Transnational Litigation in Comparative Perspective

THEORY AND APPLICATION

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New York     Oxford
OXFORD UNIVERSITY PRESS
2010
A. Introduction

Choice of law is a discipline that seeks to determine the application of law when the administration of justice requires a choice between two or more systems of law. European lawyers tend to use the term “Private International Law” to refer to this field, whereas American lawyers are more familiar with the term “Conflict of Laws.” Ironically, the common American term was coined by seventeenth-century Dutch scholars and Joseph Story, an American, is often credited for the European term.

Conflict cases arise because law-making bodies of various jurisdictions see the world differently; if the law were uniform in all jurisdictions there would be no conflict. Conflict doctrines must mediate a tension between concepts of sovereignty and fairness. On the one hand, we may be inclined to respect policy determinations of different jurisdictions. Yet we also want to decide cases in ways that make good sense and do not violate the parties’ ability to prosecute and defend the action effectively.

What has long been sought is a lingua franca of the law that permits the courts of different states to respect each other’s persons and policies, while fairly and effectively resolving private disputes. As Professor Juenger and his colleagues have demonstrated, a perfect formula for transmuting legal diversity into equivalence continues to elude both savants and practitioners. See Friedrich Juenger, Choice of Law and Multistate Justice (1993).

Conflict of Laws is a separate course in the curriculum, and deservedly so. In this chapter we can provide only an introduction to some of the topics that are at the core of transnational litigation.
The Problem: 007 Wonders*

Warner Brothers Inc. ("WB") is the owner of the copyright of the James Bond movie *Never Say Never Again*, which was produced in the United Kingdom. WB sold videos of the movie there, and Mr. Erik Viuff Christiansen, who manages a video shop in Copenhagen, purchased a copy in London with a view to renting it out in Denmark. Mr. Christiansen advertised that the film was in its original version (that is, without Danish subtitles). The local James Bond fans were delighted because until then the film had not been obtainable on the Danish market.

Under Danish copyright legislation, the owner of the copyright has a right to authorize or refuse rental and a right to a royalty whenever the video is rented out. In contrast, at all time relevant to this incident," English copyright law allowed WB to control the initial sale, but gave no right to prohibit or condition rentals of the work.

Which jurisdiction's law should be invoked to determine the respective rights and responsibilities of WB and Mr. Christiansen? Does and should your answer change depending on whether the action is filed in London; Copenhagen, or Lisbon?

For additional context, you may assume that at all times relevant to this incident, the laws of Ireland, the Netherlands, and Germany were similar to the English. French law was substantially similar to the Danish legislation. In Greece, Italy, Luxembourg, and Spain, among others, the matter had not been resolved by specific provisions. (Is this additional context relevant to the choice of law question?)

**B. Theoretical Approaches**

In this section we consider several theoretical approaches for determining the applicable law. Before engaging this reading, however, consider the answer(s) that you gave to the problem that opened this chapter and analyze the theoretical underpinnings of your intuition—how and why did you reach the conclusion that you did? If you wanted more information before answering, what exactly did you want or need to know?

1. *Lex Fori*

One approach to the question what country's law applies is simply not to pose the question at all. The court in which the transaction is litigated may simply apply its own law. In support of this solution, it can be argued that judges are, after all, most familiar with the law of the forum, or lex fori. Its application is therefore easier, less time-consuming, and (there being no need for a foreign law expert) more efficient than resort to the rules of decision of some alien legal system. Moreover, an erroneous application of the pertinent law will be less likely. That was indeed the way

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*This hypothetical is based largely on Warner Bros., Inc. v. Christiansen, Case 158/86 [1988] ECR 2655.

** The actual case invoked the Copyright Act of 1956, which has since been amended.
English common-law courts, after initially refusing even to hear cases involving foreign facts because the juries had to be drawn from the vicinage, used to deal with the problem some centuries ago. Rather than simply dismissing such cases, the common law courts resorted to the fiction that the foreign facts transpired in England, so that they could be tried before a jury and adjudicated by applying English law. Is there any contemporary justification or use for this seemingly archaic approach?

Albert A. Ehrenzweig,
The Lex Fori—Basic Rule in the Conflict of Laws

Once a court has taken jurisdiction it will usually apply its own law, unless the parties' own choice or an important foreign fact, such as a foreign domicile, a foreign situs, or a foreign conduct, appears to require application of another law. Most judges and lawyers will agree with this simple proposition—and yet text books, class notes, the Restatement, and even much language of the courts, would have it otherwise: foreign domicile, foreign situs, foreign conduct and other foreign "contacts" are said a priori to require application of a foreign law, unless the court can be persuaded for special reasons to turn to its own law or to the law chosen by the parties. This blatant discrepancy between the actual doing of the courts and "official" theory in the law of conflict of laws has made an awesome mystery or an object of ridicule of this subject in the eyes of many....

For several centuries courts have, in varying ways and degrees, recognized foreign contracts or testaments which were valid under the law of their execution, permitted an alleged wrongdoer to show that he acted lawfully under the law of his conduct, or treated the transfer of foreign land in accordance with the law of its situs. Refinements have resulted in longer lists of such exceptions from the basic rule of the law of the forum. But it should not have been forgotten that foreign laws originally assumed these functions only to fill vacua created by the superior legal orders or the forum's self-limitation. The Pope could and did prohibit the bishop from enforcing the law of his diocese against foreigners.... Sister state customs were admitted in medieval Italy, where city ordinances would in terms limit themselves to citizens....

These situations in which foreign laws have thus been called upon to fill a vacuum could well have been collected and classified in a catalogue of exceptions from the basic rule of the law of the forum.... Instead, in a gradual process of academic petrifaction,... doctrine has traded the fertile inconsistencies and intricacies which would have characterized this scheme, for the sterile consistencies and simplicities of dogmatic formulas, which distinguish our current "official" law of conflict of laws....

A California citizen was killed in an automobile accident in Arizona. In a California law suit the California defendant claimed that the plaintiff's cause of

action had died under “applicable” Arizona law, although California had long abolished what even a hundred years ago was felt to be a rule contrary to “justice,” and permitted the survival of tort actions. Nevertheless it took the imaginative-ness and scholarship of a progressive court to defeat the defendant’s seemingly conclusive insistence on the law of the “place of the wrong” in order to do justice between two California citizens according to California law. And in order to be able to do so, the court had to resort to dogmatic language devised 700 years ago for totally different purposes. [See Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953)]. Decisions of this kind could be multiplied at will. . .

Less frequent, though more disturbing, are those cases in which less courageous judges, or judges less familiar with the tools at their disposal, have more or less grudgingly acquiesced in what they thought to be compelling precedent, and have done injustice by refusing to apply their own laws. . .

Sutherland v. Kennington Truck Service, Ltd.
562 N.W.2d 466 (Mich. 1997)

[Ohio plaintiffs brought suit against Ontario, Canada, defendants to recover for injuries sustained in vehicle accident in Michigan. A Michigan trial judge, applying Ontario’s statute of limitations, granted a defense motion for summary judgment. Plaintiffs appealed and a majority of the Michigan Supreme Court held that neither Ohio nor Ontario had interest in having its law applied, and therefore, Michigan law applied.]

Brickley, Justice (concurring in part and dissenting in part).

I concur in the result reached by the majority. However, I write separately to express my view that the time has come for this state to . . . adopt a lex fori approach to choice of law questions. . .

[T]he problems in the majority’s opinion stem from this underlying methodology. The most fundamental flaw in this approach to choice of law is that it requires the courts of this state to choose between the laws of Michigan and those of foreign jurisdictions. As a matter of policy, the courts of this state should apply Michigan law. The application of foreign law requires a Michigan court to interpret and apply that law as if the court was sitting in that foreign jurisdiction. State courts should not presume to speak for other jurisdictions in this manner. Further, the majority’s analysis requires Michigan courts to apply the law of another jurisdiction in certain cases. However, before a court can do this, it must first expressly refuse to apply the laws of this state. This refusal ignores and defeats the express will of the Legislature. Clearly, the courts of this state should avoid this outcome. . .

4 It should be noted that choosing another jurisdiction’s law is fundamentally different from adopting another state’s approach to a given issue. In the choice of law context, a Michigan court acts as if it is a court in a foreign jurisdiction and purports to speak on that jurisdiction’s laws. However, when a Michigan court finds another state’s approach on an issue persuasive and adopts it, the court merely refines Michigan law. Thus, its holding only addresses the laws of this state.
Moreover, there is an increased likelihood of error when Michigan courts attempt to rule on foreign laws.

A second flaw with this state's choice of law methodology is that it is unpredictable. [The doctrine has] sought to create a system that would allow parties to accurately forecast the law that governs any given litigation. However, this case shows that this has not been the result. Rather, these parties have been delayed for over five years as the courts of this state have struggled to determine the governing law. Further, the majority does not make this system any more predictable. Instead, it fails to define a systematic approach for determining the interests of other jurisdictions. It examines two factors in determining that neither Ontario nor Ohio can be interested in this case. Yet, it is far from clear that these are the only factors to be considered.

The third flaw in this choice of law approach is that it allows hidden, pro-forum manipulation. The majority recognizes that courts manipulate apparently neutral choice of law rules in order to justify the application of forum law. This defeats the parties' expectation that choice of law rules will be neutrally applied. I agree with the majority's comment that this preference is not surprising. However, the majority fails to take steps to eliminate this problem. Indeed, the analysis that the majority uses to determine that Ohio and Ontario have no interest in this litigation is an example of that approach.

I feel that lex fori should be adopted. This approach will avoid the three evils of the majority's methodology. First, under lex fori, Michigan courts will only apply Michigan law in most cases. This eliminates the problems that result when a Michigan court applies the laws of another jurisdiction. Second, a lex fori approach will bring clarity and predictability to this area of the law. All parties entering a Michigan court would know that they are to be governed by Michigan law. Finally, courts would not be tempted to manipulate the choice of law rules.

I am aware that the lex fori approach has been criticized for encouraging forum shopping. This supposed evil is greatly exaggerated and should not deter this state's adoption of the lex fori approach. Forum shopping is thought to be an evil because it allows a plaintiff to expose a defendant to the laws of a forum that has little involvement in the litigation, assuming that the forum has jurisdiction over the defendant. Under the approach I propose, an entity may be subjected to Michigan law concerning a cause of action that may have arisen elsewhere, if all constitutional requirements are satisfied. However, this should not prevent the adoption of the lex fori approach in this state.

Initially, it is important to recognize that a forum shopping party who chooses Michigan is asking the courts of this state to effectuate the laws and policies of Michigan. There is no reason why Michigan courts should summarily refuse this request. Rather, it is the duty of Michigan courts to effectuate these laws and policies. Assume that a plaintiff chooses to file suit in Michigan because Michigan law recognizes his claim. The application of Michigan law to this plaintiff's claim will fulfill the policy expressed by the Michigan Legislature, which recognizes the claim. Thus, forum shopping is not necessarily problematic.
Forum shopping is also commonly assumed to be unfair to defendants. This view is based on the premise that the plaintiff has selected an unfair forum. However, the law that the defendant would have the court apply is likely to be just as unfair. Indeed, the defendant will likely urge the court to apply the law of the jurisdiction that is most certain to lead to a dismissal. Thus, while the plaintiff may "shop" for a forum whose law is beneficial to its case, the defendant is just as likely to "shop" for law favorable to it. Thus, there is really no innocent party in these situations. The fairest way to resolve this is to rely on the traditional notion that the plaintiff is the master of his lawsuit, and, as such, is entitled to choose the forum. Also, in the vast majority of cases, an entity that has sufficiently connected itself to Michigan so that a Michigan court has jurisdiction over it will not be unfairly burdened by the application of Michigan’s laws. 

Thus, I concur with the majority that Michigan’s statute of limitations should apply in this case. However, I cannot agree with the choice of law methodology employed by the majority. I would adopt a lex fori approach.

Leary v. Gledhill
8 N.J. 260 (1951)

VANDERBILT, CJ
The plaintiff and the defendant were friends who had become acquainted while in the military service. They first met in 1943 and occasionally thereafter through 1945. They corresponded but did not meet again until Christmas, 1948, when the defendant visited the plaintiff in Germany where he was stationed. At that time the defendant was no longer in the military service but was in Europe attempting to sell tractors for the Franam Corporation. Prior to the defendant’s trip to Europe he had corresponded with the plaintiff with reference to an investment in the Franam Corporation as one which would be very profitable. Their correspondence resulted in the plaintiff purchasing $1,000 worth of stock when the defendant went to see him in Germany, the defendant delivering to the plaintiff certificates of stock which he had brought with him to Europe in exchange for the plaintiff’s check for $1,000.

In April, 1949, the plaintiff at the defendant’s invitation visited him in Paris. The defendant had left the United States with $500 in his possession and after arriving in Europe had been in constant need of money to meet his expenses. In a conversation in a hotel in Paris the defendant told the plaintiff that he needed about $4,000 and that he could raise about $2,000 by selling his Cadillac car. In the plaintiff’s presence the defendant made a telephone call to his wife in the United States and instructed her to sell the automobile. The defendant asked the plaintiff to help him, but did not mention anything about selling the plaintiff any shares of stock. The plaintiff said he would think it over for a few days and see what he could do. After returning to his base in Germany the plaintiff mailed the defendant a check payable to the defendant’s order for $1,500 without indicating on the check or in the accompanying letter what the money was for. The defendant endorsed
the check and converted it into traveler’s checks. The parties did not see each other again until the day of the trial, although the plaintiff had made many attempts to see the defendant after they both had returned to the United States, seeking him at his home and calling him on the telephone at various times, but always without success.

The plaintiff instituted this suit against the defendant on two counts, the first for $1,000 and the second for $1,500, but at the outset of the trial the plaintiff moved for a voluntary dismissal of the first count and the pretrial order was amended accordingly. The issue as stated in the amended pretrial order was limited to whether the money given by the plaintiff to the defendant was a loan or an investment in a business venture. At the trial the plaintiff testified that the check for $1,500 was a personal loan to the defendant but this the defendant denied, contending that he had never borrowed any money from the plaintiff. At the end of the plaintiff’s case and again at the end of the entire case the defendant moved for an involuntary dismissal on the ground that the plaintiff’s proofs were insufficient, there being no promise to repay, no demand for repayment, and no pleading or proof of the law of France where the transaction occurred. These motions were denied, the trial court holding that while it would not take judicial notice of the law of France it would proceed, first, on the presumption that the law involving loans is the same there as in other civilized countries, and, secondly, on the ground that the issue with respect to the law of France had not been set forth in the pretrial order. When the case was submitted to the jury, the defendant objected to the charge on the ground that it did not instruct the jury to find as a fact what the law of France was. The jury returned a verdict in favor of the plaintiff in the sum of $1,500, and from the judgment entered thereon the defendant took this appeal. It is significant that the defendant never proved or even attempted to prove either the delivery of any stock to the plaintiff or a tender thereof. Neither did the defendant attempt to prove or even suggest that the law of France was such as to preclude recovery in the circumstances.

