# Material Justice and Conflicts Justice in Choice of Law

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## I. INTRODUCTION

Professor Friedrich K. Juenger, to whom this volume and this essay are affectionately dedicated, has spent a good part of his stellar career trying to enlighten the rest of us conflicts teachers and to make sense out of what many consider the chaos of American conflicts law. I for one consider myself a beneficiary of his prolific and incisive scholarship, although this may not be evident from the views I espouse in this or my other writings. This essay focuses on one of the questions that has occupied Juenger's attention: whether the objective of private international law (PIL) is simply to choose the state that should provide the applicable rule without regard to its content and the substantive quality of the solution it produces or whether it should seek to produce the best substantive solution for the particular multistate case without regard to its foreign elements. This old dilemma between so-called "conflicts justice" and "material justice" is explored below. Juenger is an ardent and eloquent proponent of the material-justice view.[1]

This essay takes the position that this dilemma should not be resolved in an "either or" manner. It accepts the premise that material-justice considerations should be kept in mind as one of the factors that should guide the pursuit of conflicts justice and explores the question of when and how such considerations should be given preference.[2]

### 1. THE CLASSICAL VIEW: "CONFLICTS JUSTICE"

The classical, traditional view of PIL going at least as far back as Savigny is grounded on the basic premise that the function of PIL is to ensure that each multistate legal dispute is resolved according to the law of that state that has the "most appropriate" relationship with that dispute. Opinions on defining and especially measuring the "propriety" of such a relationship have differed over the years from one legal system to another and from one subject to the next. Despite such differences, however, all versions of the classical school have remained preoccupied with choosing the proper *state* to supply the applicable law, rather than directly searching for the proper *law* or, much less, the proper *result*.

Indeed, the implicit if not explicit assumption of the classical school is that in the great majority of cases, the law of the proper state *is* the proper law. But in this context "propriety" is defined not in terms of the content of that law or the quality of the solution it produces, but rather in geographical or spatial terms.[3] If

1. *See, inter alia,* Friedrich K. Juenger, *Choice of Law and Multistate Justice* 145-73, 191-208, 233-37 (1993). This fascinating book, which rivals another 20th century classic, David F. Cavers, *The Choice of Law Process* (1965), should be a required reading in any conflicts class.

2. This essay draws from Symeon C. Symeonides, *Private International Law at the End of the 20th Century: Progress or Regress*, copyright by Kluwer Law International (1999), to which the reader is kindly referred for further documentation.

3. *See* Kegel, The Crisis of Conflict of Laws, 112 *Recueil des Cours* 91, at 184-85 (1964): "[W]hat is considered the best law according to its content, that is, *substantively*, might be far from the best (continued...)

the contacts between the state from which that law emanates and the multistate dispute at hand are such as to meet certain, usually pre-defined, choice-of-law criteria, then the application of that law is considered proper regardless of the actual qualities of the solution it produces. Whether the actual solution will be good or bad depends on the inherent goodness or badness of the applicable law, and that is something about which PIL cannot do much. After all, conflicts exist because different societies adhere to different value judgments reflected in their respective laws as to how legal disputes should be resolved. As long as multistate disputes are resolved by means of choosing the law of one state over the other, such a choice is bound to satisfy one society and one party and aggrieve another. This being so, the choice of the applicable law cannot afford to be motivated by whether it will produce a "good" or "just" resolution of the actual dispute. Hence, PIL should strive to achieve "conflicts justice," that is, ensure the application of the law of the proper state, but PIL cannot expect to achieve "material justice," i.e., the same type and quality of justice as is pursued in fully domestic situations. In Gerhard Kegel's words, PIL "aims at the *spatially* best solution . . . [while] substantive law aims at the *materially* best solution."[4]

### 2. THE SECOND VIEW: "MATERIAL JUSTICE"

A second view, which is much older than generally believed,[5] begins with the premise that multistate cases are not qualitatively different from fully domestic cases and that judges should not abdicate their responsibility to resolve disputes *justly and fairly* the moment they discover that the case contains foreign elements. Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of PIL as much as it is of internal law. PIL should not be content with a different or lesser quality of justice —so-called "conflicts justice"— but should aspire to attain "material or substantive justice." Thus, this view rejects the classical presumption that the law of the proper state is necessarily the proper law and instead directly scrutinizes the applicable law for determining whether it actually produces the "proper" *result*. Again, opinions differ on defining the "propriety" of the result, but all the various versions of this view agree that the propriety must be determined in material rather than in spatial terms.

### 3. INROADS BY "MATERIAL JUSTICE INTO "CONFLICTS JUSTICE"

During the second half of the 20th century, the material-justice view has

(...continued)
spatially."

