PLAINTIFF'S CHOICE OF LAW IN CROSS-BORDER TORT CONFLICTS

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The thesis of this Article is that, subject to specified conditions, the victims of certain cross-border torts should have the option of choosing between the laws of the state of the injurious conduct and those of the state of the resulting injury. Although this appears to be radical position, it is consistent with the results reached in most cases in the more than forty U.S. jurisdictions that have abandoned the traditional lex loci delicti rule. Adopting a rule to this effect will relieve courts from the burden of individualized choice-of-law determinations, conserve litigation resources and, in many cases, facilitate settlements.

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I. Introduction

The thesis of this Article is that, subject to specified conditions, plaintiffs in split-domicile cross-border tort conflicts should have the option of choosing between the laws of the state of the injurious conduct and those of the state of the resulting injury. Admittedly, the notion that *one* party should have the option of choosing the applicable law *after* the dispute arises appears radical. This Article explains why it is not. Adoption of a rule to this effect will enable courts in the more than forty U.S. jurisdictions that have abandoned the traditional *lex loci delicti* rule to reach the same results as they do now, but without having to reinvent the wheel in each case. It will relieve courts from the burden of individualized choice-of-law determinations, conserve litigation resources and, in many cases, facilitate settlements.

This Article proceeds in four parts, followed by a brief conclusion. Part II divides split-domicile cross-border tort conflicts into two patterns, depending on the content of the laws of the state of conduct and the state of injury, and shows that, after laboriously analyzing and comparing the interests of the two states, most courts end up applying whichever of the two laws favors the plaintiff. Part III explains how the Oregon codification and the draft Third Conflicts Restatement have turned the descriptive pro-plaintiff rule that emerges from the case law into a normative, but qualified, rule. Part IV discusses the parallel adoption of similar tort rules in many other countries, and Part V places this development into the broader context of result-selective choice-of-law rules, which have multiplied in recent years.

II. The Two Patterns of Split-Domicile Cross-Border Tort Conflicts

A. *The Substantive Parameters of this Thesis*

The above-stated thesis applies to *cross-border* torts in *split-domicile* cases, namely cases in which the tortfeasor and the victim are domiciled in different states that have conflicting laws on the disputed issues.[1] This thesis does not, however, apply

1. Under the prevailing practice following the American choice-of-law revolution, if the parties are domiciled in the same state, the law of that state

to products liability conflicts. Although most of those conflicts fit the split-domicile cross-border pattern, they also involve additional relevant contacts (such as the place of the product's design, manufacture, assembly, or distribution), which are often located in different states.[2] For similar reasons, such as the wide disbursement of the relevant contacts, this thesis does not apply to class actions.

Left unanswered for now is the question of whether this thesis should apply to the politically sensitive punitive damages conflicts. In drafting the Oregon codification, I answered this question in the affirmative because the case law supports it.[3] In drafting the Louisiana codification, I bowed to political pressure and adopted instead a more conservative rule,[4] which is now followed by the Third Conflicts Restatement draft.[5]

B. *The Two Patterns of Cross-Border Torts*

For purposes of analysis, split-domicile cross-border tort conflicts can be divided into two patterns, depending on the

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governs loss-distribution conflicts. If the parties are domiciled in different states that have the same loss-distribution rules, the law of either state governs. Split-domicile intrastate torts cases are governed by the law of the state of conduct and injury for both conduct-regulation and loss-distribution if one of the parties is domiciled there and for conduct-regulation issues if neither party is domiciled there. For documentation of these results and an explanation of the terms conduct-regulation and loss-distribution see SYMEON C. SYMEONIDES, OXFORD COMMENTARIES ON AMERICAN LAW: CHOICE OF LAW 177–272 (Oxford Univ. Press 2016) [hereinafter SYMEONIDES, CHOICE OF LAW].

2. For a discussion of products liability conflicts and the inchoate choice-of-law rules that may emerge from the case law, see *id.* at 273–342.

3. *See* OR. REV. STAT. §15.440(3)(c) (2009), discussed *infra* Part II (adopting the same rule for both compensatory and punitive damages).

