RETHINKING HARMONIZATION OF JURISDICTIONAL LAW

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In the aftermath of the various unsuccessful attempts by the Hague Conference to devise an international convention on jurisdiction and recognition and enforcement of judgments, this article examines what the common law and civil law delegations to the Conference considered irreconcilable differences between their respective jurisdictional laws. The article studies the historical and functional evolution of these allegedly irreconcilable jurisdictional categories, their underlying ideas (e.g., "minimum contacts" and due process analysis, forum non conveniens, tag jurisdiction), and suggests a new method of analysis, which in fact generates a unified approach to jurisdictional law and choice of laws rules, both part of the conflict of laws analysis.

The analysis unearths the original symmetries between jurisdictional law and choice of law rules in common law and civil law systems that existed in the past, as well as the various similarities still existing today despite the different labels sometimes used, and it exposes some preconceptions that make some of these categories and principles falsely appear to be irreconcilable. In fact, by solving some representative problem situations under both of the allegedly different regimes, the article shows that the solutions that these systems offer are, most of the times, similar. This is because there is a strong interaction between jurisdictional law and choice of law rules within each individual system and in the two legal systems, and the existing differences are not irreconcilable but merely the product of recent developments.

Conflict of laws rules governing transnational commercial transactions should be harmonized, and this article demonstrates that harmonization is feasible and worth

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pursuing. Therefore, rather than suggesting once more the adoption of an international convention on jurisdiction and recognition and enforcement of judgments only, this article suggests the adoption of an international convention on conflict of laws rules. The proposed convention could adopt similar criteria or "connecting factors" to identify the judge with jurisdiction over a controversy and the law to govern it; this will eventually make the judgment rendered at the end of the proceeding suitable for recognition and enforcement in the countries that ratify the convention. Such a convention would apply to transnational commercial transactions only, where the identification of the judge and of the governing law would significantly enhance the efficiency and fairness of this type of litigation.

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This article suggests the adoption of an international convention on conflict of laws – that is, a uniform convention on choice of law, jurisdictional law, recognition and enforcement of judgments – applicable to transnational commercial transactions. Part I defines and defends "harmonization". Part II deals with conflict of laws rules. Specifically, Part II-A deals with choice of laws rules, illustrating their origins, their main features in common and civil law systems and their similarities as to the core concepts. Part II-B deals with jurisdictional law, its origins, and similarities existing between civil law and common law approaches. Part III completes the analysis and illustrates the path to unification and harmonization. Part IV contains a draft proposal of an international convention on conflict of laws rules, applicable to transnational commercial transactions.

I. PREMISE: A FEW THOUGHTS ON HARMONIZATION

The adoption of an international convention on conflict of laws could be achieved through a "harmonization" process.

The word "harmonize" means "to make or form a pleasing or consistent whole."[2] Harmonization is often used to mean "the process by which we make everything the same, a sort of rush to the bottom to further facilitate the globalization of advanced capitalism."[3] As observed by Laura Spitz, "'Harmony' is by definition diverse. 'Harmonization' is by definition layered. Like 'globalization,' harmonization is not necessarily a normative claim, but rather a tool … 'As with music, the difficult question is which aspects should be similar and which different, in order to create a pleasing or appropriate relationship."[4] 'Globalization' has been described as 'the process of increasing interconnectedness between societies such that events on one part of the world more and more have effect on people and societies far away. It is 'a consequence of increased human mobility, enhanced communications, greatly increased trade and capital

[2] THE CONCISE OXFORD ENGLISH DICTIONARY, 538 (8th ed. 1990).
[3] See Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 Ohio State Law Journal 314, 337 (2005).
[4] *Id.* at 338.

flows and technological developments."[5] This leads to an increase in transnational litigation on business transactions, and to the consequent need for uniform rules governing the same.

We should then consider "harmonization" as a phenomenon that follows as a natural consequence of and is instrumental to "globalization". However, even if it is undeniable that interconnectedness between societies and transnational litigation have increased, there is not yet consensus as to the necessity and feasibility of harmonization of rules that would facilitate transnational litigation.

The Drafters of the UNIDROIT/ALI Principles and Rules of Transnational Civil Procedure,[6] when explaining the reasons and rationales behind those principles and rules, pointed out that "the costs and distress resulting from legal conflict can be mitigated by *reducing* differences in legal systems, so that the same or similar 'rules of the game' apply no matter where the participants may find themselves."[7] (Emphasis added). As Juenger observed, uniform rules reduce "both uncertainty in determining what national or local law should be applied and the tendency of parties to 'shop' for a favorable forum."[8] Also, "harmonization can break down local bar monopolies by opening up legal practice to persons from outside the jurisdiction. This would appear to be a significant social benefit…Harmonization might also reduce transaction costs, since the parties to international legal transactions might have somewhat of a better sense of the risks and costs of litigation they face in a harmonized system than they do in a diverse one…" and "harmonization can have some efficiency benefits. The concept of 'harmonization' implies that procedural systems will not be reformed wholesale, but rather brought into line with one another through elimination of quirks. We may assume that, other things equal, idiosyncratic features are likely to be less efficient than features that have gained

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[5] *Id.* at 339.
[6] See the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure at http://www.unidroit.org/english/principles/civilprocedure/main.htm
[7] See Antonio Gidi, Geoffrey Hazard, Michele Taruffo & Rolf Stürner, *Introduction to the Principles and Rules of Transnational Civil Procedure*, NYU Journal of International Law and Politics (JLIP), Vol. 33, No. 3, 2001, pp. 769-771.
[8] See Harold Berman, *Is Conflict of Laws Becoming Passe? An Historical Response*, in Emory University School of Law, Public Law & Legal Theory Research Paper Series: Research Paper No. 05-42 available at SSRN: http://ssrn.com/abstract=870455, p. 44.

wider acceptance. If this assumption is correct, then harmonization can offer some benefits in terms of eliminating inefficient rules and replacing them with more efficient ones."[9] In fact, "harmonization endeavors have frequently gone far beyond the mere attainment of uniformity and have resulted in the crafting of the best solutions to given legal problems. This is inevitable in any law reform project. When viewed in this light, apart from its obvious facilitative function, harmonization satisfies a development function too."[10]

The arguments against harmonization that have been put forth are not strong enough to outweigh the benefits that harmonization would bring in an area like transnational commercial transactions.

Against harmonization, some authors argue that

> "What may not seem so obvious is that reduction of legal risk [which would come from the adoption of uniform rules] does not come without costs. There is, in other words, an optimal level of legal risk that is greater than zero…Greater clarity in legal rules means providing more precise instructions covering a greater number of eventualities. As these rules become more exact and all-encompassing, the odds increase that they will lead to outcomes that parties to a transaction would like to avoid. Even if the rules permit alternative results, as much of contract and property law does, the parties must still address all those instances where they would prefer alternatives. Forcing business people to tailor their own transactional relationships at some point becomes counterproductive…In commercial law we continually must make tradeoffs between flexibility and certainty, and business people within reasonable limits seem to want the former…We thus must consider unification and harmonization as desirable to the extent it achieves a desirable reduction of legal risk, but not if it imposes such a highly developed and specific set of rules that a considerable number of transactions require substantial individualized negotiations."[11]

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[9] See Geoffrey Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, in The American Journal of Comparative Law, Vol. 45, No. 4, Symposium: Civil Procedure Reform in Comparative Context, pp. 905-918.

[10] See Sandeep Gopalan, *From Cape Town to the Hague: Harmonization Has Taken Wing*, _____, p. 47.

[11] See Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, University of Virginia School of Law, Legal Studies Working Paper Series: Working Paper No. 99-10, June 1999, available at SSRN: http://papers.ssrn.com/paper.taf?abstract_id=169209, p. 5. In line with this reasoning, Helmut Wagner notes that "Full harmonization may (at first sight) seem to be an adequate instrument for reducing the costs of cross-border legal uncertainty; however,

Yet a feasible harmonization process, as well as a successful one, is a process that leads to the adoption of principles and standards, models that can be adapted (by legislatures and courts) to the various legal systems.[12] The rules of an international convention will necessarily be framed using terminology and concepts that can be assimilated in all legal traditions, and that will necessarily leave legislators little room for variations and flexibility. Thus, there will always be a level of legal risk greater than zero. The goal of a proper harmonization project is not to eliminate legal risk – which is neither possible nor desirable – but to reduce it.

Another author has observed that "harmonization carries economic costs. One of the most important of such costs is the elimination of human capital which has been built up among the local bar on the operation of a given procedural system. Lawyers must be retrained …."[13] However, not all lawyers will have to be "retrained." A harmonization process cannot be pursued for all the rules applicable in a legal system. Usually, harmonization is suggested only for those kinds of cases that may involve commercial transactions entered into by parties from different countries. Harmonization process is usually intended for this restricted category of cases, not certainly for purely domestic matters that may be deeply intertwined with fundamental public policy considerations (like family, estate, tax, administrative law issues, etc.). Therefore, if any lawyers will

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full harmonization itself tends to imply high economic costs, so that it is not generally recommendable. Nevertheless, a gradual (partial) harmonization process could, in some circumstances, be beneficial…Legal uncertainty can be regarded as a non-tariff trade barrier. But from this it does not follow that full harmonization is necessary, because harmonization itself generates substantial costs. These include not only direct costs for developing bureaucracies or demolishing old structures, but also costs arising from a loss of the advantages of system competition, the advantages being an adaptation to the variety of preferences, efficiency advantages of regulative competition, and the minimization of 'rent-seeking' costs caused by bureaucrats/politicians. Nevertheless, from the point of view of the economy as a whole, welfare gains could possibly be realized through more harmonization." See Helmut Wagner, *Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?* available at http://www.uncitral.org/pdf/english/congress/WagnerH.pdf .

[12] An excellent example of harmonization process of procedural rules is offered by the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, available at http://www.unidroit.org/english/principles/civilprocedure/main.htm

[13] See Geoffrey Miller, *The Legal Economic Analysis of Comparative Civil Procedure*, in *The American Journal of Comparative Law*, Vol. 45, Symposium: Civil Procedure Reform in Comparative Context, at 918.

have to be retrained at all, they will be those lawyers who deal with transnational commercial transactions – that is, the same lawyers who most likely must "train" or "retrain" every time they approach a foreign legal system.

Furthermore, whether harmonization "removes diversity from the procedural system and thus reduces the available menu of options that can be looked to as models for procedural reform"[14] depends on how the uniform rules are conceived. A good harmonization process will not eliminate diversity, but build on it, combining the best elements of various systems and leaving to the national legislatures and courts some room to adapt the uniform rules to the peculiarities of their own legal system, without destroying the overall objectives of the project. Louis Visscher believes that "it remains to be seen if harmonized law indeed would result in more legal certainty (problems of different interpretation and application of the legal rules may still result in non-uniform law)", and "there is no empirical evidence that differences between legal systems indeed significantly impede international trade, nor that harmonization of law would result in more international transactions…According to several responses, problems in the functioning of the internal market are more caused by language barriers, cultural differences, distance, habits, and divergence in other areas of law, such as tax law and, noteworthy, procedural law."[15] However, these are exactly the obstacles that a harmonization process considers in trying to reduce their negative effects on the efficiency and fairness of transnational litigation, without pretending to eliminate such obstacles. The legal risk will necessarily always be greater than zero.

It is also said that the harmonization process "will not necessarily generate efficient rules, because it is likely to be carried out by elites selected in a political process, who may not necessarily give a high value to the efficiency of the rules they adopt."[16] However, assuming that we appreciate the benefits of having uniform rules governing certain aspects of transnational litigation, we cannot renounce such benefits merely because we believe the procedure for adopting these rules is not structured as it

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[14] *Id.*

[15] Louis Visscher, *A Law and Economics View on Harmonization of Procedural Law*, Rotterdam Institute of Law and Economics (RILE). Working Paper Series, No. 2010/09 available at SSRN: http://ssrn.com/abstract=1669944 , pp. 10-11.

[16] See Geoffrey Miller, *The Legal Economic Analysis*, at 918.

should. Rather, we should consider any problem in the procedure, and eliminate it through careful consideration.

Other authors, although recognizing the undeniable benefits of legal harmonization, note that countries are not trying to eliminate legal differences due to the costs that a harmonization procedure entails. These authors note that "if countries had the opportunity to do so, they would choose to reduce switching costs to facilitate legal harmonization. Surprisingly, we find that this is not necessarily the case. Even if given the opportunity to reduce switching costs, a country might choose to keep high switching costs, and in some circumstances, it might even decide to incur a cost to raise its own switching costs."[17] However, even if the costs of a harmonization procedure might be high, they would be borne by different systems, not by a single one and, in the long-term, harmonization would lead to considerable saving of resources.

So far harmonization of procedural law has made much less progress than harmonization of substantive law.[18] This is due to the perceived existence of some irreconcilable differences in the various civil procedure systems. However, not all the differences which are perceived as irreconcilable are truly so, and even if it were truly so, there have been many instances of original irreconcilable differences that did not stop

[17] See Emanuela Carbonara & Francesco Parisi, *The Economics of Legal Harmonization*, George Mason University School of Law. German Working Papers in Law and Economics: Volume 2006, Paper 16, p. 4.

[18] According to authoritative authors, harmonization of procedural law "has been impeded by the assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems" See Antonio Gidi, Geoffrey Hazard, Michele Taruffo & Rolf Stürner*, Introduction to the Principles and Rules of Transnational Civil Procedure*, pp. 769-771. There, the authors also note that "the pioneering work of Professor Marcel Storme has demonstrated that harmonization is possible in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure. This project to develop transnational rules for civil procedure has drawn extensively on the work of Professor Storme…This project endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions. The project is inspired by the desire to unite many diverse jurisdictions under one system of procedural rules as was accomplished in the United States a half-century ago with the enactment of the Federal Rules of Civil Procedure." Id., at p. 771.

countries from adopting uniform procedural rules, which turned to be extremely successful.

An international convention on service of process,[19] an international convention on the abolition of legalization,[20] and another on the taking of evidence abroad[21] are perfect examples of instances where original existing differences among countries were not real obstacles to harmonization.[22] They all demonstrate how "exorbitant" rules[23] adopted by some countries could be set aside in favor of harmonization, and how the international community as a whole could greatly benefit from uniform rules.

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[19] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on November 15, 1965.

[20] Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, concluded on October 5, 1961.

[21] Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

[22] As it has been observed, "Until the Convention [on the service abroad] was implemented, the contracting nations followed widely divergent practices for serving judicial documents across international borders, some of which did not ensure any notice, much less timely notice, and therefore often produced unfair default judgments. Particularly controversial was a procedure, common among civil law countries, called "notification au parquet", which permitted delivery of process to a local official, who was then ordinarily supposed to transmit the document abroad through diplomatic or other channels. Typically, service was deemed complete upon delivery of the document to the official whether or not the official succeeded in transmitting it to the defendant and or not the defendant otherwise received notice of the pending lawsuit. The United States delegation to the Convention objected to notification au parquet as inconsistent with 'the requirements of 'due process of law' under the Federal Constitution.' The head of the delegation has derided its '[i]njustice, extravagance [and] absurdity."… "In response to this and other concerns, the Convention prescribes the exclusive means for service of process emanating from one contracting nation and culminating in another." GAY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS, Kluwer Law International, 2007, p. 829. In other words, despite the original differences and the presence of exorbitant rules in the participating member states, consensus was reached.

[23] Exorbitant rules are rules which are valid within the legal systems where they have been adopted but they appear unreasonable to non-nationals because of the grounds used to justify them. See, for instance, K.A. *Russell, Exorbitant Jurisdiction and enforcement of judgments: the Brussels system as an impetus for the United States action*, Syracuse Journal of International Law and Commerce, Spring 1993, p. 2.
When the Hague Service Convention was adopted, notification au parquet was used by five countries: France, the Netherlands, Greece, Belgium, and Italy. 3 1964 Conference de la Have de Droit International Prive, Actes et Documents de la Dixieme Session (Notification) 75 (1964).

Through the adoption of standardized rules, these conventions have introduced cheaper and faster mechanisms to handle transnational commercial litigation, thus eventually enhancing international judicial cooperation and improving international dispute resolution.

Harmonization is possible and worth pursuing especially in the areas of conflict of laws.[24] Considering the benefits in terms of uniformity, efficiency and fairness that this convention could achieve and the fact that such a convention does not exist, one is led to believe that there must be irreconcilable differences preventing such achievement. The existing differences among conflict of law rules, however, are not irreconcilable,[25] and

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[24] Hélène van Lith observed that "The desirability for unification of jurisdiction rules at a world-wide level should be understood as a need for an international legal framework regulating cross-border commercial activities and its disputes in a 'globalizing world,' rather than a process that forms part of an economic and a political integration…As a general rule, unification of law is still considered to be desirable if it meets the 'specific needs of international legal business. In that respect it is undeniable that the desirability of unification of jurisdiction lies in the fact that the international community would benefit from jurisdictional certainty and predictability in cross-border activities and transnational commercial contracts." See HÉLÈNE VAN LITH, INTERNATIONAL JURISDICTION AND COMMERCIAL LITIGATION: UNIFORM RULES FOR CONTRACT DISPUTES, T.M.C. Assert Press; 1st Edition, (June 11, 2009), pp. 18-19. Although Visscher takes a position which is strongly opposed to harmonization, he recognizes that "clear rules regarding choice of law and regarding recognition and execution of foreign titles seems like a much better approach. In as far as 'best practices' exist which would also be used in other jurisdictions, regulatory competition enables bottom-up harmonization because other jurisdiction may incorporate similar solutions…the scope for harmonization of procedural law from a Law and Economics point of view is at best limited and it should have an optional character. Visscher, *A Law and Economics View on Harmonization of Procedural Law*, at 10-11.

[25] As observed by Friedrich K. Juenger, "The European panelists have given us an ambivalent answer to the question whether American conflicts learning can be exported to their shores. On the one hand, they tell us that there has been no 'Americanization' of European conflicts law. But in the same breath they give us many examples of European conflicts developments that look distinctly American. For example, analogues to the Second Restatement's 'most significant relationship' formula are found in the conflicts statute of Austria, the Swiss draft, and in a European draft convention [the Convention on the Law Applicable to Contractual Obligations, see *infra*]. Also, Common Market nations have emulated American practice by combining what we would call full faith and credit with a long-arm statute to produce the Brussels Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments. Family law, too, affords good illustrations of European conflicts ideas that parallel our own … Despite such striking parallels, the European panelists deny the Americanization of their conflicts law." See

they are the product of recent developments. When conflict of laws rules were originally introduced, the mechanisms that such rules adopted were very simple and hardly lent themselves to different interpretations and applications. Furthermore, the original purpose and effect of the creation of conflict of law rules were to harmonize the differences and bring unity, while preserving such differences. This purpose should still be preserved.

II. CONFLICT OF LAWS RULES

1. Terminology

Strangely, while the term "private international law" was introduced by an American writer, Joseph Story,[26] it prevails in Europe, and the term "conflict of laws," first used by a European writer, Ulrich Huber,[27] prevails in the U.S.

In the European private international law, the word "international" is used to identify cases having a transnational dimension, and the word "private" indicates controversies not involving states.

