local jurisdiction.

In view of the above, the most convenient thing to do in jurisdictional issues is to present a series of **options** to the plaintiff. This would **facilitate his access to justice**, taking into account that he is the victim who has suffered the damaging consequences of an act or fact performed by the defendant.

## V. Consideration of an international instrument on the law applicable and the internationally competent jurisdiction regarding issues related to extracontractual civil liability

It would be convenient for the Inter-American System to adopt a general regime (Convention) to rule on Extracontractual Civil Responsibility, with a wide **range of application**, in other words, that it would in principle regulate all those obligations that are born without a Convention.

This instrument must strictly circumscribe to relations of a private nature (Civil Responsibility), to the exclusion of the International Responsibility of the States.

An international instrument of this type will allow the arbiter to apply the right to qualify an infinity of legal relations arising daily from the reality of life, and which would be impossible for the legislator to foresee or regulate individually.

As this is a topic inherent to the conflict of laws arising in Private International Law, the Convention must solve it by establishing an **applicable law** and a **competent jurisdiction** concerning the claims filed by private individuals.

This regulation on the Law Applicable and the Competent International Jurisdiction applies whenever the act that generated it occurred in a State Party and the damaging effects resulting from it are produced or not in that same State or may cause effects on other States Parties of the Convention.

Thus, the current solutions that have been proposed by the doctrine, jurisprudence and comparative law must be taken into account, as their texts establish a flexibility and attenuation of the classic or traditional criteria used and the adoption of multiple connections, which would be alternatively applied taking into account the most significant connection related to the case presented. This would empower the injured party to chose among one or the other point of connection in order to point out the **applicable law**, which would allow the judge to adjust the general norm to the requirements of substantive justice to the actual case in a more reasonable rather than an arbitrary manner.

Similarly, when determining the competent jurisdiction, the plaintiff should also be granted – taking into account that he/she is the victim of the damaging act – a series of options to facilitate access to justice.

As such, both in the determination of the law applicable as in the competent jurisdiction, the domicile may be considered the feasible point of connection. It is not necessary to include in the international instrument under study an explanation that refers to the concept of domicile, since the Inter-American scenario contains the Inter-American Convention on the Domicile of Individuals of Private International Law dated 1979, which regulates precisely the question of domicile.

It is also convenient that the text of the Convention should regulate matters related to **Objective Civil Liability**, which is the one that applies to the perpetuator of the damage regardless of his or her guilt, since for liability to exist, it suffices to place others in risk, as compensation should be paid with one single damage caused.

This responsibility must contain the following elements:

- The existence of a fault or blame, in other words, an illicit act;
- The presence of the damage that must have a precise and personal nature;
- The relation of causality between the illicit act and the damage.

The existence of damage is an essential factor of the compensation or reparation.

Although it is true that a convention of this nature would be a challenge for the Inter-American System, the regulation of specific areas or sub-categories wherein a progressive development of Private International Law could be found would represent a greater challenge, as its very specificity requires an independent regulation of its own, one more suitable to its needs.

These areas could include those related to highway traffic accidents, the responsibility of the manufacturer of the product, and transborder contamination.

With regard to highway traffic accidents and responsibility for products, the Hague Conference on Private International Law rules on these in specific conventions already referred to in this report: the Convention on the Law Applicable to Traffic Accidents, dated 1971, and the Convention on Law Applicable to Products Liability, dated 1973.

The Hague Conference opted for specific regulations, since in 1967 the Secretary General of its Permanent Bureau mentioned the possible difficulty of establishing a general regime for Extracontractual Responsibility, following the guidelines adopted by the conventions in specific areas.

Within the framework of MERCOSUR, the issue of highway traffic accidents was regulated through the San Luis Protocol for Matters of Civil Responsibility in Traffic Accidents between the Mercosur States Parties which has been mentioned earlier.

Accordingly, both the Hague Conference on Private International Law and the Delegation of Uruguay on the occasion of the Inter-American Specialized Conference on Private International Law (CIDIP) have expressed their concern to establish a Law Applicable to Civil Responsibility for damage caused to the environment as a specific sub-category of Extracontractual Civil Responsibility.

At the Hague Conference this concern appeared in 1992 in a note sent by the Permanent Bureau to the Conference's Special Commission for General and Political Affairs, and which was taken up again at the Eighteenth Session of the Conference in June 1995, when it was recommended to consider the theme on the Law Applicable to the Matter of Responsibility for Damage Caused to the Environment. However, objections were made by some countries who claimed that this was a complex theme related to highly sensitive political questions.

