3. Tort law and conflict of laws

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1. INTRODUCTION

The law of torts and the law of conflict of laws, or private international law (PIL), intersect whenever the particular tort or the parties have significant contacts with more than one state or country.\(^1\) Examples of such ‘multistate’ torts would include cases in which the tortious conduct occurs in one state and the resulting injury in another (cross-border torts), or in which the conduct and the injury both occur in one state but either the tortfeasor or the victim, or both, are domiciled in, or have another significant connection with, another state.

This chapter explores the question of which state’s law determines the rights and liabilities of the parties arising from a tort: the choice-of-law question. It does not discuss the question of jurisdiction, namely which court will decide the dispute, nor the recognition or enforcement of the resulting judgment in another state.

For much of the twentieth century, most countries answered the choice-of-law question in the same way: by applying the law of the state where the tort occurred, the _lex loci delicti_. However, beginning in the 1960s, the _lex loci delicti_ rule, at least in its inexorable version, began losing ground. This chapter discusses the current status of this rule, its exceptions, and, in some cases, its replacement with other rules, methodologies, or approaches.

The discussion begins with the United States, a country with a plurilegal and uncodified PIL system that has experienced a virtual revolution in the handling of tort conflicts. The discussion then examines how other countries that have codified or recodified their PIL in the last 50 years have responded to the need for change.\(^2\)

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\(^1\) Hereinafter, the word ‘state’ connotes any country or a territorial subdivision of a country, such as a state of the United States or a Canadian province, which has its own system of tort law.

\(^2\) This chapter draws from S. Symeonides, _Codifying Choice of Law Around the World: An International Comparative Analysis_ (copyright by Oxford University Press, 2014) (hereinafter Symeonides, _Codifying Choice of Law_). The reader is kindly referred to this book for fuller documentation and discussion. For a list of the codifications cited in this chapter, see the Appendix. All of these codifications are referred to hereinafter with the country of origin and the abbreviation ‘codif.’ regardless of (a) whether they form part of another code, such as a civil code, or (b) their formal designation, such as PIL Act, statute, and so on.
2. THE AMERICAN EXPERIENCE

A. The American Choice-of-Law Revolution

For more than 100 years, American courts followed a rigid territorialist-rule system for determining the law governing conflicts of laws. For tort conflicts, this system, which was enshrined along the way in the first Conflicts Restatement of 1933, mandated the application of the *lex loci delicti*, which was defined as the law of the state in which the injury occurred, regardless of any other contacts or factors.

Over time, this system proved completely inadequate to resolve rationally the more frequent and complex conflicts brought about by increased cross-border activity and mobility. Courts gradually began searching for oblique ways to avoid the often arbitrary and artificial results dictated by the traditional system. By the 1960s, judicial disension had acquired the dimensions and intensity of an open revolution, as many courts began abandoning the *lex loci delicti* rule. In its place, these jurisdictions substituted one or more of the competing modern approaches, such as the Restatement (Second) of 1971, Brainerd Currie’s governmental interest analysis, or Professor Leflar’s better-law approach. While these approaches differ from one another, they also share one basic feature that is antithetical to the single-mindedness of the *lex loci delicti* rule: they all rely on multiple contacts, factors, and policies. Indeed, the revolution attacked not only the *lex loci* rule as such, but also the very premises and goals of the established choice-of-law system. All rules were denounced; approaches, issue-by-issue analysis, and *dépeçage* became the new terms *du jour*; material justice became an overt goal; unilateralism was resurrected; and the principle of territoriality lost significant ground to the principle of personality, especially in contract conflicts. From the perspective of methodology, general philosophy, and even terminology, the choice-of-law revolution has instigated significant and, in many respects, beneficial changes.

Three of these changes deserve note here. The first is that the choice of the applicable law is no longer based on a single contact, such as the place of the conduct or injury. Instead, the choice is based on multiple contacts, including the parties’

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domiciles or other affiliations with a particular state, or the place of their pre-existing relationship, if any.

The second change was the acceptance of the notion that, prior to choosing between the laws of the contact states, the court should consider the content of these laws and their underlying policies, as well as other policies and considerations, such as the needs of the interstate and international systems. Thus, the choice of law moved from state selection to a content-dependent law selection; that is, from the selection of a state without regard to the content of its substantive law to the selection of a state’s law based in part on the content of that law. 10

The third change was the emergence of a distinction between tort rules whose primary purpose is to deter injurious conduct (hereinafter ‘conduct-regulating’ rules) and those whose primary purpose is to allocate the economic and social losses resulting from the tort (hereinafter ‘loss-allocating’ or ‘loss-distributing’ rules). This distinction, which was first articulated by the New York Court of Appeals in the 1963 landmark case Babcock v. Jackson, 11 is discussed in the next section.

B. Differentiating between Conduct Regulation and Loss Distribution

In the United States, the substantive law of torts is viewed as having two general objectives: (a) deterrence and (b) reparation/compensation. While each rule of tort law serves both objectives to some extent, it is possible to classify some rules as serving the one objective primarily and the other only secondarily. Thus, a rule of tort law may be primarily conduct regulating 12 or primarily loss distributing. 13 Examples of conduct-regulating rules include not only rules of the road, such as speed limits and traffic-light rules, but also: rules prescribing the civil sanctions for violating rules of the road; including presumptions and inferences attached to the violation; rules prescribing safety standards for work sites, buildings, and other premises; rules imposing punitive damages; and rules defining as tortious conduct certain anti-competitive conduct or conduct amounting to ‘interference with contract’, ‘interference with marriage’, or ‘alienation of affections’. Examples of loss-distributing rules include the old guest statutes, rules that prescribe the amount of compensatory damages, rules of interspousal immunity, parent–child immunity, workers’ compensation immunity, and loss of consortium rules.

Although many academic authors dispute the clarity or usefulness of this distinction, most courts have adopted it, albeit without always using the same terminology and

10 For a full discussion of these concepts, see S. Symeonides, American Conflicts Law at the Dawn of the 21st Century, 37 Willamette L. Rev. 1, 46–60 (2000).
12 In the words of the New York Court of Appeals, conduct-regulating rules are those that ‘have the prophyllactic effect of governing conduct to prevent injuries from occurring’. Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002 (N.Y. 1994).
13 Loss-distributing rules are those that ‘prohibit, assign, or limit liability after the tort occurs’. Padula, supra note 12 at id.
without a consensus on its precise contours. Admittedly, the line between the two
categories is not always bright. While some tort rules are clearly conduct regulating and
some are clearly loss distributing, there are many tort rules that do not easily fit in
either category, and some rules that appear to fit in both categories – in other words,
they both regulate conduct and effect or affect loss distribution. Nevertheless, despite
the difficulties in its application in some cases, this distinction provides a useful
starting point for resolving or analysing many tort conflicts, although the distinction
will not make a difference in many other conflicts. The starting point is a presumption
that conduct-regulating rules are territorially oriented, while loss-distribution rules are
not necessarily territorially oriented. Consequently, territorial contacts (namely, the
places of conduct and injury) remain relevant in conduct-regulation conflicts, while
both territorial and personal contacts (i.e., the parties’ domiciles) are relevant in
loss-distribution conflicts.

C. Summarizing the Results of the Case Law

While all three of the above methodological changes have been both necessary and
beneficial, they have also dramatically increased the complexity of choice-of-law
analysis. Fortunately, when one looks beyond methodology and language and focuses
on substantive outcomes in tort conflicts, the picture becomes clearer. At least in the
three patterns of tort conflicts described below, courts have produced fairly uniform
results.

i. Common-domicile cases

The first pattern encompasses cases in which the tortfeasor and the victim are
domiciled in (or have a similar affiliation with) one state and are involved in a tort
occurring entirely in another state. If, in such a case, the conflict is confined to issues
of loss distribution (rather than conduct regulation), then most American courts would
apply the law of the parties’ common domicile. As documented elsewhere,15 the vast
majority of cases have applied the law of the common domicile, regardless of the
particular choice-of-law methodology the courts followed.

The majority of these cases involved the Babcock v. Jackson pattern, in which the
law of the parties’ common domicile favours recovery more than the law of the state of
conduct and injury. These cases present the classic false conflict paradigm in which
only the state of the common domicile has an interest in applying its law. All but one
of these cases applied the law of the common domicile. The remaining cases involved
the converse-Babcock pattern, in which the law of the common domicile prohibits or
limits recovery more than the law of the state of conduct and injury. These cases are
not such clear false conflicts as Babcock because the accident state arguably has an
interest in applying its law to compensate those injured in its territory and to facilitate
recovery of local medical costs. Even so, more than two-thirds of those cases applied

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15 For citations and discussion, see Symeonides, Revolution 145–159; Hay, Borchers, and
Symeonides, 884–895.
the law of the common domicile, thus supporting the emergence of a common-domicile rule that does not depend on the content of the law of the common domicile.

The two American codifications, the Louisiana codification of 1991 and the Oregon codification of 2009, have adopted such a rule. In both codifications, this rule (a) is confined to issues of loss distribution (as opposed to conduct regulation); (b) is confined to disputes between the victim and the tortfeasor and does not encompass disputes between third parties or joint tortfeasors; (c) is extended to encompass cases in which the tortfeasor and the victim are domiciled in states whose laws would produce the same outcome; and (d) is subject to an escape, which can prove useful, at least in converse-Babcock cases.

