Codifying Choice of Law Around the World:

The Last Fifty Years

In the land of Bartolus

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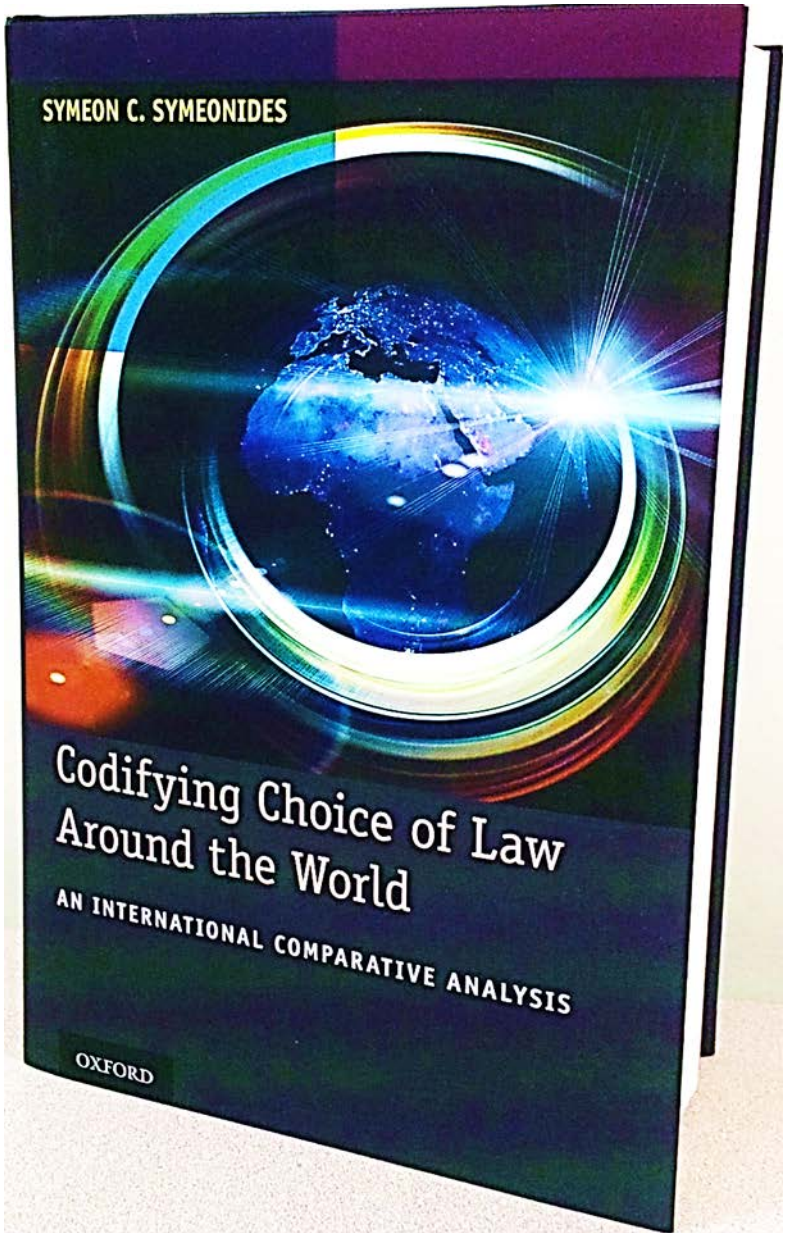
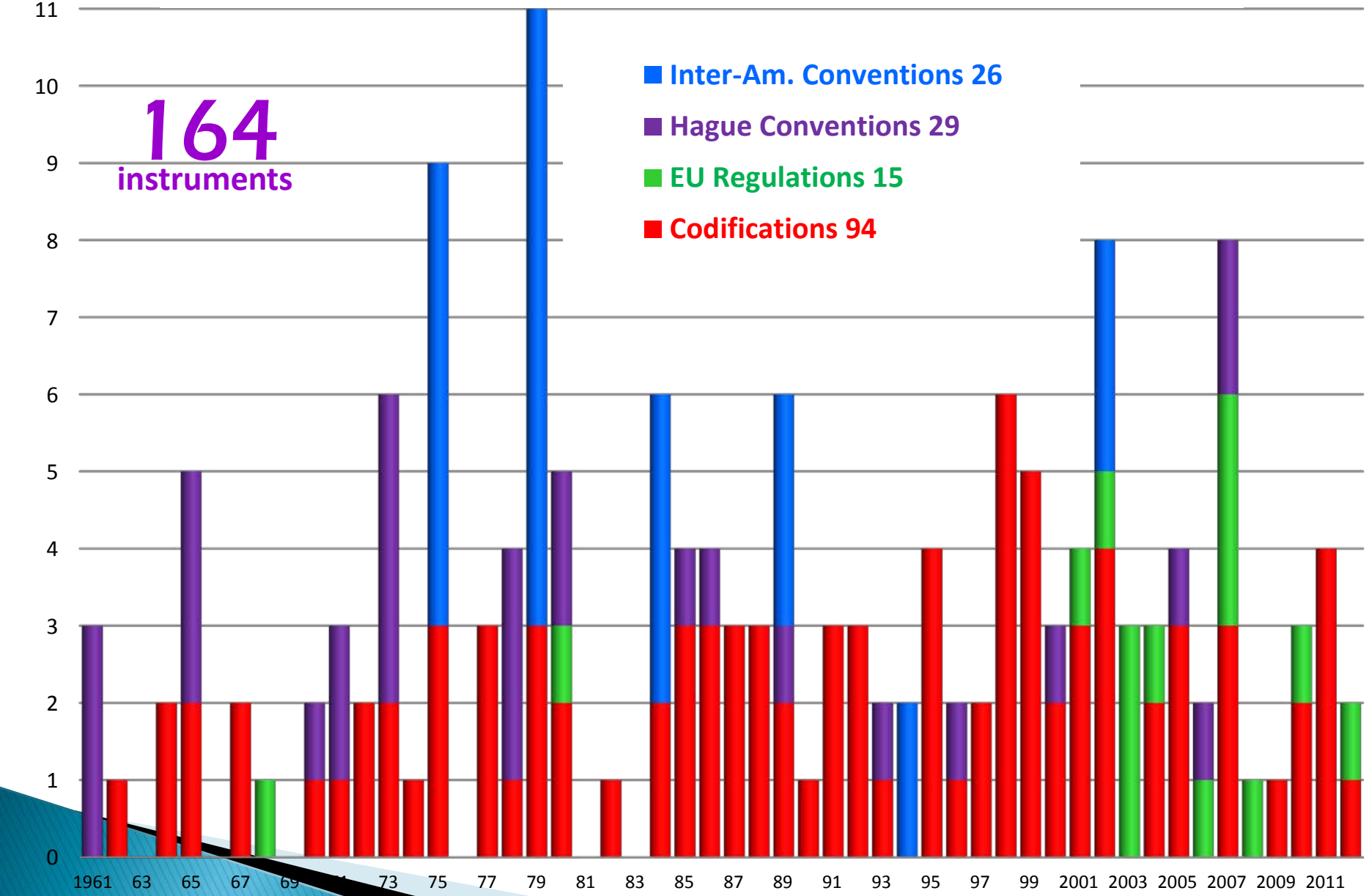
Coverage: Two Substantive Areas and Four General Themes

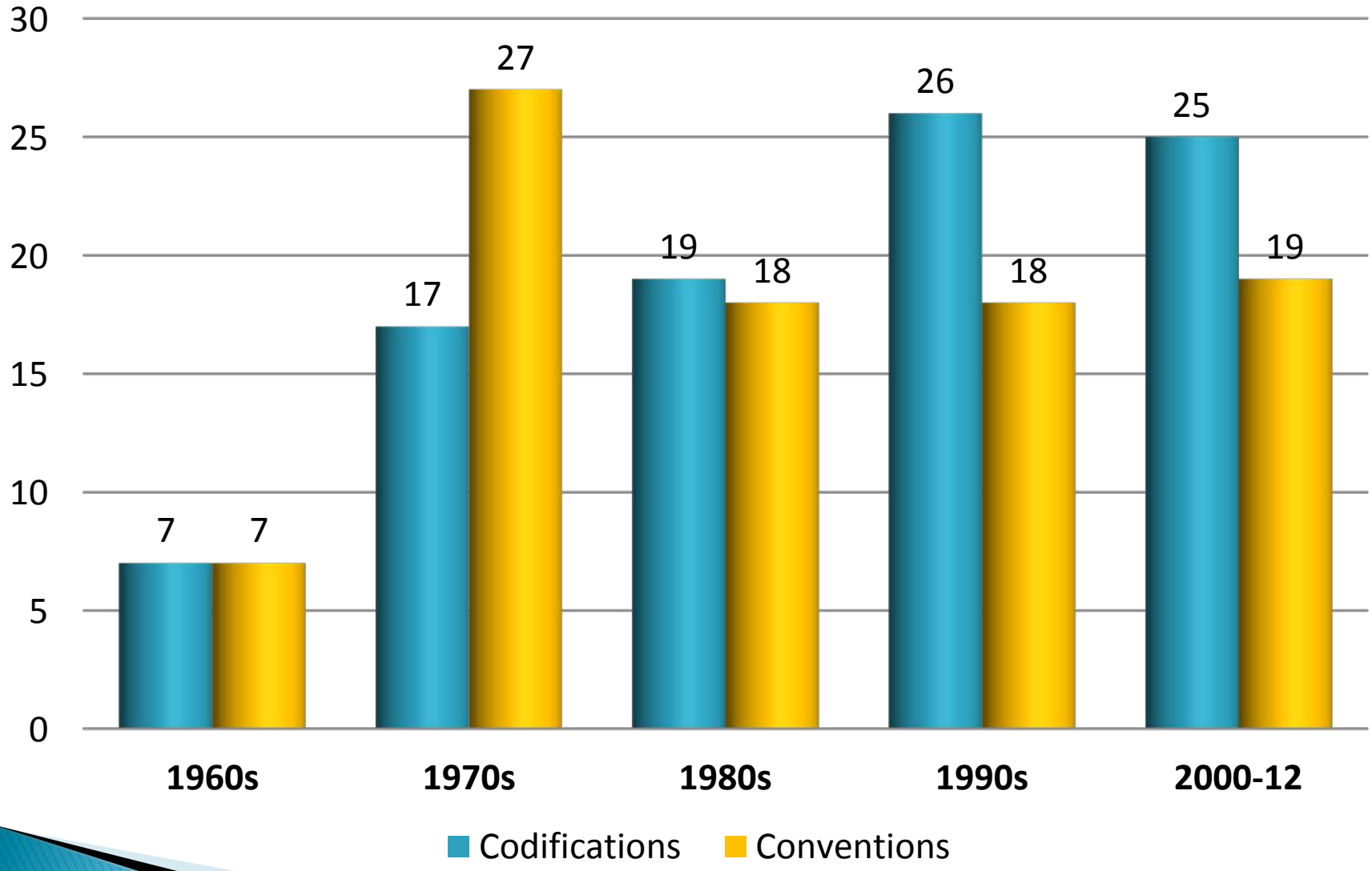
1. Law Governing Torts
2. Party Autonomy in Contract Conflicts
3. Codification and Flexibility
4. The Scope of Choice-of-Law Rules (Wholesale vs. Issue-by-Issue Choice and *Dépeçage*)
5. Codification and Result Selectivism
6. Publicization of PIL: State Interests, Unilateralism, and International Uniformity



