RESULT-SELECTIVISM IN CONFLICTS LAW*

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I. INTRODUCTION

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The classical, traditional view of the law of conflict of laws, going at least as far back as Savigny and Story,[1] is grounded on the basic premise that the function of conflicts law is to ensure that each multistate legal dispute is resolved according to the law of the state that has the clos
that dispute. Opinions on defining and especially measuring the

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*, 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

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1. *See* 8 FRIEDRICH CARL VON SAVETm[(Ar0.06 Tc[92( )-3323ETBT77f1 0 0 1 241.13 338.45 Tm[(,)] TJETBT/F1 6.9309f1 0 0 1 241.137(VO)-3(N)-

terms of the content of that law or the quality of the solution it produces, but rather in geographical or spatial terms.[2] If 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 quality of the solution it produces. Whether the actual solution is good or bad depends on whether the applicable law *itself* is good or bad, and that is something about which conflicts law 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.[3] As long as multistate disputes are resolved by means of choosing the law of one state over that of another, 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 [4] Hence, con that is, to ensure the application of the law of the proper state but cannot material (i.e., the same type and quality of justice as is pursued in fully domestic situations). In Gerhard Kegel s words, onflicts law aims at the *spatially* best solution . . . [while] substantive law aims at the *materially* best solution. [5]

2. *See* Gerhard Kegel, *The Crisis of Conflict of Laws*, *in* 112 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INT L LAW 91, 184
is, *substantively*, might be far from the best spa

3. *See* Arthur von Mehren, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 133, 134 (2000) (
teleological analysis are far greater when the controversies to be resolved are not localized in a single legal order that holds shared values and policies and has a unified administration of justice that can authoritatively weigh competing values and decide which shall prevail when *See also id.*
matters that concern more than one society as is provided in matters that concern only one

4. DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 22
state must seek the result which it regards as just . . . is simply to deny the existence and purpose of the conflict of laws . . . . [N]ot only is this a denial of true justice, . . . but also a denial *(quoting* Erwin Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165 (1938))).

combining this with other approaches. In contract conflicts, only Minnesota and Wisconsin continue to follow Leflar s approach.[16]

The early cases that followed Leflar

governmental interest.[28] However, at the end of this discussion, the court concluded that it was not the forum s interests that needed advancement but rather those of the other state.[29]

As *Nodak* indicates, the better-law criterion seems to play a far less significant role in recent decisions than it did three decades ago. Indeed, as documented elsewhere, some courts in recent years have expressed misgivings regarding their ability to determine which law is

Professor Juenger advocated a type of better-law approach that was more unconventional than Leflar s version. Unlike Leflar, who argued for choosing the better between the existing laws of the involved states, Juenger argued that the court should construct and apply to the case at hand a new substantive rule derived from the laws of the involved states.[36] For example, in product liability conflicts, Juenger proposed that the court should draw from among the laws of the states of conduct, injury, product acquisition, and domicile of the parties, and then
accords with mod [37] Not

rules that are specifically designed[47] to produce a particular substantive result.

It should be noted that these rules are classic *choice-of-law* rules, rather than substantive rules, insofar as they authorize courts to choose the existing substantive law of one of the involved states rather than directly providing a substantive solution to the conflict at hand. At the same time, they are *result-selective* or result-oriented rules because they instruct courts to choose a law that produces a particular substantive result, such as upholding a juridical act or favoring a particular party, as explained below. This article compiles an illustrative list of such rules and then attempts to determine how their existence should inform the continuing debate between the proponents of the two views.

II. RESULT-SELECTIVE STATUTORY CHOICE-OF-LAW RULES

Result-selective 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* desirable. More often than not, this result is favored by the domestic law of not only the enacting state but also the majority of states that partake in the same legal tradition. This result may be one of the following:

(1) favoring the formal or substantive validity of a juridical act, such as a testament, a marriage, or an ordinary contract;

(2) favoring a certain status, such as legitimacy or filiation, the status of a spouse, or even the dissolution of a status (divorce); or

(3) favoring a particular party, such as a tort victim, the owner of stolen movable property, 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

47. 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 of these rules or techniques, see Symeonideshniq(p)-6(r)-4(op)-6(r)-4(op)-6(r)-4(op)-6(r)-4(op)-6(r)-4e

connected with the case (*alternative-reference rules*) and authorize 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 that: (a) authorize alternative choices to the court as described above; (b) 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 (c) protect that party from the adverse consequences of a potentially coerced or uninformed choice of law.

A. Rules Favoring the Validity of Certain Juridical Acts

Choice-of-law rules designed to uphold the validity of certain juridical acts existed prior to the twentieth century. In recent decades, however, these rules have proliferated and their scope has expanded. Such rules can now be found in almost every country, and they not only apply to more juridical acts than ever before, but they also encompass formal as well as substantive validity.