4. *See* LA. CIV. CODE ANN. art. 3546 (1991) (adopting a separate rule for punitive damages which provides that such damages may be awarded only if they are imposed by the law of at least two of the following states: (1) the tortfeasor's domicile; (2) the place of conduct; and (3) the place of injury), *discussed in* Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 735–49 (1992).

5. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 6.12 (AM. L. INST., Tentative Draft No. 4, 2023) (providing that "punitive damages may not be awarded unless they are available under the law of at least two of the following states: (1) the defendant's domicile; (2) the place of conduct; (3) the place of injury.").

content of the relevant laws of the state of conduct and the state of injury:

> (1) ***Pattern 1*** consists of cases in which the law of the state of conduct favors the tortfeasor, whereas the law of the state of injury favors the tort victim.
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> (2) ***Pattern 2***, the converse of Pattern 1, consists of cases in which the law of the state of conduct favors the victim (hereinafter "plaintiff"), whereas the law of the state of injury favors the tortfeasor (hereinafter "defendant").

Table 1, below, depicts these two patterns and subdivides them into sub-patterns depending on whether the conflict is one between conduct-regulation or loss-distribution rules.[6] The last column indicates the category to which each conflict belongs under the assumptions (but not the solutions) of interest analysis—specifically, the premise that conflicts cases implicate not only the interest of the private litigants, but also the interests of the states affiliated with them.[7]

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6. According to the Third Conflicts Restatement draft:

(1) Conduct-regulating rules, in the tort context, are rules whose predominant purpose is to impose liability for conduct deemed socially undesirable or to absolve actors from liability on the ground that their conduct was not socially undesirable.

(2) Loss-allocating rules, in the tort context, are rules whose predominant purpose is to assign loss among relevant parties on the basis of considerations other than the mere wrongfulness of the injurious conduct.

RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 6.01 (AM. L. INST., Council Draft No. 4, 2020).

7. For a discussion of this premise, its general acceptance in American literature, and its ostensible rejection in continental literature, see SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW: IDEALISM, PRAGMATISM, ECLECTICISM 73–102 (Brill Nijhoff 2021) [hereinafter SYMEONIDES, IDEALISM]; Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1850–67 (2015).

TABLE 1. PATTERNS OF CROSS-BORDER TORT CONFLICTS

Pattern		State of injury (Plaintiff's domicile)	State of conduct (Defendant's domicile)	Classification
1a	Conduct regulation	Pro-plaintiff law	Pro-defendant law	True conflict
1b	Loss-distribution	Pro-plaintiff law	Pro-defendant law	True conflict
2a	Conduct regulation	Pro-defendant law	Pro-plaintiff law	False conflict
2b	Loss-distribution	Pro-defendant law	Pro-plaintiff law	Inverse conflict

The length restrictions of this Article[8] limit the following discussion in two respects. The first is that the discussion deals only with situations in which each state's law favors the same party on both conduct-regulation (sub-pattern a) and loss-distribution issues (sub-pattern b), although it examines each sub-pattern separately. It is of course possible that a state's law may favor the plaintiff in one category (*e.g.*, conduct regulation) and the defendant in the other category (*e.g.*, loss distribution). However, it is unnecessary to discuss this possibility here because, as explained later, the plaintiff should not be allowed to pick some parts of a state's law and reject other parts. The second limitation is that the discussion is confined to the most common pattern of split-domicile cases in which the defendant is domiciled in, or otherwise affiliated with, the conduct state, and the plaintiff is domiciled in or otherwise affiliated with, the state of injury.[9]

8. The editors of this Journal have imposed a five-thousand-word limit for each article.

9. The parties' domiciles are of primary importance in loss-distribution conflicts and only of supplementary, if any, importance in conduct-regulation conflicts. *See* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE 142, 211–212 (Martinus Nijhoff 2006) [hereinafter SYMEONIDES, REVOLUTION].