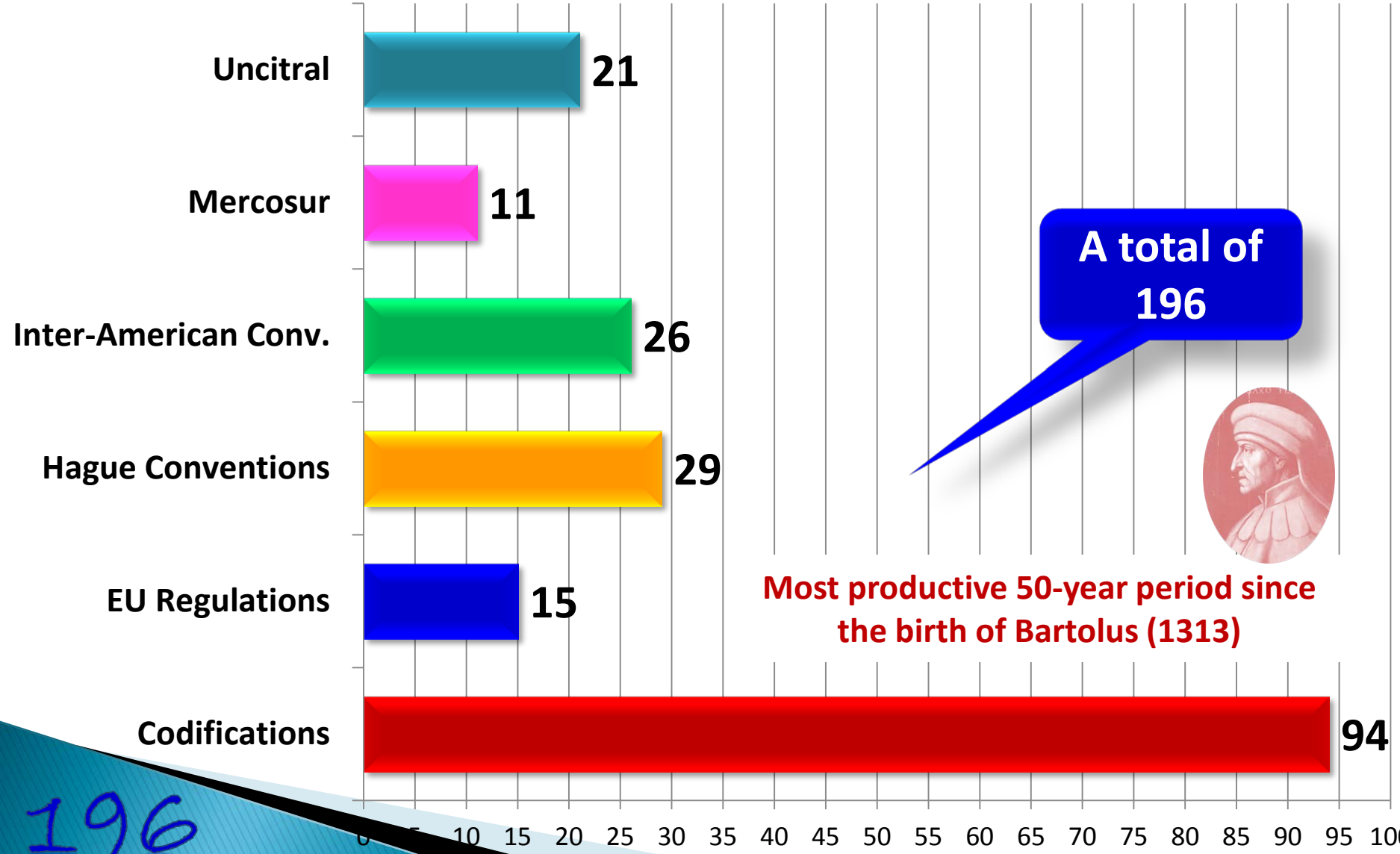
PIL Codifications, Conventions, and Regulations 1962-2012



Codifications and Conventions by Decade

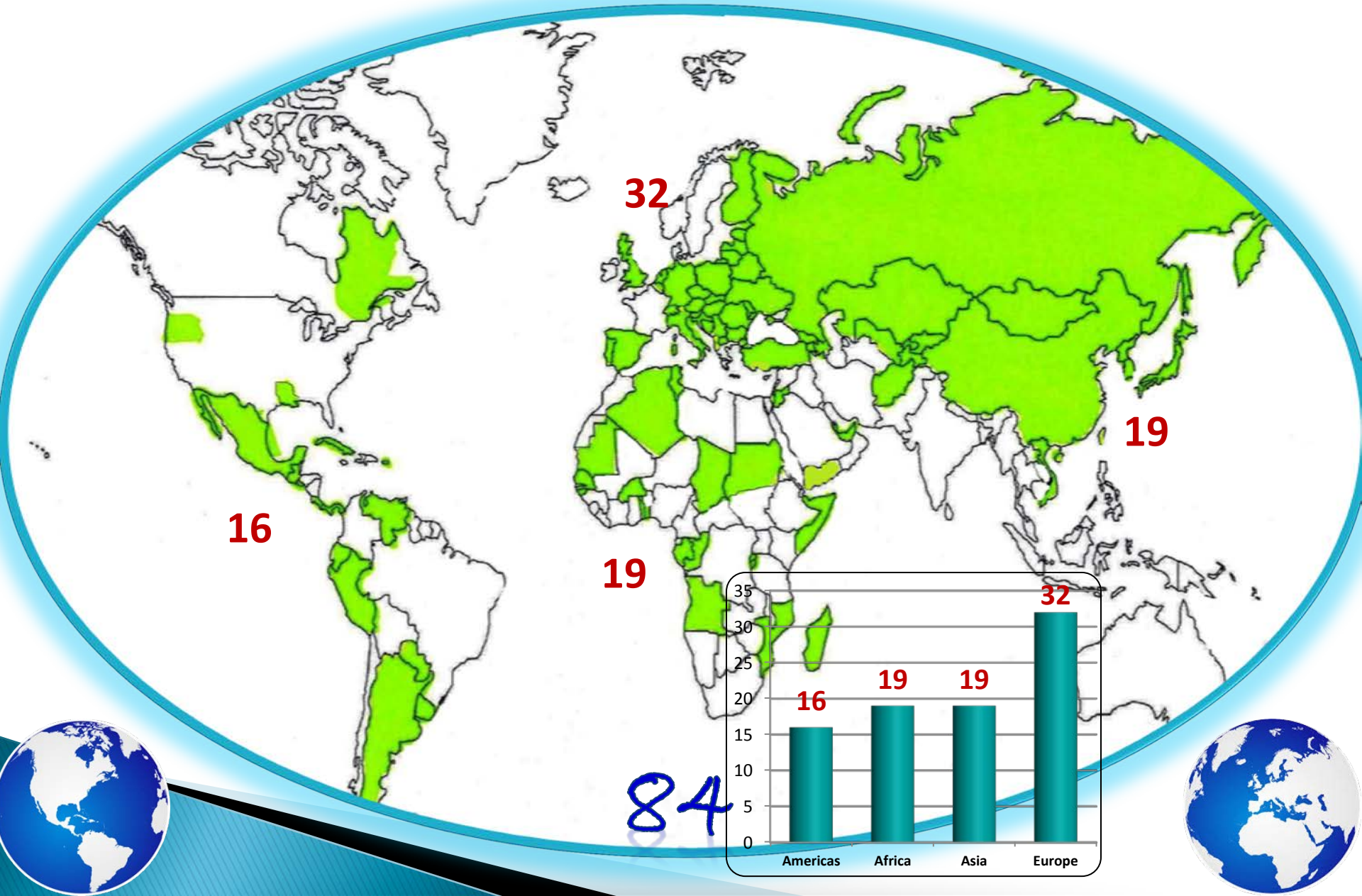


PIL Codifications, Regulations, Conventions, Protocols, and Model Laws, 1962-2012



