LOUISIANA'S NEW LAW OF CHOICE OF LAW FOR TORT CONFLICTS: AN EXEGESIS*

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I. INTRODUCTION

On January 1, 1992, Louisiana's new law of conflict of laws went into effect. Act No. 923 of 1991 (Act No. 923 or Act) is the first major revision of Louisiana conflicts law since 1825, and the first comprehensive attempt at conflicts codification in the United States. Drawing from the vast laboratory of American conflicts experience, the Act codifies, updates, and streamlines Louisiana conflicts jurisprudence, and replaces the two conflicts articles in the Preliminary Title of the Louisiana Civil Code of 1870 with thirty-six new articles. The purpose of this Article is to present to the legal profession of this state the new articles that deal with tort conflicts.[1]

II. A FEW WORDS ON THE OLD LAW

Since a new law is usually understood better when compared to its predecessor, this presentation cannot avoid at least some general references to the pre-1992 Louisiana conflicts law. Until the enactment of Act No. 923, Louisiana's conflicts rules were contained in: (a) Articles 9 and 10 of the Civil Code of 1870 (which were amended and redesignated articles 14 and

1. This paper draws from two other articles by the author: Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in a Comparative Perspective*, 38 AM. J. COMP. L. 431 (1990) [hereinafter Symeonides, *Problems and Dilemmas*]; and Symeon C. Symeonides, *Il Primo Codice Americano sui Conflitti di Leggi*, 28 REVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE (forthcoming 1992).

15);[2] (b) certain revised statutes, such as the Insurance Code,[3] the Commercial Code[4] (including the recently enacted Article 9 of the Uniform Commercial Code[5]), the consumer credit[6] and consumer protection statutes,[7] and the Lease of Movables Act;[8] and (c) the jurisprudence.[9] Act No. 923 repeals and replaces articles 14 and 15 of the Civil Code but leaves intact the conflicts rules contained in the revised statutes. The Act also draws from, streamlines, and codifies Louisiana conflicts jurisprudence.

As with their French archetype, the two conflicts articles of the Louisiana Civil Code, articles 14 and 15,[10] were quite limited in scope and did not cover the entire spectrum of conflicts problems. For instance, article 15 contained some brief black-letter, choice-of-law rules on the form and effect of contracts and testaments, but did not provide for intestate successions or for testamentary or contractual capacity.[11] As a result of subse-

2. LA. CIV. CODE ANN. arts. 9, 10 (1870) (amended and redesignated as arts. 14 and 15 by Act No. 124, 1987 La. Acts 404).

3. *See* LA. REV. STAT. ANN. § 22:611 (West 1978 & Supp. 1991).

4. *See id.* §§ 10:1-105 to 10:9-605 (West 1983 & Supp. 1991).

5. *See id.* §§ 10:9-101 to 9-605.

6. *See id.* § 9:3511 (West 1991).

7. *See id.* § 51:1418 (West 1987).

8. *See id.* § 9:3302 (West 1991).

9. For a good recent survey of Louisiana conflicts jurisprudence, see *Louisiana Conflicts Jurisprudence, A Student Symposium*, 47 LA. L. REV. 1105 (1987). The symposium contains contributions on tort conflicts, *see* James J. Hautot, *Choice of Law in Louisiana: Torts*, *id.* at 1109; prescription, *see* Dana P. Karam, *Choice of Law—Liberative Prescription*, *id.* at 1153; contracts, *see* Dana P. Karam, *Conflict of Laws—Contracts*, *id.* at 1153; and insurance, *see* Michael W. Mengis, *Conflict of Laws: Insurance*, *id.* at 1213.

10. The sources of former Louisiana Civil Code articles 14 and 15 (the latter of which contained only one paragraph in 1808) are not entirely clear. In terms of language, the two original articles parallel precisely two articles of the French *Projet du Gouvernement* of 1800. *See* LA. CIV. CODE ANN. arts. 14, 15 (West 1972 & Supp. 1991). However, there is some evidence that, in terms of substance, the two articles were intended to incorporate even older principles contained in the Spanish *Siete Partidas*. *See* PARTIDA FIRST, Title I, Law 15 & PARTIDA THIRD, Title XIV, Law 15, *reprinted in* THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (L. Moreau Lislet & Henry Carleton trans., 1820); *see also* John T. Lewis, Comment, *Conflict of Laws in Louisiana: Contracts*, 38 TUL. L. REV. 726, 730-32 (1964). A third, less credible view is that these articles were derived from early American opinions, especially those authored by Justice Story, who was in turn influenced heavily by continental jurists such as Huber and Voet. *Id.* at 731. For discussions of the influence of French sources on the 1808 Digest, see Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972).

11. For a detailed discussion of the history, meaning, and application of article 15 of the Civil Code (corresponding to article 10 of the 1808 Digest), see Symeon C. Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029, 1038-42, 1055-56, 1076-86 (1987).

quent additions, the article was extended to cover some problems of marital property and liberative prescription, but was never extended to the area in which conflicts problems are most frequent, namely torts.

Tort conflicts were supposed to be covered by article 9 of the 1870 Civil Code, which provided that "[t]he law is obligatory upon all inhabitants of the State indiscriminately [and that] the foreigner, whilst residing in the State, and his property within its limits, are subject to the laws of the State."[12] Had this article been interpreted in line with its French sources,[13] it could provide the basis for at least a unilateral *lex loci delicti* rule, that is, a rule authorizing the application of Louisiana law to Louisiana torts.[14] Although, for more than a century and a half, Louisiana courts did follow the *lex loci delicti* rule for both Louisiana and foreign torts, they did so not because of French influence, nor because of article 9, but because of influence from the common-law jurisprudence. It was just as well. This is not only because uniformity with the sister-state law is generally more desirable in this area of the law than in other areas, but also because change was more likely to come from the rich laboratory of American interstate conflicts than from the rather modest French experience with international conflicts.

When change did come in 1973, it was because of influence from sister states that were gradually abandoning *lex loci delicti*,[15] rather than from France, which was still persistently adhering to the rule. With help and encouragement from jurists

12. LA. CIV. CODE ANN. art. 9 (West comp. ed. 1972) (redesignated as article 14 by Act No. 124, 1987 La. Acts 404).

13. *See supra* note 10. Article 14 of the Civil Code was apparently modelled after article 4 of Title IV of the French *Projet du Gouvernement* of 1800, which later became article 3 of the Code Napoleon and which provides in part that "[t]he laws of police and public safety obligate all those inhabiting the territory." *See* LA. CIV. CODE ANN. art. 9 (West comp. ed. 1972). This article was used by French courts as the basis for applying the *lex loci delicti* to both French and foreign torts. *See* 1 HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 321-36 (7th ed. 1983).

14. Generally speaking, a "bilateral" or "multilateral" choice-of-law rule delineates the scope of operation of both the law of the forum and of foreign law. A "unilateral" choice-of-law rule is a rule that delineates the sphere of operation of the law of the forum, but does not directly define cases that are governed by foreign law. Unilateral rules are usually "bilateralized" by judicial practice through a process of analogical reasoning. *See* Symeon C. Symeonides, An Outsider's View of the American Approach to Choice-of-Law 257-89 (1980) (unpublished S.J.D. thesis, Harvard Law School) (discussing the uses of "bilateralism" and "unilateralism" in choice-of-law history, theory, and practice).

15. By 1991, only sixteen states still adhered to this rule. *See* P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 603-04 (1990).

like Judge Albert Tate[16] and Professor Harvey Couch,[17] the Louisiana Supreme Court decided in *Jagers v. Royal Indemnity Co.*[18] to abandon the *lex loci delicti* rule[19] and to join the American conflicts "revolution."[20] In *Jagers*, the court refused to apply Mississippi law to an action arising out of a traffic accident involving two members of a Louisiana family on the ground that, although the accident had occurred in Mississippi, that state "had no interest" in applying its law to the particular issue before the court.[21] The issue was whether members of a Louisiana family could sue each other in tort. Unlike Louisiana, Mississippi had a rule of intrafamily immunity that prohibited such suits. The court believed that Mississippi's rule was designed to protect Mississippi families from discord, and since *Jagers* did not involve a Mississippi family, that state's family-protecting policies would not be seriously affected if its law were not applied to this case. According to the court, "[i]t would not advance any policy of the place of the tort to apply its law."[22] On the other hand, Louisiana's policy of assuring the compensation of injured persons, reflected in the absence of a rule of intrafamily immunity, would be seriously affected if Louisiana law were not applied to protect one Louisiana domiciliary who had been injured—albeit in another state—by another Louisiana domiciliary. The court said that not to apply Louisiana law

16. *See* Symeon C. Symeonides, *Louisiana Conflicts Jurisprudence, A Student Symposium: Introduction*, 47 LA. L. REV. 1105, 1106-07 (1987) (discussing Judge Tate's contribution to the development of Louisiana conflicts law, including the abandonment of the *lex loci delicti*).

17. Professor Couch played an important role in the court's turnaround by constructively criticizing the court for its adherence to the *lex loci* rule, articulating the best arguments for its abandonment, and making available to the court the latest literature on the subject. His scholarly article was relied upon heavily by the supreme court in Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973). *See generally* Harvey Couch, *Choice-of-Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook*, 45 TUL. L. REV. 100 (1970).

18. 276 So. 2d 309 (La. 1973).

19. *Id.* at 313.

20. The term "revolution," with or without quotation marks, has been used widely, with or without irony, to describe the way in which the established American conflicts orthodoxy embodied in the 1930 *Restatement of Conflict of Laws* was discarded in favor of new alternative methodologies. *See* Symeonides, *supra* note 14, at 7-158. For thorough and thoughtful critiques, see Friedrich K. Juenger, *General Course on Private International Law*, 1985 Recueil des Cours d'Academie de Droit International [R.C.A.D.I.] IV 119, 207-52, and Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 778-81 (1983).

21. *Jagers*, 276 So. 2d at 312.

22. *Id.* at 313.

"would defeat the policy the State of Louisiana continues to have—to protect its citizens from damage from the wrongful acts of others."[23] Using the prevailing conflicts jargon, the court described this case as presenting a "false conflict," that is, a case in which only one of the two involved states, here Louisiana, "had an interest" in applying its law.[24]

The supreme court's reference to "state interests" and "false conflicts" between them was a clear indication that the court was thinking in terms of a methodology known as "governmental interest analysis" first advanced by Professor Brainerd Currie[25] and since followed by many American courts. Although this inference was strengthened by the court's citations to Currie's works, the court also cited the *Restatement (Second) of Conflict of Laws*, thus giving mixed signals as to the particular methodology it was inclined to follow in the future.[26] In the absence of supreme court guidance, lower courts have speculated and improvised. Their approach to tort conflicts can be divided into two steps.

First, the court would follow interest analysis and try to determine whether each of the states factually implicated in the case was actually "interested" in having its law applied to the issue at hand. The court would identify for each state the purpose of, or policy embodied in, the substantive rule of law that was claimed to be applicable, and then determine whether, in light of the contacts of that state to the parties and the dispute, that policy would be promoted by the application of the rule to the particular case. If the answer was affirmative, that state would be considered "interested." The same analysis would

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23. *Id.*

24. *Id.* at 311-12. In American conflicts jargon, a "false conflict" is a multistate case in which only one of the involved states is "interested" in having its law applied because the policies embodied in that law would be promoted by that law's application in the particular case. When more than one state is interested in having its law applied, the resulting conflict is characterized as a "true conflict." When neither or no one state is interested in having its law applied, the case is characterized as an "unprovided for" case, because no solution was provided for the cases falling into this category by the methodology that developed this jargon, namely Brainerd Currie's governmental interest analysis. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177-87 (1963). For a discussion of the utility of the above labels in modern choice-of-law methodology, see Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is there a Middle Ground?*, 46 OHIO ST. L.J. 549, 564-66 (1985).

25. *See generally* CURRIE, *supra* note 24.

26. *See Jagers*, 276 So. 2d at 311. For a thoughtful critique of *Jagers*, see Harvey Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 TUL. L. REV. 1, 1-2 (1974).

then be repeated with the other state or states. If the other state was "not interested," the conflict would be classified as a "false conflict" and would be resolved by applying the law of the "interested" state.

If both states were "interested," the conflict would be classified as a "true conflict," and if neither state was "interested," the case would be classified as an "unprovided-for" case because no solution was provided by interest analysis. In either case, the court would go through the second step of the process. Here the courts' improvisation turned in different directions.[27] Some courts[28] continued to employ governmental interest analysis and applied the law of the forum. Other courts[29] switched to the *Restatement (Second) of Conflict of Laws*, which, generally speaking, calls for the application of the law of the state having "the most significant relationship" to the parties and the dispute and then provides vague guidelines for identifying that state.[30] At least one court supplemented the use of the *Restatement (Second)* with an additional reliance on "comparative impairment,"[31] a methodology advanced by Professor William Baxter and followed by the California courts.[32]

If the above sounds vague, confusing, and unpredictable, it may well have been that way. The confusion lingering among the lower courts was epitomized in a statement by one of them that "the interest analysis principles embodied in the Second Restatement are the applicable conflicts law of Louisiana."[33] Obviously, the *Restatement (Second)* and interest analysis are distinct choice-of-law methodologies, although they are not mutually exclusive.[34] Yet, amidst the confusion, it was encour-

27. *See generally* Hautot, *supra* note 9 (discussing Louisiana jurisprudence in tort conflicts).

28. *See, e.g.*, Sutton v. Langley, 330 So. 2d 321, 326-28 (La. Ct. App. 2d Cir.), *writ denied*, 332 So. 2d 805, *and writ denied*, 332 So. 2d 820 (La. 1976).

29. *See, e.g.*, Sandefer Oil & Gas v. AIG Oil Rig, Inc., 846 F.2d 319, 323-24 (5th Cir. 1988); Cooper v. American Express Co., 593 F.2d 612, 613 (5th Cir. 1979); Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 932-33 (5th Cir. 1974); Ardoyno v. Kyzar, 426 F. Supp. 78, 81-83 (E.D. La. 1976).

30. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 187-88 (1971).

31. *Ardoyno*, 426 F. Supp. at 84.

32. *See* Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721, 726-27 (Cal. 1978); Bernhard v. Harrah's Club, 546 P.2d 719, 723-26 (Cal.), *cert. denied*, 429 U.S. 859 (1976). *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980).

33. *Brinkley & West, Inc.*, 499 F.2d at 932.

34. This kind of eclecticism is typical of the practice of many American courts. *See*

aging to see the courts' willingness to abandon the certainty and comfort of a black-letter rule, such as the *lex loci delicti*, when they were convinced that the rule was too mechanical and arbitrary. It was simply unfortunate that these courts had to proceed without a compass. Without legislative or supreme court guidance, the lower courts reached decisions that could not be reconciled with *Jagers* or with each other. Act No. 923 provides all Louisiana courts with the same compass, and, it is hoped, with all of the other tools necessary for proceeding into this heretofore uncharted territory of tort conflicts.

III. A FEW GENERAL WORDS ON THE NEW LAW

The process of drafting what became Act No. 923 began in December 1984 and was completed about four years later. During this time, the articles drafted by the Reporter were debated, amended, and eventually adopted, first one by one and then *in toto*, by an Advisory Committee[35] and then by the Council of the Louisiana State Law Institute. On March 17, 1989, the Council again discussed all the articles together and adopted them in one piece.[36] The resulting *Projet* was first submitted to the Louisiana Legislature in 1990 as Senate Bill No. 646 by Senators William McLeod and Sidney B. Nelson. It was passed with amendments by the senate,[37] but was subsequently deferred by the house of representatives "for further study." It was then resubmitted to the Council of the Law Institute and, after a long debate, was reaffirmed in its original form, that is, without the senate amendments. In 1991, the *Projet* was resubmitted to the legislature as House Bill No. 251 by Representatives Randy Roach and Allen

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Kozyris & Symeonides, *supra* note 15, at 602-04; Symeon C. Symeonides, *Choice of Law in the American Courts in 1988*, 37 AM. J. COMP. L. 457, 458-59 (1989). For a discussion of the dangers of this kind of eclecticism in the choice of law context, see William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

35. The Committee included the following members: David Conroy, Harvey Couch, James L. Dennis, Cordell H. Haymon, Harry T. Lemmon, Howard W. L'Enfant, Andrew Rinker, Jr., Raphael J. Rabalais, Katherine S. Spaht, and A.N. Yiannopoulos. Mr. James J. Carter, Jr. was the staff attorney. Their invaluable contribution is hereby acknowledged by this author who, as the Reporter, undertakes full responsibility for the shortcomings of the final product. The Council is the Institute's supreme organ and consists of over one hundred judges, practicing attorneys, and law professors selected through an elaborate system provided for by the organizing statute. *See* William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077, 1078 (1985).

36. After editorial revisions by the Semantics Committee, these articles were resubmitted to the Council and were formally adopted on March 17, 1990.

37. *See* discussion *infra* text accompanying notes 269-70.

Bradley, and by Senator Sidney B. Nelson. Eventually it was adopted unanimously by the house of representatives by a 99-0 vote and by the senate by a 36-0 vote. After being signed by Governor Roemer on July 24, 1991, the bill became Act No. 923 of 1991.[38]

A. Temporal Effect

According to section 4 of Act No. 923, the new law will go into effect on January 1, 1992 "and shall apply to all actions filed after that date."[39] The quoted phrase means that the new law: (a) will not apply to actions already in progress, although it might well influence judicial opinion in such actions; and (b) will apply to actions filed after its effective date even if the events giving rise to these actions occurred before that date. In these cases, however, the application of the new law must remain within the confines of the Louisiana and United States Constitutions, which prohibit the retroactive application of a law if such an application would deprive someone of vested rights without due process of law.[40]

B. Placement

Act No. 923 contains thirty-six substantive articles numbered from 14 to 49. This seemingly curious numbering is explained by the fact that these articles were intended to replace articles 14 and 15 of the Civil Code and to be placed in the same part of the Code, that is, the Preliminary Title. Indeed, Act No. 923 expressly provides to that effect.[41] However, the implementation of this scheme would require the renumbering of the first thirty-one articles of Book I of the Civil Code, some of which have been in the Code since 1870 and have been cited in myriad cases and cross-references.[42] After carefully considering the logistical and other costs of such a renumbering, the Louisiana State Law Institute decided to avoid them by utilizing its statutory authority to renumber and rearrange articles of the Civil

38. Act No. 923, 1991 La. Sess. Law Serv. 1693.

39. Act No. 923 § 4, 1991 La. Sess. Law Serv. 1741.

40. *See generally* LA. CIV. CODE ANN. art. 6 & cmts. (West Supp. 1991).

41. Section 1 of Act No. 923 provides: "Chapter 3 of the Preliminary Title of the Civil Code, previously comprised of Civil Code Articles 14 and 15, is hereby amended and reenacted to be comprised of Civil Code Articles 14 through 49 . . . ." Act No. 923 § 1, 1991 La. Sess. Law Serv. 1693.

42. *See, e.g.*, LA. CIV. CODE ANN. arts. 38-46 (West 1972 & Supp. 1991) (dealing with domicile of natural persons).

Code. The Institute decided to place all but the first article of Act No. 923 at the end, rather than at the beginning, of the Civil Code, in a newly created Book IV entitled "Conflict of Laws."[43]

Whether or not justified by the practical exigencies of the situation, this decision runs contrary to the civilian tradition according to which conflicts articles are placed in the preliminary title or generally at the beginning rather than the end of civil codes.[44] In the case of the Louisiana Civil Code, the original placement of the conflicts articles in the Preliminary Title was consistent with the scope of that title, which encompassed articles on the sources of law,[45] its interpretation,[46] its operation "in time,"[47] and its operation "in space."[48] Similarly, the decision to create a new book of the Civil Code is a serious violation of the Code's architecture and its division into three books, a division that can be traced as far back as the year 161 A.D. to the Institutes of Gaius.[49] This is not to say that this architecture is perfect. In fact, its age is just about the only good thing that can be said about it. Nevertheless, hasty additions are not the best way to preserve old structures.[50]

C. Scope and Coverage

The only article of Act No. 923 that retained its original number and location was the first article of the Act, article 14. Its purpose was to delineate the scope of the Act and to establish

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43. Article 14 is the only article of Act No. 923 that retains its intended location in the Preliminary Title of the Civil Code. *See* discussion *infra* text accompanying notes 51-57. Articles 15 to 49 of Act No. 923 have been renumbered as articles 3515 to 3549, respectively, and have been placed in Book IV of the Civil Code. This author has argued against this decision, both orally and in writing, for the reasons stated *infra* text accompanying notes 44-50.

44. See, for example, the French, Belgian, Spanish, Portuguese, Italian, German, and Greek Civil Codes and most of the Latin American codes. The only jurisdiction that has deviated from this tradition is Quebec, which has placed its conflicts articles in a separate book at the end of its draft civil code.

45. *See* LA. CIV. CODE ANN. arts. 1-4 (West Supp. 1991).

46. *See id.* arts. 9-13.

47. *See id.* art. 6 (dealing with retroactivity of legislation).

48. *See id.* arts. 14-15. These articles delineate the territorial scope of Louisiana law by determining whether it should apply to a case with foreign elements. In that sense, these articles delineate the operation of Louisiana law "in space," in the same way that article 6 delineates the operation of Louisiana law "in time."

49. *See* Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693, 694-97 (1970).

50. For a most comprehensive treatment of the subject of code structure, see Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987 (1980).

its residual character vis-à-vis other, more specific, provisions of Louisiana legislation. Article 14 now provides that "[u]nless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of this Chapter."[51] Thus, Act No. 923, now Book IV,[52] applies to all multistate cases or "cases having contacts with other states," whether these contacts pertain to the domicile of the parties, the transaction or the occurrence giving rise to the dispute, or the location of its object or subject matter. These "foreign" contacts may implicate the laws of the involved foreign states in a way that raises the potential for conflict between their laws and the law of Louisiana. Book IV establishes the principles for determining whether such a conflict actually exists in a given case, and, if so, how it should be resolved.

The residual nature of Book IV is established by the introductory phrase of article 14: "[u]nless otherwise expressly provided by the law of this state."[53] Thus, Book IV is not intended to supersede more specific conflicts rules contained in other Louisiana statutes, such as the Insurance Code,[54] the Commercial Code,[55] the consumer creditor and consumer protection statutes,[56] and the Lease of Movables Act.[57] When applicable, those rules, being more specific, will prevail over the provisions of Book IV of the Civil Code.

Book IV is subdivided into eight titles corresponding to the number of sections adopted by Act No. 923. These titles have the following headings and content: Title I, General Provisions;[58] Title II, Status;[59] Title III, Marital Property;[60] Title IV,

51. Act No. 923 § 1, art. 14, 1991 La. Sess. Law Serv. 1693 (codified at LA. CIV. CODE ANN. art. 3514 (West 1992)).

52. Hereinafter the terms "Book IV," "Act No. 923," and "Act" are used interchangeably to denote the new Louisiana conflicts law of 1991, consisting of new articles 3515 to 3549 of the Civil Code. These articles are referred to hereinafter by number only.

53. LA. CIV. CODE ANN. art. 3514 (West 1992).

54. *See* LA. REV. STAT. ANN. § 22:611 (West 1978 & Supp. 1991).

55. *See id.* §§ 10:1-105 to 10:9-605 (West 1983 & Supp. 1991).

56. *See id.* §§ 9:3511, 51:1418 (West 1991).

57. *See id.* § 9:3302 (West 1991).

58. LA. CIV. CODE ANN. arts. 3515-18 (West 1992). For a discussion of these articles, see Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 REVUE CRITIQUE DE DROIT INTERNATIONALE PRIVÉ (forthcoming 1992).

59. LA. CIV. CODE ANN. arts. 3519-22 (West 1992).

60. *Id.* arts. 3523-27. A 1987 draft of these articles is discussed in Carol S. Bruch, *Codification of Conflicts Law: The Louisiana Draft*, 35 AM. J. COMP. L. 255 (1987); Wil-

Successions;[61] Title V, Real Rights;[62] Title VI, Conventional Obligations;[63] Title VII, Delictual and Quasi-Delictual Obligations;[64] and Title VIII, Liberative Prescription.[65] The scope of this paper is confined to Title VII (Delictual and Quasi-Delictual Obligations).[66]

The first article of Book IV, article 3515,[67] enunciates the book's general approach to the problem of selecting the law applicable to multistate cases. This approach is implemented by the more specific articles in the eight titles of Act No. 923. As the introductory phrase indicates, "[e]xcept as otherwise pro-

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liam A. Reppy, Jr., *Viewpoint: Louisiana's Proposed "Hybrid" Quasi-Community Property Statute Could Cause Unfairness*, 13 COMMUNITY PROP. J. 1 (1986); Symeon C. Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, 13 COMMUNITY PROP. J. at 11 (1986); Symeon C. Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 AM. J. COMP. L. 259, 266-85 (1987) [hereinafter Symeonides, *Louisiana's Draft*]. With few minor differences in verbiage, articles 3523-27 of the new law correspond to articles 8-12 of the 1987 draft discussed in these writings.

61. LA. CIV. CODE ANN. arts. 3528-34 (West 1992). A 1987 draft of these articles is discussed in Symeonides, *supra* note 11, at 1038-1104, and Symeonides, *Louisiana's Draft*, *supra* note 60, at 260-70. Articles 1-7 of the draft correspond to articles 3528-34, respectively. However, article 2 of the draft has been revised to include vices of consent. It is now codified at LA. CIV. CODE ANN. art. 3529 (West 1992).

62. LA. CIV. CODE ANN. arts. 3535-36 (West. 1992).

63. *Id.* arts. 3537-41.

64. *Id.* arts. 3542-48.