It is important to stress that all of the above American cases that applied the law of the parties’ common domicile involved conflicts between loss-distribution rules (as opposed to conduct-regulation rules). In contrast, the common-domicile rule featured in Rome II and other codifications discussed later is much broader in that it encompasses both loss-distribution and conduct-regulation issues.

ii. Split-domicile intrastate torts

The second pattern of cases in which American courts have produced fairly uniform results are tort cases in which: (a) the tortfeasor and the victim are domiciled in different states; and (b) both the conduct and the injury occur in the domicile of either the tortfeasor or the victim. In these cases, courts tend to apply the law of the state with the three contacts (i.e., conduct, injury, and one party’s domicile), regardless of whether

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16 The Louisiana rule is contained in Article 3544(1), which provides that the law of the common domicile applies to ‘[i]ssues pertaining to loss distribution and financial protection … as between a person injured by an offense or quasi-offense and the person who caused the injury’. For a discussion of this codification by its drafter, see S. Symeonides, Louisiana’s New Law of Choice of Law for Tort Conflicts: An Exegesis, 66 Tul. L. Rev. 677 (1992). For an identical rule, see Puerto Rico Draft Code art. 41.

17 See Or. Rev. St. § 15.440(2)(a) (providing that the law of the common domicile of the tortfeasor and the victim applies (as between those parties) to issues other than determining the standard of care by which the injurious conduct is judged). For a discussion of this codification by its drafter, see S. Symeonides, Oregon’s New Choice-of-Law Codification for Tort Conflicts: An Exegesis, 88 Oregon L. Rev. 963 (2009).

18 Disputes between joint tortfeasors, or between a tortfeasor and a person vicariously liable for his acts, are relegated to the flexible choice-of-law approach of Article 3542 of the Louisiana codification, and Or. Rev. St. § 15.445 of the Oregon codification.

19 See La. codif. art. 3544(1); Or. Rev. St. § 15.440(2)(b). This legal fiction, which is particularly useful in cases with multiple victims or defendants, enables a court to resolve these false conflicts by applying the law of the domicile of either party, unless the general escape of the codification dictates a different result.

20 The Louisiana escape is contained in Article 3547, which authorizes a judicial deviation from the common-domicile rule if such deviation is appropriate under the codification’s general article. The Oregon escape authorizes deviation from the common-domicile rule upon a showing that the application of another law would be ‘substantially more appropriate’ under the codification’s general approach. Or. Rev. St. § 15.440(4).

21 See infra 5.
that law favours the tortfeasor or the victim, and regardless of whether the conflict involves conduct-regulation or loss-distribution issues. 22

Both the Louisiana and Oregon codifications also authorize the same result. 23 The Oregon codification takes a further step by providing that, if both the injurious conduct and the resulting injury occurred in a state other than the state in which either the victim or the tortfeasor were domiciled, the law of the state of conduct and injury governs. However, this rule is subject to an escape that depends on showing that, in the circumstances of the particular case, the application of that law to a disputed issue will ‘not serve the objectives of that law’, in which case that issue will be governed by the law selected under the codification’s general approach. 24 In contrast, the Louisiana codification does not provide a dispositive rule for these conflicts, relegating them instead to the codification’s general residual approach of Article 3542.

iii. Split-domicile cross-border torts

The third pattern encompasses torts (other than products liability) in which (a) the parties are domiciled in different states with different laws; and (b) the conduct occurs in one state (often, but not always, the tortfeasor’s home state) and the injury occurs in another state (often, but not always, the victim’s home state). In these cases, American courts are almost evenly split between applying the law of the place of conduct and the law of the place of injury. However, in the vast majority of cases (86 per cent), courts have applied whichever of the two laws favoured the plaintiff. 25 Thus, American courts have reached the same results as several foreign codifications (discussed later) that allow plaintiffs to choose the applicable law or authorize the court to choose whichever of the two laws favours the plaintiff. 26

The Louisiana codification provides for the same result in conduct-regulation conflicts by calling for the application of the law of the state of conduct, unless the state of injury has a higher standard of conduct and the occurrence of the injury in that state was objectively foreseeable, in which case the law of the state of injury governs. 27 For loss-distribution conflicts, the Louisiana codification takes a cautious position by providing a dispositive rule only for cases in which the state of injury has a ‘higher standard of financial protection’ for the victim. Article 3544(2)(b) of the codification

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22 See Symeonides, Revolution, 163–191 (for loss-distribution conflicts), 213–220 (for conduct-regulation conflicts). Courts also tend to apply the law of the state of conduct and injury in split-domicile cases in which neither party is domiciled in the state of conduct and injury. However, exceptions are possible if the conflict involves only loss-distribution issues and the latter state’s contacts are transient or otherwise fortuitous.

23 For Louisiana, see La. codif. art. 3544(2)(a) (providing that ‘when both the injury and the conduct that caused it’ occurred in the domicile of one party, the law of that state applies). Like the corresponding Louisiana rule, the Oregon rule provides that, if ‘both the injurious conduct and the resulting injury occurred in the same state, the law of that state governs if either the injured person or the person whose conduct caused the injury was domiciled in that state’. Or. Rev. St. § 15.440(3)(a).

24 Or. Rev. St. § 15.440(2)(b).


26 See infra 3.B.

27 See La. codif. art. 3543.
provides that, when the parties are domiciled in different states with different laws and
the conduct and injury occur in different states, the law of the state of injury governs,
provided that (i) the injured person was domiciled in that state, (ii) the person who caused the
injury should have foreseen its occurrence in that state, and (iii) the law of that state provided
for a higher standard of financial protection for the injured person than did the law of the
state in which the injurious conduct occurred.  

Clause (i) in the quoted text narrows this rule more than the rule produced by the cases
discussed above because it limits it to those cases in which the victim is domiciled in
the state of injury. Clause (iii) makes the rule inapplicable in the converse situation;
namely, cases of the second pattern in which the victim is injured (and domiciled) in a
state that has a pro-defendant law. These cases are relegated to the codification’s default
rule, Article 3542, which provides for a flexible approach aimed at applying ‘the law of
the state whose policies would be most seriously impaired if its law were not applied to
[the particular] issue’.  

In contrast, the Oregon codification provides dispositive rules for all categories of
cross-border torts. Section 15.440(3)(c) of the codification provides in pertinent part
that, in cross-border torts (other than products liability), the law of the state of conduct
governs. However, this provision also allows for the application of the law of the state
of injury if: (a) the activities of the tortfeasor were ‘such as to make foreseeable the
occurrence of injury in that state’; and (b) the victim ‘formally requests the application
of that state’s law by a pleading or amended pleading’.  

iv. Summary
This brief description of the American conflicts experience supports the following
observations:

1. The appearance of chaos and anarchy created by the multiplicity of diverse and
malleable approaches employed by the courts that joined the American choice-of-
law revolution no longer translates into an unusual degree of disuniformity of
results.

2. Although the revolution brought major methodological changes, it brought
significantly fewer changes in terms of the final choice of the law governing tort
conflicts.

28 Id. art. 3544(2)(b).
29 Id. art. 3542(1).
30 Or. Rev. St. § 15.440(3)(c). In such a case, the request ‘shall be deemed to encompass all
claims and issues’ against the particular defendant. Id. This provision is subject to an exception
if a party demonstrates that the application to a disputed issue of the law of another state is
‘substantially more appropriate under the principles of [Or. Rev. St.] § 15.445’ (which articulates
the codification’s residual choice-of-law approach), in which case the law of the other state
applies to that issue.
3. Regardless of which modern approach they follow, American courts that joined the revolution (and especially those that did not) continue to apply the law of the *locus delicti* in several patterns and a significant number of tort conflicts, albeit under rationales different from the traditional theory. Specifically:

(a) Courts continue to apply the law of the state in which both the conduct and the injury occurred, if that state is also the domicile of either the tortfeasor or the victim (the intrastate split-domicile cases described above), regardless of which party that law favours and regardless of whether the conflict involves conduct-regulation or loss-distribution issues. Thus, these cases are compatible with the old *lex loci delicti* rule, even if they base the choice of law on additional contacts and factors.

(b) In cross-border torts in which the parties are not domiciled in the same state or states with identical laws, courts apply the law of either the state of conduct or the state of injury, whichever favours the plaintiff.

(i) When courts apply the law of the state of injury, they reach the same result as that dictated by the *lex loci* rule, even when invoking a different rationale.

(ii) When courts apply the law of the state of conduct, they deviate from the American version of the *lex loci* rule, which mandated the application of the law of the state of injury. However, because the place of conduct is a territorial contact rather than a personal one, these cases are consistent with the principle of territoriality, which is the foundation of the *lex loci* rule. Thus, if these cases represent a change, it is an intra-territorial and less than dramatic change.

4. The only major departure from both the philosophy and the results of the traditional system has occurred in one pattern of tort conflicts; namely, common-domicile cases in which the conflict is confined to loss-distribution – as opposed to conduct-regulation – issues. In these cases, all the American courts that joined the revolution have almost unanimously applied the law of the common domicile, thus switching from territoriality to personality. As the discussion of PIL codifications in the rest of this chapter demonstrates, several other countries have made the same change.