196

94 Codifications in 84 countries

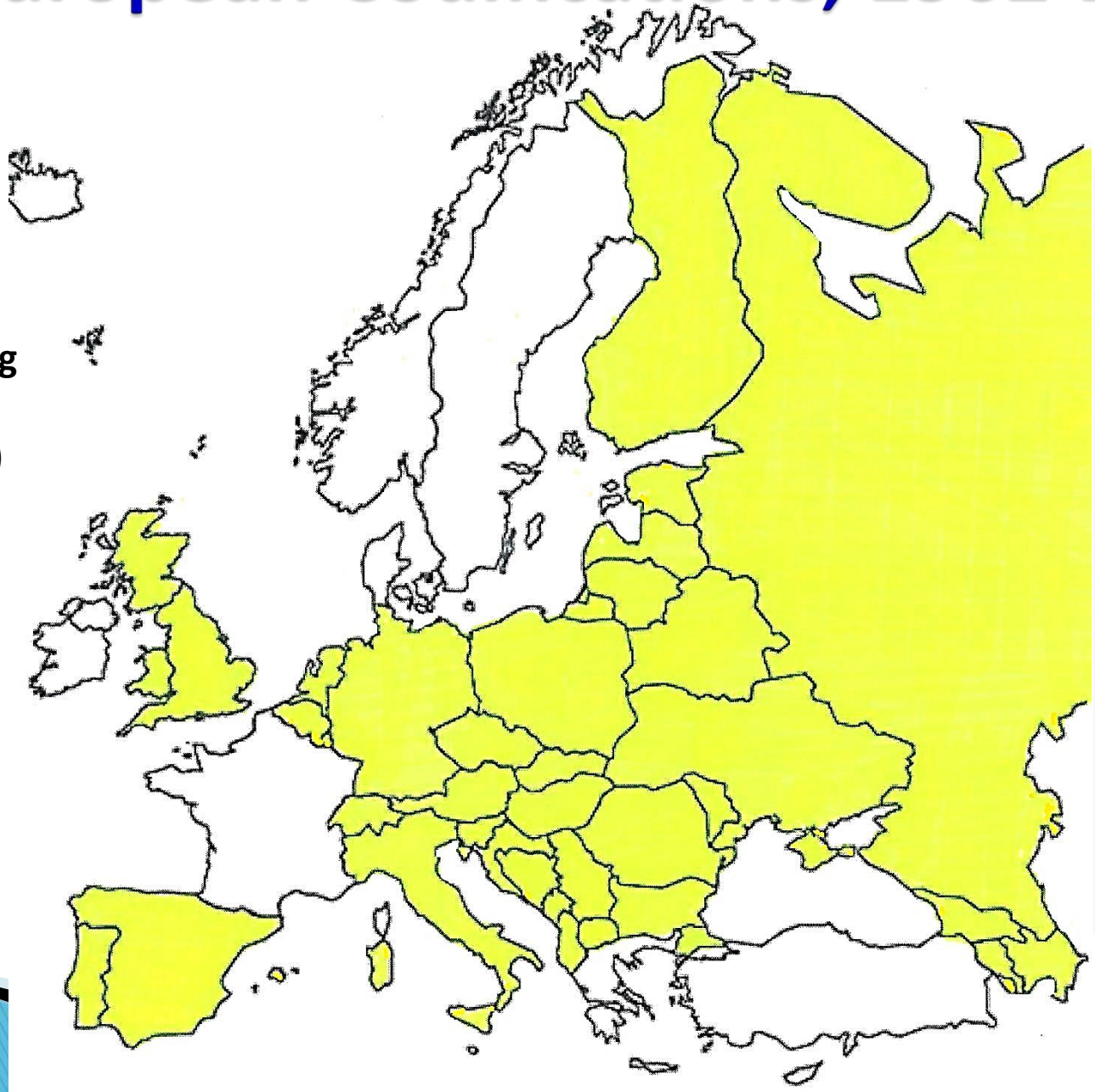


The Most Productive Codification Period

- In terms of legislative activity, this 50-year period is not only more productive than any previous 50-year period, but also more productive than all of the previous 650 years since the birth of Bartolus (1313).
- This dramatic increase in codification activity can be attributed only partly to the emergence of new independent states, following the decolonization of Africa and parts of Asia, and then the fall of communism in Eastern Europe.
- For the rest, the reasons must be sought in other factors, such as the momentous upsurge of cross-border activity and mobility, even before "globalization."
- Whatever the reasons, this dramatic increase has definitely answered the old question of whether PIL is susceptible to codification, even if the debate regarding the resultant costs and benefits will continue.

32 European Codifications, 1962-2012

(Not Including EU Regulations)



21 come from countries of the former Soviet sphere.

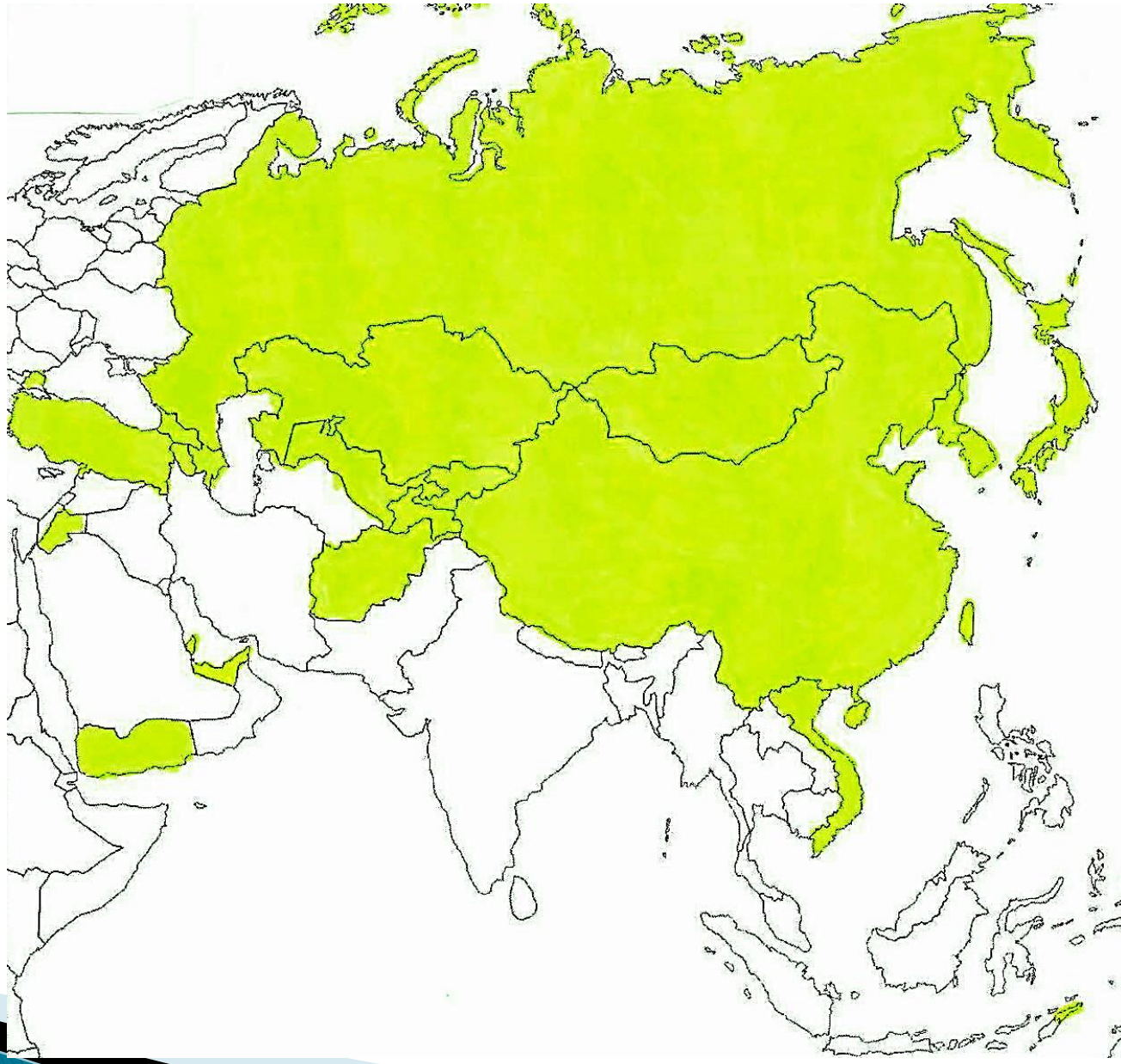
Before 1991, that area had only 7 codificati ons

European Codifications, 1962-2012

European Union Member States (20)	Former Soviet Sphere		Non-EU Countries (12)
Austria	Bulgaria	Albania	Switzerland
Belgium	Croatia	Armenia	Liechtenstein
Finland	Czech Rep.	Azerbaijan	
Germany	Estonia	Belarus	
Italy	Hungary	FYROM	
Netherlands	Latvia	Georgia	
Portugal	Lithuania	Moldova	
Spain	Poland	Russia	
U.K.	Romania	Serbia	
	Slovakia	Ukraine	
	Slovenia		
9	11	10	2

19 Asian Codifications, 1962-2012

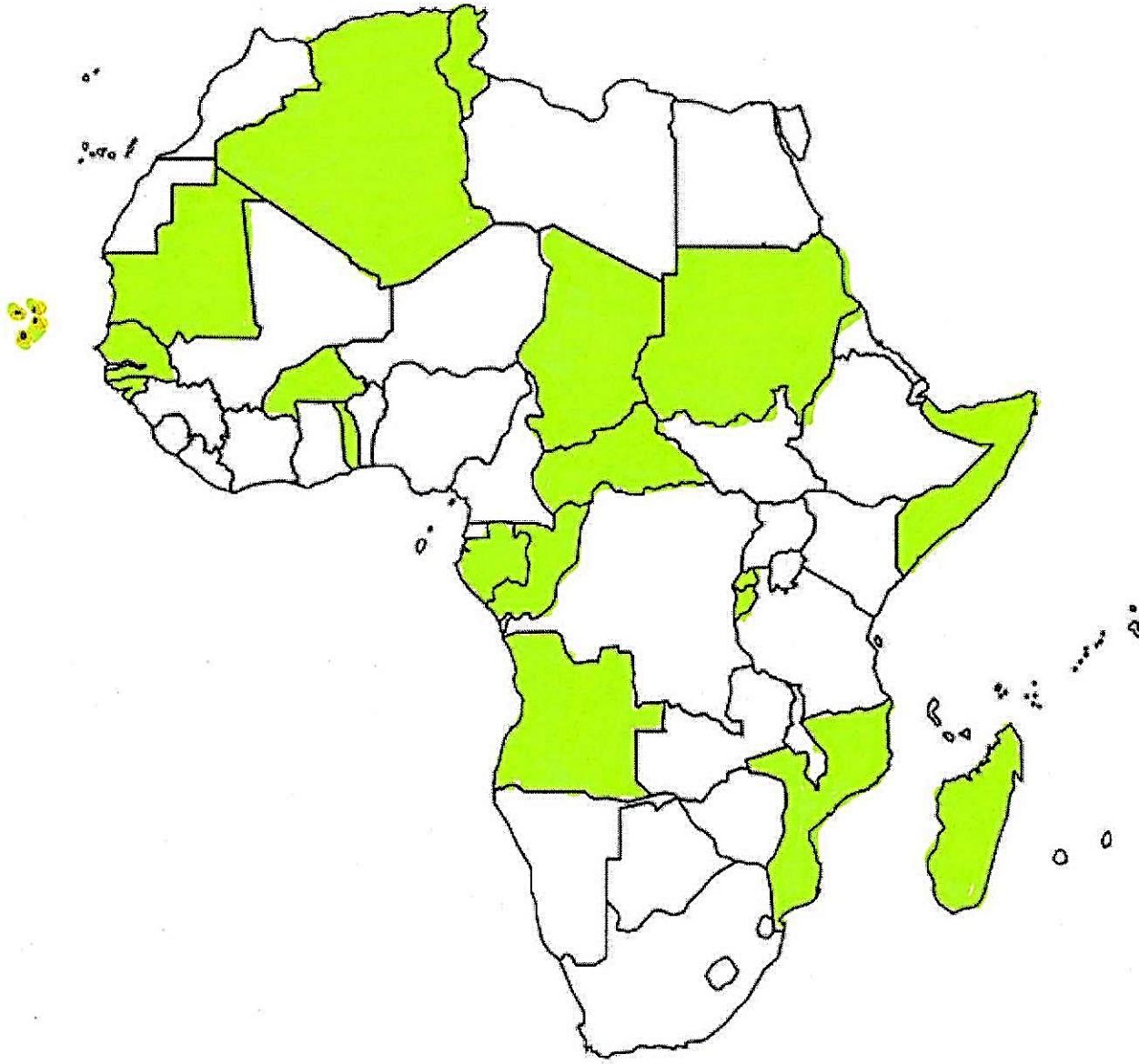
- Afghanistan 1977
- Jordan 1977
- U.A.E. 1985
- Yemen 1992
- North Korea 1995
- Vietnam 1995
- Uzbekistan 1997*
- Kyrgyzstan 1998*
- Kazakhstan 1999*
- Macau 1999
- South Korea 2001
- Mongolia 2002
- Qatar 2004
- Tajikistan 2005*
- Japan 2007
- Turkey 1982, 2007
- Taiwan 2010
- China 1985, 87, 99, 2010
- East Timor 2011
  - * Former USSR Republics