65. *Id.* art. 3549. For a discussion of a similar, but not identical, article and a discussion of the problems and dilemmas in drafting such an article, see Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413, 433-47 (1990) (discussing PROJET FOR THE CODIFICATION OF PUERTO RICAN PRIVATE INTERNATIONAL LAW (Puerto Rican Academy of Jurisprudence & Legis. Draft No. 1, 1991) [hereinafter PROJET]).

66. LA. CIV.CODE ANN. arts. 3542-48 (West 1992). For additional discussion of the tort provisions of what is now the Louisiana conflicts law, see P. John Kozyris, *Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions*, 38 AM. J. COMP. L. 475 (1990); Russell J. Weintraub, *The Contributions of Symeonides and Kozyris in Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 AM. J. COMP. L. 511 (1990); and Jean-Claude Cornu, Choice-of-Law in Tort: A Comparative Study of the Louisiana Draft on Delictual and Quasi-Delictual Obligations and the Swiss Statute on Private International Law (1989) (unpublished LL.M. thesis, Louisiana State University Law School).

67. LA. CIV. CODE ANN. art. 3515 (West 1992). This article, as well as all the articles of Title VII dealing with tort conflicts, are reproduced in the appendix accompanying this Article. In the official text of Act No. 923, these articles are accompanied by extensive comments, written by the Reporter, which attempt to describe the intended meaning of these articles for the benefit of the members of the Council of the Law Institute, the legislature, and the legal profession. Since the Reporter and this author are the same person, it is natural that there will be extensive overlap between those comments and some parts of this Article. Acknowledging this overlap from the outset and bringing it to the reader's attention obviates the need for extensive references to the comments in this Article.

vided in this Book," article 3515 is the "residual" article of Book IV.[68] If any specific article in Book IV is found to be applicable to a particular case or issue, that specific article will prevail. However, article 3515 is also the "general" article of Book IV in that it contains the general principles from which the other articles of Book IV have been derived, and in light of which they should be interpreted and applied.

D. Terminology

In enunciating the general objective of the choice-of-law process, the first paragraph of article 3515 calls for the application of the law of "the state whose policies would be most seriously impaired if its law were not applied to [the particular] issue."[69] The quoted phrase may well prove to be the "catch-phrase" by which Book IV will be remembered. It is hoped that Book IV will be judged not by that phrase *alone*, but rather by the substantive choices made by the drafters and the specific solutions they have adopted for concrete conflicts problems. Phrases like this, or like the phrases "most significant relationship," "closest relationship," "closest connection," and "strongest connection," employed respectively by the *Restatement (Second)*,[70] the Swiss,[71] the West German,[72] and the Austrian[73]

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68. LA. CIV. CODE ANN. art. 3515 (West 1992).

69. *Id.*

70. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188, 222, 283, 291 (1971).

71. *See* Bundesgesetz über das Internationale Privatrecht vom 18 Dezember 1987 [IPRG] [Federal Statute on Private International Law of December 18, 1987], 1988 Bundesblatt [BB] I 5; Loi fédérale sur le droit international privé du 18 decembre 1987 [LDIP], 1988 Feuille fédérale [FF] I 5; Legge federal sul diritto internationale privato del 18 Dicembre 1987 [LDIP], 1988 Foglio federale suizzero [FF] I 5, *translated in* Jean-Claude Cornu, Stephanie Hankins & Symeon Symeonides, *Swiss Federal Statute on Private International Law of December 18, 1987* (LSU Translation), 37 AM. J. COMP. L. 193 (1989). Article 15 of the statute reads: "The law designated [as applicable] by the present statute is, by way of exception, not to be applied if, from the totality of the circumstances, it is manifest that a particular case has only a very slight connection to that law and has a much closer relationship to another law." Cornu et al., *supra*, at 199 (footnote omitted). Article 117 reads: "In the absence of a choice of law, the contract is governed by the state with which it has the closest connections." *Id.* at 223.

72. *See* Gesetz zur Neuregelung das Internationalen Privatrechts vom 25 Juli 1986 [German Private International Law Revision Act of July 25, 1986], 1986 Bundesgesetzblatt [BGB1.I], art. 28(1), *translated in* Federal Republic of Germany: Act on the Revision of the Private International Law, 27 INT'L LEGAL MATERIALS 1, 18 (1988) ("To the extent that the law applicable to the contract has not been chosen . . . the contract shall be governed by the law of the state with which it is most closely connected."); Convention on the Law Applicable to Contractual Obligations, art. 4, 1980 O.J. (L 266) 1, 2 ("To the extent that the law applicable to the contract has not been chosen in accordance with Article 3,

conflicts codifications should be seen as mere shorthand expressions and not as accurate descriptions of the basic theory underlying these codifications. Occasionally, these catch-phrases carry a great deal of symbolism, but not much more. For example, the phrase "strongest connection," used in the Austrian codification, was chosen because it was similar enough to, but at the same time different from, the old Savignian notion of the "seat of the relationship."[74] Similarly, in drafting the Puerto Rican codification, the phrase "most significant connection" was eventually chosen as a symbolic expression of Puerto Rico's equidistance from North American and European law.[75]

In the case of Act No. 923, the negative phrasing of its catch-phrase was intended to disassociate the approach of Book IV from Brainerd Currie's "governmental interest analysis"[76] and other modern American approaches which seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance.[77] Instead, Book IV is based on the premise that the choice-of-law process should strive for ways to minimize the impairment of the involved states' interests, rather than to maximize one state's interests at the expense of those of the other states. This is accomplished by identifying the state that, in light of its relationship to the parties and the dispute, and the policies rendered pertinent by that relationship, would suffer the most serious legal, social, economic, and other consequences if the court did not apply its law to the issue.

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the contract shall be governed by the law of the country with which it is most closely connected.").

73. *See* Bundesgesetz vom 15 Juni 1978 über das Internationale Privatrecht [IPR-Gesetz] [Federal Statute of 15 June 1978 on Private International Law], 1978 BGB1 § 1(1), *translated in* Edith Palmer, *The Austrian Codification of Conflicts Law*, 28 AM. J. COMP. L. 197, app. at 222-34 (1980). Section 1 reads: "Factual situations with foreign contacts shall be judged, in regard to private law, according to the legal order to which the strongest connection exists." Palmer, *supra*, at 222.

74. The originally chosen catch-phrase, "closest connection," was thought to have even "strong[er] associations with the teachings of Savigny and his ideas of the natural *situs* of each legal relationship." Palmer, *supra* note 73, at 204. "The change in wording [to "strongest connection"] . . . was aimed at lessening this affinity with classical conflicts doctrine in order to allow for the development of new ideas." *Id.*

75. *See* Symeonides, *supra* note 65, at 428-29. This phrase is, in a sense, the half-way point between the phrase "most significant relationship" in the American *Restatement (Second)* and the phrases "strongest connection" or "closest connection" in the European codifications mentioned *supra* notes 71-73.

76. *See generally* CURRIE, *supra* note 24.

77. *See* Symeonides, *supra* note 24, at 562-63, 566-67.

On the other hand, this negative phraseology, coupled with the use of the word "impaired," is bound to evoke comparison with the "comparative impairment" approach originally advanced by Professor William Baxter and followed by the courts of California.[78] To be sure, there is nothing wrong with such a comparison or any other comparison.[79] However, to be meaningful, comparisons must go beyond the acoustic or superficial resemblance, which may well be accidental, or in any event inconsequential.[80] The assumption that such a resemblance entails an ideological or philosophical affinity should not be taken for granted, but should be tested through a careful examination of the specifics.

In this case, such an examination will reveal what both Professor Baxter and the drafters of Book IV already know: the two approaches have much less in common than their acoustic resemblance might suggest. For example, the specific rules contained in Book IV deliberately steer away from the quantitative measurement of the "impairment of state interests," which is implicit, and sometimes even explicit, in Baxter's theory.[81] Moreover, in designating the applicable law, these rules point to the law of a state other than the one to which Baxter would point. With regard to tort conflicts, one example suffices to demonstrate this difference. In one of Baxter's famous hypotheticals, two motorists from state *Y* have a car accident in state *X* while driving in excess of the speed limit of the latter state. In this case, Professor Baxter would not apply the negligence per se rule of state *X* because that state's regulatory interest embodied in the rule "will not be impaired significantly if it is subordinated

78. *See supra* note 32.

79. Curious students may find it more fruitful to compare the *substance* of Book IV with Professor Cavers' "principles of preference," *see* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 114-80 (1965), with von Mehren and Trautman's "functional approach," *see* ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS *passim* (1965), and with Professor Evrigenis' teachings. *See* Dimitrios J. Evrigenis, Les tendances doctrinales actuelles en droit internationale privé, 118 R.C.A.D.I. II 313 (1966). This author was fortunate to have been their student.

80. The negative phrasing of the catch-phrase was not accidental. *See supra* text accompanying notes 76-77. However, the use of the word "impaired" was, in a sense, accidental. Precisely in order to avoid association with Baxter's comparative impairment, the Reporter and the Advisory Committee carefully avoided the use of the word "impaired" and instead used the word "affected" in the draft submitted to the Council of the Law Institute. The change from "affected" to "impaired" was made by the Council, not because the Council wished to adopt Baxter's theory, but in order to clarify that the article contemplated *adversely* "affected" state policies.

81. *See infra* note 82.

in the *comparatively rare* instances involving two nonresidents."[82] By contrast, under article 3543 of Book IV, the negligence per se rule will apply because it is a "rule of the road" that operates territorially and because both the conduct and the resulting injury occurred in that state.[83] Because of these differences, an indiscriminate borrowing of either Baxter's theory or the California courts' application of the theory may cause more harm than good. Nothing said herein should be taken as a criticism of Baxter's approach, which is fundamentally sound and certainly worthy of emulation. The drafters of Book IV, however, consciously, knowingly, and deliberately decided not to emulate it.

E. General Approach

The first paragraph of article 3515[84] of Book IV enunciates the objective of the choice-of-law process, while the second paragraph prescribes the process or method for achieving that objective. It consists of a set of parameters intended to guide, rather than confine, the choice-of-law process.[85] The process should begin by identifying, through the resources of statutory interpretation, the various state policies that might be implicated in the conflict. These policies should include not only those embodied in the rules of law claimed to be applicable, but also the more general policies, domestic as well as multistate, that might be pertinent to the particular issue.[86]

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82. Baxter, *supra* note 32, at 13 (emphasis added). The italicized phrase is indicative of the quantitative element in Baxter's original analysis. This element is carried through in Bernhard v. Harrah's Club, 546 P.2d 719 (Cal.), *cert. denied*, 429 U.S. 859 (1976), the first case in which the California Supreme Court adopted comparative impairment. Consider, for example, the statement by the *Bernhard* court to the effect that "Nevada's interest in protecting its tavern keepers from civil liability . . . [would] not be significantly impaired when as in the instant case liability is imposed *only on those* tavern keepers who actively solicit California business." *Id.* at 725 (emphasis added). The court appeared to abandon this thinking in its next major conflicts case, Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978). However, *Offshore* seems to have gone so far in the direction of other approaches, such as von Mehren's and Trautman's "functional approach," that it raises doubts as to whether it can be classified as a comparative impairment case at all.

83. *See* case no. 3, Table 1a *infra* note 159 and text accompanying notes 159-62.

84. LA. CIV. CODE ANN. art. 3515 (West 1992).

85. For an authoritative comparison between an "approach" and a rule system, see Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

86. The Reporter's original draft article 3515 called for a consideration of "the policies embodied in the particular rules of law claimed to be applicable as well as any other pertinent policies of the involved states." LOUISIANA STATE LAW INST., REVISION OF LOUISIANA CONFLICTS LAW: A PROJET, art. 2(a), at 1 (Symeon C. Symeonides reporter, adopted Mar. 17, 1989) (on file with the *Tulane Law Review*); *cf.* VON MEHREN & TRAUT-

The next step in the process is to evaluate the "strength and pertinence" of state policies in light of "the relationship of each [involved] state to the parties and the dispute,"[87] and in light of "the policies and needs of the interstate and international systems."[88] What is to be evaluated is not the wisdom or goodness of a state policy, either in the abstract or vis-à-vis the policy of another state, but rather the "strength and pertinence" of this policy "in space."[89] A legislative policy that is strongly espoused by the enacting state for intrastate cases may in fact be attenuated in a particular multistate case that has only minimal contacts with that state. Similarly, the same policy may prove to be far less pertinent if the case has sufficient contacts with that state, but not contacts of the type that would actually implicate that policy.

Furthermore, as indicated by the repeated use of the word "issue," both in article 3515 and throughout Book IV, this evaluation is to be made with regard to each "particular issue" as to which there exists a conflict of laws. When a conflict exists with regard to only one issue, the court should focus on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue should be analyzed separately, since each may implicate different states or may bring into play different policies of the implicated states. Seen from another angle, each state having factual contacts with a given multistate case may not have an equally strong interest in regulating all issues in the case, but only those issues that actually implicate its policies in a significant way. This "issue-by-issue" analysis is an integral feature of all modern choice-of-law methodologies. This focus on the particular issue facilitates a more nuanced, individualized, and thus more rational, resolution of conflicts problems. However, one result of this analysis is the possibility that the laws of different states

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MAN, *supra* note 79, at 76-79, 376-78, 392, 394-95, 406-08. Although it was approved by the Advisory Committee as well as by the Council of the Law Institute, the above phrase did not survive the Semantics Committee, which found it redundant and replaced it with the words "relevant policies."

87. LA. CIV. CODE ANN. art. 3515 (West 1992). The relationship with the parties may consist of anything from the formal bond of citizenship or domicile, past or present, to habitual or mere residence. The relationship to the dispute may consist of any factual or legal connection to the events or the transaction giving rise to the dispute or to its subject matter.

88. *Id.*

89. *See supra* note 48; *cf.* VON MEHREN & TRAUTMAN, *supra* note 79, at 76-79, 376-78, 392, 394-95, 406-08.

may be found applicable to different issues in the same dispute. This phenomenon, known in American conflicts literature by its French name of *dépeçage*, is not as anomalous as it might seem to the uninitiated. In fact, *dépeçage* is a common occurrence in American conflicts practice, although infrequently referred to by this name.[90] However, occasionally *dépeçage* may be dangerous. Its indiscriminate use may result in an unprincipled eclecticism that distorts the policies of the involved states. This Article discusses ways of minimizing these dangers.[91]

The admonition in article 3515 to evaluate the state policies "in the light of . . . the needs of the interstate and international systems"[92] obviously goes beyond the self-evident requirement of complying with the limits prescribed by the Federal Constitution for state choice-of-law decisions.[93] What might be constitutionally permissible may not necessarily be appropriate from the perspective of choice-of-law.[94] The court should strive for decisions that not only stay within the limits prescribed by the Federal Constitution, but which are also deferential and sensitive to the needs and policies of the interstate and international systems. Some of these policies, like the policy of discouraging forum shopping or favoring interstate uniformity of result, are so universally acknowledged that they need not be mentioned expressly. Other policies, however, are more susceptible to being overlooked if they are not brought to the attention of the decisionmaker. This is why the second paragraph of article 3515 expressly mentions "the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."[95]

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90. For comprehensive discussions of this phenomenon in American conflicts law, see Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973), and Christian L. Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329 (1968).

91. *See infra* text accompanying notes 231-47.

92. LA. CIV. CODE ANN. art. 3515 (West 1992).

93. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 722-30 (1988); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-23 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-13 (1981). These are the latest decisions of the United States Supreme Court to articulate the limits imposed by the Due Process and the Full Faith and Credit clauses of the Constitution on state choice-of-law decisions.

94. *See* Peter Hay, *Reflection on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1665-66 (1981).

95. LA. CIV. CODE ANN. art. 3515 (West 1992).

"Upholding the justified expectations of the parties"[96] is a self-explanatory idea that is imbedded in the internal law of all states, but it is also an important multistate policy. It is this multistate policy that article 3515 seeks to promote. All other factors being equal, the parties should not be subjected to a law whose application they had no reason to anticipate. In some instances, however, the parties may have, or should have had, reason to anticipate the application of the law of a certain state, but they may have had no way of complying with that law.[97] Sometimes compliance with the law of one state might entail the violation of the law of another state. In these instances, the court should try to "minimiz[e] the adverse consequences that might follow from subjecting a party to the law of more than one state."[98] When all other factors are equal, the court should try to minimize the adverse impact on multistate activity and party expectations of a peculiarly American phenomenon which, for lack of a better term, can be called "pluralegalism," that is, having several legal systems within the confines of an otherwise unified country. More than two centuries ago, Voltaire complained about a similar phenomenon in pre-Napoleonic France, writing that the traveller changed legal systems as often as he changed horses.[99] The interstate traveler in the United States changes legal systems as often as he refills his car's gas tank. This

96. *Id.*

97. For example, a corporation may have reason to anticipate that the laws of states in which it does business may apply to some aspects of its internal organization, but that corporation might have no way of complying with the law of all of those states, short of reincorporating in each such state. *See* Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 625 (1947) (holding that application of the law of the state of incorporation to the internal affairs of a fraternal benefit association was required by the Full Faith and Credit Clause of the Constitution). Although this case is considered as either overruled or discredited as a Full Faith and Credit Clause case, it continues to provide support for the notion that the application of the law of the place of incorporation to the internal affairs of a corporation is *desirable from a choice-of-law perspective*. For a recent strong reaffirmation of this principle at the state level, see McDermott, Inc. v. Lewis, 531 A.2d 206, 209 (Del. 1987). For a scholarly discussion, see generally P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1. Outside the area of corporate law, parties to an ordinary juridical act that is intended to be performed in more than one state may find it difficult to comply with the requirements of each state. Even complying with the most stringent of these laws may sometimes be problematic if what is required by that law is outlawed by another state's law. In these and similar instances, it is useful to remember that enabling the parties to rely on a single law is a *desideratum* of the choice-of-law process. *See, e.g.*, Davis v. Humble Oil & Ref. Co., 283 So. 2d 783, 786-90 (La. Ct. App. 1st Cir. 1973).

98. LA. CIV. CODE ANN. art. 3515 (West 1992). This admonition should also serve as a proscription against excessive *dépeçage*. *See supra* text accompanying notes 92-94.

99. 7 OEUVRES DE VOLTAIRE, Dialogues 5 (1838) ("Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that

pluralegalism is, of course, the essence of American federalism. At least from a systemic perspective, pluralegalism may well be more good than bad. However, from the perspective of the individual caught in the midst of a conflict of laws, pluralegalism may become too high a price to pay in exchange for engaging in multistate activity. One of the goals of the choice-of-law process should be to lower that price as much as possible.

IV. THE TORTS TITLE OF THE NEW LAW

A. Structure and General Approach

The title on torts, or, in civilian terminology, "delictual and quasi-delictual obligations," begins with a general article, article 3542,[100] and then descends gradually to narrower, more specific rules for different categories of issues. Article 3543 provides for "issues of conduct and safety,"[101] article 3544 provides for "issues of loss distribution and financial protection,"[102] article 3545 provides for certain products liability cases regardless of the type of issue involved,[103] article 3546 provides for punitive damages in cases other than the products cases covered by article 3545,[104] article 3547 provides an "escape" from articles 3543-46,[105] and article 3548 contains a special rule with regard to the domicile of some corporate tortfeasors.[106]

The first paragraph of article 3542 enunciates the general objective of the choice-of-law process for tort conflicts in language that is purposefully identical to that of the first paragraph of article 3515. Thus, there should be no doubt that the objective of the choice-of-law process and the method for attaining it are the same for tort conflicts as they are in other conflicts.[107]

The second paragraph of article 3542 adds specificity to the

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citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses.").

100. LA. CIV. CODE ANN. art. 3542 (West 1992).

101. *Id.* art. 3543; *see infra* text accompanying notes 151-77.

102. LA. CIV. CODE ANN. art. 3544 (West 1992); *see infra* text accompanying notes 178-230.

103. LA. CIV. CODE ANN. art. 3545 (West 1992); *see infra* text accompanying notes 299-340.

104. LA. CIV. CODE ANN. art. 3546 (West 1992); *see infra* text accompanying notes 245-98.

105. LA. CIV. CODE ANN. art. 3547 (West 1992); *see infra* text accompanying notes 358-66.

106. LA. CIV. CODE ANN. art. 3548 (West 1992); *see infra* text accompanying notes 342-56.

107. *See supra* text accompanying notes 76-81.

description of this method by: (a) adding to the list of policies referred to in article 3515 two sets of policies that are *ex hypothesi* pertinent in tort conflicts—"deterring wrongful conduct and of repairing the consequences of injurious acts;"[108] and (b) providing an illustrative list of the most important factual contacts to be considered when evaluating the strength and pertinence of the above policies. These contacts serve the dual role of helping to identify the potentially concerned states and to assess the pertinence and strength of their respective policies and the impact of the court's decision on such policies. The list of contacts is neither exhaustive nor hierarchical and should not be interpreted as an invitation to mechanically count contacts. The fact that one state has more contacts with the dispute than other states does not necessarily mean that the law of the former state should be applied to any or all issues of the dispute, unless such contacts are of the kind that bring into play policies of that state which "would be most seriously impaired if its law were not applied to that issue."[109] As one court put it, "the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."[110]

The general approach of article 3542 is implemented by specific rules contained in articles 3543-3546, which are essentially a priori legislative determinations of "the state whose policies would be most seriously impaired if its law were not applied."[111] Being more specific, these articles should, when applicable, prevail over article 3542.[112] Besides focusing on narrow issues rather than broad categories, the rules of articles 3543-3546 are content oriented, open ended or elliptical, and rebuttable or displaceable.

The rules of articles 3543-3546 are "content-oriented" rather than "jurisdiction-selecting"[113] because, expressly or by

108. LA. CIV. CODE ANN. art. 3542 (West 1992).

109. *Id.*

110. Schultz v. Boy Scouts of America, 480 N.E.2d 679, 684 (N.Y. 1985) (quoting with approval Miller v. Miller, 237 N.E.2d 877, 879 (N.Y. 1968)).

111. LA. CIV. CODE ANN. art. 3542 (West 1992).

112. However, articles 3543-3546 may be displaced in those cases falling within the escape clause of article 3547. *See infra* text accompanying notes 357-66.

113. The term "jurisdiction-selecting" was coined by Professor Cavers. *See* David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 175 (1933). The term has been widely accepted for describing the perceived indifference of traditional choice-of-law rules to the content of the conflicting substantive laws and to the result produced by their application in individual cases.

implication, they elevate the content of the substantive laws of the involved states to one of the principal factors for choosing the applicable law. The content of the substantive laws of the involved states is taken into account through the references to: (1) The "policies of the involved states" in the second paragraph of articles 3515 and 3542;[114] (2) the "standard of conduct" provided by the law of the place of conduct or the place of injury in article 3543;[115] (3) the "higher standard of financial protection for the injured person" in article 3544(2)(b)(iii);[116] (4) the "[products liability] law of this [forum] state" in article 3545;[117] and (5) whether or not "[p]unitive damages . . . [are] authorized" by the law of the states, in article 3546.[118]

The rules of articles 3543-3546 are open-ended or elliptical in the sense that they do not cover all the cases or issues that might fall under their general headings. In full awareness of the limits of the legislative process, the drafters decided that it would be futile or dangerous to attempt to establish a priori legislative rules for all conceivable tort conflicts cases. Instead, the drafters decided to confine themselves to those cases that appeared susceptible to relatively noncontroversial choice-of-law rules derived from the accumulated experience of Louisiana and American jurisprudence. These are the cases that are covered by articles 3543-3546. The remaining cases are left for judicial determination within the parameters established by article 3542, which applies "[e]xcept as otherwise provided in [the Torts Title]."[119] Thus, as will be explained later, articles 3543, 3544, and 3546 cover only issues that can be classified as "issues of conduct and safety," "issues of loss distribution," or "issues of punitive damages," respectively.

Consequently, in a nonproducts case, issues that do not fit into any one of the three categories above are to be decided under article 3542. With regard to issues of conduct and safety, article 3543 does not cover cases in which the tortfeasor could not have foreseen that the injury would occur in a state which provides for a higher standard of conduct than that of the state where his conduct occurred.[120] Similarly, with regard to issues

114. LA. CIV. CODE ANN. arts. 3515, 3542 (West 1992).
115. *Id.* art. 3543.
116. *Id.* art. 3544(2)(b)(iii).
117. *Id.* art. 3545.
118. *Id.* art. 3546.
119. *Id.* art. 3542.
120. *See infra* text accompanying notes 168-70.

of loss distribution, article 3544 does not cover cases in which the conduct, the injury, and the domicile of each party are in different states.[121] With regard to products liability, article 3545 does not cover cases in which the four contacts considered pertinent by that article (injury, victim's domicile, manufacturing of the product, and acquisition of the product) are located in different states.[122] These and all other "unprovided-for" cases or issues are relegated to the flexible "approach" of article 3542. It is hoped that, in time, and through trial, and perhaps error, the judicial applications of that approach may produce additional rules or, at least, more specific guidelines.[123]

Finally, the rules of articles 3543-3546 are rebuttable or displaceable in that they are subject to the escape clause of article 3547.[124] As with any a priori rules, articles 3543-3546 may, in exceptional cases, produce a result that is incompatible with the general objective of article 3542, pursuant to which they were drafted. In order to avoid such a result, article 3547 contains an "escape clause" that, when applicable, overrides articles 3543-3546 and refers these cases back to article 3542, the residual article of the Torts Title of Book IV.