1. *Pattern 1*

In Pattern 1 cases, the conduct occurs in a state that, with regard to the issue in conflict, has a law that favors the defendant, whereas the injury occurs in a state that, on the same issue, has a law that favors the plaintiff. The issue can be one of either:

> (1) conduct regulation, such as when the state of conduct does not consider the conduct tortious, but the state of injury considers it tortious, or imposes a more exacting or "higher" standard than the state of conduct (Sub-pattern 1a); or
>
> (2) loss distribution, such as when the state of conduct immunizes the defendant from suit or otherwise disallows or limits the plaintiff's recovery, while the state of injury provides for more generous or unlimited recovery (Sub-pattern 1b).

Both of these sub-patterns present the direct or true conflict paradigm. Under the assumptions of interest analysis, both the state of conduct and the state of injury have an interest in applying their laws to Pattern 1 conflicts. In conduct-regulation conflicts, the conduct state has an interest in protecting conduct that occurs within its territory and is lawful there, while the state of injury has an interest in preventing injuries within its territory caused by conduct considered unlawful there.[10]

In loss-distribution conflicts, the first state has an interest in protecting conduct that is legal within its territory, while the second state has an interest in ensuring reparation for injuries caused by conduct it considers tortious. *Additionally*, however, each state arguably has an interest in protecting the parties affiliated with it. The first state has an interest in protecting a tortfeasor acting (and usually domiciled) within its territory, while the second state has an interest in protecting victims who are injured (and often domiciled or hospitalized) within its territory.

The argument for applying the higher standard of the state of injury is stronger in cases involving intentional torts than in negligence cases. Indeed, not many people would question the right of a state to punish conduct that is intended to produce,

10. These interests exist even if the defendant is not domiciled in the state of conduct and the plaintiff is not domiciled in the state of injury. *See id.*

and does produce, detrimental effects within its territory, even when that conduct takes place outside the state. In cases involving negligent conduct, the argument for applying the higher standard of the state of injury may be less powerful psychologically, but it is nevertheless a strong one. As the California Supreme Court noted, a person whose conduct outside of California predictably causes injuries in California "effectively acts within California in the same way a person effectively acts within the state by, for example, intentionally shooting a person in California from across the California–Nevada border."[11] Nevertheless, the fact that the state of conduct also has an interest in applying its law makes this a difficult conflict.

The traditional and unqualified *lex loci damni* rule is not functionally defensible. A solution based solely on the *favor laesi* principle of favoring victims, which underlies the relevant provisions of most foreign codifications,[12] may be morally attractive, but is not sufficiently principled. An all-around principled solution is one that also considers the tortfeasor's reasonable expectations and evaluates them by objective standards. This is why the application of the *lex loci damni* in Pattern 1 cases should depend on whether the defendant's activities were such as to make foreseeable the occurrence of injury in the particular state.[13] For example, an entity that operates a chemical plant in State A, but near the border with State B, should foresee that substances emitted by the plant could easily be carried by the wind into State B. If the type or quantities of the emitted substances were permissible under the law of State A but not State B, the resulting true conflict should be resolved under the pro-plaintiff law of State B because the occurrence of the injury in that state was objectively foreseeable. In other words, objective foreseeability is what tips the scales in these true conflicts.

A study of all cross-border tort conflicts cases decided in all states that have abandoned the *lex loci damni* rule has identified forty-eight cases falling within Pattern 1.[14] In forty-three of

11. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006).

12. *See infra* Part III (identifying several foreign codifications that have adopted the *favor laesi* principle).

13. For an early documentation and defense of this thesis, see SYMEONIDES, REVOLUTION, *supra* note 9, at 192–200, 228–36.

14. Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win, and Should*, 61 HASTINGS L. J. 337, 366–379 (2009) [hereinafter Symeonides, *Why Plaintiffs Win and Should*]. For subsequent cases see SYMEONIDES, CHOICE OF

those cases (or 90 percent), the courts applied the pro-plaintiff law of the state of injury.[15] However, in all of those cases, the occurrence of the injury in the particular state was objectively foreseeable, though the courts did not always discuss this factor.[16] It is worth noting that the above cases were decided under different choice-of-law methodologies, except the traditional one.[17]

2. *Pattern 2*

In cases falling within Pattern 2, the conduct occurs in a state whose law favors the plaintiff, and the injury occurs in a state whose law favors the defendant. From the perspective of interest analysis (though not necessarily from the courts' perspective), Pattern 2 cases can be subdivided into:

> (a) cases in which the conflict is confined to conduct-regulation issues, such as when the conduct state considers the particular conduct tortious, and the injury state does not (Sub-pattern 2a); and
>
> (b) cases in which the conflict is confined to loss-distribution issues, such as when the state of conduct provides more generous compensatory damages than the state of injury (Sub-pattern 2b).

a. False Conflicts. Sub-pattern 2a presents the false conflict paradigm regardless of where the parties are domiciled. On the one hand, the conduct state has an undeniable interest in applying its conduct-regulating rule to police and deter conduct occurring within its territory and violating its law, even if the injury occurs outside its borders. Indeed, the effectiveness of this rule is undermined if it is not applied to out-of-state injuries. On the other hand, the state of injury has no

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LAW, *supra* note 1, at 218–22, 238–47. Because the subsequent cases did not appreciably change the percentages of the 2009 study, the following discussion refers only to that study.

15. *See* Symeonides, *Why Plaintiffs Win and Should*, *supra* note 14, at 368–69, 375 (tables showing the cases that applied the pro-plaintiff law of the state of injury).

16. *See id.* at 368–74 (describing thirty-one cases involving a conduct-regulation conflict (Pattern 2A)); *id.* at 374–79 (describing seventeen cases involving a loss-distribution conflict (Pattern 2B)); *see also id.* (noting that this distinction did not affect the outcome).

17. *Id.* at 379–81.

countervailing interest in applying its more lenient conduct-regulating rule because that rule is designed to protect conduct within, not outside, that state. In other words, the application of the stricter conduct-regulating rule of the conduct state promotes the policy of that state in policing conduct within its borders—without subordinating the (non-implicated) policies embodied in the less strict rule of the state of injury. Moreover, there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of that state, the tortfeasor should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state.

The above study has identified forty-one cases falling within Sub-pattern 2a. Thirty-four of the forty-one cases (or eighty-three percent) applied the pro-plaintiff law of the state of conduct.[18]

b. Inverse Conflicts. In Sub-pattern 2b cases, which involve loss-distribution conflicts, the parties' domiciles become relevant factors.[19] In the most common scenario, the defendant is domiciled in, or has a similar affiliation with, the conduct state, which has a law that favors the plaintiff, and the plaintiff is domiciled in, or has a similar affiliation with, the state of injury, which has a law that favors the defendant. Under Brainerd Currie's interest analysis Sub-pattern 2b arguably presents the no-interest paradigm because neither state would be interested in protecting the domiciliary of the *other* state.[20] Currie concluded that the law of the forum *qua* forum should govern these cases because "no good purpose will be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law."[21]

However, the courts did not adopt Currie's characterizations or his solution. The above study has identified sixteen cases falling within Sub-pattern 2b.[22] Thirteen of those cases (or 81 percent) applied the pro-plaintiff law of the state of conduct.[23] Only seven of the sixteen cases applied forum

18. *Id.* at 355–56 (table depicting the forty-one cases and the law applied).

19. *See supra* note 10.

20. *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 152–53 (Duke Univ. Press 1963) (discussing a similar case and concluding that "[n]either state cares what happens." *Id.* at 152).

21. *Id.* at 156.

22. *See* Symeonides, *Why Plaintiffs Win and Should*, *supra* note 14, at 361–66 (summarizing the sixteen cases in which the state of conduct had a pro-plaintiff law and the state of injury had a pro-defendant law).