19 African Codifications 1962-2012

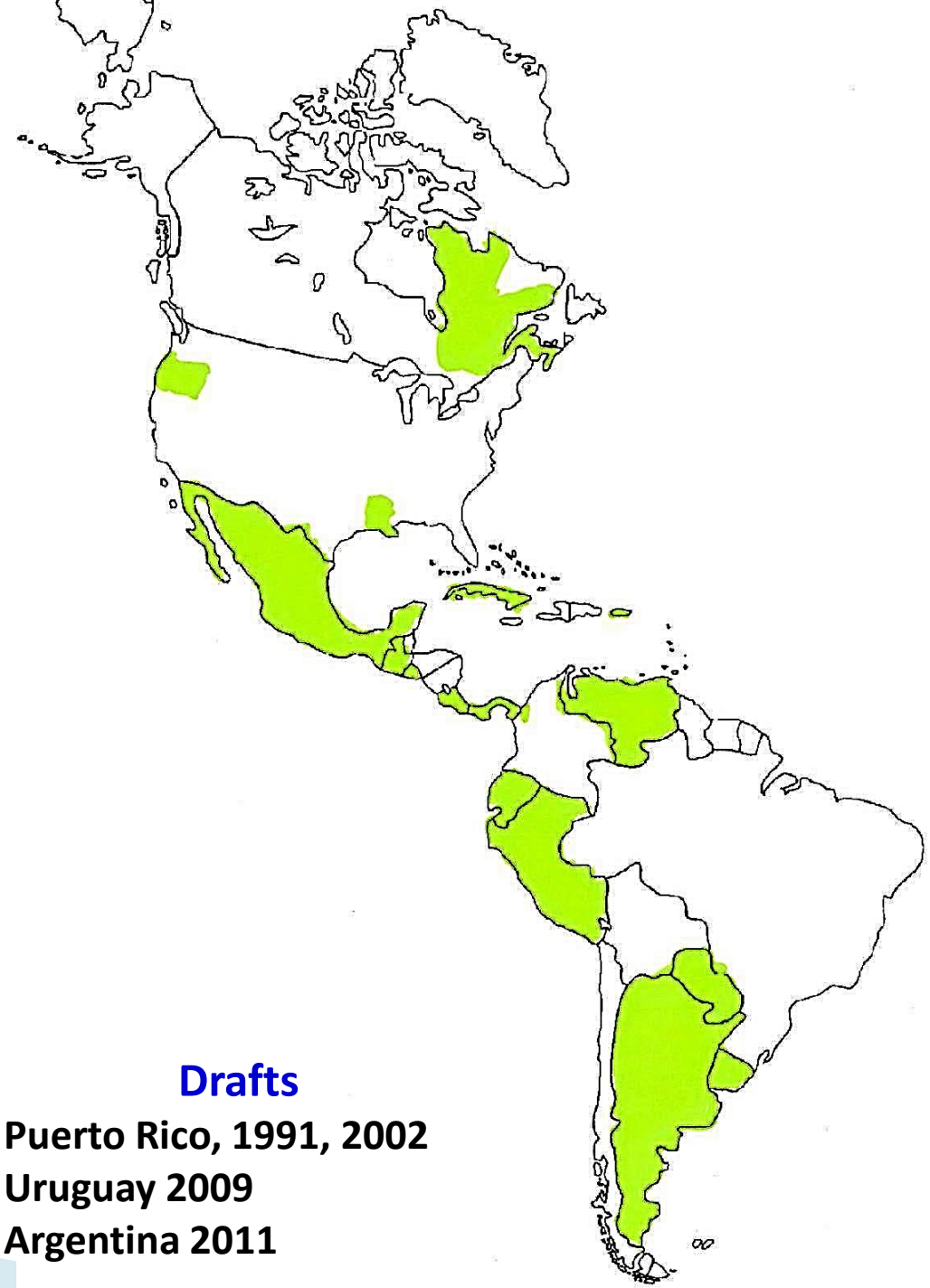
- Madagascar 1962
- Centr. Afric. Rep. 1965
- Chad 1967
- Sudan 1971
- Gabon 1972
- Senegal 1972
- Guinea Bissau 1973*
- Somalia 1973
- Algeria 1975
- Mozambique 1975*
- Angola 1977*
- Burundi 1980
- Togo 1980
- Congo-Brazzaville 1984
- Rwanda 1988
- Mauritania 1989
- Burkina Faso 1990
- Cape Verde 1997*
- Tunisia 1998

* Portuguese codif.



13 American Codifications

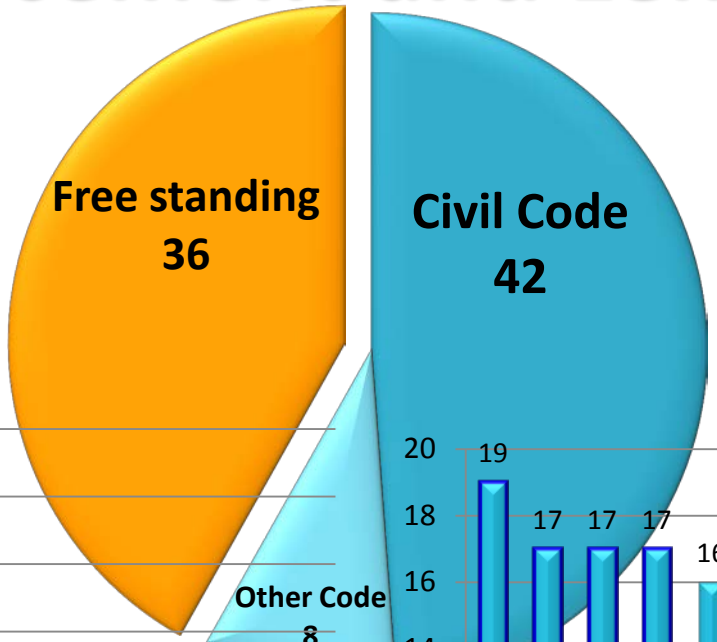
- Ecuador 1970
- Peru 1984
- Paraguay 1985
- Costa Rica 1986
- El Salvador 1986
- Cuba 1987
- Mexico 1988
- Guatemala 1989
- Louisiana 1991
- Quebec 1991
- Panama 1992-94
- Venezuela 1998
- Oregon 2001, 09