B. The Distinction Between Conduct-Regulating Rules and Loss-Distributing Rules

Moving now to specifics, the first feature of Book IV that calls for explanation is the distinction drawn by articles 3543 and 3544 between issues of conduct and safety on the one hand, and issues of loss distribution or financial protection on the other. The so-called "rules of the road" are examples of rules that establish standards of conduct and safety. Rules imposing a ceiling on the amount of compensatory damages or providing immunity from suit, such as intrafamily immunity or guest statutes, are examples of rules of loss distribution or financial protection. This distinction can be traced to, although it is not directly taken from, *Babcock v. Jackson*[125] and *Schultz v. Boy*

121. *See infra* Table 5a, at note 228.

122. *See infra* text accompanying notes 302-06.

123. *Cf.* Reese, *supra* note 85, at 322-23 ("[T]he courts . . . should look in each case to the basic policies involved and to reach the result that would best implement these policies . . . . It is to be expected that, as cases are decided by reference to the underlying policies, issues which can apparently be regulated satisfactorily by a given rule will gradually appear.").

124. *See infra* text accompanying notes 357-66.

125. 191 N.E.2d 279 (N.Y. 1963).

Scouts of America,[126] the alpha and omega of the American conflicts revolution,[127] and can also be grounded in *Jagers*,[128] Louisiana's leading case on tort conflicts.

Babcock allowed a New York guest-passenger to recover damages under New York law from her New York host-driver for injury received in Ontario, despite the fact that under Ontario's guest statute the host-driver would be immune from suit by his guest-passenger.[129] The court emphasized that the issue at stake was

> not whether the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong concededly committed.[130]

The court noted that

> [w]here the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[131]

Schultz drew the same distinction between conflicts with regard to "the appropriate standards of conduct, rules of the road, for example,"[132] and conflicts with regard to "allocating

126. 480 N.E.2d 679 (N.Y. 1985).

127. For a recent application of this distinction, see FCE Transp. v. Ajayem Lumber Midwest Corp., No. 87AP-1146, 1988 Ohio App. LEXIS 1854, at *12-14 (Ohio Ct. App. May 12, 1988), where the court distinguished between issues of conduct and issues of loss distribution, although without using this terminology. The conduct-regulating issue was a classic example of a "rule of the road" to which the court applied unhesitantly the law of the site of the traffic accident (Michigan) because that state had "a more substantial governmental interest in controlling traffic behavior within its borders." *Id.* at *13. The loss-distribution issue was whether the tortfeasor's employer should compensate the victim's employer for the increase in worker's compensation premiums attributable to the accident. Since all parties, and especially the claimant employer, were Ohio domiciliaries, the court applied Ohio law, under which such compensation was not available. *Id.* at *7-8.

128. Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973); *see also supra* text accompanying notes 18-26.

129. *Babcock*, 191 N.E.2d at 285.

130. *Id.* at 284.

131. *Id.*

132. Schultz v. Boy Scouts of America, 480 N.E.2d 679, 684 (N.Y. 1985).

losses that result from admittedly tortious conduct."[133] Concluding that the issue of charitable immunity belonged in the latter category, the court applied the law of the common domicile of the tortfeasor and the victims, rather than the law of the place of the wrongful conduct, and denied recovery.[134]

Finally, although the Louisiana Supreme Court in *Jagers* did not use this particular terminology, the court's discussion seemed to clearly presuppose this distinction. The court's discussion was divided into two parts.[135] In the first part of the opinion, the court discussed the issue of intrafamily immunity, an obvious issue of loss distribution, and applied to it the law of Louisiana, which was the common domicile of the tortfeasor and the victim, on a rationale that was not dissimilar to that of *Babcock*. In the second part of the opinion, the court discussed the issue of negligence and affirmed the lower courts' findings that the tortfeasor was negligent and that the victim was not contributorily negligent.[136] Because the issue of the tortfeasor's negligence apparently did not raise any legal questions, the courts' discussion of it did not contain citation to either a Louisiana or a Mississippi rule of law.[137] The issue of the victim's alleged contributory negligence did raise legal questions and the court of appeal appeared willing to apply the law of Mississippi, the locus of the accident.[138] However, because the defendant failed to prove that Mississippi's law on this issue was different than Louisiana's, the lower courts applied the law of the forum as the residual law,[139] and the supreme court affirmed.[140]

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133. *Id.* at 685.

134. *Id.* at 689.

135. *See* Jagers v. Royal Indem. Co., 276 So. 2d 309, 311-13 (La. 1973).

136. *Id.* at 313.

137. It would be safe to assume that, had such questions been raised, they would have been resolved under the law of Mississippi, where both the conduct and the injury occurred.

138. *See* Jagers v. Royal Indem. Co., 257 So. 2d 806, 808 (La. Ct. App. 3d Cir. 1972), *aff'd*, 276 So. 2d 309 (La. 1973).

139. *See id.* at 809. The lower court reasoned that "where the laws of a sister state are relied upon, such laws must, in the absence of definite proof to the contrary, be presumed to be the same as ours." *Id.* at 808. After discussing a Mississippi case on assumption of risk and finding it inapplicable, the court concluded that "[s]ince no Mississippi law has been shown to us that [is different than Louisiana's], . . . we now must look to the applicable law in Louisiana." *Id.* at 809.

140. For a similar recent Louisiana case, see Brown v. DSI Transps., Inc., 496 So. 2d 478 (La. Ct. App. 1st Cir.), *writ denied*, 498 So. 2d 18 (La. 1986). *Brown* arose out of an accident in Alabama involving Texas and Louisiana parties. Applying Alabama law, the lower court found the defendant negligent, but also assigned to the plaintiff a certain percentage of fault. *Id.* at 480. The court of appeal affirmed and approved of that application,

Although the distinction between conduct-regulating and loss-distributing rules is rather basic to American tort law and American conflicts law, it has been either rejected or recognized grudgingly by the recent European codifications. Austria, Spain, the former East Germany, and Poland are among the jurisdictions that reject it.[141] Ironically, in the latter two jurisdictions, the law of the common domicile of the parties overrides the *lex loci delicti*.[142] Thus, these jurisdictions went from one extreme to the other, from a purely territorial to a purely personal thesis,

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saying that with regard to the issue of the applicable standard of care, there was "no conflict" since Alabama was the only interested state and that the other two states could not interject their standard of care rules. *Id.* at 480-81. However, the court distinguished that issue from the issue of the impact that any fault assigned to the plaintiff under Alabama law would have on his recovery. Under Alabama's contributory negligence rule, any fault by the plaintiff could diminish his recovery to zero, while under Louisiana's and Texas' comparative negligence law, the plaintiff's fault could simply reduce his recovery in proportion to the percentage of his fault. *Id.* at 482-83. Without using the terminology of loss distribution, the court of appeal recognized that the issue of assigning legal consequences to fault already adjudged under the law of the state of the accident was an issue on which that state had little interest and on which the domicile of the parties had all the interest. *Id.* at 480-83.

141. For Austria's rejection of this distinction, see § 48 of the Federal Statute of 15 June 1978 on Private International Law, which provides in part that "[n]oncontractual damage claims shall be judged according to the law of the state in which the damage-causing conduct occurred. However, if the persons involved have a stronger connection to the law of one and the same other state, that law shall be determinative." Palmer, *supra* note 73, at 234.

For Spain, see Article 10(9) of the Preliminary Title of the Spanish Civil Code (Código Civil) as amended on July 9, 1974, by Normas de derecho internacional privado [Norms of Private International Law], Boletín Oficial del Estado [B.O.E.], No. 163, art. 10(9), *translated in* Extract of the Preliminary Title of the Spanish Civil Code as Amended on July 9, 1974, 1974 NETH. INT'L L. REV. 367, 372 ("Non-contractual obligations shall be governed by the law of the place where the event from which they derive has occurred.").

142. *See* Rechtsauwendungsgesetz [RAG] [Act Concerning the Law Applicable to International, Private, Family, and Labor Law Relationships as Well as to International Commercial Contracts], 1975 Gesetzblatt der DDR, Teil I [GBl.I] 748 (G.D.R.), *translated in* Friedrich K. Juenger, *The Conflicts Statute of the German Democratic Republic: An Introduction and Translation*, 25 AM. J. COMP. L. 332, 354-63 (1977). Section 17 of the statute reads:

> (1) The liability for injuries inflicted outside of contractual relationships, including competency and other personal prerequisites as well as the measure of damages, is governed by the law of the state in which the injury was caused.
>
> . . .
>
> (3) If the person who inflicted the injury and the injured party are nationals or residents of the same state, the law of that state shall apply.

Juenger, *supra*, at 359. Article 31 reads:

> § 1. Obligations not arising from legal transactions shall be governed by the law of the State where the act giving rise to the obligation has occurred.
>
> § 2 If, however, the parties are nationals of the same state and have their domicile in its territory, the law of this State shall be applied.

Id.

without pausing to consider ways in which to compromise the two theses. The Swiss, Portuguese, and Hungarian codifications, as well as the Hague Conventions on Traffic Accidents and on Products Liability, contain varying admonitions to "not prejudice" or to "take into consideration" the laws of conduct and safety prevailing at the place of conduct.[143]

As viewed by the drafters of Book IV, this distinction is amply supported by the substantive law of torts and its two fundamental objectives—deterrence and compensation. It is also a good vehicle for bringing about the desired equilibrium between the perennially competing principles of territoriality and personality, by assigning each principle its own zone of preference. Most people can agree that a state's policy of deterrence embodied in its conduct-regulating rules is implicated by all substandard conduct that occurs within its territory, regardless of whether the parties involved are domiciled in that state. Conversely, a state's loss-distribution policy may or may not extend to nondomiciliaries acting within its territory, but does extend to its domiciliaries even when they act outside that state. In other words, most reasonable people can agree that conduct-regulating rules are territorially oriented, whereas compensation and loss-distributing rules usually are *not* territorially oriented. As the *Schultz* court noted:

> [W]hen the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place

143. *See* 1988 BB I 5, 1988 FF I 5 art. 142(2) (Switz.), *translated in* Cornu et al., *supra* note 71, at 230 ("Rules of safety and conduct in force at the place of the act are [to be] taken into consideration."); C. CIV. art. 45(3) (as amended in 1966, Portugal) ("If, however, the actor and the victim have the same nationality or, failing that, have the same habitual residence, and they happen to be in a foreign country, the applicable law shall be that of the common nationality or habitual residence, without prejudice to provisions of local state laws which must be applied to all persons without differentiation.") (author's translation); A Magyar Népköztàrsaság Elnöki Tanácsának 1979. évi 13. számú törvényerejü rendelete a nemzetközi magánjogról [Decree on Private International Law], 33 Magyar Közlöny [MK] 495 § 33(1) (Hung.), *translated in* Francis A. Gabor, *A Socialist Approach to the Codification of Private International Law in Hungary: Comments and Translation*, 55 TUL. L. REV. 63, app. at 98 ("The law of the place of the tortious conduct shall determine whether the tortious conduct was realized by the violation of traffic or other security regulations."); Convention on the Law Applicable to Products Liability, Oct. 21, 1972, art. 9, 11 INT'L LEGAL MATERIALS 1283, 1284 (1972) ("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."); Convention on the Law Applicable to Traffic Accidents, Oct. 26, 1968, art. 7, 8 INT'L LEGAL MATERIALS 31, 35 (1969) ("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.").

> of the tort "will usually have a predominant, if not exclusive, concern" because the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance .... Conversely, when the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, ... rules such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit, considerations of the State's admonitory interest and party reliance are less important.[144]

As is often the case, however, the problem is determining "which is which." The line between conduct-regulating rules and loss-distributing rules may not always be as clear as one would like.[145] For instance, a given rule of law may at the same time regulate safety and (or through) loss distribution.[146] This ambiguity did not escape the attention of the drafters of Book IV. After several debates and careful consideration of the alternatives,[147] the drafters eventually decided that this ambiguity

144. Schultz v. Boy Scouts of America, 480 N.E.2d 679, 684-85 (N.Y. 1985) (citations omitted) (quoting Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963)).

145. Even the *Schultz* court had problems with this distinction. The dissenting judge argued that while New Jersey's rule of charitable immunity was a rule of loss distribution, New York's rule of "charitable nonimmunity" should not be so classified. *Shultz*, 480 N.E.2d at 693-94 (Jasen, J., dissenting). The majority responded rather summarily that "New York's rule holding charities liable for their tortious acts ... is also a loss-allocating rule, just as New Jersey's charitable immunity statute is." *Id.* at 685 n.2.

146. For example, in Calla v. Shulsky, 543 N.Y.S.2d 666 (App. Div. 1989), the court observed:

> The classification of statutes into those which regulate conduct and those which allocate loss may be regarded as somewhat artificial in that the act of shifting financial responsibility often serves to regulate conduct by providing an inducement to exercise oversight in order to avoid the economic disincentive of vicarious liability. As this case well illustrates, a particular statute may defy classification and render unavailing the criteria governing choice of law suggested in *Schultz v. Boy Scouts of America*.

Id. at 669. The *Shulsky* court found that a provision of New York's labor law that imposed upon an owner absolute liability for injury caused by an unsafe scaffolding device was both conduct-regulating and loss-distributing, and was applicable to a labor accident in New Jersey involving a New York employer and a New York employee. *Id.* at 669-70. Another case decided the same year, Zangiacomi v. Saunders, 714 F. Supp. 658 (S.D.N.Y. 1989), involved almost identical facts but was decided the other way. The court held that the very same provision of New York's labor law was a rule of "conduct as opposed to loss distribution" and thus was inapplicable to a labor accident in Connecticut involving a New York employee and a New York employer. *Id.* at 664.

147. One of the alternatives considered was to provide that when an issue could not be clearly categorized, the issue should be decided under article 3542. This proposal was eventually rejected because: (a) issues that clearly do not belong in either category are

and whatever uncertainty it may bring with it are preferable to abandoning the above distinction, which is probably one of the few breakthroughs in modern American conflicts law; that this ambiguity might just provide the right dosage of needed flexibility for a court in choosing between article 3543 and 3544.[148] Finally, they felt that, in any event, the availability of the escape clause of article 3547 was a sufficient guarantee that this distinction would not become a straight jacket. In the words of Professor Baxter, as with any other functional approach, the process of distinguishing between the two categories of issues

> involves identification, in each case, of the objective or objectives underlying each of the competing internal rules. That process of identification will sometimes be difficult, and reasonable disagreement may exist regarding the objectives of various internal rules. The process, however, is a familiar one rather than a unique concomitant of the choice analysis proposed.[149]

Indeed, the decision of whether the issue is one of conduct regulation or one of loss distribution may occasionally be difficult, but, as the Louisiana Supreme Court noted in *Jagers*, "[d]ifficulty . . . is no excuse for abandoning the judicial function."[150] Any difficulty in the application of this distinction in practice is a price one must be prepared to pay for attaining more rational solutions to conflicts problems.

C. *Article 3543: Issues of Conduct and Safety*

Article 3543 applies to "issues pertaining to standards of conduct and safety."[151] Based on the premise that the rules that establish these standards are territorially oriented,[152] article 3543 discounts the parties' domicile as a connecting factor and focuses instead on the place of conduct and the place of injury. The operation of this article may be illustrated by the following

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already covered by article 3542; and (b) when the particular issue belongs to both categories, the case will probably be exceptional enough to invoke the escape clause of article 3547, which will refer the case to article 3542. The structure and arrangement of the Torts Title of Book IV offer support for proposition (a). Unfortunately, it is not completely clear whether the final language, as opposed to the spirit, of article 3547 supports proposition (b).

148. Professor Weintraub, who expresses serious misgivings about the practicality of this distinction, suggests that "Article [3543's] application of the law of the place of conduct and injury should be limited to directory rules intended to regulate conduct in the strictest sense." Weintraub, *supra* note 66, at 515.

149. Baxter, *supra* note 32, at 12 n.28.

150. Jagers v. Royal Indem. Co., 276 So. 2d 309, 313 (La. 1973).

151. LA. CIV. CODE ANN. art. 3543 (West 1992).

152. *See supra* text accompanying notes 125-49.

table.[153]

TABLE 1
(The application of art. 3543 to issues of conduct and safety)

#	C	I	P	D	Applicable Law
1.	A	A	-	-	A
2.	a	a	-	-	a
3.	A	B	-	-	A
4.	a	b	-	-	a
5.	A	b	-	-	A
6.	a	B	-	-	B if "foreseeable"
7.	La.	B	-	La.	La.

1. Conduct and Injury in the Same State or in States with the Same Standards

The first paragraph of article 3543 subjects to the law of the place of conduct: (a) cases in which the conduct and the injury occurred in the same state;[154] and (b) cases in which the conduct and the injury occurred in different states, and in which (i) the two states prescribe the same standards of conduct and safety;[155] or (ii) the state of the injury provides for a lower standard than the state of conduct.[156]

When, as in patterns 1 and 2, the contacts of conduct and injury coincide in the same state, or when, as in patterns 3 and 4, these contacts are located in different states that adhere to the same standard of conduct and safety, there is no actual conflict. In interest-analysis terminology,[157] these cases would easily be

153. Table 1 illustrates the application of article 3543 to issues of conduct and safety. In this and all other tables hereinafter, the first two columns represent the place of the conduct (C) and the injury (I), respectively. The next two columns represent the domicile of the "injured person," or plaintiff (P), and the "person who caused the injury," or defendant (D), respectively. For the meaning of these terms, see *infra* notes 187, 189-91. The use of a capital letter in a particular column indicates that the state represented by that letter prescribes a "higher standard" of conduct than a state represented by a lower-case letter. The last column shows the law applicable under article 3543. The symbol "-" indicates that the identity or the law of the state represented by that column is inconsequential.

154. Table 1, *supra*, (patterns 1 & 2).

155. *Id.* (patterns 3 & 4).

156. *Id.* (pattern 5).

157. The use of interest-analysis terminology in this Article does not imply the adoption of interest analysis by either this author or the drafters of Book IV. For this author's views on this matter, see generally Symeonides, *supra* note 24. Although coined by interest

classified as "false conflicts" in which the state of conduct would be the only interested state.[158] This is why in these cases the first paragraph of article 3543 calls for the application of the law of the place of conduct, without any further qualifications and without regard to whether the standard prescribed by that law is higher or lower than, for instance, the standard prescribed by the law of the domicile of either or both parties.[159]

A case in point is Professor Baxter's hypothetical of the two motorists from state *Y* who are involved in a traffic accident in state *X* while driving in excess of the speed limit of the latter

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analysts, the terms "false," "true," or "apparent conflicts," or "unprovided for cases" have also been employed or accepted by proponents of other modern choice-of-law methodologies and provide a common vocabulary in the dialogue among conflicts lawyers of any philosophical orientation.

158. *See supra* note 24.

159. When the laws of the domiciles of the victim (P) and the tortfeasor (D) are added to the calculus, patterns 1-4 produce the following subpatterns:

TABLE 1a

(Cases where conduct and injury occurred in the same state)

Pattern 1

#	C	I	P	D	Appl. Law
1.	A	A	A	b	A
2.	A	A	b	A	A
3.	A	A	b	b	A
4.	A	A	b	c	A
5.	A	A	B	c	A
6.	A	A	b	C	A

Pattern 2

#	C	I	P	D	Appl. Law
7.	a	a	a	B	a
8.	a	a	B	a	a
9.	a	a	B	B	a
10.	a	a	B	C	a
11.	a	a	b	C	a
12.	a	a	B	c	a

(Cases where conduct and injury occurred in different states with same standards)

Pattern 3

#	C	I	P	D	Appl. Law
13.	A	B	c	A	A
14.	B	C	a	a	B
15.	C	A	A	b	C
16.	A	B	A	c	A
17.	B	A	c	A	B
18.	A	B	c	d	A
19.	A	B	C	d	A
20.	A	B	c	D	A

Pattern 4

#	C	I	P	D	Appl. Law
21.	a	b	C	a	a
22.	b	c	A	A	b
23.	c	a	a	B	c
24.	a	b	a	C	a
25.	b	a	C	a	b
26.	a	b	C	d	a
27.	a	b	c	D	a
28.	a	b	C	D	a

state.[160] Few people would dispute the fact that the speed limit of state *X* is a typical "rule of the road" and that state *X* has an interest in applying this rule even to out-of-staters driving within that state. This interest is not diminished if, in addition to, or *in lieu of*, criminal liability, state *X* chooses to impose the civil sanction of negligence per se on violators of its speed limit. Not to apply the per se rule to an out-of-state motorist would impair state *X*'s ability to effectively ensure compliance with its speed limit. Professor Baxter recognizes this interest of state *X* but considers it weaker than the countervailing interest of state *Y* in controlling loss distribution among its domiciliaries.[161] Professor Weintraub points out that it is rather unlikely that a state *Y* motorist driving into state *X* would slow down because that state has a negligence per se rule.[162] He may well be right. It may also be true that the same motorist would not slow down at the sight of a street sign indicating a speed limit lower than she is accustomed to in her home state. None of the above arguments, however, would seem to negate or diminish the interest of state *X* in defining the price of a violation of its conduct-regulating rules that was committed within that state and caused injury there.

2. Conduct and Injury in Different States with Different Standards

Cases in which the tortfeasor's conduct and the victim's injury occur in different states[163] that prescribe different standards of conduct and safety may present a true conflict or a false conflict depending on which of the two states prescribes the higher standard. To be sure, whether or not there is a true conflict also depends on whether the particular conduct in question conforms with the standards of both, neither, or only one of these two states. If the particular conduct conforms to the standards of both states, there is no tort, and thus there can be no conflict. If the particular conduct conforms to the standards of neither state, then the conduct is tortious in both states, and, generally, it makes little difference which state's law the court

160. *See supra* text accompanying notes 81-83. This hypothetical mirrors case 3 in Table 1a, *supra* note 159.

161. *See* Baxter, *supra* note 32, at 12-13.

162. *See* Weintraub, *supra* note 66, at 515.

163. For cases in which the conduct or injury occurs in more than one state, see *infra* part IV.C.3.

applies. This discussion is confined to cases in which the particular conduct conforms to the law of only one of these states (*i.e.*, either the state of such conduct or the state of the resulting injury).

Pattern 5

If the conduct violates the "higher" standard of the state of conduct, but not the "lower" standard of the state of injury,[164] the resulting conflict between the laws of these two states can be characterized as a false conflict, in which only the state of conduct has an interest in having its law applied. Since the particular conduct is considered substandard under the law of the state where it occurred, the application of that law would promote the policy of that state in policing conduct and preserving safety within its borders, without subordinating whatever policies may be embodied in the law of the state of injury, which allows a lower standard of conduct. The effectiveness of the conduct-regulating law of the state of conduct would be seriously impaired if exceptions were made for out-of-state injuries. Such exceptions

164. If the laws of the domicile of the victim (P) and the tortfeasor (D) are added to the calculus, pattern 5 produces the following subpatterns:

TABLE 1b
(Cases in which the state of conduct has a higher standard than the state of injury)

Pattern 5

#	C	I	P	D	Appl. Law
5.	A	b	A	A	A
8.	B	a	a	a	B
11.	A	b	b	A	A
17.	A	b	A	b	A
27.	A	b	c	A	A
29.	A	b	C	A	A
34.	B	c	A	A	B
37.	B	c	a	a	B
42.	C	a	a	B	C
44.	C	a	a	b	C
45.	A	b	A	c	A
47.	A	b	A	C	A
54.	B	a	C	a	B
55.	B	a	c	a	B
57.	A	b	c	d	A
64.	A	b	C	d	A
66.	A	b	c	D	A
69.	A	b	C	D	A

are not warranted by the fact that the state of injury happens to allow a lower standard of conduct, since that standard is designed to protect conduct within, not without, that state. In addition, there is nothing unfair about subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of conduct of that state, he should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state.[165] For these reasons, the first paragraph of article 3543 authorizes the application of the law of the place of conduct.[166]

Pattern 6

On the other hand, cases in which the particular conduct does not violate the "lower" standards of the state of conduct but does violate the "higher" standards of the state of injury,[167] are likely to present true conflicts in which both states are interested in having their law applied. These are the "other cases" (*i.e.*, other than those provided for by the first paragraph) for which the second paragraph of article 3543 authorizes the application of the law of the state of injury, but only if the tortfeasor

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165. For a similar thesis, see Professors Cavers' third "principle of preference," which provides as follows:

> Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.

CAVERS, *supra* note 79, at 159. For an eloquent defense of this principle, see *id.* at 159-66.

166. LA. CIV. CODE ANN. art. 3543 (West 1992). For a recent case reaching this result, see Rong Yao Zhou v. Jennifer Mall Restaurant, Inc., 534 A.2d 1268, 1270-71 (D.C. 1987), which is almost identical to the old favorite, Schmidt v. Driscoll Hotel, Inc., 82 N.W.2d 365 (Minn. 1957). In *Rong*, a driver who became intoxicated in a restaurant in the District of Columbia drove into Maryland and there injured a D.C. couple. *Rong*, 534 A.2d at 1269-70. The victims sued the restaurant owner in the District of Columbia under the District's dram shop act. Maryland has no such act and does not impose civil liability on tavern owners under such circumstances. *Id.* at 1270. Applying interest analysis, the court found this to be a false conflict in which only the District of Columbia was interested and applied the law of the District. *Id.* at 1270-71.

167. When the laws of the domiciles of the victim (P) and the tortfeasor (D) are added to the calculus, pattern 6 produces the following subpatterns:

should have foreseen the occurrence of the injury in that state.[168] This foreseeability should not be confused with the foreseeability of substantive tort law, but should be understood in a "spatial" sense. The pertinent question here is not whether the tortfeasor should have foreseen the occurrence *of the injury*, but whether he should have foreseen that the injury would occur *in the particular state* in which the injury did occur.[169] Secondly, as indicated by the use of the phrase "*should* have foreseen" in the second paragraph of article 3543,[170] the foreseeability test contemplated therein is an objective, not a subjective one. Finally, if the occurrence of the injury in that state was *not* reasonably foreseeable, then the law of that state would not apply under article 3543. Such a case would then be governed by the residual article (article 3542), which, depending on the other factors in the case, may or may not produce the same result.