The defendant argues five points on this appeal, none of which has merit:

... 3. “The rules of law for a foreign country must be pleaded and proved as facts along with the other elements of a cause of action to enable a plaintiff to recover against the defendant.” A court will in general take judicial notice of and apply the law of its own jurisdiction without pleading or proof thereof, the judges being deemed to know the law or at least where it is to be found, 9 Wigmore on Evidence (3rd ed., 1940), 551. Under the common law of England as adopted in this country, however, the law of other countries, including sister states, would not be so noticed and applied by a court, but it was deemed an issue of fact to be pleaded and proved as other material facts had to be.... This common law rule had two great disadvantages; it made every jury pass on questions of law quite beyond its competence and the decision of the jury as to the foreign law was unappealable at common law as were its findings on all questions of fact.

The courts, however, were reluctant to dismiss an action for a failure to plead and prove the applicable foreign law as they would have dismissed it for a failure
to prove other material facts necessary to establish a cause of action or a defense. Accordingly the courts frequently indulged in one or another of several presumptions: that the common law prevails in the foreign jurisdiction; that the law of the foreign jurisdiction is the same as the law of the forum, be it common law or statute; or that certain fundamental principles of the law exist in all civilized countries. As a fourth alternative, instead of indulging in any presumption as to the law of the foreign jurisdiction, the courts would merely apply the law of the forum as the only law before the court, on the assumption that by failing to prove the foreign law the parties acquiesce in having their controversy determined by reference to the law of the forum, be it statutory or common law. By the application of these various presumptions the courts have in effect treated the common law rule that foreign law could not be noticed but must be pleaded and proved as if it were a matter of fact merely as a permissive rule whereby either party could, if it were to his advantage, plead and prove the foreign law. Thus the failure to plead and prove the foreign law has not generally been considered as fatal....

In New Jersey, in the absence of proof as to the applicable foreign law, the courts have frequently applied the presumption that the common law exists in the foreign jurisdiction....

While our attention has not been directed to any New Jersey cases on the point, this presumption as to the existence of the common law in a foreign jurisdiction is equally applicable in cases involving other common law countries such as England in the absence of proof to the contrary....

In the instant case the transaction occurred in France. Our courts may properly take judicial knowledge that France is not a common law, but rather a civil jurisdiction. It would, therefore, be inappropriate and indeed contrary to elementary knowledge to presume that the principles of the common law prevail there. This does not mean, however, that the plaintiff must fail in his cause of action because of the absence of any proof at the trial as to the applicable law of France. In these circumstances any one of the other three presumptions may be indulged in, i.e., that the law of France is the same as the law of the forum; that the law of France, like all civilized countries, recognizes certain fundamental principles, as, e.g., that the taking of a loan creates an obligation upon the borrower to make repayment; that the parties by failing to prove the law of France have acquiesced in having their dispute determined by the law of the forum.

The court below based its decision upon the presumption that the law of France in common with that of other civilized countries recognizes a liability to make repayment under the facts here present, and its decision is not without substantial merit in reason and support in the authorities.... The utilization of this presumption has decided limitations, however, for in many cases it would be difficult to determine whether or not the question presented was of such a fundamental nature as reasonably to warrant the assumption that it would be similarly treated by the laws of all civilized countries. The presumption that in the absence of proof the parties acquiesce in the application of the law of the forum, be it statutory law or common law, does not present any such difficulties for it may be universally
applied regardless of the nature of the controversy. This view, moreover, is favored by the authorities. ... We are of the opinion, therefore, that in the instant case the rights of the parties are to be determined by the law of New Jersey which unquestionably permits recovery on the facts proven.

We recognize, of course, that in certain cases there might be present factors which would make it unreasonable for the court to indulge in any presumption and where the court in the exercise of its sound discretion might require proof of applicable foreign law to be laid before the court, but such is certainly not the situation here. The defendant is in no way prejudiced by the application of the law of this State. If he had desired to raise an issue as to the foreign law, he might have done so in his answer or at the pretrial conference or, with permission of the court, at the trial itself, and himself have introduced proof as to the law of France. It is against the letter and the spirit of our practice to permit him to make the failure of the plaintiff to plead and prove foreign law the basis of a surprise motion addressed to the court either in the course of or at the conclusion of the case....

The judgment below is affirmed.

2. Multilateralism

A different way for judicial systems to deal with conflicts of law is the so-called multilateral approach. Multilateral approaches articulate rules to conceptually locate an incident or transaction within a particular jurisdiction. These rules typically identify a determinative contact for the controversy—whether an individual’s domicile or the place where an event occurred or where certain property is located—to identify the state whose law should govern all conflicts within a particular substantive field. One purpose of such a system is to ensure predictable and uniform results irrespective of where the litigation takes place. Forum shopping thus would be discouraged, provided the alternative fora have adopted the same jurisdiction-selection rules.

As you read the materials that follow to develop a deeper understanding of multilateral approaches, focus on two questions in particular: (1) What is the theoretical justification for a court to ignore forum law? (2) Are fixed rules of choice appropriate for conflicts questions?

Ernst Rabel, The Purposes of Conflicts Law

1 The Conflict of Laws: A Comparative Study 94–95 (2d ed. 1958)

[It has been customary to regard the attainment of uniform solutions as the chief purpose of private international law. Cases should be decided under the same substantive rules, irrespective of the court where they are pleaded. We may gratefully note that this postulate has continued in favor, if only as an ideal remote from reality, at a time when separate conflicts laws have grown up in the various countries and their diversities have been prized. The real value of this postulate under present conditions is that it forms a test for the relative convenience of conflicts rules. The time has come to approach the goal with more energy.]
One of the considerations leading to a universally useful rule is the legitimate expectation of the parties. Not to disappoint fair assumptions by persons disposing of property or entering into engagements, was the justified motive of the twisted doctrines protecting vested rights. For example, formalities are subject to the law of the place where a transaction has been concluded; the acquisition of property is governed by the law of the situs as of the time of the acquisition; capacity to contract a business obligation partly is, or should be, determined by the law governing the validity of the contract, et cetera. "When a matter has been settled, in conformity with the law then and there controlling the actions of the parties, the settlement should not be disturbed because the point arises for litigation somewhere else." This fundamental premise suggests that courts should search, in the absence of express intentions with respect to the applicable law, for the "tacit" and eventually the "presumed" intentions of the parties.

Moreover, as a European writer has recently postulated, when a fact or an act is governed by a certain law according to all the conflicts laws practically involved, this law should be applied by any court before which the case may come as a result of subsequent circumstances.

In a more general way, Savigny regarded it a guarantee of uniform treatment of legal relations that the law of that place where the relation has its legal "seat" should be applied everywhere—a conception that through Wharton has been admitted in the Supreme Court of the United States. Gierke substituted for "seat" "center of gravity"; Bar sought localization "according to the nature of things"; and Westlake recommended the law of the state with which the relation has closest connection. All these formulas tend toward the same goal, the importance of which still is in no wise impaired. But the obstacles barring the way to the goal have increased since the world order envisaged by Savigny has been dissolved into more than a hundred national legal systems.

Comments and Questions

1. Is the multilateralist approach appropriate only if a country’s peer jurisdictions have also adopted it? (Put another way, is a multilateralist approach appropriate only in the context of multilateral agreement?) Or is it appropriate for a jurisdiction to adopt such an approach even if no other jurisdiction reciprocates?

Raleigh C. Minor, The Basis of Private International Law
Conflict of Laws § 4 at 5–10 (1901)

Effect is given to a foreign law, not through any convention or agreement of nations, but merely because justice and policy often demand that, in the enforcement and

interpretation of contracts and other transactions possessing a foreign element, the court should be governed by some other than the domestic law.

When one voluntarily does an act in a particular country, it is, as a general rule, just and proper that the effect of the act should be measured by the law under which it is done. The party need not do the act there unless he chooses, and if he elects to do it there, the just measure of its operation is the law to which he has thus voluntarily submitted himself. In other words, the situs or locality of the act in question furnishes the law which will govern it. And the same general principle, as we shall hereafter see, applies to transactions and circumstances which are not the result of voluntary action. The law of the situs of the particular matter will control.

It is often said that a court, in enforcing a foreign law, acts ex comitatu, and if care is observed to note the meaning of the term "comity," the expression is not erroneous. The basis of private international law may be said to be comity, but it is as much a comity shown to the litigants in referring to the law of the situs, as above explained, as a comity to the State whose law is thus enforced. In truth, it is something more even than comity to the litigants. It is in answer to the demands of justice and an enlightened policy.

It is to be observed that the rules of private international law do not derive force from a power superior to the sovereign States which recognize and enforce them. On the contrary, the very essence of a sovereign State is that it has no superior. It is one of the fundamental principles of this branch of the law that each sovereign State is supreme within its own limits. It is therefore within the power of such a State at any time to exclude any or all foreign laws from operation within its borders. To the extent that it cannot do this, it is not sovereign. Hence, when effect is given to a foreign law in any territory, it is only because the municipal law of that State temporarily abdicates its supreme authority in favor of the foreign law, which, for the time being, with reference to that particular matter, becomes itself, by the will of that State, its municipal law....

It is of the utmost importance to observe at the outset that every point that may come up before a court for its decision must have a situs somewhere, and each point that arises will in general be governed by the law of the State where that situs is ascertained to be. Whether the interest before the court be one arising from the voluntary action of the individual, or whether it be created, without voluntary action, merely by the law itself, is immaterial. It must have its situs, assigned by the individual or by the law.... A Tort, a contract, a conveyance of property, the devise or descent of land or personality, marriage, all have their situs, whose law will generally govern with respect to them....

(Evey sovereign State has absolute control over the persons and property within its borders, and may regulate them as its own notions of propriety and policy dictate. The question in all such cases is, shall it exercise the right to control these matters by its own law, or shall it yield to the law of another State? If it chooses the latter course, it does so not because the foreign legislation or institutions have an extraterritorial force within its limits, but simply because policy and justice demand it.
It may be said that the legislature of the State in which the question arises has foreseen and provided for the contingency, and has expressly laid down the rule that shall govern its courts should a foreign element creep into a particular case. In such event the legislature may enact that the foreign law is to control, or that, notwithstanding the foreign element, the domestic law shall still govern. This is a matter of policy wholly in the discretion of the legislature, into which the courts cannot inquire. In the latter case, there would be no room for the operation of the rules of private international law. It is merely a question of the court's obedience to the mandates of the State's municipal law.

But it rarely happens that the legislature, in enacting a statute, expressly deals with cases involving a foreign element. Primarily the legislature enacts laws for its own citizens, touching property and transactions within the State, and does not usually notice expressly those cases in which the person, the property, or the transaction affected may be without the State, in whole or in part. Under these circumstances therefore the duty devolves upon the courts to determine whether the municipal law, by its silence, means to include or to exclude these cases. Here it is that the rules of private international law come into play, and guide the courts in the solution of problems that often intricate.

There may be said to be five instances wherein it is generally considered that the municipal law of the State where the question is raised (lex fori) forbids the enforcement of a foreign law. (1) Where the enforcement of the foreign law would contravene some established and important policy of the State of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property.

These exceptions are of supreme importance in the study of this subject, and must be constantly borne in mind, for they constitute standing exceptions to almost every proposition that can be laid down. Yet they are often lost sight of by the courts, or are confounded with the principles themselves. The unnoticed existence and enforcement of them in many of the cases is one main cause of the confusion that envelops the subject. . . .

Joseph Story, Commentaries on the Conflict of Laws (1834)

§ 4. [I]n the present times, without some general rules of right and obligation, recognised by civilized nations to govern their intercourse with each other, the most serious mischief and most injurious conflicts would arise. Commerce is now so absolutely universal among all countries; the inhabitants of all have such a free intercourse with each other; contracts, marriages, nuptial settlements, wills and successions, are so common among persons, whose domicils are in different countries, having different and even opposite laws on the same subjects; that without some common principles adopted by all nations in this regard there would be an
utter confusion of all rights and remedies; and intolerable grievances would grow up to weaken all the domestic relations, as well as to destroy the sanctity of contracts and the security of property.

§ 5. A few simple cases will sufficiently illustrate the importance of some international principles in matters of mere private right and duty. Suppose a contract, valid by the laws of the country, where it is made, is sought to be enforced in another country, where such a contract is positively prohibited by its laws; or vice versa, suppose a contract, invalid by the laws of the country, where it is made, but valid by that of the country, where it is sought to be enforced; it is plain, that unless some uniform rules are adopted to govern such cases, (which are not uncommon), the grossest inequalities will arise in the administration of justice between the subjects of the different countries in regard to such contracts....

§ 6. Questions of this sort must be of frequent occurrence; not only in different countries wholly independent of each other; but also in provinces of the same empire, governed by different laws, as was the case in France before the Revolution; and also in countries acknowledging a common sovereign, but yet organized as distinct communities....Innumerable suits must be litigated in the judicial forums of these countries and provinces, in which the decision must depend upon the point, whether the nature of a contract should be determined by the law of the place, where it is litigated; or by the law of the domicil of one or both of the parties; or by the law of the place, where the contract was made; whether the capacity to make a testament should be regulated by the law of the testator's domicil, or that of the location of his property; whether the form of his testament should be prescribed the law of his domicil, or of that of the location of his property, or of that of the place, where the testament is made; and in like manner, whether the law of the domicil, or what other law should govern in cases of succession of intestate estates.

§ 7. It is plain, that the laws of one country can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only while they remain there. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them, giving them effect, as the phrase is, sub mutuæ vicissitudinis obtentu, with a wise and liberal regard to common convenience and mutual necessities....

Joseph H. Beale, Vested Rights Doctrine

Instead of the... theory of comity, the common law has worked out indigenously a theory of vested rights, which serves the same purpose, that is, the desire to reach a just result, and is not subject to the objections which can be urged against the doctrine of comity.
As early as the time of Story the courts were already saying that an act or obligation valid by the laws of the place where made was valid everywhere; and that a foreign judgment by a court of competent jurisdiction was conclusive of the right it decided. The fullest statement of this new doctrine was by Sir William Scott in Dalrymple v. Dalrymple: "The cause being entertained in an English court it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin." Story accepted and developed this theory, which from his time has been the accepted theory in the English and American courts.

This doctrine may be stated and explained as follows. Although the law to be applied to the solution of the Conflict of Laws is the territorial law, this does not mean the law by which such right as those brought in question would be created within the territory.... The will which imposes a national law within territorial limits does not necessarily decree the application of that law to all the cases there arising, when great inconvenience would result from so doing. The national law which is applied to the solution of conflicts is that portion of the national law which deals with the solution of conflicts. If by the national law the validity of a contract depends upon the law of the place where the contract was made, then that law is applied for determining the validity of a contract made abroad, not because the foreign law has any force in the nation, nor because of any constraint exercised by an international principle, but because the national law determines the question of the validity of a contract by the lex loci contractus. If it were really a case of conflicting laws, and the foreign law prevailed in the case in question, the decision would be handed over bodily to the foreign law. By the national doctrine, the national law provides for a decision according to certain provisions of the foreign law; in the case considered, according to the foreign contract law. The provisions of this law having been proved as a fact, the question is solved by the national law, the foreign factor in the solution—i.e., the foreign contract law—being present as mere fact, one of the facts upon which the decision is to be based.