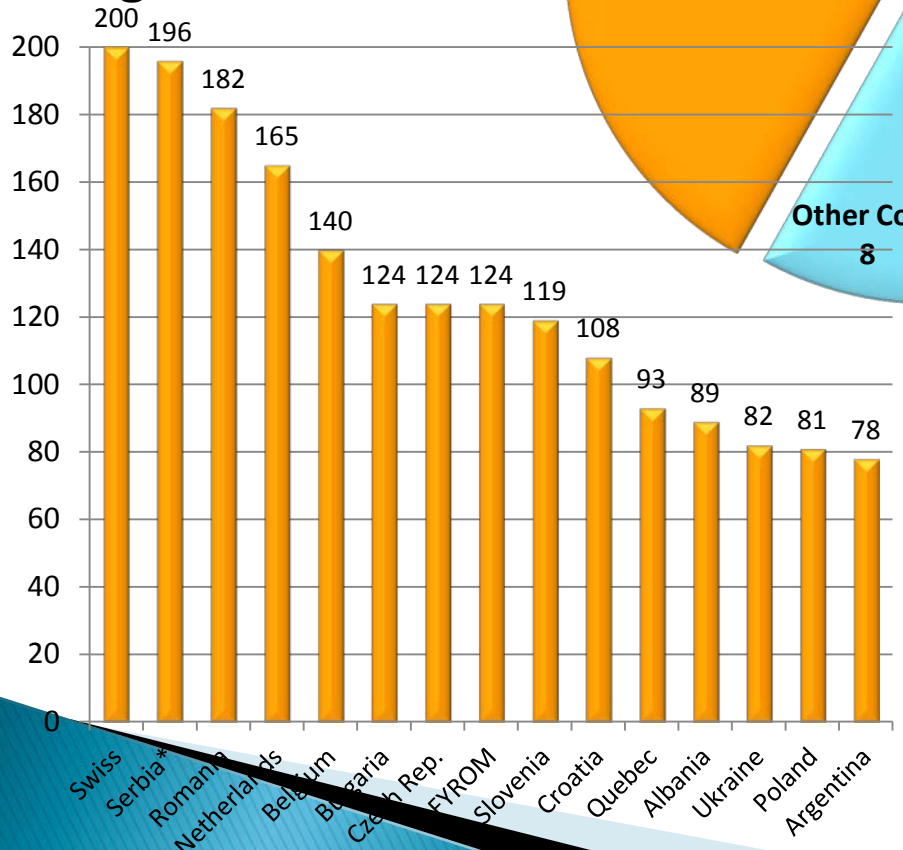
Drafts

- Puerto Rico, 1991, 2002
- Uruguay 2009
- Argentina 2011

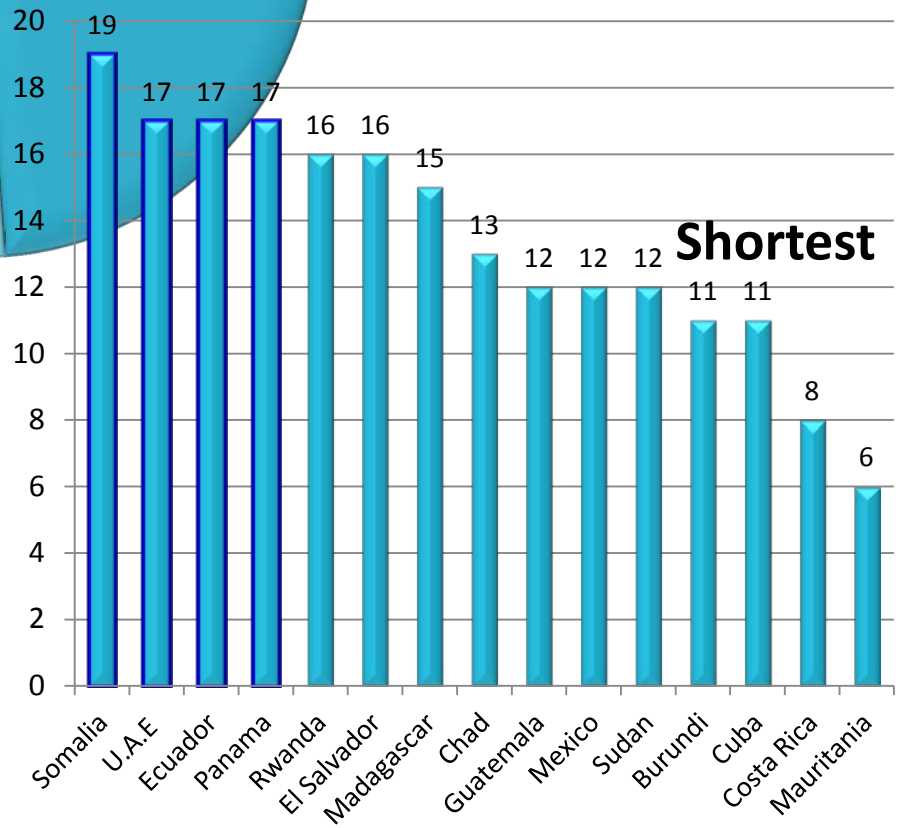
Placement and Length



Longest



Shortest

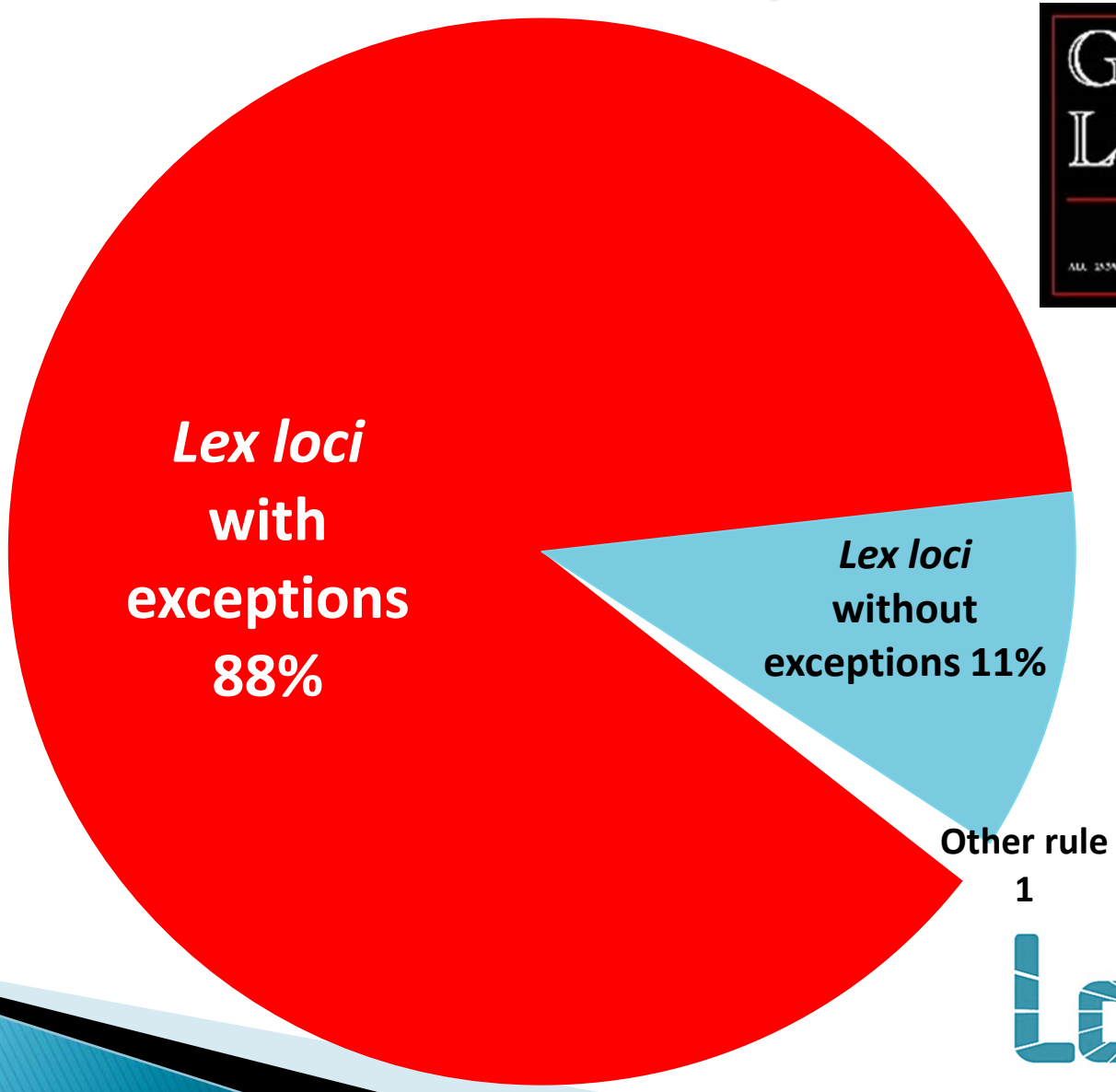


Law Governing

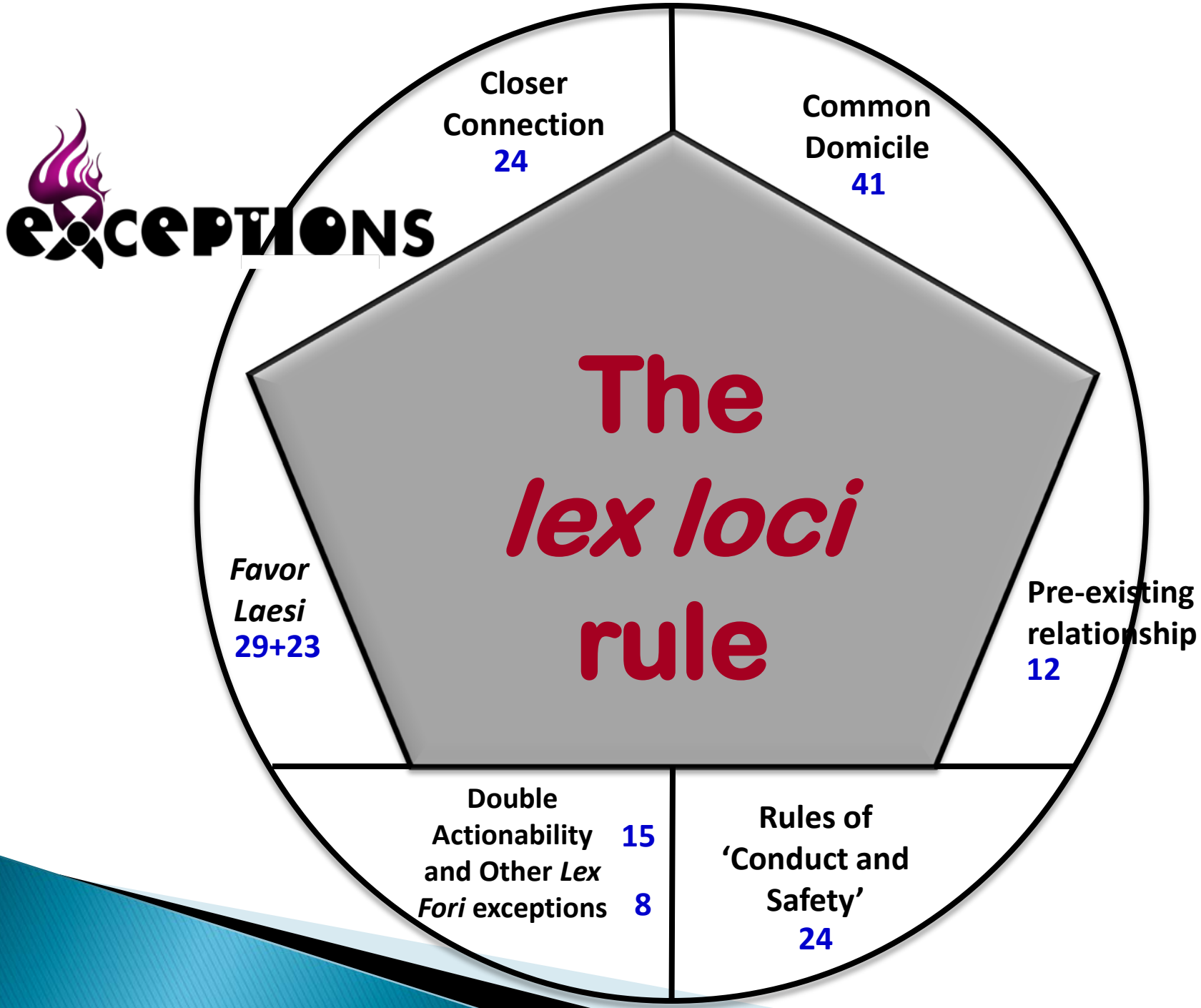
Tort Conflicts

The *Lex Loci Delicti* Rule

With and Without Exceptions



LOCUS ENERGY


EXCEPTIONS
Closer Connection 24
Common Domicile 41
The lex loci rule
Favor Laesi 29+23
Pre-existing relationship 12
Double Actionability and Other Lex Fori exceptions 15 8
Rules of 'Conduct and Safety' 24

Torts and the *Lex Loci* Rule

(73 codifications)

- All but one adopted the *lex loci* rule (72 codifications)
  - In all but 6, the *lex loci* is the basic rule (67)
- In all but 8, the *lex loci* rule is subject to exceptions (65):

Bilateral exceptions

1. Common-domicile (41 codif.)
2. "Closer connection" (24)
3. "Pre-existing relationship" (12)

Unilateral exceptions

1. "Double-actionability" rule (15)
2. *Lex fori* limitations for damages (6)

Favor Laesi

29 codifications adopted the *favor laesi* principle for all cross-border torts, and 23 did so for some cross-border torts

The "Closer Connection" Exception

- **Appears in 24 of the 73 codifications**

Variations in Scope

- **(1) As an exception from the *lex loci*:**
  - **Variations in verbiage**
    - **Without specifics (FYROM, Slovenia, Taiwan, Turkey)**
    - **With language suggesting that the parties' common affiliation with same state or their pre-existing relation is a closer connection (Austria, Estonia, Japan, Liechtenstein, U.K.)**
- **(2) As an exception from both the *lex loci* and the parties' common law**
  - **Rome II, Albania, Belgium, Bulgaria, Germany, Netherlands, Serbia, Switzerland.**

The Common-Domicile Rule

41+6 of 73 codifications

Variations in affiliation

- Domicile
- Habitual residence (h.r.)
- Domicile *or* h.r.
- Nationality
- Nationality *and* residence
- Nationality *or* h.r.
- Forum state nationality

Variations in expression and scope

- Bilateral rule (38 codif)
  - Express (32 codif.)
  - Implied in the "closer connection" exception (6 codif.)
- Unilateral rule in favor of forum domiciliaries (9 codif., all former Soviet reps., plus Vietnam)

Exceptions

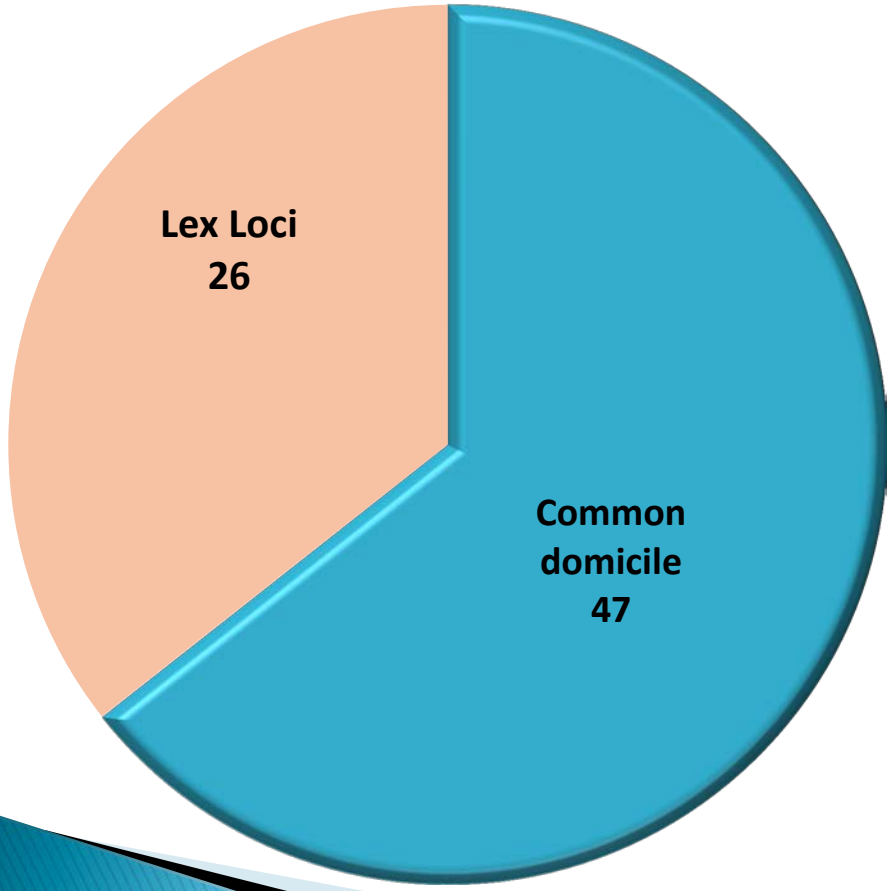
- "Conduct & safety" rules (20)
- "Double-actionability" rules (9)
- Forum damages rules (7)