The application of the law of the place of injury to cases falling within pattern 6 may appear as a tilt towards the victim. If this is a tilt, it is neither an unqualified nor an unjustified one. It is expressly qualified by the foreseeability defense made available to the tortfeasor by the second paragraph of article 3543.

TABLE 1c
Pattern 6
(Cases governed by the law of the place of injury, if occurrence of injury in that state was foreseeable)

#	C	I	P	D	Appl. Law
6.	a	B	a	a	B
7.	b	A	A	A	A
12.	a	B	B	a	B
15.	b	A	A	b	A
18.	a	B	a	B	B
19.	b	A	b	A	A
30.	a	B	C	a	B
31.	a	B	c	a	B
35.	b	C	A	A	C
38.	b	C	a	a	C

#	C	I	P	D	Appl. Law
39.	c	A	A	b	A
40.	c	A	A	B	A
48.	a	B	a	C	B
49.	a	B	a	c	B
51.	b	A	c	A	A
53.	b	A	C	A	A
58.	a	B	c	d	B
62.	a	B	C	d	B
65.	a	B	c	D	B
68.	a	B	C	D	B

168. LA. CIV. CODE ANN. art. 3543 (West 1992).

169. A similar provision in the *Projet for the Codification of Puerto Rican Private International Law* clarifies this point by providing that the application of the law of the state of injury will depend on whether "that state's contacts with the defendant's actual or intended course of conduct were such as to make foreseeable the occurrence of the injury in that state." PROJET, *supra* note 65, art. 46(b), at 150; *see also* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 360 (3d ed. 1986) (proposing rule for tort conflicts using comparable language).

170. LA. CIV. CODE ANN. art. 3543 (West 1992).

By protecting the tortfeasor from a law whose application he could not reasonably have anticipated, this defense makes the application of the law of the state of injury in the remaining cases not only constitutionally permissible, but appropriate from a choice-of-law perspective. Not to apply that law would defeat the primary reason for which that state has established the higher standard, that is, to protect people within its territory. While it is true that the policy of this state stands in opposition to the policy of the state of conduct, the fact that the *impact* of that conduct is felt in another state is a good enough reason to apply the law of the latter state. Although reasonable people may disagree, the application of the law of the place of injury in cases of pattern 6 can be defended rather easily by resort to both judicial practice and established academic doctrine.[171]

Pattern 7

What may be more difficult to justify is the abandonment of this principle when it comes to cases falling within pattern 7. These cases are in all respects identical to those within pattern 6, except that now the state of conduct is the forum state. The third paragraph of article 3543, however, essentially provides that cases falling within pattern 7 are not to be treated like cases falling within pattern 6.[172] This paragraph provides that conduct in Louisiana by a person domiciled in, or having another significant connection with, Louisiana is to be judged according to Louisiana standards of conduct and safety, even if it violates

171. See, inter alia, Professor Cavers' first "principle of preference" which provides, in part, that "[w]here the liability laws of the state of injury set a higher standard of conduct . . . than do the laws of the state where the person causing the injury has acted . . . the laws of the state of injury should determine the standard . . . applicable to the case." CAVERS, *supra* note 79, at 139. For cases reaching this result in a similar fact-law pattern, see the famous Bernhard v. Harrah's Club, 546 P.2d 719 (Cal.) (allowing recovery under California's dram shop act where the injury occurred and the victim was domiciled, even though the law of Nevada, where the defendant acted and was domiciled, would not impose civil liability), *cert. denied*, 429 U.S. 859 (1976), and the recent case of Sommers v. 13300 Brandon Corp., 712 F. Supp. 702 (N.D. Ill. 1989) (applying Indiana's dram shop act against an Illinois tavern owner for injury caused by one of his intoxicated patrons in Indiana).

172. The following table illustrates, through the last two columns, the difference between the second and third paragraphs of article 3543. This table is otherwise identical to Table 1c, *supra* note 167, which illustrates the operation of the second paragraph of article 3543 to the cases of pattern 6. In Table 1d, the state of Louisiana has been substituted for state "a" or state "A" in Table 1c. The last column of Table 1d shows the cases that will be affected by the third paragraph of article 3543 if the defendant meets the requirements prescribed therein, that is, if he was either "domiciled in, or had another significant connection with" Louisiana. LA. CIV. CODE ANN. art. 3543 (West 1992).

the "higher" standards of another state where the injury occurs. This paragraph was not contained in the draft submitted by the Reporter and the Advisory Committee to the Council of the Law Institute. It was drafted by the Council after a long debate in order to "ensure that conduct in Louisiana by persons domiciled in, or having another similarly significant relationship with, this state will not be subjected to higher standards of another state where the injury might occur."[173]

Professor Weintraub is justifiably critical of this provision.[174] Using as an example Louisiana Revised Statutes section 9:2800.1(B), which provides that tavern owners are not liable for the accidents caused by their intoxicated patrons,[175] Weintraub finds it "outrageous" and "unfortunate" that "under protection of uncivilized Louisiana law, Louisiana bars near the border could launch visiting drunks like unguided missiles back into Texas or Oklahoma."[176] Indeed, assuming, but not conceding, that this case falls within the scope of article 3543, then the third paragraph of this article will protect the Louisiana tavern owner or social host from liability imposed by the law of Oklahoma, where his drunk patron or guest drove and caused the injury.

TABLE 1d
(Comparing patterns 6 and 7)

#	C	I	P	D	Appl. Law ¶ 2	¶ 3
6.	La	B	La	La	B	La
7.	b	LA	LA	LA	LA	
12.	La	B	B	La	B	La
15.	b	LA	LA	b	LA	
18.	La	B	La	B	B	La
19.	b	LA	b	LA	LA	
30.	La	B	C	La	B	La
31.	La	B	c	La	B	La
35.	b	C	LA	LA	C	
38.	b	C	La	La	C	

#	C	I	P	D	Appl. Law ¶ 2	¶ 3
39.	c	LA	LA	b	LA	
40.	c	LA	LA	B	LA	
48.	La	B	La	C	B	La
49.	La	B	La	c	B	La
51.	b	LA	c	LA	LA	
53.	b	LA	C	LA	LA	
58.	La	B	c	d	B	La
62.	La	B	C	d	B	La
65.	La	B	c	D	B	La
68.	La	B	C	D	B	La

173. LA. CIV. CODE ANN. art. 3543 cmt. j (West 1992). It is worth noting that the *Projet* adopted by the Puerto Rican Academy of Legislation and Jurisprudence does not contain this third paragraph. *See* PROJET, *supra* note 65.

174. *See* Weintraub, *supra* note 66, at 515-16.

175. *See* LA. REV. STAT. ANN. § 9:2800.1 (West 1991). By sheer coincidence this is the very same statute that prompted the Council's debate and produced the third paragraph of article 3543. However, rather than focusing on the bar owner as Weintraub does, the Council was thinking more of the "social host," who is immunized by § 9:2800.1(C) from liability for injury caused by his drunk guest in the same way that the bar owner is immunized by § 9:2800.1(B). *See id.*

176. Weintraub, *supra* note 66, at 515-16.

Weintraub takes note of the potentially salvaging role of the escape clause of article 3547 but expresses pessimism on whether such a case would be worth arguing for a contingent fee. This pessimism may well be justified in the case of a social host offering his guest a drink, say in Baton Rouge, which is more than 300 miles from the nearest Oklahoma town. On the other hand, a case against the owner of a bar situated only a couple of miles from the border may well be worth taking on a contingent fee. Be that as it may, there is no denying that the third paragraph of article 3543 is a typical example of hometown protectionism which should be neither vilified nor, of course, idealized, but can be understood as a very common part of the legislative process in this imperfect world.

3. Conduct or Injury in More Than One State

Article 3543 and the above discussion speak of the places of conduct and injury as if these places can always be determined with ease, or as if there is always only one such place. Obviously this is not always the case. However, determining the places of conduct or injury is essentially a factual inquiry and should be approached as such. Whatever legal questions are raised by such inquiry, they should be approached with the understanding that legal characterization is to be undertaken under the law of the forum.[177] For instance, cases in which the injurious conduct occurs in more than one state should be approached under the principles of causation found in the law of the forum. Ordinarily, these principles will enable the court to determine which particular conduct was, legally speaking, the principal cause of the injury. Following such a determination, the case will be governed either by the law of the state of that conduct or by the law of the state of the injury, depending on which paragraph of article 3543 is applicable, and subject always to the "escape clause" of article 3547. In some instances, the fact that the injurious conduct was not localized in any single state will render the case

177. *Cf.* PROJET, *supra* note 65, art. 5, at 2-3. ("[T]he characterization of legal or factual issues for purposes of selecting the applicable provision of this Code is to be done in accordance with the legal categories, concepts, and terms of the law of [the forum]."); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (1971) ("The classification and characterization of Conflict of Laws concepts and terms are determined in accordance with the law of the forum . . . ."). Although Book IV does not contain such an article, the same principles can be derived from the residual article (article 3515), which, however, is not as inexorably pointed to the law of the forum.

exceptional enough to trigger the escape clause of article 3547, even without resorting to the principles of causation.

Cases involving multiple victims who sustained their respective injuries in different states should be handled separately for each victim. Cases where the same victim sustained injury in more than one state should be resolved by a factual determination of where the injury was primarily suffered. Following such a determination, the case will be governed either by the law of the state of injury or by the law of the state of conduct, depending on which paragraph of article 3543 applies, and subject always to the escape clause of article 3547.

D. Article 3544: Issues of Loss Distribution

1. Common-Domicile Cases

One of the few uncontested gains of the American conflicts revolution in the arena of tort conflicts has been the increasing acceptance of the parties' domicile as the focal point around which to resolve, or at least debate, the conflicts between laws of loss distribution. When both the tortfeasor and the injured party are domiciled in the same state, opinions tend to converge on the proposition that that state has a better claim to apply its law than, for instance, the state of the injury.[178] Indeed, there is enough of a convergence of opinion in both judicial and academic circles on this proposition that it is accurate to speak of a common-domicile *rule*. As one knowledgeable observer noted, "there has been . . . a universal perception . . . that with respect to tort rules of the loss-distribution kind, the law of the parties' common home state has a much stronger claim to application than does the law of the locus."[179] Opinions tend to diverge, however, when it comes to defining the exact scope of this rule, demarcating its boundaries, and, especially, articulating its philosophical foundations. The first dilemma of the conflicts codifier is whether to espouse the common-domicile rule, and, if so, how

178. As the *Schultz* court reasoned:

> Under those circumstances, the locus jurisdiction has at best a minimal interest in determining the right of recovery or the extent of the remedy in an action by a foreign domiciliary for injuries resulting from the conduct of a codomiciliary that was tortious under the laws of both jurisdictions. Analysis then favors the jurisdiction of common domicile because of its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority.

Schultz v. Boy Scouts of America, 480 N.E.2d 679, 685 (N.Y. 1985) (citations omitted).

179. Korn, *supra* note 20, at 789.

exactly to define the fact-law patterns, issues, and persons that should be included within its scope.

By way of example, and moving from the narrowest to the broadest formulation, the scope of the common-domicile rule could be defined in at least the following five ways, each of which reflects different philosophical assumptions and biases in favor of forum law, the law that favors recovery, or both: (a) confine this rule to cases of the *Babcock* or *Jagers* pattern,[180] that is, cases where the common domicile is in the forum state and that state's law is more protective of the victim than is the law of the place of the injury; (b) phrase this rule in forum-neutral terms but confine it to cases where the common domicile is the state most favorable to recovery;[181] (c) liberate the rule from its pro-recovery bias and apply the law of the common domicile "for better or worse," that is, whether or not that law favors recovery;[182] (d) extend the common-domicile rule to cases in which the tortfeasor and the victim are domiciled in different states, if these states have the same law on the issue;[183] and, finally, (e) extend the scope of this rule beyond issues of loss distribution. The latter has been done in recent continental codifications, including the East German, Hungarian, Polish, Portuguese, and Swiss codifications, where, with varying exceptions, the law of the common domicile applies to all tort issues, to the exclusion of the *lex loci delicti* and without regard to which of the two laws is more favorable to the victim.[184]

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180. *See supra* text accompanying notes 18-26 and 129-31.

181. Consider the following "rule of choice-of-law," extrapolated by Professor Sedler from the judicial applications of interest analysis: "When two parties from a recovery state, without regard to forum residence, are involved in an accident in a nonrecovery state, recovery will be allowed." Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1034 (1977).

182. *See* Table 3, *infra* p. 724 (patterns 1 & 2). Cases falling within this category can be further distinguished into (a) cases where the suit is brought in the common domicile and (b) cases where the suit is brought in the state of the injury. According to Professor Sedler, the American practice has been to apply the law of the common domicile to cases of the first category. Sedler, *supra* note 181, at 1033-34. Of the category (b) cases, Professor Sedler addresses only those in which the state of the injury allows recovery while the common domicile does not. His third "rule" states that "the courts are divided, with the majority view being that the forum should apply its own law allowing recovery." *Id.* at 1035.

183. *See* Table 3, *infra* p. 724 (patterns 1 & 2). According to Professor Sedler, this has been the practice of most American courts when the two domiciles favor recovery. Sedler, *supra* note 181, at 1034; *see also* Table 3, *infra* p. 724 (pattern 1).

184. The pertinent provisions of the East German and Polish codifications provide that the law of the common domicile displaces the *lex loci delicti* regardless of whether the issue involved is one of regulation of conduct or one of loss distribution. *See supra* note 142. The same displacement is possible under the pertinent provision of the Austrian codi-

Although Act No. 923 does not go as far as these last codifications, article 3544 does adopt a version of the common-domicile rule. However, this rule: (a) is clearly confined to matters of loss distribution, such as guest statutes or compensatory damages, as distinguished from matters of conduct and safety or issues of punitive damages;[185] (b) is further confined to disputes "between a person injured . . . and the person who caused the injury,"[186] as distinguished, for instance, from disputes between joint tortfeasors;[187] (c) is subject to the escape clause of article 3547;[188] (d) is phrased in bilateral, forum-neutral terms; and (e) is phrased in terms that neither favor nor disfavor recovery. In

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fication, which provides that "if the persons involved have a stronger connection with the law of one and the same other [than the *locus delicti*] state," the law of that state applies. Palmer, *supra* note 73, at 234. On the other hand, the Portuguese provision provides that the displacement of the *lex loci delicti* by the law of the common domicile shall be "without prejudice to provisions of local state laws which must be applied to all persons without differentiation." After restating the *lex loci delicti* rule, § 32 of the Hungarian Decree on Private International Law of 1979 provides that "[i]f the domicile of the tortfeasor and the injured party is in the same State, the law of that State shall be applied." 33 MK 495 § 32(3), *translated in* Gabor, *supra* note 143, at 98. This provision is qualified, however, by by two other provisions: § 32(4), which provides that "[i]f, according to the law governing the tortious act or omission, 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" and § 33(1), which provides that "[t]he law of the place of the tortious conduct shall determine whether the tortious conduct was realized by the violation of traffic or other security regulations." *Id.* §§ 32(4), 33(1), *translated in* Gabor, *supra* note 143, at 98. Similarly, article 133 of the Swiss conflicts statute, which authorizes the application of the law of the common habitual residence of the tortfeasor and the victim, is qualified by several provisions in the same statute, including that of article 142(2), which requires that "[r]ules of safety and conduct in force at the place of the act are [to be] taken into consideration." 1988 BBI 5, 1988 FF I 5 arts. 133 ¶1, 142 ¶ 2, *translated in* Cornu et al., *supra* note 71, at 228, 230.

185. LA. CIV. CODE ANN. art. 3543 (West 1992). For matters of conduct and safety under article 3543, see discussion *supra* text accompanying notes 151-77. For punitive damages under article 3546, see discussion *infra* text accompanying notes 248-98.

186. LA. CIV. CODE ANN. art. 3544 (West 1992).

187. Thus, claims for contribution or indemnification between joint tortfeasors, or between a tortfeasor and a person vicariously liable for his acts (*e.g.*, an employer or parent), are not covered by article 3544, but rather by article 3542, the residual article. *See supra* text accompanying notes 119-23. Nevertheless, in applying article 3542, the court may be guided by the rules of article 3544.

When one tortfeasor causes injury to more than one person, the applicable law is to be determined separately with regard to each victim. When one person is injured by more than one tortfeasor, the latter's obligations vis-à-vis the victim and the law governing them, are to be determined separately with regard to each tortfeasor.

For purposes of this Article, the "injured person" in a survival action is the deceased victim. *See* LA. CIV. CODE ANN. art. 2315.1 (West 1991). In a wrongful death action, however, *id.* art. 2315.2, or in an action for loss of consortium, *id.* art. 2315, the "injured persons" are the persons who qualify as plaintiffs under those articles.

188. *See infra* text accompanying notes 357-68.

other words, the law of the common domicile is to be applied "for better or worse," regardless of whether it provides a higher or lower standard of financial protection for the tort victim than, for instance, the place of the conduct or injury or both.

The operation of the common-domicile rule of article 3544 may be illustrated by the table reproduced below. Here again, the first two columns represent the places of conduct and injury respectively, the next two columns represent the domicile of the "injured person" (plaintiff)[189] and the "person who caused the injury" (defendant)[190] respectively, while the last column represents the state whose law is applicable under the article. The use of a lower-case letter in a particular column indicates that the state represented by that column has a "lower" standard of financial protection, such as a guest statute, an immunity-from-suit rule, or a limit on the amount of compensatory damages, than the other state involved in the conflict. The use of a capital letter indicates that the particular state has a "higher" standard, such as a nonimmunity rule or a higher amount of compensatory

189. It should be noted that the terms "injured person" and "plaintiff" are not necessarily or always synonymous. For example, in a survival action under article 2315.1, the injured person is the deceased and the plaintiffs are his surviving beneficiaries in the order provided in that article. LA. CIV. CODE ANN. art. 2315.1 (West Supp. 1991); *see supra* note 187. In other cases, the actual plaintiff may simply be the assignee or subrogee of the injured person. By consistently using the term "injured person" rather than the term "plaintiff," Book IV signifies that in cases where these two terms do not coincide in the same person, only the former and not the latter term is relevant for purposes of the Book. The same understanding should be kept in mind when reading this Article, which, for the sake of convenience, uses the terms "plaintiff" or "victim" in lieu of the more accurate "injured person."

190. It should be noted that the terms "person who caused the injury" and "defendant" are not necessarily synonymous. For example, the defendant may be the insurer of the actual tortfeasor being sued under a direct action statute which does not require joinder of the actual tortfeasor. By consistently using the long and awkward term "person who caused the injury" rather than the more common term "defendant," Book IV signifies that in cases where these two terms do not coincide in the same person, only the former, and not the latter, term is relevant for the purposes of that Book. The same understanding should be kept in mind in reading this Article, which, for the sake of convenience, uses the terms "defendant" or "tortfeasor" in lieu of the more accurate but longer term "person who caused the injury." Of course, this term is not without problems. In many instances, the question of whether the defendant actually caused an injury is a hotly contested factual issue that cannot be resolved until the end of a full-fledged trial. In many cases, this question may also be a legal one on which the laws of the involved states are in sharp disagreement. To accommodate these eventualities, Book IV would have had to use the phrase "the person *claimed to have* caused the injury" or perhaps some other even longer and more awkward phrase. For instance, the 1973 Hague Convention on the Law Applicable to Products Liability employs the term "la personne dont la responsabilité est invoquée," or "the person claimed to be liable." Convention on the Law Applicable to Products Liability, Oct. 21, 1972, art. 4, 11 INT'L LEGAL MATERIALS 1283 (1972).

damages, than the other state involved in the conflict. The use of the symbol "-" indicates that the identity of the state represented by the particular column is inconsequential. It may be assumed that the law of that state is the opposite of that of the other state in the same line.

TABLE 2
(The common-domicile rule of art. 3544(1))

#	C	I	P	D	Appl. Law
1.	-	-	A	A	A[191]
2.	-	-	a	a	a[192]

191. As indicated by the use of the symbol "-" in the first two columns and as explained in the text, the application of the common-domicile rule of article 3544(1) is not dependent on the identity of the state or states in which the conduct or the injury occurred nor on the content of their laws. Nevertheless, in order to illustrate the wide gamut of cases that fall under this rule and to evaluate its overall fairness, it might be helpful to add to the calculus the law of the states of conduct and injury. When this is done, pattern 1 of Table 2 produces the following subpatterns:

TABLE 2a
(Cases in which the state of common domicile has a higher standard)

#	C	I	P	D	Appl. Law
5.	A	b	A	A	A
7.	b	A	A	A	A
13.	b	b	A	A	A
33.	b	c	A	A	A
34.	B	c	A	A	a
35.	b	C	A	A	A

192. When the states of conduct and injury are added to the calculus, pattern 2 produces the following subpatterns:

TABLE 2b
(Cases in which the common domicile has a lower standard)

#	C	I	P	D	Appl. Law
6.	a	B	a	a	a
8.	B	a	a	a	a
14.	B	B	a	a	a
36.	B	C	a	a	a
37.	B	c	a	a	a
38.	b	C	a	a	a

As the table illustrates, the common-domicile rule of article 3544 encompasses not only cases in which the common domicile provides for a higher standard of financial protection than the state of conduct and injury, that is, cases falling into the *Babcock* [193] or *Jagers* [194] pattern. It also encompasses cases in which the common domicile is the state with the "lower standard,"[195] that is, cases that fall into the reverse-*Babcock* pattern, such as *Sutton* [196] and *Schultz*.[197]

The application of the law of the common domicile in cases of the first, or *Babcock*, pattern need not be defended here, not only because it codifies established Louisiana jurisprudence,[198] but also because it is universally acknowledged, even by skeptics, as the American conflicts revolution's "only unqualified success."[199]

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193. *See* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (allowing a New York guest-passenger to recover damages under New York law from her New York host-driver for injury received in Ontario despite the fact that under Ontario's guest-statute the host-driver would be immune from liability to his guest-passenger); *see also* discussion *supra* text accompanying notes 125-31.

194. *See* Jagers v. Royal Indem. Ins. Co., 276 So. 2d 309 (La. 1973) (allowing a Louisiana mother to recover damages under Louisiana law for injury received while riding as passenger in an automobile driven by her son in Mississippi despite the fact that under Mississippi's intrafamily immunity the defendant would be immune from liability); *see also* discussion *supra* text accompanying notes 21-25, 135-40. Both *Babcock* and *Jagers* involved an issue of loss distribution, rather than an issue of regulation of conduct, and both cases allowed recovery under the law of the common domicile of the parties.

195. Table 2, *supra* p. 719 (pattern 2).

196. Sutton v. Langley, 330 So. 2d 321 (La. Ct. App. 2d Cir.), *writ denied*, 332 So. 2d 805, *and writ denied*, 332 So. 2d 820 (La. 1976). The *Sutton* court applied Louisiana law to allow a Texas guest-passenger to recover from her Texas host-driver and his insurer for injury suffered in a traffic accident in Louisiana, despite the fact that the Texas guest statute would bar recovery. It should be noted, however, that the *Sutton* accident also involved two other cars and some defendants from the *locus delicti*. *But cf.* Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973) (applying *locus delicti* in spite of the fact that both plaintiff and defendants were foreign). Under subparagraph (1) of article 3544, cases like *Sutton* will be governed by the law of the common domicile.

197. Schultz v. Boy Scouts of America, 480 N.E.2d 679 (N.Y. 1985) (applying the charitable immunity rule of New Jersey, the state where the plaintiffs and one of the defendants were domiciled, rather than the law of New York, where the wrongful conduct occurred, and which did not provide for charitable immunity).

198. *Jagers*, 276 So. 2d at 312-13; *see* discussion *supra* text accompanying notes 21-25 and 135-40.

199. Korn, *supra* note 20, at 788. According to Korn, the "only unqualified success" of the American conflicts revolution and "probably . . . its most enduring contribution" was confined to the subcategory of common-domicile cases in which suit is brought in the common domicile rather than in the injury state. *Id.* For recent examples, see Forsman v. Forsman, 779 P.2d 218, 220 (Utah 1989) (applying California law and allowing a California woman to sue her husband for injuries she sustained in a traffic accident in Utah while riding as a passenger in his car; Utah, unlike California, had a rule of intrafamily immu-

There is considerably less agreement regarding cases falling under the second, or reverse-*Babcock* pattern. At least in cases in which the action is brought in the state of conduct and injury, the prevailing American practice has been to apply the law of that state rather than that of the parties' common domicile.[200] By extending the common-domicile rule to these types of cases, the first subparagraph of article 3544 runs contrary to the prevailing practice. This was a conscious policy choice that was based on elementary notions of evenhandedness rather than conceptual symmetry.[201]

2. A Few Words on Domicile

As the preceding discussion indicates, domicile is one of the primary connecting factors under article 3544. This article should be read together with article 3518 of Book IV, which provides that the domicile of a person "is determined in accordance

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nity), and Nelson v. Hix, 522 N.E.2d 1214, 1218-19 (Ill.) (The court applied Ontario law and allowed recovery for an Ontario woman injured in a traffic accident in Illinois while riding in a car driven by her Ontario husband. At the time of the accident, Illinois, but not Ontario, prohibited interspousal suits.), *cert. denied*, 488 U.S. 925 (1988).

200. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 414-17 (Minn. 1973) (where the court, following the "better-law approach," refused to apply Ontario's guest statute in a suit by an Ontario guest-passenger against his Ontario host-driver arising out of a traffic accident in Minnesota, which did not have a guest statute). A Louisiana court reached the same result in a similar case. *See Sutton*, 330 So. 2d 321; *see also* Korn, *supra* note 20, at 789-90. This practice was disapproved by the pronouncement of the first "Neumeier rule" in Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972), which provides for the application of the law of the common domicile of the guest-passenger and the host-driver whether that state provides for a higher or a lower standard than the state of injury. *Id.* at 457. *Schultz* is one of the few major cases to follow this part of the first Neumeier rule and to apply the law of the common domicile when that state has a lower standard than the state of injury. *See Schultz*, 480 N.E.2d at 686-87.

201. The *Schultz* court offered the following reasons for applying the law of the common domicile even in cases where that state, unlike the state of injury, denies recovery:

> First, it significantly reduces forum-shopping opportunities, because the same law will be applied by the common-domicile and locus jurisdictions, the two most likely forums. Second, it rebuts charges that the forum-locus is biased in favor of its own laws and in favor of rules permitting recovery. Third, the concepts of mutuality and reciprocity support consistent application of the common-domicile law. In any given case, one person could be either plaintiff or defendant and one State could be either the parties' common domicile or the locus, and yet the applicable law would not change depending on their status. Finally, it produces a rule that is easy to apply and brings a modicum of predictability and certainty to an area of the law needing both.

480 N.E.2d at 686-87. Although *Schultz* was published after the first drafts of article 3544, the above reasons fairly reflect the considerations that influenced the debate of this article by the Advisory Committee.

with the law of [the forum]."[202] For natural persons, domicile is defined in articles 38-46 of the Louisiana Civil Code of 1870 in a way that is similar to the definition prevailing in most other legal systems.[203] For juridical persons, article 3518 of Book IV provides that "[a] juridical person may be treated as a domiciliary of either the state of its formation or the state of its principal place of business, whichever is most pertinent to the particular issue."[204] Also relevant in this respect is article 3548 of Book IV, which provides that certain foreign corporations that incur a delictual liability from activity conducted within Louisiana may be treated as Louisiana domiciliaries.[205]

For purposes of article 3544, the pertinent domicile is the domicile "at the time of the injury."[206] This is stated expressly in both subparagraphs of article 3544 and is implied by the use of the past tense throughout the article. On the other hand, article 3542, which refers to "the domicile, habitual residence, or place of business of the parties"[207] without assigning any time dimension to them, allows consideration of a party's domicile at both the time of the critical event and the time of litigation. Thus, in determining whether a case falls within the common-domicile rule or any other rule of article 3544, the court should focus on the domicile of the parties at the time of the injury. However, in deciding whether such a case is exceptional enough to come under the escape clause of article 3547, which operates in conjunction with article 3542, or in deciding cases falling directly under article 3542, the court should consider the parties' domicile at both the time of the injury and the time of litigation. For example, a post-injury change of domicile by the victim usually brings into play the pertinent compensatory policies of his new domicile in the same way that a post-injury change of domicile by the tortfeasor will bring into play the new domicile's policy of deterring or protecting tortfeasors. Since the court's decision will inevitably have an impact on these states, the change of domicile cannot be dismissed as irrelevant, provided of course that it is bona fide.[208]

Finally, it should not be forgotten that the reason domicile

202. LA. CIV. CODE ANN. art. 3518 (West 1992).
203. *Id.* arts. 38-46 (West Supp. 1991).
204. *Id.* art. 3518 (West 1992).
205. *Id.* art. 3548; *see* discussion *infra* text accompanying notes 341-56.
206. LA. CIV. CODE art. 3544 (West 1992).
207. *Id.* art. 3542.
208. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (holding that the plain-

has been chosen as the primary connecting factor for purposes of article 3544 is that domicile connotes a permanent, factual, consensual, and formal bond between a person and a given society. Because of this bond, the person participates, however indirectly, in the shaping of that society's values and may reasonably expect the protection of its laws. Correspondingly, that society has both a right and a duty to be concerned about that person's welfare. When the domiciliary bond is attenuated, for whatever reason, both the person's expectations and the society's concerns may also be diminished accordingly. Thus, when a person is only nominally domiciled in one state but habitually resides in, or has another substantial factual connection with, another state implicated by the particular issue, the interest of the latter state in protecting him may be stronger than that of the former state. Depending on the other factors in the case, such a case may be a good candidate for invoking the "escape clause" of article 3547.[209]

3. "Fictitious Common-Domicile" Cases

The second clause of subparagraph (1) of article 3544 extends the common-domicile rule to what may be called "fictitious common domicile" cases, that is, cases in which the tortfeasor and the victim are domiciled in different states which adhere to a "substantially identical" standard of loss distribution.[210] By treating these parties as if they were domiciled in the same state, this provision consciously engages a legal fiction that will alleviate the court's choice-of-law burden by properly identifying and resolving as "false conflicts" a great number of cases, especially those involving multiple victims or multiple tortfeasors. The operation of this rule may be illustrated by the following table, using the same abbreviations as above in Table 2.

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tiff's post-accident acquisition, in good faith, of a new domicile in Minnesota was sufficient to trigger that state's interest in protecting her).

209. *See infra* text accompanying notes 357-66.

210. A different kind of a "fictitious common domicile" may be produced by the application of article 3548 of the new law, which allows a foreign juridical person who transacts business in Louisiana and incurs a delictual obligation out of activity in this state to be treated as a Louisiana domiciliary. *See infra* text accompanying notes 343-55 (discussing article 3548 and its impact on article 3544).

TABLE 3
(The "fictitious common-domicile" rule of art. 3544(1))

#	C	I	P	D	Appl. Law
1.	-	-	A	B	A B[211]
2.	-	-	a	b	a b[212]

Article 3544 does not attempt to define exactly what is required for the laws of the two states to be "substantially identical," nor does it answer the question of which of the two laws to apply. Both problems are left to judicial interpretation, and in most instances they will resolve themselves. For instance, if both states have a guest statute, an intrafamily immunity rule, or a charitable immunity rule, then the laws of both states on the issue of whether the defendant is susceptible to suit are "substantially identical." In such cases, it makes no difference which law is applied, since in either case the plaintiff's suit will be barred.

211. When the laws of the states of conduct and injury are added to the calculus, this pattern produces the following subpatterns:

TABLE 3a

#	C	I	P	D	Appl. Law
24.	a	a	B	C	A C
29.	A	b	C	A	C A
40.	c	A	A	B	A B
47.	A	b	A	C	A C
53.	b	A	C	A	C A
68.	a	B	C	D	C D
69.	A	b	C	D	C D
63.	a	b	C	D	C D

212. When the states of conduct and injury are added to the calculus, this pattern produces the following subpatterns:

TABLE 3b

#	C	I	P	D	Appl. Law
21.	A	A	b	c	b c
31.	a	B	c	a	c a
44.	C	a	a	b	a b
49.	a	B	a	c	a c
55.	B	a	c	a	c a
57.	A	b	c	d	c d
58.	a	B	c	d	c d
61.	A	B	c	d	c d

On the other hand, if the two states have a ceiling on the amount of compensatory damages but the two ceilings differ significantly on the amount, then, on the issue of whether or not the plaintiff may recover unlimited damages, the law of the two states will be deemed as not "substantially identical." Consequently, even if the state of conduct or injury or both impose no such ceiling, the plaintiff may not recover unlimited damages. The exact amount of the plaintiff's damages will depend in part on which of the two ceilings the court chooses to apply. Since article 3544 does not address this question, the question will be answered under the residual article (article 3542).

Finally, it should be noted that the legal fiction of treating two states with "substantially identical" laws as being the same state for choice-of-law purposes does *not* extend to states other than those in which the parties are domiciled. For example, if the conduct, the injury, and the defendant's domicile are located in three different states that adhere to a "substantially identical" standard of loss distribution, these states are not treated as one state by article 3544. Consequently, this case would not fall under clause (a) of subparagraph (2) of article 3544, which would authorize the application of the above standard,[213] but would instead fall under the residual article, article 3542. There is a good possibility, however, that this standard will be found applicable under article 3542.

4. Split-Domicile Cases

Split-domicile cases, that is, cases in which the tortfeasor and the victim are domiciled in different states, present much more difficult if not intractable problems for the conflicts codifier. Accordingly, the first question is how many, if any, of these cases are at all susceptible to a priori choice-of-law rules. Unlike most European codifiers, the drafters of Book IV concluded that neither their collective foresight nor the experience accumulated from the vast laboratory of American interstate conflicts was capable of providing solutions for all split-domicile cases.

As a result, article 3544 addresses only some of these conflicts, those that are described in subparagraph (2) of the arti-

213. *See* Table 4, *infra* p. 726 (patterns 1 & 2).

cle.[214] The remaining cases[215] are implicitly relegated to article 3542, which by its language applies "[e]xcept as otherwise provided in [the Torts Title]."[216] This relegation should be seen as a proper exercise of legislative restraint and an expression of confidence in the potential of the judicial process. It is hoped that, in applying the flexible approach prescribed by article 3542, the courts will, in time, develop more specific rules or guidelines.

Subparagraph (2) of article 3544 divides split-domicile cases into two major categories addressed by clauses (a) and (b) of that subparagraph, respectively.[217]

a. Clause (a)

The first category comprises the cases in which both the injurious conduct and the resulting injury occurred in the domicile of either the tortfeasor or the victim. Clause (a) of subparagraph (2) refers these cases to the law of that domiciliary state in which both the conduct and the injury occurred, regardless of whether that state provides for a higher or lower standard of financial protection than the law of the domicile of the other party. The operation of this paragraph may be illustrated in the following table, using the same abbreviations as above in Tables 2 and 3.

TABLE 4
(Split-domicile cases and art. 3544(2)(a))

#	C	I	P	D	Appl. Law
1.	a	a	B	a	a
2.	A	A	b	A	A
3.	a	a	a	B	a
4.	A	A	A	b	A

Again, using familiar casebook favorites as examples, these cases may be further subdivided into four fact-law patterns. Pattern 1 encompasses cases like *Cipolla v. Shaposka*,[218] in which

214. LA. CIV. CODE ANN. art. 3544(2) (West 1992); *see also* Table 4, *infra* p.726; Table 5, *infra* p.730(patterns 1 & 2).

215. *See* Table 5a, *infra* note 228.

216. LA. CIV. CODE ANN. art. 3542 (West 1992).

217. *Id.* art. 3544(2).

218. 267 A.2d 854, 856 (Pa. 1970) (applying Delaware's guest statute and thus denying recovery to a Pennsylvania plaintiff injured in Delaware while riding as a guest-passenger in the car owned and driven by a Delaware host-driver).

the conduct and the injury occurred in the tortfeasor's domicile, which had a lower standard (*e.g.*, a guest statute) than the victim's domicile. Pattern 2 encompasses cases like *Hurtado v. Superior Court*,[219] in which the conduct and injury occurred in the tortfeasor's domicile, which had a higher standard (*e.g.*, more generous compensatory damages) than the victim's domicile. Pattern 3 encompasses cases like *Neumeier v. Kuehner*,[220] in which the conduct and injury occurred in the victim's domicile, which had a lower standard (*e.g.*, a guest statute) than the tortfeasor's domicile.[221] Finally, pattern 4 is the reverse-*Neumeier* pattern, that is, cases in which the conduct and the injury occur at the victim's domicile, which has a higher standard than the tortfeasor's domicile.

Those interest analysts who tend to ignore territorial factors and instead focus exclusively on domicile would characterize the cases of patterns 1 and 4 as true conflicts and the cases of patterns 2 and 3 as "unprovided for" cases. Resort to territorial factors, however, readily transforms these conflicts into mere

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219. 522 P.2d 666, 671 (Cal. 1974) (allowing a Mexican plaintiff to recover damages under the higher standard of California, where the conduct and injury occurred and the defendant was domiciled).

220. 286 N.E.2d 454 (N.Y. 1972) (applying Ontario's guest statute, where the conduct and injury occurred and the guest-passenger was domiciled, rather than the law of New York, where the defendant host-driver was domiciled). *But see* Erwin v. Thomas, 506 P.2d 494 (Or. 1973) (applying Oregon law and allowing an action for loss of consortium for a Washington plaintiff whose husband was injured in Washington by an Oregon defendant, even though Washington law did not allow such action). *Neumeier* is more famous for enunciating a set of choice-of-law rules for guest statute conflicts. The first *Neumeier* rule calls for the application of the law of the common domicile of the parties, if the car is also registered in that state. *Neumeier*, 286 N.E.2d at 457. The first part of the second *Neumeier* rule calls for the application of the law of the defendant's domicile if the accident occurred in that state and that state has a defendant-protecting law. *Id.* at 457-58. This rule would produce the same result as article 3544 in pattern 1 of Table 4. The second part of the second *Neumeier* rule calls for the application of law of the plaintiff's domicile if the accident occurred in that state and that state has a plaintiff-protecting law. This rule would produce the same result as article 3544 in pattern 4 of Table 4. Patterns 2 and 3, as well as all other cases, are presumptively relegated to the law of the place of the accident by the third *Neumeier* rule. *See id.*

221. *See* Stutsman v. Kaiser Found. Health Plan, 546 A.2d 367 (D.C. 1988) (applying Virginia law and denying a Virginia husband an action for loss of consortium against two District of Columbia medical providers for the death of his wife caused by medical malpractice in Virginia). In *Stutsman*, Virginia, unlike the District of Columbia, did not allow actions for loss of consortium. The court distinguished this case from Kaiser-Georgetown Community Health Plan v. Stutsman, 491 A.2d 502 (D.C. 1985) (*Stutsman I*), an earlier case that applied District of Columbia law to the late Mrs. Stutsman's own medical malpractice action because, unlike her husband, she was a member of the District's workforce and was required to obtain health insurance benefits through her employer. *Stutsman*, 546 A.2d at 373.

"apparent conflicts" or renders all these labels entirely dispensable. Better yet, resort to territorial factors can solve these conflicts in a way that is consistent with both the interests of the involved states and the expectations of the parties.

Thus, when, as in patterns 1 and 2, a person engages in activity in his home state that causes injury in that state, the application of that state's law would not only preserve the loss-distribution equilibrium established by that state's law, but would also be consistent with that person's decision "to accept both the benefits and the burdens of identifying with that jurisdiction and to submit . . . to its authority."[222] In the absence of special circumstances, the fact that the injured person is domiciled in another state is simply not a good enough reason to change the equation. This is true in both patterns 1 and 2.

In pattern 2, the tortfeasor should not be heard to complain about the application of the law of the state where he is domiciled and where he also acted and caused the injury. Similarly, in pattern 1, the injured person should not be heard to complain about the application of the law of the place of the injury. In the words of Professor Cavers, "[b]y entering the state or nation, the visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created."[223]

Similar considerations should prevail in cases falling into patterns 3 and 4 of Table 4. In pattern 4, a person injured in his home state by conduct in that state should be entitled to the protection of the law of that state, whether or not the person who caused the injury is from another state that provides for a lower standard of protection. Again using Cavers' words, "[t]he defendant who is held to the higher standard [of the state of injury] is not an apt subject for judicial solicitude. He cannot fairly claim to enjoy whatever benefits a state may offer to those who enter its bounds and at the same time claim exception from

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222. Schultz v. Boy Scouts of America, 480 N.E.2d 679, 685 (N.Y. 1985).

223. CAVERS, *supra* note 79, at 147. The quoted statement was advanced in support of Cavers' second principle of preference, which, in part, provides:

> Where the liability laws of the state in which the defendant acted and caused an injury set a *lower* standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case . . . .

Id. at 146; *cf. Neumeier*, 286 N.E.2d at 457-58 (stating second *Neumeier* rule, part *a*).

the burdens."[224] While these words are directed to cases of pattern 4, an analogous rationale may be employed against the injured person in cases of pattern 3 (the *Neumeier* pattern).[225] Being injured in his home state by conduct in that state, that person should not be allowed to invoke the protection of that state's law "and at the same time claim exception from its burdens."[226] Article 3544(2)(a) accords the defendant the benefit of the lower standard of the state of injury, though not necessarily for his own sake.

b. Clause (b)

The second category of split-domicile cases encompasses all such cases in which the injurious conduct and the resulting injury occurred in different states. Article 3544(2)(b) addresses only a minute percentage of these cases[227] and provides for the application of the law of the state of the injury if: (i) the victim was domiciled in that state; (ii) that state provides for a higher standard of financial protection for the victim than the law of the place of conduct; and (iii) the tortfeasor should have foreseen the occurrence of the injury in the state of the victim's domicile. These cases are illustrated by the following table.

224. CAVERS, *supra* note 79, at 141; *cf. Neumeier*, 286 N.E.2d at 458 (stating second *Neumeier* rule, part *b*).

225. Yet, according to the *Neumeier* rules, cases falling under this pattern are presumptively governed by the law of the place of injury. The presumption, however, is rebuttable.

226. CAVERS, *supra* note 79, at 141.

227. *Compare* Table 5, *infra* p.730 *with* Table 5a, *infra* note 228.

TABLE 5
(Split-domicile cases and art. 3544(2)(b))[228]

#	C	I	P	D	Appl. Law
1.	b	A	A	b	A[229]
2.	c	A	A	b	A
3.	C	A	A	b	A

The application of a law favorable to the victim may appear as another tilt towards the victim. This application, however, is

228. Table 5 illustrates the "split-domicile" cases of article 3544(2)(b). The following cases are not provided for by article 3544 and are relegated to article 3542. Some of these cases, however, may be affected by article 3548. *See infra* text accompanying notes 346-56.

TABLE 5a

#	C	I	P	D	Appl. Law
11.	A	b	b	A	-
17.	A	b	A	b	-
18.	a	B	a	B	-
22.	A	A	B	c	-
23.	A	A	b	C	-
25.	a	a	B	c	-
26.	a	a	b	C	-
27.	A	b	c	A	-
28.	A	B	c	A	-
30.	a	B	C	a	-
32.	a	b	C	a	-
42.	C	a	a	B	-
43.	c	a	a	B	-
45.	A	b	A	c	-
46.	A	B	A	c	-
48.	a	B	a	C	-
50.	a	b	a	C	-
51.	b	A	c	A	-
52.	B	a	c	A	-
54.	B	a	C	a	-
56.	b	a	C	a	-
59.	a	b	C	d	-
60.	a	b	c	D	-
62.	a	B	C	d	-
64.	A	b	C	d	-
65.	a	B	c	D	-
66.	A	b	c	D	-
67.	A	B	C	d	-
70.	A	B	c	D	-

229. In this and in both of the other cases in Table 5, the application of the law of the place of injury further depends on whether the occurrence of the injury in that state was foreseeable. *See infra* text accompanying note 230.

conditioned on a foreseeability defense being available to the defendant.[230] Moreover, like the rest of article 3544, clause (b) of subparagraph (2) is subject to the escape clause of article 3547. Finally, requiring that the victim's domicile provide for a higher standard before its law is applied under this provision does not preclude the application of that state's law in cases in which it provides for a lower standard. It simply means that, rather than being subjected to a black-letter rule, these cases will be referred to the more flexible approach of article 3542. In applying article 3542, the court will have the opportunity to look at the totality of the circumstances of the particular case and to evaluate them in the light of the policies expressed in that article. Following such an evaluation, the court may well conclude that applying the law of the victim's domicile is the best solution under the circumstances.

E. Dépeçage and Articles 3543 and 3544

As stated earlier,[231] any choice-of-law approach that proceeds on an "issue-by-issue" analysis may lead to a phenomenon known as *dépeçage*, namely, the application of the laws of different states to different issues of the same case. Although it may be startling to the uninitiated, *dépeçage* is not as novel a phenomenon as it might appear. For example, *dépeçage* was not uncommon under pre-1992 Louisiana conflicts law, which provided one rule for the formal validity of a testament, another rule for the "effect" or substantive validity of a testament, and perhaps another for testamentary capacity.[232]

By adopting one set of rules for issues of conduct and safety (article 3543) and another set for issues of loss distribution (article 3544), Book IV contains the potential for *dépeçage*. In many cases, however, these two articles will lead to the application of the law of the same state and *dépeçage* will be avoided.[233] Among these cases are the following:

(1) When both the conduct and the injury occurred in the

230. *See* LA. CIV. CODE ANN. art. 3544(2)(b)(ii) (West 1992). This foreseeability defense is intended to have the same meaning as the similarly phrased defense in article 3543. *See* discussion *supra* text accompanying notes 168-72.

231. *See supra* text accompanying notes 90-91.

232. *See* Symeonides, *supra* note 11, at 1044-47, 1055-56, 1076-86.

233. An a priori *dépeçage* is also avoided in those cases in which article 3544 does not designate the applicable law and which are thus relegated to the residual article, article 3542. *See* Table 5a, *supra* note 228. In applying article 3542, the courts will have all the flexibility of avoiding *dépeçage* if they find it inappropriate in the particular case.

same state, the law of that state applies to issues of conduct and safety under the first paragraph of article 3543.[234] If either the plaintiff or the defendant were also domiciled in that state, then the law of that state would also apply to issues of loss distribution under article 3544(2)(a);[235]

(2) When the conduct and injury occurred in different states, but the former state had a higher standard of conduct, then the law of that state would apply to issues of conduct and safety under article 3543(1).[236] If both the plaintiff and the defendant were domiciled in that state, then the law of that state would also apply to issues of conduct and safety under article 3544(1);[237]

(3) When the state of conduct has a lower standard of conduct than the state of injury and the occurrence of the injury in the latter state was foreseeable, then the law of that state would apply to issues of conduct and safety under article 3543(2).[238] The law of the same state would also apply to issues of loss distribution under article 3544 if both the plaintiff and the defendant were domiciled in that state,[239] or if the plaintiff was domiciled in that state and that state had a higher standard of financial protection for him than did the state of conduct.[240]

In many cases, however, articles 3543 and 3544 may point to the laws of two different states for the two categories of issues to which these articles apply. For example, when both the conduct and the injury occurred in state *A* and both the plaintiff and the defendant were domiciled in state *B*, then the law of state *A* would apply to issues of conduct under the first paragraph of article 3543(1)[241] while the law of state *B* would apply to issues of loss distribution under article 3544(2)(a).[242] Similarly, when

234. *See* Table 1, *supra* p.706 (patterns 1 & 2); *see also id.* (patterns 3 & 4) (illustrating cases where the states of conduct and injury adhere to the same standard).

235. *See* Table 4, *supra* p.726 (patterns 1-4); Tables 2a-2b, *supra* notes 191-92; Table 3, *supra* p. 724 (patterns 1 & 2).

236. *See* Table 1, *supra* p.706 (pattern 5).

237. *See* Table 2, *supra* p.719 (pattern 1); *cf.* Table 3a, *supra* note 211 (cases 29 & 47).

238. *See* Table 1, *supra* p.706 (pattern 6).

239. *See* Table 2, *supra* p.719 (pattern 1); *see also* Table 3a, *supra* note 211 (cases 40, 53, and 68).

240. *See* Table 5, *supra* p.730 (patterns 1 & 2).

241. *See* Table 1a, *supra* note 159 (cases 3 & 9).

242. *See* Table 2, *supra* p.719. The same would be true if the plaintiff and the defendant were domiciled in different states whose laws on the particular issue of loss distribution were substantially identical. *See* Table 3, *supra* p. 724.

only the conduct or only the injury occurred in state *A*, its law may apply to issues of conduct if the case meets the requirements of article 3543(1) or (2) respectively.[243] However, if both the plaintiff and the defendant are domiciled in another state, state *B*, the law of that state would apply to issues of loss distribution under article 3544(1).[244]

In these cases, the cumulative application of articles 3543 and 3544 results in *dépeçage*. This is neither good nor bad. In the majority of cases, it is simply a natural consequence and appropriate recognition of the fact that the states involved in the case may be interested in different aspects of the case or may be interested in varying degrees in the various aspects of the case. In some cases, however, the application of the law of two different states to different issues in the same case may unintentionally defeat the policies of both states. In such cases, *dépeçage* is inappropriate and must be avoided. The obvious and difficult question is how to distinguish appropriate *dépeçage* from inappropriate *dépeçage*. In this context it is worth recalling that the term *dépeçage* can be paraphrased in English as "picking and choosing." Generally speaking, this picking and choosing is inappropriate when the rule of one state that is chosen is so closely interrelated to a rule of the same state that is not chosen, that applying one without the other would drastically upset the equilibrium established by the two rules and would distort and defeat the policies of that state.

For instance, suppose that in the first of the above cases where articles 3543 and 3544 lead to *dépeçage*, state *A*, a northern state, requires the use of snow tires for cars driven in that state during the winter months and that failure to use such tires is considered negligence per se. State *B*, a southern state, does not require the use of snow tires. While driving in state *A* without snow tires, a driver from state *B* causes an accident resulting in the death of his passenger who was also from state *B*. In such a case, there is little argument that state *A* has every legitimate reason to insist on adherence to its snow tire rule and on defining the consequences of noncompliance, and that state *B*'s no-snow-tire rule is simply irrelevant to driving outside its borders. Article 3543 recognizes the obvious and calls for the application of state *A*'s snow-tire rule.

243. *See* Table 1, *supra* p.706 (patterns 3-5).

244. *See* Tables 2a-2b, *supra* notes 191-92 (cases 5-8, 33-38).