The American "conflict of laws," on the other hand, focuses on the "conflict" between different applicable laws or jurisdictions,[28] which is not resolved *ex ante* by an applicable rule, but it should be solved by courts at the time the issue arises, through the analysis and the approach which they consider more valuable.

In both cases, conflict of laws or private international law involves three areas of law: choice of law, jurisdictional law, and recognition and enforcement of judgments.

Until recently, the differences reflected in the different terminology were not so evident, especially because American conflict of laws subscribed to the same premises and aspirations as Savigny[29]'s classical theory. In fact, while most of American law

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Friedrich K. Juenger, *American and European Conflicts of Laws*, in The American Journal of Comparative Law, Vol. 30, No. 1 (Winter, 1982), at 117-118.

[26] See Symeon C. Symeonides, *The American Revolution*.

[27] See Symeon C. Symeonides, *Id*.

[28] See Symeon C. Symeonides, *Id*. at p. 39.

[29] Friedrich Carl von Savigny was a German scholar, who lived between the end of the XVIII sec. and the first half of the XIX century. In the words of Friedrich Juenger

derives from English common law, American conflict of laws rules derive from continental European law, mainly Roman and German law. Therefore, American and European conflict of laws rules share deep historic roots.[30]

Originally, both American conflict of laws and European private international law aimed at achieving international or interstate uniformity of choice-of-law decisions regardless of where litigation occurred. In this context, there was no room for interest analysis or forum-law favoritism or protectionism of forum litigants. Until the middle of the twentieth century, in most countries, conflict of law rules had to be neutral in the sense that foreign and forum laws had to be applied equally.[31]

2. The Romanist Origins of Conflict of Laws Principles: choice of law and jurisdictional law adopted the same "connecting factors"[32] to identify the

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s"According to Savigny, the conflict of laws serve the purpose of allocating each legal relationship to a particular legal system to avoid disparate treatment of the same transaction at the hands of judges in different cases. Because he focused on the need for a uniform treatment of legal transactions irrespective of the forum, he rejected the statutists' unilateralist doctrine, as well as the primacy of forum law Watcher had always advocated. In Savigny's words: 'in many conflict cases there is concurring jurisdiction in different places, so that in a particular case the plaintiff is free to choose the forum. Accordingly, if [Watcher's] principle should control the local law applicable in each case depends not only on fortuitous circumstances, but on a litigants' unilateral choice.'" F. JUENGER, LAW AND REALITY. ESSAYS ON NATIONAL AND INTERNATIONAL PROCEDURAL LAW, 1992, p. 138

[30] See EUGENE SCOLES, PETER HAY, PATRICK BORCHERS & SIMEON C. SYMEONIDES, CONFLICT OF LAWS, (4th ed. 2004), at 18 – 19. The principle according to which the courts of the place where the defendant resides have personal jurisdiction over the defendant, which was spelled out in *Milliken v. Meyer*, comes from the Justinian Code. Roman law also provided the concept of limited jurisdiction, according to which the plaintiff could sue in tort at the place of wrongful conduct; the plaintiff could bring contract claims at the place of contract execution or performance, and the plaintiff could bring property right claims at the situs. Under Roman law, the same connecting factors were used to identify the law applicable to the controversy: courts usually applied the law of the place where the contract was entered into (lex loci contractus), the law of the place where the tort or the crime was committed (lex loci delicti), the law of the place where the property in dispute was situated (lex rei sitae). These connecting factors and conflict of laws rules were adopted by American courts too that. See para. 2.1 *infra*, for further discussion.

[31] See Symeon C. Symeonides, *Id*. at 39 – 40.

[32] Connecting factors are the factors which link an event, a transaction or a person to a country. See ABLA MAYSS, PRINCIPLES OF CONFLICT OF LAWS, Cavendish Pub., London, 1999, p. 3.

law applicable to a controversy and the judge with jurisdiction over the same and the parties

According to Friedrich Juenger, the origins of conflict of laws can be traced back to the Roman law of the XII century, when Western scholars began to study and teach Justinian's Code in northern Italy.[33] Usually, a conflict of laws problem arose when a citizen of one city sued a citizen of another city, and the judge had to identify the law applicable to the controversy. The same occurred in Western Europe, and in France, England and Germany where, not only issues concerning conflicts of urban laws, but also conflicts of feudal, mercantile, royal and ecclesiastical laws arose.[34]

The Romanist scholars who commented on the Justinian Code derived fundamental conflict of laws concepts and doctrines from the canon law applied in the ecclesiastical courts. According to one such doctrine, when a choice of law has to be made, courts usually should apply the law of the place where the contract was entered into (*lex loci contractus*), the law of the place where the tort or the crime was committed (*lex loci delicti*), the law of the place where the property in dispute was situated (*lex rei sitae*) or the law of the place where the marriage was celebrated (*lex loci celebrationis*). These were all connecting factors, which linked the controversy to a particular jurisdiction. In any event, justice should prevail over formal choice of law rules when the application of a formal rule would be unjust.[35] These principles were very simple, fair and relatively predictable.

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[33] See Harold J. Berman, *Is Conflict of Laws Becoming Passe'? An Historical Response*" in Emory University School of Law, Public Law & Legal Theory Research Paper Series, Research Paper No. 05-42, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870455, p. 45. However, private international law had somehow already emerged in Greece with the growth of Greek city-states around the Fourth Century B.C. See FRIEDRICH JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE, Transnational Publishers, 2005, p. 6.

[34] Berman, *id*. at 47.

[35] Berman, *Is Conflict of Laws Becoming Passe'? An Historical Response*", at 47, quoting Karl Neumeyer, "*Die gemeinrechtliche Entwickelung des internationalen Privat- and Strafrechts bis Bartolus*", Munich, 1901. See also Hessel E. Yntema, *The Historic Bases of Private International Law*, The American Journal of Comparative Law, Vol. 2, No. 3 (Summer 1953), at 304. According to Yntema, "The analysis indicates that by the fourteenth century a considerable structure for the solution of statutory conflicts according to the nature and subject matter of the statutory provisions had been developed.

The same connecting factors would, most of the times, identify the judge with jurisdiction over the case and the parties; thus, in some legal settings, the determination of jurisdiction was the choice of law.[36] That was true in England, but it was also true in any conflict between civil and ecclesiastical courts. In fact, no civil court would have taken jurisdiction of a case against a cleric, or a case involving marriage, and then applied canon law. Nor would an ecclesiastical court have heard a case of novel disseisin. Less obviously, a manorial court would not have applied the common law, which in England

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In this scheme, a number of principles, which have since become common property, were set forth, e.g. – That questions of form are governed by the *lex loci actus*. That *litis ordination*, the conduct of litigation or, as we should say today, questions of procedure, are governed by the law of the place of suit, the *lex fori*. That *ltis decision*, viz. of matters affecting the performance of a contract, if arising conformably to the contract at the time of its conclusion, is governed by the law of the place of contract; if arising *ex post facto* as a result of negligence or delay in performance, by the law of the place of performance. That liability for delicts is governed by the *lex loci delicti* except when a foreigner may justifiably plead ignorance of an unusual local law. That questions of rights arising out of things are governed by the *lex rei sitae.* That questions affecting the quality or status of persons are governed by the personal law, which applies only to subjects. With variants in detail, the technique of statutory interpretation dominated conflicts law for five centuries. The reasons why it was ultimately superseded are implicit in Bartolus' commentary. The spheres of application of conflicting statutes cannot be resolved by their pretensions; therefore, the method necessarily involved recourse to fluctuating formalistic and equitable considerations on which the doctors disagreed in concrete cases. By the sixteenth century, d'Argentré observed that the subject had become so complicated with divergent scholastic distinctions, opinions and precedents that confused masters left their readers more confused." *Id.* at 304.

[36] The idea that by choosing the law applicable to a controversy the parties would choose the judge with jurisdiction over the parties and the case is very old. Around the fourth century B.C., contracts between Egyptians and Greeks contained "implicit choice-of-law rules" and "specifying language as the pertinent connecting factor for jurisdiction purposes, it recognized the principle of party autonomy. By choosing the idiom, the parties could select the court and thus, indirectly, the applicable law." See FRIEDRICH JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE, *Id.* at 8. Likewise, when the Germanic Tribes invaded Rome, they blended the Roman law with their own customary laws, and inhabitants of Rome continued to be ruled under Roman law, while the "barbarians" were ruled by their own law. And when conflicts arose over which law to apply, the parties would made a *professio iuris*. "A declaration originally meant to evidence the parties' ethnicity…by professing to belong to a particular ethnic group, a party could in effect stipulate the law it wished to govern." *Id.* at 10.

was tied to the system of royal writs.[37] Therefore, the origins of choice of law rules tell us much about the origins of choice of jurisdiction.

After all, jurisdictional law and choice of law are branches of conflict of laws,[38] and although authors often forget this and focus on jurisdictional law as a separate and independent doctrine, the opposite is true. Truth is, when conflict of laws rules started being adopted and used, they used the same connecting factors to identify the law applicable to a controversy and the judge with jurisdiction over the same and the parties. This approach proved to be successful and efficient. A joint study and analysis of the choice of law and jurisdictional law, their origins and evolution, helps us better identify the flaws that have developed over the years, think about the reasons why they have developed, and formulate hypotheses for reform.

2.1 Roman and American conflict of laws rules share relevant roots

Roman conflict of laws – from which civil law derives – and American conflict of laws share some relevant roots.

The Justinian Code provided the maxim *actor sequitur forum rei*,[39] thus anticipating the decision in *Milliken v. Meyer*,[40] according to which the courts of the place where the defendant resides have personal jurisdiction over the defendant. Roman law also provided the concept of limited jurisdiction, according to which the plaintiff could sue in tort at the place of wrongful conduct; the plaintiff could bring contract claims at the place of contract execution or performance, and the plaintiff could bring property right claims at the *situs*.[41] Exactly the same connecting factors were used to identify the law applicable to the controversy: courts usually applied the law of the place

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[37] In England, after 1066, the church had exclusive authority over ecclesiastical matters and "manorial courts … dealt with the peasants who worked monastic and other ecclesiastical lands." See JANIN HUNT, MEDIEVAL JUSTICE: CASES AND LAWS IN FRANCE, ENGLAND AND GERMANY, 500-1500, Jefferson, N.C. : McFarland & Co., 2004, p. 69.

[38] The other two branches being choice of law, and recognition and enforcement of foreign judgments.

[39] See Cod. Just. 3.19.3, 3.13.2.

[40] 311 U.S. 457 (1940). See *infra*.

[41] See Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, Michigan Law Review, Vol. 82, 1195, at 1203.

where the contract was entered into (*lex loci contractus*), the law of the place where the tort or the crime was committed (*lex loci delicti*), the law of the place where the property in dispute was situated (*lex rei sitae*).

As Juenger observed, "fourteen hundred years before *International Shoe,* the civil law, unhampered by constitutional doctrine and territorialist dogma, already premised jurisdiction on 'minimum contacts,' and this idea continues to inform current European jurisdictional law."[42]

While most of American law derives from English common law, American conflict of laws rules derive from continental European law.[43] And, as Symeon Symeonides observed, "it is therefore natural that, even after its formative period, American conflicts law continued to share some basic characteristics with its European counterpart. Indeed, until the middle of the twentieth century, the two systems shared the same general goals and followed similar methods. They aspired for international/interstate uniformity and 'conflicts justice' and employed the same general methodology – bilateral selectivism – and the same basic choice of law syllogism consisting of characterization, localization and application of the pre-designated law, with *ordre public* and *renvoi* functioning as occasional exceptions."[44]

At some point, however, the American and the continental European systems started diverging, or at least, this is the idea that we must have had, if we accepted the assumption that adopting a uniform convention on conflict of laws rules was utopian.

The proposed Hague Convention on jurisdiction, recognition and enforcement of judgments – that is, an international convention which was supposed to harmonize only

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[42] Juenger, *Id*. at 1204. In other words, despite what many authors and commentators still believe, European jurisdictional law is not based on a territorialist dogma, rather, it is premised on 'minimum contacts' as much as American jurisdictional law is. See *infra*.
[43] See EUGENE SCOLES, PETER HAY, PATRICK BORCHERS & SIMEON C. SYMEONIDES, CONFLICT OF LAWS, (4th ed. 2004), at 18 – 19.
[44] See Symeon C. Symeonides, *The American Revolution and the European Evolution in Conflict of Laws*, Tulane Law Review, Vol. 82, No. 5, 2008, at 3-4.

two branches of conflict of laws – failed, allegedly due to irreconcilable differences existing between civil law and common law systems.[45]

Perhaps a brief overview of a few civil law and common law countries considered to be fairly representative of the common and civil law systems could help us understand whether this belief is well grounded and whether reasons exist to stop pursuing the original goal of harmonizing conflict of laws rules while preserving differences.

II. A CHOICE OF LAW RULES

1. General features of the systems under consideration

The phrases 'choice of law' and 'conflicts of law' are often used interchangeably.[46] However, as clarified above,[47] choice of law is only an area of conflict of laws analysis, and choice of law rules identify, in case of conflict between potentially applicable laws, the substantive law that should apply and govern a specific controversy.

The following analysis focuses on the choice of law system adopted by Italy, Germany, France, England – as well as on some uniform choice of law rules adopted in Europe – and the U.S., considering these systems as fairly representative of the civil law (the Italian, German and French systems) and of the common law (the English and American systems) systems. Civil law systems come from Roman law, that strongly influenced and shaped most of the European systems first, and Latin America and some Asian countries (e.g. China, Japan) later. Common law started developing in England and then it was adopted in the US. Due to colonization and various dominations by common law countries like England and the US, the Philippines, the African and Asian parts of the British Commonwealth, South Africa, Liberia, Scotland, Sri Lanka, Guyana, were

[45] *See*, ANDREAS F. LOWENFELD, LINDA J. SILBERMAN, THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: RECORDS OF THE CONFERENCE HELD AT THE NEW YORK UNIVERSITY SCHOOL OF LAW ON THE PROPOSED CONVENTION, 2001.
[46] See Jeffrey M Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, Buff. L. Rev. 45, 329, 1997,
[47] See para. II.1, *supra*.

strongly affected by the common law system, but they were also influenced by the civil law system.[48]

This analysis does not take into account the so called "religious systems" (like the Islamic one) since, in those cases, there are too many variables to consider, and that analysis would exceed the scope of this work. However, this analysis could be considered by those systems too since, as illustrated above, it deals only with transnational commercial transactions litigation, an area where religion and public policy issues should play a relatively modest role.

Italy

In Italy, the international private law is Law no. 218 of 31 May 1995 for the Reform of the Italian System of Private International Law ("Italian PIL").[49] Choice of law rules are, therefore, codified, and case law does not create new rules but merely interprets the existing rules. The Italian PIL contains more than forty articles dealing with choice of law. Chapter I contains the general provisions on applicable law, while the other chapters deals with capacity and rights of natural persons, companies, family relations, succession, property rights, contractual and non contractual obligations, these two latter being now regulated respectively by Regulation (EC) no. 593/2008 and Regulation (EC) no. 864/2007. R*envoi* is accepted.[50] Therefore, if Italian courts find that the applicable law is that of a foreign state, they must determine whether the choice of law rules of the foreign law refer to the law of a different country and, if this is the case, they have to apply the Italian law if the foreign law refers back to Italian law (*rinvio all'indietro*) or, when the choice of law rules designate the law of a third state (*rinvio altrove*), they have to apply the law of that third state, if the law of that state accepts *renvoi*, that is, considers itself applicable in the particular case. After determining the applicable law, the Italian court can still refuse to apply it to the particular case if the

[48] See UGO A. MATTEI, TEEMU RUSKOLA, ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW. CASES-TEXT-MATERIALS, 7th ed., 190 f.
[49] For more information on Italian private international law and transnational litigation, see SIMONA GROSSI, TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE. ITALY. Oxford University Press, March 2010.
[50] See Article 13 Italian PIL.

result would be contrary to the *ordre public*, that is, a fundamental principle of Italian law (Article 16 Italian PIL). The statute also recognizes the existence of mandatory rules of the *lex fori* that must be applied in all cases, even when the choice of law rules would designate a foreign law as the applicable law (Article 17 Italian PIL).

As observed by Ballarino and Bonomi, "these rules require a different approach to conflicts issues. Here the judge does not have to determine the law applicable to a certain legal relationship, but ask whether the object and purpose (in other words, the policy) of the domestic rule imposes its application in the particular case."[51] This method is similar to the functional policy oriented approach adopted in the United States under the influence of Prof. Currie's interest analysis:[52] however, it is limited to cases where an important interest of the forum is at stake.[53] Therefore, *ordre public* and rules of mandatory application function as occasional exceptions.

Some choice of law rules aim at achieving a particular substantive result that is the expression of a certain policy of the law of the forum. In this case, policy considerations influence the choice of the applicable law in order to ensure that a certain result is achieved, and this is done through alternative connecting factors and optional rules. Alternative connecting factors are used to uphold the formal validity of certain activities like marriage, recognition of an illegitimate child, testamentary wills,[54] while optional rules are sometime used to protect the party who is considered weaker in the legal relationship. In all areas where the statute contains policy-oriented choice of law rules, it also makes exceptions to the general rule on *renvoi*,[55] which could otherwise nullify the intent of the legislature in these circumstances.

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[51] TITO BALLARINO, ANDREA BONOMI, *The Italian Statute on Private International Law*, id.

[52] See *infra.*

[53] See also TITO BALLARINO, ANDREA BONOMI, id., footnote 40.

[54] For instance, legitimacy and legitimation of children is governed, alternatively, by the national law of the child and its parents, whereby the law more favorable to the creation of a relation of kinship prevails.

[55] For instance, as far as legitimacy and legitimation are concerned, *renvoi* must be applied only if it promotes the policy underlying the choice of law rule, i.e. if it leads to the application of a law that favors the establishment of the parental link. See VENTURI, *Sul cosiddetto invio in favorem nel sistema italiano di diritto internazionale privato*, in *Riv. Dir. Int. priv. proc.* 1999, pp. 526-556.

Most Italian choice of law rules can be regarded as jurisdiction-selecting rather than result-selecting. In other words, the court should determine the applicable law without taking into account the contents of the law designated by the choice of law rules. However, Italian choice of law rules become result-selecting when *ordre public* or a rule of mandatory application should apply. As observed by Ballarino and Bonomi, "codification of the rule of mandatory application, on the one hand, and the introduction of some result-oriented choice-of-law rules, on the other hand, are expressions of the 'methodological pluralism' that constitutes one of the distinguishing characteristics of private international law in Europe in the modern or rather post-modern era, as professors Jayme and Brilmayer would put it. This syncretism is generally considered a sign of maturity."[56] Furthermore, the adoption of this method moves European private international law closer to American choice of law.[57] Foreign law is not considered as a "fact" that must be proved by the parties; rather, the judge is required to ascertain the content of foreign law *sua sponte*. When doing so, the judge can use experts in the field.