Difference from American Rule

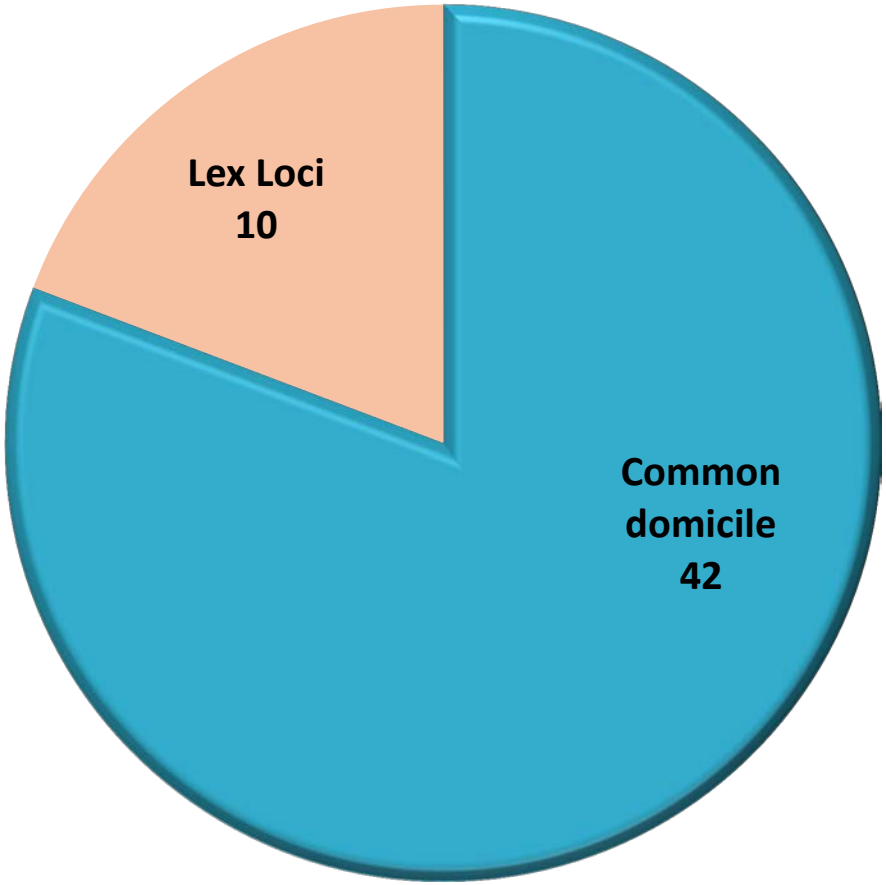
American rule applies only to "loss-distribution", not "conduct-regulation" issues.

Results in Common-Domicile Cases

Codifications



American Cases



Double Actionability Rules

- **The foreign conduct must be actionable under both the foreign and forum law.**
  - **Adopted in 15 codifications and the U.K. (for defamation only).**
  - **Abolished in China, Hungary, Russia, Taiwan.**

Three Versions

- **(1) Exception from foreign *lex loci:***
  - **Afghanistan, Algeria, Jordan, North Korea, Qatar, Somalia, Sudan, U.A.E.**
- **(2) Exception from both *lex loci* and common-domicile law:**
  - **Belarus, Japan, Kazakhstan, Kyrgyzstan, Tajikistan, Ukraine, Uzbekistan.**
- **(3) Applicable to both liability and damages**
  - **Japan, North Korea.**

Other Exceptions in Favor of *Lex Fori*

Overt

- **Foreign conduct must be actionable under both foreign and forum law, and, if it is, damages may not exceed standards of *lex fori* (Japan, North Korea).**
- **Forum law governs foreign torts involving forum tortfeasors (Mongolia).**
- **Damages for foreign torts may not exceed standards of *lex fori*:**
  - **Hungary (for infringement of personal rights)**
  - **Romania (for products liability and unfair competition),**
  - **Switzerland (for products liability and obstruction to competition)**
  - **Turkey (for obstruction to competition).**

Covert

- **Damages for foreign torts must be limited to *compensation* of the victim (Germany, South Korea).**

Rules of "Conduct and Safety"

- **Operable when the tort is not governed by the law of the place of conduct, such as when it is governed by the law of:**
  - **the state of injury in cross-border torts, or**
  - **the common-domicile, closer connection, or pre-existing relation.**
- **Available in:**
  - **21 codifications** (Albania, Angola, Austria, Belgium, Bulgaria, Cape Verde, Dutch Torts Act, East Timor, Guinea-Bissau, Hungary, Louisiana, Macau, Mozambique, Oregon, Poland, Portugal, Puerto Rico, Romania, Serbia, Switzerland, Tunisia).
  - **Rome II, and**
  - **The Hague Conventions on traffic accidents and products liability.**
- **Variations in verbiage and scope.**
- **Variations in applicability:**
  - **These rules "apply", or**
  - **These rules "shall" or "may" be "taken into consideration."**

The *Favor Laesi* Rule in Cross-Border Torts

For all cross-border torts (29)

Express (21)

(a) Victim's choice (9): Estonia, FYROM, Germany, Italy, Lithuania, Oregon, Tunisia, Uruguay, Venezuela (9).

(b) Court's choice (12): Angola, Cape Verde, Croatia, East Timor, Georgia, Guinea-Bissau, Hungary, Macau, Mozambique, Peru, Portugal, Slovenia

Implied (6): China, Japan, South Korea, Quebec, Russia, Switzerland

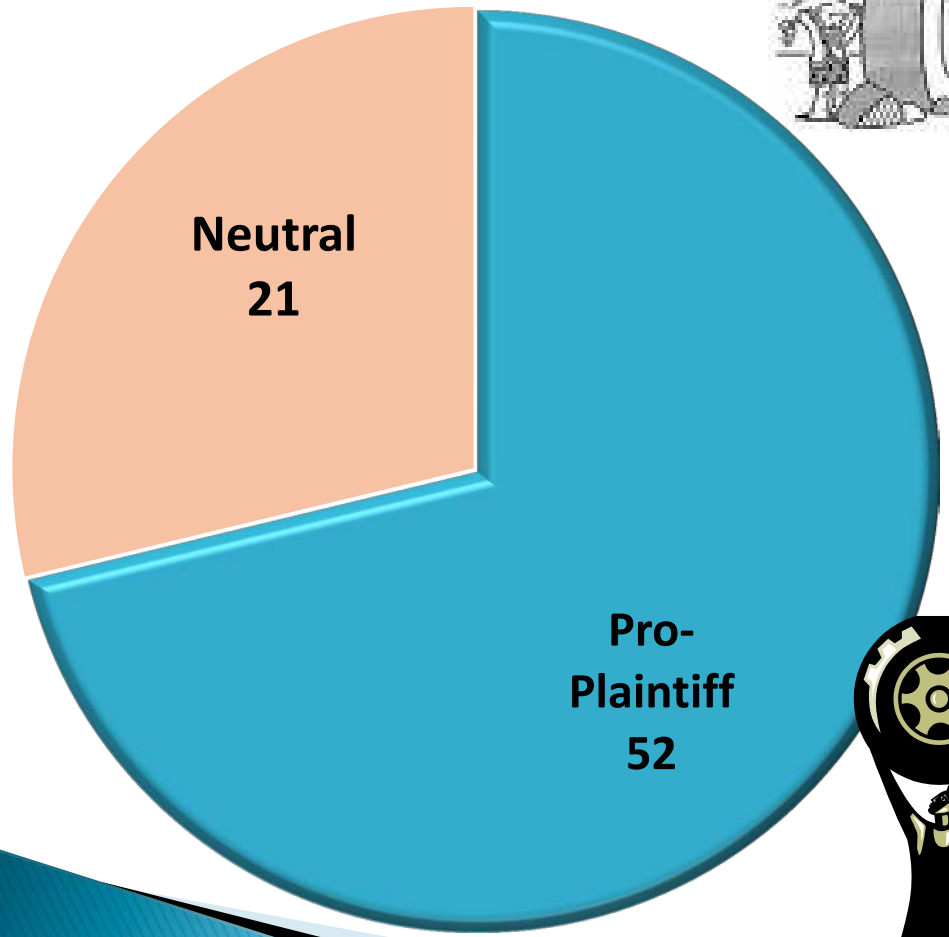
Discretionary (2): Slovakia, Vietnam

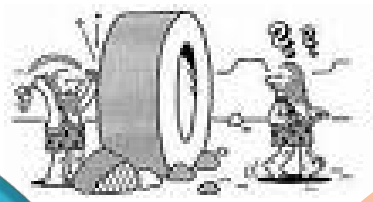
For some cross-border torts (23)

Albania, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Czech Republic, Kazakhstan, Kyrgyzstan, Louisiana, Moldova, Poland, Puerto Rico, Romania, Rome II, Russia, Serbia, Switzerland, Taiwan, Tajikistan, Turkey, Ukraine, Uzbekistan.