1. 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 whenever reasonably possible. This result is guaranteed (or greatly facilitated) by providing a list of alternative references to the laws of several states having a connection with the testament or the testator and authorizing the court to apply whichever one of the listed laws would uphold the testament as to form.

Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961), which is in force in 39 countries,[48] contains one of the longest lists. The article provides that a testament shall be considered formally valid if it conforms to the internal law of any one of the following *eight*

codifications.[49] The Romanian codification increases the list to *ten* potentially different validating laws.[50] In the United S-0.06 Tc7(d)-824S-0.06 Tc7(d)-824S-

2. Other Juridical Acts (favor negotii)

Many codifications provide similar validating rules for contracts and other *inter vivos* juridical acts. Even traditional European civil codes, such as the Greek, Spanish, and Italian, provided an alternative-reference rule for the formal validity of *inter vivos* juridical acts. This rule allowed 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.[56]

Currently, such validating rules are more common and much broader. Article 11 of the European Union s Regulation on the Law Applicable to Contractual Obligations (Rome I) stands out as one characteristic example. That article provides that, subject to certain limitations, a contract is formally valid if it conforms to the law that gove

list of alternative validating references. Among the latter is the Inter-American Convention on the Law Applicable to International Contracts, which authorizes, *inter alia*, the application of the law of the State in which the contract is valid. [61]

The trend of favoring validation of juridical acts has even been carried over to issues of capacity, although validation in such situations is placed within narrower parameters than is the case with regard to issues of form. For example, both old and new conflicts codifications favor validation by authorizing the application of the validating rule of the law of the forum state or the state where the act occured, in lieu of the otherwise applicable personal law of the actor.[62] 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.[63] The Rome I Regulation, as well as the German, Italian, South Korean, Quebec, Romanian, Swiss, and Tunisian codifications, narrowly favor validation by limiting the circumstances under which a party may

law of the place of performance to the extent of performance to be rendered in that state, and the law chosen by the parties); QUEBEC CIV. CODE art. 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 (Law No. 36.511of 6 August 1998 on PIL) (alternative validation references to the *lex loci*, the *lex causae*, and the law of the domicile of the executing party or parties).

certain contacts with Belgium.[78] The Inter-American Convention on Conflict of Laws Concerning Adoption of Minors provides that the the

s habitual residence, in which case the latter law applies.[79]

4. Marriage and Divorce

Until the middle of the twentieth century, most countries imposed strict requirements for the substantive validity of marriages and to the granting of divorce, and conflicts law 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 twentieth century, the substantive law of most countries had become more liberal, and so had conflicts law.

Regarding marriage, the notion of *favor matrimonii* has gained wider acceptance and is pursued through choice-of-law rules with alternative connecting factors. With regard to the form of a marriage, the most generous rule is probably found in the Chinese Model Act. Article 131 provides that a marriage is valid as to form if it complies

With regard to substantive requirements, the Swiss codification provides that a marriage between foreigners in Switzerland is to be

the New York property.[96] In so providing, the statute enables foreign testators who deposit money in New York banks to evade the laws of their own countries.

b. Post-Dispute Choice by One Party in Torts (favor laesi)

Material justice considerations 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 have occurred, such as a cross-

Belgium allows such a choice only in cases of defamation and in direct actions against insurers;[108] Turkey adds products liability;[109] the Rome II regulation does so only in environmental torts, certain cases involving anti-competitive restrictions, and direct actions against insurers;[110] Switzerland does so in cases involving emissions, injury to rights of personality, and products liability;[111] and Romania does likewise in cases of defamation, unfair competition, and products liability.[112]

In products liability conflicts, the Italian, Quebec, Swiss, and Turkish codifications allow the 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

residence, the place of dissemination of the defamatory material, or the place of the injury.

108. *See* BELGIAN PIL CODE art. 99(2)(1) (applicable to defamation; allowing plaintiff to choose between the laws of the state of conduct and, subject to a foreseeability proviso, the

that the action will be allowed if it is allow

domicile, or the obligor s nationality or domicile.[133]

2. 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, which are reproduced without material changes in the new Rome I regulation.[134] These articles 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. Similar provisions are found in the laws of many countries, including Austria,[135] Germany,[136] Japan,[137] South Korea,[138] Quebec,[139] Romania,[140] Russia,[141] Switzerland,[142] and Turkey.[143] Thus, a choice-of-law clause can expand but cannot contract 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.

133. *See* TUNISIAN PIL CODE art. 51.

134. *See* ROME CONVENTION arts. 5 6, and ROME I, arts. 6, 8.