Germany

In Germany, the statutory bases for the application of foreign substantive law is set forth in the Introductory Law to the Civil Code ("EGBGB" or "German PIL"). Articles 3 – 38 EGBGB form the foundation of German private international law. German choice of law rules are governed by black letter rules and not by open-ended provisions indicating the considerations to be taken into account when deciding. Like Italian courts, German courts may interpret rules governing private international law, but they are not free to change statutory provisions. *Renvoi* is accepted (Article 4 I EGBGB), however, as it happens in Italy, if the application of foreign law that should apply manifestly violates German public policy, the foreign law is not applied, applied differently or substituted by German domestic law (article 6 EGBGB).

German courts tend to refrain from using this "escape clause". This enhances predictability and reduces the chances of arbitrary decisions. As Carter observed, public

[56] See TITO BALLARINO, ANDREA BONOMI, *The Italian Statute on Private International Law*, id., p. 112.
[57] See *infra*.

policy is an escape route from the application of the relevant choice of law rule, which denotes the shortcoming of choice of law rules.[58]

Codification definitely helped limiting the use of public policy as an escape devise in Italy and Germany.

France

Differently from Italy and Germany, France has not any choice of laws statute and the main source of choice of law rules is case law. Some of the case law solutions were adopted during the pre-revolutionary time, in order to solve conflicts among local customary law in fields like succession and matrimonial property. Later and recent attempts to codify private international law were unsuccessful. The legislature ended up introducing specific choice of law rules while reforming certain areas of domestic family law, and then the European Union adopted some EC Regulations,[59] which provided France with codified choice of law rules. There is, however, a general codified choice of law rule also in France, and this is contained in article 3 of the Civil Code, which provides that "Statutes relating to public policy and safety are binding on all those living on the territory. Real estate is governed by French law even when owned by aliens."

As it happens in the Italian and German PIL, *renvoi* is excluded by French private international law where its application would be inconsistent with the purposes underlying the conflicts rule. The French *Cour de Cassation* has held that the "escape device" of public policy should be invoked where the foreign law is found to offend

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[58] See P.B. Carter, *The Role of Public Policy, in English Private International Law*, International and Comparative Law Quarterly, Vol. 42, Jan. 1993, at 1. Carter also observes that "Public policy historically has been, and continue to be today, only one of several fairly well-trodden escape routes. Others include contrived characterization of an issue, (occasionally) misuse of the doctrine of *renvoi*, doctrinaire inhibitions about penal and revenue laws, the so-called "public-law" mystique, and, of course, in modern times the elaborate pseudo-methodological pantomime of governmental interest analysis. As contrasted with some of these other routes public policy may be seen as having the disadvantageous merit of being blatantly frank and obvious." *Id*., at 2-3.

[59] See, among others, those described *infra*. EC Regulations are immediately applicable in each Member States, while European directives are implemented by all member states through enactment of national legislation, which must reflect the directive, but may be interpreted by each Member State.

"principles of universal justice deemed of absolute international value by common French opinion."[60] Following an approach which resembles Prof. Curries' "governmental interest analysis,"[61] a foreign law may also be set aside by French law because it is incompatible with the French legislative policy on the matter, at least where the case has specific contacts with the *forum*. When refusing to apply a foreign law due to a public policy issue, a French court must consider the intensity of the policy underlying the competing French rule, and or the significance of the controversy's connecting factors with France, thus combining considerations of policy and contacts with considerations pertaining to the content of the foreign law[62] (result-selecting approach).

Although the application of domestic laws to transnational situations should be the exception, not the rule, the opposite is happening in France, since French courts more and more often apply domestic rules rather than foreign rules that might otherwise be applicable, based on the legislator's assumed intent and without any reference to the normally applicable bilateral choice of law rule.[63] Such "mandatory rules" are referred to in French law as laws of "immediate application" or *lois de police*, under Article 3, paragraph 1 of the Civil Code.[64] The exact scope of application of these rules may be very uncertain and unpredictable.

England

Before the beginning of the XVII century, English common law courts had applied exclusively English law to controversies, ignoring any foreign element that these controversies involved. English choice of law rules were introduced in the early years of the XVII century,[65] when English courts had to face conflict issues, specifically, those involving the courts of common law and the courts of equity, conflicts between custom

[60] GEORGE A. BERMANN, ETIENNE PICARD, INTRODUCTION TO FRENCH LAW, at 455.
[61] See *infra*.
[62] This happens, for instance, in maintenance obligations.
[63] See GEORGE A. BERMANN, ETIENNE PICARD, INTRODUCTION TO FRENCH LAW, at 456.
[64] Article 3, paragraph 1 of the French Civil Code provides that "Laws of police and security are binding upon all those who inhabit the territory"
[65] For the origins of Conflict of Laws in the UK, see KRISTY J. HOOD, CONFLICT OF LAWS WITHIN THE UK, Oxford University Press, 2007.

and statute, statute and precedent, general and local custom. At that time, in the XVII century, a body of uniform choice of law rules finally developed in England.[66]

The most important sources of the English choice of law rules are statutes, the decisions of the courts and the opinions of jurists. Statutes are, however, the most important source. Various connecting factors are adopted to identify the applicable laws, but they more or less resemble those adopted by the other European systems.[67]

English private international law reliance upon public policy is rare if compared to the French one. This approach has been considered as a consequence of the "forum orientated bias which is built into many English choice of law rules"[68] rather than of any "internationalist" attitude on the part of English courts. In other words, since English internal law should apply most of the times – in family matters,[69] e.g. divorce, voidability of marriage, judicial separation, adoption and maintenance[70] – there is no need to refer to public policy to avoid the application of a foreign law. Similarly, public policy very rarely comes into play in torts actions. English law provides that there is no action in tort at all unless the tort can be actionable under English domestic law.[71] On the other hand, in the area of commercial contracts – where English choice of law rules are more "internationalist" – public policy is often invoked with regard to choice of law.[72] Harmonization might enhance predictability.

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[66] Then, common law and equity was brought to America by the colonists. This body of law did not vary with the colony to which the colonists took such laws. Thus, there were originally no differences between the law of Virginia and Massachusetts, New York and Connecticut, Pennsylvania and Maryland and, on the face of it, there were no conflict of laws issues. The only significant conflict of laws issue that existed at that time, was the conflict among different jurisdictions. KRISTY J. HOOD, CONFLICT OF LAWS WITHIN THE UK, *Id*.

[67] See *infra*.

[68] See P.B. Carter, *The Role of Public Policy, in English Private International Law*, at 3.

[69] However, public policy has played a substantial role in the area of recognition of foreign judgments. Carter, Id.

[70] In these cases, in other countries, choice of law rules would call for the application of the foreign *lex causae*.

[71] See Carter, *Id*.

[72] See Carter, *Id*.

The U.S.

In the U.S., choice of law rules are judge-made law and various approaches and theories have been suggested and adopted throughout the years.[73]

The first approach to choice of law issues was the so called traditional "vested rights" approach, proposed by the First Restatement of Conflict of Laws. Under this approach, the law of the state in which the parties' rights "vested", that is, were created, had to apply to any given case. This approach was abandoned and substituted by the "most significant relationship" approach introduced by the Second Restatement of Conflict of Laws, according to which the law of the state having the most significant relationship to the parties and the transaction in light of the particular issues applies. This approach ends up being not so different from the "vested rights" approach nor from the approach originally adopted and still present in Europe.

The European and the American approach to conflict of laws seemed to diverge when American courts started following Prof. Currie's approach, who suggested the so called "governmental interest analysis". Under this approach, when determining which law to apply to the controversy, the court should consider the underlying policies of the laws of the states involved and the interest of the states in furthering those policies. This is because Prof. Currie believed that the forum courts were instruments of state policy and, thus, they had to apply forum laws whenever there were legitimate interests to do so. Once the policies are defined, the court should determine which state has the strongest interest in applying its own law to the specific issue. If the court finds that only one of two or more states with allegedly conflicting laws has a legitimate interest in applying its law, then what is called a "false conflict" exists, and the court should apply the law of the interested state. On the contrary, where more than one state has a legitimate interest in having its law applied to the issue and the laws of the interested states conflict, then there

[73] For a comprehensive description of American Conflict of Laws, on which this work is also based, see DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER, KERMIT ROOSEVELT, CONFLICT OF LAWS. CASES. COMMENTS. QUESTIONS, Thomson-West, 2006.

is what is called a "true conflict" and various solutions and methods can apply to identify the applicable law.[74]

A fourth approach was introduced by Prof. Leflar, who proposed the so called "better law" approach, which rejects rules and formulas, and select the better law on the basis of particular considerations.

The traditional vested-rights approach has been abandoned by American courts, most of which adopt the "most significant relationship" approach.[75] This approach is more flexible and takes into account the fact that controversies may give rise to different issues, each of which related to a different state and a different substantive law, considerations which a "single contact" approach would not be able to consider. This approach is also referred to as the "center of gravity" approach, and it was developed in

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[74] Prof. Currie suggested that, in this case, the court should recognize the interests of the forum by applying its own law, even though this would defeat the interests of the other states involved. Applying the "*forum non conveniens*" doctrine, the forum should dismiss the case; otherwise, the forum should apply the law of one of the interested states, which law it may choose by (i) considering which law is better or sounder, or (ii) considering which law most resembles its own. There may be also a case where neither the forum nor the other states involved have an interest in applying their respective law, the s.c. "unprovided case". In this case, Prof. Curries suggests four possible solutions: (i) apply the law of that state providing the better solution to the underlying social and economic problem; (ii) protect the local driver against the claims of foreign plaintiffs; (iii) reach the same result as in (ii) by applying a more sophisticated rule that would treat foreign plaintiffs as they would be treated in their home states; or (iv) apply the law of the forum, since application of another state's law is not justified. Prof. Currie preferred the fourth alternative. Another approach has been suggested by Prof. Baxter, who proposes to run a "comparative impairment" analysis, in which a federal court would assume jurisdiction in cases of true conflict and would apply the law of the state whose underlying policies would be most impaired if its laws were not applied to resolve the case. Baxter believed that neither of the two conflicting states could resolve the conflict but if an impartial federal court could do so, Currie's solution of having each state apply its own law could be avoided. Baxter believed that neither of the two conflicting states could resolve the conflict, but if an impartial federal court could do so, Currie's solution of having each state apply its own law could be avoided.

[75] This approach is the one adopted by Restatement Second, Section 145, which identifies the contacts generally considered in a tort case, in order to locate its "center of gravity" for choice of laws purposes. These contacts are: (i) the domicile, residence, etc. of the parties to the action; (ii) the place where the harmful act or omission occurred; (iii) the place where the relationship between the parties, if any, was centered. See Restatement (Second) of Conflict of Laws, sec. 145.

the *Babcock v. Jackson*[76] case. There, plaintiffs and defendants were from New York. They made a trip to Ontario, where the accident occurred. Instead of applying Ontario law – which denied recovery - as the vested rights approach suggested, the New York court applied New York law considering that the parties were from NY, the trip started and was going to end in New York, thus New York was the place where the parties' relationship was centered. In other words, the most significant contacts had to be traced to New York.

In *Dym v. Gordon*,[77] the court adopted the "governmental interest analysis" approach. There, two students from New York, attending the University of Colorado, went on a trip together and were involved in an accident. One was driving; the other was a passenger. The passenger claimed that negligent driving by the driver caused the accident, and sued the driver before a New York court. Colorado law permitted recovery only for "willful and wanton" behavior by the driver. The New York court held that, since the most significant contacts were with Colorado, Colorado law had to apply. The New York court also noted that Colorado policy was intended to give high priority to claims of innocent third-party victims. This was another reason to apply Colorado law.

Usually, courts adopting the Second Restatement approach identify the state with the most significant relationship with reference to a "governmental interest", thus combining the two approaches. Thus, despite the original intent of the Restatement Second of Conflict of Laws, uniformity and predictability of outcomes seem hard to achieve since different courts may reach different conclusions as to what is significant and what is not in light of underlying public policies.

In recent years, legal scholars have suggested other approaches to choice of law rules,[78] but they lend themselves to the same critiques applicable to the governmental

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[76] 191 N.E.2d 279 (N.Y. 1963).

[77] 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

[78] Prof. Arthur von Mehren and Donald Trautman, as well as prof. Russell Weintraub, proposed the adoption of a "functional analysis" approach, which substitutes the term "concerned jurisdiction" for "interested state" under the governmental interest approach. The forum should locate concerned jurisdictions, identify the "predominantly concerned jurisdiction" and apply the law of that state to the particular issue in question. In the absence of a predominantly concerned jurisdiction, this approach requires the forum to "weigh" the status of the conflicting laws, considering the policies behind the laws in

interest analysis approach. Uniformity is necessary to enhance predictability and, ultimately, fairness and efficiency.

2. Commonalities existing between European and American choice of law systems

The preceding analysis of the general features of the systems under consideration shows that these systems share many similarities.

As far as codification is concerned, the Italian, German and English[79] systems have codified choice of law provisions. Even if France is a civil law system, code-based by definition, in the past, choice of law rules were mainly found in case law. However, with the adoption of EC Regulations governing choice of law, France now has codified choice of law rules too. The American legal system does not have binding codified choice of law provisions; however, by adopting the Restatement (Second) of Conflict of Laws, it showed an interest in "systematization," thus suggesting that codification should not be so unacceptable to the US.

The European and American choice of law rules adopt a "methodological pluralism" approach, since they apply different methods to identify the applicable choice of law rules, not just a single approach.

The "most significant relationship" approach adopted by the American courts is, in its essence, very similar to the European courts' approach,[80] if one only considers that what renders a relationship among the controversy, the parties and a specific place "most significant" is the presence of connecting factors tidying that controversy and the parties to a specific place. And, after all, these connecting factors do not – and cannot – vary substantially from system to system, since the underlying idea and purpose is to make the applicable law predictable to the parties. Most of the times, whenever a choice of law

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terms of both their effectiveness and current trends in the law. Prof. Weintraub's approach follows governmental analysis up to the point of a "true conflict", when he proposes a rational solution based on the underlying policies of the interested states and general trends in the law.

[79] It is worth noting that, as observed above, the English legal system is a common law system, which traditionally consider case law as the main source of law. However, the main sources of choice of law rules in England are statutes.

[80] For further discussion, see para. II.A.2 *infra.*

needs to be made, courts apply the law of the place where the contract is made or the law of the place where the tort is committed, or the law of the place where the property in dispute is situated.[81] This is the law of the place that is "most significantly" or substantially related to the case.

All the civil law and common law systems considered use "public policy" as an exception to the application of foreign law,[82] an "escape device." American's "governmental interest analysis," despite the name, is nothing else but the European public policy analysis. The only difference between the American and the European approach lies in the extent to which the "government's interest," "forum's interest" or "public policy" is used to prevent the application of an otherwise applicable foreign law which would lead to a different result. France and the US, however, seem to use this exception more often than the other systems.

The existing similarities among these systems' conflict of laws rules and approaches clearly outweigh their differences and, by focusing on the predominating similarities, this analysis is intended to prove that harmonization of choice of law and, more broadly, conflict of law rules is possible.

Despite the apparently different approaches adopted by the various systems, the outcomes are similar, perhaps because, notwithstanding the different paths or merely "labels" adopted by the legislatures, scholars and judges, choice of law rules cannot totally depart from their original uniformity goals, as well as from due process.[83]

Given the limited scope of this work, this analysis will not consider each and every single choice of law problem in the systems considered, but merely focus on a few

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[81] See *infra*.

[82] See articles 16 and 17 Italian PIL; article 6 EGBGB; article 3 of the French Civil Code; see also the English and American approach, *supra*. Public policies were always considered in choice of law analysis. Since the origins of conflict of laws, since the XII century, codified connecting factors would be applied unless *justice* demanded otherwise.[82] However, in all these contexts, public policies considerations made in the interest of *justice* were only the exception, not the rule. Prof. Currie's idea that courts are instruments of state policy and, thus, they should apply forum laws whenever there are legitimate interests to do so necessarily leads to different results and disuniformity, which run against the idea of harmonization and with Savigny's theory, according to which the main goal of private international law is international (or interstate) uniformity of choice-of-law decisions, regardless of where litigation occurs.

[83] See para. II.A.3 below.

areas and issues which might arise in the context of litigation on transnational commercial transactions.

The preceding brief overview of the main features of the five countries considered should provide the reader with some preliminary ideas of the approaches used by these systems as well as the bases to better understand the analysis that follows, intended to prove that European and American choice of law rules share important similarities, which should encourage harmonization.

2. A selection of few choice of law rules which might be harmonized

As indicated above, while American choice of laws rules have not been codified, the vast majority of American courts tends to follow the Restatement (Second) of Conflict of Laws and to interpret and apply the Restatement uniformly. Most of the European Member States' choice of law rules have been codified but not harmonized; however, European choice of law rules dealing with contractual and non-contractual obligations have been harmonized through the adoption of European Regulations.[84] This means that, whenever a controversy on contract or torts issues involves parties from different European countries, these harmonized rules will apply rather than the European Member States' domestic choice of law rules.[85]

The analysis that follows focuses on European and American choice of laws rules governing contracts and torts.

2.1 Contractual obligations

Contractual obligations are governed by Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008, which replaced the original 1980 Rome Convention.[86] The Regulation applies only to "civil and commercial

[84] See para. 2.2 and 2.3, *infra*.
[85] It is interesting to see how, despite the differences existing in the European conflict of laws systems, European Member States were still able to reach consensus on a set of uniform conflict of laws rules.

[86] The 1980 Convention was not applicable to the ten Member State which joined the Union in 2004, and it was necessary to have a proper Community instrument – i.e. an EC

matters", that is, it does not apply to revenue, customs and administrative matters, liability states, and matrimonial and family relationships.

The central feature of the system established by the Regulation is the principle of freedom of choice, according to which the parties to a contract are free to choose the law applicable to it. Where the parties have not determined the applicable law, the contract is governed by the law of the country with which it has the closest connection.[87] The contract is presumed to be connected with the country where the party who is to perform the characteristic performance[88] is habitually resident.

In the absence of the parties' choice as to the applicable law, the law governing the contract is, for contracts for the sale of goods, the law of the country where the seller has his habitual residence; for contracts for the provision of services, the law of the country where the service provider has his habitual residence; for contracts relating to a

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Regulation automatically applicable in all Member States – rather than an international agreement applicable to only some Member States.

[87] This formula resembles the Second Restatement's 'most significant relationship' formula.

[88] Generally, the decision on who renders the characteristic performance has to be determined having regard to center of gravity of the various parts of the contract. According to Giuliano/Lagarde report, "the characteristic performance defines the connecting factor of the contract from the inside not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded. In addition, it is possible to relate the concept of characteristic performance to an even more general idea, namely the idea that this performance refers to the function which the legal relationship involved fulfils in the economic and social life of any country. The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form part." Giuliani & Lagarde, 1980, comment on Article 4 at 3. However, as observed by Mireille M. M. van Eechoud, "while the latter part of the above quote seems to say that policies of substantive law play a role in determining what the characteristic performance is and, therefore, in determining what the law governing the contract is, in fact "the doctrine of characteristic performance entails the chategorisation of different types of contracts and the determination of a (standard) connecting factor for each, with little or no consideration for the actual social or economic function of the various contracts… As in modern societies the counter-performance in many contracts is the payment of a sum of money, such payment is not regarded as the characteristic performance. ... Identification of the characteristic performance then also becomes easy: this lies with the party that sells property, or takes on the obligation to do work, or takes on the obligation to transport goods, etc." MIREILLE M. M. VAN EECHOUD, CHOICE OF LAW IN COPYRIGHTS : ALTERNATIVE TO THE LEX PROTECTIONIS, 2003, at 198.

right in rem in immovable property or to a tenancy of immovable property, the law of the country where the property is situated; for franchise contracts, the law of the country where the franchisee has his habitual residence; for distribution contracts, the law of the country where the distributor has his habitual residence; etc. (Article 4.1). However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that above indicated, the law of that other country shall apply (Article 4.3). And, where the law applicable to the contract cannot be determined as above, the contract shall be governed by the law of the country with which it is most closely connected (Article 4.3). Other special provisions identify the law applicable to specific types of contracts (e.g. employment contracts, consumer contracts, insurance contracts, etc). This approach really resembles the American approach.[89]

In the US, Restatement Second of Conflict of Laws, under section 186, provides that "Issues in contract are determined by the law chosen by the parties in accordance with the rule of section 187 and otherwise by the law selected in accordance with the rule of section 188."