In *Babcock v. Jackson*, the seminal case that launched the revolution, the New York Court of Appeals thought that the basic question was whether the law of 'the place of the tort [should] invariably govern the availability of relief for the tort'. More than four decades later, 42 state supreme courts – including the *Babcock* court – have answered the question in the negative. However, although none of the 42 courts professes categorical adherence to the *lex loci* rule *as such*, the only categorical

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32 *Id.* at 280–281 (emphasis in original).
exception from it is the application of the law of the common domicile in loss-distribution conflicts. One wonders whether a revolution was necessary for such a relatively minor change.

3. THE LEX LOCI DELICTI RULE IN RECENT PIL CODIFICATIONS

A. Intrastate Torts

In other countries, most codifications enacted in the last 50 years continue to follow the lex loci delicti rule as the basic rule for tort conflicts. The difference from the previous generation of codifications is that, in most new codifications, this rule is now subject to express exceptions.

A small number of codifications (15) continue to follow the old double-actionability rule, which provides that, in order for a plaintiff to recover for injury sustained outside the forum country, the defendant’s conduct must be actionable under both: (a) the law of the state of conduct and/or injury; and (b) the law of the forum state as such. The new Chinese and Taiwanese codifications of 2010 have abandoned the double-actionability rule.

Less categorical exceptions are the application of the law of the state of conduct in certain cross-border torts (see supra) and the availability of general escapes for atypical cases. Standing apart is the Yemeni codification, which has unequivocally adopted the lex fori without any exceptions. See Yemeni codif. art. 32 (providing that torts occurring outside Yemen are governed by Yemeni law). The former Arab Republic of Yemen (North Yemen) had adopted the same rule (see North Yemen codif. art. 31), whereas the People’s Republic of Yemen (South Yemen) allowed the tort victim to choose between the law of the place of conduct and the law of the forum state.

The only recent codifications in which the lex loci delicti is not the basic rule are those of Louisiana and Oregon (as well as the Puerto Rico Draft Code). Under Article 99 of the Belgian codification, the lex loci delicti applies only if the parties do not have their habitual residence in the same state and only if both the conduct and the injury occurred in the same state. In all other cases, the law of the state of the closest connection governs. However, the lex loci delicti governs certain specified torts, subject to conditions and exceptions stated in Articles 99 et seq. For the few codifications in which the lex loci rule is not subject to exceptions (other than the general ordre public exception), see Symeonides, Codifying Choice of Law, 53.

In addition to the United Kingdom, which continues to follow this rule only in defamation cases, these countries include: Afghanistan, Algeria, Belarus, Japan, Jordan, Kazakhstan, North Korea, Kyrgyzstan, Qatar, Somalia, Sudan, Tajikistan, Ukraine, and Uzbekistan. For documentation, see Symeonides, Codifying Choice of Law, 83–85.

See Taiwanese codif. art. 25; Chinese codif. art. 46.
Most recent codifications define the *locus delicti* as the place of conduct. The rest define it as the place of injury, or as the law of either the place of conduct or the place of injury, or leave it undefined.

**B. Cross-Border Torts**

Obviously, whether the *locus delicti* is defined as being in the place of conduct or the place of injury makes a difference only in cases: (1) in which these two contacts are located in different states (cross-border torts); and (2) in which one state holds the actor liable and the other does not. How do recent codifications resolve these conflicts?

A plurality of recent codifications follow the *favor laesi* principle; namely, they authorize the application of the law of whichever of the two states (state of conduct or state of injury) is more favourable to the victim. They do so either by choosing the more favourable of the two laws or by allowing the tort victim to choose between them. Specifically:

- At least 21 codifications follow this principle for all cross-border torts: Angola, Cape Verde, Croatia, East Timor, Estonia, Former Yugoslav Republic of Macedonia (FYROM), Georgia, Germany, Guinea-Bissau, Hungary, Italy, Lithuania, Macau, Mozambique, Oregon, Peru, Portugal, Slovenia, Tunisia, Uruguay, and Venezuela.

- At least 23 codifications, including Rome II, follow the *favor laesi* principle only for certain specified types of cross-border torts, such as products liability, environmental torts, defamation, unfair competition, and so on. This list includes the codifications of Albania, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Czech Republic, Kazakhstan, Kyrgyzstan, Louisiana, Moldova, Poland, Puerto Rico, Romania, Rome II, Russia, Serbia, Switzerland, Taiwan, Tajikistan, Turkey, Ukraine, and Uzbekistan.

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38 See Algerian codif. art. 20(1); Armenian codif. art. 1289; Austrian codif. art. 48(2); Belarus codif. art. 1129(1); German codif. art. 40(1); Hungarian codif. art. 32(1); Jordanian codif. art. 22; North Korean codif. art. 31; Kyrgyzstan codif. art. 1203(1); Latvia codif. art. 20; Liechtenstein codif. art. 52(1); Moldova codif. art. 1616.1; Dutch codif. art. 1.1; Peruvian codif. art. 2097; Polish codif. art. 31.1; Quebec codif. art. 3126; Russian codif. art. 1219(1); Spanish codif. art. 10.9; Taiwanese codif. art. 25; Tunisian codif. art. 70; Turkish codif. art. 134(1); U.A.E. codif. art. 20(1); Uruguayan draft art. 52(1).

39 See Rome II art. 4(1); Bulgarian codif. art. 105(1); Italian codif. art. 62; Japanese codif. art. 17; Mongolian codif. art. 551.1; United Kingdom codif. art.11; Venezuelian codif. art. 32. Article 551.2 of the Mongolian codification provides for the application of the law of the country of injury, but also provides that if the injury occurred outside Mongolia and the tortfeasor is a Mongolian natural or legal person, Mongolian law governs.

40 See Chinese codif. 46; Croatian codif. art. 28(1); Czech codif. art. 115; Lithuanian codif. art. 143.1; Serbian codif. art. 32; Slovenian codif. art. 30; Vietnam codif. art. 773(1).

41 For documentation, see Symeonides, *Codifying Choice of Law*, 60–61. Nine of these codifications give the choice directly to the tort victim (Estonia, FYROM, Germany, Italy, Lithuania, Oregon, Tunisia, Uruguay, and Venezuela). The rest authorize the court to apply whichever of the two laws favours the victim. See id.

42 For documentation, see Symeonides, *Codifying Choice of Law*, 62–64.
Five codifications (Japan, Korea, Quebec, Russia, and Switzerland) provide that the law of the state of injury displaces the law of the state of conduct if the occurrence of the injury in the former state was objectively foreseeable. This foreseeability proviso authorizes an implied favor laesi result because foreseeability is a relevant inquiry only if the law of the state of injury is more favourable to the victim than the law of the state of conduct. Two codifications (Slovakia and Vietnam) allow the court to choose between the two laws without specifying whether the choice must favour the victim.

4. EXCEPTIONS TO THE LEX LOCI DELICTI RULE

A. The Closer Connection Exception

Most recent codifications provide exceptions to the lex loci delicti rule. Although most of these exceptions are based on the principle of the closer connection with another state, they are phrased in many different ways, including the following:

1. codifications using the closer connection phraseology, without providing examples of what the closer connection may be;
2. codifications that use the closer connection phraseology and also contain language suggesting that the parties’ common affiliation with the same state (through domicile, habitual residence, or nationality) or the parties’ pre-existing relationship, or both, are examples of such a closer connection;
3. codifications that provide separate exceptions based, respectively, on (a) the closer connection, (b) common party affiliation, and (c) any pre-existing relationship; and
4. codifications stating directly that either such an affiliation or relationship (or both) are a basis for an exception from the otherwise applicable law, but without using the closer connection term.

i. Closer connection without specific examples

Five codifications provide that the lex loci shall be displaced by the law of the state that has a closer connection with the tort, but without providing explicit examples of such a closer connection. The Turkish codification simply provides that if the obligational relationship arising from the tort is more closely connected with another country, the

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43 See Japanese codif. art. 17; Quebec codif. art. 3126; Russian codif. art. 1219.1; Swiss codif. art. 133.2. For Russia and Switzerland, this applies to torts other than those in which these countries favour the favor laesi principle. See supra. In China and South Korea, the courts have interpreted the applicable statutory provisions as authorizing the application of the law most favourable to the victim. See Symeonides, Codifying Choice of Law, 62.

44 In China and South Korea, the courts have interpreted the applicable statutory provisions as authorizing the application of the law most favourable to the victim. See Symeonides, Codifying Choice of Law, 62.