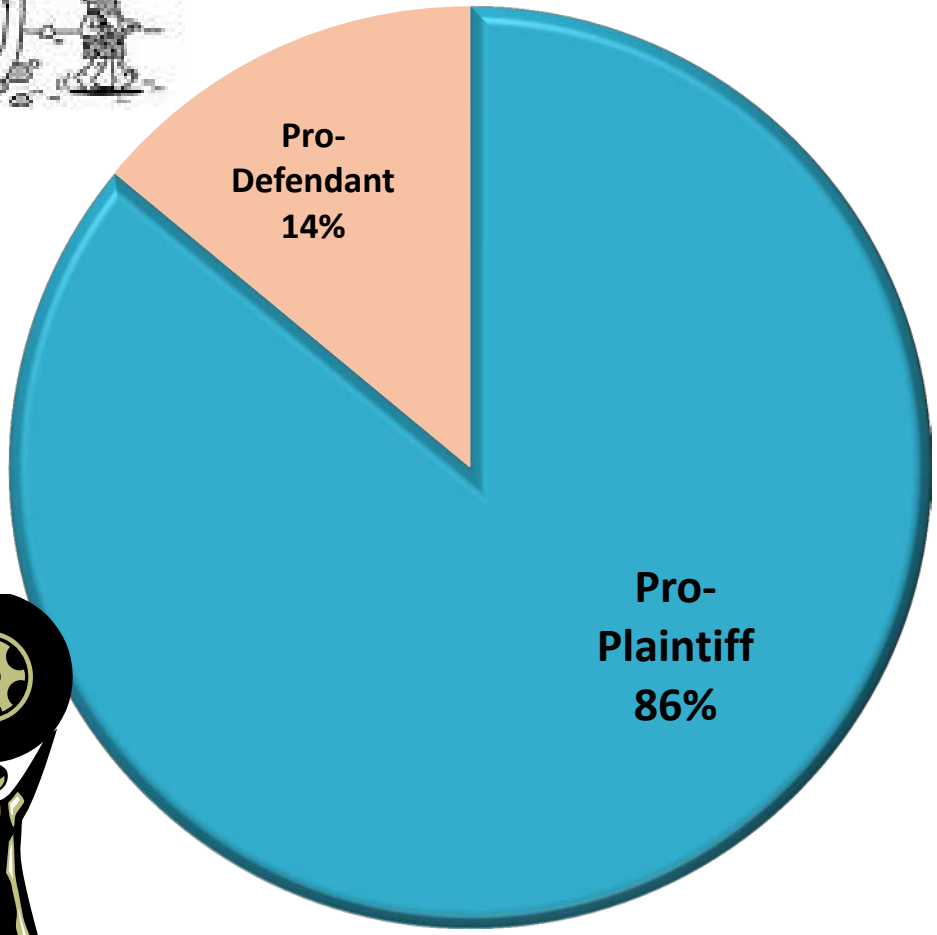
Results in Cross-Border Torts

Codifications





American Cases

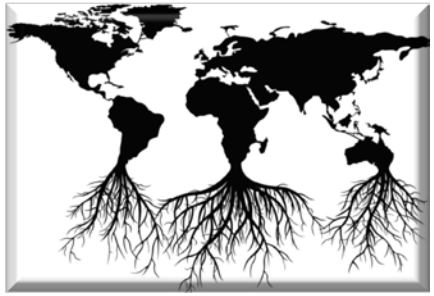


Victim's Choices in Product Liability Conflicts

	V's domicile	Injury	Acquisition	D's PPB
Taiwan	X	X	X	X
Tunisia	X	X	X	X
Russia	X*		X*	X
Azerbaijan	X		X	X
Belarus	X		X	X
Kazakhstan	X		X	X
Kyrgyzstan	X		X	X
Tajikistan	X		X	X
Ukraine	X		X	X
Uzbekistan	X		X	X
China	X*	X		X
Italy			X*	X
Quebec			X	X
Switzerland			X*	X
Turkey			X	X
Moldova	X		X*	
Romania	X		X*	

* Indicates commercial availability proviso

Territoriality and Personality in Tort Conflicts

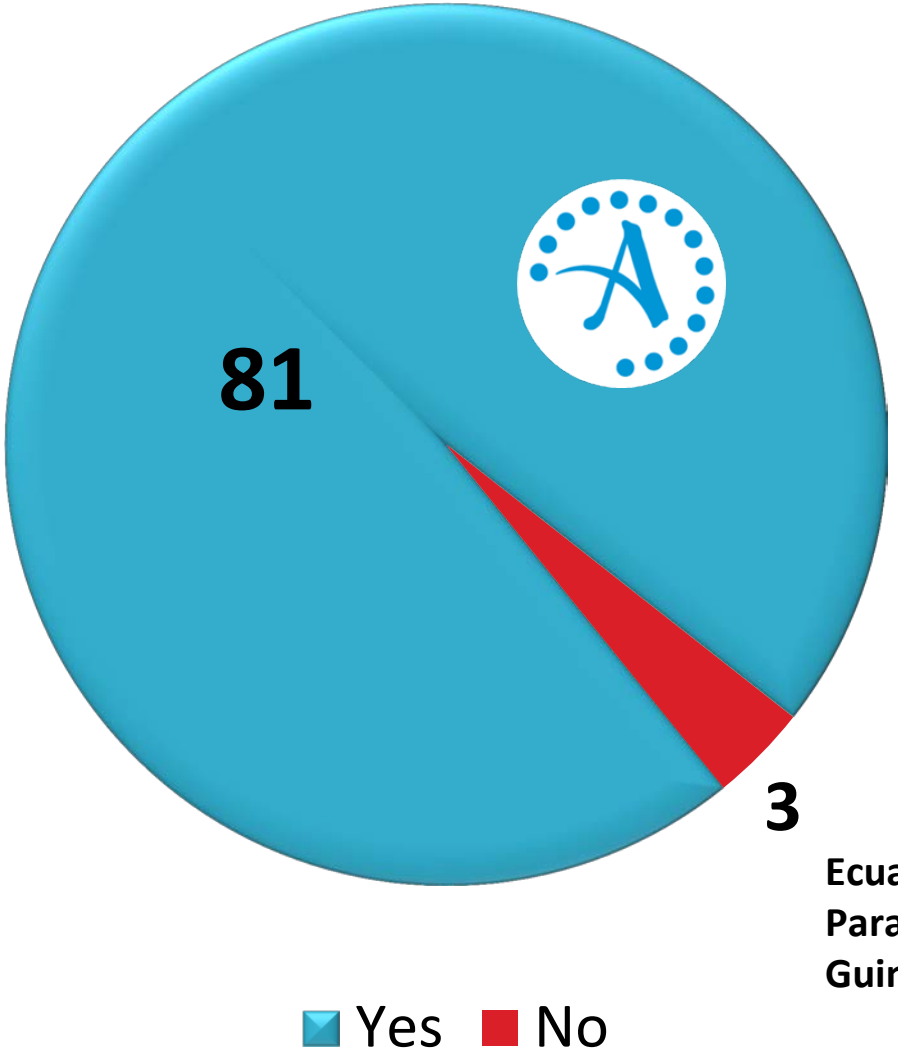


- ***Some*** laws operate territorially (e.g., conduct-regulating rules)
- ***Some*** laws ***may*** follow the person (e.g., loss-allocating rules)

Party Autonomy

in Contracts

Codifications Endorsing Party Autonomy



Ecuador
Paraguay*
Guinea-Conakry

Parameters of Party Autonomy (P.A.)

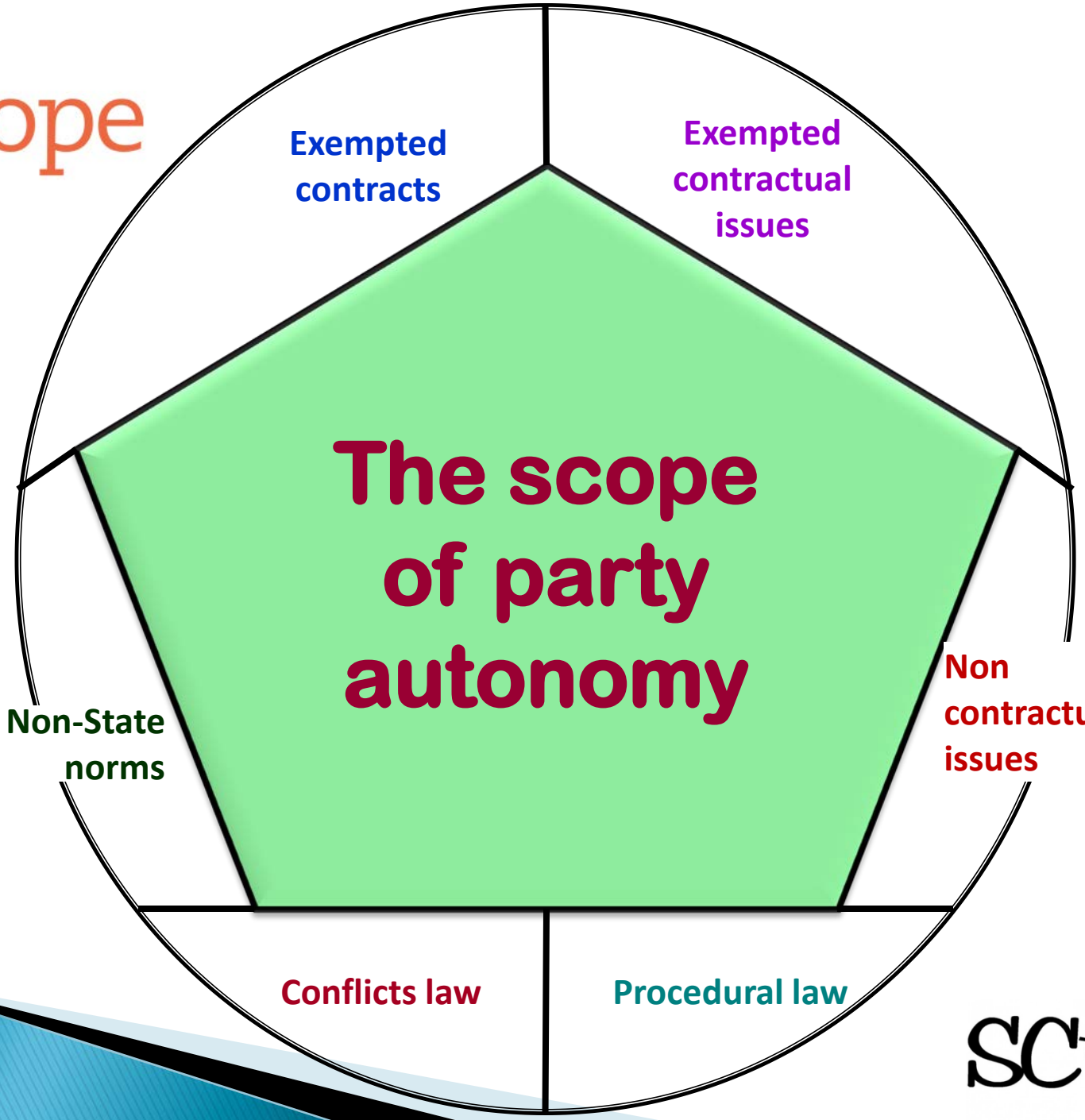
- **Internationality**
  - P.A. applies only to international or multistate contracts.
  - Internationality cannot be created solely by the C-o-L agreement.
- **Connection with chosen state**
  - Required for all contracts (Restatement 2nd, U.C.C., Portuguese codes)
  - Required for some contracts (Rome I-passengers, insureds)
  - Not required (40 codifications, 5 conventions, Hague Principles)