Similarly to the EC Regulation no. 593/2008, the Restatement Second provides the parties with the power to select the law applicable to their contract and, only in case the parties have not exercised this power, section 188 identifies a series of connecting

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[89] Interestingly, Recital 19 to the Regulation provides "Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorized as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its *centre of gravity*."(Emphasis added). Recital 21 also provides that "In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is *most closely connected*. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."(Emphasis added).

factors that can be used to identify such law. In particular, section 188 of Restatement Second, first paragraph provides that "the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the transaction and the parties under the principles stated in section 6."(Emphasis added). Then, paragraph second lists the relevant connecting factors, in the absence of the parties' choice. The list includes (i) the place of contracting, (ii) the place of negotiation of the contract, (iii) the place of performance, (iv) the location of the subject matter of the contract, and (iv) the domicile, residence, nationality, place of incorporation and place of business of the parties.

American courts usually apply these principles, following the "center of gravity" and the "most significant relationship" approach. Under the "center of gravity" approach, the various contacts in the case are considered so that the law of the place where there is a preponderance of contacts will be applied. Under the "most significant relationship" approach, the above connecting factors should identify the place that is most significantly related to the controversy. This is exactly what happens in the EC Regulation 593/2008 which, in order to identify the law applicable to the contract absent the parties' choice, look at the country with which the contract has "the closest connection."

However, American courts following the Second Restatement generally identify the state with the most significant relationships not only by looking at the "specific contacts" but also considering the interests of the states involved. In other words, starting from the assumption that choice of law problems should be considered in light of the underlying policies – that is, purposes or functions of the laws of the involved states and the respective interests of those states in furthering such policies – courts identify the law applicable to the controversy. The forum court will then consider the "contacts" and interests of each state involved and apply the law of the state having the most significant relationship with the parties and the transaction in light of the particular issue before the court. Other modern decisions have adopted the "governmental interest" approach to choice of law, in which the forum applies its own law if it has an interest in doing so.

This seems to set the American approach far from the European one. However, as already explained, this is not true for a series of reasons. First, the states most likely to be interested in the outcome of a given case dealing with contract issues are those presenting

one of the above listed contacts with the parties' transaction, and these are the states having the "closest connection" with the contract; or, the states having a fundamental (exceptional) public policy that might be affected by certain outcomes of the case. Second, European conflict of laws rules give consideration to public policies issues too.[90] In any event, good conflict of laws rules should be drafted in such a way that there is no need to make "public policy" considerations to avoid unwanted results, unless rare and exceptional circumstances occur.[91]

The general idea behind choice of law rules dealing with contracts, both the European rules and the American rules is the same: The choice of the parties should prevail and, where the parties have not exercised their power to choose, the contract will be subject to the law of the place that is most significantly "related" or "connected" to the contract; public policy issues are – or should – be taken into account only where they really pertain to a fundamental public policy that need to be preserved.

One would then wonder whether it is reasonable to have different conflict of laws rules if the regulations are so similar. Or whether it would be useful to engage in the process of harmonizing rules that, after all, are the same. The problem with the lack of uniform rules is the unpredictability of outcomes. Even if, most of the times, the outcome of the controversy should be the same, it could still not be so, and uniform rules would reduce unpredictability and favor efficiency.

An example might better clarify this issue. A seller from California enters into a contract with a French buyer; the contract has to be performed in New York. The parties do not choose the law applicable to this contract. The seller performs the contract but the buyer fails to pay for it and the seller files a suit before a California state court for breach

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[90] See, e.g. article 3 of the French Civil Code, p. 18, *supra*; article 6 German PIL, p. 20 *supra*; articles 16 and 17 of the Italian PIL; Recital 37 in the EC Reg. 593/2008 provides "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circum- stances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'over- riding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively." EC Reg. 593/2008. Also, article 21 of the same Reg. provides "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

[91] See paragraph IV, *infra*.

of contract. The California judge, applying California choice of law rules and following section 188 of the Restatement (Second) of Conflict of Laws might decide that California law applies, since California is the state where the seller is domiciled and California has an interest in protecting its sellers. This result would be consistent with the applicable European rules (Article 4.1 of Regulation (EC) no. 593/2008).[92] But what if the California seller sues the French buyer before a New York judge. This judge, following section 188 of the Restatement (Second) of Conflict of Laws might decide that New York law should apply since New York was the place of performance and the state of New York has an interest in the dispute and in applying its own law, because it has an interest in making sure that investments and business relationships taking place in New York are honored. In this case, despite the original similarities between the American and the European choice of laws rules, the differences prevail and the outcome of the litigation might be different. Uniform rules would avoid disuniformity of outcomes and enhance predictability, fairness and efficiency.

2.2 Non-contractual obligations

In Europe, Regulation (EC) no. 864/2007 (Rome II)[93] defines the choice-of-law rules applicable to non-contractual obligations in civil and commercial matters,[94] including product liability, *negotiorum gestio* (activities carried on by someone relating to the affairs of somebody else, in the interest of this latter) and *culpa in contrahendo* (non-contractual obligations arising out of dealings that precede the conclusion of a contract).

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[92] Article 4.1 EC Reg. 593/2008 provides "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows …a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence."

[93] As EC Reg. 593/2008, Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0040:EN:PDF

[94] The Regulation does not apply to revenue, customs and administrative matters, the liability of the state, and matrimonial and family relationships.

As Regulation no. 593/2008 harmonizes the Member States' choice of law rules dealing with contractual obligations, Regulation no. 846/2007 harmonizes the Member States' choice-of-law rules governing non-contractual obligations so that, no matter where in the European Union a non-contractual action is brought, the rules determining the applicable law will always be the same. The Regulation is of universal application, that is, the law specified is applied whether or not it is the law of a Member State.[95]

As a general rule, and in order of priority, the law applicable to non-contractual obligations is: (i) the law of the country where the damage occurs (principle of territoriality); (ii) the law of the country where both parties were habitually resident when the damage occurred;[96] and (iii) the law of the country with which the case is manifestly *more closely connected* than the other countries.

The Regulation also authorizes the parties to choose, by mutual agreement, the law applicable to their obligation. The agreement may be entered into also after the event giving rise to the damage or, when all the parties to the agreement are pursuing commercial activity, it may be freely negotiated before the event giving rise to the damage.[97] The choice must be explicit or evident from the circumstances, and must not prejudice the rights of any third party. In any event, when all the elements relevant to the situation relate to a country other than the one chosen, the agreement by which the parties chose to apply a different law is not valid. Similarly, Community law overrides the law of a non-EU country, chosen by the parties, when all the elements of the situation are located in one or more EU Member states.

Rome II convention gives very limited recognition to the role of state interests and the Convention's Explanatory Report explains most of Rome II's rules in terms of the parties' expectations. However, Recital 32 in the Preamble to the Regulation provides "Considerations of public interest justify giving the courts of the Member States the

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[95] Berthiaume v. Dastous [1930] AC 79.

[96] According to Symeon C. Symeonides, *The American Revolution*, at 19, Europeans don't accept Professor Currie's interest analysis. However, the drafters of choice of law rules should identify and resolve false conflicts and this is what the drafters of the Rome II convention have tried to do by adopting the common domicile rule. They recognized that in certain cases the state of the tort has no claim to apply its law to a dispute that involves only co-domiciliares of another state.

[97] See Article 14, EC Reg. 864/2007.

possibility, *in exceptional circumstances*, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (ordre public) of the forum."[98] (Emphasis added). Furthermore, article 26 of the Regulation provides "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is *manifestly incompatible with the public policy* (ordre public) of the forum."[99] (Emphasis added). In other words, recourse to public policy to prevent the application of an otherwise applicable law, must be made only under exceptional circumstances.

This approach is not so different from the modern approach most American courts adopt.

In the U.S., originally, the approach to torts was the traditional "vested rights" approach, according to which the existence of tort liability was to be determined according to the law of the place of the wrong (*lex loci*). This approach was abandoned by the Second Restatement, that adopted the "most significant relationship" approach. More specifically, section 145, paragraph 1, of the Restatement Second provides "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6." Section 145, second paragraph, lists the contacts that can be taken into account to determine the applicable law. Such contacts include (i) the place where the injury occurred, (ii) the place where the conduct causing the injury occurred, (iii) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (iv) the place where the relationship, if any, between the parties is centered." This is exactly what the EC Regulation on the law applicable to non-contractual obligations

[98] EC Reg. 864/2007, Recital 32.
[99] EC Reg. 864/2007, Article 26.

provides.[100]These contacts should be evaluated according to their relative importance with respect to the particular issue and taking into account the interests of the states involved.[101]

Although in theory, the Restatement (Second) of Conflict of Laws should have shifted from the vested approach to a different modern approach which take into account governmental interest and applies the law of the forum sometime even when there is a true conflict, the reality is that the modern approach is not so different from the old approach under the First Restatement, that is, the "vested rights" approach, since American courts continue to apply the law of the state of torts in several patterns of tort conflicts, thus basically reaching the same result they would reach were they following the First Restatement.[102]

Therefore, the American and the European approaches share important similarities also as far the law governing non-contractual obligations is concerned[103].

A recent study by Symeonides explained that "despite using different approaches and invoking varied rationales, [American] courts that have joined the revolution[104] have reached fairly uniform results in resolving cross-border tort conflicts: they have applied

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[100] See *supra*, within this paragraph.

[101] Rest. Sec., section 145, paragraph 3. As to the modern approach to the "most significant relationship" under the Restatement Second of Conflict of Laws, see para. 3.2, *infra*.

[102] In some other cases, American courts apply the law of the state of conduct rather than the law of the state of injury. See Symeon C. Symeonides, *The American Revolution*, at 5.

[103] Regulation (EC) no. 864/2007 (Rome II) has been only recently adopted; therefore, it is too early to get significant empirical data as to its application and the connecting factors which courts are applying. However, I would not be surprised to see that, in fact, European courts are mainly applying the law of the place where the wrong occurred, where this is the law more favorable to the victim. This is consistent with Symeonides' study. See footnote 112, *infra*.

[104] According to Symeonides, the choice-of-law revolution that has taken place in the U.S. "succeeded in demolishing the old regime in forty-two U.S. jurisdictions, but failed to replace it with anything resembling a unified system." See Symeon C. Symeonides, *Choice of Law in Cross-Border Torts* (January 14, 2009). Available at SSRN: http://ssrn.com/abstract=1328191. Europe does not recognize the distinction between subject-matter and personal jurisdiction, but the distinction between "general" and "special" jurisdiction. The court with general jurisdiction is that of the place where the defendant has its domicile or seat if it's a corporation. The courts with special jurisdiction are those located in a place somehow related to the controversy.

the law of the state of either the injurious conduct or the resulting injury, but, in the vast majority of cases (86 percent), they have applied whichever of the two laws favored the tort victim. Another finding is that the vast majority of recent conflicts codifications around the world (a total of 20) have adopted the same solution: they apply whichever law favors the victim, by authorizing either the court or the victim directly to make the choice."[105]

II.B JURISDICTIONAL LAW

1. Brief overview of European jurisdictional law

In Europe, jurisdiction is governed by Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[106]

The EC Regulation 44/2001 contains various provisions identifying the judge with jurisdiction over specific cases, and it applies where the defendant is domiciled in a Member State of the European Union.[107] The Regulation aims at establishing certain rules and identifying, with some level of certainty, the judge with jurisdiction over every case. This is why the Regulation does not adopt the doctrine of *forum non conveniens*,[108] which would have required the courts to exercise their discretion to establish the convenience (or inconvenience) of the exercise of jurisdiction, thus making the

[105] See SYMEON C. SYMEONIDES, *Choice of Law in Cross-Border Torts*, *id*.
[106] The Regulation, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML, substituted the Brussels Convention on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters of 1968.
[107] Therefore, it will not apply where the defendant is domiciled in the U.S, but it will apply if a French national sues an Italian, or vice-versa. In controversies involving non-Europeans, the EU Member States apply their national laws, i.e. their conflict of laws rules which are, most of the times, codified.
[108] This doctrine is not known to civil law systems. However, see *infra* for further discussion on this point.

identification of the "competent" judge uncertain, in contrast with the fundamental aim of the Regulation.[109]

This Regulation, as well as the one on the law applicable to contractual obligations and the one governing the law applicable to non-contractual obligations,[110] applies to "civil and commercial matters."[111]

As a general rule of jurisdiction, persons domiciled[112] in a Member State should be sued in the courts of that Member State, regardless of their nationality, subject to the rules of jurisdiction applicable to the nationals of that State (Article 2). The defendant's domicile is considered the preferred *forum* for legal disputes and, as the European Court of Justice has explained, this is because the defendant may defend himself more easily there. Accordingly, the criteria of special jurisdiction or the cases where the plaintiff may file the action before the court of the Member State where he is domiciled are exceptions, and should be interpreted and applied narrowly.[113] Regardless of the defendant's domicile, the courts of the Member States where the property is located have *exclusive jurisdiction* over actions concerning rights in rem in real estate or tenancies of real estate (Article 22).[114] And, in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in real estate, a person domiciled in a Member State may be sued in the court of the Member State in which the property is situated (Article 6(4)).[115]

The Regulation provides different rules of *special jurisdiction*, according to the different type of controversy considered. In these cases, the person can be sued also at a

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[109] ECJ, C-288/92 Custom Made Commercial Ltd v. Stawa Metallbau GmbH [1994], ECR I-2956 18.
[110] See para. II.A.2 above.
[111] See Article 1. See also para. II.A.2.2. above.
[112] Domicile is determined in accordance with the domestic law of the Member State, where the matter is brought before a court. Legal persons or firms are considered as domiciled in the state where they have their statutory seat, central administration or principal place of business
[113] ECJ, C-26/91, Judgment of 17/06/1992, Handte / TMCS (Rec.1992, p.I-3967)
[114] This idea resembles the idea of proper and exclusive venue for *local actions* in the US, according to which actions concerning title or possession of real estate must be brought before the court of the place where that property is located.
[115] The location of the *res* also identifies the law applicable to the controversy dealing with real estates (*lex rei sitae*). See Regulation (EC) no. 593/2008, article 4(c).

place different from domicile. However, as indicated above, these special jurisdiction criteria are exceptions to the general principle of domicile as the place where the defendant should be sued, and should be interpreted and applied narrowly.[116]

In controversies "in matters relating to a contract", a person domiciled in a Member State may be sued in another Member State, where the contract was performed or had to be performed (Article 5(1)).[117] The place of performance has to be determined for each obligation separately, and the court has to refer to the specific obligation object of the controversy;[118] and if a claim is based on different obligations or causes of action, the main obligation determines the place of performance.[119] The place of performance should be determined according to the private law referred to by the choice of law rules of the forum, unless Article 5(1)(b) of the Regulation applies.[120]

In order to identify the judge with jurisdiction over a case concerning contracts, the EC Regulation 44/2001 uses very predictable connecting factors. It is reasonable, thus, predictable, that a party to a contract can be sued before the court of the place where the contract was performed or was to be performed. This is the place with which the controversy arising out of the contract is more closely connected, the place with which the controversy has "minimum" or, better, "substantial contacts". The plaintiff, therefore, is free to decide whether to sue the defendant at the place of his domicile (general jurisdiction, general forum), or at the place where the contract was performed or was to be performed (alternative and specific forum).[121]

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[116] ECJ, C-26/91, Judgment of 17/06/1992, Handte / TMCS (Rec.1992, p.I-3967)

[117] In contracts for the sale of goods, unless where otherwise agreed, this place is the place where the goods were delivered or should have been delivered; in the case of the provision of services, this place is the place were the services were provided or should have been provided.

[118] ECJ, 6 October 1976, C-14/76, de Bloos v. Bouyer, ECR 1976, 1497.

[119] ECJ, 15 January 1987, C-266/85, Shenavai v. Kreischer, ECR 1987, 239.

[120] This is the so called "Tessili Rule", spelled out by the ECJ in Tessili v. Dunlop, 6 October 1976, C-12/76M 1473.

[121] This approach is consistent with the approach adopted by Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on contractual obligations, providing that, in the absence of the parties' choice as to the law applicable to the contract, the contract is governed by the law of the country with which it has the closest connection. While Regulation (EC) 44/2001, in order to identify the judge with jurisdiction over the case, adopts a general formula – the judge of the place where the

Likewise, in matters relating to torts, the person who is domiciled in a Member State can be sued in the courts of the place where the harmful event occurred or may occur (Article 5(3)). This provision applies to all claims seeking to establish the liability of a defendant that does not arise out of a "matter relating to contract," within the meaning of Article 5(1) of the Regulation.[122] This is because, under the principle of ubiquity the claimant can choose between the courts of the place where the damage occurred and the courts of the place of the event giving rise to this damage. Damages under Article 5(3) refer to the place where the tortuous activity directly produced its harmful effects upon the person who is the immediate victim of that event, as opposed to mere indirect consequences.[123]

These are only a few examples of the rules contained in the EC Regulation 44/2001. All of them identify the judge with jurisdiction over cases on the basis of very

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contract was performed or had to be performed – Regulation (EC) 593/2008 adopts a more complex and detailed formula to identify the law applicable to contracts, absent the parties' choice. After all, the connecting factors adopted to identify the judge with jurisdiction over the case, as well as the law applicable to the contract, are factors that tie the controversy to a specific place. The place where the contract was or had to be performed is most of the times the place where the party who has to perform the contract resides and the place with which the controversy is, most of the times, closely connected. Therefore, rather than having two different provisions, one to identify the judge with jurisdiction over the case, and another one to identify the applicable law, a single provision using the same reasonable criterion could be adopted for both tasks. "Substantial" contacts – the same contacts – between the controversy and the place would point at the competent judge and the applicable law.

[122] ECJ, 27 September 1988, Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, Case C-189/87.