45 See Slovak codif. art. 15; Vietnamese codif. art. 773(1).
law of that country shall apply.\textsuperscript{46} The codifications of FYROM, Slovenia, and Taiwan are equally brief and similar in substance.\textsuperscript{47} The Austrian codification uses the same exception but provides more direction, stating that if the persons involved have a stronger connection to the law of one and the same state, that law shall be determinative.\textsuperscript{48} The Liechtenstein codification also provides that the closest connection must be sought in the parties’ common affiliation with the same state.\textsuperscript{49}

The 1995 United Kingdom statute for tort conflicts does not actually use the phrase ‘closer connection’ but uses the comparable phrase ‘substantially more appropriate’. The statute provides for the displacement of the normally applicable law if it is substantially more appropriate to apply the law of another country to a disputed issue or issues. Such appropriateness is determined through a comparison of: ‘(a) the significance of the factors that connect a tort or delict with the country whose law would be applicable under the general rule; and (b) the significance of any factors connecting the tort or delict with another country’.\textsuperscript{50} These factors include ‘factors relating to the parties, any of the events constituting the tort or delict in question, or any of the circumstances or consequences of those events’.\textsuperscript{51}

\textbf{ii. Closer connection with examples}

Like the Austrian and Liechtenstein codifications – which, as noted earlier, tie the closer connection exception to the parties’ common affiliation with the same state – the Estonian and Japanese codifications also provide similar examples of the exception’s intended meaning. The Estonian codification provides that a closer connection ‘may arise, above all: (1) from a legal relationship or factual connection between the parties, [or] (2) … from the fact that at the [pertinent] time … the residence of the parties is in the same state’.\textsuperscript{52} The Japanese codification provides that the law of the place that is ‘manifestly more closely connected with the tort’ is determined by considering all the circumstances of the case, including whether the parties had their habitual residence in the same jurisdiction or whether the tort constitutes a breach of obligations under a contract between the parties.\textsuperscript{53}

\textbf{iii. Closer connection as an exception from both the \textit{lex loci} and the parties’ common law}

Rome II, along with six national codifications, provides that: (1) a common affiliation between the tortfeasor and the victim with the same state displaces the \textit{lex loci}; (2) the law of a state that has a closer connection displaces both the normally applicable law and the law of the state with the common affiliation; and (3) a pre-existing relationship between the parties is an example of a closer connection.

\textsuperscript{46} Turkish codif. art 34(3).
\textsuperscript{47} See FYROM codif. art. 33(2); Slovenian codif. art. 30(2); Taiwanese codif. art. 25.
\textsuperscript{48} Austrian codif. art. 48(2).
\textsuperscript{49} Liechtenstein codif. art. 52(1).
\textsuperscript{50} United Kingdom codif. art. 12(1).
\textsuperscript{51} \textit{Id} at art. 12(2).
\textsuperscript{52} Estonian codif. art. 53(2).
\textsuperscript{53} Japanese codif. art. 20.
Paragraph 2 of Article 4 of Rome II provides that if both the tortfeasor and the victim maintain their habitual residence in the same country at the time of the injury, the law of that country displaces the *lex loci damni* designated as applicable by paragraph 1. However, paragraph 3 of the same article provides (a) that if the tort 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; and (b) that a manifestly closer connection with another country ‘might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question’.\(^{54}\)

Likewise, the German codification provides that, if the parties have their habitual residence in the same country, the law of that country governs,\(^{55}\) but if there is a ‘substantially closer connection’ with another country, then the law of that other country shall apply.\(^{56}\) The Albanian, Bulgarian, Dutch, and Serbian codifications essentially provide rules to the same effect.\(^{57}\) The South Korean codification is similar in that the law of the parties’ common habitual residence displaces the *lex loci*, and the law that governs a pre-existing relationship displaces both laws, but the codification does not use the closer connection phraseology.\(^{58}\)

The Swiss and Belgian codifications are slightly different. The Swiss codification provides that: (1) the law of the state in which both parties have their habitual residence is the primarily applicable law to the exclusion of the *lex loci delicti*; and (2) a pre-existing relationship between the parties displaces both laws.\(^{59}\) The codification does not provide a closer connection exception specifically for torts. However, the general escape of Article 15, which qualifies all of the codification’s rules, would presumably be applicable to torts as well.

The Belgian codification provides that: (1) the law of the state of the parties’ habitual residence is the primarily applicable law; (2) the *lex loci* applies only if there is no common habitual residence, and only if both the conduct and the injury occurred in the same *locus*; (3) in all other cases, the law of the state with the closer connection applies;\(^{60}\) and (4) a close connection with an existing legal relationship between the parties displaces all of the above laws.\(^{61}\)

### iv. Common party affiliation as the sole exception

Finally, 24 codifications provide that a common affiliation with the same state between the tortfeasor and the victim displaces the *lex loci delicti*, but without phrasing this

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54 Rome II art. 4(2) and (3).
55 German codif. art. 40(2).
56 *Id.* art 41(1). This article also provides that a substantially closer connection ‘may be based in particular … on a special legal or factual relationship between the persons involved in connection with the obligation’.
57 For documentation, see Symeonides, *Codifying Choice of Law*, 71.
58 See South Korean codif. art. 32.
59 See Swiss codif. art. 133.
60 See Belgian codif. art. 99.
61 See *id.* art. 100.
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exception in closer connection terminology and without subjecting the common-domicile law to further exceptions. These codifications are discussed below, along with codifications that use this exception together with other exceptions.

B. The Common-Domicile Exception or Rule

As documented elsewhere, the plurality of PIL enacted in the last 50 years have adopted the notion that, when the tortfeasor and the victim are affiliated with the same state, the law of that state should displace the otherwise applicable law. The various codifications differ slightly in describing this affiliation. With regard to natural persons, the most commonly used affiliation is habitual residence, but some codifications use domicile or nationality, singly, alternatively, or (in some cases) cumulatively. With regard to juridical persons, the affiliation can be the person’s seat, central administration, principal place of business, or simply place of business. For the sake of brevity, this chapter refers to this affiliation as domicile, and to the notion of applying the law of the parties’ common affiliation as the common-domicile rule.

The common-domicile rule is phrased: (a) as an express bilateral rule in Rome II and 31 national codifications; (b) as an implied bilateral rule in six codifications; and (c) as an express unilateral rule in favour of the forum state in nine codifications. It is stated (a) as the primary rule in some codifications; (b) as the sole exception to the lex loci rule in other codifications; and (c) as part of the closer connection package (together with other exceptions) in other codifications.

The Belgian and Swiss codifications belong to the first category because they have adopted the common-domicile rule as the primary rule, although they subject it to the pre-existing relationship exception as well as other exceptions for particular torts. The codifications of Louisiana, Oregon, and Puerto Rico also assign a prominent role to the common-domicile rule, but they also confine it to issues of loss distribution, as opposed to conduct regulation.

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62 See Symeonides, Codifying Choice of Law, 72–79. Among recent codifications, the following 24 do not contain a common-domicile exception (or a similar exception that will produce the same result): Afghanistan, Algeria, Armenia, Burundi, Central African Republic, Croatia, Gabon, Jordan, Latvia, Madagascar, Mauritania, Moldova, Mongolia, North Korea, Peru, Qatar, Romania, Slovakia, Somalia, Spain, Sudan, U.A.E., Venezuela, and Yemen. Four of these codifications (the Croatian, Romanian, Slovak, and Spanish) are superseded by Rome II, which provides such an exception.

63 These are the codification of Albania, Angola, Argentina, Austria, Belgium, Bulgaria, Cape Verde, China, East Timor, Estonia, Georgia, Germany, Guinea-Bissau, Hungary, Italy, Japan, Lithuania, Louisiana, Macau, Mozambique, Netherlands, Oregon, Poland, Portugal, Puerto Rico, Quebec, Serbia, South Korea, Switzerland, Tunisia, and Uruguay.

64 These are the codifications of FYROM, Liechtenstein, Slovenia, Taiwan, Turkey, and the U.K.

65 These are the codification of Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, Uzbekistan, and Vietnam.

66 See Belgian codif. art. 99; Swiss codif. art. 133.

67 See supra 2.C.i.
The codifications of Azerbaijan, China, Georgia, Italy, Lithuania, Russia, Uruguay, and Vietnam provide that the parties’ common domicile in – or similar affiliation with – the same state is the sole exception to the *lex loci*. As noted earlier, Rome II and the codifications of Albania, Belgium, Bulgaria, Estonia, Germany, Japan, South Korea, and Switzerland use the common-domicile exception – together with other exceptions – as part of the closer connection package. The Hague Convention on Products Liability provides a common party affiliation exception (together with other exceptions) from the otherwise applicable law. Article 5 provides in part that the law of the state of the victim’s habitual residence displaces the otherwise applicable law if that state is also the manufacturer’s principal place of business.

The codifications of Austria, FYROM, Slovenia, Taiwan, Turkey, and the United Kingdom provide a closer connection exception to the *lex loci*, but not a common-domicile exception. However, it is reasonable to expect that if the parties in a given case are affiliated with the same state, then the law of that state is likely to apply under the closer connection exception.

Finally, nine codifications have adopted a unilateral version of the common-domicile rule in favour of forum law but not foreign law. They apply the law of the parties’ common domicile only when the parties are domiciled in the forum state and the tort occurred in another state, but *not* in the converse situation (tort in the forum state involving foreign domiciliaries), or when a tort committed in another country involved parties domiciled in a third country.