4. Kegel, Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers, 27 *Am. J. Comp. L.* 615, 616-17 (1979).

5. As Juenger reminds us (*see* Juenger, *supra* n.1 at 12, 15, 43), historical precedents include the Byzantine scholars' preference for the *philanthropoteron* result, the Italian statutists' preference for the forum's *statuta favorabilia* over foreign *statuta odiosa*, and Magister Aldricus' call for the application of the *potior et utilior* law.

gained significant ground at the expense of the classical view. This is particularly evident in the United States where some approaches have elevated the pursuit of material justice into a principal choice-of-law criterion.[6] This essay does not discuss these approaches. Nor does it discuss the *de facto* role that material-justice considerations play in the actual judicial resolution of conflicts case under other approaches followed in the United States or elsewhere.[7] Instead, this essay focuses on codified PIL systems, which are seen as the bastions of the classical view, and examines the degree to which these systems *officially* sanction the pursuit of material justice in the choice-of-law process. The best evidence of this *de jure* result-orientation is found in statutory choice-of-law rules that are specifically designed[8] to produce a particular *substantive* result. This essay identifies these *result-oriented* rules and then attempts to determine how their existence should inform the continuing debate between the proponents of the two views.

## II. RESULT-ORIENTED STATUTORY CHOICE-OF-LAW RULES

Result-oriented rules appear in varying shapes and forms. Their common characteristic, however, is that they are specifically designed to accomplish a certain substantive result that is considered a priori as desirable. More often than not, this result is favored by the domestic law of not only the forum state but also of the majority of states that partake in the same legal tradition. This result may be one of the following:

> (a) favoring the formal or substantive validity of a juridical act, such as a testament, a marriage, or an ordinary contract;
>
> (b) favoring a certain status, such as the status of legitimacy or filiation, the status of a spouse, or even the dissolution of a status (divorce); or

6. *See* Leflar's "better-law approach" in Leflar, Choice-Influencing Considerations in Conflicts Law, 41 *N.Y.U.L. Rev*. 367 (1966); McDougal's "best-law approach" in McDougal, Towards the Application of the Best Rule of Law in Choice of Law Cases, 35 *Mercer L. Rev.* 483 (1984); and Juenger's call for the construction of a "rule of decision which most closely accords with modern standards of products liability" in Juenger, *supra* n.1 at 197. To a lesser extent, material-justice considerations inform the writings of David Cavers and Russell Weintraub. *See* Cavers, A Critique of the Choice of Law Problem, 47 *Harv. L. Rev*. 173 (1933) ("justice in the individual case"); David F. Cavers, *The Choice of Law Process* 180 (1965) (result-oriented principles of preference for contracts); Cavers, The Proper Law of Producer's Liability, 26 *Int'l & Comp.L.Q*. 703 (1977) (result-oriented principle for products liability); Russell J. Weintraub, *Commentary on the Conflict of Laws* 360, 397-98 (3d ed. 1986) (plaintiff-favoring rule for torts and rule of validation for contracts).

7. For a discussion of result-oriented trends and techniques in other American approaches and in other uncodified PIL systems, *see* Symeonides, *supra* n.2 at 46, 60.

8. Material justice can also be pursued through other rules or techniques that are not specifically designed for this purpose. Among them are open ended choice-of-law rules, rules which rely on soft or indeterminate connecting factors, content-oriented choice-of-law rules, statutory escape clauses, the *ordre public* reservation, the characterization process, and *renvoi*. For a comparative discussion, *see* Symeonides, *supra* n.2 at 26-34, 37-42.

(c) favoring a particular party, such as a tort victim, a consumer, an employee, a maintenance obligee, or any other party whom the legal order considers weak or whose interests are considered worthy of protection.

The first two objectives (favoring the validity of a juridical act or favoring a certain status) are accomplished by choice-of-law rules that contain a list of alternative references to the laws of several states (*alternative-reference rules*) and allow the court to select a law that validates the juridical act or confers the preferred status. The third objective (protecting a particular party) is accomplished through choice-of-law rules which: (I) provide alternative choices to the court as above; (ii) allow the protected party, either before or after the events that give rise to the dispute, to choose the applicable law from among the laws of more than one state; or (iii) protect that party from the adverse consequences of a potentially coerced or uninformed choice-of-law.

### 1. RULES FAVORING THE VALIDITY OF CERTAIN JURIDICAL ACTS

In recent years, result-oriented rules that are designed to uphold the validity of certain juridical acts have proliferated and their scope has expanded. Such rules can now be found in almost every country, they apply to more juridical acts than ever before, and they encompass not only formal but also substantive validity.

#### *a. Testaments (favor testamenti)*

One of the oldest and most widely adopted rules of this kind is a rule which, in keeping with the ancient substantive policy of *favor testamenti*, is designed to uphold the formal validity of testaments. This result is guaranteed or greatly facilitated by providing a list of alternative references to several laws and authorizing the court to apply whichever one of the listed laws would uphold the testament as to form.