To explain the territorial theory in other terms, all that has happened outside the territory, including the foreign laws which have in some way or other become involved in the problem, is regarded merely as fact to be considered by the national law in arriving at its decision, and to be given such weight in determining the decision as the national law may choose to give it. The author summarized this theory in 1902 as follows:

The topic called "Conflict of Laws" deals with the recognition and enforcement of foreign created rights. In the legal sense, all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A Right is a political, not a social thing; no legal right can be created by the mere will of parties. Law being a general rule to govern future transaction, its method of creating rights is to provide that upon the happening of a certain event a right shall accrue.
The law annexes to the event a certain consequence, namely, the creation of a legal right. The creation of a right is therefore conditioned upon the happening of an event. Events which the law acts upon may be of two sorts; acts of human beings and so-called "acts of God," that is, events in which no human being has a share. Rights generally follow acts of men; though sometimes a right is created as a result solely of an act of God (as lapse of time: accretion). When a right has been created by law, this right itself becomes a fact; and its existence may be a factor in an event which the same or some other law makes the condition of a new right. In other words, a right may be changed by the law that created it, or by any other law having power over it. If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.

Comments and Questions

1. According to the vested rights theory, the state in which the events assertedly giving rise to a tort or contract obligation occurred, and only that state, had the power to create such an obligation and define its scope and content. If that state did so, the obligation became a "vested right" which every other state was bound to enforce. Because the elements of the underlying transaction might be dispersed among two or more states, a single crucial act or event had to be designated whose location would identify the source of the governing law. In contract cases, this is typically the "place of contracting" and in tort cases, the place of injury or the place of the conduct that caused the injury.

2. One frequent criticism is that absolute rules decide concrete cases on generalities that cannot account for the unique considerations that might be presented in a particular application. Might certain applications of an absolute rule be unjust or unwise? Or are those the circumstances that especially require the certainty and predictability of a mechanical and dispassionate formula that ensures decisional harmony?

3. One method of avoiding mischief would be to draft a truly comprehensive set of rules. However, it would be surprising if any corpus of rules could anticipate all of the possible scenarios, and for this reason choice of law is often thought to be among those fields that does not lend itself to codification. Do you agree?

4. Another method of avoiding mischief would be to incorporate an "escape hatch" or "safety valve" into the schemata of rules. For example, what if the rules permitted a judge to decline to apply a designated law that was against the public policy of the forum state?

3. Unilateralism

Although multilateralists attempt to allocate transactions to a particular legal system, unilateralists approach choice-of-law problems in a rather different manner. Instead of focusing on a rigid framework of rules, unilateral approaches favor a process of more discretionary decision making that can be tailored to the needs
of each particular case. Unilateral approaches encourage judges to look beyond the locus or forum or domicile, and allow a broader range of contacts to inform the choice-of-law inquiry and to improve the quality of that determination. Thus, rather than locate a given legal transaction in one legal system or another, unilateralists inquire into the spatial purport of the potentially applicable domestic and foreign rules of decision, such as statutory provisions or case law rules on consideration. The foundation of this approach is that: “[j]ustice, fairness and, the best practical result, may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.” Babcock v. Jackson, 12 N.Y.2d at 481, 191 N.E.2d 279.

This section allows you to explore again one of the fundamental themes of this course: the proper balance between the certainty and predictability and simplicity of rules, on one hand, and the flexible and discretionary standards of fairness and justice, on the other.

Ernst Rabel, The Purposes of Conflicts Law

I The Conflict of Laws: A Comparative Study 95–98 (2d ed. 1958)

In view of the difficulties of reaching uniformity, a more modest aspiration has been...to attain "as much certainty as may be reasonably hoped for in a changing world" and is compatible with "needed flexibility."78 A just result or the realization of prescribed policies is now often viewed as the main purpose of conflicts law. This is right without doubt, if certain fundamental distinctions be borne in mind.

(a) The usual confusion of private and conflicts laws has engendered the conception that both have to follow the same pattern of values and purposes. If this were true, all the differences that permeate the national laws with respect to the organization of the family, the categories of property rights, freedom of contract, privileges and duties, public interests, and so on, would be reflected, nay reproduced, in the conflicts rules of the diverse countries. The writers have formulated their axioms according to their particular views. Kahn,81 for instance, who considered relationships created by internal law to be the subject matter of conflicts rules, required conformity with the fundamental idea of the internal institution.

If, in the doctrine of the internal law, parental power is regarded as a mere right, the father's personal law should govern; if the father's duty is accentuated, the law of the child. Under Pillet's leadership, French writers transformed their doctrine of sovereignty so as to require the determination of what law ought to govern capacity to contract, succession on death, etc., in conformity with the "social purpose" of the state regulations pertaining to personality, family, security of commerce,

78 Walter Wheeler Cook, the Logical and Legal Bases of the Conflict of Laws 432 (1942).
81 Franz Kahn, 1–2 Abhandlungen zum internationalen Privatrecht (1928).
etc.; the applicable law is that which most efficiently protects the purpose fostered by the forum's own domestic legislation.

This identification of motives, sometimes extremely consequential, aggravates the difficult task of the conflicts law beyond all limits. To care for social prosperity is the responsibility of the municipal private laws, which have to resolve the merits of each particular problem. The principle, jus suum cuique tribuere, instructs legislators and judges to ponder carefully private and public interests. But this is what each private law does for itself; the function of private international rules is to choose the applicable law with all its evaluations whatever they may be. Existing conflicts law presumes that all laws of civilized countries are of equal rank, not to speak of sister states in a federation. Assuredly, the origin of this idea was political, and its modern theoretical foundation came from its connection with the law of nations. But, as things are, to inject national policies directly into conflicts law, will destroy it. In such event, "international public order" would embrace all internal laws.

(b) When preconceptions are eliminated, policy in the field of conflicts law is of course the main object of concern. Conflicts rules have never been entirely uninfluenced by the underlying social situation. This is pioneer ground. How the interest of the state, of other states, of the parties, of third persons in good faith, of commerce or trade in general, are to be valued against each other in various situations and best reconciled with the postulate of certainty, needs renewed and detailed deliberation. For the time being, it would be entirely premature to try to enumerate or to analyze such considerations in a general way.

(c) The postulate that conflicts rules should have juts results may be understood—or perhaps misunderstood—as signifying that the outcome of lawsuits in every case should conform, not to the lex fori, but to the judge's sense of justice.

We well know that courts will try many direct or devious ways to satisfy this sense of justice. They will use the faculty to reject a foreign rule on the ground of a public policy of the forum. They will classify an unwelcome foreign rule as inapplicable foreign procedure. They will, with a desired end in view, affirm or deny a person's domicil. And we may trust the courts always to select, of two accessible ways, that which leads to the result to them appearing preferable. These expedients of judicial wisdom cannot be closed entirely, and should not be, while conflicts rules remain crude and vague. It is good to know that inscrutable judgments occasionally alleviate the conflicts chaos.

Yet, subservience to subjective and local values would be dangerous and unsound as a general policy. Cavers seems to envisage disintegration of conflicts rules as the consequence of his postulate of just results and, by way of palliation, recommends re-enforcement of the doctrine of stare decisis and recourse to standards.85 Such programs, not sufficiently detailed, are disturbing.

The central problem of conflict of laws may be defined... as that of determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield. The problem would not exist if this were one world, with an all-powerful central government. It would not exist (though other problems of "conflict of laws" would) if the independent sovereignties in the real world had identical laws. So long, however, as we have a diversity of laws, we shall have conflicts of interest among states. Hence, unless something is done, the administration of private law where more than one state is concerned will be affected with disuniformity and uncertainty. To avoid this result by all reasonable means is certainly a laudable objective; but how? Not by establishing a single government; even if such a thing were remotely thinkable as a practical possibility, we attribute positive values to the principle of self-determination for localities and groups. The attainment of uniformity of laws among diverse states is, to put it mildly, a long-range undertaking. Federations could be established wherein the central government, while not disturbing the autonomy of the states in their internal policies, would determine which of several interests must yield in case of conflict. Treaties might be useful in the accomplishment of the same purpose, but this approach to solution has certain inherent difficulties. For various reasons, the political measures which would seem to be the only possible means of avoiding or adequately solving such problems have not done the job.

We do not, however, despair. We turn, instead, to the resources of jurisprudence, placing our faith primarily in the judges rather than the lawmakers. The judicial function is not narrowly confined; we indulge the hope that it may even be equal to the ambitious task of bringing uniformity and certainty into a world whose conflicts political action has failed to resolve. At first, of course, the judges will not be so bold (or so frank) as to avow that they are assuming the high political function of passing upon the relative merits of the conflicting policies, or interests, of sovereign states. They will address themselves to metaphysical question concerning the nature of law and its abstract operation in space—matters remote from mundane policies and conflicts of interest—and will evolve a set of rules for determining which state's law must, in the nature of things, control. If all states can be persuaded to adhere to these rules, the seemingly impossible will have been accomplished: there will be uniformity and certainty in the administration of private law from state to state. The fact that this goal will be achieved at the price of sacrificing state interests is not emphasized; rather, it is obscured by the metaphysical apparatus of the method.

The rules so evolved have not worked and cannot be made to work. In our times, we have suffered particularly from the jurisprudential theory which has been compounded in order to explain and justify the assumption by the courts of so extraordinary a function. The territorialist conception has been directly responsible for indefensible results and, what is perhaps worse, has therefore driven some
of our ablest scholars to consume their energies in purely defensive action against it. But the root of the trouble goes deeper. In attempting to use the rules we encounter difficulties which do not stem from the fact that the particular rules are bad, nor from the fact that a particular theoretical explanation is unsound, but rather from the fact that we have such rules at all.

First, such rules create problems which did not exist before....

Second, the false problems created by the rules may be solved in a quite irrational way—e.g., by defeating the interest of one state without advancing the interest of another. In at least some instances, this result could be avoided by contriving a different rule; but the substitute rule may be objectionable on other grounds....

Third, despite the camouflage of discourse, the rules do operate to nullify state interests. The fact that this is often done capriciously, without reference to the merits of the respective policies and even without recognition of their existence, is only incidental. Trouble enough comes from the mere fact that interests are defeated. The courts simply will not remain always oblivious to the true operation of a system which, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state, especially when that state is the forum. Consequently, the system becomes complicated. It is loaded with escape devices: the concept of “local public policy” as a basis for not applying the “applicable” law; the concept of “fraud on the law”; the device of novel or disingenuous characterization; the device of manipulating the connecting fact; and, not least, the provision of sets of rules which are interchangeable at will. The tensions which are induced by imposing such a system on a setting of conflict introduce a very serious element of uncertainty and unpredictability even if there is fairly general agreement on the rules themselves. A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive. At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity; we are handicapped in even presenting the issue in its true light; and instances of mechanical application of the rules to produce indefensible results are by no means rare. Whichever of these phenomena is the more common, it is a poor defense of the system to say that the unacceptable results which will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert.

Fourth, where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to “weigh” the competing interests, or value their relative merits, and choose between them accordingly. This is especially evident when we consider two coordinate states, with such decisions being made by the courts of one or the other. A court need never hold the interest of the foreign state inferior; it can simply apply its own law as such. But when the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state inferior and preferring the policy or interest of the foreign state. Nor are we much better off if we vest this
extraordinary power in a superior judicial establishment, such as our federal courts in the exercise of their diversity jurisdiction, or the Supreme Court in the exercise of its power to review state court decisions. True, such a superimposed tribunal escapes the embarrassment of having to nullify the interests of its own sovereign; but the difficulty remains that the task is not one be performed by a court. I know that courts make law, and that in the process they "weigh conflicting interests" and draw upon all sorts of "norms" to inform and justify their action. I do not know where to draw the line between the judicial legislation which is "molecular," or permissible, and that which is "molar," or impermissible. But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources. Not even a very ponderous Brandeis brief could marshall the relevant considerations in choosing, for example, between the interest of the state of employment and that of the state of injury in matters concerning workmen's compensation. This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body. We, of course, have such a competent legislative body in Congress; but it has not seen fit to exercise its powers under the full-faith-and-credit clause in such a way as to contribute to the resolution of true conflicts of interest.

We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific area in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws. This would imply a basic method along the following lines:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

The suggested analysis does not imply the ruthless pursuit of self-interest by the states.... [T]here is no need to exclude the possibility of rational altruism: for example, when a state has determined upon the policy of placing upon local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of where the harm occurs and who the victim is. [Moreover,] there is room for restraint and enlightenment in the determination of what state policy is and where state interests lie....

I have been told that I give insufficient recognition to governmental policies other than those which are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on. If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles which the present system interposes to any intelligent approach to the problem. Let us first clear away the apparatus which creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills which arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.

Comments and Questions

1. Professor Currie’s approach has been very influential. But do you agree with him that the basic problem in conflicts of law is reconciling or resolving the conflicting interests of different jurisdictions?

2. Is Currie’s approach unduly biased toward forum law?

3. (How) Does Currie’s approach incorporate multistate values into his model? What are some multistate values?

4. Harmonization of Substantive Law

A fourth way of dealing with the problem focuses on commonalities rather than on differences. The substantive law approach asks whether there is an interstate or international rule on point. This was the way in which Justice Joseph Story, the great conflicts scholar, dealt with an interstate negotiable instruments problem in Swift v. Tyson. Justice Story’s opinion in Swift eliminated the possible conflict between the asserted New York requirement of consideration and whatever rule may have prevailed in Maine, where the bill of exchange at bar was dated, by invoking a federal common-law rule derived from a supranational law merchant.
As far as sales contracts are concerned, Justice Story's approach has, in a way, become positive law: Article 2 of the Uniform Commercial Code largely eliminates conflicts within the United States. And internationally, the 1980 Vienna Convention on Contracts for the International Sale of Goods, which the United States and most developed countries have ratified, lays down substantive rules governing the sale of merchandise across national boundaries. Thus, both within the United States and worldwide there now exists, once again, a uniform commercial law of sales.

Of course, American sales law is not entirely uniform because the versions of Article 2 enacted by different states vary and the courts of each state may construe even identical provisions differently. As far as international sales are concerned, the modern lex mercatoria had to take the form of an international compact to become the supreme law of the land. This is not what Justice Story had in mind when, in Swift v. Tyson, he talked about "the law...of the commercial world," which is to say a set of rules that is not the law of any particular state and does not owe its existence to treaties among nations. Rules of international commercial law do not necessarily require the exercise of sovereign prerogatives. The law merchant to which the great judge and conflicts scholar referred, the roots of which reach back to the Roman ius gentium, emerged from commercial custom during the Middle Ages, when it helped Europe to escape from the Dark Ages that followed the fall of the Roman Empire.

This revival of Western culture preceded the existence of territorial states and their claim to a monopoly in law making. Once the world was divided into nation states, legal positivists, such as Justice Holmes, denied that such a set of rules on the practice of private parties could still exist. But, while the U.S. Supreme Court has adopted Holmes' view, see Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a respectable array of current scholarly opinion maintains that modern realities, in particular the prevalence of arbitration as the means of resolving commercial disputes, have spawned a new law merchant. Accordingly, the substantive law approach to multistate and multinational problems presents, even now, a possible alternative to the traditional multilateral and unilateral methodologies.