There is, however, one major difference between the American and the foreign versions of the common-domicile rule. As noted earlier, the American version of the common-domicile rule is limited to issues of loss distribution. In contrast, in virtually all of the above codifications, the common-domicile rule applies in principle to both

69 See Rome II, arts. 4(2), 5(1), 6(2), 9; Albanian codif. arts. 56.2, 64.2, 69.2; Belgian codif. arts. 99–100; Bulgarian codif. art. 105.3; Estonian codif. art. 53(2)(2); German codif. art. 40(2); Japanese codif. art. 20; South Korean codif. arts. 32, 8; Swiss codif. arts. 133, 25.
71 See supra 4.A.i.
72 The same will likely be true under the 1971 Hague Convention on the Law Applicable to Traffic Accidents. Articles 4–6 of the Convention provide various exceptions to the *lex loci delicti* rule in favour of the law of the place of the car’s registration, which usually coincides with the domicile of the owner. The first exception applies to single-car accidents and provides that the law of the state of registration displaces the *lex loci delicti* (a) with regard to a victim who is a passenger if he habitually resides in a state other than the *locus delicti*, and (b) with regard to a victim who is not a passenger if she habitually resides in the state of registration. The second exception applies to accidents involving two or more vehicles, and provides that the law of the state of registration displaces the *lex loci delicti* only if all the vehicles are registered in the same state.
73 These are the codifications of Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, Uzbekistan, and Vietnam. For documentation and discussion, see Symeonides, *Codifying Choice of Law*, 78–79.
74 See id.
75 See supra 2.C.i.
loss-distribution and conduct-regulation issues. Some of these codifications provide a special provision for issues of ‘conductor and safety’, which can function as weak exception from the common-domicile rule. This issue is discussed later.

### C. Parties Domiciled in States with the Same Law

Although in some respects the common-domicile rule is phrased too broadly so as to encompass issues that should be governed by the law of the state of conduct, in other respects this rule is phrased too narrowly: it applies only when the parties are domiciled in the same country but not when they are domiciled in different countries that have the same laws. The better view is that the latter cases are functionally analogous to common-residence cases and should be treated accordingly.

Suppose, for example, that while hunting in Kenya, a French hunter injures a Belgian hunter with whom he has no pre-existing relationship. Suppose that French and Belgian law provide the same amount of compensation, which is much higher than what Kenyan law allows. In such a case, there is no reason to apply Kenyan law and every good reason to apply either Belgian or French law. This is the classic false conflict because: (a) Kenya has no interest in applying its low recovery law to a dispute between foreigners; (b) Belgium has every interest in applying its high recovery law for the protection of the Belgian victim; and (c) France has no countervailing interest because its law also provides the same high recovery as Belgium. Yet because of the aversion by the drafters of many codifications to the concept of false conflict (perhaps because of its American origins), this conflict will be resolved under Kenyan law. For example, Article 4(1) of Rome II mandates the application of Kenyan law, and – as explained elsewhere – none of Rome II’s exceptions to the lex loci rule would be operable in this case.

In contrast, the codifications of Louisiana, Puerto Rico, and Oregon treat this case as analogous to a common-domicile case, without using the term false conflict. For example, the Oregon codification provides that ‘persons domiciled in different states shall be treated as if domiciled in the same state to the extent that the laws of those states on the disputed issues would produce the same outcome’.

### Footnotes

76 The only exceptions are the codifications of Louisiana, Oregon, and Puerto Rico. A fourth possible exception is the Lithuanian codification in which the common-domicile rule applies to ‘the reparation of damage’ (art. 1.43.4), thus seemingly excluding conduct-regulation issues, such as liability.
77 See infra 5.
78 See infra 5.
80 Or. Rev. Stat. § 15.440(2)(b). For similar provisions, see La. Codif. art. 3544(1); Puerto Rico Draft Code art. 41; American Law Institute, Complex Litigation: Statutory Recommendations and Analysis § 6.01(c)(2) & (3) (1994).
D. The Pre-Existing Relationship Exception

As noted earlier, in many recent codifications, the parties’ pre-existing relationship (even if not accompanied by a common domicile or other common affiliation) provides a basis for an exception from the lex loci delicti or the normally applicable law. The parties’ relationship must be a contract in one codification, a legal relationship in other codifications, a legal or factual relationship in other codifications, and simply a pre-existing relationship in still other codifications.

This exception is phrased either (a) as a particular example of the closer connection exception (as in the Rome II Regulation and the Bulgarian, Estonian, German, and Japanese codifications); or (b) as an independent exception (as in the Belgian, Dutch, South Korean, and Swiss codifications).

The codifications in the second group expressly state that, when the court finds the exception applicable, the tort will be governed by the same law as that which governs the pre-existing relationship. In Rome II and the codifications of the first group, this exception is more ambiguous. It may lead to either (a) the application of the same law as that which governs the pre-existing relationship; or (b) the application of the law of the same state in which the pre-existing relationship is primarily centred and which is presumptively the state of the closest connection.

To be sure, in some cases, the two directions will lead to the same destination. For example, if the pre-existing relationship is a family relationship centred in state X, then the law of that state will govern that relationship and, under the above exception, the court may apply the same law to a related delictual obligation. If, however, the relationship is contractual, then there is no guarantee that the state in which the relationship is centred will also be the state whose law will govern the contract. For example, the contract may contain a choice-of-law clause choosing the law of state Z, even if that state has a relatively tenuous but otherwise sufficient connection with the relationship. In such a case, the question is which (if any) of the two states, X or Z, will be the candidate for the closer connection exception. Z cannot be the candidate for the closer connection exception.

81 See Japanese codif. art. 20.
82 See Belgian codif. art. 100; Dutch codif. art. 5; South Korean codif. art. 32(3); Swiss codif. art. 133(3).
83 See Estonian Codif. art. 53(2); German codif. art. 41(2)(1).
84 See Rome II art. 4(3); Bulgarian codif. art. 105(3).
85 See Rome II, art. 4(3); Bulgarian codif. art. 105(3); Estonian codif. art. 53(2); German codif. art. 41(2)(1); Japanese codif. art. 20. See also Albanian codif. art. 56.4; Serbian draft codif. art. 161.3.
86 See Belgian codif. art. 100; art. 5 of Dutch Act of 11 April 2001 Regarding Conflict of Laws on Torts; Korean codif. art. 32(3); Swiss codif. art. 133(3).
87 The same result can be obtained more directly through the common-domicile rule. This means that this exception is superfluous in most cases in which the parties to the relationship are residents of the same state.
88 If the relationship is merely social rather than legal, as in Babcock v. Jackson – in which the parties were neighbours who drove together from New York to Ontario – it makes little sense to say that the tort will be governed by the same law that governs the relationship because the social relationship may not, as such, be governed by any law. However, it does make sense to say that the tort will be governed by the law of the state in which the relationship was centred.
because, in this scenario, it does not have a close enough factual connection. On the other hand, X has a factual connection, but the application of its law will defeat the apparent purpose of this exception, which is to apply the same law to both the tort and contract aspects of the case.

E. Unilateral Exceptions in Favour of the Lex Fori

As noted earlier, nine codifications follow the double-actionability rule, which provides that an injured person may not recover from the person who caused the injury unless the act is actionable under both the foreign lex loci delicti and the lex fori. Also, six of those codifications and three others follow a unilateral version of the common-domicile rule that operates in favour of the lex fori and as an exception to the foreign but not the local lex loci delicti. Two other codifications take a more direct route to protecting domestic defendants through the application of forum law. The Mongolian codification provides that if the injury occurred outside Mongolia and the tortfeasor is a Mongolian natural or legal person, then Mongolian law governs both liability and damages. The Vietnamese codification has a similar but narrower rule, which provides that Vietnamese law applies to foreign torts if both the tortfeasor and the victim are Vietnamese nationals.

Finally, a few other codifications contain unilateral rules limiting the amount or types of damages to the standards of the lex fori for torts that in other respects are governed by foreign law. These rules are designed to ensure that, when a foreign law governs a tort action, the amount or type of damages to be awarded will not differ, or at least not differ significantly, from the damages available under the lex fori. For example, the Japanese codification provides that (a) when a tort is governed by a foreign law, ‘claims for damages or any other remedies under that law may not be claimed if the actions causing the tort are not unlawful under Japanese law’; and (b) even if those actions are unlawful both under that foreign law and Japanese law, ‘the victim may not claim any greater recovery of damages or any other remedies than those available under Japanese law’. The Romanian codification provides that Romanian courts may award damages under the applicable foreign law, but ‘only within the limits fixed by Romanian law’. The Estonian codification provides that, in such cases, the amount of damages shall not be ‘significantly greater’ than the amount Estonian law allows.