One of the longer lists of alternative references is contained in Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961) which is in force in more than 30 countries.[9] This article provides that a testament shall be considered formally valid if it conforms to the internal law of any one of the following *eight* potentially different places: the place of making; the testator's nationality, domicile, or habitual residence at either the time of making or the time of death; and with regard to immovables, the situs state. Similar rules are found in many national conflicts codifications.[10] In the United States, the same policy of *favor testamenti* was

9. *See* Symeonides, *supra* n.2 at 49 n.192.

10. *See, e.g.*, Austrian PIL Act Art. 30; Hungarian PIL Act Art. 26(2); Italian PIL Act Art. 48; Polish PIL Act Art. 35; Portuguese Civ. Code Art. 65.1; Swiss PIL Act Art. 93; EGBGB Art. 26; Yugoslav PIL Act Art. 31. Hereinafter, conflicts codifications that are not part of a civil code (Civ. Code) are referred to as PIL Acts without further information. Such information is provided in (continued...)

espoused by the widely followed Uniform Wills Act of 1909 and later by § 2-506 of the Uniform Probate Code.

Rules designed to favor the validity of a testament with regard to matters other than form are less common, but they do exist. For example, regarding capacity to dispose, Article 94 of the Swiss PIL provides that "[a] person is capable of disposing *mortis causa* if . . . he possesses such capacity under the law of the state of his domicile or of his habitual residence, or the law of one of the states of which he is a national." A narrower rule is found in the Louisiana and Austrian codifications.[11]

***b. Other Juridical Acts*** *(favor negotii)*

With regard to contracts and other *inter vivos* juridical acts, a similar and old though narrower validation rule can be found in many civil law countries. Even traditional European civil codes such as the Greek, the Spanish, and the old Italian, provide an alternative-reference rule of validation for the form of *inter vivos* juridical acts. This rule allows validation under the law of any one of three potentially different laws: the law of the place of making, the law governing the substance of the act, or a law affiliated with the executing party or parties.[12]

Nowadays, such validating rules are more common and much broader. Article 9 of the 1980 European Convention on the Law Applicable to Contractual Obligations (Rome Convention) stands out as one characteristic example. The article provides that, subject to certain limitations, a contract is formally valid if it conforms to the law that governs the substance of the contract or the law of the country or countries from which either party expressed its assent to the contract. Parallel provisions are found in the Hague Sales Convention, the German codification, and the Swiss PIL Act.[13] Similar rules exist in many recent PIL codifications, some of which provide a shorter[14] and others a longer[15] list of

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Symeonides, *supra* n.1.

11. *See* Louisiana Civ. Code Art. 3529 (choice between the law of domicile at either time of making or time of death, whichever favors validity); Austrian PIL Act § 30 (accord).

12. *See* Greek Civ. Code Art. 11; Spanish Civ. Code Art. 11(1); Italian Civ. Code 1942 (Prel. Disp.) Art. 26. These rules are subject to certain limitations and exceptions not on point here. For similar validation rules in the new Italian PIL Act, *see* Art. 57 (incorporating the Rome Convention for contracts), Art. 28 (marriage), Art. 35 (recognition of a child acknowledgment), Art. 56 (donations), Art. 60 (representation). For a somewhat narrower provision *see* Art. 2094 of the Peruvian Civ. Code (1984) (alternative reference to the *lex loci actum* or the *lex causae*). *See also* the French jurisprudence described in Audit, *Rapport Français* in Symeonides, *supra* n.2 at 198-200, 201.

13. *See* Art. 11 of the Hague Convention for the Law Applicable to the International Sales of Goods (1985); EGBGB Art. 11; Swiss PIL Act Art. 124. *See also id.* Art. 56 (formalities of matrimonial agreements).

14. *See* Polish PIL Act Art. 12 (alternative validating references to the law of the place of making or the *lex causae*); Portuguese Civ. Code Art. 36.2 (same); Yugoslav PIL Act Art. 7 (same).

15. *See, e.g.*, Louisiana Civ. Code Art. 3538 (alternative references to *lex loci actum*, the *lex causae*) same, the law of the common domicile or place of business of the parties, the law of the (continued...)

alternative references.

The trend of favoring validation of juridical acts has even been carried over to issues of capacity, although here validation is placed within narrower parameters than is the case with regard to issues of form. For example, even traditional European civil codes tilt towards validation by authorizing the application of the validating rule of the *lex fori* in lieu of the otherwise applicable personal law of the actor.[16] Similarly, the codifications of Louisiana and Venezuela provide alternative validating references to the law of the actor's domicile or the law that governs the substance of the act.[17] The Rome Convention, as well as the German, the Swiss, the Italian, and the Quebec codifications, narrowly favor validation by limiting the circumstances under which a party may invoke the provisions of a law that declares that party incapable of contracting.[18] Also, in the United States, two influential conflicts scholars have proposed explicit validation rules encompassing, *inter alia*, issues of contractual capacity. Thus, subject to certain exceptions, Professor Weintraub would uphold a contract that is considered valid under the law of "any state having a contact with the parties or with the transaction sufficient to make that state's validating policies relevant."[19] Similarly, in his Principle of Preference no. 6, Professor Cavers would apply the invalidating law of a state only if the party protected by that law is domiciled in that state *and* the transaction is centered there.[20]