C. National Practice

1. United States

Stephen C. McCaffrey, Conflict of Laws in the United States

This brief treatment of choice-of-law in the United States will be divided into three parts: The first will describe the traditional approaches to choice-of-law as well as the endemic problems that have led to their substantial abandonment; the second will survey some of the leading modern choice-of-law approaches; and the third will discuss statutory choice-of-law rules.
Traditional Choice of Law Doctrine

Historical Background

...Professor Joseph H. Beale... was the Reporter for the American Law Institute's first Restatement of the Law of Conflict of Laws, which appeared in 1934, and published his own three-volume treatise on the subject a year later. While Beale's theories did not go unquestioned among conflicts scholars, together they formed a body of rules which were generally accepted by American courts.

The "Vested Rights" Doctrine of Joseph Beale and the First Restatement of Conflicts

This theory reconciled giving extraterritorial effect to foreign causes of action with the then-popular notion that all laws are territorial by reasoning that the court, rather than applying the foreign law, merely enforced a "foreign-created right."...

The hallmark of the Bealean vested rights approach to choice of law was its mechanistic simplicity. The first Restatement of Conflicts laid down hard-and-fast rules; it did not offer loose guidelines or flexible principles. Ambiguity was an anathema, and therein lay the doctrine's greatest theoretical advantages: its proponents maintained that it produced uniformity of results, and thus discouraged "forum shopping"; and that it produced results that were certain and predictable, ensuring what has been referred to as "conflicts justice". But, as Professor Currie has observed, uniformity of result will occur only if all courts use the system in precisely the same way. Thus, courts in two different states would decide a case in the same way under the traditional method only

if both states (a) characterize the problem in the same way, as [e.g.] one involving the validity of a contract, and (b) apply the rule that the law of the place of making governs (rather than some alternative rule), and (c) locate the connecting factor (the place of making) in the same way, and (d) not invoke any second-line defenses, such as local public policy. This is a long list of 'ifs'.... The ideal of uniformity of result is, therefore, to some extent illusory.

The very rigidity of the first Restatement's vested rights doctrine proved to be its ultimate undoing. Courts concerned with reaching a just result in the individual case on a principled basis began to resort to various techniques which would allow them to avoid undesirable outcomes that would have been produced by straightforward applications of the Restatement's rules. These "escape devices" included the use of characterization of the issue at hand—both in terms of whether it was substantive or procedural in nature, and as to the nature of the cause of action (such as, tort or contract); the use of renvoi to reach a pre-ordained result; and the invocation of forum public policy as a bar to the application of an "offensive" foreign law. This section will consider the operation of these escape devices in greater detail after surveying the first Restatement's choice-of-law rules in tort and contract cases as representative examples of its general approach.
(a) Torts

Section 378 of the first Restatement sets forth the generally applicable law in tort cases, the lex loci delicti: "The law of the place of wrong determines whether a person has sustained a legal injury." Section 377 defines the "place of wrong" to be "the state where the last event necessary to make an actor liable for an alleged tort takes place." Thus, the place of wrong, and therefore the jurisdiction whose law would be applied, would be, e.g. the place where the bullet enters the victim's body, not the place from which it is shot; the place where poison "takes effect within the body", i.e., produces illness, not the place from which it is sent to the victim, where it is ingested, or where the victim dies; the place where noxious fumes cause property damage, not the place from which the emanate; the place where loss is sustained as the result of fraudulent misrepresentations, not the place where those representations are made; and the place where a defamatory statement is communicated, not the place from which it is broadcast.

(b) Contracts

The Law made applicable in contract cases by the first Restatement depends upon the issue involved: matters concerning the validity of a promise (including the capacity of the parties to enter into a contract) and its effect are governed by the law of the place of contracting;\(^{39}\) matters concerning performance of the contract are governed by the law of the place of performance.\(^{40}\) In general, the "place of contracting" was the place where the last act occurred that was necessary under the "general law of contracts" to make the contract binding, assuming hypothetically that the local law of the place where such act occurred rendered the contract binding. . . . The Restatement also specifies in great detail where the place of contracting would be when the acceptance of an offer is authorized to be communicated in various different ways, such as by mail (where the acceptance is mailed); by telegraph (where the acceptance is received by the telegraph company for transmission); and by telephone (where the acceptance is spoken). It even provides for the unlikely situation where "a contract is made by word of mouth between two persons standing on opposite sides of a state boundary line," in which case "the place of contracting is where the acceptor speaks at the time he makes his acceptance".

The "place of performance" is defined by Section 355 as "the State where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed". The law of the place governs the details of performance, including the manner, time and locality, and sufficiency of performance, as well as the persons by whom or to whom performance is to be made and excuses for non-performance.

It is obvious that the first Restatement's entire system of rules concerning the law applicable in contract cases assumes that contract issues are neatly divisible into two groups: those concerning the underlying obligation and those concerning

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39 Ibid., Section 332.
40 Ibid., Section 358.
performance. Yet the Restatement itself admits, in an uncharacteristic display of candid realism, that “there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance”. But while logic is useless, the Restatement asserts that “a practical line is drawn in every case by the particular circumstances thereof”. Such a “practical line” is reached, according to the Restatement, when, e.g., application of the law of the place of contracting would determine issues concerning the details of performance. Yet, it is recognized that even this line is not one “which can be fixed by any rule of law of universal application to all cases. Like all questions of degree,” the Restatement concluded, “the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment”.

Thus, while the Restatement’s rules themselves are typified by dogmatic rigidity, a court applying those rules may still have some latitude. This would be true in situations like the present one, where the issue involved does not fit clearly within one of the Restatement’s categories. The need for the “exercise of judgment” in such cases obviously leaves the door open to result-conscious application of the Restatement’s rules, which in turn frustrates its primary objectives of certainty, predictability, and uniformity of result. Characterization of an issue as relating either to the contractual obligation or to performance of the contract is one form of “escape device” courts could use to avoid results they perceive as undesirable. This and other escape devices are the subject of the next section.

Circumvention of Rigid Rules through “Escape Devices”

As stated above, the devices used by courts to escape the confining choice-of-law rules of the traditional approach are of three types: characterization; renvoi; and public policy. This section will briefly illustrate the use of these techniques in order to indicate the need perceived by many courts for more flexible approaches to selecting the applicable law.

(a) Characterization

This type of escape device may be subdivided into two categories: characterization of the issue as substantive or procedural; and characterization of the nature of the cause of action.

(1) Substance versus procedure—The first Restatement provides in Section 585 that “[a]ll matters of procedure are governed by the law of the forum.”54 And the determination of whether a given question is one of substance or procedure is made by the forum court according to its own conflicts rules (Section 584). The Restatement does, however, contain a number of specific directives concerning

54 The rationale for this rule is given in the Introductory Note to Chapter 12 of the Restatement. The purpose of the rule is to allow courts to conduct proceedings in accordance with procedures with which they are familiar. The Restatement counsels, however, that the “procedural” label is to be used restrictively in order to allow application of the appropriate foreign law to the greatest extent possible, toward the end of the uniformity of result.
issues to which the law of the forum is to apply (Sections, 585 et. seq.). But it is impossible to provide for every situation, and, to the extent that the Restatement’s provisions have not been specifically adopted by statutory or case law, the courts are not bound to follow them in any event. As a result, procedural labels were sometimes attached to issues that seemed clearly substantive. In Kilberg v. Northeast Airlines, Inc., 55 for example, the New York Court of Appeals (the highest court in the state of New York) refused to apply a Massachusetts limitation on wrongful death recoveries on the ground, inter alia, that the measure of damages was a remedial, or “procedural” issue, and was thus governed by the law of the forum. Thus, while there are good reasons for applying the lex fori to matters of procedure, the need to decide which issues are “procedural” and which are “substantive” gave courts an opportunity to manipulate the first Restatement’s rules with a view toward reaching a pre-ordained result.

(2) Nature of the action—Use of the vested rights approach necessitates identification of the type of action before the court—such as, tort or contract. While in many cases the cause of action will admit only one characterization, it will often be possible for plaintiff and defendant to take different views as to the nature of the action. This can be used to the litigant’s advantage by selecting that category which will lead to the law most favorable to their respective positions. Thus, in Haumschild v. Continental Cas. Co., 56 a woman sued her husband in Wisconsin, the state of their domicile, to recover for injuries she had sustained in a California automobile accident. Under California law, a woman could not sue her husband in tort; under Wisconsin law, she could. The trial court treated the suit as a tort action and applied California law as the lex loci delicti. The Supreme Court of Wisconsin reversed, finding that “incapacity to sue because of marital status presents a question of family law rather than tort law,” and that therefore the law of the spouses’ domicile should apply.

(b) Renvoi

The term “renvoi” applies to the situation encountered when the choice-of-law rule of the State of the applicable law refers back to the law of the forum State (remission) or on to the law of a third State (transmission). Thus, for example, in a case involving the validity of a testamentary disposition of movables, the forum’s choice-of-law rule might refer to the law of the decedent’s domicile at death; but the choice-of-law rule of the state of the decedent’s domicile might refer back to the lex fori as the law of the state of the decedent’s nationality. If the latter reference is taken as being to the “whole law” of the forum (including its choice-of-law rules), the court is presented with the problem of how to escape the potentially endless oscillation between the conflicts rules of the forum and the state of the decedent’s domicile. Three solutions are possible:

(1) Rejection of the renvoi: Here, the court takes the initial reference of the forum’s choice-of-law rule as being to the internal law of the foreign state, not to

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55 9 N.Y.2d 34, 172 N.E.2d 526 (1961). Kilberg was an action to recover for the wrongful death of a New York resident who had been killed when the plane in which he was traveling crashed at Nantucket, Massachusetts, in the course of a flight from New York to Nantucket.

56 7 Wis.2d 130, 95 N.W.2d 814 (1959).
its whole law. In the above hypothetical case, this would result in forum's applying the domiciliary state's local substantive law rules concerning validity of wills, and never looking to its choice-of-law rule.

(2) Partial acceptance of the renvoi: Here, the court takes the reference of the forum's conflicts rule as being to the whole law of the foreign State, but treats the foreign choice-of-law rules as referring back to the internal law of the forum State.

(3) Total acceptance of the renvoi: Here, the court endeavors to place itself in the position of the foreign court and decide the case as it would. Thus, in the above hypothetical case, if a court in the domiciliary State would refer to the whole law of the nationality State, the forum would do likewise, but would then treat the forum/nationality State's conflicts rule as referring to the local law of the domiciliary State. It will be noted that this result is the same as would have been reached had the renvoi been rejected altogether.

Renvoi affords courts manifest opportunities to circumvent hard-and-fast choice-of-law rules: In the absence of controlling statutory or decisional law, a court may simply decide which state's law it wishes to apply, and get off the renvoi merry-go-round in that jurisdiction. The first Restatement, however, rejected the renvoi, providing that where the forum's choice-of-law refers to the law of a foreign state, that reference should be taken as being to the internal law of such State (Section 7). But the Restatement did create exceptions for cases involving title to land and validity of a divorce, as to which it provided that the applicable law would be that of the situs, and of the domicile of the parties, respectively, including the conflict rules of those states. The reason usually given for this exception is that uniformity of result, irrespective of where the suit is brought, is particularly important in these kinds of cases. Yet, the exception does leave the door open to judicial result selection.

(c) Public Policy

The first conflicts Restatement provides in Section 612 that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum". In the comments to that section, the Restatement emphasizes that its "application...is extremely limited". Still, the claim that otherwise applicable foreign law violates forum public policy is just one more weapon in the arsenal of courts wishing to avoid applying the law mandated by the traditional rules. Thus, in the Kilberg case adverted to above, one of the grounds used by the New York court for refusing to give effect to the wrongful death damages limitation of the place of the injury (Massachusetts) was that such limitations on recovery are offensive to New York's public policy of providing full compensation to the estates of its residents.

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64 Restatement, supra n. 9, Section 612, Comment c.
66 See also Rosenthal v. Warren 475 F.2d 438 (2d. Cir. 1973) (applying New York law); and Mertz v. Mertz, 271 N.Y. 466 (1936) (New York public policy of interspousal immunity prevents suit by wife against husband for a tort occurring where such suits were allowed). Cf. Miller v. Miller, 42 N.Y. 2d 12 (1968)
"Modern" Choice-of-Law Approaches

The vested rights doctrine had come under heavy attack even before publication of the first conflicts Restatement in 1934. Disquieted by the rigidity of the traditional approach, a number of scholars began in the 1920's to advocate the use of choice-of-law methodologies which took social and economic policies into account and which would permit a court to consider the justness of the result that a particular choice-of-law would produce....

In 1953, the American Law Institute began work on the Restatement of the Law Second, Conflict of Laws (hereinafter referred to as the Second Restatement), which was not to be published in final form until 1971. The Reporter for the Second Restatement was Professor Willis L.M. Reese of Columbia University. The project, which "started as a modest update and expansion of Professor Beale's Restatement—one which would provide...somewhat more flexible jurisdiction-selecting rules—was gradually compromised by a grudging and finally more whole-hearted acceptance of Policy analysis."...

Courts and commentators differ sharply on the question of whether the "cure" (the modern approaches) is worse than the "malady" (the traditional approach). Not only do most of the modern approaches sacrifice certainty and predictability on the altar of policy analysis; their complexity and sheer number is enough to bewilder even the most dedicated judge. This latter phenomenon alone has prompted one scholar to caution that judges cannot be expected to invest in a choice-of-law question the time it would take to stay current on, and properly apply, the modern theories.74

This section on "modern" choice-of-law theories will focus principally on the approach of the Second Restatement but will also offer a brief description of the approaches of four prominent writers to illustrate current American thought in the choice-of-law field.

The "Most Significant Relationship" Doctrine of the Second Restatement

As mentioned above, the Second Restatement of Conflicts, which entirely superseded the first, took a wholly different approach to choice-of-law from that of its predecessor. The nub of the difference between the two approaches is illustrated as follows in the "Introduction" to the Second Restatement:

The earlier Restatement treated choice-of-law in torts and contracts by articulating a closed set of rules derived from vested rights analysis. The governing law in torts was determined by the place in which the injury occurred; that in contracts by the place in which the contract became binding or, when performance was in issue, where the contract was to be performed. Restatement Second supplants these rules by the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State, which, as to that issue, has the most significant relationship to the occurrence and the parties. The factors

relevant to that appraisal, absent a binding statutory mandate, are enumerated
generally (Section 6) to include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of the other interested states and the relative interests
   of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied

The Institute recognized that “the jettisoning of...rigid rules in favor of stan-
dards of greater flexibility...reduces certitude”, and “leaves the answer to specific
problems very much at large.” Therefore, after laying down “general principles” for
each field of law, the Second Restatement provides a “secondary statement...set-
ting forth the choice-of-law the courts will usually make in given situations.”

The balance of this section will be devoted to surveying the Second Restatement’s
approach to identifying the applicable law in tort and contract cases, as was done
with the first Restatement, and to taking a brief look at the manner in which the
Second Restatement deals with the three kinds of “escape devices” used in con-
junction with the traditional approach.

(a) Torts

...Section 145 sets forth the “general principle” applicable “to all torts and to all
issues in tort. ...”

(1) 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.

(2) Contacts to be taken into account in applying the principles of Section 6 to
determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of
   business of the parties, and
(d) the place where the relationship, if any, between the parties is
   centered.”

These contacts are to be evaluated according to their relative importance with
respect to the particular issue. ...