Suppose further that the two states differ in designating the beneficiaries of the victim's survival action; state *A* designates the victim's spouse as the exclusive beneficiary in the first class, while state *B* includes in that class the victim's children. Here again, there is little argument that state *B* has the best claim of deciding this issue of loss distribution. Article 3544 simply recognizes the obvious when it calls for the application of state *B*'s law. In this case, it may be said with certainty that the resulting *dépeçage* is not inappropriate because the snow-tire rule of state *A* is not closely related, and perhaps not at all related, to the survival action rule of the same state. The application of the former rule and the nonapplication of the latter would not distort or defeat the policies of that state, nor would it disturb whatever equilibrium these two rules might establish between deterrence and compensation. The same would be true for the application of state *B*'s survival action rule without state *B*'s no-snow-tire rule.[245]

On the other hand, if, in the same hypothetical, the conduct-regulating rule and the loss-distributing rule of state *A* were closely interrelated and were intended to be applied together as one package, then to apply one without the other would overturn the equilibrium established by that package and would be inappropriate. For example, if state *A*'s snow-tire rule were coupled with a rule that reduced or increased by ten percent the amount of damages that could be recovered from a defendant depending on whether or not he used snow tires, then it would be inappropriate to apply the snow-tire rule without its intended companion rule with regard to the amount of damages. If articles 3543 and 3544 dictate such a result, the case might be a good candidate for the escape clause of article 3547.[246] In employing that clause, the court should consider all the factors enumerated in articles 3547 and 3542, as well as the desideratum incorporated by reference into article 3542 of "minimizing the

245. As Cavers put it, there is no reason to insist that "two rules, unrelated in policy, be drawn from a single source." CAVERS, *supra* note 79, at 42. Cavers was commenting on a hypothetical case in which Massachusetts, the place of the accident, had one rule imposing strict liability on the owners of unregistered vehicles and another rule immunizing charitable corporations from tort suits. Cavers thought it appropriate to apply the former, but not the latter, rule in a case involving a New York corporation and a New York victim. In Cavers' words, "Massachusetts' policy of granting immunity to charitable corporations has no relation to its policy of imposing strict liability on drivers of unregistered vehicles. Massachusetts excepts its charities from that rule just as it excepts them from all its rules imposing liability for tort." *Id.*

246. *See infra* text accompanying notes 357-66.

adverse consequences that might follow from subjecting a party to the law of more than one state."[247]

F. Punitive Damages

A rule that imposes punitive damages is *par excellence* of a rule that regulates conduct and safety. Consequently, punitive damages issues should fall within the scope of article 3543, rather than article 3544.[248] This was indeed the initial plan. However, apparently because the Council of the Louisiana State Law Institute saw in article 3543 a pro-victim tilt that the Council considered undesirable in punitive damages conflicts, the Council instructed this Reporter to draft a separate article for punitive damages. After several debates, an article that later became article 3546[249] was adopted by the Council. This is the first attempt in this country or elsewhere to draft a choice-of-law rule for this extremely difficult and, for many people, emotional issue. Indeed, in the United States,[250] neither the *Restatement (Second)* nor any other attempt at rule making has expressly addressed punitive damages conflicts.[251] Although the *Restate-*

247. LA. CIV. CODE ANN. art. 3515 (West 1992).

248. This approach has been followed in drafting the Puerto Rican *Projet*. Article 46 of the *Projet for the Codification of Puerto Rican Private International Law*, which corresponds to article 3543 of the Louisiana law, provides that "[i]ssues pertaining to standards of conduct and safety, including issues of punitive damages are governed." PROJET, *supra* note 65, art. 46, at 149.

249. LA. CIV. CODE ANN. art. 3546 (West 1992). It should be noted that, as evidenced by its placement in that title of Book IV dealing with delictual and quasi-delictual obligations, article 3546 applies only to cases in which punitive damages are sought to be imposed because of an alleged delict or quasi-delict. Punitive damages based on other grounds are not covered by article 3546.

250. For the European practice on this issue, see Symeonides, *Problems and Dilemmas*, *supra* note 1, at 457-58.

251. Other than the *Restatement (Second)*, the other American attempts at rulemaking have been few and far between. None of these attempts has originated in—though many are presumably addressed to—the legislative chambers, and none of them has expressly addressed the question of punitive damages. These attempts include: the "*Neumeier* rules," *see* Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972); Professor Cavers' "principles of preference," CAVERS, *supra* note 79, at 139-80; and Professor Sedler's "rules of choice of law," extrapolated from the judicial applications of interest analysis, Sedler, *supra* note 181, at 1032-41. *See also* Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Litigation*, 1989 U. ILL. L. REV. 129, 148. Although these rules are sufficiently broad to encompass punitive damages, they do not do so expressly. Professor Sedler's seventh rule comes close when it provides that "[w]hen the law of the state in which an act or omission occurs reflects an admonitory policy, the defendant will be held liable if that act causes harm in another state." Sedler, *supra* note 181, at 1038. Only Professor Weintraub has considered specifically the question of punitive damages in the context of products liability conflicts and has proposed a rule to that effect. *See* Weintraub, *supra*, at 148. With some exceptions, Professor Weintraub's rule allows the plaintiff and, if

ment (Second) contains two sections that apply to damages in general, and thus encompass punitive damages,[252] these sections ultimately do little more than refer the issue to the general and vague formula of section 6 of the *Restatement (Second)*.[253]

The basic premise of article 3546 is that punitive damages are not intended for the protection of the individual victim who, *ex hypothesi*, has been compensated for his loss through ordinary damages, but rather are designed to "punish" the individual tortfeasor, to deter him and other potential tortfeasors in the future, and to protect victims only indirectly.[254] This is why article 3546 ignores the domicile of the victim and focuses instead on three potentially different places related to the tortfeasor: the place of his domicile, the place of his conduct, and the place of the injury resulting from that conduct.[255] The

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he fails to do so, the defendant, to choose the law applicable to punitive damages from among states connected to the manufacturer, such as the latter's principal place of business, or the place of manufacture, design, or sale of the product. *Id.* Unfortunately, this rule came too late to be of any help to the drafters of the new Louisiana law.

252. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 171 cmt. d, 178 cmt. a (1971) (indicating that these sections apply to punitive damages).

253. Section 171 of the *Restatement (Second)* provides that "[t]he law selected by application of the rule of § 145 determines [the measure of] damages" in torts other than wrongful death. *Id.* § 171. Section 145 provides that "an issue in tort [is governed] . . . 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 § 6." *Id.* § 145. Section 178 provides that "[t]he law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death." *Id.* § 178. Finally, § 175 of the *Restatement (Second)*, provides that a wrongful death action is governed by

> the local law of the state where the injury occurred . . . unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. § 175.

254. In their comprehensive study of punitive damages cases in the fifty states and the District of Columbia, James Ghiardi and John Kircher identify the primary purpose for awarding punitive damages in the forty-seven jurisdictions that allow such damages as follows: In thirty-three jurisdictions, the purpose is deterrence and punishment; in six jurisdictions, the purpose is deterrence only; in three jurisdictions the purpose is punishment only; in one jurisdiction (Georgia), the purpose is deterrence as well as compensation; in one jurisdiction (Indiana), the purpose is punishment and compensation; and in three jurisdictions (Connecticut, Michigan and New Hampshire), the purpose is compensation. JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE tbl. 4-1, at 48 (Supp. 1991).

255. *See* Keene Corp. v. Insurance Co. of N. Am., 597 F. Supp. 934, 938 (D.D.C. 1984). According to the *Keene* court,

> [w]hen the primary purpose of a rule of law is to deter or punish conduct, the States with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of defendant are located. "The State of domicile of plaintiff has no interest in imposing

state of the tortfeasor's domicile must have a say on whether the tortfeasor is to be punished or protected (and, if so, to what degree), and also on whether similarly situated potential tortfeasors should be deterred.[256] The state of the tortfeasor's conduct has the equally obvious right and interest in regulating (policing, punishing, deterring, or encouraging) conduct within its borders.[257] Finally, as the state that bears many of the consequences of such conduct, the state where the injury occurred has a legitimate claim to determine the legal consequences of such conduct.[258]

Article 3546 authorizes the award of punitive damages when the particular conduct evokes punitive damages under the substantive laws of all three or any two of these states, or by the laws of a state that has all three or any two of the above contacts. The operation of the article is illustrated by the following table, which portrays all possible fact-law patterns and, in the

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> punitive damages. The legitimate interests of [plaintiffs' domiciliary] states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries . . . . Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those States are satisfied."

Id. at 938-39 (quoting *In re* Air Crash Disaster Near Chicago, 644 F.2d 594, 613 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981)); *see also In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, 720 F. Supp. 1445, 1452 (D. Colo. 1988) ("In air crash cases, the interests of the domicile of the plaintiffs and the center of the relationship is relatively low in regard to the issue of punitive damages."); *In re* Air Crash Disaster at Washington, 559 F. Supp. 333, 353 (D.D.C. 1983); Bryant v. Silverman, 703 P.2d 1190, 1193 (Ariz. 1985).

256. The *Bryant* court observed that

> [t]he purpose of allowing punitive damages is to punish defendant for his conduct and deter defendant or others from engaging in similar conduct in the future. Since [defendant] is incorporated and has its principal place of business in Arizona, Arizona has a strong interest in assuring that one of its domiciliaries does not engage in gross, wanton, malicious or oppressive conduct.

703 P.2d at 1196 (citation omitted).

257. *See In re* Air Crash Disaster Near Chicago, 644 F.2d at 613. The court noted that

> [t]he purposes underlying the allowance of punitive damages . . . are punishment of the defendant and deterrence of future wrongdoing. The purpose underlying the disallowance of punitive damages is protection of defendants from excessive financial liability. Two states which very definitely have an interest in punishment or protection are California and Missouri, the states in which, respectively, the conduct occurred and the principal place of business is located. Both states have an obvious interest in preventing future misconduct; both states have an obvious interest in protecting businesses located or acting within its borders. Illinois, the place of injury, also has an interest in the punitive damages question . . . .

Id.

258. For cases in which either the conduct or the injury, or both, occurred in more than one state, see *supra* part IV.C.3.

fourth column, the result that would be reached under the article. In the first four columns, the word "Yes" means that the state with the contact appearing at the top of the column allows punitive damages for the conduct in question, while the word "No" means that the particular state does not allow punitive damages.

TABLE 6
(Punitive damages and art. 3546)

#	[a] C	I	P	D	Result
1.	Yes	Yes	-	Yes	Yes
2.	Yes	Yes	-	No	Yes
3.	Yes	No	-	Yes	Yes
4.	No	Yes	-	Yes	Yes
5.	No	No	-	Yes	No
6.	No	Yes	-	No	No
7.	Yes	No	-	No	No
8.	No	No	-	No	No

Cases in which article 3546 authorizes the award of punitive damages fall into four different fact-law patterns, that is, cases in which the conduct in question would evoke punitive damages under the laws of: (1) the state of the tortfeasor's conduct, the state of the victim's injury, and the state of the tortfeasor's domicile;[259] (2) the state of the tortfeasor's conduct and the state of the victim's injury;[260] (3) the state of the tortfeasor's conduct and the state of the tortfeasor's domicile;[261] or (4) the state of the victim's injury and the state of the tortfeasor's domicile.[262] By coincidence, this represents fifty per-

259. *See* Table 6 *supra* text above (pattern 1). For cases in which only one of these states provides for punitive damages, see *id.* (patterns 5-7).

260. *See* LA. CIV. CODE ANN. art. 3546(1) (West 1992); *see also* Table 6, *supra* text above (pattern 2). It is not necessary that the conduct and the injury occur in the same state. When they occur in different states, however, both of those states must provide for punitive damages in order for that case to fall under article 3546(1). For cases in which the conduct or the injury have occurred in more than one state, see *supra* part IV.C.3.

261. *See* Table 6, *supra* text above (pattern 3). Again, it is not necessary that the tortfeasor's conduct and domicile coincide in the same state. When they do not coincide, however, both states must provide for punitive damages in order for the case to fall under article 3546(1). For cases in which the conduct occurred in more than one state, see *supra* part IV.C.3.

262. *See* LA. CIV. CODE ANN. art. 3546(2) (West 1992); *see also* Table 6, *supra* text above (pattern 4). Again, it is not necessary that the victim's injury and the tortfeasor's

cent of all possible patterns.[263] When the domicile of the victim is added as a relevant factual contact, the total number of patterns increases from eight to sixteen. Again, article 3546 would allow punitive damages, in eight, or fifty percent, of these patterns.[264] Although they are purely coincidental and do not purport to reflect the statistical frequency with which punitive damages will be awarded under article 3546, these percentages are indicative of the evenhanded stance of this article on this difficult issue.

In interest-analysis terminology, the cases falling within pattern 1 of Table 6, that is, cases in which all three of the above states allow punitive damages, present classic "false conflicts," since all three involved states share the same policy of deterrence. Interest analysts, their critics, and everyone in between, would easily agree that to award punitive damages in such cases

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domicile coincide in the same state for punitive damages to be recoverable under article 3546(2), as long as both states provide for punitive damages. For cases in which the injury occurred in more than one state, see *supra* part IV.C.3.

263. *See* Table 6, *supra* p. 738 (patterns 1-4).

264. Although not a pertinent connecting factor under article 3546, the domicile of the victim is nevertheless a helpful factor is assessing the overall fairness or soundness of this article. When the law of the domicile of the victim is added to the calculus, the possible fact patterns increase from eight to sixteen. They are shown below, together with the results produced by article 3546.

TABLE 6a

#	C	I	P	D	Result
1.	Y	Y	Y	Y	Y
2.	Y	Y	Y	n	Y
3.	Y	Y	n	Y	Y
4.	Y	n	Y	Y	Y
5.	b	Y	Y	Y	Y
6.	Y	Y	n	n	Y
7.	Y	n	n	Y	Y
8.	n	Y	n	Y	Y
9.	n	n	Y	Y	n
10.	n	Y	Y	n	n
11.	Y	n	Y	n	n
12.	n	n	n	Y	n
13.	n	n	Y	n	n
14.	n	Y	n	n	n
15.	Y	n	n	n	n
16.	n	n	n	n	n

The results remain the same as in Table 6, as does the 50:50 ratio of cases in which punitive damages will be awarded to those in which they will not.

would promote this shared policy without impairing the policy of any other state. The only other potentially affected state is the state of the victim's domicile. Even if that state prohibits punitive damages, however, that prohibition need not be heeded, since it is obviously designed to protect tortfeasors acting or domiciled within that state rather than to prevent victims domiciled therein from recovering punitive damages.

The cases falling into pattern 2 are at most "apparent conflicts." The appearance of a conflict is created by the fact that the defendant-deterring policy embodied in the punitive damages law of the first two states (the states of the conduct and the injury) are juxtaposed to the defendant-protecting policy embodied in the prohibition of punitive damages by the law of the tortfeasor's domicile. Nevertheless, the fact that neither the tortfeasor's conduct nor the injury occurred in that state would easily defeat any argument by the tortfeasor that he relied on the protection of the law of his domicile or that he was unable to foresee the application of the law of either the state of conduct or injury or both. Thus, most conflicts analysts would agree that the award of punitive damages in these cases would promote the defendant-deterring policies of the first two states without unduly impairing the defendant-protecting policies of the third state.

Similarly, the award of punitive damages in the cases of pattern 3 would promote the defendant-deterring policies of the state of the tortfeasor's domicile and the state of the tortfeasor's conduct without impairing the defendant-protecting policies of the state of injury.[265] The latter policies are intended for the protection of tortfeasors domiciled or acting within that state, rather than tortfeasors domiciled and acting outside that state and causing injury in that state. A tortfeasor falling within this pattern should hardly be allowed to invoke the protection of the law of the state of the injury unless, perhaps, he expected the injury to occur in that state and had reason to expect the application of that state's law. Such exceptional cases, however, can be adequately handled through the escape clause of article 3547.

265. For a Louisiana case falling within this pattern and reaching the same result, see Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976) (applying the law of Mississippi, which allowed punitive damages in defamation cases rather than the law of Louisiana which did not allow such damages, because, although the injury occurred in Louisiana and the victim was domiciled in that state, the tortfeasor was domiciled in Mississippi and acted in that state).

Finally, the award of punitive damages in the case pattern 4 would impair the defendant-protecting policies of the state of conduct to a lesser degree than the nonaward of punitive damages would impair the defendant-deterring policies of the states of the injury and of the tortfeasor's domicile. Here again, any exceptional cases can be adequately handled through the escape clause of article 3547.

When, as in patterns 5-7, only one of the above three states provides for punitive damages, the awarding of such damages might be more controversial, although by no means indefensible, at least when the fourth state, the domicile of the victim, would also impose such damages. It is only because of Louisiana's general hostility towards punitive damages that article 3546 prohibits, as a general matter, the awarding of punitive damages in such cases. Nevertheless, like the rest of article 3546, this prohibition is subject to the exception provided in article 3547.

It is important to note that the escape clause of article 3547 "cuts both ways" and thus may lead not only to a contraction, but also to an expansion, of the scope of article 3546. Thus, a court may, in appropriate circumstances, deny punitive damages in a case where such damages are authorized by article 3546, if the court determines that the award of punitive damages in the particular case would defeat the basic principles enunciated in article 3542.[266] What might be less obvious is that the escape clause of article 3547 may also lead to the award of punitive damages in cases other than the ones enumerated in article 3546. Indeed, despite its prohibitory language, the first sentence of article 3546 is not immune from the escape clause of article 3547.[267] Thus, a court may, in appropriate circumstances, award punitive damages in a case where such damages are not authorized by article 3546 if the court determines that the denial of punitive damages in the particular case would defeat the basic

266. In turn, this presupposes a finding that: (a) a state other than the state or states mentioned by article 3546 prohibit punitive damages; (b) that state's law would have been applicable to the issue under the residual article (article 3542) in the absence of article 3546; and (c) the policies of that state in prohibiting punitive damages would be more seriously impaired by the award of such damages than would the policies of the article 3546 states by the denial of punitive damages.

267. This particular point was specifically discussed by the Council of the Law Institute, and the Reporter received permission to state so in the official comments that accompanied article 3546 when it was submitted to the legislature. *See* Act No. 923, 1991 La. Sess. Law Serv. 1736.

principles enunciated in article 3542.[268]

1. Opposition

For the record, it should be noted that article 3546 encountered considerable opposition at virtually every step of the legislative process. For the most part, the opposition was apparently based on a misunderstanding of the role and function of article 3546, if not of the role and function of conflicts law in general. How else could one explain statements like "[article 3546] will drastically alter the punitive damages law of Louisiana."[269]

To begin with, article 3546 is a rule of choice-of-law, not of substantive law. As Brainerd Currie noted three decades ago, "[t]he choice-of-law rule is an odd creature among laws. It never tells what the result will be, but only where to look to find the result . . . ."[270] Article 3546 was neither intended to, nor capable of, "altering the punitive damages law of Louisiana."[271] As stated in the cover page of the document that introduced this article to the Council of the Law Institute, "[article 3546] does *not* change the substantive law of Louisiana on the issue of punitive damages . . . . It does *not* introduce punitive damages

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268. Here again, such a decision presupposes a finding that: (a) punitive damages are imposed by a law that would have been applicable to the issue under the residual article, article 3542, in the absence of article 3546; and (b) the policies of that state in imposing punitive damages would be more seriously impaired by denying such damages than would the policies of the article 3546 states by the award of punitive damages.

269. These statements are contained in an unsigned "Point Paper" of known authorship that was circulated to the members of the legislature during the 1991 regular session. This, and a later, lengthier paper of the same authorship are available to interested readers. To buttress their arguments, the authors of these papers resort to use of case authority. Their selection is careful enough to avoid all cases in which a Louisiana court awarded punitive damages, *see* discussion *infra* text accompanying notes 282-92, but not careful enough to notice that a case cited as Louisiana authority is in fact a "Texas case." The case is Pappion v. Dow Chemical Co., 594 F. Supp. 428 (W.D. La. 1984), which, although decided by a federal district court sitting in Louisiana, was decided under Texas choice-of-law rules. This is so because the action was originally filed in federal district court in the Eastern District of Texas and was transferred to the Western District of Louisiana under 28 U.S.C. § 1404(2). *Id.* at 430-31. Obviously, in such a transfer, the transferee court is bound to apply the choice-of-law rules of the transferor court. *See* Ferens v. John Deere Co., 494 U.S. 516 (1990); Van Dusen v. Barrack, 376 U.S. 612 (1964); *see also* Kozyris & Symeonides, *supra* note 15, at 627-30 (discussing *Ferens*).

270. CURRIE, *supra* note 24, at 170. For the corresponding conception in the civilian world, consider Professor Dölle's classic statement that conflicts law is not "dispositive" law, but is rather "indicative" law. ("Das internationales Privatrecht ist nicht 'Entscheidungsrecht,' sodern 'Verweisungsrecht.' ") HANS DÖLLE, INTERNATIONALES PRIVATRECHT 2 (1968); *see also* Pierre Lalive, *Tendances et Methodes en Droit International Privé*, 1977 R.C.A.D.I. II 1, 33.

271. *See supra* note 269.

'through the back door.' . . . It does *not* favor punitive damages. . . ."[272] The task of the conflicts codifier is not to alter, favor, or disfavor a rule of substantive law, but rather to help delineate its operation at *the multistate level*.[273] After several lengthy debates before the Council of the Law Institute (a body not known for its sympathies towards punitive damages), this point became abundantly clear and article 3546 won the endorsement of some of the most severe skeptics.

Opposition continued in the legislative chambers, however, with an all out effort to obtain an absolute prohibition of such damages. The effort enjoyed temporary success during the 1990 legislative session when an amendment was adopted by the senate.[274] This amendment, however, was later deleted by the House Civil Law and Procedure Committee, which restored the original version of article 3546. The same amendment was reintroduced twice during the 1991 legislative session. In both instances, the amendment failed to attract the requisite number of votes because the true meaning of article 3546 was eventually understood.

Indeed, there is nothing revolutionary about article 3546. Without in any way questioning Louisiana's general hostility towards punitive damages, article 3546 simply delineates those *multistate* cases in which punitive damages *may* be awarded under the law of a state that allows them and whose law is otherwise applicable under mainstream choice-of-law principles. If anything, article 3546 is: (a) much more conservative than the

272. Symeon C. Symeonides, Louisiana Law Inst., Conflicts Laws: Law Governing Delictual and Quasi-Delictual Obligations 7 (condensed version, May 14, 1988) (on file with the *Tulane Law Review*).

273. It would be both presumptuous and unnatural to extend Louisiana's prohibition to *all multistate cases* that come before Louisiana courts, especially in light of the fact that Louisiana is surrounded by fifty common-law jurisdictions, forty-seven of which allowed punitive damages (at the time article 3546 was drafted). *See* GHIARDI & KIRCHER, *supra* note 254, tbl. 4-1, at 48 (illustrating that forty-six states and the District of Columbia allow punitive damages in tort cases; Louisiana, Massachusetts, Nebraska, and Washington, as well as the Commonwealth of Puerto Rico, do not allow punitive damages); *see also* 5 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 40.03, at 40-8 to 40-9 (1989) (adding Connecticut and New Hampshire as states generally disallowing punitive damages); JOHN MORRISON, THE INSURABILITY OF PUNITIVE DAMAGES app. B (1985) (indicating that except for Quebec, all Canadian jurisdictions allow punitive damages).

274. The amendment prohibited punitive damages except in the cases where such damages are permitted by Louisiana substantive law, that is, for injuries caused by "wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances," LA. CIV. CODE ANN. art. 2315.3 (West 1991), or for "injuries . . . caused by . . . a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries." *Id.* art. 2315.4.

practice of many sister state courts of awarding punitive damages if any one of the above three states, or a state having only one of the above contacts, such as the place of conduct, allows such damages;[275] (b) more conservative than pre-1991 Louisiana jurisprudence;[276] and (c) fairly protective of Louisiana industry and other activity within this state.

The last proposition results from the combination of two factors: (1) article 3546's determinative use of the places of the defendant's conduct and domicile for selecting the applicable law; and (2) Louisiana's general prohibition of punitive damages. Because of the way the article is drafted, when a person domiciled in Louisiana engages in conduct there for which Louisiana does not impose punitive damages, such damages may not be imposed under this article. This is illustrated by the following table, in which it is assumed that Louisiana does not allow punitive damages for the particular conduct, while Mississippi does.

TABLE 7

#	C	I	P	D	Result
1.	Ms(Y)	Ms(Y)	Ms(Y)	Ms(Y)	Ms(Y)
2.	Ms(Y)	Ms(Y)	Ms(Y)	La (n)	Ms(Y)
3.	Ms(Y)	Ms(Y)	La (n)	Ms(Y)	Ms(Y)
4.	Ms(Y)	La (n)	Ms(Y)	Ms(Y)	Ms(Y)
5.	La (n)	Ms(Y)	Ms(Y)	Ms(Y)	Ms(Y)
6.	Ms(Y)	Ms(Y)	La (n)	La (n)	Ms(Y)
7.	Ms(Y)	La (n)	La (n)	Ms(Y)	Ms(Y)
8.	La (n)	Ms(Y)	La (n)	Ms(Y)	Ms(Y)
9.	La (n)	La (n)	Ms(Y)	Ms(Y)	La (n)
10.	La (n)	Ms(Y)	Ms(Y)	La (n)	La (n)
11.	Ms(Y)	La (n)	Ms(Y)	La (n)	La (n)
12.	La (n)	La (n)	La (n)	Ms(Y)	La (n)
13.	La (n)	La (n)	Ms(Y)	La (n)	La (n)
14.	La (n)	Ms(Y)	La (n)	La (n)	La (n)
15.	Ms(Y)	La (n)	La (n)	La (n)	La (n)
16.	La (n)	La (n)	La (n)	La (n)	La (n)

Eight of the above sixteen patterns arise out of conduct

275. *See, e.g.*, Bryant v. Silverman, 703 P.2d 1180 (Ariz. 1985); *see also supra* notes 255-56.