The Swiss and Turkish codifications contain similar rules for certain torts. The Swiss codification provides that, in products liability and obstruction to competition cases governed by foreign law, ‘no damages may be awarded in Switzerland other than those that would be awarded … under Swiss law’. The italicized words are from the French text of the codification. In the German text of the same codification, the corresponding

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89 See supra 3.A.
90 See supra 4.B.
91 Mongolian codif. art. 551.2.
92 Vietnamese codif. art. 773.3.
93 Japanese codif. art. 22.
94 See Romanian codif. art. 119.
95 Estonian codif. art. 52.
96 Swiss codif. arts. 135(2) and 137(2) (emphasis added).
words are ‘no damages … beyond that …’. Thus, the two texts can be interpreted to mean different things. While the German text addresses the amount of damages, the French text addresses not only the amount but also the type of damages and thus would exclude, for example, punitive damages which are not available under Swiss law. The Turkish codification has a similar provision regarding the amount of damages in cases of obstruction to competition.97

The German and South Korean damages-limiting rules are more subtle. The German rule provides that damages claims for a tort governed by foreign law ‘cannot be raised insofar as they (1) go substantially beyond what is necessary for an adequate compensation of the injured party, [or] (2) obviously serve purposes other than an adequate compensation of the injured party’.98 The South Korean rule provides that damages for a tort governed by foreign law ‘shall not be awarded if the nature of the damages is clearly not appropriate to merit compensation to the injured party or if the extent of the damages substantially exceeds appropriate compensation to the injured party’.99 From a methodological perspective, these provisions differ in some respects from the Swiss provisions and those of the other countries described above. For example, strictly speaking the German and South Korean provisions are not unilateral choice-of-law rules (or for that matter choice-of-law rules); they do not mandate the automatic application of forum law to the exclusion of foreign law. Rather they are substantivist provisions authorizing the judge to scrutinize foreign law through the lenses of the forum’s substantive law and reject claims considered excessive or punitive under that law. In this sense, these provisions may be characterized as specialized ordre public exceptions clauses.100 At the same time, however, these provisions dramatically lower the threshold for interjecting the forum’s public policy and are likely to produce the same pro-forum results as the above Swiss and Hungarian provisions.101

97 Turkish codif. art. 38(2).
98 German codif. art. 40(3).
99 South Korean codif. art. 32(4).
100 A draft of what later became Rome II provided specifically that the application of a foreign law that imposed exemplary or punitive damages was contrary to Community public policy. This provision was dropped in the final text on the assumption that the generic ordre public reservation would likely produce the same result in most cases without mandating it in all cases.
101 Before its 2009 revision, the Hungarian codification favoured plaintiffs by allowing them to choose between the laws of the state of conduct and the state of injury in cross-border torts, and between the laws of the forum and the state of injury in torts involving the ‘infringement of personal rights’. See Hungarian codif. arts. 32(2) and 10(2), in force until 4 April 2009. It also provided that: (a) if under the law governing the ‘tortious act’ liability is conditioned on a finding of culpability, ‘the existence of culpability can be determined by either the personal law of the tortfeasor or the law of the place of injury’ (id. art. 32(4)); and that (b) even in cases otherwise governed by foreign law, Hungarian courts ‘shall not impose liability for … conduct that is not unlawful under Hungarian law … [nor] impose legal consequences not known to Hungarian law.’ Id. art. 34. The 2009 revision deleted the above provisions as inconsistent with Rome II (see Hungarian codif. art. 32 as revised by Act IX of 2009), but retained the provision regarding infringement of personal rights, a subject that is not covered by Rome II. See Hungarian codif. art. 10(3) as revised by Act IX of 2009.
5. RULES OF CONDUCT AND SAFETY

The 1966 Portuguese codification – which was among the first codifications to introduce the common-party-affiliation exception to the lex loci delicti – provided that the application of the law of the parties’ common nationality or habitual residence shall be ‘without prejudice’ to those provisions of the lex loci delicti ‘which must be applied to all persons without differentiation’. Thus, this codification differentiated between two categories of tort rules: (a) those that must be applied to all conduct within the locus state, and (b) those that need not be so applied. In time, the rules of the first category came to be known as rules of ‘conduct and safety’ and, in the United States, as conduct-regulating rules (as opposed to loss-allocation rules).

A few years later, the 1972 Hague Products Convention used the term ‘rules of conduct and safety’, whereas the 1971 Hague Traffic Accidents Convention understandably referred to rules relating to the ‘control and safety of traffic’. The latter convention provided that, ‘[w]hatever may be the applicable law’ on other issues, ‘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’. The 1979 Hungarian codification provided that the law of the state of conduct ‘shall determine’ whether the conduct ‘was realized by the violation of traffic or other security regulations’. The 1982 Yugoslav codification provided that the law governing the ‘unlawful character of an act’ is the law of the place of the act or of its consequences and, if they occurred in more than one place, then ‘it is sufficient that the act is unlawful according to the law of any of those places’. Several other codifications have since adopted the same notion, albeit using slightly different phraseology, culminating with Rome II, which provides that, ‘[i]n 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’ of the conduct state.\footnote{Rome II art. 17.}

It is possible that the precise scope of rules of conduct and/or safety varies from codification to codification,\footnote{It is also possible that some of these differences are the result of different translations of identical terms.} although it appears similar to (albeit narrower than) the American concept of conduct-regulating rules. For example, the phrase ‘rules of safety and conduct’, which is used in some of the above codifications, is arguably broader than other phrases, such as ‘rules of conduct and safety’ (which is used in the Swiss codification), or ‘rules relating to the control and safety of traffic’ (which is used in other codifications). The phrase ‘traffic and safety regulations and other comparable regulations for the protection of persons or property’, used in the Dutch codification, occupies the enigmatic middle.

A more outcome-determinative difference is between, on the one hand, those codifications (such as the Portuguese, Hungarian, Yugoslav, and Romanian codifications) which require the application of the conduct and safety rules of the conduct state, and, on the other hand, all the other codifications which only contain mild admonitions to the courts to ‘consider’ or ‘take account’ of those rules. This difference becomes important in all cases in which the applicable law is that of a state other than the state of conduct, including: (a) cases governed by the law of the parties’ common affiliation or pre-existing relationship; or (b) cross-border torts in countries that apply the law of the state of injury. The problem is exacerbated in those codifications that do not provide escapes, such as the Italian, South Korean, Lithuanian, Polish, Quebec, and Russian codifications, which do not provide an escape from the common-domicile rule.

As noted earlier, Rome II authorizes the consideration – but not necessarily the application – of the rules of conduct and safety and only ‘as a matter of fact and in so far as is appropriate’ in ‘assessing the conduct’ of the alleged tortfeasor.\footnote{Rome II art. 17.} This equivocal wording, along with the legislative history of the article, suggests that it is intended as a mere evidentiary instruction about which facts to consider in assessing the defendant’s culpability, rather than as a true choice-of-law rule calling for the application of the conduct and safety rules of the state of conduct.\footnote{For extensive discussion and critique, see S. Symeonides, Rome II and Tort Conflicts: A Missed Opportunity, 56 Am. J. Comp. L. 173, 211–215 (2008).}


For example, in cases falling within the scope of the common-domicile rule of Rome II, this phraseology contradicts the general proposition that conduct-regulating rules operate territorially. Travellers do not carry with them the conduct-regulating rules of their home state, even when they travel with their fellow citizens. Conversely, a state has an interest in enforcing its conduct-regulating rules, even if neither the violator nor the victim is domiciled in that state and even if both parties are domiciled in the same foreign state. For example, an Algerian worker injured in France at a work site operated by an Algerian employer may not be denied the protection of

\footnote{Rome II art. 17.}}
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the French conduct-regulating rules, nor may the employer claim exemption from those rules. Even if both parties are domiciled in Algeria, France has the exclusive claim to apply its law to the conduct-regulating aspects of the case. Yet, because of the broad and unqualified phrasing of the common-domicile rule of Rome II, Algerian law must apply to all aspects of the case, including conduct regulation. The timidity of Article 17 (and its tilt towards defendants) becomes problematic if the employer would be liable under French law but not under Algerian law. In such a case, any ‘taking into account’ of French law that stops short of applying it would do little to protect France’s interests in promoting work safety within its borders or, for that matter, protecting a worker injured and hospitalized in France.

It is of course true that Rome II provides a closer connection escape from the common-domicile rule. However, that escape is phrased in very broad terms (e.g., the whole tort/delict rather than in terms of specific issues), and contains other language (e.g., ‘manifestly’) which makes it very difficult to employ in all but the most extreme cases.114

The comparison with American conflicts law on this issue is revealing. As noted earlier, with Joseph Beale’s Restatement of the 1930s, American conflicts law embraced the principle of territoriality wholesale115 but, with the revolution of the 1960s, it partially retreated from this principle by adopting an exception to it for common-domicile cases, but only for those involving loss-distribution conflicts. In contrast, many other systems, which in areas other than torts have been far less hospitable to the principle of territoriality,116 clung to this principle much longer and then moved quite far in the opposite direction, towards the principle of personality, by adopting an overbroad common-domicile rule. This may be one of very few instances in which American conflicts law has been more cautious than its foreign counterparts.117

6. PARTY AUTONOMY

One question that recent codifications address is whether the tortfeasor and the victim can agree on the law applicable to the tort. The first – and rather uncommon – scenario is when the tortfeasor and the victim, after each had knowledge of the events giving rise to the dispute, agree on the law that will govern the dispute (hereinafter post-dispute agreements). Such agreements present no problems whatsoever. After all, they differ little from agreements encompassing only contractual claims, and indeed they help facilitate settlement.