The comments to Section 146 provide some guidance for the evaluation process,
suggesting that the extent to which another State has a more significant relationship
to the occurrence and the parties than the injury State will depend largely upon

78 Ibid., p. VIII.
whether the "other State has a greater interest in the determination of the particular issue than the state where the injury occurred... The likelihood that some State other than that where the injury occurred is the State of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties." 83...

(b) Contracts

...It will be recalled that the original Restatement divided contract issues into those concerning validity and those concerning performance, for choice-of-law purposes. It provided that issues of validity are governed by the law of the place where the last act occurred that was necessarily to give the contract binding effect (Section 332), and that issues of performance are governed by the law of the place where the last act occurred that was necessarily to give the contract binding effect (Section 332), and that issues of performance are governed by the law of the place of performance (Section 358). The Second Restatement’s approach differs from that of its predecessor in four principal respects. 93 First, while the original Restatement did not acknowledge that the parties had the power to choose the law governing their contract, the Second Restatement does (Section 187); second, issues of validity are no longer governed by the law of the place of contracting, but, following the Second Restatement’s general formula, by the law of the State which, with respect to the particular issue, has the most significant relationship to the transaction and the parties (Section 188); third, the Second Restatement does not draw the sharp distinction between issues of validity and performance that characterized the first Restatement’s approach; and finally, while the original Restatement distinguished between different kinds of contracts only with respect to locating the place of contracting, the Second Restatement provides special choice-of-law for nine different kinds of contracts.

Section 186 of the Second Restatement states the basic principal that “[i]ssues 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.” Section 187 sets forth in some detail the circumstances under which party choice of law will be respected. The first paragraph directs the court to apply the law chosen by the parties “if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue”. As examples of issues the parties could not have resolved by such a provision the Restatement gives questions involving capacity, formalities and substantial validity. 84 Paragraph 2 of Section 187 provides that the law chosen by the parties will be applied even if the issue involved is not one that the parties could have resolved by a provision in their agreement, unless:

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83 Restatement 2d, Section 146, Comment C, referring implicitly to factors (b) and (c) of Section 6.
85 Restatement 2d, Introductory Note to Chapter 8, Contracts, p. 558.
94 Ibid., Section 187, Comment d. “A person cannot vest himself with contractual capacity by stating in the contract that he has such capacity. He cannot dispense with formal requirements such as that of a writing, by agreeing with the other party that the contract shall be binding without them. Nor can he by a similar device, avoid issues of substantial validity, such as whether the contract is illegal.”
(a) the chosen State has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen State would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen State in the determination of the particular issue and which, under the rule of Section 188, would be the State of the applicable law in the absence of an effective choice-of-law by the parties."

The rule of Section 187 applies even where there is no express provision in the contract concerning the applicable law, so long as the court can determine from the contract's provisions that the parties had the law of a particular State in mind. "So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular State may provide persuasive evidence that the parties wished to have this law applied."

The rationale given by the Second Restatement for allowing the chosen law to govern even issues that the parties could not have determined by an explicit agreement is essentially that this furthers the prime objective of contract law, protecting the parties' justified expectations and enabling them to predict accurately what their rights and liabilities will be under the contract. The qualifications to party autonomy given in subparagraph (a) of Section 187 simply require that the State whose law is selected have some substantial relationship to the parties or the contract. If so, the parties will be considered to have had a reasonable basis for their choice. Such a relationship could be supplied, for example by the fact that the chosen State was the place of performance or the domicile of one of the parties. But the Second Restatement recognizes that the parties may have a reasonable basis for choosing a given State's law even where neither they nor the contract may have any contacts with the State whose law is chosen. This would be the case, for example, where the parties were unfamiliar with each other's legal systems but were familiar with that of a third State, and where the latter was particularly well developed in the field of the contract's subject matter.

The qualification to party autonomy given in subparagraph (b) of Section 187 allows the court to refuse to respect the parties' choice on the ground that the law chosen would contravene "a fundamental policy", not necessarily of the forum, but of a State which has a greater interest than the chosen State and whose law would be applicable in the absence of an effective party choice. The Restatement points out that mere difference in the two laws will not justify a court in refusing to apply the chosen law; rather, the court is to decline to honor the parties' choice only:

(1) to protect a fundamental policy of the State which, under rule of Section 188, would be the State of the otherwise applicable law, provided
(2) that this State has a materially greater interest than the State of the chosen law in the determination of the particular issue.

The forum is to apply its own law in determining whether the policy is a "fundamental" one. As illustrations of policies which are likely to be considered "fundamental" the Restatement cites those embodied in statutes making certain
contracts illegal, or those designed to protect parties with relatively weak bargaining positions. Those not likely to be found fundamental, on the other hand, are policies relating to formalities (such as the statute of frauds) or those represented by rules "tending to become obsolete", such as those relating to the capacity of married women. The "fundamental policy" as used in Section 187 and "public policy": "To be fundamental within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action...."

The Second Restatement's final "general principle" concerning contracts covers cases in which there is no effective choice-of-law by the parties. Section 188 provides that, in the absence of effective party choice, the applicable law will be that of the State with the most significant relationship to the transaction and the parties. The State of the most significant relationship is to be determined by evaluating the following factual contracts in light of the choice-of-law principles stated in Section 6: the place of contracting; the place of negotiation; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties. The third paragraph of Section 188 provides that where "the place of negotiating the contract and the place of performance are in the same State, the local law of this State will usually be applied, except as otherwise provided in Sections 189-199 [concerning particular kinds of contracts and the issues of capacity and formalities] and 203 [concerning usury]."

The Second Restatement's rules concerning "Particular Contracts" create what amounts to a presumptively applicable law, but then allow that law to be displaced if there is another State with a more significant relationship to the transaction and the parties. The types of contracts covered and the law made presumptively applicable are as follows: transfer of interest in land (situs); contractual duties arising from the transfer of interests in land (situs); sale of interests in chattels (State where seller is to deliver chattel); life insurance contracts (domicil of insured at time policy was applied for); fire, surety or casualty insurance contracts (principal location of insured risk); suretyship (law governing principal obligation); repayment of loans (place of repayment); rendition of services (place where services, or major portion thereof, to be rendered); and transportation (place of departure or dispatch)....

(c) The Second Restatement's Treatment of "Escape Devices"
Inasmuch as many of the Restatement's rules eventually came to be circumvented through the use of the "escape devices" of characterization, renvoi and forum policy, the question of whether the Second Restatement has made any efforts to seal off these escape routes merits brief attention. It will be recalled that the first Restatement provided that "all matters of procedure are governed by the law of the forum" (Section 585), thus giving courts an open invitation to characterize those issues as procedural to which they wished forum law to apply. The Second Restatement devotes an entire chapter to "Procedure" (Chapter 6), dividing the subject into three topic: "The General Principle" (Topic 1, (Section 122)), "Specific Applications of General Principle" (Topic 2, Sections 123-143) and "Conversion of
Foreign Currency" (Topic 3, Section 144). It eschews the broad "substance-procedure dichotomy" in favor of a narrower and more specific definition of the types of issues to which the law of the forum should apply. As to those issues, the forum is that State of the most significant relationship "merely because it is the State where the litigation is conducted...."104 Uncharacteristically, the Second Restatement finds that as to most of the issues treated in the Chapter on Procedure, "it is possible to state categorically that the local law of the forum will be applied."105

The "General Principle" concerning procedure is stated in Section 122, which provides as follows:

Section 122. Issues Relating to Judicial Administration

A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local rules of another State to resolve other issues in the case.

As examples of issues relating to judicial administration the Second Restatement gives "the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs".106 The Second Restatement recognizes that some issues clearly relate to judicial administration, others clearly relate to the rights and liabilities of the parties, and still others "fall into a gray area [in] between...."107 As mentioned, it undertakes to provide "categorical rules" calling for those issues falling clearly into the former area to be governed by the law of the forum.108 Other issues susceptible of being categorized as "procedural" are generally subjected to the law of the forum, unless they would affect the outcome of the case (Sections 128, 133, 134) or unless another State has dominant interest in the issue (Section 132).

The other type of characterization, that concerning the nature of the action, is dealt with in Section 7 of the Second Restatement, which provides in paragraph three that "classification and interpretation of local law concepts and terms are determined in accordance with the law that governs the issue involved". Thus, forum case law would not be determinative of the nature of the action in a given case unless the forum were the State of the applicable law under its conflicts rules. The problem with this approach, of course, is that characterization of the issue may well be a precondition to determining what law applies.

Section 8 of the Second Restatement deals with renvoi. It provides that, with two exceptions, the forum applies the local law (excluding choice-of-law rules) of

104 Restatement 2d, introductory note to Chapter 6.
105 Ibid.
106 Ibid., Section 122, Comment A.
107 Ibid.
108 See Section 123 (Proper Court), 124 (Form of Action), 126 (Service of Process) 127 (Pleading and Conduct of Proceedings), 129 (Trial by Court or Jury), 130 (Methods of Securing Obedience to Orders of the Court), 131 (Manner of Enforcing Judgement), 136 (Notice and Proof of Foreign Law), 137 (Competency of Witnesses), 138 (Admissibility of Evidence), and 142 (Statute of Limitations, exclusive of "borrowing statutes").
the State whose law it is directed to apply by its own choice-of-law rule. Thus, the Restatement basically rejects the renvoi. The two exceptions to this general rule are contained in subsections 2 and 3 of Section 8 which provide as follows:

(2) When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another State, the forum will apply the choice-of-law rules of the other State, subject to considerations of practicability and feasibility.

(3) When the State of forum has no substantial relationship to the particular issue or the parties and the courts of all interested States would concur in selecting the local law rule applicable to this issue, the forum will usually apply this rule.

As examples of cases in which the first exception would apply the Second Restatement gives questions relating to the validity and effect of transfers of interests in land (because the situs State clearly has the dominant interest) and those relating to succession to interests in movables (because “there is an urgent need that all States should apply a single law [here, that of the decedent’s domicile at death] in resolving [this] question”). But where these reasons for applying the foreign State’s conflicts rules would not be served because the rules are difficult of ascertainment or imprecise, the forum is to apply its own choice-of-law rules. Contract and tort choice-of-law rules are cited as being imprecise; those directing application of the law of the situs of land, of a chattel, or of a person’s domicile as being sufficiently precise.

The second exception is subject to the qualification that it only applies when “it is clear that the courts of all interested States would have applied the same local law…” When this is not clear, the exception does not apply and the forum applies its own conflicts rules.

The final type of escape device, public policy, is dealt with in the chapter of the Second Restatement on “Judicial Jurisdiction”. Section 90 provides that “[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum”. The comments to Section 90 emphasize that it “has a narrow scope of application”, since it does not apply to situations where the court refuses to give effect to a foreign law on public policy grounds but proceeds to decide the controversy, applying its own local law. Thus, one of the most common uses of public policy as an escape device is not covered. Where Section 90 does apply, the comments caution that “[a]ctions should rarely be dismissed because of the rule of this Section”. For example, the mere fact that the foreign rule is different from that of the forum will not justify dismissal on public policy grounds. Rather, the test is whether applying the foreign rule “would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonwealth.”

Professor Brainerd Currie’s “Governmental Interest Analysis”

Professor Currie rejected choice-of-law “rules” in favor of evaluation of the interests of the States involved in the case at hand. He essentially called upon the court
to identify the policies underlying the conflicting laws, and to determine whether each of the States involved has an interest in giving effect to its respective policy. If only one State has such an interest, that State's law should be applied, but if the forum and another State both have interests (and the conflict cannot be avoided through reconsideration as explained below) the forum should apply its own law. It is important to note that whereas the Second Restatement calls for the court to weigh the relative interests of the States involved in the determination of the particular issue, Professor Currie views this as not being a proper judicial function. It is for this reason that his approach calls for the forum to apply its law automatically in the event that both it and another State are interested, rather than to attempt to determine which State has a greater interest.

Professor Currie prepared the following summary of his approach for inclusion in one of the leading American conflicts casebooks:

1. When a court is asked to apply the law of a foreign State different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective States to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

2. If the court finds that one State has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested State.

3. If the court finds an apparent conflict between the interests of the two States it should reconsider. A more moderate and restrained interpretation of the policy or interest of one State or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two States is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other States, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other States. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between States will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own State, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interests shall be required to yield.

Thus, under the Currie approach, there are potentially three different types of "conflicts" between the laws in question: The second step of his methodology
involves the situation where there is a "false conflict" because one of the rules, when given its intended scope of application, would simply not apply since the policy it embodies would not be furthered by such application. The third step deals with the situation where there is an "apparent conflict", in which case the forum is to attempt to avoid the conflict by endeavoring to interpret the policies or interests of the States involved in a "more moderate and restrained" manner in an effort to avoid the conflict. If this proves impossible, there is a "true conflict" (the fourth step) which can only be resolved by applying the law of the forum (assuming the forum is one of the interested States). It perhaps bears reemphasis that the court is to apply its own law in the event of a true conflict even where it views another State as having a greater interest in the resolution of the issue.

Choice-of-Law Statutes

There are no comprehensive choice-of-law codifications in the United States, either at the State or the Federal level. This is in marked contrast to the situation in Europe. There are, however, several "uniform acts" containing choice-of-law provisions, which have been adopted widely by the States. Of course, any Intra-United States conflicts would be eliminated (and these choice-of-law provisions would be unnecessary) to the extent that the adoption of these acts was indeed "uniform" among all American jurisdictions—a goal which has, as yet, proved elusive.

The Uniform Commercial Code (UCC) has enjoyed the most widespread acceptance of all the uniform laws, having been adopted in all but one of the States. Section 1-105(1) of the UCC allows party choice when the transaction involved "bears a reasonable relation" to the State whose law is chosen. Section 1-105(2) provides, however, that in situations governed by five other Sections of the UCC, the law made applicable by those Sections applies, "and a contrary agreement (party choice) is effective only to the extent permitted by the law (including the conflict of law rules) so specified...."

The Uniform Probate Code contains a provision which validates wills that comply with the requirements of the place of execution or of "the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national". And the Uniform Securities Act contains a detailed set of mechanical rules that specify the jurisdiction whose law governs a number of different issues.

Choice-of-law directives also may be found in the legislation of individual States governing such fields as worker's compensation and insurance. Another common variety of State conflicts legislation is the so-called "borrowing statute". These statutes are so named because they "borrow" the statute of limitations of the foreign State where the cause of action arose. Thus, for example, if P sued D in State X (where the statute of limitations had not run) for injuries negligently inflicted by D in State Y (where the statute of limitations had run), a State X borrowing statute would require the X court to apply the Y statute of limitations to bar the action.
The principal Federal choice-of-law statute of note is that contained in the Federal Tort Claims Act. This Act prescribes what has been described as “a completely inept and inappropriate choice-of-law rule…,” that “the law of the place where the act or omission occurred” determines whether the Federal government is liable in tort. In order to bring this provision into line with the then-prevailing rule that the law of the place of the injury governed tort cases, the United States Supreme Court interpreted the Act as referring to the whole law of the place of the act, including its conflicts rules.

**Comments and Questions**

1. A contemporary snapshot of the choice-of-law methodologies for each of the states is provided in the following table. Note that some states use different methodologies for torts (T) and contracts (C) cases, respectively.

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For more than two decades, Dean and Professor Symeon Symeonides of the Willamette University College of Law has published an annual survey of choice of law doctrine. See, e.g., Symeon Symeonides, Choice of Law in the American Courts in 2007: Twenty-First Annual Survey, 56 Am. J. Comp. L. 243 (2008). His survey includes the methodological table reprinted above.