276. *See, e.g.*, Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982); Cooper v. American Express Co., 593 F.2d 612 (5th Cir. 1979); Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976).

within Louisiana, and, under article 3546, Louisiana law will be applied to six of them (patterns 9, 10, 12, 13, 14, and 16). In four of these cases (patterns 10, 13, 14 and 16), the defendant is also domiciled in Louisiana, while in another case (pattern 12), the defendant, though not from Louisiana, both acted and caused the injury within this state. In only two of the eight cases involving conduct in Louisiana may punitive damages be awarded (patterns 5 and 8). However, in both of these cases, the defendant is a domiciliary of a state that provides for punitive damages *and* has caused injury in that state. Thus, it can be concluded that *where a Louisiana domiciliary engages in conduct in Louisiana for which Louisiana law does not impose punitive damages, such damages may not be awarded against him under article 3546.*[277] As a result of article 3548, the same protection may be available to foreign corporations that transact business in Louisiana.[278] Thus, it is grossly inaccurate to say that article 3546 "will discourage companies from doing business in Louisiana."[279] Companies that do business in Louisiana understood

277. In all of the Table 7 cases, it has been assumed that Louisiana does not allow punitive damages while Mississippi does. Since 1984, however, Louisiana allows punitive damages in cases involving the handling of hazardous substances and cases of drunk driving. *See* LA. CIV. CODE ANN. art. 2315.3-.4 (West 1991). The following table illustrates how these cases will be decided under article 3546 if Mississippi does not allow punitive damages for the same conduct.

TABLE 7a

#	C	I	P	D	Result
1.	La (Y)	La (Y)	La (Y)	La (Y)	La (Y)
2.	La (Y)	La (Y)	La (Y)	Ms(n)	La (Y)
3.	La (Y)	La (Y)	Ms(n)	La (Y)	La (Y)
4.	La (Y)	Ms(n)	La (Y)	La (Y)	La (Y)
5.	Ms(n)	La (Y)	La (Y)	La (Y)	La (Y)
6.	La (Y)	La (Y)	Ms(n)	Ms(n)	La (Y)
7.	La (Y)	Ms(n)	Ms(n)	La (Y)	La (Y)
8.	Ms(n)	La (Y)	Ms(n)	La (Y)	La (Y)
9.	Ms(n)	Ms(n)	La (Y)	La (Y)	Ms(n)
10.	Ms(n)	La (Y)	La (Y)	Ms(n)	Ms(n)
11.	La (Y)	Ms(n)	La (Y)	Ms(n)	Ms(n)
12.	Ms(n)	Ms(n)	Ms(n)	La (Y)	Ms(n)
13.	Ms(n)	Ms(n)	La (Y)	Ms(n)	Ms(n)
14.	Ms(n)	La (Y)	Ms(n)	Ms(n)	Ms(n)
15.	La (Y)	Ms(n)	Ms(n)	Ms(n)	Ms(n)
16.	Ms(n)	Ms(n)	Ms(n)	Ms(n)	Ms(n)

278. *See infra* text accompanying note 342-56.

279. *See supra* note 269.

this point fully when they gradually withdrew their oposition to article 3546. The only company that did not want to understand is a well-known foreign tobacco company.

The second proposition is borne out by a quick perusal of pertinent Louisiana jurisprudence since 1973, the year *Jagers* abandoned the rule of *lex loci delicti*.[280] Pre-1973 jurisprudence would be inapposite because the rule of *lex loci delicti* compelled the award of punitive damages in all those cases in which the *locus delicti* was in a foreign state that imposed such damages. Since 1973, the issue of punitive damages arose in only seven conflicts cases, involving a total of twelve defendants. Three of these cases were the type of products liability cases that would be governed by Louisiana law under article 3545 and are discussed later in this Article.[281] The remaining four cases involved nine defendants, and Louisiana courts awarded punitive damages against six of those defendants. If these cases were to be decided under article 3546, two of these defendants could avoid punitive damages. The following table illustrates these cases and indicates how they would be decided under article 3546.

TABLE 8
(Illustrating the results reached by Louisiana courts in conflicts cases involving punitive damages)

# Case name	C	I	P	D	Results	Art. 3546	Result
1. *Karavokiros*	La (n)	La (n)	Oh (Y)	Ind(Y)	La (n)	La (n)	same
2. *Ardoyno*	Ms(Y)	La (n)	La (n)	Ms (Y)	Ms (Y)	Ms (Y)	same
3. *Cooper*	La (n)	Al (Y)	Al (Y)	La (n)	Al (Y)	La (n)	diff
4. *Ashland*							
D#1 (Rollins)	La (n)	Ms(Y)	Ky (Y)	La (n)	La (n)	La (n)	same
D#2 (Young)	La (n)	Ms(Y)	Ky (Y)	La (n)	Ms (Y)	La (n)	diff
D#3 (Creech)	La (n)	Ms(Y)	Ky (Y)	La (n)	La (n)	La (n)	same
D#4 (Waco)	Ms(Y)	Ms,Ky(Y)	Ky (Y)	Ms (Y)	Ms (Y)	Ms (Y)	same
D#5 (Miller)	Ms(Y)	Ms,Ky(Y)	Ky (Y)	Ms (Y)	Ms (Y)	Ms (Y)	same
D#6 (Ashland)	Ms(Y)	Ms(Y)	Ky (Y)	Ky (Y)	Ms (Y)	Ms (Y)	same

In the first case, *Karavokiros v. Indiana Motor Bus Co.*,[282] the court refused to impose punitive damages on an Indiana defendant for conduct in Louisiana that caused injury to an Ohio plaintiff. Article 3546 will lead to the same result since, of the three states considered relevant by the article, only one, the

280. *See* discussion *supra* text accompanying notes 15-24.
281. *See* discussion *infra* text accompanying notes 330-40.
282. 524 F. Supp. 385 (E.D. La. 1981).

domicile of the defendant, imposed punitive damages.[283] The state of conduct and injury did not do so and, although the victim's domicile did authorize such damages, that state is not considered relevant by this article.

In *Ardoyno v. Kyzar*,[284] the court imposed punitive damages under Mississippi law on a Mississippi defendant for conduct in Mississippi that caused injury in Louisiana to a Louisiana domiciliary. Article 3546 will lead to the same result because the law of the places of conduct and of the defendant's domicile authorized the award of punitive damages.[285]

In *Cooper v. American Express Co.*,[286] the court awarded punitive damages under Alabama law against a Louisiana defendant who acted in Louisiana and caused intentional injury in Alabama to a plaintiff domiciled therein.[287] The result would be different under article 3546, unless the court is convinced that the case is exceptional enough to warrant utilization of the escape clause of article 3547. This case might well be a candidate for the escape clause given the defendant's deliberate intent to produce injury in Alabama. The same may be said about defendant #2 (Young) in *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*[288] The court ordered this Louisiana defendant to pay punitive damages to a Kentucky plaintiff for injury sustained in Mississippi and Kentucky because "[a]lthough the preponderance of Young's misconduct occurred in Louisiana, he *knowingly* transported the [hazardous] substances into Mississippi disguised as a benign oil product."[289] Under article 3546, this defendant's amenability to punitive damages would have been decided under the law of Louisiana, the place of the defendant's conduct and domicile. Since at that time Louisiana did not allow punitive damages,[290] this defendant would have avoided punitive damages unless the court were persuaded to invoke the escape clause of article 3547. With regard to the other five

283. *See* Table 6, *supra* p. 738.

284. 426 F. Supp. 78, 80-81 (E.D. La. 1976).

285. *See* Table 6, *supra* p. 738 (patterns 1 & 3).

286. 593 F.2d 612 (5th Cir. 1979).

287. *See id.* at 613.

288. 678 F.2d 1293 (5th Cir. 1982); *see* Table 8 *supra* p.746.

289. *Ashland*, 678 F.2d at 1306 (emphasis added).

290. In 1984, Louisiana imposed punitive damages for "wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances." LA. CIV. CODE ANN. art. 2315.3 (West Supp. 1991). Thus, if defendant Young's conduct had taken place after 1984, he could not have avoided punitive damages, regardless of whether *Ashland* were decided before or after the new conflicts law.

defendants in *Ashland*, article 3546 would lead to the application of the same law as in the actual case.[291]

Thus, once again, it is inaccurate to say that article 3546 "will open the floodgates and allow plaintiffs to recover arbitrary and excessive punitive damages awards that are now forbidden in Louisiana."[292] If anything, the "floodgates" are less open after January 1, 1992, than they were before.

2. Punitive Damages and *Dépeçage*

As discussed earlier, any system that proceeds by means of narrow, issue-oriented rules contains the potential for *dépeçage*.[293] In the case of Book IV, this potentiality arises from the existence of one rule for punitive damages, another for issues of conduct and safety, and still another for issues of loss distribution. If the case presents a conflict with regard to two or three of the above issues and the applicable rules point to a different state with regard to each issue, *dépeçage* will result. This *dépeçage* may or may not be appropriate, but it is not inevitable. Its propriety should be scrutinized by the court.[294] If *dépeçage* is found inappropriate, the court may avoid it by using one of two means: the word "may" in article 3546, or the escape clause of article 3547. A third possibility is for the court to use appropriate discretion in fixing the amount of damages.

For example, if articles 3544 and 3546 lead to the law of two different states with regard to compensatory and punitive damages respectively, the defendant may complain that such *dépeçage* gives the plaintiff the best of both worlds: generous compensatory damages under the law of a state that does not allow punitive damages, and, in addition, punitive damages under the law of another state. If the court is convinced that in the particular case *dépeçage* would distort the policy of both states and would disrupt the equilibrium between deterrence and reparation established by the law of each state, the court may avoid the *dépeçage* by any one of the three aforementioned means it deems appropriate in the particular case.

As between issues of conduct and safety provided for by article 3543, on the one hand, and punitive damages provided

291. *See supra* note 274 (discussing the 1984 change in Louisiana punitive damages law).

292. *See supra* note 269.

293. *See* discussion *supra* text accompanying notes 90-91.

294. *See* discussion *supra* text accompanying notes 231-47.

for by article 3546, on the other, *dépeçage* can also be avoided by a fourth means—a cumulative construction of the two articles. In other words, article 3546 could be interpreted as not authorizing punitive damages under the law of the state of the conduct or under the law of the state of the injury, unless the law of that state is also applicable to the other issues of conduct and safety under article 3543.[295] Thus, a court may take the position that when, under article 3546, punitive damages are available under the law of the place of conduct,[296] such damages should not be awarded unless the law of that state is also applicable to matters of conduct and safety under the first paragraph of article 3543.[297] Similarly, when, under article 3546, punitive damages are available under the law of the state of injury, punitive damages should not be awarded unless the law of that state is also applicable to other issues of conduct and safety under article 3543(2);[298] in other words, unless the occurrence of the injury in that state was foreseeable.

G. Products Liability

Products liability conflicts are usually so much more complex than generic tort conflicts that they raise the question of whether a special set of choice-of-law rules might be necessary. The answer given to this question by the Louisiana drafters is a "partial yes." Book IV does provide a special rule for products

295. The following table illustrates the results of such construction by juxtaposing Tables 6 and 1.

TABLE 9

(Punitive damages under art. 3546) (Other issues of conduct and safety under art. 3543)

#	C	I	P	D	Result
1.	Yes	Yes	-	Yes	Yes
2.	Yes	Yes	-	no	Yes
3.	Yes	no	-	Yes	Yes
4.	no	Yes	-	Yes	Yes
5.	no	no	-	Yes	no
6.	no	Yes	-	no	no
7.	Yes	no	-	no	no
8.	no	no	-	no	no

#	C	I	P	D	Result
1.	A	A	-	-	A
3.	A	B	-	-	A
5.	A	b	-	-	A
2.	a	a	-	-	a
4.	a	b	-	-	a
6.	a	B	-	-	B if foreseeable
7.	La.	B	-	La.	La.

296. Table 6, *supra* p.738 (patterns 1-3).

297. Table 1, *supra* p.706 (patterns 1-5).

298. *Id.* (pattern 6).

liability conflicts (article 3545),[299] but that rule is relatively limited in scope. As explained below, article 3545 is deliberately elliptical in that it only encompasses a few of the products liability cases that are governed by Louisiana law.

Article 3545 applies to delictual and quasi-delictual, as distinguished from contractual, liability that may arise from an injury caused by a product.[300] Contractual liability is governed by the conventional Obligations Title of Book IV. For cases falling within its scope, article 3545 applies regardless of whether the issue in question is one of conduct and safety, loss distribution, or punitive damages. For purposes of article 3545, the word "product" is not confined to industrial products, but includes natural substances, whether raw, processed, or otherwise altered by the industry of man. The term "product" includes movables and immovables, single and composite things, and a product's component parts. The product need not be "defective." It suffices that the product has caused the injury, as for instance when the injury results from a misleading description.. This article applies to any injury caused by a product, rather than to the product itself. The latter type of damage is likely to be characterized as contractual in nature and thus would be governed by the conventional obligations articles of Book IV.

Article 3545 applies to any injury directly sustained by a person or his property, whether or not that person is the owner of the product, and whether or not he was using the product at the time of the injury. This article covers the liability of any person who can be made a defendant in a products liability action under Louisiana law. It is understood that this coverage may include not only the producer or manufacturer of the product and its component parts, but also retailers, wholesale distributors, and other persons in the commercial chain of preparation and distribution of the product.

Article 3545 has been criticized for its "unilaterality and incompleteness."[301] Indeed, the first paragraph of article 3545 may be described as an "introspective," unilateral choice-of-law rule, that is, a rule that "specif[ies] the field of application—

299. LA. CIV. CODE ANN. art. 3545 (West 1992).

300. *Id.*

301. Kozyris, *supra* note 66, at 508; *see also* Weintraub, *supra* note 66, at 516 ("A rule that is desirable for choosing products liability law should apply generally, whether it selects the forum's law or the law of another state.").

inside the legal order to which [it] belong[s]—of the substantive rules of the same legal order."[302] The first paragraph is also an "incomplete," or, more accurately, elliptical rule, not only in the sense that, like any unilateral rule, it does not provide for the cases to be governed by foreign law, but also in the sense that it does not purport to identify *all* the cases that will eventually be governed by Louisiana law, but rather only those cases in which the application of that law is relatively noncontroversial. In other words, the first paragraph of article 3545 does not purport to define the maximum reach of Louisiana products liability law.[303] It simply authorizes the application of that law to any case in which Louisiana has any two or more[304] of the following factual contacts: the place of injury; the victim's domicile or residence; the place of the acquisition of the product; and the place of the manufacture of the product. Although this may sound like a "jurisdiction-selecting rule" or a prefabricated grouping of the contacts approach, the drafters would like to think of it more as a "preguided functional approach." Although the content of the applicable substantive law forms no part of its selection by the judge applying article 3545, the content of that law was one of the major reasons for its a priori selection by the drafters of the article.[305]

The operation of the first paragraph of article 3545 is illustrated by the following table. The first column represents the place of injury, the second the victim's domicile, the third the place of acquisition of the product, the fourth the place of the product's manufacture, and the fifth the state of the applicable law. The letters "La" indicate that the particular contact is situ-

302. Rodolfo De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 1966 R.C.A.D.I. II 435, 571; *see also* discussion *supra* note 14 (discussing the difference between unilateral and bilateral choice-of-law rules).

303. It could be said that this paragraph defines the minimum reach of Louisiana products liability law. However, the fact that this paragraph is subject to the escape clause of article 3547 means that some of the cases assigned to Louisiana law by this paragraph may eventually be governed by the law of another state.

304. In patterns 1-11 of Table 10, *infra* p. 752, Louisiana has two or more contacts. The first paragraph of article 3545(1) subjects patterns 1-10 to Louisiana products liability law. Pattern 11 is the only case in which Louisiana has two contacts and yet is not covered by the first paragraph of the article. *See* Table 10, *infra* p. 752. The third paragraph of article 3545 relegates this case, as well as patterns 12-16, to the other articles of the Torts Title of Book IV. *See id.* (patterns 12-16); discussion *infra* text accompanying notes 320-30.

305. At the time this article was drafted, Louisiana's substantive law on products liability was distinctively pro-consumer. As a result of subsequent amendments, this law is now more neutral.

ated in Louisiana while the symbol "--" indicates that the contact represented by that column is located in a state other than Louisiana.

TABLE 10
(Products liability and art. 3545(1))

#	Injury	V.Dom.	Acqu.	Mnfg.	Appl. Law
1.	La	La	La	La	La
2.	--	La	La	La	La
3.	La	--	La	La	La
4.	La	La	--	La	La
5.	La	La	La	--	La
6.	La	La	--	--	La
7.	La	--	La	--	La
8.	La	--	--	La	La
9.	--	La	La	--	La
10.	--	La	--	La	La
11.	--	--	La	La	--
12.	La	--	--	--	--
13.	--	La	--	--	--
14.	--	--	La	--	--
15.	--	--	--	La	--
16.	--	--	--	--	--

The cases to which Louisiana law applies under this article can be grouped into two major categories. The first category comprises cases in which Louisiana is the place of the product-induced injury and, in addition, is either the victim's domicile or residence, the place of the acquisition of the product, or the place of the manufacture of the product.[306] The occurrence of a product-induced injury in Louisiana will usually implicate the pertinent policies of that state in regulating the consequences of the injury and minimizing similar injuries in the future. Whether or not the policies of that state should prevail over the countervailing policies of another state will depend on what other connections the two states have with the particular case.

When, in addition to being the place of injury, Louisiana is also the victim's domicile or residence,[307] the application of Louisiana law is justified by Louisiana's legitimate interest in pro-

306. *See* Table 7, *supra* p.744 (patterns 1, 3-8).
307. *See* Table 10, *supra* (patterns 4-6).

tecting consumers living and injured within its borders. This need exists whether or not the product was manufactured[308] or acquired[309] in Louisiana. Any potential argument of unfair surprise that might be made by the defendant is adequately taken care of by the defense provided in the second paragraph of article 3545.[310] Besides, the application of Louisiana law may well benefit the defendant if this law turns out to be less protective of the plaintiff than, for instance, the law of the place of manufacture or acquisition of the product.

When, in addition to being the place of injury, Louisiana is also the place of the product's manufacture,[311] the application of Louisiana law is justified by the need to ensure that products that are manufactured in this state and actually cause injury here conform to the standards prescribed by the law of this state. This need exists whether the injured person is a Louisiana domiciliary[312] or a domiciliary of another state[313] whose law would protect him more or less than Louisiana law.

When Louisiana is the place of injury and the place of the acquisition of the product,[314] the application of Louisiana law is justified by the need to ensure that products marketed in this state, and which actually cause injury here, conform to the standards prescribed by the law of this state. This need exists whether the injured person is a Louisiana domiciliary[315] or a domiciliary of another state whose law would protect him more or less than Louisiana law.[316] Again, any potential argument of unfair surprise by the defendant is adequately taken care of by the defense provided in the second paragraph.

The second category comprises cases in which Louisiana is the place of the victim's domicile, as well as the place of either the acquisition or the manufacture of the product, or both.[317] Here, the application of Louisiana law is justified in light of Lou-

308. *See id.* (pattern 4).

309. *See id.* (pattern 5).

310. The defense provides that "[t]he preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels." LA. CIV. CODE ANN. art. 3545 (West 1992).

311. *See* Table 10, *supra* p. 752 (patterns 4 & 8).

312. *See id.* (pattern 4).

313. *See id.* (pattern 8).

314. *See id.* (patterns 5 & 7).

315. *See id.* (pattern 5).

316. *See id.* (pattern 7).

317. Table 7, *supra* p.744 (patterns 2, 9-10).

isiana's connections with both the plaintiff and the defendant. The plaintiff's connection consists of his domicile in this state, which forms the basis and the reason for this state's interest in that person's welfare. The defendant's connections consist of manufacturing the product within Louisiana[318] and allowing the product to reach the Louisiana market through ordinary commercial channels.[319] Given these affiliations on both sides of the conflict, no other connection, such as the occurrence of the injury within that state, seems necessary to justify the application of its law. This is why, unlike the first clause, the second clause of the first paragraph of article 3545 does not require that the injury occur within Louisiana.

Returning now to the criticism concerning unilaterality, it must be emphasized that the fact that the first paragraph of article 3545 consists of a unilateral rule does not mean that the article *as a whole*, or the title that contains it, or, much less, the entire new law, subscribes to unilateralism as a choice-of-law philosophy. In particular, one should not overlook the third paragraph of article 3545 which relegates "[a]ll the cases not disposed of by the preceding paragraphs . . . [to] the other Articles of this [Title]."[320] These are the cases in which Louisiana has fewer contacts, or contacts other than the ones required by the first paragraph,[321] as well as cases in which the foreseeability defense provided in the second paragraph has been successfully invoked.

The articles to which these cases are relegated, articles 3542-3544 and 3546-3548, consist mostly of bilateral choice-of-law rules with a varying degree of specificity and completeness, with the residual article, article 3542, being the least specific and the most complete. Concededly, the determination of the applicable law is a much more laborious process under these articles than it is under article 3545. If there is a bias built into this scheme, it is to be found in this differentiation between those cases for which the applicable law is designated directly by article 3545, and those cases in which the applicable law must be sought through articles 3543, 3544, 3546, and eventually article 3542.[322] The reasons for this differentiation are to be found in

318. Table 10, *supra* p.752 (patterns 2 & 10).

319. *Id.* (pattern 9).

320. LA. CIV. CODE ANN. art. 3545(3) (West 1992).

321. *See* Table 10, *supra* p. 752 (patterns 11-16).

322. In some of the latter cases, one would have to distinguish between matters of

practicality, forum restraint, and legislative restraint.

In the first place, in most of the cases that are not covered by article 3545, Louisiana has only one, or none, of the factual contacts considered pertinent by that article,[323] and at least in some of those cases, Louisiana courts may lack jurisdiction. It can be safely assumed that, even when jurisdiction exists, very few of these cases will be litigated in Louisiana. Thus, from a pragmatic viewpoint, these cases do not justify the risks entailed by, nor the effort that goes into, the drafting of a specific a priori rule.

Secondly, the fact that these cases are not as closely connected with Louisiana as the cases covered by article 3545 makes them less appropriate candidates for the automatic application of Louisiana law under that article. This is fairly obvious in all cases where Louisiana has only one contact with the case, whether that contact is the acquisition or manufacture of the product, the victim's domicile, or even the occurrence of the injury. This is why article 3545 does not subject these cases directly to Louisiana law, but rather relegates them to the other articles of the title, which may lead to the application of either Louisiana law or the law of another state.

Finally, another reason for which neither article 3545 nor any other article of Book IV subjects these cases directly to the law of any particular foreign state is the existing wide diversity of opinion on the proper criteria for choosing that law. This diversity is graphically illustrated by other efforts to draft choice-of-law rules for products liability, including the "modern" and most "flexible" rule of letting the plaintiff, or the defendant, choose the applicable law.[324] Consider, for instance,

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conduct and safety on the one hand, and loss distribution on the other, and to pinpoint the place of the injurious conduct from among the places of design, testing, approval, manufacture, etc.

323. *See* Table 10, *supra* p. 752 (patterns 12-16); *see also id.* (pattern 11) (illustrating case where Louisiana has two contacts).

324. The notion of letting the plaintiff choose the applicable law under certain circumstances was first advanced by the 1972 Hague Products Liability Convention. *See* The Hague Convention on the Law Applicable to Products Liability, *supra* note 143. It was then given more prominence in this country by Professor Cavers in his 1977 principle of preference for products conflicts. *See* David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L L.Q. 703, 728-29 (1977). Recently, Professor Weintraub carried this concept to its logical conclusion by also allowing the defendant to choose the applicable law under certain circumstances. *See* Weintraub, *supra* note 251, at 148. As appealing as it might be to the conflicts expert, this idea sounds quite heretical to the uninitiated. This is why it has little or no chance of being accepted by the majority of state legislatures. Perhaps this is also why the concept eventually did not survive in the Swiss statute, although it

the results produced by some of these rules in the following case, in which the four above contacts are dispersed in four different states. A person domiciled in state *A* is injured in state *B* by a product he purchased in state *C*, which was manufactured in state *D* by a manufacturer having its principal place of business in state *E*. The Hague Convention on the Law Applicable to Products Liability would allow the plaintiff to choose between the laws of either state *B* or *E*.[325] The Swiss conflicts statute would let the plaintiff choose between states *C* and *E*.[326] Despite his willingness to allow the plaintiff to choose the most favorable law, Professor Cavers would be forced to confine the plaintiff to the law of state *D*.[327] Professor Kozyris would apply the law of

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was contained in all of the previous drafts, which had been prepared mostly by academics. It can be safely assumed that this notion would have had the same fate in Louisiana. A similar but much more innocuous notion (letting the victim choose whether a corporate tortfeasor should be treated as a Louisiana domiciliary under article 3548) was proposed by this author and soundly defeated both by the Advisory Committee and the Council of the Louisiana State Law Institute. It is a safe bet that the legislature would not have been any more receptive.

325. *See* Convention on the Law Applicable to Products Liability, *supra* note 143, art. 6. Article 6 provides:

> 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.

Id. Articles 4 and 5 of the Convention would be inapplicable in this case because neither the state of injury nor the state of the victim's residence has any of the additional contacts required by these articles.

326. According to article 135(1) of the Swiss Statute on Private International Law of 1987,

> [c]laims based on a defect in, or a defective description of, a product are governed, at the choice of the injured party:
>
> (a) By the law of the state in which the tortfeasor has his place of business or, in absence thereof, his habitual residence; or
>
> (b) By the law of the state in which the product was acquired, unless the tortfeasor proves that the product has been marketed in that state without his consent.