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116 See id.
117 For the movement of the pendulum between territoriality and personality, see S. Symeonides, Territoriality and Personality in Tort Conflicts, in T. Einhorn and K. Siehr (eds.), Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter Nygh 405 (2004).
The second (and increasingly more common) scenario is when the eventual tortfeasor and the victim agree in advance on the law that will govern their rights and obligations arising from a tort (hereinafter pre-dispute agreements). Clearly, this scenario can only occur when: (a) the eventual tortfeasor and the victim are parties to a pre-existing contract, such as a contract of employment, carriage, or sale; and (b) the contract contains a choice-of-law clause that is phrased in a way that purports to include not only contractual issues but also non-contractual issues that may arise from, or are connected to, the contractual relationship. If both of the foregoing elements are satisfied, then the next question is whether the legal system should enforce the clause to the extent it encompasses non-contractual issues.

Until recently, the prevailing view in Europe was to enforce only post-dispute agreements. The codifications of Belgium, Bulgaria, China, Germany, Japan, Turkey, and FYROM expressly provide to that effect, whereas the codifications of Estonia, South Korea, Lithuania, Russia, Switzerland, Taiwan, Tunisia, and Ukraine also do likewise but limit such agreements to the law of the forum. The codifications of Armenia, Austria, Belarus, Kyrgyzstan, and the Netherlands authorize such agreements, but without any express limitation as to their timing and without limiting them to the law of the forum. Article 14 of Rome II differentiates between pre-dispute and post-dispute choice-of-law agreements for non-contractual claims and allows enforcement of both, but subject to different restrictions. Post-dispute agreements are enforced regardless of the identity of the parties, but pre-dispute agreements are enforced only if: (a) the parties are pursuing a commercial activity; (b) the agreement is freely negotiated; and (c) the choice of law is expressed or demonstrated with reasonable certainty by the circumstances of the case.

Unfortunately, the space limitations of this chapter do not allow discussion of the issues raised by the above provision, nor a comparison with the law and practice in the United States. However, such discussion and comparison can be found in other publications by this author.

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118 See Belgian codif. art. 101; Chinese codif. art. 47; German codif. art. 42; Turkish codif. art. 34(5); Bulgarian codif. art. 113(1); Japanese codif. art. 21; FYROM codif. art. 33(3).
119 See Estonian codif. art. 54; Swiss codif. art. 132; South Korean codif. art. 33; Lithuanian codif. art. 1.43.3; Russian codif. art. 1219.3; Taiwanese codif. art. 31; Tunisian codif. art. 71; Ukrainian codif. art. 49.
120 See Armenian codif. art. 1289; Austrian codif. art. 48(1); Belarus codif. art. 1093(2); Kyrgyzstan codif. art. 1167(2); Dutch codif. art. 6.
121 Article 14 applies to all non-contractual claims other than those arising from unfair competition, restrictions to competition, and infringement of intellectual property rights. See Rome II, Arts. 6(4) and 8(3). These exclusions mean that choice-of-law agreements on these two subjects are unenforceable, regardless of whether they are entered into before or after the dispute.
122 Rome II art. 14(1)(a).
123 Rome II art. 14(1)(b).
124 Id.
125 Id. Another requirement is that the agreement shall not prejudice the rights of third parties. Id.
7. PRODUCTS LIABILITY

Beginning with the 1970s, PIL codifications began including choice-of-law specifically applicable to products liability conflicts, as distinct from generic tort conflicts. To date, at least 26 codifications contain such specific rules. These rules can be grouped into two occasionally overlapping categories: (a) content-neutral rules based on factual contacts or combinations thereof; and (b) result-oriented rules based on the favor laesi principle.

The first set of choice-of-law rules especially designed for products liability was adopted in 1973 with the Hague Convention on the Law Applicable to Products Liability. Article 5 of the Convention provides that the law of the state of the victim’s habitual residence applies, as long as that state is also: (a) the defendant’s principal place of business; or (b) the place where the product was acquired by the victim. Article 4 provides that if these conditions are not met, then the law of the state of injury applies, as long as that state is also: (a) the defendant’s principal place of business; or (b) the place where the product was acquired by the victim. When none of the above conditions is met, Article 6 gives the victim a choice between the law of the state of injury and the law of the state of the defendant’s principal place of business. The Convention also protects the defendant by providing a defence which is now found in virtually all other codifications, albeit in slightly different formulations: Article 7 provides that the defendant may prevent the application of the law of the place of injury or of the victim’s habitual residence by proving that he could not reasonably have foreseen that the product that caused the injury or his products of the same type would be made available in those states through commercial channels.

The Louisiana and Oregon codifications follow a similar combination of contacts but also combine unilateral rules with bilateral ones. The Louisiana rule provides that, subject to a foreseeability/commercial unavailability proviso, the law of the forum state governs cases in which: (1) the injury was sustained in that state by a domiciliary or resident of that state; or (2) the product was manufactured, produced, or acquired in that state, and the victim was a domiciliary of that state or the injury occurred there. Cases in which the forum state lacks the above combinations of contacts are relegated


127 In alphabetical order, these codifications are those of: Albania, Azerbaijan, Belarus, Belgium, Bulgaria, China, Italy, Japan, Kazakhstan, Kyrgyzstan, Lithuania, Louisiana, Moldova, Oregon, Puerto Rico, Quebec, Romania, Rome II, Russia, Switzerland, Taiwan, Tajikistan, Tunisia, Turkey, Ukraine, and Uzbekistan. For documentation and discussion, see Symeonides, Codifying Choice of Law, 93–98.

128 See arts. 4–7 of the Hague Convention on the Law Applicable to Products Liability (1973). The Convention is in force in Croatia, Finland, France, Luxembourg, the Netherlands, Montenegro, Norway, Slovenia, Spain, Serbia, and FYROM. The Lithuanian codification follows an identical combination of contacts as the Hague Convention. See Lithuanian codif. art. 1.43.5.

129 See La. codif. art. 3545. For an explanation of the rationale of this article by its drafter, including the reasons for using a unilateralist technique, see S. Symeonides, Louisiana’s New Law of Choice of Law for Tort Conflicts: An Exegesis, 66 Tul. L. Rev. 677, 749–759 (1992).
to other rules that require an issue-by-issue analysis that, more likely than not, will lead to the application of non-forum law. The Oregon rule is substantially identical.\(^\text{130}\)

The Belgian, Bulgarian, and Japanese codifications follow a simpler formula. The Belgian codification calls for the application of the law of the victim’s habitual residence, subject to the pre-existing relationship exception.\(^\text{131}\) The Bulgarian codification calls for the application of the law of the victim’s habitual residence, subject to a foreseeability proviso and subject to the common habitual residence and closer connection exceptions.\(^\text{132}\) The Japanese codification calls for the application of the law of the state of the product’s delivery, subject to a foreseeability proviso and to the closer connection exception, but also limits damages and other remedies to those provided by Japanese law.\(^\text{133}\)

Article 5, paragraph 1 of the Rome II Regulation designates, in successive order, three countries whose law may govern: (a) the country of the victim’s habitual residence; (b) the country in which the product was acquired; and (c) the country in which the injury occurred. The application of each country’s law depends on whether the product was ‘marketed in that country’.\(^\text{134}\) For example, if a German plaintiff is injured in India by a product acquired in Egypt, the applicable law will be that of Germany if the product was marketed there; if not, Egypt, if the product was marketed there; if not, India, if the product was marketed there. The same provision gives defendants a defence whereby they can avoid the application of the law of each of the above three countries by demonstrating that they “could not reasonably foresee the marketing of the product, or a product of the same type in that country”.\(^\text{135}\) If this defence succeeds, or if the product is not marketed in the aforementioned countries, the applicable law will be the law of the defendant’s habitual residence. Thus, if the product was manufactured by a Japanese defendant, Japanese law will govern the case – unless, of course, Japanese law is more favourable to the plaintiff than Egyptian or Indian law, in which case the defendant would not likely invoke this defence to begin with.

Paragraph 1 of Article 5 applies ‘[w]ithout prejudice to Article 4(2)’, which contains the common-residence rule. This means that, if the parties have their habitual residence in the same country, its law applies to the exclusion of all others, even if the product was not marketed in that country. Thus, if the product in the above scenario was manufactured by a German defendant, German law would govern, even if the product was not marketed in Germany. Finally, all of paragraph 1 (including the cross-reference to the common-residence rule) is subject to the ‘manifestly closer connection’ escape contained in paragraph 2 of Article 5.\(^\text{136}\) This escape authorizes a court either to:


\(^{131}\) See Belgian codif. art. 99.2.4 and art. 100.

\(^{132}\) See Bulgarian codif. art. 106.

\(^{133}\) See Japanese codif. arts. 18, 20, and 22(2).

\(^{134}\) Rome II art. 5(1).

\(^{135}\) Id.

\(^{136}\) Rome II art. 5(2). The escape also repeats the ‘pre-existing relationship exception’, which means, inter alia, that in all cases in which the victim was also the acquirer of the product, either
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(a) deviate from the order established in paragraph 1 and apply the law of one of the countries listed there; or (b) apply the law of a country not listed in paragraph 1, such as the country of the product’s manufacture, upon showing that this country has a manifestly closer connection than the country whose law would normally govern under paragraph 1.\textsuperscript{137}

A significant number of recent national codifications (at least 17) have adopted a direct pro-plaintiff rule by allowing the victim to choose from among the laws of states that have certain specified contacts. Below are some of the specifics.