23. *Id.* at 362.

law, and they did so on grounds other than those advanced by Currie.[24] In six of those seven cases, the forum state was also the state of conduct, and the courts based their choice of law on that state's affirmative interest to police conduct within its borders.[25]

Thus, in terms of actual results, the distinction between conduct-regulation conflicts (Sub-pattern 2a) and loss-distribution conflicts (Sub-pattern 2b) did not make much difference; courts opted for the pro-plaintiff law of the state of conduct at approximately the same rate in both Sub-pattern 2a and Sub-pattern 2b cases. Altogether, forty-seven of the fifty-seven Pattern 2 cases (or eighty-two percent) applied the pro-plaintiff law of the state of conduct.[26]

3. *Summary*

Table 2 summarizes the results of the case law in Patterns 1 and 2. The shaded cells indicate the state whose law the courts applied.

24. *Id.* at 362, 364–66.

25. *Id.* at 36–66.

26. *See id.* at 355–56, 362 (tables depicting the thirty-four cases where courts chose pro-plaintiff law in conduct-regulation conflicts and the thirteen cases where courts chose pro-plaintiff law in loss-distribution conflicts).

TABLE 2. SUMMARY OF RESULTS

Pattern 1

Patterns	Number of cases	Injury **(Pro-P)**	Conduct (Pro-D)
1a. Conduct-Regulation	31	27 or 87%	4 or 13%
1b. Loss-Distribution	17	16 or 94%	1 or 6%
Total Pattern 1	48	**43 or 90%**	5 or 10%

Pattern 2

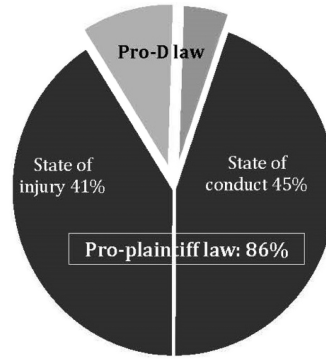
		Injury (Pro-D)	Conduct **(Pro-P)**
2a. Conduct-Regulation	41	7 or 17%	34 or 83%
2b. Loss-Distribution	16	3 or 19%	13 or 81%
Total Pattern 2	57	10 or 18%	**47 or 82%**

Total Patterns 1 & 2: 105 cases	Applying pro-P law
	90 or 86%

As Table 2 indicates, the 105 cases of the study period were almost evenly split (fifty-two to fifty-three) between applying the law of the place of conduct and the law of the place of injury, but the vast majority of them (ninety out of 105 cases, or eighty-six percent) applied *whichever* of the two laws favored the *plaintiff*.

Chart 1, below, depicts these results.

Chart 1. Law applied in cross-border torts.



C. *The Descriptive Rule Emerging from the Case Law*

The above results can be compressed into the following one-sentence descriptive rule:

> *When conduct in one state causes injury in another state and the tortfeasor and the victim are domiciled in different states with conflicting laws, most courts apply the law of the state of conduct unless the law of the state of injury is more favorable to the victim, in which case they apply that law, but only if the occurrence of the injury in that state was objectively foreseeable.*

III. From the Descriptive to the Normative

Good or bad, this rule describes what courts *do*. If, as Holmes said, the law is "[t]he prophecies of what the courts will do,"[27] then what the courts have *done* is the best basis for prophesizing about what they will do in the future. The question is whether this descriptive rule should be codified so as to spare courts and litigants of the cost of reinventing the wheel in each case. If the answer is yes, the next question is whether the choice of the applicable law should be assigned to the court or given directly to plaintiffs.

A. *American Rules for Cross-Border Torts*

As noted below, the two American choice-of-law codifications (Louisiana's and Oregon's) and the Third Conflicts Restatement draft have answered the first question in the affirmative. The Louisiana codification of 1991 codified the above results in Patterns 1a, 1b, and 2a (but not 2b) by instructing the court to apply the pro-plaintiff law, subject to certain conditions and exceptions.[28] The Oregon codification of 2009 is bolder because it assigns the choice to the victim in all of the

27. Oliver W. Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 460 (1897).

28. La. Civ. Code Ann. arts. 3543–3544 (effective Jan. 1, 1992). For a full discussion of these articles by their drafter, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 699–734 (1992).

above sub-patterns. Or. Rev. Stat. § 15.440(3)(c) provides that, in split-domicile cross-border torts (other than products liability), the law of the state of conduct governs, but subject to an exception in favor of the law of the state of injury, if:

> (A) The activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state; and
>
> (B) The injured person formally requests the application of that state's law by a pleading or amended pleading. The request shall be deemed to encompass all claims and issues against that defendant.[29]

In 2017, the Reporters of the Third Conflicts Restatement adopted the same rule. Section 6.08 provided that split-domicile cross-border torts are governed by the law of the state of conduct, but subject to an exception in favor of the law of the state of injury if:

> (a) the occurrence of the injury in that state was objectively foreseeable; and
>
> (b) the injured person formally and timely requests the application of that state's law.[30]

In 2023, this section was replaced with section 6.09, which reproduces the substance of 6.08 but, perhaps for political reasons, assigns a less visible role to the plaintiff. Section 6.09 provides that the law of the state of conduct is the default law but "if the injured party shows that the location of the injury was reasonably foreseeable, the law of the state of injury, rather than the state of conduct, governs all issues subject to this Section."[31] As under the previous section and the Oregon rule, (1) plaintiffs will undertake such a showing only if the law of the state of injury is more favorable to them than the law of the state of injury, and (2) without such a showing the court will not be permitted to apply the law of the state of injury.

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29. Or. Rev. Stat. § 15.440(3)(c) (2009). For a full discussion of this provision by its drafter, see Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 Or. L. Rev. 963, 1022–32 (2009).

30. Restatement (Third) of Conflict of Laws § 6.08 (Am. L. Inst., Council Draft No. 4, 2020).

31. Restatement (Third) of Conflict of Laws § 6.09 (Am. L. Inst., Tentative Draft No. 4, 2023). This Draft was approved by the ALI membership on May 24, 2023.

B. *The Proposed Rule*

Inspired by the above, this Article proposes the following rule:

> *1. When conduct in one state causes injury in another state and the tortfeasor and the victim are domiciled in different states with conflicting laws, the law of the state of conduct governs.*
>
> *2. However, the law of the state of injury governs if:*
>
> *(a) The tortfeasor's activities were such as to make foreseeable the occurrence of injury in that state; and*
> *(b) The victim formally requests the application of that state's law, in which case the request shall be deemed to encompass all claims and issues against that tortfeasor.*

IV. Foreign Rules for Cross-Border Torts

In the meantime, many other countries have adopted similar pro-plaintiff rules for either all or some cross-border torts.[32] Relying on the principle of *favor laesi* (favoring the injured), these rules authorize the application of the law of either the state of conduct or the state of injury, whichever favors the victim. They do so either by directing the court to choose the more favorable of the two laws, or by allowing the victim to make the choice. Table 3, below, shows the various versions of these pro-plaintiff rules.

32. For documentation, see Symeon C. Symeonides, Codifying Choice of Law Around the World: An International Comparative Analysis, 58–67, 273–78 (Oxford Univ. Press 2014) [hereinafter Symeonides, Choice of Law Around the World].

TABLE 3. PRO-PLAINTIFF RULES IN FOREIGN CODIFICATIONS

Court's Choice	**Plaintiff's Choice**			
All cross-border torts		Products	Infringement	Environmental
Express (10) Angola Cape Verde East Timor Georgia Guinea-Bissau Macau Mozambique Portugal Peru Slovenia *Implied (5)* Austria Quebec Russia Slovakia South Korea	Estonia Germany Italy Lithuania North Macedonia Tunisia Uruguay Venezuela	Azerbaijan Belarus China Dominican Rep. Italy Kazakhstan Kyrgyzstan Moldova Quebec Russia Switzerland Taiwan Tajikistan Tunisia Turkey Ukraine Uzbekistan Hague Conv.	Albania Belgium Bulgaria Czech Rep. Hungary Lithuania Moldova Monaco Montenegro Poland Romania Serbia (draft) Switzerland Turkey	Albania Dominican Rep. Chile Montenegro Serbia (draft) Switzerland Rome II (27)
15	8	17	14	7

The rules of the first ten countries listed in column 1 of Table 3 instruct the court to choose the law most favorable to the victim for all cross-border torts,[33] while the rules of the last five countries in that column *allow* the court to do so.[34]

However, several rules enacted in other countries give this choice directly to the tort victim. Specifically:

(1) Eight countries (listed in column 2) give this choice directly to the victim in all cross-border torts.[35]

33. For citations to the codes of these countries, see SYMEONIDES, IDEALISM, *supra* note 7, at 204.

34. For citations to the codes of these countries and the specifics, see SYMEONIDES, CHOICE OF LAW AROUND THE WORLD, *supra* note 32, at 62.