2. Generally speaking, states use the same system of conflicts rules for both domestic and international conflicts. But because there is considerable flexibility in those conflicts rules, you might anticipate that judges might reach different conclusions as to the applicable law even on similar facts when the conflict is between the laws of California and Texas, in one case, and between California and Brazil, in another. Consider why an American judge might be more inclined to apply the
law of another state rather than that of another country. And consider why an American judge might be less inclined to apply the law of another state rather than that of another country.

3. Of course, contracting parties may be able to negotiate what body of law should govern the interpretation and enforcement of their agreement. Perhaps in exchange for a price concession or perhaps merely to confirm what then is manifest common sense, a provision in an agreement may provide: "This agreement shall be interpreted in accordance with, and governed by, the laws of California." (Would this include California's choice-of-law rules?) Recognizing party autonomy has many obvious benefits, including certainty and predictability for the parties at the time of contracting, and in the event of litigation, the conservation of judicial (and party) resources.

Reread § 187 of the Restatement (Second) of Conflict of Laws quoted above in the excerpt by Professor McCaffrey, and focus on the prerequisites for enforcing a choice-of-law clause. Until very recently, Section 1-105(1) of the Uniform Commercial Code similarly required that a choice of law clause have some "reasonable relationship" to the parties or their transaction. Why impose any prerequisites if the clause was the product of a full and fair bargain? Should a decision by contracting parties to choose some "neutral" state's law be enforced?

As we saw in the context of enforcing forum selection clauses, see Chapter 5, a dispute even among private parties may implicate others' interests. A choice of law clause may oblige the court to apply the substantive law of some foreign jurisdiction with which it is not familiar. More significantly, the substantive law that would apply but for the choice of law clause is displaced—ousting whatever values and public policy that law embodied. Yet choice of law clauses are presumptively valid. Why?

The doctrinal framework for enforcing choice of law clauses is analogous to the doctrinal framework for enforcing forum selection clauses. Is there any reason for courts to be more cautious or suspicious of one or the other?

Lauritzen v. Larsen
345 U.S. 571 (1953)

Mr. Justice Jackson delivered the opinion of the Court.
The key issue in this case is whether statutes of the United States should be applied to this claim of maritime tort. Larsen, a Danish seaman, while temporarily in New York joined the crew of the Randa, a ship of Danish flag and registry, owned by petitioner, a Danish citizen. Larsen signed ship's articles, written in Danish, providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. He was negligently injured aboard the Randa in the course of employment, while in Havana harbor.
Respondent brought suit under the Jones Act\(^1\) on the law side of the District Court for the Southern District of New York and demanded a jury. Petitioner contended that Danish law was applicable and that, under it, respondent had received all of the compensation to which he was entitled. He also contested the court's jurisdiction. Entertaining the cause, the court ruled that American rather than Danish law applied, and the jury rendered a verdict of $4,267.50. The Court of Appeals, Second Circuit, affirmed. Its decision, at least superficially, is in variance with its own earlier ones and conflicts with one by the New York Court of Appeals. We granted certiorari.

The shipowner, supported here by the Danish Government, asserts that the Danish law supplies the full measure of his obligation and that maritime usage and international law as accepted by the United States exclude the application of our incompatible statute.

That allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law is plain from a general comparison of the two systems of dealing with shipboard accidents. Both assure the ill or injured seafaring worker the conventional maintenance and cure at the shipowner's cost, regardless of fault or negligence on the part of anyone. But, while we limit this to the period within which maximum possible cure can be effected, the Danish law limits it to a fixed period of twelve weeks, and the monetary measurement is different. The two systems are in sharpest conflict as to treatment of claims for disability, partial or complete, which are permanent, or which outlast the liability for maintenance and cure, to which class this claim belongs. Such injuries Danish law relieves under a state-operated plan similar to our workmen's compensation systems. Claims for such disability are not made against the owner but against the state's Directorate of Insurance Against the Consequences of Accidents. They may be presented directly or through any Danish Consulate. They are allowed by administrative action, not by litigation, and depend not upon fault or negligence but only on the fact of injury and the extent of disability. Our own law, apart from indemnity for injury caused by the ship's unseaworthiness, makes no such compensation for such disability in the absence of fault or negligence. But, when such fault or negligence is established by litigation, it allows recovery for elements such as pain and suffering not compensated under Danish law and lets the damages be fixed by jury. In this case, since negligence was found, United States law permits a larger recovery than Danish law. If the same injury were sustained but negligence was absent or not provable, the Danish law would appear to provide compensation where ours would not.

Respondent does not deny that Danish law is applicable to his case. The contention as stated in his brief is rather that "A claimant may select whatever forum

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\(^1\) "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...." 46 U.S.C. § 688.
he desires and receive the benefits resulting from such choice" and "A ship owner is liable under the laws of the forum where he does business as well as in his own country." This contention that the Jones Act provides an optional cumulative remedy is not based on any explicit terms of the Act, which makes no provision for cases in which remedies have been obtained or are obtainable under foreign law. Rather he relies upon the literal catholicity of its terminology. If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.

The shipping laws of the United States, set forth in Title 46 of the United States Code, 46 U.S.C.A., comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies. While some have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application and are in general terms which leave their application to be judicially determined from context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. Thus, in United States v. Palmer, 3 Wheat. 610, this Court was called upon to interpret a statute of 1790, 1 Stat. 115, punishing certain acts when committed on the high seas by "any person or persons," terms which, as Mr. Chief Justice Marshall observed, are "broad enough to comprehend every human being." But the Court determined that the literal universality of the prohibition "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them," and therefore would not reach a person performing the proscribed acts aboard the ship of a foreign state on the high seas.

This doctrine of construction is in accord with the long-heeded admonition of Mr. Chief Justice Marshall that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains...." And it has long been accepted in maritime jurisprudence that "...if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect
to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.” Lord Russell of Killowen in The Queen v. Jameson (1896), 2 Q.B. 425, 430. This is not, as sometimes is implied, any impairment of our own sovereignty, or limitation of the power of Congress. “The law of the sea,” we have had occasion to observe, "is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States." Farrell v. United States, 336 U.S. 511, 517. On the contrary, we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether “any” or “every” reaches to the limits of the enacting authority’s usual scope or is to be applied to foreign events or transactions....

Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.

Respondent places great stress upon the assertion that petitioner’s commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea....

Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

In the case before us, two foreign nations can claim some connecting factor with this tort—Denmark, because, among other reasons, the ship and the seaman were Danish nationals; Cuba, because the tortious conduct occurred and caused injury in Cuban waters. The United States may also claim contacts because the seaman had been hired in and was returned to the United States, which also is the state of the forum. We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort
claim, particularly a maritime tort claim, and the weight and significance accorded them.

1. Place of the Wrongful Act.—The solution most commonly accepted as to torts in our municipal and in international law is to apply the law of the place where the acts giving rise to the liability occurred, the lex loci delicti commissi. This rule of locality, often applied to maritime torts, would indicate application of the law of Cuba, in whose domain the actionable wrong took place. The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. These range from ports, harbors, roadsteads, straits, rivers and canals which form part of the domain of various states, through bays and gulfs, and that band of the littoral sea known as territorial waters, over which control in a large, but not unlimited, degree is conceded to the adjacent state. It includes, of course, the high seas as to which the law was probably settled and old when Grotius wrote that it cannot be anyone’s property and cannot be monopolized by virtue of discovery, occupation, papal grant, prescription or custom.

We have sometimes uncompromisingly asserted territorial rights, as when we held that foreign ships voluntarily entering our waters become subject to our prohibition laws and other laws as well, except as we may in pursuance of our own policy forego or limit exertion of our power. This doctrine would seem to indicate Cuban law for this case. But the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag. This would appear to be consistent with the practice of Cuba, which applies a workmen’s compensation system in principle not unlike that of Denmark to all accidents occurring aboard ships of Cuban registry. The locality test, for what it is worth, affords no support for the application of American law in this case and probably refers us to Danish in preference to Cuban law, though this point we need not decide, for neither party urges Cuban law as controlling.

2. Law of the Flag.—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship’s papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it “is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.”... Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flagstate, but apply the law of the flag on the pragmatic basis that there must be some law
on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. . . . These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears.

3. Allegiance or Domicile of the Injured.—Until recent times there was little occasion for conflict between the law of the flag and the law of the state of which the seafarer was a subject, for the long-standing rule, as pronounced by this Court after exhaustive review of authority, was that the nationality of the vessel for jurisdictional purposes was attributed to all her crew. Surely during service under a foreign flag some duty of allegiance is due. But, also, each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support. In some later American cases, courts have been prompted to apply the Jones Act by the fact that the wrongful act or omission alleged caused injury to an American citizen or domiciliary. We need not, however, weigh the seaman's nationality against that of the ship, for here the two coincide without resort to fiction. Admittedly, respondent is neither citizen nor resident of the United States. While on direct examination he answered leading questions that he was living in New York when he joined the Randa, the articles which he signed recited, and on cross-examination he admitted, that his home was Silkeburg, Denmark. His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another.

4. Allegiance of the Defendant Shipowner.— . . . In recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them. But here again the utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner is a Dane by nationality and domicile.

5. Place of Contract.—Place of contract, which was New York, is the factor on which respondent chiefly relies to invoke American law. It is one which often has significance in choice of law in a contract action. But a Jones Act suit is for tort, in which respect it differs from one to enforce liability for maintenance and cure. As we have said of the latter, “In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner.” But this action does not seek to recover anything due under the contract or damages for its breach.
The place of contracting in this instance, as is usual to such contracts, was fortuitous. A seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them. The practical effect of making the lex loci contractus govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.

But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the contract with the Danish union were to control...

We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort.

6. Inaccessibility of Foreign Forum.—It is argued, and particularly stressed by an amicus brief, that justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum. This might be a persuasive argument for exercising a discretionary jurisdiction to adjudicate a controversy; but it is not persuasive as to the law by which it shall be judged. It is pointed out, however, that the statutes of at least one maritime country (Panama) allow suit under its law by injured seamen only in its own courts. The effect of such a provision is doubtful in view of our holding that such venue restrictions by one of the states of the Union will not preclude action in a sister state.

Confining ourselves to the case in hand, we do not find this seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed, prolonged, expensive and uncertain litigation. It is stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner.

7. The Law of the Forum.—It is urged that, since an American forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, it should apply its own law to the controversy between them. The “doing business” which is enough to warrant service of process may fall quite short of the considerations necessary to bring extraterritorial torts to judgment under our law. Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in foreign ports under American law is to be able to serve American process on the defendant. We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143; Home Ins. co. v. Dick, 281 U.S. 397. The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate
law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable.

It is pointed out that our statute on limitation of shipowner's liability which formerly applied in terms to "any vessel" was applied by our courts to foreign causes. Hence, it is argued by analogy that "any seaman" should be construed so to apply. But the situation is inverted. The limitation-of-liability statute was construed to thus apply only against those who had chosen to sue in our courts on foreign transactions. Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not. Furthermore, this application of the limitation on liability brought our practice into harmony with that of all other maritime nations, while the application of the Jones Act here advocated would bring us into conflict with the maritime world.

This review of the connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong shows an overwhelming preponderance in favor of Danish law. The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. Against these considerations is only the fact that the defendant was served here with process and that the plaintiff signed on in New York, where the defendant was engaged in our foreign commerce. The latter event is offset by provision of his contract that the law of Denmark should govern. We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact. But we can find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters.

In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by amicus briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us.

The judgment below is reversed and the cause remanded to District Court for proceedings consistent herewith.

Comments and Questions

1. What are the origins of the law of the flag rule? What is its relevance or virtue today?
2. Is the court applying interest analysis here?

3. Will foreign ships be less inclined to visit American shipping ports if the Jones Act applies in cases like this? What retaliatory acts does the Court contemplate?

4. In the next case that you read, the Court makes no mention of Lauritzen. Consider why not. (Is it overruling Lauritzen? Is Lauritzen irrelevant?)

E.E.O.C. v Arabian-American Oil Co
499 U.S. 244 (1991)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court:
These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. The United States Court of Appeals for the Fifth Circuit held that it does not, and we agree with that conclusion.

Petitioner Boureslan is a naturalized United States citizen who was born in Lebanon. The respondents are two Delaware corporations, Arabian American Oil Company (Aramco), and its subsidiary, Aramco Service Company (ASC). Aramco's principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas.

In 1979, Boureslan was hired by ASC as a cost engineer in Houston. A year later he was transferred, at his request, to work for Aramco in Saudi Arabia. Boureslan remained with Aramco in Saudi Arabia until he was discharged in 1984. After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission), he instituted this suit in the United States District Court for the Southern District of Texas against Aramco and ASC. He sought relief under both state law and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-2000e-17, on the ground that he was harassed and ultimately discharged by respondents on account of his race, religion, and national origin.

Respondents filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction over Boureslan's claim because the protections of Title VII do not extend to United States citizens employed abroad by American employers. The District Court agreed and dismissed Boureslan's Title VII claim; it also dismissed his state-law claims for lack of pendent jurisdiction and entered final judgment in favor of respondents. A panel for the Fifth Circuit affirmed. After vacating the panel's decision and rehearing the case en banc, the court affirmed the District Court's dismissal of Boureslan's complaint. Both Boureslan and the EEOC petitioned for certiorari. We granted both petitions for certiorari to resolve this important issue of statutory interpretation.

Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Cf. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949). Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction. It is our
task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.

It is a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Foley Bros., 336 U.S. at 285. This "canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained." Ibid. It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963).

In applying this rule of construction, we look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." Foley Bros, 336 U.S. at 285. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," we must presume it "is primarily concerned with domestic conditions." Foley Bros, 336 U.S. at 285.

Breuer and the EEOC contend that the language of Title VII evinces a clearly expressed intent on behalf of Congress to legislate extraterritorially. They rely principally on two provisions of the statute. First, petitioners argue that the statute's definitions of the jurisdictional terms "employer" and "commerce" are sufficiently broad to include United States firms that employ American citizens overseas. Second, they maintain that the statute's "alien exemption" clause, 42 U.S.C. § 2000e-1, necessarily implies that Congress intended to protect American citizens from employment discrimination abroad. Petitioners also contend that we should defer to the EEOC's consistently held position that Title VII applies abroad. We conclude that petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.

Title VII prohibits various discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. See §§ 2000e-2, 2000e-3. An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [ (LMRDA) ] [29 U.S.C. §§ 401 et seq.]," § 2000e(h). "Commerce," in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." § 2000e(g).
Petitioners argue that by its plain language, Title VII’s “broad jurisdictional language” reveals Congress’ intent to extend the statute’s protections to employment discrimination anywhere in the world by a United States employer who affects trade “between a State and any place outside thereof.” More precisely, they assert that since Title VII defines “States” to include States, the District of Columbia, and specified territories, the clause “between a State and any place outside thereof” must be referring to areas beyond the territorial limit of the United States.