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place of performance to the extent of performance to be rendered in that state, and the law chosen by the parties); Quebec Civ. Code 3109 (1)(2) (alternative validating references to the *lex loci actum*, the *lex causae*, the *lex rei sitae*, and the law of the domicile of one of the parties); Venezuelan PIL Act Art. 37 (alternative validation references to the *lex loci*, the *lex causae*, and the law of the domicile of the executing party or parties). *See also* Quebec Civ. Code Art. 3088 (formal validity of marriages governed by the *lex loci celebrationis* or by the law of domicile or nationality of either spouse); Portuguese Civ. Code Art. 19 (rejecting renvoi where it leads to the invalidity of an otherwise valid juridical act).

16. *See, e.g.*, Greek Civ. Code Arts. 7, 9; Spanish Civ. Code Art. 10(8); Peruvian Civ. Code Art. 2070; Portuguese Civ. Code Art. 28(1); Hungarian PIL Act Art. 15(2)(3). The objective of these rules is not validation for its own sake but rather validation for the sake of preserving security of transactions within the forum state. In contrast, a bilateral rule like Article 14 of the Yugoslav PIL Act which is phrased in forum-neutral terms (giving a choice between the *lex nationalis* and the *lex loci contractus*) is more directly geared towards validation.

17. *See* La. Civ. Code Art. 3539 (providing that a person is considered capable of contracting if he possesses such capacity under either the law of the state in which he is domiciled or the law of applicable to the particular issue under the flexible approach provided in Art. 3537, the general article for contract conflicts); Venezuelan PIL Act Art. 18 (providing that a person lacking capacity under the law of his domicile shall be considered capable if he possesses capacity under the law governing the substance of the act). *See also id.* Art. 17 providing that a change of domicile "does not restrict any acquired capacity."

18. *See* Rome Convention Art. 11; EGBGB Art. 12; Swiss PIL Act Art. 36; Italian PIL Act Art. 23(2)(3); Quebec Civ. Code art 3086. These articles provide that a person considered capable of contracting under the law of the place of the making may invoke his incapacity resulting from another law only if the other party knew or should have known of the incapacity at the time of the contract.

19. Russell J. Weintraub, *Commentary on the Conflict of Laws* 397 (3d ed. 1986).

20. *See* Cavers, *The Choice of Law Process* 180 (1965). Although the last two rules have not been explicitly adopted by courts, they arguably reflect judicial practice. *See* the "rule of (continued...)

## 2. RULES FAVORING A CERTAIN STATUS

### *a. Legitimacy*

At least until the middle of the 20th century, illegitimacy carried discriminatory and stigmatizing legal and social effects in virtually every country. Because of these dire consequences, the domestic law of most countries contained several rules which were designed to ensure that all ambiguities and doubts would be resolved in favor of legitimacy. Since legitimacy was the preferred status in domestic law, legitimacy became the favored status in PIL. This preference was reflected in choice-of-law rules which, within certain narrow parameters, were designed to lead to the application of a law that accorded the status of legitimacy.

By now, these rules have multiplied, although by this time the discriminatory treatment of illegitimate children is on the way out, having been declared unconstitutional in many countries. For example, Article 19 of the German EGBGB provides, essentially though not literally, that a child is legitimate if at the time of birth it would be accorded this status under the law that governs the effects of the mother's marriage, or the national law of either spouse.[21] Equally representative is a provision from another continent: Article 2083 of the Peruvian Civil Code provides that "[m]atrimonial filiation is governed by the law of the place where the marriage was celebrated or of the conjugal domicile at the time the child is born, whichever is more favorable to legitimacy."[22]

### *b. Filiation*

Even if the very distinction between legitimacy and illegitimacy were to disappear, the consequences attaching to the status of a child (legitimate or illegitimate) will continue to provide justification for other result-oriented rules favoring that status. An example is Article 3091 of the Quebec Civil Code which provides that filiation is governed by "the law of the domicile or nationality of the child or one of his parents . . . whichever is more beneficial to the child."[23] A

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validation" extracted from judicial decisions by Professor Ehrenzweig in Ehrenzweig, The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation, 59 *Colum. L. Rev.* 874, 875-80 (1959); Ehrenzweig, Choice of Law: Current Doctrine and "True Rules," 49 *Calif. L. Rev.* 240 (1961).

21. For a similar rule regarding legitimation by subsequent marriage, *see* EGBGB Art. 21. *See also* Austrian PIL Act § 21 (providing that "[i]n case of different personal status laws of the spouses, the one more favorable to the child shall be determinative.") *See id.* §22 (legitimation by subsequent marriage). *See also* French Civil Code Art. 311-16.1.