- The Moldovan and Romanian codifications allow the victim to choose between the laws of (1) the victim’s domicile, and (2) the state of the product’s acquisition (the latter subject to a foreseeability proviso).\textsuperscript{138}
- The Italian and Swiss codifications allow the victim to choose between the laws of (1) the defendant’s principal place of business or, in the absence thereof, his habitual residence; and (2) the law of the state of the product’s acquisition, unless the defendant proves that the product has been marketed in that state without his consent.\textsuperscript{139}
- The Turkish and Quebec codifications allow the same choices, but without the above quoted proviso.\textsuperscript{140}
- The Russian and Ukraine codifications do likewise but add the law of the victim’s habitual residence or principal place of activity (subject to the same proviso).\textsuperscript{141}
- The codifications of Belarus and Kyrgyzstan do likewise, but without the pro-manufacturer proviso.\textsuperscript{142}
- The Tunisian codification adds a fourth choice – the place of injury (without the proviso).\textsuperscript{143}
- The Taiwanese codification provides for the application of the defendant’s national law, but also allows the victim to choose her national law or the law of the state of injury or the law of the state of the product’s acquisition.\textsuperscript{144}

side can claim a ‘pre-existing relationship’ between the victim and the defendant manufacturer, distributor, or retail seller.

\textsuperscript{137} For an assessment of this article from an American perspective, see S. Symeonides, Rome II and Tort Conflicts: A Missed Opportunity, 56 Am. J. Comp. L. 173, 206–209 (2008).

\textsuperscript{138} See Moldova codif. art. 1618; Romanian codif. art. 114. But see also id. art. 116 (limiting damages to those provided by Romanian law).

\textsuperscript{139} See Swiss codif. art. 135; Ital. codif. art. 63.

\textsuperscript{140} See Turkish codif. art. 36; Quebec Civil Code art. 3128.

\textsuperscript{141} See Russian codif. art. 1221 (which also provides that, if the victim does not take advantage of these choices, the applicable law shall be determined under the general article for tort conflicts); Ukrainian codif. art. 50. The codifications of Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Ukraine, and Uzbekistan provide the victim with the same three choices as the Russian codification, but without the pro-manufacturer proviso. See Azerbaijan codif. art. 27; Belarus codif. art. 1130; Kazakhstan codif. art. 1118; Kyrgyzstan codif. art. 1203; Tajikistan codif. art. 1227; Ukrainian codif. art. 50; Uzbekistan codif. art. 1195.

\textsuperscript{142} See Belarus codif. art. 1130; Kyrgyzstan codif. art. 1203.

\textsuperscript{143} See Tunisian codif. art. 72.

\textsuperscript{144} See Taiwanese codif. art. 26.
The Chinese codification provides for the application of the law of the state of the victim’s habitual residence – unless the defendant has not conducted related business in that state, in which case the victim may choose between the laws of the state of injury or the defendant’s principal place of business.\textsuperscript{145}

8. SPECIAL RULES FOR OTHER TORTS

In addition to (or aside from) products liability, many recent codifications provide separate choice-of-law rules for other categories of torts.\textsuperscript{146} Unfortunately, those rules cannot be discussed here due to space limitations.

9. A SUMMARY COMPARISON

This chapter has discussed the way in which tort conflicts are resolved: (1) in the United States, as a typical uncodified model from the common-law world; and (2) under more than 50 PIL codifications, enacted in mostly civil-law countries during the last 50 years.\textsuperscript{147}

The comparison between the two ‘camps’ is instructive. It reveals a stark difference in methods and tactics, but also a surprising convergence in final substantive outcomes. As explained at the beginning of this chapter, American conflicts law has chosen the

\textsuperscript{145} See Chinese codif. art. 48.

\textsuperscript{146} The following partial list of codifications provides a general idea regarding the torts that tend to be provided in this fashion: Belarus (products liability); Belgium (products liability, defamation, unfair competition, environmental torts, and traffic accidents); Bulgaria (products liability, unfair competition, defamation and injury to rights of personality, environmental torts, intellectual property); China (products liability and infringement on rights of personality); Japan (products liability, defamation); Kyrgyzstan (products liability); Liechtenstein (unfair competition); Lithuania (products liability, traffic accidents, infringement on rights of personality, and unfair competition); Moldova (products liability, injury to rights of personality, unfair competition); North Korea (collision on the high seas); Poland (traffic accidents, injury to rights of personality, actions against state entities); Quebec (products liability, injury caused outside Quebec by raw materials originating in Quebec); Romania (products liability, injury to rights of personality, unfair competition); Rome II (products liability, unfair competition and restraints to competition, environmental torts infringement of intellectual property rights, and industrial action); Russia (products liability, unfair competition); Switzerland (products liability, traffic accidents, obstruction to competition, emissions, injury to rights of personality); Taiwan (products liability, unfair competition and torts committed through the media); Tunisia (products liability and traffic accidents); Turkey (products liability, injury to rights of personality, unfair competition and restraints to competition); and Vietnam (copyright infringement).

\textsuperscript{147} Included in these codifications are: (1) the Rome II Regulation, which is in force in 27 EU member-states, including the mixed jurisdiction of Scotland, and the common-law jurisdictions of England, Wales, Ireland, Cyprus, and Malta; (2) the codifications of 17 EU member-states, which Rome II preempts with respect to most torts; and (3) two codifications enacted in the United States, one of which is in the common-law state of Oregon, and the other in the mixed jurisdiction of Louisiana.
route of revolution. In contrast, the countries of the codified camp have chosen the route of quiet evolution. Rather than demolishing the established PIL structure, they have gradually repaired it through limited and respectful judicial corrections and/or carefully crafted and exhaustively debated legislative overhauls. This particular difference is not surprising because, to a great extent, it mirrors the differences between the legal cultures in the two camps.

What may be surprising is the fact that, despite significant methodological and perhaps philosophical differences, the two camps have arrived at fairly similar substantive solutions to most conflicts. As this chapter documents, the various PIL codifications have retained some iteration of the *lex loci* rule, while also accepting the common-domicile exception to it and/or introducing other exceptions, such as the ‘closer connection’, that in many cases are likely to lead to the same results as those reached by American courts. In cross-border torts, many codifications have cleverly and boldly resolved the dilemma of choosing between the law of the place of conduct or the place of injury by either directing the court to choose the law that favours the victim or giving the choice directly to the victim. To be sure, there are still some differences. For example, the American version of the common-domicile rule is expressly confined to loss-distribution issues, whereas in many other countries this rule is not so confined. Nevertheless, many codifications recognize – albeit in an oblique and limited way – the need to differentiate for certain purposes between conduct-regulating and loss-distributing rules by requiring or encouraging the court to ‘take account’ of the rules of ‘conduct and safety’ of the conduct state.

As the first part of the chapter documents, these solutions are not too different from those reached by American courts after the choice-of-law revolution. It may well be that the only real difference is that, in order to reach these results, American courts must undertake a laborious and time-consuming case-by-case analysis, with all the attendant consequences on judicial economy and efficiency.
APPENDIX

PIL Codifications Cited in this Chapter

ALBANIA: Law No. 10428 of 2 July 2011 on PIL.
ALGERIA: Algerian Civil Code, arts. 9–24, as amended by Ordinance No. 75-58 of 26 September 1975.
AUSTRIA: Bundesgesetz vom 15. 6. 1978 über das internationale Privatrecht, as subsequently amended.
AZERBAIJAN: Law of 6 June 2000 on PIL.
BELGIUM: Code de droit international privé (Loi du 16 juillet 2004).
BULGARIA: Bulgarian PIL Code (Law No. 42 of 2005 as amended by Law No. 59 of 2007).
CHINA: Statute of Application of Law to Foreign Civil Relations, adopted at the 17th session of the Standing Committee of the 11th National People’s Congress on 28 October 2010.
CZECH REPUBLIC: Law No. 91 of 25 January 2012 on PIL, effective 1 January 2014.
GEORGIA: Act No. 1362 of 29 April 1998 on PIL.
HUNGARY: Law-Decree No. 13 of 1979 on PIL., as revised by Act IX of 2009.
JAPAN: Law No. 10 of 1898 as Newly Titled and Amended on 21 June 2006, effective 1 January 2007, on the General Rules of Application of Laws.
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LIECHTENSTEIN: PIL Act of 1996.


MOLDOVA: Moldova Civil Code (Law 1107 of 6 June 2002), arts. 1578–1625.


PORTUGAL: Portuguese Civil Code, arts. 14–65, as revised in 1966 and subsequently.


SLOVAKIA: Czechoslovakian Act 97 of 1963 on PIL and Procedure, as subsequently amended.

SPAIN: Spanish Civil Code, arts. 8–16, as revised in 1974 and subsequently.
TURKEY: Law No. 5718 of 27 November 2007 adopting the Turkish Code of PIL and International Civil Procedure.
UKRAINE: Law of 23 June 2005 No. 2709-IV on PIL, as subsequently amended.
VENEZUELA: Act of 6 August 1998 on PIL.
YEMEN: Law of 29 March 1992 on PIL.