Respondents offer several alternative explanations for the statute’s expansive language. They contend that the “or between a State and any place outside thereof” clause “provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce” but not to “regulate conduct exclusively within a foreign country.” They also argue that since the definitions of the terms “employer,” “commerce,” and “industry affecting commerce” make no mention of “commerce with foreign nations,” Congress cannot be said to have intended that the statute apply overseas. In support of this argument, respondents point to Title II of the Civil Rights Act of 1964, governing public accommodation, which specifically defines commerce as it applies to foreign nations. Finally, respondents argue that while language present in the first bill considered by the House of Representatives contained the terms “foreign commerce” and “foreign nations,” those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. They conclude that these deletions “[are] inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially.” Id., at 7.

We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application discussed above. Each is plausible, but no more persuasive than that. The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous, and does not speak directly to the question presented here. The intent of Congress as to the extraterritorial application of this statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas. See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12). . . .

Petitioners’ reliance on Title VII’s jurisdictional provisions also finds no support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of “commerce” that expressly refer to “foreign commerce” do not apply abroad. . . .

The EEOC places great weight on an assertedly similar “broad jurisdictional grant in the Lanham Act” that this Court held applied extraterritorially in Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952). In Steele, we addressed whether the Lanham Act, designed to prevent deceptive and misleading use of trademarks, applied to acts of a United States citizen consummated in Mexico. The Act defined commerce as “all commerce which may lawfully be regulated by Congress.” 15 U.S.C. § 1127. The stated intent of the statute was “to regulate commerce within
the control of Congress by making actionable the deceptive and misleading use of marks in such commerce." Ibid. While recognizing that "the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," the Court concluded that in light of the fact that the allegedly unlawful conduct had some effects within the United States, coupled with the Act's "broad jurisdictional grant" and its "sweeping reach into all commerce which may lawfully be regulated by Congress," the statute was properly interpreted as applying abroad. Steele, 344 U.S. at 285, 287.

The EEOC's attempt to analogize these cases to Steele is unpersuasive. The Lanham Act by its terms applies to "all commerce which may lawfully be regulated by Congress." The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Since the Act expressly stated that it applied to the extent of Congress' power over commerce, the Court in Steele concluded that Congress intended that the statute apply abroad. By contrast, Title VII's more limited, boilerplate "commerce" language does not support such an expansive construction of congressional intent. Moreover, unlike the language in the Lanham Act, Title VII's definition of "commerce" was derived expressly from the LMRDA, a statute that this Court had held, prior to the enactment of Title VII, did not apply abroad. McCulloch, 372 U.S. at 15.

Thus petitioners' argument based on the jurisdictional language of Title VII fails both as a matter of statutory language and of our previous case law. Many Acts of Congress are based on the authority of that body to regulate commerce among the several States, and the parts of these Acts setting forth the basis for legislative jurisdiction will obviously refer to such commerce in one way or another. If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.

Petitioners argue that Title VII's "alien-exemption provision," 42 U.S.C. § 2000e-1, "clearly manifests an intention" by Congress to protect United States citizens with respect to their employment outside of the United States. The alien exemption provision says that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Petitioners contend that from this language a negative inference should be drawn that Congress intended Title VII to cover United States citizens working abroad for United States employers. There is "[n]o other plausible explanation [that] the alien exemption exists," they argue, because "[i]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States." Since "[t]he statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States," petitioners conclude that "Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose all potential extraterritorial applications of the statute."
Respondents resist petitioners' interpretation of the alien-exemption provision and assert two alternative raisons d'être for that language. First, they contend that since aliens are included in the statute's definition of employee, and the definition of commerce includes possessions as well as "States," the purpose of the exemption is to provide that employers of aliens in the possessions of the United States are not covered by the statute. Thus, the "outside any State" clause means outside any State, but within the control of the United States. Respondents argue that "[i]t his reading of the alien exemption provision is consistent with and supported by the historical development of the provision." Second, respondents assert that by negative implication, the exemption "confirm[s] the coverage of aliens in the United States."

If petitioners are correct that the alien-exemption clause means that the statute applies to employers overseas, we see no way of distinguishing in its application between United States employers and foreign employers. Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk. The EEOC assures us that in its view the term "employer" means only "American employer," but there is no such distinction in this statute and no indication that the EEOC in the normal course of its administration had produced a reasoned basis for such a distinction. Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

This conclusion is fortified by the other elements in the statute suggesting a purely domestic focus. The statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States. See, e.g., 42 U.S.C. § 2000h-4 (stating that the Act should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the Act); § 2000e-5 (requiring the EEOC to accord substantial weight to findings of state or local authorities in proceedings under state or local law); § 2000e-7 (providing that nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII); §§ 2000e-5(c), (d), and (e) (provisions addressing deferral to state discrimination proceedings). While Title VII consistently speaks in terms of "States" and state proceedings, it fails even to mention foreign nations or foreign proceedings.

Similarly, Congress failed to provide any mechanisms for overseas enforcement of Title VII. For instance, the statute's venue provisions, § 2000e-5(f)(3), are ill-

* Title VII defines "employee" as: "an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision." 42 U.S.C. § 2000(f).
suited for extraterritorial application as they provide for venue only in a judicial
district in the State where certain matters related to the employer occurred or were
located. And the limited investigative authority provided for the EEOC, permit-
ting the Commission only to issue subpoenas for witnesses and documents from
"any place in the United States or any Territory or possession thereof," 29 U.S.C. §
161 incorporated by reference into 42 U.S.C. § 2000e-9, suggests that Congress did
not intend for the statute to apply abroad.

It is also reasonable to conclude that had Congress intended Title VII to apply
overseas, it would have addressed the subject of conflicts with foreign laws and
procedures. In amending the Age Discrimination in Employment Act of 1967
(ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq. to apply abroad, Congress
specifically addressed potential conflicts with foreign law by providing that it is
not unlawful for an employer to take any action prohibited by the ADEA "where
such practices involve an employee in a workplace in a foreign country, and com-
pliance with [the ADEA] would cause such employer . . . to violate the laws of the
country in which such workplace is located." § 623(f)(1). Title VII, by contrast, fails
to address conflicts with the laws of other nations . . . .

Our conclusion today is buttressed by the fact that "[w]hen it desires to do so,
Congress knows how to place the high seas within the jurisdictional reach of a
(1989). Congress' awareness of the need to make a clear statement that a statute
applies overseas is amply demonstrated by the numerous occasions on which it
has expressly legislated the extraterritorial application of a statute . . . . Indeed, after
several courts had held that the ADEA did not apply overseas, Congress amended
§ 11(f) to provide: "The term 'employee' includes any individual who is a citizen of
the United States employed by an employer in a workplace in a foreign country." 29
U.S.C. § 630(f). Congress also amended § 4(g)(1), which states: "If an employer
controls a corporation whose place of incorporation is in a foreign country, any
practice by such corporation prohibited under this section shall be presumed to
be such practice by such employer." § 623(h)(1). The expressed purpose of these
changes was to "mak[e] provisions of the Act apply to citizens of the United States
employed in foreign countries by U.S. corporations or their subsidiaries." S. Rep.
Congress, should it wish to do so, may similarly amend Title VII and in doing so
will be able to calibrate its provisions in a way that we cannot.

Petitioners have failed to present sufficient affirmative evidence that Congress
intended Title VII to apply abroad. Accordingly, the judgment of the Court of
Appeals is Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join,
dissenting.

Like any issue of statutory construction, the question whether Title VII
protects United States citizens from discrimination by United States employ-
ners abroad turns solely on congressional intent. As the majority recognizes, our
inquiry into congressional intent in this setting is informed by the traditional
"canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949). But contrary to what one would conclude from the majority's analysis, this canon is not a "clear statement" rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. Rather, as our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools "whereby unexpressed congressional intent may be ascertained." Ibid. When these tools are brought to bear on the issue in this case, the conclusion is inescapable that Congress did intend Title VII to protect United States citizens from discrimination by United States employers operating overseas. Consequently, I dissent.

I

Because it supplies the driving force of the majority's analysis, I start with "[t]he canon ... that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Ibid. The majority recasts this principle as "the need to make a clear statement that a statute applies overseas." (emphasis added). So conceived, the presumption against extraterritoriality allows the majority to derive meaning from various instances of statutory silence—from Congress' failure, for instance, "to mention foreign nations or foreign proceedings," "to provide any mechanisms for overseas enforcement," or to "address[s] the subject of conflicts with foreign laws and procedures." At other points, the majority relies on its reformulation of the presumption to avoid the "need [to] choose between ... competing interpretations" of affirmative statutory language that the majority concludes "does not speak directly to the question" of extraterritoriality. (emphasis added). In my view, the majority grossly distorts the effect of this rule of construction upon conventional techniques of statutory interpretation....

The presumption against extraterritoriality is not a "clear statement" rule. Clear-statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them. When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, and even compel courts to select less plausible candidates from within the range of permissible constructions. The Court's analysis in Foley Brothers was by no means so narrowly constrained. Indeed, the Court considered the entire range of conventional sources "whereby unexpressed congressional intent may be ascertained," including legislative history, statutory structure, and administrative interpretations. Subsequent applications of the presumption against extraterritoriality confirm that we have not imposed the drastic clear-statement burden upon Congress before giving effect to its intention that a particular enactment apply beyond the national boundaries....
II

...Confirmation that Congress did in fact expect Title VII's central prohibition to have an extraterritorial reach is supplied by the so-called "alien exemption" provision. The alien-exemption provision states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1 (emphasis added). Absent an intention that Title VII apply "outside any State," Congress would have had no reason to craft this extraterritorial exemption. And because only discrimination against aliens is exempted, employers remain accountable for discrimination against United States citizens abroad.

The inference arising from the alien-exemption provision is more than sufficient to rebut the presumption against extraterritoriality....

Notwithstanding the basic rule of construction requiring courts to give effect to all of the statutory language, the majority never advances an alternative explanation of the alien-exemption provision that is consistent with the majority's own conclusion that Congress intended Title VII to have a purely domestic focus. The closest that the majority comes to attempting to give meaning to the alien-exemption provision is to identify without endorsement "two alternative raisons d'être for that language" offered by respondents. Neither of these explanations is even minimally persuasive....

IV

In the hands of the majority, the presumption against extraterritoriality is transformed from a "valid approach whereby unexpressed congressional intent may be ascertained," Foley Bros., 336 U.S. at 285, into a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions. Because the language, history, and administrative interpretations of the statute all support application of Title VII to United States companies employing United States citizens abroad, I dissent.

Comments and Questions

1. Do you find the majority or the dissent more persuasive?

2. What does the Court know about the substantive content of Saudi law? What does the Court need to know about Saudi law?

3. In order to overcome the presumption against extraterritoriality, what exactly must the plain statement include?

Hartford Fire Ins. Co. v. California et al.
509 U.S. 764 (1993)

Justice Souter announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, III, and IV, and an opinion with respect to Part II(B) in which Justice White, Justice Blackmun and Justice Stevens joined.
The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, 15 U.S.C. § 1. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq., precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not immunized from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

I

The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true.

A

According to the complaints, the object of the conspiracies was to force certain primary insurers (insurers who sell insurance directly to consumers) to change the terms of their standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes.

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." In place of this traditional "occurrence" trigger of coverage, the defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered
“sudden and accidental” pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer would bear the legal costs of defending covered claims against the insured without regard to the policy’s stated limits of coverage; the defendants wanted legal defense costs to be counted against the stated limits (providing a “legal defense cost cap”).

[The Court then discussed the various allegations in the complaint.]

C

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated § 1 of the Sherman Act, 15 U.S.C. § 1. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action; or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. The Court of Appeals reversed. We granted certiorari in No. 91-1111 to address two narrow questions about the scope of McCarran-Ferguson Act antitrust immunity,8 and in No. 91-1128 to address the application of the Sherman Act to the foreign conduct at issue.9 We now affirm in part, reverse in part, and remand.

[The Court first discussed the liability of the domestic insurance companies.]

III

Finally, we take up the question presented by No. 91-1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct. The Fifth Claim for Relief in the California Complaint alleges a violation of §1 of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making “occurrence CGL coverage … unavailable in the State of California for many risks.” The Sixth Claim for Relief in the California Complaint alleges that the London reinsurers violated § 1 by a conspiracy to limit coverage of pollution risks in North America, thereby rendering “pollution liability coverage … almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California.” The Eighth Claim for Relief in the California Complaint alleges a further § 1 violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired

8 We limited our grant of certiorari in No. 91-1111 to these questions: “1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance,” and “2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a ‘boycott’ outside the exemption of the McCarran-Ferguson Act.”

9 The question presented in No. 91-1128 is: “Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court’s teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?”
to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California.

At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained"). Although the proposition was perhaps not always free from doubt, see American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. Restatement (Third) of Foreign Relations Law of the United States § 415 and Reporters' Note 3 (1987). Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect. See 938 F.2d at 933.

According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity. The Court of Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction." But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, outweighed the supposed conflict and required the exercise of jurisdiction in this litigation.

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23 Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S.C. § 6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. § 6a(1)(A). The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy, see H.R. Rep. No. 97-686, pp. 2–3, 9–10 (1982); P. Areeda & H. Hovenkamp, Antitrust Law § 236a, pp. 296–297 (Supp.1992), and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it. See id., § 236a, p. 297. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.

24 Justice Scalia contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.
When it enacted the FTAIA, 96 Stat. 1246, 15 U.S.C. § 6a, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H.R. Rep. No. 97-686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[’s] ability to employ notions of comity ... or otherwise to take account of the international character of the transaction"). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as Justice SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for Southern Dist. Of Ia., 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as amicus curiae, concurs. They assert that Parliament has established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law § 415, Comment j. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." Restatement (Third) Foreign Relations Law § 403, Comment e. Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See Restatement (Third) Foreign Relations Law § 403, Comment e, § 415, Comment j. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II, in which JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS have joined.

25 Justice Scalia says that we put the cart before the horse in citing this authority, for he argues it may be apposite only after a determination that jurisdiction over the foreign acts is reasonable. But whatever the order of cart and horse, conflict in this sense is the only substantial issue before the Court.
Petitioners in No. 91-1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act. It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as Lauritzen v. Larsen, 345 U.S. 571 (1953), make clear, that is sufficient to establish the District Court's jurisdiction over these claims.

The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction—want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.

There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction," This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see id., at 231. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "[t]o regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected. But the question in this litigation is whether, and to what extent, Congress has exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' "Applying that canon in Aramco, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, 42 U.S.C. §§ 2000e to 2000e-17 (1988 ed.), did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "any activity, business, or industry in commerce." " We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth
considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially.

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 2 Cranch. 64, 118 (Marshall, C.J.). This canon is "wholly independent" of the presumption against extraterritoriality. Aramco, 499 U.S. at 264. It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401–416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in Romero v. Intl. Terminal Operating Co., 358 U.S. 354 (1959), the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. See id. at 383. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." Id. at 382–83. "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." Id. at 383.

Romero referred to, and followed, the choice-of-law analysis set forth in Lauritzen v. Larsen, 345 U.S. 571 (1953). As previously mentioned, Lauritzen also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The Lauritzen Court recognized the basic problem: "If [the Jones Act were] read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment.'" The solution it adopted was to construe the statute "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon—of course—Chief Justice Marshall's statement in Schooner Charming Betsy quoted supra. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim."
Lauritzen, Romero and McCulloch were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be construed in light of international law in other areas as well. More specifically, the principle was expressed in U.S. v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945), the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned “we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the ‘Conflict of Laws.’” Id. at 443.