22. *See also* Portuguese Civ. Code Art. 19(1) (providing that renvoi will not be followed if it would render illegitimate a status which otherwise would be legitimate; Italian PIL Act Art. 33(2) (legitimacy governed by the national law of either parent), Art. 34 (legitimation by subsequent marriage governed by the child's national law or the national law of either spouse). For similar rules in Japan, *see* Chin Kim, New Japanese PIL: The 1990 Horei, 40 *Am. J. Comp. L.* 1, 28-32 (1992).

23. For similar rules and jurisprudence in France, *see* Audit, *Rapport Français* in Symeonides, *supra* n.2 at 200. *See also* Yugoslav PIL Act Art. 43 (providing that, if the parents do not have the same nationality, filiation is governed by the national law of either parent, whichever is more favorable to the child).

similar rule is contained in Article 20 of the EGBGB, which provides that paternity is determined by alternative references to the national law of either parent or the law of the habitual residence of the child.[24] The Swiss PIL Act raises to as many as *six* the number of potentially different laws under which a child acknowledgment can be made in Switzerland,[25] or under which an acknowledgement or legitimation made abroad can be recognized in Switzerland.[26]

***c. Adoption***

The Belgian experience with adoption offers another example of material-justice considerations making inroads into conflicts justice in a country known for its strong adherence to the classical view. A 1969 Belgian law which required compliance with the national laws of both parents for a valid adoption was subjected to repeated manipulation by Belgian courts. In 1987, that law was replaced with a new law which favors adoption by providing that compliance with either the national law of the adopting parent or with Belgian law will suffice for a valid adoption in Belgium by parties who have stable relations with that country.[27]

***d. Marriage and Divorce***

Until the middle of the 20th century, most countries imposed strict requirements for the substantive validity of marriages and to the granting of divorce. PIL did likewise. The substantive validity of a marriage was judged either exclusively under a single law or cumulatively under the personal laws of both prospective spouses. Divorce was also exclusively governed by a single law, usually the law of the spouses' common domicile or nationality. By the end of the century, the substantive law of most countries has become more liberal, and so has PIL.

Regarding marriage, the notion of *favor matrimonii* has gained wider acceptance and is pursued through choice-of-law rules with alternative connecting factors. For example, Article 44 of the Swiss PIL Act provides that a marriage between foreigners in Switzerland is to be considered valid if it conforms to the substantive requirements prescribed by Swiss law or by the national law of *either* prospective spouse.[28] The corresponding German provision begins by requiring compliance with the national law of *each* prospective spouse, but if neither law

24. *See also* Italian PIL Act Art. 13(3) (providing that *renvoi* shall be taken into account only if it leads to the application of a law that allows filiation to be established).

25. *See* Swiss PIL Art. 72. These laws are the law of the child's habitual residence or nationality or the law of the domicile or nationality of either parent. The same article provides that the contestation of acknowledgment is governed exclusively by Swiss law. *See also* Italian PIL Act Art. 35 (acknowledgment, wherever made, is governed by the national law of the child or of the acknowledging parent, whichever is more favorable to acknowledgment).

26. *See* Swiss PIL Act Arts. 72-73.

27. *See* Fallon & Meeusen, *Belgian Report* in Symeonides, *supra* n.2. at 110-11. *See also* Italian PIL Act Art. 38 (forum law governs adoption petitions filed in forum courts).

28. For a narrower rule for the formal validity of marriage, *see, e.g.*, Italian PIL Act Art. 28 (providing alternative validation references to the *lex loci celebrationis*, the national law of either spouse, or the law of their common residence).

allows the marriage then German law applies if either spouse is a resident or citizen of Germany and the foreign law is "incompatible with freedom of marriage."[29] The Dutch International Marriages Act follows a similar approach.[30]

Regarding divorce, the policy of *favor divortii* has gained wider acceptance in recent years. In its more extreme form, this policy can be seen in the United States where the pro-divorce law of the forum has been applied to all cases subject to its jurisdiction, which may even include cases in which neither spouse is domiciled in the forum state.[31] In the Netherlands, the possibility of applying non-forum law is retained, but spouses are given a choice between their common foreign national law and the law of the forum.[32]

In other countries, a more moderate policy of *favor divortii* is pursued through the alternative application of the law of the forum if that law allows divorce and at least one of the parties has a certain affiliation with the forum state. For example, Article 17 of the EGBGB provides for the alternative application of either the law that governs the effects of marriage or of German law, whichever allows divorce.[33] Article 61 of the Swiss PIL Act accords a more prominent role to the *lex fori* by providing that even for those cases in which divorce is governed by foreign law —such as when both spouses possess a common foreign nationality and only one of them is domiciled in Switzerland— Swiss law will replace foreign law if the latter "does not allow divorce or subjects it to extraordinarily severe conditions." Similar pro-forum and pro-divorce practices are followed in Belgium, the Netherlands, Yugoslavia, Hungary, China, and, most recently, even in Italy.[34]

### 3. RULES FAVORING ONE PARTY

By favoring the validity of a juridical act or a certain status, the choice-of-law rules described above also favor, directly or indirectly, the party or parties whose interests depend on the particular act or status. Other rules, however, are even more explicitly and directly designed to benefit one of the parties to a legal dispute. This party can be a tort victim, a maintenance obligee, a consumer, an employee, or any other party whom the legal order considers weak or whose

29. EGBGB Art. 13. This article also provides that the prospective spouses must have taken reasonable steps to comply with their national law. The article also gives examples of foreign laws that violate the principle of freedom to marry by providing that "a marriage shall not be prevented by a previous marriage of either engaged person, if the validity of the previous marriage has been set aside by a decision made or recognized within the country, or, if the spouse of either engaged person has been declared dead."