[123] Regulation (EC) no. 864/2007 provides that the law applicable to torts is (i) the law of the country where the damage occurs (principle of territoriality) or (ii) the law of the country where both parties were habitually resident when the damage occurred or (iii) the law of the country with which the case is manifestly more closely connected than the other countries. The connecting factor used by Regulation (EC) 44/2001 to identify the competent judge – "place where the harmful event occurred or may occur" – is not different from the connecting factor used by Regulation (EC) no. 864/2007 to indentify the law applicable to the contract – "the law of the country where the damage occurs". Here, again, the adoption of two separate conventions is not the best solution. A single criterion, connecting the controversy to a specific place should simultaneously identify the judge with jurisdiction over the case and the law applicable to it. This would render the handling of the controversy by the judge easier, since the judge will be, most of the times, applying his own law. Alternative connecting factors would be adopted to make sure that justice prevails over formalistic results.

clearly defined connecting factors; very little room is left to judges to create "new" rules, while pretending to interpret the existent rules. The defendant is put on notice that the judge of the place where these connecting factors are located will be the one with jurisdiction over his case,[124] and the place where substantial connecting factors exist would also identify the applicable law.[125]

Where the defendant(s) are domiciled in a Member State of the European Union and the proceedings involving the same cause of action[126] and the same parties (lis pendens) are brought before courts of different Member States, any court other than that where the action was first brought[127] *should*, sua sponte, stay the proceeding until the court where the action was brought first has declared its jurisdiction or lack of jurisdiction over the case. Once the court first seized declares that it has jurisdiction over the case, the other courts where the same case between the same parties was brought should decline jurisdiction in favor of the first court (Article 27).[128]

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[124] See, e.g., Section 3 of the EC Reg. 44/2001, jurisdiction in matters relating to insurance (artt. 8-14); Section 4, jurisdiction over consumer contracts (artt. 15-17), etc

[125] The connecting factors used by the EC Reg. 44/2001 to identify the judge with jurisdiction over specific cases are the same as the connecting factors used by EC Reg. 864/2007 and EC Reg. 593/2008 to indentify, respectively, the law applicable to contractual obligations and the law applicable to non-contractual obligations. See the analysis under para. II.A above.

[126] The European Court of Justice has clarified that two proceedings involve the same cause of action when the same subject-matter lies "at the heart of the two actions", ECJ, 8 December 1987, C-144/86, Gubisch Maschinenfabrik KG v. Giulio Palumbo, ECR 1987, 4861, at para. 16.

[127] A court is considered as "first seized" having regard to the time when the complaint (or an equivalent document) is filed with the court, or, when the document should be first served and then filed with the court, at the time when it is received by the authority responsible for the service (Article 30).

[128] In order to determine whether there is *lis pendens*, the court first seized should consider the facts and the rule of law relied on as the basis of the action (ECJ, 6 December 1994, C-406/92, Tatry v. Maciej Rataj, ECR 1994, 5439, at para. 38), the aims of the action and the object of the action (*Id*. at para. 40); on the other hand, the procedural positions of the parties as well as the grounds of defense raised by the defendant are not relevant (ECJ, 8 May 2003, C-111/01, Gantner Electronic GmbH v. Basch Exploitatie Maatschappij BV, ECR 2003, I-4207, at para. 26). With reference to the requirement concerning parties' identity, in *Drouout Assurances SA v. Consolidated Metallurgical Industries*, the European Court of Justice held that two parties formally not identical are nevertheless deemed to be "the same person" if there is such a degree of identity between the interests of them that a judgment delivered against one of them

Also, the judge before whom an action related to another action is brought, *may* stay the action. Actions are considered "related" where they are so closely connected that it is expedient to hear and determine them together, in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (Article 28). In making this discretionary determination, courts consider the degree of relatedness and risk of irreconcilability, the progress of the proceedings already reached, and the connections of the courts to the issue.[129]

Articles 27 and 28 implement the objectives of Recital 15 of the EC Regulation, according to which "*in the interests of the harmonious administration of justice* it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending."[130] (Emphasis added)

When deciding that, in case of lis pendens or related actions, the "most convenient" forum "in the best interest of justice" is the court that was first seized, the European legislature adopted a doctrine that resembles the *forum non conveniens* doctrine adopted by Americans, but which vests less discretion in the determination of whether a forum is "more convenient" than another.[131]

Parties may consent to jurisdiction or waive any objection they may have for lack of jurisdiction. Article 24 provides that a court of a Member State before which a defendant enters an appearance may have jurisdiction by virtue of such filing. However, the filing of an appearance merely to contest jurisdiction will not provide the court with

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would have the force of *res judicata* against the other (ECJ, 19 May 1998, C-351/96, Drouot assurances SA v. Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'interet economique (GIE) Reunion europeenee, ECR 1998 I-3075, at para. 19). In the U.S., a similar procedural devise is provided for proceedings pending before federal coruts, except that the first court *may* enjoin the second action or the second court *may* dismiss, stay or transfer the action to the first court. *See*, IDES, MAY, CIVIL PROCEDURE: CASES AND PROBLEMS, 3rd ed., at 695.

[129] ECJ, 20 January 1994, C-129/92, Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA, ECR 1994 I-117.

[130] See Recital 15, EC Regulation 44/2001, footnote 1.

[131] For further discussion on the point, see paragraph 6 below.

jurisdiction over the case. Similarly, if another court has exclusive jurisdiction over the case under the Regulation,[132] then the filing of the appearance will not give the "non-exclusive" court jurisdiction over the case. Lack of jurisdiction must be raised no later than the first statement of the defendant which, according to the applicable national laws (*lex fori*), most of the times constitutes a defense against the claim.[133] Not only the defendant can object to jurisdiction, but also the court, *sua sponte*, may declare lack of jurisdiction. Article 26, first paragraph of the EC Regulation 44/2001 provides that where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare *sua sponte* that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Regulation.

The common law doctrine of *forum non conveniens*, according to which a court having jurisdiction over the case may decline jurisdiction if there is an alternate adequate forum that, in the court's discretion, appears "more convenient" for the case,[134] does not apply in Europe.[135] Therefore, the defendant in a proceeding will not be able to challenge the jurisdiction of a European Member State on the basis of this doctrine, but he will still be able to argue that the "more convenient" forum for two pending related actions is the court which was seized with the case first.[136]

2. Brief overview of American jurisdictional law[137]

In the U.S., rules of jurisdiction[138] have been mainly shaped by the U.S. Supreme Court's decisions.[139]

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[132] See Article 22, Regulation EC 44/2001.
[133] ECJ, 24 June 1981, C-150/80, Elephanten Schuh v. Jacqmain, ECR 1981, 1671.
[134] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
[135] However, see paragraph III.3.2 *infra*.
[136] See paragraph III, *infra*.
[137] *See*, IDES, MAY, CIVIL PROCEDURE: CASES AND PROBLEMS, 3rd ed., pp. 53 – 220.
[138] Differently from European jurisdictional law, American jurisdictional distinguishes between personal jurisdiction – jurisdiction over the person or property by reasons of the person's location within the territory of the state, or by virtue of the person's contacts with the territory – and subject matter jurisdiction – which, by looking at the subject-matter of the litigation, indicates whether a case falls within the jurisdiction of a federal or state courts. Having in mind the scope of this project which deals with transnational commercial transaction litigations, this analysis focuses on personal jurisdiction only.

Consistently with the traditional Justinian maxim according to which *actor sequitur forum rei* and the European approach,[140] the U.S. recognizes the jurisdiction of the court of the place where the defendant is domiciled.[141] This principle is expanded to say that, even when the individual or the corporation are not formally "domiciled" in a state but their activity there is so continuous, substantial and systematic, they can be treated as if they were domiciled in that state, and the court may exercise "general jurisdiction" over them.[142]

Under *Perkins v. Benguet Consolidated Mining Co.*,[143] during WWII, the president of Benguet, a corporation from The Philippines, moved to Ohio and carried out all the corporation's activities there. The Supreme Court held that due process did not prevent the Ohio court from exercising jurisdiction over Benguet, since the activities that Benguet had carried out in Ohio were continuous, substantial and systematic and Benguet should reasonably expect to be held into court there on any cause of action, even if non-related to the corporations' contacts with the forum state. The exercise of general jurisdiction by the Ohio court was proper and consistent with due process.

Jurisdiction may be based on consent or agreement and the objection for lack of (personal) jurisdiction is waived if not raised by the defendant's first defense.[144]

Whenever the defendant is sued in a place different from his domicile, there must be some indication that he was on notice of the possibility to be sued there, either because he performed activities in that state, or because his "contacts" with that state are such that the exercise of jurisdiction by the court of that state does not come as an "unfair surprise" to him. More specifically, in *International Shoe*, the Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he *have certain minimum contacts* with it 'such that the

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[139] *See*, IDES, MAY, CIVIL PROCEDURE: CASES AND PROBLEMS, 3rd ed., pp. 53- 200. *See, also*, FRIEDRICH JUENGER, *American Jurisdiction: A story of Comparative Neglect*, 65 U. Colo. L. Rev. 1 (1993), at 2-17.
[140] *See* EC Reg. 44/2001, Article 2.
[141] Pennoyer v. Neff, 95 U.S. 714, 723 (1877).
[142] In federal courts, by motion to dismiss for lack of personal jurisdiction under FRCP 12(b)(2) or by answer, whichever comes first.
[143] 342 U.S. 437 (1952).
[144] *See* FRCP 12(b)(2) and FRCP 12(h)(1).

maintenance of the suit does not offend 'traditional notions of fair play and justice."[145] (Emphasis added). On the basis of *International Shoe* and the case law following this opinion, a court may exercise jurisdiction over a non-resident defendant consistently with due process if the "minimum contacts test" is satisfied. Under the minimum contacts test, there should be an applicable long-arm statute that gives the court of the state the power to exercise jurisdiction over the non-resident defendant, the non-resident defendant must have availed himself of the benefits and protection of the laws of the state (purposeful availment) – e.g. by doing activities there,[146] entering into contracts with residents of the forum state,[147] through the "stream of commerce,"[148] by satisfying the effects test[149] – his activities or contacts with the state must be related to the claim (specific jurisdiction)[150] or be so "continuous, substantial and systematic" that it might be considered as if it were domiciled there (general jurisdiction),[151] and the exercise of jurisdiction must be reasonable.[152]

Jurisdiction may be properly established by attaching the property that the non-resident defendant owns in the forum state. This is what is called quasi-in-rem jurisdiction.[153] However, even when the court exercises quasi-in-rem jurisdiction over the

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[145] 326 U.S. 316 (1945)
[146] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[147] Burger King v. Rudzewicz, 471 U.S. 462 (1985).
[148] World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).
[149] See Calder v. Jones, 465 U.S. 783 (1984).
[150] Nowak v. Tak How Inv. Ltd., 899 F. Supp. 25 (D. Mass. 1995).
[151] Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); Helicopteros v. Hall. 466 U.S. 408 (1984).
[152] Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Nowak v. Tak How Inv. Ltd., 899 F. Supp. 25 (D. Mass. 1995).
[153] The court has quasi-in-rem jurisdiction over some property, tangible or intangible, that is located within its territory. By attaching the property at the commencement of the action and serving the defendant owner of that property with process, the court has jurisdiction over him, but jurisdiction is limited to the property and its value. In other words, quasi in rem actions only affect the interests of particular persons in the attached property, namely, those who have been made parties to the suit. Examples of quasi in rem actions include suits to foreclose on a mortgage or lien, suits to repossess goods, and suits for money damages instituted by attaching a defendant's house, farm, car, bank account or other real or personal property. See, ALLAN IDES & CHRISTOPHER MAY, CIVIL PROCEDURE: CASES AND PROBLEMS, 3d. ed., at 66 f.

non-resident defendant, the contacts that this latter has with the forum state must be such that the defendant may reasonably expect to be haled into court there. In *Shaffer v. Heitner*,[154] Heitner filed a shareholder's derivative suit against some Greyound corporations and some members of Greyhound's board of directors and officers in Delaware, where he seized approximately 82,000 shares of Greyhound stock owned by 21 of the defendants, thus trying to establish quasi-in-rem jurisdiction of the Delaware court over the defendants. The Supreme Court held that the exercise of jurisdiction would be inconsistent with due process since the property attached – that is, the shares – was not related to the plaintiff's claims and, thus, the minimum contacts test had not been satisfied. In other words, the defendants did not have any contacts with Delaware but the shares that had been attached at the commencement of the Delaware proceeding. The shares were not related to the plaintiff's cause of action, therefore, the defendants could not expect to be held into court in Delaware, and the Delaware court's exercise of jurisdiction was thus inconsistent with due process.

Likewise, a contract case falls within the jurisdiction of a court if the non-resident defendant, party to the contract, may reasonably expect this exercise of jurisdiction. In *Burger King Corp. v. Rudzewicz*,[155] John Rudzewicz and McShara, both residents of Michigan, entered into a franchise agreement with Burger King, a corporation with headquarters in Miami, Florida. Rudzewicz and McShara failed to pay the monthly payments due to Burger King under the franchise agreement, and Burger King sued them in Florida for breach of contract. By examining the franchise agreement, the Supreme Court held that the contract had substantial connections with Florida, since it had been negotiated in Florida, it was entered into with a Florida corporation, it was subject to Florida substantive law, payments due under the contract had to be sent to Florida, training took place in Florida etc. It was evident that, by entering into that contract with Burger King, the Michigan defendants availed themselves of the benefits and protection of the laws of Florida. Therefore, they could reasonably expect to be held into court there for breach of that contract, and Florida courts could exercise jurisdiction over them consistently with due process.

A defendant to a torts action must have the same due process guarantees, and the

[154] 433 U.S. 186 (1977).
[155] 471 U.S. 462 (1985).

exercise of jurisdiction over him will be proper if he can reasonably expect to be haled into the forum state court. In Calder v. Jones,[156] the plaintiff, actress Shirley Jones, sued the defendants, the *National Enquirer*, its distributor, a writer and Calder, the editor in chief of the magazine, over an article in which the *Enquirer* alleged Jones was an alcoholic. Jones lived in California and, although the article had been written and edited in Florida, Jones sued the defendants in a California state court. The Supreme Court held that the California court had jurisdiction over the defendants because the defendants intentionally defamed Jones, they knew that she lived and worked in California and that she was going to suffer the "brunt of the harm" there. Therefore, they had to expect to be haled into court in California and the exercise of jurisdiction by a California court over them is consistent with due process.

Similar considerations apply to product liability and "stream of commerce" cases.[157] In *World Wide Volkswagen Corp. v. Woodson*,[158] Harry and Kay Robinson purchased an Audi from Seaway Volkswagen, Inc. in New York. When they and their two children were travelling in Oklahoma, their car collided with another, and the members of the family were severely injured. The Robinsons filed an action in Oklahoma against the automobile's manufacturer (Audi), its importer (Volkswagen of America), its regional distributor (World-Wide Volkswagen Corp.), and its retailer dealer (Seaway Volkswagen). The Supreme Court held that Oklahoma did not have jurisdiction over the regional distributor and the retailer since they had not placed the car within the stream of commerce with the expectation that it would be sold in Oklahoma. The regional distributor and the retailer had carried out no activity in Oklahoma, had no office there, they had not advertised the car there. In other words, the regional distributor and the retailer had no "minimum contacts" with Oklahoma such as they should reasonably

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[156] 465 U.S. 783 (1984).

[157] The "stream of commerce" is the chain that goes from the manufacturer to the consumer. Under the "stream of commerce" theory, elaborated by *World-Wide Volkswagen Corp v. Woodson,* when the manufacturer places a product within the stream of commerce with the expectation that the product will be sold there, he has availed himself of the benefits and protection of the law of the state, and can reasonably expect to be held into court there. See World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 (1980).

[158] 444 U.S. 286 (1980).

expect to be haled into court there. Therefore, the exercise of jurisdiction by Oklahoma courts over these two defendants would be inconsistent with due process.

American jurisdictional law also recognize "tag" or "transient" jurisdiction and the *forum non conveniens* doctrine. Tag or transient jurisdiction is personal jurisdiction based on service properly made upon the defendant, while voluntarily present within the territory of that state, even when such presence is unrelated to the object of the litigation.[159] Under the *forum non conveniens* doctrine, even when an American court has (personal and subject matter) jurisdiction over a specific case, in its sound discretion and by balancing private and public considerations, it could grant a motion to dismiss on forum non conveniens grounds when it believes that there is another adequate forum, "more convenient" for the case. The doctrine of forum non conveniens was developed mainly by three U.S. Supreme Court's decisions, i.e. *Gulf Oil Corp v. Gilbert*,[160] *Koster v. Lumbermens Mutual Casualty Co.*[161] and *Piper Aircraft Co. v. Reyno*.[162]

In *Gulf Oil Corp*, the Court held that "in all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process. The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. … Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[163] The Court also noted that, when exercising discretion in the application of the *forum non conveniens* doctrine, a court should give strong deference to the plaintiff's choice of forum.[164] The Court identified two groups of factors, private and

[159] Burnham v. Superior Court of California, 495 U.S. 604 (1990).
[160] 330 U.S. 501 (1947)
[161] 330 U.S. 518 (1947)
[162] 454 U.S. 235 (1981)
[163] 330 U.S. 501, 506-08 (1947)
[164] The Court noted that, while "the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy …unless the balance is

public, which should guide courts when deciding to stay or dismiss a case in favor of another forum. The private factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the public factors include the administrative difficulties which follow for courts when litigation is piled up in congested centers instead of being handled at its origin, jury duty – that should not be imposed upon the people of a community which has no relation to the litigation – a local interest in having localized controversies decided at home.[165]

3.Comparing European and American jurisdiction law: are the differences truly irreconcilable?

From the preceding brief overview, American jurisdictional law looks very similar to European jurisdictional law, except for tag jurisdiction and the *forum non conveniens* doctrine. However, both tag jurisdiction and *forum non conveniens* are merely permitted but not required by American due process and, in any event, they do not constitute serious impasse to harmonization, as it will be explained below.

3.1 Strong similarities between European and American jurisdictional law

As it happens in Europe, in the U.S. the defendant's domicile is considered the preferred forum, since it is undisputable that the exercise of jurisdiction by the court of that forum will be consistent with due process. The defendant has certainly availed himself of the benefits and protections of the laws of his own state and, thus, he can expect to be haled in to court there.[166]

American "general jurisdiction" seems to have expanded the concept of "domicile" to include situations where, even if not formally domiciled in a state, a defendant is acting as if it were domiciled there. This happens when the defendant does

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strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. 501, 508 (1947).

[165] 330 U.S. 501, 508-09 (1947).

[166] See, generally, International Shoe Co. v. Washington, 326 U.S. 310 (1945), for the idea that the exercise of jurisdiction must be consistent with due process.

continuous, substantial and systematic activity in that state. If this happens, the defendant may be sued in that state on any cause of action, and the court of that state will have general jurisdiction over him. *Perkins v. Benguet Consolidated Mining Co.*,[167] where the US Supreme Court spelled out the principle of general jurisdiction, would be decided the same way under EC Regulation 44/2001. More specifically, Ohio courts would have jurisdiction over Benguet also under Articles 2 and 60.1 of EC Regulation 44/2001. Under Article 2 of EC Regulation 44/2001, a court has jurisdiction over any defendant who is domiciled within its territory; and, under Article 60.1, a corporation is considered as domiciled in the place where its central administration is located. Therefore, since Benguet's central administration was, at that time of the action, located in Ohio, Ohio courts would have jurisdiction over Benguet under Articles 2 and 60.1 of EC Reg. 44/2001 too.