135. *See* AUSTRIAN PIL ACT § 41 (providing that consumer contracts are to be governed by the law of the consumer
private law protection as a c -
of-law clause shall be disregarded to the extent it deprives the consumer of the protection provided by the mandatory rules of that state). *See also id.* § 44(3) (providing that a choice-of-law clause in an employment contract may not deprive the employee of the protection provided by the mandatory rules of the otherwise applicable law).

136. *See* EGBGB arts. 29 30.

137. *See* JAPANESE PIL ACT arts. 11 12.

138. *See* KOREAN PIL ACT of 2001 arts. 27 28.

139. *See* QUEBEC CIV. CODE arts. 3117 18.

140. *See* ROMANIAN PIL ACT arts. 101 102 (employment contracts).

141. *See* RUSSIAN CIV. CODE art. 1212.

142. *See* SWISS PIL ACT art. 120(2).

143. *See* TURKISH PIL CODE arts. 26 27.

III. CONCLUDING THOUGHTS

A

Although the above list of result-selective statutory choice-of-law rules is illustrative rather than exhaustive, it is also sufficiently long and diverse to provide a convincing answer to the rhetorical question of whether material-

The list demonstrates that, despite significant differences among themselves and from the American system, foreign conflicts systems even the codified ones are far from indifferent to material justice considerations.

To be sure, differences exist between the rules described above and, for example, Leflar s better-law approach or, especially, Juenger s substantive-law approach. However, many of these differences, discussed below, are attributable to the different role of legislators and judges in their respective legal systems. Indeed, in many respects, much of what American approaches endeavor to do judicially, other systems endeavor to do legislatively. However, the very use of different implements tends to magnify the real and apparent differences in implementation. American solutions appear more ad hoc, more subjective, and more extreme. European solutions appear more objective, consistent, and moderate. Yet the real differences are often differences in degree rather than substance.

In any event, the fact that so many codified conflicts systems typically perceived as the bastions of conflicts justice saw fit to enact so many choice-of-law rules specifically designed to accomplish a particular substantive result suggests that this perception is either wrong or outdated. During the course of the twentieth century, the material-justice view has gained significant ground over

Rather, it is a question of when, how, and how much the desideratum of material justice should temper the search for conflicts justice.

Professor Friedrich K. Juenger, an ardent and eloquent proponent of the material justice view, concluded that the existence of so many result-

supplemental rather than exclusive. The distinction between substantive and spatial teleology is just another name for the old dilemma between material justice and conflicts justice. Unlike Juenger, I continue to lean toward the conflicts-justice view, subject to the qualifications described later in this article. I believe that: (1) conflicts of laws should be resolved by choosing extant law rather than creating new law; (2) a judge s choices are limited to the laws of the states that have pertinent contacts with the case; and (3) from among those laws, the judge should choose the one that is spatially most appropriate.

Defining the spatially appropriate law is of course *the* grand question. But it is a question of *choosing* a law, *not creating* one. The judge is the one to make the choice, but in so choosing, the judge should always examine the purpose or *telos* (hence the term teleology) of each of the laws involved in the conflict. In many cases, this examination will reveal whether the particular law was intended to reach the multistate case at hand (*volonté d application*). In turn, this will enable the judge to diagnose the type of conflict the case presents and to proceed accordingly. Juenger steadfastly rejected this type of teleology.

Juenger and I agree on the propriety of the legislative-*substantive* teleology that is embodied in the many result-selective statutory choice-of-law rules described earlier in this essay. However, Juenger and I draw different conclusions from the existence and numerosity of these rules. This is why I disagree with Juenger s third proposition that the existence of these result-selective rules signifies or militates for a *wholesale* reorientation of conflicts law toward substantive justice.[150] As important as these rules may be, they remain exceptional and they cover a relatively modest range of conflicts problems. More importantly, these rules are designed to produce results which the *collective* will considers desirable and non-controversial. The existence of these rules demonstrates that even codified conflicts systei3(onf)10 0 -3(s)4(ul)-2(t)] TJETBT1 0 0 1 354.2aMETBT1 0 0 1 144.02 29/F

However, 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 [illegible] TJE436 T1 0 0 (.41 559.54.5 T

human weakness to a pri [151] Unlike Juenger[152] and Leflar,[153] I remain apprehensive about the dangers of judicial subjectivism, and this ani(.41 559.54 Tmr10(e3-3(t))4(m)-2(,)h144.02 61)-2(, be405.79 63)-

statutes,[157] I must acknowledge and disclose the possibility of my own biases, although, as this article illustrates, I do my best to confront them. Unlike the majority of conflicts scholars, including both Juenger and Leflar,[158] I believe that choice-of-law legislation is both feasible and desirable.[159] For reasons noted earlier, I also believe that result-