30. *See* Boele-Woelki, Joustra & Steenhoff, *Dutch Report* in Symeonides, *supra* n.2 at 309.

31. *See* Spaht & Symeonides, Covenant Marriage and the Law of Conflict of Laws, 32 *Creighton L. Rev.* 1085, 1102-07 (1999).

32. *See* the International Divorce Act of 1981, discussed in Boele-Woelki, Joustra & Steenhoff, *Dutch Report* at 6.5.

33. The application of German law is conditioned on the plaintiff's German citizenship at either the time of the marriage or the time of filing the petition.

34. For authorities, *see* Symeonides, *supra* n.2 at 56.

interests are considered worthy of protection. This party is favored through one or more of the following means: (I) granting that party, either before or after the events that give rise to the dispute, the right to choose the applicable law from among the laws of more than one state, or allowing the court to make a choice for the benefit of that party; or (ii) protecting that party from the adverse consequences of a potentially coerced or uninformed choice-of-law. These means are described below.

***a. Choice of law by, or for the benefit of, one party***

Rules which allow one party[35] the right to select the applicable law are par excellence result-oriented since that party is likely to choose the law that he or she considers best. Although this is clearer when the choice is exercised after the dispute (see below), it is also true when the choice is made in advance, as in the case of testate succession.

*(I) Pre-dispute choice by one party*

Indeed a testator chooses a certain law to govern his or her succession not only for the certainty which that law provides, but also for the substantive solutions (e.g., avoiding forced heirship) which that law ensures. Rules that require such a choice to be respected reflect a societal substantive choice in favor of testamentary freedom at the expense of other substantive succession policies, such as protecting heirs. In this sense, the new choice-of-law rules that allow a testator to select, within certain geographical and substantive limits,[36] the law that will govern his or her succession can be seen as another example of a recent concession to material-justice considerations. Such rules are found in the Uniform Probate Code in the United States, as well as in Switzerland, Quebec, Italy, and the 1989 Hague Convention on the Law Applicable to Estates.[37]

*(ii) Post-dispute choice by one party in torts (favor laesi)*

Considerations of material justice are even more prevalent in choice-of-law rules that allow one party to choose the applicable law *after* the events giving rise to the dispute. Thus, in many countries, victims of certain torts are allowed to choose between or among the laws of more than one state. Thus, in products liability conflicts, the Swiss, the Italian, and the Quebec codifications allow the

35. Rules that allow both parties to a bilateral act, such as an ordinary contract, to pre-select the applicable law should not be considered result-oriented (although they are content-oriented) in that they are motivated primarily (or at least as much) by conflicts-justice consideration as by material-justice considerations. *See* Symeonides, *supra* n.2 at 38-39.

36. In contrast to these rules, New York's Estate Powers and Trusts Law § 3-5.1(h) places virtually no limits to the testator's choice if the chosen law is that of New York and the property, immovable or movable, is situated there. This rule provides that, even in the absence of other connections with New York, a testator may choose to have New York law govern the disposition of his New York property, in which case "the *intrinsic validity, including the testator's general capacity, effect*, interpretation, revocation or alteration of any such disposition" (emphasis added) will be governed by New York law. Thus, sometimes party autonomy can go wild.

37. *See* Uniform Probate Code § 2-602; Swiss PIL Act Arts. 90.2, 91.2, 87.2, and 95.2.3; Quebec Civ. Code Arts. 3098-99; Italian PIL Act Art. 46 (successions) and Art. 56 (donations); and Article 5 of the Hague Convention.

plaintiff to choose from among the laws of: (a) the tortfeasor's place of business or habitual residence, or (b) subject to a proviso, the place in which the product was acquired.[38] The Hague Convention on the Law Applicable to Products Liability also allows the plaintiff to choose between the laws of the tortfeasor's principal place of business or the law of the place of injury, if certain contingencies are met.[39] Similar rules have been proposed in the United States.[40]

In other torts, the victim (or the court on the victim's behalf) is allowed to choose between the law of the place of the injurious conduct and the place of the resulting injury. This solution has been developed judicially in some countries[41] and has been sanctioned by statute in other countries, either for all torts[42] or for some torts.[43]

*(iii) Choice for the benefit of maintenance obligee*

In areas other than torts, choice-of-law rules expressly designed to favor one party are fairly common in domestic relations matters. In addition to the rules involving status discussed earlier, other rules of this kind are those which, in child and spousal support disputes, authorize the court to choose from among several laws the one most favorable to the obligee. One example is Article 18 of the German EGBGB which, subject to certain qualifications, allows a choice of the law most favorable to the maintenance obligee from among the laws of the obligee's habitual residence, the common nationality of the obligor and the obligee, and the law of the forum. Similar rules are found in the 1956 Hague Convention on the Law Applicable to Maintenance Obligations Towards

38. *See* Swiss PIL Act Art. 135(1); Italian PIL Act Art. 63; Quebec Civ. Code Art. 3128.