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of “international comity.” The “comity” they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict of Laws § 38 (1834) (distinguishing between the “comity of the courts” and the “comity of nations,” and defining the latter as “the true foundation and extent of the obligation of the laws of one nation within the territories of another”). Comity in this sense includes the choice-of-law principles that, “in the absence of contrary congressional direction,” are assumed to be incorporated into our substantive laws having extraterritorial reach. Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue.9

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (Lauritzen, Romero, and McCulloch) and in the decisions of other federal courts, especially Timberlane. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

9 Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the “comity of courts,” which has led them to characterize the question presented as one of “abstention,” that is, whether they should “exercise or decline jurisdiction.” Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3rd Cir. 1979); see also In re Insur. Antitrust Litig., 938 F.2d 919, 932 (9th Cir. 1991). As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.
Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," id., § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," id., § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," id., § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," id., § 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h). Rarely would these factors point more clearly against application of United States law.

The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," id., § 403(2)(g). Finally, § 2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b)—suggesting that "the importance of regulation to the [United States]," Restatement (Third) § 403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise ... jurisdiction," rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed .... It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong.

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10 Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "[t]he interests of Britain are at least diminished where the parties are subsidiaries of American corporations." 938 F.2d at 933. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.
It concludes that no "true conflict" counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a violation of another country's law. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.

In the sense in which the term "conflict" was used in Lauritzen, 345 U.S. at 582, 592, and is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here, like the defendant in Lauritzen, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary. See generally R. Weintraub, Commentary on Conflict of Laws 2-3 (1980); Restatement (First) of Conflict of Laws § 1, Comment c and Illustrations (1934).

Literal only support that the Court adduces for its position is § 403 of the Restatement (Third)—or more precisely Comment e to that provision, which states:

Subsection (3) [which says that a State should defer to another state if that State's interest is clearly greater] applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both....

The Court has completely misinterpreted this provision. Subsection (3) of § 403 (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of § 403 has been complied with—i.e., after it has been determined that the exercise of jurisdiction by both of the two States is not "unreasonable." That prior question is answered by applying the factors (inter alia) set forth in subsection (2) of § 403, that is, precisely the factors that I have discussed in text and that the Court rejects.

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91-1128.

Comments and Questions

1. Can you reconcile the Court's opinion with EEOC v. Arabian American Oil Co.? Put another way, under what circumstances should courts apply the strong presumption against extraterritoriality?

2. Which of the following seems to have greater influence on the Court's reasoning: the particular facts of this case or the concern for comity in this type of case?
Article 21: Public policy of the forum

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.


Chapter I: Scope

Article 1: Scope

1. This Regulation shall, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships...
(b) non-contractual obligations arising out of matrimonial property regimes...
(c) non-contractual obligations arising under bills of exchanges, cheques and promissory notes or other negotiable instruments...
(d) non-contractual obligations arising out of the law of companies...
(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
(f) non-contractual obligations arising out of nuclear damage;
(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Article 2: Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise...

Article 3: Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Chapter II: Torts/Delicts

Article 4: General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in
which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 5: Product liability

1. Without prejudice to Article 4(2), the applicable to a non-contractual obligation arising out of damage caused by a product shall be:
   (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
   (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
   (c) the law of the country in which the damage occurred, if the product was marketed in that country.

   However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 6: Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

   (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her
claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the markets in the Member State of that court.

Article 7: Environmental damage
The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 8: Infringement of intellectual property rights
1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9: Industrial action
Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been taken.

Chapter III: Unjust Enrichment, Negotiorum Gestio and Culpa in Contrahen.do

Article 10: Unjust Enrichment
1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

**Article 11: Negotiorum gestio**

[Includes provisions analogous to Article 10.]

**Article 12: Culpa in contrahendo**

[Includes provisions analogous to Article 10.]

### Chapter IV: Freedom of Choice

**Article 14: Freedom of choice**

1. The parties may agree to submit non-contractual obligations to the law of their choice:
   
   (a) by an agreement entered into after the event giving rise to the damage occurred; or
   
   (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

   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.

2. 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 other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

### Chapter V: Common Rules

**Article 15: Scope of the law applicable**

The law applicable to non-contractual obligations under this Regulation shall govern in particular:
(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;
(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person;
(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16: Overriding mandatory provisions
Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 17: Rules of safety and conduct
In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability....

Chapter VI: Other Provisions

... 

Article 24: Exclusion of renvoi
The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law....

Article 26: Public policy of the forum
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.

Comments and Questions

1. How respectful are the Rome Regulations of party autonomy (freedom of choice)?
2. Does Rome II address the concerns expressed by Professor Weintraub above about the characterization of the quantification of damages as procedural?
3. Compare the provisions of Rome II to the quoted excerpts above from the German, Austrian, and Swiss national codes. If you were a practitioner in one of those countries, would the Rome II regulation represent a significant reform in conflicts doctrine?

4. If you were a practitioner in the U.S. would local adoption of principles reflected in Rome II represent a significant reform?

D. Hague Conventions

As we have seen, the determination of the applicable law can raise intriguing and difficult questions. Only a few international conventions are in force to regulate the question, and countries have only to a very limited degree adopted uniform principles as to the determination of the applicable law. Three examples follow.

Hague Conference on Private International Law, Convention on Celebration and Recognition of Validity of Marriages
Concluded March 14, 1978

The States signatory to the present Convention,*

Desiring to facilitate the celebration of marriages and the recognition of the validity of marriages,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions—

Chapter I—Celebration of Marriages

Article 1

This Chapter shall apply to the requirements in a Contracting State for celebration of marriages.

Article 2

The formal requirements for marriages shall be governed by the law of the State of celebration.

Article 3

A marriage shall be celebrated—

(1) where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or

(2) where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.

* The three Member States of the Hague Conference that are Contracting States to this Convention are Australia, Luxembourg, and the Netherlands.
Article 4

The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles.

Article 5

The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the State of celebration.

Article 6

A Contracting State may reserve the right, by way of derogation from Article 3, sub-paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither is a national of that State nor habitually resides there.

Chapter II—Recognition of the Validity of Marriages

Article 7

This Chapter shall apply to the recognition in a Contracting State of the validity of marriages entered into in other States.

Article 8

This Chapter shall not apply to—

(1) marriages celebrated by military authorities;
(2) marriages celebrated aboard ships or aircraft;
(3) proxy marriages;
(4) posthumous marriages;
(5) informal marriages.

Article 9

A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.

A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration.

Article 10

Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established.

Article 11

A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State—

(1) one of the spouses was already married; or
(2) the spouses were related to one another, by blood or by adoption, in the
direct line or as brother and sister; or
(3) one of the spouses had not attained the minimum age required for mar-
riage, nor had obtained the necessary dispensation; or
(4) one of the spouses did not have the mental capacity to consent; or
(5) one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-
paragraph 1 of the preceding paragraph, the marriage has subsequently become
valid by reason of the dissolution or annulment of the prior marriage.

Article 12
The rules of this Chapter shall apply even where the recognition of the validity of a
marriage is to be dealt with as an incidental question in the context of another question.

However, these rules need not be applied where that other question, under the
choice of law rules of the forum, is governed by the law of a non-Contracting State.

Article 13
This Convention shall not prevent the application in a Contracting State of rules of
law more favourable to the recognition of foreign marriages.

Article 14
A Contracting State may refuse to recognize the validity of a marriage where such
recognition is manifestly incompatible with its public policy ("ordre public").

Article 15
This Chapter shall apply regardless of the date on which the marriage was celebrated.

However, a Contracting State may reserve the right not to apply this Chapter
to a marriage celebrated before the date on which, in relation to that State, the
Convention enters into force.

Chapter III—General Clauses

Article 16
A Contracting State may reserve the right to exclude the application of Chapter I.

Article 17
Where a State has two or more territorial units in which different systems of law
apply in relation to marriage, any reference to the law of the State of celebration
shall be construed as referring to the law of the territorial unit in which the mar-
riage is or was celebrated.

Article 18
Where a State has two or more territorial units in which different systems of law
apply in relation to marriage, any reference to the law of that State in connection
with the recognition of the validity of a marriage shall be construed as referring to
the law of the territorial unit in which recognition is sought.
Article 19
Where a State has two or more territorial units in which different systems of law apply in relation to marriage, this Convention need not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another territorial unit.

Article 20
Where a State has, in relation to marriage, two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the system of law designated by the rules in force in that State.

Article 21
The Convention shall not affect the application of any convention containing provisions on the celebration or recognition of the validity of marriages to which a Contracting State is a Party at the time this Convention enters into force for that State.

This Convention shall not affect the right of a Contracting State to become a Party to a convention, based on special ties of a regional or other nature, containing provisions on the celebration or recognition of validity of marriages.

Article 22
This Convention shall replace, in the relations between the States who are Parties to it, the Convention Governing Conflicts of Laws Concerning Marriage, concluded at The Hague, the 12th of June 1902.

Article 23
Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, inform the Ministry of Foreign Affairs of the Netherlands of the authorities which under its law are competent to issue a marriage certificate as mentioned in Article 10 and, subsequently, of any changes relating to such authorities.

Chapter IV—Final Clauses

Article 24
The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 25
Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
Article 26

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 27

A Contracting State which has two or more territorial units in which different systems of law apply in relation to marriage may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 28

Any State may, not later than the time of ratification, acceptance, approval or accession, make one or more of the reservations provided for in Articles 6, 15 and 16. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made.

The withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 29

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 24 and 25.

Thereafter the Convention shall enter into force—

1. for each State ratifying, accepting, approving or accession, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2. for a territory to which the Convention has been extended in conformity with Article 26, on the first day of the third calendar month after the notification referred to in that Article.

Article 30

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29 even for States which subsequently have ratified, accepted, approved or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 25, of the following—

(1) the signatures and ratifications, acceptances and approvals referred to in Article 24;
(2) the accessions referred to in Article 25;
(3) the date on which the Convention enters into force in accordance with Article 29;
(4) the extensions referred to in Article 26;
(5) the declarations referred to in Article 27;
(6) the reservations referred to in Articles 6, 15 and 16, and the withdrawals referred to in Article 28;
(7) the information communicated under Article 23;
(8) the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 14th day of March, 1978, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

Concluded May 4, 1971

The States signatory to the present Convention,*

Desiring to establish common provisions on the law applicable to civil non-contractual liability arising from traffic accidents,

* The nineteen Member States of the Hague Conference that are Contracting States to this Convention are Austria, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, the Former Yugoslav Republic of Macedonia, France, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Poland, Serbia, Slovakia, Slovenia, Spain, and Switzerland.
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability.

For the purpose of this Convention, a traffic accident shall mean an accident which involves one or more vehicles, whether motorized or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.

Article 2

The present Convention shall not apply—

1) to the liability of manufacturers, sellers or repairers of vehicles;
2) to the responsibility of the owner, or of any other person, for the maintenance of a way open to traffic or for the safety of its users;
3) to vicarious liability, with the exception of the liability of an owner of a vehicle, or of a principal, or of a master;
4) to recourse actions among persons liable;
5) to recourse actions and to subrogation in so far as insurance companies are concerned;
6) to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile guarantee funds, and to any exemption from liability laid down by the law which governs these institutions.

Article 3

The applicable law is the internal law of the State where the accident occurred.

Article 4

Subject to Article 5, the following exceptions are made to the provision of Article 3—

a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability
   — towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
   — towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,
   — towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.
   Where there are two or more victims the applicable law is determined separately for each of them.

b) Where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State.
c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration.
The same is true even though these persons are also victims of the accident.

Article 5
The law applicable under Articles 3 and 4 to liability towards a passenger who is a victim governs liability for damage to goods carried in the vehicle and which either belong to the passenger or have been entrusted to his care.
The law applicable under Articles 3 and 4 to liability towards the owner of the vehicle governs liability for damage to goods carried in the vehicle other than goods covered in the preceding paragraph.
Liability for damage to goods outside the vehicle or vehicles is governed by the internal law of the State where the accident occurred.
However the liability for damage to the personal belongings of the victim outside the vehicle or vehicles is governed by the internal law of the State of registration when that law would be applicable to the liability towards the victim according to Article 4.

Article 6
In the case of vehicles which have no registration or which are registered in several States the internal law of the State in which they are habitually stationed shall replace the law of the State of registration. The same shall be true if neither the owner nor the person in possession or control nor the driver of the vehicle has his habitual residence in the State of registration at the time of the accident.

Article 7
Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident.

Article 8
The applicable law shall determine, in particular—
(1) the basis and extent of liability;
(2) the grounds for exemption from liability, any limitation of liability, and any division of liability;
(3) the existence and kinds of injury or damage which may have to be compensated;
(4) the kinds and extent of damages;
(5) the question whether a right to damages may be assigned or inherited;
(6) the persons who have suffered damage and who may claim damages in their own right;
(7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;
(8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 9

Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right, under the law applicable according to Articles 3, 4 or 5.

If the law of the State of registration is applicable under Articles 4 or 5 and that law provides no right of direct action, such a right shall nevertheless exist if it is provided by the internal law of the State where the accident occurred.

If neither of these laws provides any such right it shall exist if it is provided by the law governing the contract of insurance.

Article 10

The application of any of the laws declared applicable by the present Convention may be refused only when it is manifestly contrary to public policy ("ordre public").

Article 11

The application of Articles 1 to 10 of this Convention shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

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Concluded October 2, 1973

The States signatory to the present Convention,*

Desiring to establish common provisions on the law applicable, in international cases, to products liability,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

* The eleven Member States of the Hague Conference that are Contracting States to this Convention are Croatia, Finland, the Former Yugoslav Republic of Macedonia, France, Luxembourg, Montenegro, Netherlands, Norway, Serbia, Slovenia, and Spain.
Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability inter se.

This Convention shall apply irrespective of the nature of the proceedings.

Article 2

For the purposes of this Convention—

a) the word "product" shall include natural and industrial products, whether raw or manufactured and whether movable or immovable;
b) the word "damage" shall mean injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;
c) the word "person" shall refer to a legal person as well as to a natural person.

Article 3

This Convention shall apply to the liability of the following persons—

(1) manufacturers of a finished product or of a component part;
(2) producers of a natural product;
(3) suppliers of a product;
(4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also—

a) the place of the habitual residence of the person directly suffering damage, or
b) the principal place of business of the person claimed to be liable, or
c) the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

a) the principal place of business of the person claimed to be liable, or
b) the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.
Article 7
Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

Article 8
The law applicable under this Convention shall determine, in particular—
(1) the basis and extent of liability;
(2) the grounds for exemption from liability, any limitation of liability and any division of liability;
(3) the kinds of damage for which compensation may be due;
(4) the form of compensation and its extent;
(5) the question whether a right to damages may be assigned or inherited;
(6) the persons who may claim damages in their own right;
(7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
(8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;
(9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 9
The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

Article 10
The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ("ordre public").

Article 11
The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State....

Concluding Comments and Questions
1. Return to the problem that opened this chapter. Does the additional perspective offered by the theory and practice change your answer as to what law should apply?
2. Is the question what law applies something that the law should resolve with certain and predictable rules or with flexible and discretionary standards?
E. Bibliography of Additional Resources


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