35. For citations and the specifics, see SYMEONIDES, IDEALISM, *supra* note 7, at 203–04.

(2) Seventeen other countries (listed in column 3), as well as the Hague Products Liability Convention (which is in force in eleven countries) give products liability plaintiffs two or more choices on the applicable law.[36]

(3) Fourteen countries (listed in column 4) give plaintiffs in infringement of personality conflicts two or more choices on the applicable law.[37]

(4) Six countries (listed in column 5), as well as the Rome II Regulation, which is in force in the 27 Member States of the European Union, allow plaintiffs in environmental torts to choose between the laws of the state of conduct and the state of injury.[38]

Altogether, there are now sixty-two rules in forty-nine foreign countries that favor plaintiffs in cross-border torts. Fifteen of these rules assign the choice of law to the court while the remaining forty-six rules give this choice directly to plaintiffs, either for all cross-border torts (eight) or for some cross-border torts (thirty-eight).

It is worth noting that many (but not all) of the above foreign rules do not subject the application of the law of the state of injury to a foreseeability proviso. By contrast, this is an indispensable requirement under the rules of Louisiana, Oregon, and the Third Restatement, as well as under the rule proposed in this Article. [39]

V. The Broader Context: Result-Selective Choice-of-Law Rules

All of the above are *result-selective* choice-of-law rules because they are designed to select a law that produces a predesignated substantive result—in this case, a result that favors the tort victim. They are part of a broader and recently accelerated movement of legislative result-selectivism, in which the previously

36. *Id.* at 205–06.
37. *Id.* at 370–72.
38. *Id.* at 206–08.
39. *See* La. Civ. Code Ann. arts. 3543–3544 (1991); *see also* Or. Rev. Stat. § 15.440(3)(c) (2009); *see also* Restatement (Third) of Conflict of Laws § 6.09 (Am. L. Inst., Tentative Draft No. 4, 2023).

heretical view of "material justice" challenges the prevalence of the classical view of "conflicts justice" and the traditional notion that the choice of law must always be a content-blind and value-neutral choice based solely on territorial contacts.[40]

Private international law has always employed result-selective rules, but their use has increased dramatically in recent years.[41] As documented in a recent survey, eighty-two out of eighty-six countries that have codified or recodified their conflicts law since 1970 saw fit to enact similar result-selective rules not only for torts but also for other subjects.[42] Some of these rules instruct the court to select from among the laws of the involved states whichever law favors the formal or substantive validity of a contract or other juridical act, such as a testament, or a certain status, such as marriage, legitimacy, or filiation, or even the dissolution of a status (divorce).[43] In a similar fashion, other rules are designed to protect a particular party (besides a tort victim), such as a consumer, an employee, a maintenance obligee, the owner of stolen cultural goods or other movable property, or other presumptively weak parties.[44] Some of these rules allow the protected party to choose from among the laws of certain designated states, while other rules protect the presumptively weak party from the adverse consequences of a potentially coerced or uninformed choice-of-law agreement.[45]

Despite contrary appearances, the legislative result-selectivism embodied in these rules differs in important respects from the judicial result-selectivism advocated in the United States by Professor Robert Leflar in his "better-law" approach.[46] The most important difference is that, in legislative selectivism, the desirable substantive result is identified in advance and *in abstracto*

40. *See generally* Symeonides, Idealism, *supra* note 7, at 161–80 (discussing this movement and the meaning of the terms "conflicts justice" and "material justice").