Similarly to European jurisdictional law, under American jurisdictional law jurisdiction may be based on consent or agreement and, as it is in Europe, the objection for lack of (personal) jurisdiction is waived if not raised by the defendant's first defense.

Moreover, by applying the "minimum contacts" test to see whether an American court has jurisdiction over a non-resident defendant, one obtains the same results he would obtain if he were trying to establish jurisdiction under EC Regulation 44/2001.

Even if European courts do not recognize quasi-in-rem jurisdiction,[168] most of the times, quasi-in rem jurisdiction cases are decided the same way under American and European jurisdictional law. *Shaffer v. Heitner*[169] would be decided the same way under EC Regulation 44/2001 and, as the US Supreme Court held in *Shaffer*, a European court would hold that the Delaware court does not have jurisdiction over the non-resident

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[167] 342 U.S. 437 (1952). See paragraph II.B.2, *supra*.

[168] The court has quasi-in-rem jurisdiction over some property, tangible or intangible, that is located within its territory. By attaching the property at the commencement of the action and serving the defendant owner of that property with process, the court has jurisdiction over him, but jurisdiction is limited to the property and its value. In other words, quasi in rem actions only affect the interests of particular persons in the attached property, namely, those who have been made parties to the suit. Examples of quasi in rem actions include suits to foreclose on a mortgage or lien, suits to repossess goods, and suits for money damages instituted by attaching a defendant's house, farm, car, bank account or other real or personal property. See, ALLAN IDES & CHRISTOPHER MAY, CIVIL PROCEDURE: CASES AND PROBLEMS, 3d. ed., at 66 f.

[169] 433 U.S. 186 (1977).

defendants. In fact, the defendants were not domiciled in Delaware, thus Article 2 of EC Regulation 44/2001 does not apply, and no other provision in the Regulation could otherwise confer jurisdiction upon the Delaware courts.

Most of the times, contracts cases are decided the same way under American and European jurisdictional law. *Burger King Corp. v. Rudzewicz*[170] would be decided the same way under European jurisdictional law and Florida courts would have jurisdiction over the two Michigan defendants. Since the subject matter of the litigation was failure to perform the franchise agreement that had to be performed in Florida, Florida courts would have jurisdiction over the two Michigan defendants under Article 5.1(a) of EC Regulation 44/2001, according to which "A person domiciled in a Member State may, in another Member State, be sued … in matters relating to a contract, in the courts of the place of performance of the obligation in question… ."[171]

Hanson v. Denckla,[172] would also be decided the same way under the relevant provisions of EC Regulation 44/2001. In *Hanson*, Mrs. Donner, who lived in Pennsylvania, created a trust and incorporated it in Delaware, appointing a Delaware bank as the trustee. Donner later moved to Florida, where she died. The will was admitted

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[170] 471 U.S. 462 (1985). See paragraph II.B.2, *supra*.

[171] According to Laura García Gutiérrez, "As is well known, notwithstanding the presumption in article 5.1.b [of EC Reg. 44/2001, according to which 'for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered; - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided…], as ruled by the European Court of Justice (hereinafter, ECJ) in *De Bloos*, in deciding whether a case is under international jurisdiction, the relevant obligation is 'that on which the suit is based', and 'the place of performance of said obligation' shall determine the special jurisdiction. This implies that if the place of performance of the different obligations arising from the franchise contract were to be different, multiple courts would have jurisdiction over these contracts. The inclusion of the franchise contracts in the presumptions of Article 5.1.b of the Brussels I Regulation implies that EC legislature would be in favor of concentrating all lawsuits relating to franchise contracts in the place of the 'provision of services', as a special jurisdiction stated in Article 5.1 of the Brussels I Regulation." See Laura García Gutiérrez, Franchise *Contracts and the Rome I Regulation on the Law Applicable to International Contracts*, in *Yearbook on Private International Law*, Vol. X, 2008, at 236-237.

[172] 357 U.S. 235 (1958).

to probate in Florida and a dispute arose among the beneficiaries of the trust and the beneficiaries under the will. The beneficiaries under the will sued the trustee in Florida, but the Supreme Court held that the Florida court had no jurisdiction over the trustee, since the Delaware bank had carried out no activity in Florida, had no offices there, and had no "minimum contacts" with Florida such that it could reasonably anticipate being haled into court there. Therefore, the exercise of jurisdiction by the Florida court was inconsistent with due process. Likewise, under EC Regulation 44/2001, Florida courts would not have jurisdiction over the trustee, since no provision in the EC Regulation would support this exercise of jurisdiction.

Most of the times, torts cases are decided the same way under American and European jurisdictional law. Under EC Regulation 44/2001, *Calder v. Jones*[173] would be decided the same way and California courts would have jurisdiction over the defendants from Florida. Article 5.3 of EC Regulation 44/2001 allows the plaintiff to sue the defendants in "the place where the harmful event occurred." In *Calder*, the harmful event occurred in California. Therefore, California would have jurisdiction over the defendants under Article 5.3 of EC Regulation 44/2001 too.

Product liability and "stream of commerce" cases[174] are often decided the same way under American and European jurisdiction law. Like the U.S. Supreme Court, a European court would have not exercised jurisdiction over the defendants in *World Wide Volkswagen Corp. v. Woodson*.[175] Under Article 16.1 of EC Regulation 44/2001, consumers-plaintiffs may sue the manufacturer before the court of place where the consumer is domiciled or before the court of the place where the manufacturer is domiciled. In *World Wide Volkswagen Corp. v. Woodson*, the Robinsons might have filed their action before a New York court – place where they were domiciled – or before a

[173] 465 U.S. 783 (1984). See paragraph II.B.2, *supra*.
[174] The "stream of commerce" is the chain that goes from the manufacturer to the consumer. Under the "stream of commerce" theory, elaborated by *World-Wide Volkswagen Corp v. Woodson,* when the manufacturer places a product within the stream of commerce with the expectation that the product will be sold there, he has availed himself of the benefits and protection of the law of the state, and can reasonably expect to be held into court there. See World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286 (1980).
[175] 444 U.S. 286 (1980).

German court – place where the Audi's manufacturer had its headquarters. There, they could have sued the importer, the regional distributor and the retailer too.[176] However, since under EC Regulation 44/2001 plaintiffs cannot sue the manufacturer in the place where the harmful event occurred, Oklahoma would have not been an option under EC Regulation 44/2001 either.

3.2 Minor differences that cannot prevent harmonization: tag jurisdiction and *forum non conveniens*

"Tag" or "transient" jurisdiction is considered an "exorbitant" rule of jurisdiction by most of the legal community, that still applies in the U.S. In *Burnham v. Superior Court of California*,[177] the nine Justices of U.S. Supreme Court, with different rationale but reaching the same conclusion, held that the trial court had personal jurisdiction over a non-resident defendant who had been in the state for three days, doing activities unrelated to the pending action, since he was personally served with process while voluntarily within the state. They believed that this exercise of personal jurisdiction did not violate the "'traditional notions of fair play and substantial justice.'"[178]

The tag jurisdiction doctrine was highly criticized "with 'virtual unanimity'"[179] by commentators. Wilson observed that "the doctrine was attacked, not on its conceptual basis, but on its inconsistency with modern methods of analysis and its potential for

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[176] Under Article 6 of EC Regulation 44/2001 "A person domiciled in a Member State may also be sued…where he is one of a number of defendants, in the courts of the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings … . "

[177] 495 U.S. 604 (1990).

[178] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1845) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[179] Paul C. Wilson, *A Pedigree for Due Process? Burnham v. Superior Court of California*, 56 Mo. L. Rev. 353, at * 359. See also, Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121, at 112. There Prof. Clermont observes that "Formerly the most important basis of U.S. jurisdiction, but today far from essential, it is occasionally used to sue foreigners in the United States, even though the resulting judgments would be unlikely to receive recognition or enforcement abroad. Indeed, transient jurisdiction is necessary only when the appropriate bases of jurisdiction are unavailing." Id.

producing unfairness in a highly mobile society."[180] As the mere presence of property unrelated to the controversy would not be sufficient to give a state jurisdiction over the owner of that property after *Shaffer v. Heitner*,[181] it is hard to understand how the transient presence of the defendant in one state, doing activities unrelated to the controversy, should be enough to give the forum of that state jurisdiction over the defendant.[182] Tag jurisdiction has been justified on the basis of the territoriality principle, according to which the court has jurisdiction over people or property located within its territory, even if this presence is only transitory and completely unrelated to the subject of the litigation.[183] However, it is doubtful that the defendant will in fact expect to be sued before the court of a state where he is only temporarily visiting, for activities unrelated to the controversy which is brought to that forum.

Civil law systems do not recognize tag jurisdiction and there are no functional equivalents to this jurisdictional category there.[184] However, one wonders what is the purpose of having "tag jurisdiction" in transnational commercial transaction litigation if the judgment rendered by an American court would not be recognized by any other foreign court. And, most importantly, American tag jurisdiction is allowed by due process, but not required by due process. Therefore, the US has no reason for not joining a convention that disallows tag jurisdiction in the transnational context, considering that this practice is not required by due process. The problems would arise if the convention allowed a practice that would violate due process. Most likely, however, a practice that violates American due process would also violate European due process.

Tag jurisdiction should not prevent the harmonization of jurisdictional law governing this type of controversies.[185]

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[180] *Id*.
[181] 433 U.S. 186 (1977).
[182] Vernon, *Single-Factor Bases in Personam Jurisdiction : A Speculation on the Impact of Shaffer v. Heitner*, 1978 Wash. U. L.Q. 273, 302 – 303 (1978).
[183] See Pennoyer v. Neff, 95 U.S. 714 (1877); and Burnham v. Superior Court. 495 U.S. 604 (1990).
[184] *See*, Peter F. Schlosser, *Lecture on Civil-Law Litigation Systems and American Cooperation With Those Systems*, 45 Kan. L. Rev. 9 (Nov., 1996).
[185] In this respect, in the year 2000, when writing about the Hague Convention, Prof. Clermont wrote "The expectation is that this eventual multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial

Likewise, f*orum non conveniens* doctrine cannot prevent harmonization. *Forum non conveniens* is a common law doctrine that allows the court where an action is filed the discretion to decline jurisdiction if there is an adequate alternative and "more convenient" forum for that case.

This doctrine was first adopted in Scotland and then it developed in other common law countries, showing similarities and differences with the original Scottish doctrine.

In the U.S., the term "forum non conveniens" appeared, for the first time, in a law review article, in 1929. More specifically, this article, by Paxton Blair, noted that "it is apparent that the courts of this country have been for years applying the doctrine."[186] In this article, Blair observed that, in applying *forum non conveniens* doctrine, American courts considered factors such as the availability of witnesses, the burden on the state's citizens, the possible differences between right and remedy, the ability to enforce a judgment when a foreign law governed the dispute and, most of all, the complexity of the governing foreign law. In other words, when the foreign law to apply to the controversy was too complex, American courts applied the *forum non conveniens* doctrine to dismiss a case "in the interest of the justice."

As described above,[187] the US Supreme Court dealt with the doctrine of *forum non conveniens* mainly in *Gulf Oil Corp v. Gilbert*,[188] *Koster v. Lumbermens Mutual Casualty Co.*[189] and *Piper Aircraft Co. v. Reyno*,[190] but recently also in *American Dredging Co. v. Miller*.[191] There, Justice Scalia stated that the doctrine "is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought

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matters will be similar to the Brussels Convention. This eventuality means that the United States might soon abandon—on the international level among signatory countries—transient jurisdiction, attachment jurisdiction, and "doing business" as a basis for general jurisdiction." See Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121, at 95.

[186] Paxton Blair, *The Doctrine of Forum non conveniens in Anglo-American Law,* 29 Colum. L. Rev. 1, 22 (1929).

[187] See paragraph II.B.2 above.

[188] 330 U.S. 501 (1947)

[189] 330 U.S. 518 (1947)

[190] 454 U.S. 235 (1981). See para. II.B.2, *supra*

[191] 510 U.S. 443 (1994).

to be declined."[192] He noted that the doctrine has developed in response to court administration and private litigant problems that often result from a plaintiff's misuse of venue. Thus, the doctrine serves to discourage plaintiffs from forum shopping.[193] He noted that "the discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application…make uniformity and predictability of outcome almost impossible."[194] He, however, thought that this outcome was acceptable, since the doctrine serves as a procedural rule, and not as a substantive rule affecting the primary conduct of litigants.[195]

This is, to say the least, at odds with our experience and the reality of litigation today. As Professor Clermont noted, "outcome often turns on forum" and "the fight over forum can be the critical dispute of the case."[196] This means that a "procedural rule" highly affects the conduct of litigants and, ultimately, their substantive rights, thus calling for the application of due process safeguards.

Even if the European Court of Justice made it clear that European law is strongly opposed to the *forum non conveniens* doctrine,[197] the principles and ideas behind this doctrine are not completely unknown to civil law systems, that, on some occasions,

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[192] 510 U.S. 443, 445 (1994).
[193] 510 U.S. 443, 450 (1994).
[194] 510 U.S. 443, 463 (1994).
[195] 510 U.S. 443, 454 n. 4 (1994).
[196] See Kevin M. Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction.* 2 CILE STUDIES: PRIVATE LAW, PRIVATE INTERNATIONAL LAW & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP, Chapter 4, 2005, at 77; Cornell Law School Research Paper No. 04-023. Available at SSRN: http://ssrn.com/abstract=588321 or doi:10.2139/ssrn.588321. Prof. Clermont observes that "Outside the academy, lawyers in the United States expend significant time, energy, and other resources on the process of forum selection. They know that the 'name of the game is forum-shopping'. Few cases reach trial in the U.S. civil litigation system today: after perhaps some initial skirmishing, most cases settle. Yet, all cases entail forum selection, be it selection of local venue, interstate shopping, state/federal selection, or international shopping. First, consider the individual case. The plaintiff's opening moves include shopping for the most favorable forum. Then, the defendant's parries and thrusts might include some forum-shopping in return, possibly by a motion for transfer of venue. Forum is worth fighting over because outcome often turns on forum, as I shall document below. When the dust settles, the case does too – but on terms that reflect the results of the skirmishing; thus, the fight over forum can be the critical dispute in the case." Id.
[197] See Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383.

consider whether a forum would be more convenient than another when deciding whether or not that forum should decline jurisdiction. As illustrated above,[198] Article 27 and Article 28 of EC Regulation 44/2001 identify the "most convenient" forum where two cases having the same parties and the same cause of action (lis pendens, Article 27) or when two related actions (related actions, Article 28) are pending before different judges. In those cases, even though the ordinary rules of jurisdiction would identify a specific judge as the one with jurisdiction over that case, these two provisions identify a "more convenient" judge – the court where the same case (Article 27) or the related case (Article 28)[199] was filed first – the one that better serves "the interest of the justice". Among the objectives of the EC Regulation 44/2001, Recital 15 provides that "in the interests of the harmonious administration of justice it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States."[200]

The ALI/UNIDROIT Principles of Transnational Civil Procedure[201] adopted the *forum non conveniens* doctrine as a possible basis for denying jurisdiction. Under Principle 2.5 "Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction."[202] This provision would probably be too broad for Europeans. What they would most likely reject is not the outcome – that is, choosing a forum over another one because the first is "more convenient" and better serves "the interest of the justice". What Europeans would likely reject is the lack of criteria and the broad discretion left to judges to decide when a forum is more convenient than another one, identified as the "natural" judge by the otherwise applicable provisions.

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[198] See para. II.B.1 above.
[199] Under Article 28, the court seised later may decide to decline the jurisdiction in favor of the court first seized. Here, since the actions are not the same, but they are merely related, the legislator wanted to leave to the judge's discretion the decision on whether to decline or retain jurisdiction over the case.
[200] The Regulation is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML
[201] The ALI/UNIDROIT Principles of Transnational Civil Procedure are available at http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf
[202] *Id*.

European judges would most likely agree with American judges that the forum where witnesses are located is more convenient and that the court that should apply a foreign law to the controversy brought before it might not know that law well enough to properly apply it, thus making the forum "less convenient" for that case. However, they would make, and actually made the evaluation as to what is the more convenient forum for each controversy *ex ante*, in the Regulation (EC) 44/2001; the "more convenient" judge under the Regulation is the judge of the place where the contract was performed for controversies concerning contracts (Article 5(1)); the judge of the place where the harmful event occurred or may occur for tort, delict or quasi-delict controveries (Article 5(3)); the judge of the place where the branch, agency or other establishment is located for controversies arising out of the operation of that branch, agency or establishment (Article 5(5)); the judge first seized in case of *lis pendens* (Article 27); the judge first seized in case of related actions (Article 28); etc.[203]

The adoption of uniform clear-cut rules to identify the judge with jurisdiction over the case would substantially reduce the need to adopt the doctrine of forum-non-convenience. The "convenience" of a forum would, in fact, be considered in advance, when setting forth the criteria for the identification of competent judges. By defining the "minimum contacts" required to establish jurisdiction, the most convenient forum for the litigation will also be identified, most of the times.[204] And when the applicable rule would not be able to identify such judge, the public policy exception could apply to "adjust" a result which is not in the best interest of justice.

Thus, the common law doctrine of *forum non conveniens* should not be an obstacle to the harmonization of jurisdictional law. The US and Europe should be able to reach consensus on a provision that, while allowing *forum non conveniens* dismissals, would also better identify the criteria that courts should apply when granting or denying any such motions. Also, a dismissal on *forum non conveniens* grounds would be the

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[203] See also paragraph 1.2 above.

[204] The same idea was suggested by Prof. Clermont, who noted that "the costs of the doctrine [of *forum non conveniens*] outweigh its benefits; and if the [Hague] treaty also were to narrow general jurisdiction and refine specific jurisdiction, any benefits of *forum non conveniens* would all but disappear." Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121, at 120.

exception, assuming that the rules identifying the judge with jurisdiction over each case already identify, most of the times, the most convenient *fora*.

In any event, should Americans and Europeans not reach consensus on a provision allowing *forum non conveniens* dismissals, there is no reason why the US could not join an international convention that disallowed dismissals on *forum non conveniens* grounds in the context of litigation on transnational commercial transactions. In fact, American due process merely allows, but does not require, *forum non conveniens*.

3.3 Similarities predominate over differences

From the preceding analysis, it is clear that American jurisdictional law and European jurisdictional law share more similarities than differences. They both recognize "general jurisdiction" and "domicile" as the preferred forum to exercise jurisdiction over a defendant. Whenever the defendant is not sued before the court of the place where he is domiciled, it is necessary that the defendant's due process rights are guaranteed. American "minimum contacts" test and European Regulation 44/2001 are intended to guarantee these rights and even if the American test is not codified, while the European provisions are so, they lead to the same results – that is, jurisdiction is similarly established or denied – most of the times.[205]

Therefore, Americans and Europeans should be able to reach consensus on what constitutes "minimum contacts" in the various situations – i.e. contracts, torts, property, etc. – and codify these contacts in an international convention, that would make sure that the defendant is "on notice" of the possibility to be sued in a state because of his contacts with it. This would be done only for litigation on transnational commercial transactions and this harmonization effort would greatly enhance predictability, fairness and efficiency. The exercise of jurisdiction would be reasonable, and forum shopping would be reduced and, consequently, there would be less need to apply the *forum non conveniens* doctrine for this purpose.