1988 BB I 5, 1988 FF I 5, art. 135(1) (Switz.), *translated in* Cornu et al., *supra* note 71, at 228 (footnote omitted).

327. Professor Cavers's principle of preference for products liability provides in part that

> (a) . . . the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved).
>
> (b) If, however, the claimant considers the liability laws of that State (i) less protective than the laws of the claimant's habitual residence where either he had acquired the product or it had caused harm or (ii) less protective than the laws of the State where the claimant had acquired the product and it had caused harm, then the claimant should be entitled to base his claim on whichever of those two States' liability laws would be applicable to his case.

state *C* as the state of the "original delivery" and presumed "intended use" of the product.[328] Finally, Professor Weintraub would apply the law of state *A*, unless the product was not available there through ordinary commercial channels.[329] In summary, the results would be as follows: Hague, *B* or *E*; Swiss, *C* or *E*; Cavers, *D*; Kozyris, *C*; and Weintraub, *A*.[330]

This wide divergence of results suggests that cases of this type present extremely difficult conflicts problems. Fortunately, these cases are infrequent. The complexity and infrequency of these cases are good reasons to avoid any attempt to regulate these conflicts in advance by means of fixed statutory rules. This is why article 3545 relegates these cases to the flexible approach of articles 3542-3544. To the extent that these articles are permeated by deference to and confidence in the judiciary, this relegation can be seen as an exercise in legislative self-restraint.

Cavers, *supra* note 324, at 728. Since the case discussed in the text does not meet the requirements of either article 3544(2)(b)(i) or (ii), the plaintiff will be confined to the law of the state of manufacturing under article 3544(2)(a).

328. A choice-of-law rule proposed on February 27, 1987 by Professor Kozyris as an appendix to Ohio's substantive Products Liability Act, OHIO REV. CODE ANN. §§ 2307.71-.80, 2315.20 (Baldwin 1987), provided for the application of the law of "the state of the intended use of the product at the time of the delivery to the original acquirer." *Id.*; *see also* P. John Kozyris, *Choice of Law for Products Liability: Whither Ohio?* 48 OHIO ST. L.J. 377, 383 (1987). The state of original delivery was presumed to be the state of the intended use, unless the manufacturer was informed otherwise. The claimant was also given the option of choosing the law of the state of injury, but only if it coincided with the state of his domicile. *Id.* at 384-85. Professor Kozyris' new formulation, which would not necessarily lead to a different result in the case discussed in the text, appears in Kozyris, *supra* note 66, at 506.

329. Professor Weintraub's proposed rule provides in part:

> I. To determine whether plaintiff will be compensated and the extent of compensation for actual damages:
>
> > (A) Apply the law of plaintiff's habitual residence if the product that caused the harm or products of the same type are available there through commercial channels and the defendant should have foreseen this availability.

Weintraub, *supra* note 251, at 148. The rule provides several other contingencies for the cases that do not fall under the above-quoted provision.

330. This divergence of opinion is illustrated in the following table:

V.Dom.	Inj.	Acqu.	Mfg.	DPB	Methodol.	Result
A	B	C	D	E	Hague	B or E
					Swiss	C or E
					Cavers	D
					Kozyris	C
					Weintraub	A

H. *Products Liability and Punitive Damages*

As discussed earlier, for cases falling within the scope of article 3545, Louisiana law applies whether or not the issue in question would be classified as one of conduct and safety or loss distribution. Both the language of the article and its placement after articles 3543 and 3544[331] leave no doubt that, with regard to cases falling within its scope, article 3545 is more specific than, and prevails over, articles 3543 and 3544. As a result of a Senate amendment that added a reference to punitive damages to the opening sentence of article 3545,[332] the same is now true with regard to punitive damages. Because of this express reference to punitive damages, article 3545 becomes, despite its location,[333] more specific than and prevails over article 3546 in those products liability cases that fall within its scope.[334] The amendment seeks to ensure that when Louisiana products liability law is applicable to a case under article 3545, Louisiana law will also apply to the issue of punitive damages. This means that, as long as Louisiana substantive law maintains its current negative stance on punitive damages, no punitive damages will be available in such a case *under article 3545*.

Three Louisiana products liability cases involving the issue of punitive damages may illustrate the operation of this amendment in practice: *Lee v. Ford Motor Co.*,[335] *Commercial Union Insurance Co. v. Upjohn Co.*,[336] and *K.E. Pittman v. Kaiser Aluminum & Chemical Corp.*[337] In all three cases, the defective product caused injury in Louisiana to a Louisiana domiciliary. Because of this combination of facts, all three cases would be governed by Louisiana products liability law under the first par-

331. The arrangement of articles in the Torts Title of Book IV is from the general to the specific, except for articles 3543 and 3544, which are equally specific and parallel. Another exception is made by a Senate amendment to article 3545 that makes it more specific than article 3546. *See infra* text accompanying notes 334-36.

332. The amendment added the following italicized words to the opening sentence of article 3545, which now reads as follows: "Delictual and quasi-delictual liability for injury caused by a product, *as well as damages, whether compensatory, special, or punitive, are* governed by the law of this state . . . ." LA. CIV. CODE ANN. art. 3545 (West 1992).

333. *See* discussion *supra* note 331. Because the amendment was a last minute compromise, it was too late to reverse the sequence of the two articles.

334. For products liability cases not falling within the scope of article 3545 (*see* Table 10, *supra* p.752 (patterns 11-16)) or for cases not "disposed of" by the first paragraph of that article, article 3546 remains more specific.

335. 457 So. 2d 193 (La. Ct. App. 2d Cir.), *writ denied*, 461 So. 2d 319 (La. 1984).

336. 409 F. Supp. 453 (W.D. La. 1976).

337. 559 So. 2d 879 (La. Ct. App. 4th Cir.), *writ denied*, 563 So. 2d 885 (La. 1990).

agraph of article 3545.[338] Because of the Senate amendment to article 3545, Louisiana law will also apply to the issue of punitive damages under the same article and, as in the actual decisions, punitive damages will not be available in these cases.[339]

It should not be forgotten, however, that, like any other clause of article 3545, the reference to punitive damages contained therein is subject to the escape clause of article 3547, which, moreover, operates on an issue-by-issue basis. An earlier effort to amend article 3546 so as to prohibit the award of punitive damages in all products liability cases governed by Louisiana law, and to prevent the application of the escape clause of article 3547, was unsuccessful. When the amendment to article 3545 was proposed and accepted, it was clear that it would remain subject to the escape clause of article 3547. Consequently, it is theoretically possible for a court to award punitive damages under a foreign law in a products case that is otherwise governed by Louisiana law, if the court is convinced that, with regard to the issue of punitive damages, the case is exceptional enough to warrant invoking the escape clause of article 3547.[340]

I. Corporate Tortfeasors

The domicile of the parties is one of the connecting factors used quite frequently by Book IV to pinpoint the applicable law. When the party is a juridical person, its domicile is to be determined by article 3518 of Book IV, which provides that a juridical person is considered domiciled either in the state of its formation or in the state where it has its principal place of busi-

338. *See* Table 10, *supra* p. 752 (pattern 6).

339. Without the senate amendment, the issue of punitive damages in these cases would be decided under article 3546, and under that article punitive damages might be available. In all three cases, the injurious product was manufactured in a foreign state that imposed punitive damages by a defendant domiciled in that state or in another state that also imposed punitive damages. If the manufacturing of the product is treated as the "conduct" that caused the injury under article 3546, then punitive damages would be available in these cases under the first paragraph of article 3546. The following table illustrates the facts of these cases. The last three columns indicate the result in the actual cases on the issue of punitive damages, the result under article 3546, and the result under article 3545, which, because of the senate amendment, will be the controlling article.

#	Case name	C (M)	I	P	D	Appl. Law	Art. 3546	Art. 3545
1.	*Lee*	Ga (Y)	La(n)	La(n)	X (Y)	La(n)	Ga (Y)	La(n)
2.	*Comm. Un.*	X (Y)	La(n)	La(n)	X (Y)	La(n)	X (Y)	La(n)
3.	*Pittman*	Cal(Y)	La(n)	La(n)	Cal(Y)	La(n)	Cal(Y)	La(n)

340. *See* discussion *infra* text accompanying notes 357-66.

ness.[341] Article 3548,[342] the last article of the Torts Title of Book IV, applies to juridical persons that are domiciled outside Louisiana, but transact business in Louisiana[343] and incur a delictual or quasi-delictual obligation arising from their activity in Louisiana. This article authorizes the court to treat such foreign juridical persons as Louisiana domiciliaries for purposes of this title if the court determines that such treatment is "appropriate under the principles of Article [35]42."[344] Such principles include causing the least possible impairment to the interests of the involved states and promoting the policies of "deterring wrongful conduct and repairing the consequences of injurious acts."[345]

One of the main effects of article 3548, as well as the original reason behind its inception,[346] is to facilitate the court's task by pinpointing the applicable law in many cases involving issues of loss distribution or financial protection for which article 3544 does not designate the applicable law.[347] For example, article 3544 does not provide a rule for cases in which the injurious conduct, as well as the resulting injury occurred in Louisiana, but in which neither the victim nor the tortfeasor was domiciled

341. LA. CIV. CODE ANN. art. 3518 (West 1992).

342. *Id.* art. 3548.

343. *See, e.g.*, LA. REV. STAT. ANN. §§ 12:301-:302 (West 1969 & Supp. 1991) (meaning of "transact[ing] business in this state"); *see* Aspen Indus., Inc. v. Williams, 378 So. 2d 527, 528 (La. Ct. App. 4th Cir. 1979); A.E. Landvoight, Inc. v. Louisiana State Emp. Retirement Sys., 337 So. 2d 881, 884-85 (La. Ct. App. 1st Cir.), *writ denied*, 339 So. 2d 852 (La. 1976); Charles Pfizer & Co. v. Tyndall, 287 So. 2d 552, 553 (La. Ct. App. 3d Cir. 1973), *writ denied*, 290 So. 2d 908 (La. 1974).

344. LA. CIV. CODE ANN. art. 3548 (West 1992). The word "shall" at the end of the text of article 3548 was substituted for the word "may" by an amendment introduced in the Committee on Civil Law and Procedure of the house of representatives. The apparent intent of the amendment was to ensure that when a foreign juridical person meets the qualifications of article 3548, the court should have no discretion but must treat it as a Louisiana juridical person. The amendment, however, did not reduce the court's discretion in deciding whether such treatment is "appropriate under the principles of article [35]42." *Id.*

345. *Id.*

346. Article 3548 was originally drafted as a complement to article 3544, at which time the latter article was the only one using domicile as a factor for choosing the applicable law. Article 3546 and the third paragraph of article 3543 were added later. *See* discussion *supra* text accompanying notes 172-73, 248-49.

347. *See* Table 5a, *supra* note 228 (cases 11-70). If Louisiana is substituted for state "a" and state "A," then article 3548 will help pinpoint the applicable law in at least the thirteen patterns appearing in the following table:

in this state.[348] In such a case, if the tortfeasor is a juridical person that meets the qualifications prescribed by this article, the court could decide to treat that person as a Louisiana domiciliary for the purposes of the particular case. This would mean that the cases would then fall under article 3544(2)(a) and would be governed by Louisiana law.[349]

Similarly, article 3544 does not designate the applicable law in cases in which Louisiana is the domicile of the victim, but not the defendant, and has only one or none of the contacts considered pertinent by that article.[350] Again, if the tortfeasor in such a case is a juridical person that meets the qualifications prescribed in article 3548, the court could decide to treat that person as a Louisiana domiciliary for the purposes of the particular case. This would mean that the case would fall under the common-domicile rule of article 3544(1) and would be governed by Louisiana law, whether that law favored the plaintiff or the defendant.[351]

On the other hand, article 3548 may result in taking some cases out of the scope of the common-domicile rule of article 3544(1).[352] For example, under article 3544(1), loss distribution issues between a Texas tortfeasor and a Texas victim injured in Louisiana by the tortfeasor's Louisiana conduct would be gov-

TABLE 11

#	C	I	P	D	Applicable Law Art. 3544	Art. 3548	Comments
16.	B	La	La	B	-	La	com. dom.
17.	LA	b	LA	b	-	LA	com. dom.
18.	La	B	La	B	-	La	com. dom.
22.	LA	LA	B	c	-	LA	3544(2)(a)
23.	LA	LA	b	C	-	LA	3544(2)(a)
25.	La	La	B	c	-	La	3544(2)(a)
26.	La	La	b	C	-	La	3544(2)(a)
42.	C	La	La	B	-	La	com. dom.
43.	c	La	La	B	-	La	com. dom.
45.	LA	b	LA	c	-	LA	com. dom.
46.	LA	B	LA	c	-	La	com. dom.
48.	La	B	La	C	-	La	com. dom.
50.	La	b	La	C	-	La	com. dom.

348. *See* Table 5a, *supra* note 228 (cases 22-26).
349. *See* Table 11, *supra* note 347 (cases 22-26).
350. *See* Table 5a, *supra* note 228 (cases 11-17, 42-50).
351. *See* Table 11, *supra* note 347 (cases 16-18, 42-50).
352. The following table illustrates this effect:

erned by Texas law.[353] However, if the tortfeasor is a juridical person that meets the qualifications prescribed in article 3548, the court could decide to treat that person as a Louisiana domiciliary for the purposes of the particular issue. This would render inoperative the common-domicile rule of article 3544(1) and would make applicable the rule of article 3544(2)(a).[354] This would mean that the case would be governed by Louisiana law, irrespective of whether that law favors the plaintiff or the defendant, because both the conduct and the resulting injury would have occurred in the state of the "domicile" of one of the two parties.[355]

Finally, article 3548 may benefit certain corporate tortfeasors in a very direct and substantial way by bringing them under the protective umbrella of Louisiana's prohibition of punitive damages. A foreign juridical person that meets the requirements of article 3548 and engages in conduct in Louisiana for which Louisiana law does not impose punitive damages will be able to invoke the protection of Louisiana law, even if the resulting injury is manifested in another state that imposes punitive damages. Because the other state would have only one of the contacts considered pertinent by article 3546 (*i.e.*, place of injury) and Louisiana would have two such contacts, the place of the defendant's conduct and its fictitious Louisiana domicile, punitive damages will not be available under article 3546. Once again, it must be noted that treating the foreign juridical person as a Louisiana domiciliary is not automatic, but rather depends on whether the court is persuaded that such treatment is "appro-

TABLE 12

#	C	I	P	D	Applicable Law Art. 3544	Art. 3548	
9.	LA	LA	b	b	b		LA
10.	La	La	B	B	B		La
21.	LA	LA	b	c	b c	LA	
24.	La	La	B	C	B C	La	

353. *See* Table 2, *supra* p.719 (patterns 1-2).

354. Because article 3544 designates the applicable law "in the following order," the rules of article 3544(2) may not, in the ordinary case, displace the common-domicile rules of article 3544(1). However, in cases involving juridical persons that meet the qualifications of article 3548, such displacement is possible if the court so decides, because, with regard to these persons, article 3548 is more specific. The flexible language of article 3548 and the degree of discretion it vests in the judge are a sufficient guarantee that such displacement will not be automatic.

355. *See* Table 12, *supra* note 352.

priate under the principles of article 3542."[356]

J. The Escape Hatch

This Article is replete with references to the "escape clause" of article 3547. The frequency of these references is also indicative of the great importance of this clause in the overall scheme of the torts title of Book IV. The clause provides that "[t]he law applicable under Articles [35]43-46 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article [35]42, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue."[357] First, by way of explanation, it should be noted that the words "another state" do not mean a state other than Louisiana, but rather a state other than the one whose law is designated as applicable by articles 3543-3546. Semantic revisions by collective bodies do not always improve clarity. Thus, the clause is intended to operate, in a bilateral fashion, not only against, but also in favor of, Louisiana law.

The philosophy behind this clause is simple enough. Almost two hundred years ago, the redactors of the Code Napoleon acknowledged the simple truth that had escaped the drafters of the Prussian Code of 1794: that "to anticipate everything is a goal impossible of attainment," and that the legislator cannot anticipate everything.[358] Consequently, the redactors thought that the code should aspire to do no more than provide some general principles, and leave to judges the power and discretion to make these principles concrete and fill in the remain-

356. LA. CIV. CODE ANN. art. 3546 (West 1992).

357. *Id.* art. 3547.

358. *See* Portalis et al., *Texte du discours préliminaire*, *in* 1 LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 251, 255 (Paris, Treuttel & Würtz 1827); *see also* Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 761, 768 (1969). Professor Levasseur's article contains translations by Professor Shael Herman of the Preliminary Discourse of Portalis, including the following excerpt:

> We also kept clear of the dangerous ambition of wanting to forecast and regulate everything.
>
> . . .
>
> [T]here is a host of details which either escape [the legislator's attention] or are too much open to contention and instability to become the subject of a legal provision.
>
> In any case, how can one fetter the movement of time? . . . How can one know and calculate in advance what only experience can reveal? Can a forecast ever encompass matters that thought cannot reach?

Id. at 769.

ing gaps.[359] This idea was put in even more explicit terms by the redactors of the Louisiana Civil Code of 1825.

> The idea of forming a body of Laws, which shall provide for every case that may arise, is chimerical; the continual change which takes place in the state of Society; the new wants, new relations, new discoveries, which continually succeed each other, and which cannot be foreseen; would alone render it impossible to provide Laws for their Government. Therefore, even, if men could be found capable of framing regulations, sufficiently minute and comprehensive, to embrace all present relations, and to govern the intercourse of the present day, the System would in the course of years be as inconvenient, and as ill suited to our descendants, as the antiquated Laws, of which we complain, are now to us.[360]

The idea of an escape hatch is not too different. It, too, is premised on the notion that the legislature cannot anticipate everything, even when it purports to, and even when it enacts specific, as opposed to general, rules. Any a priori rule may, if applied mechanically or uncritically, produce results contrary to the purpose for which it was enacted. Article 3547 authorizes and requires the court to avoid such a result.[361]

The applicable rules are those contained in articles 3543-3546. Their underlying purpose was to effectuate the principles of article 3542 and to render concrete the idea of causing the least possible impairment to state interests. This is accom-

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359. Specifically Portalis noted:

> The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details . . . .
>
> . . .
>
> It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application.

Levasseur, *supra* note 358, at 769.

360. Edward Livingston et al., *Preliminary Report of the Code Commissioners, Dated February 13, 1823*, *in* LOUISIANA LEGAL ARCHIVES, at lxxxv, lxxxviii (1937).

361. Such escape clauses have become a common phenomenon in recent continental conflicts codifications and international conventions. For a typical example, see article 15 of the Swiss Federal Statute on Private International Law, which provides that "[t]he law designated . . . by the present statute is, by way of exception, not to be applied if, from the totality of the circumstances, it is manifest that the particular case has only a very slight connection to that law and has a much closer relationship to another law." 1988 BB I 5 art. 15(1), *translated in* Cornu et al., *supra* note 71, at 199 (footnote omitted); *see also* Symeonides, *supra* note 14, at 305-59; Alfred E. von Overbeck, *Les Questions Générales du Droit International Privé à la Lumière des Codifications et Projets Récents*, 1982 R.C.A.D.I. III 9, 186-207; Kurt H. Nadelmann, Comment, *Choice of Law Resolved by Rules or Presumptions With an Escape Clause*, 33 AM. J. COMP. L. 297, 297 (1985).

plished by identifying the state whose policies would be most impaired if its law were not applied, and calling for the application of that law. By expressly designating the applicable law, these rules provide the desired measure of legal certainty and predictability while also alleviating the court's choice-of-law burden. Article 3547 is a recognition of the fact that, while important, certainty and predictability are not the only goals. Ensuring that laws are applied in light of their purpose is even more important. Article 3547 is a legislative authorization and a reminder to the court to scrutinize the application of articles 3543-3546 so as to ensure that such application will not be inconsistent with the purpose underlying these articles.[362] If, in a particular case, the court is convinced from the totality of the circumstances that the policies of a state other than that identified by articles 3543-3546 would be significantly more impaired if its law were not applied, the court is authorized to deviate from those articles and to apply the law of the former state.

Through this arrangement, Book IV attempts to attain an appropriate balance between the perennially competing values of legal certainty and legal flexibility.[363] As a famous comparatist put it, "[t]here is and will always be in all countries a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable to circumstances on the other hand."[364] Book IV provides sufficient certainty through articles 3543-3546, which compose the main operative body of the torts title. At the same time, Book

362. This idea is stated more clearly in the escape clause contained in paragraph 3 of article 45 of the *Projet for the Codification of Puerto Rican Private International Law* adopted by the Puerto Rican Academy of Legislation and Jurisprudence. *See* PROJET, *supra* note 65, art. 45, at 145. The general article on tort conflicts in the Puerto Rican *Projet*, article 45, closely resembles article 3542 of the Louisiana *Projet* but begins without the "except clause" and ends with the following paragraph: "When a particular case or issue is not provided for in the following Articles of this Title, or *when these Articles would produce a result that is clearly contrary to the objectives of this Article*, the applicable law is to be selected in accordance with this Article." *Id.* (emphasis added).

363. *See generally* Paul H. Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795 (1963); Frank B. Vischer, *The Antagonism Between Legal Security and the Search for Justice in the Field of Contracts*, 1974 R.C.A.D.I. II 1. As one contemporary legal philosopher asked, "[i]s it possible to find a solution to the problem which proceeds from the basic assumption that certainty and elasticity in legal methodology are not polar opposites, between which a clearcut choice must be made, but complementary values, which in some fashion must be meshed together?" Edgar Bodenheimer, *The Need for a Reorientation in American Conflicts Law*, 29 HASTINGS L.J. 731, 745 (1978).

364. RENÉ DAVID, ENGLISH LAW AND FRENCH LAW 24 (1980).

IV attempts to provide some flexibility through the "escape valve" of article 3547 and the fall-back general approach of article 3542.

While fully endorsing the idea of an escape hatch, Professor Weintraub[365] criticizes the fact that it is "reserved for the truly exceptional cases."[366] For the record, it should be stated that the words "exceptional" and "clearly" were not contained in the original text of article 3547 as submitted to the Council of the Louisiana State Law Institute. They were added by the Council after a long and specific debate in an effort to ensure that article 3547 would not end up swallowing articles 3543-3546. what is "exceptional," however, remains very much a judicial determination. "Exceptional" need not be confined to extraordinary or statistically rare cases. "Exceptional" might be any case in which most reasonable people would agree that the policies of one state will be significantly more impaired than those of the state whose law is designated as applicable by articles 3543-3546.

In the final analysis, the utility of the escape clause and the frequency with which it will be employed will depend greatly on how good or bad the outcome would be under articles 3543-3546, or how good or bad the courts think they would be under these articles. If these articles produce spectacularly bad results, the pressure to resort to the escape hatch will become irresistible. If these articles produce good results, the need for an escape will be gradually diminished. Perhaps one should hope for the latter, but expect the former.

V. CONCLUSION

This is, in general terms, the new Louisiana law for tort conflicts. As said at the beginning, Act No. 923 represents the first comprehensive attempt in the United States to resolve conflicts problems through legislation. Naturally, "first" does not mean "best." Those who plow the ground first encounter many more difficulties than those who come later, and are much more likely to make mistakes or compromises that in hindsight appear avoidable. Thus, if nothing else, Act No. 923 may contribute to the advancement of American conflicts law in a negative way by enabling others to learn from and avoid its mistakes or compromises. It is hoped, however, that Act No. 923 will also con-

365. *See* Weintraub, *supra* note 66, at 517-18.

366. LA. CIV. CODE ANN. art. 3547 cmt. (West 1992).

tribute in a positive way: by demonstrating that conflicts problems are susceptible to legislative solutions, and that the lessons of modern choice-of-law theories are capable of being compressed into statutory rules.

Act No. 923 was drafted during the waning years of the not-so-glorious American conflicts revolution and the beginning of a bitter counter-revolution, that is, during a period of transition, reorientation, and intense soul-searching in American conflicts law. Although the Act draws heavily from the American conflicts experience, it is the product of neither the revolution nor the counter-revolution. Rather, it is the collective intellectual product of the efforts of the men and women of the Louisiana State Law Institute and the Louisiana Legislature. It is also the product of an indigenous legal culture that has always drawn from both sides of the north Atlantic. This culture is now coming of age and is able and ready to give back to the American legal culture.

APPENDIX
ACT NO. 923 OF 1991 ON CONFLICTS LAW
* * * * *
TITLE I: GENERAL PROVISIONS
* * * * *

Article 3515. Determination of the applicable law; general and residual rule. Except as otherwise provided in this Chapter, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

* * * * *

TITLE VII: DELICTUAL AND QUASI-DELICTUAL OBLIGATIONS

Article 3542. General rule. Except as otherwise provided in this Title, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 15, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

Article 3543. Issues of conduct and safety. Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.

In all other cases, those issues are governed by the law of

the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.

The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.

Article 3544. Issues of loss distribution and financial protection. Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:

(1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.

(2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state; and (b) when the injury and the conduct that caused it occurred in different states, by the law of the state in which the injury occurred, 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.

Article 3545. Products liability. Delictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused injury either in this state or in another state to a person domiciled in this state.

The preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels.

All cases not disposed of by the preceding paragraphs are governed by the other Articles of this Title.

Article 3546. Punitive damages. Punitive damages may not be awarded by a court of this state unless authorized:

(1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or

(2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

Article 3547. Exceptional cases. The law applicable under articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue. In such event the law of the other state shall apply.

Article 3548. Domicile of juridical persons. For the purposes of this Title, and provided it is appropriate under the principles of Article 3542, a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state.