39. *See* Arts. 6 and 4-5 of the Hague Convention on the Law Applicable to Products Liability (1972).

40. *See* Cavers, The Proper Law of Producer's Liability, 26 *Int'l & Comp. L.Q.* 703, 728-29 (1977) (letting the plaintiff choose from among the laws of: (a) the place of manufacture; (b) the place of the plaintiff's habitual residence if that place coincides with either the place of injury or the place of the product's acquisition; or (c) the place of acquisition, if that place is also the place of injury); Weintraub, Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation, 1989 *U. Ill. L. Rev.* 129, 148 (1989) (giving both the victim and the tortfeasor a choice under certain circumstances); Symeonides, The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts), 75 *Ind. L. Rev.* 437, 450-51, 472-74 (2000) (same notion but different choices). Professor Juenger's proposed rule instructs the court to choose "the rule of decision that most closely accords with modern products liability standards." Juenger, *supra* n.1 at 197.

41. *See* Audit, *Rapport Français* in Symeonides, *supra* n. 2. at 197; Boele-Woelki, Joustra & Steenhoff, *Dutch Report id.* 311-12; Pajor, *Polish Report id.* at 335.

42. See EGBGB Art. 40(1); Italian PIL Act Art. 62; Quebec Civ. Code Art. 3126; Venezuelan PIL Act Art. 32; Hungarian PIL Act Art. 32(2); Yugoslav PIL Act Art. 28. See (see also Art. 1102(4) of Act no. 402 of 30 March 1978 (applicable to internal inter-republic conflicts and providing that damages for torts are governed by "that law which is most favorable for the injured party.").

43. *See* Swiss PIL Act Art. 138 (applicable to injury resulting from emissions). *See also id.* Art. 139 which, for injuries to rights of personality, allows a choice from among the laws of the tortfeasor's habitual residence or place of business, and — subject to a foreseeability defense— the victim's habitual residence or the place of the injury; Hungarian PIL Act Art. 32(4) (choice between the law of the place of injury and the tortfeasor's personal law for issues of culpability); Art. 10.2 (choice between the *lex loci* and the *lex fori* for damages in cases of violation of personal rights).

Children,[44] the 1973 Hague Convention on the Law Applicable to Maintenance Obligations,[45] the 1989 Inter-American Convention on Support Obligations,[46] the French Civil Code,[47] the Dutch PIL Draft of 1992,[48] the Hungarian PIL Act,[49] and the Quebec Civil Code.[50]

***b. Protecting consumers or employees from the consequences of an adverse choice-of-law clause***

In contrast to the above rules which protect tort victims by granting them the right to choose the applicable law, other rules seek to protect consumers and employees from the adverse consequences of their own, potentially coerced or uninformed, assents to choice-of-law clauses. The best known examples are articles 5 and 6 of the Rome Convention.[51] They provide that a choice-of-law clause in a consumer contract or an employment contract may not deprive the consumer or employee, respectively, of the protection afforded by the mandatory rules of the country whose law would govern the contract in the absence of such a clause. Thus a choice-of-law clause can expand but cannot reduce the protection available to consumers or employees. Again, the materially desirable result of protecting members of a protected class is given preference over conflicts-justice considerations.

## III. CONCLUSIONS

The fact that so many codified PIL systems, which are typically perceived as the bastions of conflicts justice, saw it fit to enact so many choice-of-law rules specifically designed to accomplish a particular substantive result suggests either that this perception is wrong or that the material-justice view has gained significant ground over the classical view. In any event, this phenomenon suggests that the dilemma is no longer (and perhaps it never should have been) an "either or" choice between conflicts justice and material justice. Rather, it is a question of when, how, and how much the desideratum of material justice should temper

44. *See* arts 1-3 (choice between the *lex fori* and the law of the child's habitual residence).

45. *See* arts 4-6 (choice from among the laws of the forum, the obligee's habitual residence, or the common national law of the obligor and the obligee).

46. *See* Art. 6 (choice from among the laws of the habitual residence or domicile of either obligor or obligee).

47. *See Code civil* Arts. 311-18 which give the choice directly to the child.

48. *See* Boele-Woelki, Joustra & Steenhoff, *Dutch Report* in Symeonides, *supra* n.2 at 309-11 (also describing Dutch jurisprudence on child custody, filiation, and maintenance).