As this analysis shows, due process is the main preoccupation of both American and European jurisdictional law, and the content of due process is not different in the US

[205] See para. II.B.2, *supra*.

and Europe. Under US law, the required elements of due process are those that "minimize substantively unfair or mistaken deprivation" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. The core of this requirement is notice and hearing before an impartial tribunal. The concept of due process has been further developed through the idea of "fundamental fairness," that has been illustrated by various case law.[206] Elementary considerations of fairness dictate that individuals should have an opportunity to know who is the judge with jurisdiction over their case. In Europe that would be called the "natural judge," and the right to a "natural," pre-determined judge is considered a fundamental right, which is part of the bundle of due process rights to which every individual is entitled.

Despite some opinions to the contrary,[207] constitutional analysis is not absent from European jurisdictional law. Since European jurisdictional law is codified, the parties to transnational litigation and the judge do not need to run any constitutional analysis in order to see whether jurisdiction meets due process requirements each and every time. The European legislature ran this analysis when it drafted the rules. That does not mean Europeans do not care about due process, since quite the opposite is true. In fact, by clearly and precisely indicating the judge(s) with jurisdiction over specific cases on the basis of specific and reasonable connecting factors,[208] the European legislature intended to ensure that the individual's due process rights were duly implemented. This approach is shared by most of the constitutions of the European Member States.[209] The European Court of Justice, when interpreting the jurisdictional rules under EC Regulation 44/2001, observed that "it must be borne in mind that the Convention is necessarily based

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[206] See also Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693 U.S., 2001, May 14, 2001, where the interests in fundamental fairness are considered as satisfied "(*through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws*." *Id.*

[207] See the reports of the Hague Convention on jurisdiction and recognition and enforcement of judgments.

[208] The defendant should be able to predict which judge is going to have jurisdiction over his case, with no unfair surprise to him. The identification of the judge should be reasonable and fair.

[209] See PIETRO FRANZINA, LA GIURISDIZIONE IN MATERIA CONTRUATTUALE: L'ART. 5 N. 1 DEL REGOLAMENTO N. 44/2001/CE NELLA PROSPETTIVA DELLA ARMONIA DELLA DECISIONI, Padova, 2006, at 126 f.

on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect…. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them.[210] Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention,[211] which are limited to the stage of recognition and enforcement and relate only to certain rules of special or exclusive jurisdiction… , the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State."[212]

However, even more than preserving the idea of mutual trusts among the Contracting Member States, EC Regulation 44/2001 intended to protect the fundamental right (due process) of the individual not to be brought before a judge who is not his "natural judge". Article 6 – that resembles Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[213] – under the second paragraph provides that "[A person domiciled in a Member State may also be sued] as third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him *from the jurisdiction of the court which would be competent in his case*."[214] (Emphasis added).

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[210] See, to that effect, Case -351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 23, and Gasser, paragraph 48.
[211] Here reference is made to the Bruxells Convention of 1968, whose provisions are almost identical to the EC Reg. 44/2001's provisions, with very few and minor variations.
[212] See, to that effect, Overseas Union Insurance and Others, paragraph 24. See Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA. C-159/02, at 24 - 26, available at http://eurlex.europa.eu/Notice.do?val=287586:cs&lang=ga&list=287586:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=
[213] The Convention is available at http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf
[214] Article 6, EC Reg. 44/2001.

In other words, the defendant has legitimate expectation to be sued before a certain judge. This expectation is part of his bundle of due process rights, and the EC Regulation, by posing clear and well-defined criteria for the identification of the judge with jurisdiction over cases, is intended to protect such rights.

European and American jurisdictional law thus agree on the major premise: the exercise of (personal) jurisdiction has to be consistent with due process. However, while European jurisdictional law tries to achieve this result through an *ex ante* analysis and the identification and codification of the connecting factors pointing to the most "reasonable" and "predictable" judge, American jurisdictional law does that by using a case-by-case minimum contacts analysis.[215] Whichever method is used, the result is the same.[216] The court of a state has jurisdiction over a non-resident defendant when he should reasonably except to be haled into court there. Therefore, harmonizing jurisdictional law for transnational commercial transaction litigation is indeed possible.

III. HARMONIZING CONFLICT OF LAWS RULES AND FINAL REMARKS

The above analysis of civil law and common law conflict of laws rules shows us that, despite a few differences, there are many similarities, and the apparent differences disappear as soon as one realizes that, in fact, American courts tend to adopt one approach, the "most significant relation" approach that, most of the times, resembles the approach adopted by Europeans.

Moreover, although it is true that there are different ways in which one can identify what the "most significant relation" is, the approaches used by European and American conflict of laws rules are very similar.

Europeans do not completely refuse the "governmental interest analysis" approach, nor the "better law" approach,[217] and there are cases, especially where public

[215] In this respect, it is worth noticing that many American states have so called "tailored" or "specific acts" long-arm statutes, that identify the specific situations over which a court of the state has jurisdiction over a non-resident defendants. The criteria adopted by these statutes strongly resemble the criteria adopted by EC Regulation 44/2001.
[216] See paragraph II.B.3.1, *supra*.
[217] See paragraph II *supra.*

policy interests are at stake – such as when marriage, divorce, filiation and legitimation – where Europeans adopt solutions very similar to those adopted by Americans. Public policy considerations, however, rarely find – or should find – application in purely transnational commercial transaction contexts.

At the origins of the conflict of laws rules, courts used to identify the laws applicable to the controversies on the basis of very simple and highly predictable connecting factors. The law governing contracts was the law of the place where the contract was made (*lex loci contractus*); the law governing torts or crimes was the law of the place where the tort or the crime was committed (*lex loci delicti*); the law governing property was the law of the place where the property in dispute was situated (*lex rei sitae*).

The analysis above shows that the systems under consideration have not substantially departed from the original approach, and, in any event, the differences between the two systems seem to be exceptions to a common pattern, exceptions adopted as corrective measures to the general rules, to ensure that, as it was in the past, justice prevail over formal rules of conflict of laws when the application of formal rules would be unjust.[218]

If we focus on these important similarities, consensus should be relatively easy to achieve, at least as far as uniform rules governing transnational commercial transaction are concerned.

In 1996, the Hague Conference on Private International Law started working on the draft of an international convention concerning the recognition and enforcement of judgments and the harmonization of jurisdictional rules. The convention was meant to (i) indentify the grounds of jurisdiction guaranteeing recognition and enforcement under the convention, (ii) identify the prohibited grounds of jurisdiction, and (iii) provide flexibility for national jurisdiction rules which could continue to apply.[219] The works were

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[218] Berman, *Is Conflict of Laws Becoming Passe'? An Historical Response*", p. 47, quoting Karl Neumeyer, "*Die gemeinrechtliche Entwickelung des internationalen Privat- and Strafrechts bis Bartolus*", Munich, 1901.

[219] See the general outline of the Hague Choice of Court Convention of 30 June 2005, signed by the European Union and the U.S., available at http://hcch.e-vision.nl/upload/outline37e.pdf

interrupted many times and, in 2001, it was finally clear that there was no consensus[220] on a text adopting uniform jurisdictional basis. Instead, a narrower convention was finally adopted, limited to the "exclusive choice of court agreements concluded in civil or commercial matters," with an optional extension of the chapter on recognition and enforcement of judgments given by a court designated in a non-exclusive choice of court agreement. The resulting convention – that, so far, has been ratified only by Mexico[221] – is quite disappointing, if compared to the original ambitious, but feasible project. The main reasons offered for the failure of this huge project were mostly related to the allegedly different approaches to jurisdiction adopted by common law – i.e. Americans – and civil law – i.e. Europeans – systems. These apparently irreconcilable differences were found in the American constitutional approach to jurisdiction and the "minimum contacts" test, the "tag" or "transient" jurisdiction and the *forum non conveniens* doctrine.

These approaches and criteria adopted by Americans seemed to be irreconcilable with the jurisdictional law approaches and criteria adopted by Europeans. However, as this analysis shows, these approaches and criteria, despite the different labels, are very similar and, most of the times, reach the same results.

The "minimum contacts" test that American courts run on a case-by-case basis has been already completed *ex ante* by Europeans through the identification of the "substantial contacts" in the provisions of the EC Regulation 44/2001, that give courts jurisdiction over the cases. Perhaps, the question should be not what forum is the natural forum or, even, the more appropriate one, but rather, which forum is "reasonable," that is, which forum presents "substantial contacts" with the controversy.[222]

The "substantial contacts" that Americans and Europeans use to identify jurisdiction and the law applicable to a controversy are very similar. It would then be possible to draft uniform rules of jurisdiction and choice of law rules that, on the basis of the same criteria,

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[220] *See*, ANDREAS F. LOWENFELD, LINDA J. SILBERMAN, THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: RECORDS OF THE CONFERENCE HELD AT THE NEW YORK UNIVERSITY SCHOOL OF LAW ON THE PROPOSED CONVENTION, 2001.

[221] See the status table available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=98

[222] "Substantial contacts" have been adopted as the basis for jurisdiction by ALI/UNIDROIT Principles of Transnational Litigation, Principle 2. See also Peter Nygh, *Conference Papers*. *The criteria for Judicial Jurisdiction*, A-4, footnote 48 above.

identify the judge with jurisdiction over a case and the law applicable to it. These uniform provisions and the criteria adopted would be consistent with due process since they would incorporate the relevant constitutional tests.[223] The controversy and the defendant should present "substantial contacts" with the forum state, to say that the court of that forum has jurisdiction over that controversy. This would make the forum "reasonable" and predictable for the defendant.[224]

Tag jurisdiction would most likely be absent from this international convention on conflict of laws as a possible jurisdictional category, but this should not be a problem for the US as it has been explained above.[225]

Forum non conveniens is not a real obstacle to harmonization either. As this work illustrates, the notion of a "more convenient" forum is not unknown to the Europeans that have adopted a similar idea in the EC Regulation 44/2001 when dealing with *lis pendens* and related actions. A general provision on *forum non conveniens* could be adopted in a global convention on jurisdiction. This provision could probably contain a non-

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[223] In favor of regulation of territorial authority to adjudicate, see Clermont, *Jurisdictional Salvation*, *supra* note 121, at 107.

[224] The American approach to personal jurisdiction is becoming more and more unpredictable. As noted by Prof. Clermont, "More and more obviously, the several bases for personal jurisdiction invoked sovereign power in only a metaphorical sense: minimum contacts, which would satisfy the power test, existed whenever the defendant's activities constituted purposeful availment of the benefits and protections of the forum's laws. This elaboration evolved uncontrollably far beyond physical power. Ultimately, the Supreme Court has come to require 'a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum' [Kulko v. Superior Court, 436 U.S. 84, 91 (1978)] This inquiry into the fairness of exercising power over the defendant must turn on the interests of others; therefore, the power test is inevitably eroding into a reasonableness test. In fact, the Court recently has gone even further, observing that fairness 'considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.' [Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)] This subversive observation could spell the demise of the power test. For the present, the power test remains a complicated way station, and it yields unpredictable results. " See Kevin M. Clermont, *Jurisdictional Salvation*, at 102.

[225] See paragraph II.B.3.3, *supra*. Also, Prof. Clermont observed "Given transient jurisdiction's dubious propriety and general un-necessariness, the United States should be, and seems to be, willing to accept the treaty's prohibition. Perhaps, however, the United States should insist on a new provision for jurisdiction against terrorists and human rights violators, against whom the human rights community has relied on tag jurisdiction." See Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121. At 112;

exhaustive and illustrative list of circumstances which would make a forum "more convenient", thus setting the basic guidelines for a decision that would not appear as completely arbitrary and left to the sole discretion of judges, which solution would most likely be rejected by Europeans.

As clearly expressed by Prof. Clermont, harmonization would bring a fair and advantageous compromise. He noted, "The Europeans' principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's physical presence, property ownership, or doing business in the forum. They do not object to specific jurisdiction, as long as a rules-based approach controls its mandatory application. Thus, jurisdiction under the [Hague] treaty would exist at the un-consenting defendant's *habitual residence* or the place where a *specific part of the events* in suit occurred, but would not extend to the broader bases of jurisdiction now authorized by U.S. law. In exchange, the United States would get other countries to respect its judgments and also to renounce their own exorbitant jurisdiction."[226]

According to some authors, Europeans and Americans have different ideas about what jurisdiction is.[227] However, jurisdiction is the power of the judge to adjudicate cases and this analysis shows that American and European jurisdictional law starts from similar major premises and, most of the times, reach the same results despite their different labels or methodological paths. In fact, as illustrated above, by applying the relevant jurisdictional law provisions under EC Regulation 44/2001 to cases that have been submitted to the U.S. Supreme Court for review of personal jurisdiction issues, most of the times the result is the same under European and American law. Uniform rules on jurisdiction over transnational commercial transaction litigation could indeed be adopted.[228]

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[226] See Kevin M. Clermont, *Jurisdictional Salvation,* supra note 121, at 96.
[227] See Ralph Michaels, *Two Paradigms of Jurisdiction*, 27 Mich. J. Int'l. 1011.
[228] For a proposed draft of a uniform convention on jurisdictional law, see Kevin M. Clermont and Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, in KEVIN M. CLERMONT, A GLOBAL LAW OF JURISDICTION AND JUDGMENT: LESSONS FROM THE HAGUE 3, The Hague; London; New York: Kluwer Law International, 2002, at 10 f. The Authors adopt the defendant's habitual residence as the basis for general jurisdiction (see Title 2 section 201). Given that "general jurisdiction

Harmonization should be pursued when there are the bases to do so or no real reason not to do so. An international convention on service of process,[229] an international convention on the abolition of legalization[230] and another on the taking of evidence abroad[231] are perfect examples of how the original differences existing among the countries are not always real obstacles to harmonization,[232] how "exorbitant" rules[233]

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confers broad power to adjudicate any claim against the defendant, without taking into consideration the relation between the particular case and the forum, the basis for this jurisdiction requires a strong nexus between the defendant and the forum." *Id*. at 11. The Authors then suggest a series of bases of specific jurisdiction. For instance, with reference to contracts, "The state has personal jurisdiction over the defendant as to a claim in contract if the claim arose from the defendant's transacting business in that state. (Title 2, section 202 (a)). *Id*. at 16. "Transacting business" was chose as a basis for personal jurisdiction in cases dealing with contracts in order "to provide flexibility". *Id*. at 17. The proposed provision "uses the restrictive phrase 'arose from' to ensure a close connection." Id. With regards to torts, Title 2, section 202(b) provides that "A state has personal jurisdiction over a defendant as to a claim in tort if: (1) the act or omission causing injury occurred in that state; or (2) the injury occurred in that state and the defendant purposefully directed other activities relating to the tortuous injury to that state." *Id*. at 16. "This jurisdictional basis for specific jurisdiction in tort has long been deemed appropriate in the United States." *Id*. at 21. See also Restatement (Second) of Conflict of Laws section 36(1)(1976) providing that "The state where the tortuous act or omission occurs will often be the most appropriate location for the trial of the action." Other proposed provisions may be found in Kevin M. Clermont and Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, *id*. See also paragraph IV, *infra.*

[229] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on November 15, 1965.

[230] Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded on October 5, 1961.

[231] Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

[232] As it has been observed, "Until the Convention [on the service abroad] was implemented, the contracting nations followed widely divergent practices for serving judicial documents across international borders, some of which did not ensure any notice, much less timely notice, and therefore often produced unfair default judgments. Particularly controversial was a procedure, common among civil law countries, called "notification au parquet", which permitted delivery of process to a local official, who was then ordinarily supposed to transmit the document abroad through diplomatic or other channels. Typically, service was deemed complete upon delivery of the document to the official whether or not the official succeeded in transmitting it to the defendant and or not the defendant otherwise received notice of the pending lawsuit. The United States delegation to the Convention objected to notification au parquet as inconsistent with 'the requirements of 'due process of law' under the Federal Constitution.' The head of the

adopted by some countries could be set aside in favor of harmonization, and how the international community as a whole could highly benefit from these instruments. Through the adoption of standardized forms, these conventions have introduced cheaper and faster mechanisms to be adopted in transnational litigation, thus eventually enhancing international judicial cooperation and improving transnational litigation.

Jurisdictional law still needs to be harmonized. This is not an easy task, as the "failure" of the Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments has proved. However, this is not an impossible task either, especially if we limit it to certain areas where not only would harmonization be highly beneficial, but also very feasible. Countries will have to accept compromises to reach consensus on a uniform set of rules and on a uniform text. However, this work shows that the bases for a reasonable compromise exist and that international commercial transactions and legal systems in general would greatly benefit from uniform conflict of laws rules.

An international convention on conflict of laws rules could adopt very simple, easily predictable and alternative connecting factors – the ones that have already been adopted by the various legal systems and proved successful there; these criteria, as this analysis shows, are ultimately very similar. These uniform conflict of laws rules will leave to judges the power to depart from them only under exceptional circumstances, where it would be unjust or against the fundamental principles and public policy of that system, to apply them. The convention could identify such exceptional circumstances, which would call for the analysis of the "governmental interest" or for the identification of the "better law". This would be possible through the application of each country's

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delegation has derided its '[i]njustice, extravagance [and] absurdity."… "In response to this and other concerns, the Convention prescribes the exclusive means for service of process emanating from one contracting nation and culminating in another. As the Court observes, the Convention applies only when the document is to be '…transmit[ted] for service abroad'; it covers not every transmission of judicial documents abroad, but only those transmissions abroad that constitute 'formal' service." GAY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS, Kluwer Law International, 2007, p. 829.

[233] At the time of the Hague Service Convention, notification au parquet was used by five countries: France, the Netherlands, Greece, Belgium, and Italy. 3 1964 Conference de la Have de Droit International Prive, Actes et Documents de la Dixieme Session (Notification) 75 (1964).

fundamental principles of policy (or rules of mandatory application) and *ordre public*. In other words, rules of mandatory application and *ordre public* would be the vehicle through which a state would be able to pursue its "governmental interest" or to select the "better law" to apply to the controversy. However, departures from the general rules for reasons of *ordre public* should be the exception, especially considering that transnational commercial transactions is not an area where public policy exceptions – usually concerned with family, succession, administrative matters, etc… – apply. In any event, there cannot be a fundamental public policy or *ordre public* which needs to be considered every time a conflict of laws problem arises. Furthermore, although governmental interests and public policies may change throughout the years, they rarely change dramatically and quickly. This will give the systems some further stability.

This article does not suggest to revert to vested rights approach under the American (First) Restatement of Conflict of Laws, which approach proved to be inadequate to meet justice needs. Rather, this article suggests the adoption of a uniform and flexible system, based on a pluralistic approach, which would still be able to achieve uniformity of solutions and harmonization, while preserving the real differences.

In such a system, public policy as an "escape devise" would be used cautiously. As Carter observed, "public policy should not be invoked in private international law merely because it could, or would, be invoked in the *forum* if the same facts had been presented in a purely domestic context – unless, of course, the internal law of the *forum* is the *lex causae*. Locally acceptable inhibitions and prejudices are not always appropriate in a transnational context. The automatic injection of standards applicable in a domestic situation into a transnational situation may be seen, at best, as an exercise in mechanical jurisprudence, and at worst as blatant judicial chauvinism. Secondly, and more generally, the initial reaction to any attempted invocation of public policy should be, if not hostile, at least one of guarded suspicion. As Cardozo J. said in *Loucks v. Standard Oil Co.* over 70 years ago: 'The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal.' These are oft-quoted words, but, when resort has been had to public policy, oft-disregarded words.