41. *See* Symeonides, Choice of Law Around the World, *supra* note 32, at 285–87 (documenting that result-selective choice-of-law rules exist in almost every country that has enacted choice-of-law rules in the last fifty years).

42. Symeonides, Idealism, *supra* note 7, at 217.

43. *Id.* at 180–201.

44. *See id.* at 201–16.

45. *Id.*

46. *See generally* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 269 (1966). (proposing five choice-influencing considerations, the most decisive of which was the application of the "better rule of law").

through the consensus mechanisms of democratic legislative processes. These rules are designed to produce results that the *collective* will considers desirable and noncontroversial. By contrast, in Leflar's judicial selectivism, the substantive result is chosen *ex post facto* and *in concreto*, often by a single judge who, even with the best of intentions, cannot easily avoid the dangers of subjectivism, which in turn leads to favoritism for forum law, local litigants, or both.[47]

Thus, one can applaud the selective, targeted use of result-selective rules in choice-of-law legislation, while rejecting an *ex post* freewheeling result-selectivism in choice-of-law adjudication.

VI. Conclusion

Returning to tort conflicts, let us first reiterate that the pro-plaintiff rule proposed in this Article is confined to one relatively small category of tort conflicts—those arising from split-domicile cross-border torts. In all other categories, such as split-domicile intra-state torts or common-domicile cases, the choice of the applicable law does not, and should not, depend on whether it favors the plaintiff or the defendant.[48]

Second, the proposed pro-plaintiff rule simply reflects the results of the case law. The fact that so many courts in different states, applying different choice-of-law methodologies, have converged around these results suggests that they are sound and worthy of being incorporated into a normative rule.

Third, although both the proposed rule and the foreign rules described above have the effect of favoring the tort victim they are motivated by different considerations. The foreign rules are directly and explicitly based on the *favor laesi*, whereas the rule emerging from the case law and proposed here is based primarily on consideration and appropriate accommodation of the conflicting state interests. In Pattern 2 cases, the application of the pro-plaintiff law of the state of conduct is justified by the fact that only that state has an interest in applying its law. In Pattern 1 cases, both involved states have an interest in applying their law but, on balance, the application of the pro-plaintiff

47. For evidence to this effect, see Symeonides, Choice of Law, *supra* note 1, at 170–73.

48. *See supra* note 1.

law of the state of injury is justified by the fact the occurrence of the injury in that state was objectively foreseeable.

Fourth, the proposed rule is not unfair to defendants. In Pattern 2 cases, defendants may not complain about being subject to the law of the state in which they acted. In Pattern 1 cases, the requirement of objective foreseeability adequately addresses any concerns about unfairness. These are difficult conflicts in which the two states disagree on who should bear the loss caused by injurious conduct. In the final analysis, of the two parties involved in the conflict, the tortfeasor is the one who is likely to be in a better position to prevent the loss or to insure against it.

Finally, the fact that the proposed rule would delegate the choice of law to the victim rather than the court is simply a vehicle for achieving the same results as those reached by American courts—a vehicle that has distinct practical advantages. When the choice is assigned to the court, the court must determine whether, and explain why, one state's law is more favorable than the other state's law. Perhaps surprisingly, this is not always easy, and an erroneous determination would be a ground for appeal. By contrast, giving the choice to the plaintiff obviates the need for a judicial answer to the question of whether a given law indeed favors the plaintiff. This is particularly helpful, not only when the answer to that question is unclear, but also when a law favors one party on some issues and the other party on other issues. Like the Oregon rule, the proposed rule will avoid the possibility of an inappropriate *dépeçage*. A plaintiff will have to carefully weigh all the pros and cons of exercising or not exercising the option to choose. If the plaintiff exercises that option, the choice must be for all claims and issues against the defendant. If the choice proves ill-advised, it will not be appealable, and the plaintiff's attorney should bear all the blame.

In light of the above, the notion of giving plaintiffs in split-domicile cross-border torts the option of choosing between the laws of the state of conduct and (subject to foreseeability) the state of injury is not at all radical and should not be controversial.