At the Fifth Inter-American Specialized Conference on Private International Law (CIDIP V) held in March 1994, the Delegation of Uruguay requested the inclusion of theme 4 related to other matters: "International Civil Responsibility for Transborder Contamination." In Resolution No. 8/94 of this Conference, the recommendation was made for the General Assembly of the OAS to incorporate into the Agenda of CIDIP VI the theme "International Civil Responsibility for Trans-border Contamination: Aspects of Private International Law."

The theme was of course proposed in the two main *fora* in charge of the progressive development of Private International Law, namely, the Hague Conference and the CIDIP, because of the importance that environmental contamination currently has in the scope of this Law, seeing that its harmful effects not only jeopardize people and their property but also deeply affect the economy in this sense that environmental contamination knows no frontiers.

As regards all that has been presented in this report, we conclude that it is convenient that the Inter-American System should adopt a convention that rules on the topic of Extracontractual Civil Responsibility in broad and general terms. A Convention of this nature could later produce other Conventions relating to the various sub-categories.

In this sense the **Inter-American Draft Convention on Applicable Law and Internationally Competent Jurisdiction on matters of Extracontractual Responsibility** prepared and presented by the Delegation of Uruguay on the occasion of the Inter-American Specialized Conference on Private International Law (CIDIP-VI) and circulated in document

OEA/Ser.K/XXI.6, CIDIP-VI/doc.16/02, 4 February 2002, in Spanish, regulates the themes we have mentioned in accordance with the current tendency of Private International Law. That is, flexibilization and attenuation of the classic or traditional criteria are recommended, as well as adopting multiple connections to be applied alternatively, taking into account the "most significant connection" and offering the judge the option concerning the victim or injured party, as reflected in **article 2** of the Draft, on establishing the Applicable Law:

The applicable law will be at the judge's discretion according to what is most favorable to the injured party [or according to the plaintiff's option], that of the State Party:

a) where the act producing the responsibility was performed, or

b) where the damage was perpetrated against the injured party as a result of this act, or

c) where the involved parties have their common domicile.

Likewise, when the Competent Jurisdiction is regulated, a series of options are offered to the plaintiff to make access to justice easier (**Article 4** of the Draft).

**This more flexible methodology by incorporating alternatives presented by the Draft and enabling the judge to choose based on criteria clearly set down by the legislator, will allow him or her to act in a reasonable manner and adjust the general standard to the requisites of the substantive justice of the concrete case, thereby creating a more significant connection to the situation, and also taking into account the socio-economic context to which the parties belong.**

In this sense, **Article 4** of the draft declares:

The courts competent for actions founded on this Convention, at the option of the plaintiff, will be:

a) those of the State Party where the act that caused the damage was performed,

b) any of the States Parties where the damage resulting from this act was caused,

c) the State Party where the plaintiff or defendant have their domicile, usual abode or commercial establishment.

With regard to the scope of application, **Article 1** of the Draft answers the expectations required of this type of Convention, being broad enough to include extracontractual liabilities in general, that is, all those liabilities born without a Convention, including offenses, quasi offenses and quasi contracts.

The Draft also incorporates material relating to Civil Responsibility and its effects, to be regulated in accordance with the law that proves applicable in article 2 of the Draft, such as established in **Article 3** of the Draft, which reads:

> The law that proves applicable to civil responsibility, in accordance with the previous article, will regulate on the following, among others:
>
> a) the conditions and scope of responsibility,
>
> b) the causes of exoneration, the limits and distribution of responsibility,
>
> c) the existence and nature of repairable damage,

d) the forms and amount of indemnity,

e) [transmissibility of the right to indemnity],

f) subjects liable to indemnity,

g) [the responsibility of the commissioner because of his or her position] and

h) prescription and lapsing.

**Article 5** of the Draft refers to "General Provisions," which are drawn up according to the standards of the Inter-American Conventions.

Concerning the formal aspects of the Draft, we suggest that the themes be divided by title rather than in articles, so that the Draft Convention will bear the following titles: Scope of Application; Applicable Law; Aspects regulated by the Applicable Law; Competent Jurisdiction and General or Final Provisions. Another suggestion is that the beginning should include the corresponding Exposition or Consideration Part of the Convention.

Finally, this report, being mindful of the current importance of the theme of Extracontractual Civil Responsibility within Private International Law and the need to regulate it, recommends that all necessary efforts be made for the Inter-American System to have a General Convention that regulates Applicable Law and Competence of International Jurisdiction regarding Extracontractual Civil Responsibility, taking as a fundamental basis the draft presented by the Delegation of Uruguay at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) held 4 to 8 February 2002 in Washington, D.C.. The recommendation is also made that work be later carried out on preparing international instruments to rule on specific sub-categories, mainly those relating to Traffic Accidents, Responsibility for Products and Transborder Contamination.

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