49. *See* Hungarian PIL Act, Art. 46 (with regard to the status, family relationships, and maintenance rights of children living in Hungary, Hungarian law applies whenever it is more favorable to the child than the otherwise applicable law).

50. *See* Quebec Civ. Code Art. 3094 (choice between the law of the domicile of the obligee or the obligor).

51. For similar rules in national legislation, *see, e.g.,* German EGBGB Arts. 29-30; Swiss PIL Act, Art. 120(2); Austrian PIL Act, §§ 41, 44(3); Quebec Civ. Code Arts. 3117-18.

the search for conflicts justice.

Juenger concludes that the existence of so many result-oriented rules: (a) "contradicts the proposition that our discipline is value-free;"[52] (b) demonstrates that "teleology can be reduced to statutory form;"[53] and (c) strengthens his argument that "teleology" or result-orientation should be elevated into a controlling choice-of-law criterion, at least in uncodified PIL systems like the American system.[54] I fully concur with the first two propositions. Indeed, our discipline is not value-free, it is not and should not be indifferent to material-justice considerations, and contemporary legislatures are perfectly capable of taking cognizance of these considerations.

Regarding the third proposition, however, I cannot agree that the existence of these result-oriented rules either signifies, or militates for, a *wholesale* reorientation of conflict law towards material justice.[55] As important as they may be, these rules remain exceptional. They cover a relatively small range of conflicts problems and, more importantly, they are designed to produce results which the *collective* will considers desirable and non controversial. The existence of these rules demonstrates that even codified PIL systems are capable of making targeted adjustments where such are needed, and in turn this militates in favor of preservation and against condemnation and demolition. Such adjustments are structurally and philosophically easier in uncodified systems and the real value of the result-oriented rules described above is that they pinpoint the areas in which uncodified systems can make similar adjustments in favor of material justice.

But it is one thing to speak of selective pre-authorized adjustments in favor of material justice and another thing to advocate an ad hoc method in which material justice completely displaces conflicts justice. Like Juenger, I recognize that result-orientation is often the most realistic explanation of the outcome of most American conflicts cases. But I see serious dangers in ratifying this *de facto* state of affairs and elevating it to a *de jure* method of conflicts resolution. Unlike Juenger,[56] I remain apprehensive about the dangers of judicial subjectivism, and this apprehension has not been reduced by my reading of myriad conflicts cases over the last two decades.[57] I believe that there is an important qualitative difference between result-selectivism in legislation and result-selectivism in adjudication. In the former, the desirable result is determined in advance and *in abstracto* through the consensus mechanisms of the collective democratic processes. In the latter, the result is chosen *ex post facto* and *in concreto* and often

52. Juenger, *supra* n.1 at 185.

53. *Id.* at 185. *See also id.* at 179 ("In legislation, as in adjudication, teleology can take various shapes.").

54. *See id.* at 179, 192-95, *et passim*.

55. *See id.* at 191 ff.

56. *See id.* 199-208.

57. *See* my annual surveys of American conflicts cases published annually in 37 *Am.J.Comp.L.* 457 (1989); 38 *Am.J.Comp.L.* 601 (1990); 42 *Am.J.Comp.L.* 599 (1994); 43 *Am.J.Comp.L.* 1 (1995); 44 *Am.J.Comp.L.* 181 (1996); 45 *Am.J.Comp.L.* 447 (1997); 46 *Am.J.Comp.L.* 233 (1998); 47 *Am.J.Comp.L.* 327 (1999).

by a single individual who, with the best of intentions, cannot easily avoid the dangers of subjectivism. For this reason, I applaud the selective, targeted use of result-oriented rules in choice-of-law legislation such as the ones described in this essay, but I remain highly skeptical of unguided freewheeling result-selectivism in choice-of-law adjudication.

Yet again, I am mindful of Juenger's caustic statement that "those who actually draft conflicts statutes are frequently academicians beholden to one or the other orthodox doctrine."[58] As one of those academicians who, as fate would have it, participated in the drafting of such statutes,[59] I must acknowledge and disclose the possibility of my own biases.[60]

58. Juenger, *supra* n.1 at 179.

59. *See* Symeonides, Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience, 57 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 460 (1993); Symeonides, Revising Puerto Rico's Conflicts Law: A Preview, 28 *Colum. J. Trans'l L.*, 601 (1990).

60. Having been indoctrinated in the classical European view, I have yet to attain my emancipation from it, even after spending more than two decades in the United States. As far as I can see, even in this relatively legally-homogenous country, what is considered just and fair on one side of the Mississippi River is not necessarily considered just and fair on the other side. In drafting conflicts legislation for one side, I resorted to result-oriented rules only in cases in which the accumulated collective experience provided clear guidance on what the proper material result ought to be. *See* Symeonides, Les grands problèmes de droit international privé et la nouvelle codification de Louisiane, 81 *Revue critique de droit international privé* 223, 253-56 (1992).