The message they embody is nevertheless salutary and benign."[234] Care must be taken to ensure that public policy, the "unruly horse" "is not allowed to weak havoc in international pastures. To vary the metaphor – indulgence in "palm tree" justice is as undesirable in private international law as it is in internal law. The penultimate objective must largely lie in judicial restraint. But this, although to be welcomed, can be no more than a palliative of uneven consistency."[235]

Well-defined conflict of laws rules would help avoid the risk of arbitrary decisions. Conflict-of-laws rules should be framed in such a way that there is no need to refer to public policy to avoid unfairness and un-justice. Carter suggests that rigid rules with a narrowly and appropriately defined scope, or broad scope rules with sufficiently flexible terms, should be adopted; and that rigid rules of broad scope should be avoided, since they give rise to the need to refer to public policy.[236] An international convention might set forth general rules which would adopt the approach adopted by the original conflict-of-laws rules, preserving and encouraging a strong interaction between choice of law and jurisdictional law rules.

The rules of this international convention would identify the law applicable to the controversy and the jurisdiction over the same based on single connecting factors, that would make the selection of the applicable law and of the jurisdiction over the case highly predictable, fair and efficient. Public policy would be invoked under exceptional circumstances, thus avoiding applying locally acceptable inhibitions and prejudices to transnational controversies. These rules will be specifically adopted for international controversies and, thus, will be most of the times different from the rules adopted for domestic controversies.[237] The presumption to apply the same rules to national as well as to international controversies must be wrong, by definition. There should be a separate regulation for international controversies and an international agreement upon those rules would eventually enhance the quality of the rules themselves.[238] This is what happened

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[234] See P.B. Carter, *The Role of Public Policy, in English Private International Law*, at 2.
[235] See Carter, at 10.
[236] *Id*.
[237] The "American" approach thus should be abandoned.
[238] Hence, not only the quality of the international rules, but also the quality of the internal rules would thus be enhanced. "The exercise of specifying which of the

with the EC Regulations,[239] that, however, as shown above, still contains many useless repetitions of similar connecting factors used to identify the judge with jurisdiction over the case and the law applicable to it, which repetitions could be easily avoided by adopting uniform and single criteria.

There are multiple interactions between jurisdictional law and choice of law connecting factors that cannot be ignored. Often times courts use the same "connecting factors" to identify the law applicable to the case as well as the judge with jurisdiction over the same.[240] The strong interaction between choice of law and jurisdictional law

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constitutional forums are the more convenient, efficient, and otherwise desirable would do a great service to U.S. law. In addition, learning more about foreign thinking on jurisdictional matters could have only a salutary effect on the shape of U.S. law." Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121, at 116.

[239] As noted by Prof. Clermont, "The Brussels Convention takes only the best of the civilian tradition regarding jurisdiction. … On the prohibited side, each member state gave up its exorbitant jurisdiction, but only as against domiciliaries of other member states. So, France gave up jurisdiction based on the plaintiff's French nationality. England, too, is now a signatory and has relinquished transient and attachment jurisdiction. Furthermore, the Convention not only prohibits exorbitant jurisdiction, but also makes mandatory the permissible bases of jurisdiction. Accordingly, England abandoned its judicial practice of sometimes declining jurisdiction on expressly discretionary grounds, but again only when the Convention applies." See Kevin M. Clermont, *Jurisdictional Salvation*, *supra* note 121, at 93.

[240] In *Alton v. Alton*, rather than begin with the in rem nature of the proceedings and deduce the application of the forum law to the case, the court began with a decision to apply forum law and inferred that their choice of law could be guaranteed only through an in rem proceeding based on domicile, the traditional test for presence of the marital res. See Alton v. Alton, 207 F.2d 667 (3d Cir. 1953). As observed by Carol Bruch Myers, "Striking down an attempt by the Virgin Islands legislature to base divorce on other grounds, the court of appeals majority apparently failed to recognize the distinction between judicial jurisdiction and application of forum law. Consequently, Judge Goodrich used reasoning appropriate to a choice of law decision, although the issue was one of jurisdiction: 'We think that adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens.' *Id*. at 676. As Judge Hastie suggested, the court's concern could have been met instead by a requirement that the law of the place of domicile be applied in divorce cases, regardless of the jurisdictional base. Indeed, such a choice of law rule would secure application of the same law as jurisdiction based on domicile, yet allow in personam adjudications where convenience to the parties would be better served. Under current practice, an in personam jurisdictional base is necessary for resolution of the property and financial aspects of a divorce… If personal jurisdiction with a choice of law restraint were permissible, she could retain." See Carol Brunch Myers, *At the Intersection of*

Jurisdiction and Choice of Law, California Law Review, Vol. 59, No. 6 (Nov., 1971), at 1522-1533. In cases dealing with internet, when "U.S. law may apply, the judges seem to assume that U.S. law should apply, even without any sustained discussion of other possible outcomes…" and the decision in GlobalSantaFe Corp. v. Clobalsantafe.com [250 F.Supp.2d 610], which involved two American corporations and a Korean individual, the "vision of choice of law that emerges…is founded solely on jurisdictional power and a race to the courthouse." See Paul Schiff Berman, *Choice of Law and Jurisdiction on the Internet: Towards A Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interest in a Global Era,* University of Pennsylvania Law Review, Vol. 153, 2005, at 1823-1829. In GlobalSantaFe Corp. v. Clobalsantafe.com, the court never questioned that the Anticybersquatting Consumer Protection Act (ACPA) was the only possible relevant legal regime. Indeed the court assumed that the ACPA's legal reach was limited solely by the scope of the court's jurisdiction, not by any choice-of-law considerations. *Id*. at 1828. Justice Brennan, dissenting in World-Wide Volkswagen Corp. v. Woodson 444 U.S. 287, observed that "I recognize that the jurisdictional and choice-of-law inquiries are not identical. Hanson v. Denckla, 357 U. S. 235, 254 (1958). But I would not compartmentalize thinking in this area quite so rigidly as it seems to me the Court does today, for both inquiries "are often closely related and to a substantial degree depend upon similar considerations." *Id*., at 258 (Black, J., dissenting). In either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum State. While constitutional limitations on the choice of law are by no means settled, see, e.g., Home Ins. Co. v. Dick, 281 U. S. 397 (1930), important considerations certainly include the expectancies of the parties and the fairness of governing the defendants' acts and behavior by rules of conduct created by a given jurisdiction. See, e.g., Restatement (Second) of Conflict of Laws § 6 (1971) (hereafter Restatement). These same factors bear upon the propriety of a State's exercising jurisdiction over a legal dispute. At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy." *Id*. at *225. Furthermore, Justice Brennan, concurring in *Burnham v. Superior Court of California*, noted that there is "an interaction among rules governing jurisdiction, forum non conveniens, and choice of law". See Burnham v. Superior Court of California, 495 U.S. 604, footnote 9. In *Hanson v. Denckla*, Justice Black, dissenting, held that "True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations." 357 U.S. 235, 256 (1958). Also, Justice Stevens, concurring in *Allstate Ins. Co. v. Hague*, held that "I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction." 449 U.S. 302, at *326. Prof. Currie

rules cannot be ignored, also for due process purposes.[241] A proposed unifying theory for jurisdiction and choice of law rules recognizes that "the selection of a forum has a determinative and inescapable influence on the result in the case before it, an effect that cannot be nullified by the forum's decision to apply rules that parallel some other sovereign's rules of local law."[242] Selection of forum selects an entire decision making regime and "deciding that the forum's exercise of judicial jurisdiction is constitutional also decides that it is constitutional for the forum to determine the result of the case."[243] The power to decide carries with it the power to select the rules that will inform the decision.[244] Therefore, there is a necessary interrelation between the two set of rules, and a unified approach to them will ensure consistency and logical and efficient solutions.

The rules that have mostly been adopted and proven successful in the participating states will form the basis for the provisions in this convention, that will not adopt any "exorbitant" rule, like the "tag jurisdiction" rule.

Not long ago, I talked to Prof. Allan Ides about my idea of harmonizing civil procedure rules. He listened to me and then said, "well, you have to consider that institutions perform the same functions, civil procedure systems have been adopted to solve disputes. They cannot be that different after all." I thought that that was exceptionally brilliant and wise, for two reasons. First, when trying to harmonize law provisions, the goal of these provisions should be always kept in mind, as well as the final goal of legal systems that is to solve disputes in a just, efficient and speedy way,

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believed that the forum courts were instruments of state policy and, thus, they had to apply forum laws whenever there were legitimate interests to do so.

[241] Justice Brennan, in *Allstate v. Hague*, held that "In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation … In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair…the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." 449 U.S. 302, at *308.

[242] See Harold G. Maier and Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, in The American Journal of Comparative Law, Vol. 39, No. 2 (Spring, 1991), at 255.

[243] *Id*. at 257.

[244] *Id.* at 281.

whether or not this has been expressly stated by rules or case law. We comparatists often forget this when we focus on the differences rather than similarities. If we had in mind the goal of the provisions we were analyzing, there would have been more works on "convergences" rather than on "divergences," and there would have been more "professional awareness," that is the true obstacle to harmonization. Second, I thought it was brilliant and incredibly right in its simplicity and made me think that we do not need exceptionally complicated theories to support harmonization. Everything we need is a careful study and analysis of the systems under consideration, to look beyond the surface and what seem irreconcilable differences and rediscover common origins and shared roots as well as functional equivalences still existing today.

The common goal of legal systems is to solve disputes in a just, efficient and speedy way. Therefore, legal systems' rules must be similar and, where they are not so, one of these systems must be adopting the less efficient or less fair solution, unless where the different approach or method is justified by a real public policy reason.

Harmonization would be an excellent tool in the hands of the legislatures but professional awareness needs to be increased to reach this very important goal.

IV. AN INTERNATIONAL CONVENTION ON CONFLICT OF LAWS RULES: A DRAFT PROPOSAL

Section I

Scope and Application

Article I

This Convention shall apply to conflict of laws issues arising out in transnational commercial transactions.

The scope of this Convention is intentionally limited to transnational commercial transactions, considering this area an area where harmonization is especially needed – uniform rules will favor this kind of transactions, reduce the costs of litigation and enhance predictability and fairness – and possible – civil law and common law systems share many similarities and public policies issues preventing the application of the

otherwise applicable uniform rules should not arise except under exceptional circumstances.

Article II

Any law indicated by this Convention as the law applicable to the controversy shall be applied, whether or not it is the law of a country that has ratified the Convention.

Any judge indicated by this Convention as the judge with jurisdiction over a case shall have jurisdiction over the case, whether or not it is the judge of a country that has ratified the Convention.

The Convention provides that even when the connecting factors that it adopts lead to the application of a law or to the identification of a competent judge of a country that has not ratified the Convention, this selection will be valid. This selection mechanism enhances predictability and efficiency, and it encourages countries to ratify the Convention.

Section II

General Jurisdiction

Article III

Subject to this Convention, individuals having their domicile or corporations having their statutory seat, central administration or principal place of business in a country that has ratified the Convention shall, whatever their nationality, be sued in the courts of that country.

Individuals or corporations doing continuous, systematic and substantial activities in a country that has ratified the Convention, whatever their nationality, may also be sued in that country.

Domicile is the preferred basis of jurisdiction, because the defendant can more easily defend before the court of the place where he is domiciled. Moreover, the defendant is

clearly "on notice" of the possibility of being haled into court in the place where he is domiciled. This makes the exercise of jurisdiction consistent with due process.

The formal concept of "domicile" is expanded to include the idea of "domicile in fact." When doing continuous, substantial and systematic activity in a place, the individual or corporation will be considered as if they were domiciled there for purposes of jurisdiction. The exercise of jurisdiction by the courts of that place will be consistent with due process, since by reason of the activities – commercial or not – that the defendant is carrying out in that place, the defendant should reasonably expect to be haled into court there over any cause of action, including those that are not related to the activity carried out in that place.

Section III
Rights in rem

Article IV

The title or possession of real estate shall be governed by the law of the country where the real estate is located.

The judge with jurisdiction over a dispute over the title or possession of real estate shall be the judge of the country where the real estate is located.

The principle according to which actions over title or possession of real estate should be brought before the court of the place where the real estate is located and governed by the law of the same place was originally adopted by Roman law and, then, by common law.

Section IV
Pendent party jurisdiction

Article V

A person domiciled in a country may also be sued: (i) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided that

the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (ii) as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case; (iii) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending; (iv) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in real estate, in the court of the country in which the property is situated.

This provision provides for the possibility to bring before the same judge claims arising out of the same transaction or occurrence as the main claim, that would not otherwise fall within the jurisdiction of that judge. This is intended to enhance judicial efficiency and fairness, as well as to avoid any res judicata problems.

Section V

Lis Pendens and Related Actions

Article VI

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different countries, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

Where related actions are pending in the courts of different countries, any court other than the court first seized may stay its proceeding. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the action in question and its law permits the consolidation thereof. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is

expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

In case of lis pendens, any court other than the court first seized shall decline jurisdiction in favor of the court first seized that has declared to have jurisdiction over the case. This mechanism is intended to enhance efficiency and avoid the risk of irreconcilable judgments.

The court will determine, in its own discretion, whether two or more actions are "related." In this case, any court other than the court first seized will have discretion to decline jurisdiction in favor of the court first seized. When deciding to decline jurisdiction, courts will consider, inter alia, the status of the proceedings – that is, the court will consider whether the status of the proceeding pending before the court first seized is such to allow a through examination of the issues involved in the second proceeding – the interests of the parties in consolidating the actions, and any delay or any other prejudice that the defendant or the other parties may suffer.

Section VI
Contractual obligations

Article VII

A contract shall be governed by the law chosen by the parties. By their choice the parties can select the law applicable to the whole or to part only of the contract. Notwithstanding the above choice, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the provisions of the law of that other country that cannot be derogated from by agreement.

The parties may choose the judge with jurisdiction over their contractual obligations by agreement entered into before or after the event of default occurred, if all the parties are

pursuing a commercial activity. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The choice has to the applicable law and or the judge with jurisdiction over a contractual dispute shall be (i) in writing or evidenced in writing, or (ii) in a form which accords with practices which the parties have established between themselves; or (iii) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The parties' choice of the applicable law or of the judge with jurisdiction over the case shall be preserved, unless where this choice is clearly intended to circumvent the public policy provisions of the country with which the contract is mostly connected. The choice of the judge with jurisdiction over the case shall be exclusive unless the parties have agreed otherwise. This last provision is intended to address the issue of forum selection clauses and the power that courts may have to disregard them when deciding on motions to transfer the case to another forum.

The parties' choice shall be clearly indicated and proven according to the provision of this Article.

Article VIII

In the absence of the parties' choice, the law applicable to the contract shall be the law of (i) the place of contracting, or (ii) the place of performance, or (iii) the place of subject matter of the contract, or (iv) the domicile, residence, place of incorporation or place of business of the parties, or (v) the place with which the defendant and the case are more closely connected.

The same connecting factors will be applied to identify the judge with jurisdiction over the case.

This Article adopts a 'methodological pluralism' approach in order to identify the law that is more closely connected to the parties and the case.

Section VII
Non-contractual obligations

Article IX

The law applicable to non-contractual obligations shall be the law that the parties have selected by agreement entered into before the event giving rise to the damage or after the damage occurred, if all the parties are pursuing a commercial activity.

The judge with jurisdiction over non-contractual disputes shall the judge that the parties have selected by agreement entered into before the event giving rise to the damage or after the event giving rise to the damage occurred, if all the parties are pursuing a commercial activity. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

Notwithstanding what provided by the preceding paragraph, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country that cannot be derogated from by agreement.

Parties have the right to choose the law governing their non-contractual obligations as well as the judge with jurisdiction over any case dealing with such obligation.

The forum selection clause shall be exclusive unless the parties have agreed otherwise.

Article X

In the absence of the parties' choice, the law applicable to non-contractual obligations shall be (i) the law of the country where the damage occurred, or (ii) the law of the country where the event giving rise to the damage occurred, or (iii) the law of the country where both parties are domiciled, habitually resident, have their place of incorporation or place of business, or (iv) the law of the country with which the defendant and the case are manifestly more closely connected, or (v) the law of the country with which the parties and the case are manifestly more closely connected.

The same connecting factors will be applied to identify the judge with jurisdiction over the case.

This provision adopts a 'methodological pluralism' approach in order to identify the law that is more closely connected to the parties and the case.

Article XI

The law applicable to non-contractual obligations arising out of damage caused by a product shall be the law that the parties have selected by agreement entered into before the event giving rise to the damage.

The judge with jurisdiction over non-contractual disputes shall the judge that the parties have selected by agreement entered into before the event giving rise to the damage. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The choice shall be in writing or evidenced in writing.

Article XII

In the absence of the parties' choice, the law applicable to non-contractual obligation arising out of damage caused by a product shall be (i) the law of the country where the

individual sustaining the damage had his or her habitual residence when the damage occurred, or (ii) the law of the country where the manufacturer had his habitual residence or statutory seat, central administration or principal place of business when the damage occurred, or (iii) the law of the country with which the parties and the case are manifestly more closely connected.

A consumer may bring proceedings against the other party to a contract either in the courts of the country in which that party is domiciled or in the courts for the place where the consumer is domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the country in which the consumer is domiciled.

The slightly different regime under Articles XI and XII is provided considering the consumer as the weakest part in the relationship.

Section VIII
Forum Non Conveniens

Article XIII

Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction. When deciding whether a forum is more convenient than another, the judge might take into account the following factors: (i) the relative ease of access to sources of proof; (ii) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; (iii) the administrative difficulties which follow for courts when litigation is piled up in congested centers instead of being handled at its origin; (iv) jury duties; (vi) a local interest in having localized controversies decided in the local forum.

Forum non conveniens is a possible ground for denying jurisdiction that would otherwise be proper under this Convention. The list of considerations that a court may make when

deciding whether to deny jurisdiction on forum non conveniens grounds is non-exhaustive. However, the considerations that a court may make when deciding to deny jurisdiction on forum non conveniens grounds should closely resemble the factors listed in the Article.

Section X
Tag Jurisdiction

Article XIV

Jurisdiction cannot be exercised solely on the basis of proper service of process made upon an individual temporarily and voluntarily present within a country, when such presence is unrelated to the object of the litigation.

Tag jurisdiction is not allowed.

Section XI
Public Policy of the Forum

Article XV

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with a fundamental public policy (*ordre public*) of the forum.

This "escape device" should be used only under exceptional circumstances, that indicate the presence of a fundamental public policy of the forum that needs to be preserved.

Section XII
Recognition and Enforcement of Judgments

Article XVI

The judgment rendered by a judge with jurisdiction over the case as indentified by the above provisions shall be recognized and enforced in the countries that have ratified this Convention, by appropriate procedures provided by the same countries.

The procedure for recognition and enforcement of judgments shall be provided by the domestic law of the forum that should recognize and enforce judgments.