Modalities of Party Autonomy

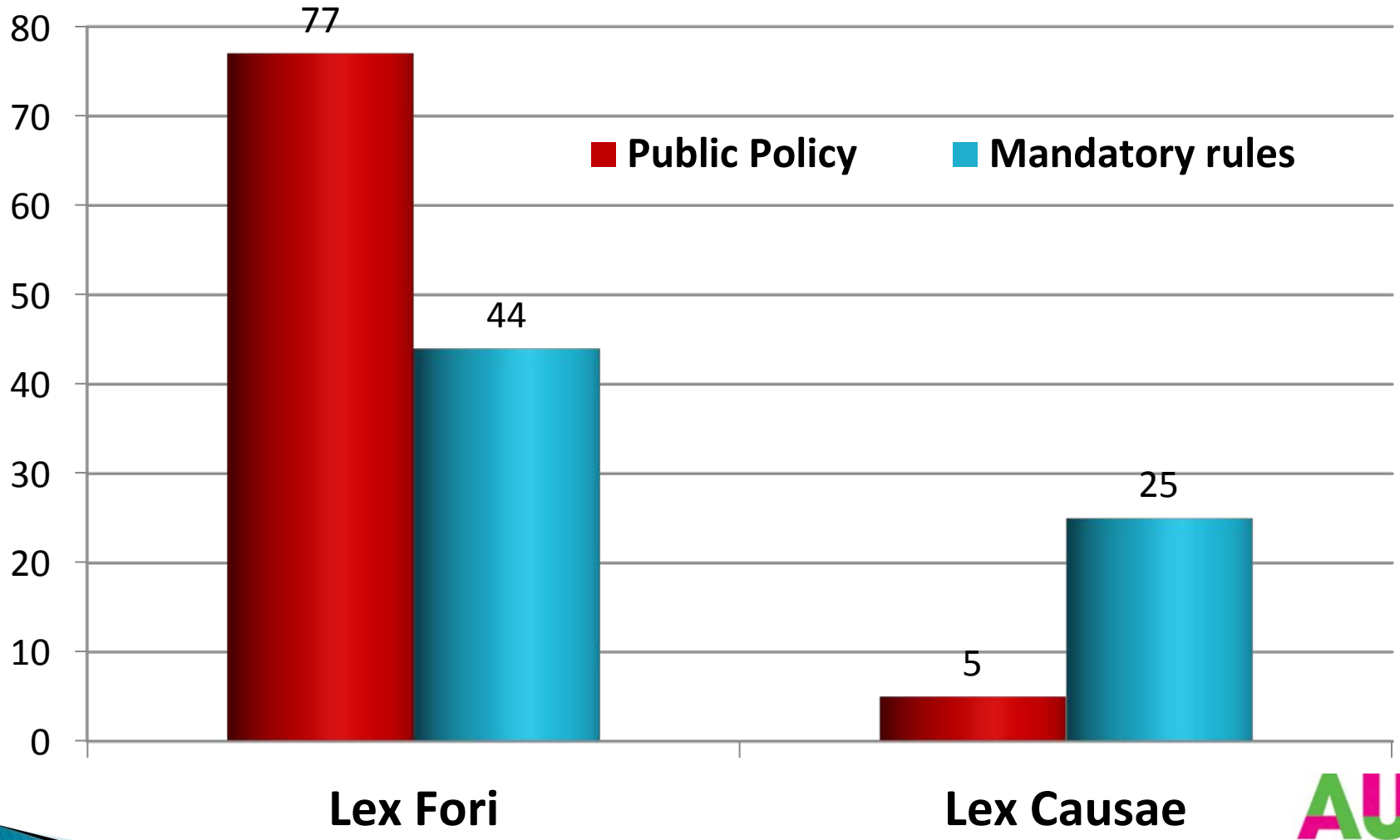
- **Mode of expression** (express or implied, usually no formalities).
- **Multiple or partial choice** (expressly permitted).
- **Timing of the choice or the change** (can be made or changed later).
- **Choice of an invalidating law** (in whole or in part; split of authority).

The Scope of Party Autonomy

- **Exempted contracts:**
  - Total exemptions (immovables, consumers, employees, insureds, non-commercial actors)
  - Partial exemptions (consumers, employees)
- **Exempted contractual issues:**
  - Capacity
  - Consent and contract formation
  - Form
- **Other Limitations:**
  - Limitation to contractual (vs. non-contractual) issues
  - Limitation to substantive (vs. procedural) law
  - Limitation to substantive (vs. conflicts) law
  - Limitation to State (vs. non-state) law


Exempted contracts
Exempted contractual issues
The scope of party autonomy
Non-State norms
Non contractual issues
Conflicts law
Procedural law

Whose Limitations? The *Lex Limitativa*



The *Lex Limitativa:*
The Difference and Why it Matters

	Lex Fori	*Lex Causae*	Chosen Law	Result	
1	a	a	B	Not upheld	
2	a	b	C		
				U.S.	R.W.
3	a	B	B	Upheld*	Not upheld
4	a	B	C	Upheld*	Not upheld
5	A	b	A	Not upheld	upheld
6	A	b	C	Not upheld	upheld

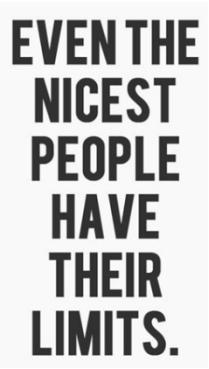
LEGEND

CAPITAL LETTER= Unrestricted PA

Lower case letter=restricted PA

Deadly combination with a choice-of-forum clause

Public Policy Thresholds as Limitations to Party Autonomy



1. *Ordre public* of *lex fori*, properly applied

2. "Overriding" mandatory rules of *lex fori*

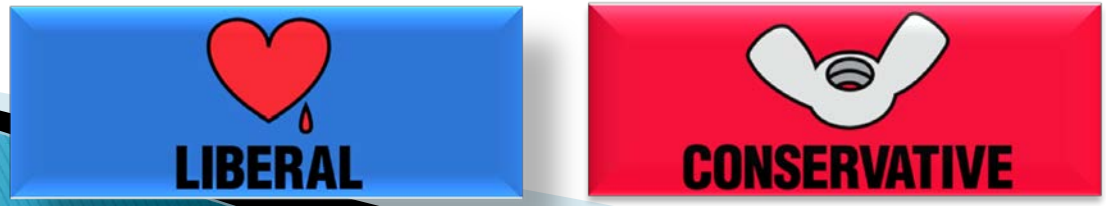
3. "Fundamental" public policy of *lex causae*

4. *Ordre public* or mandatory rules of *lex fori*, in some states

5. "Simple" mandatory rules of *lex causae* or state that has "all" contacts

Comparison: Liberal vs. Restrictive

- The relative heights of these thresholds do not tell the whole story of which systems are more or less liberal toward party autonomy.
- A high threshold implies a liberal regime, *unless* courts employ it too frequently.
- A low threshold normally suggests a restrictive regime, *unless* courts employ only it infrequently.
- Similarly, a system, such as Rome I and the codifications influenced by the Rome Convention, which separates consumer and employment contracts for protective treatment can afford to be, and is, more liberal in other contracts.
- Conversely, a system such as that of the Restatement (Second), which does not exempt any contracts from the scope of party autonomy, appears to be too liberal toward party autonomy.
- At the same time, the Restatement mitigates that liberality by using a public policy threshold that is both lower and more readily deployable than the threshold or Rome I.

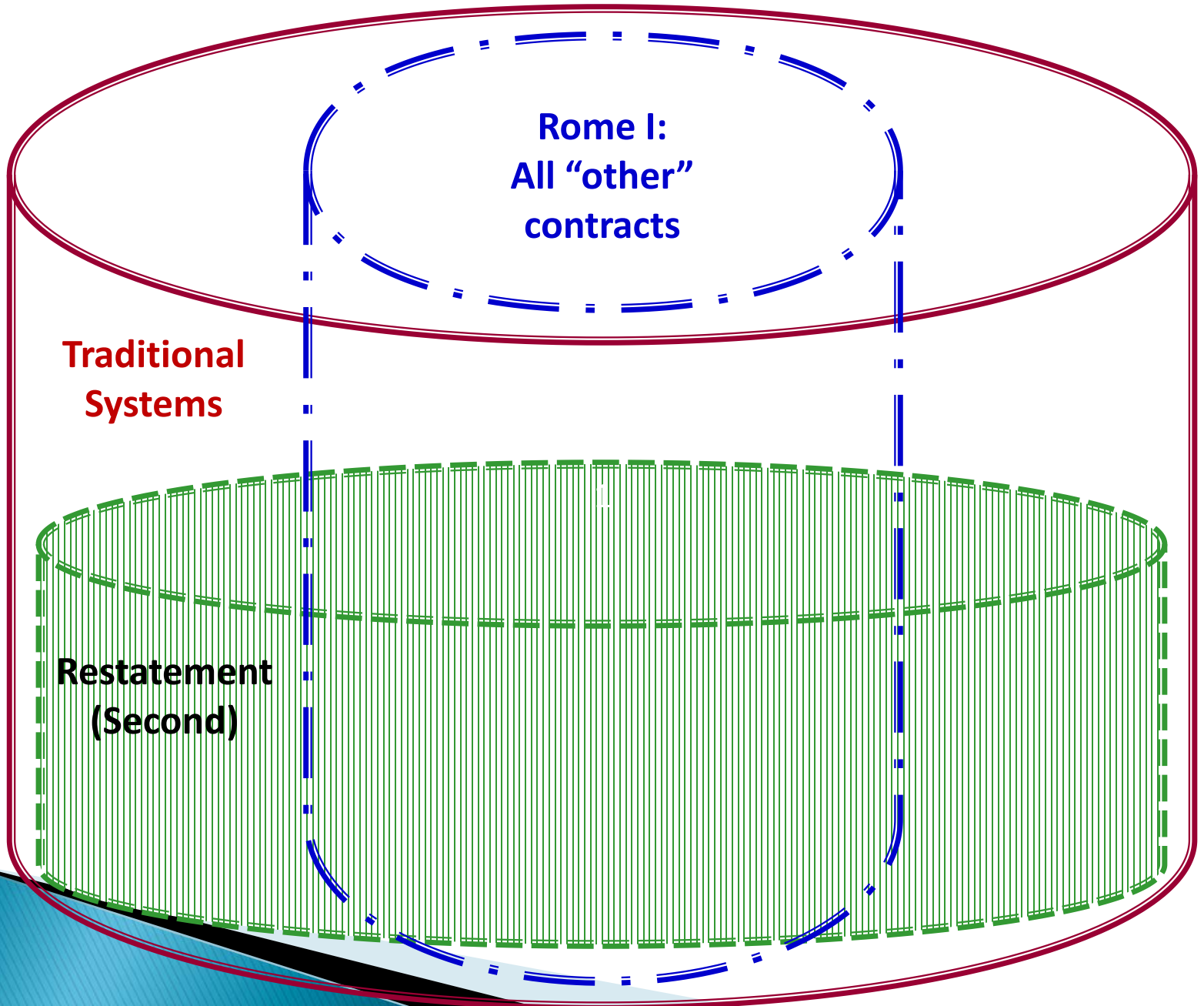


Comparison: The Factors

A reliable assessment of the "liberality" of a particular P.A. regime must consider all pertinent factors and parameters, including:

- **(a) Which contracts, if any, are exempted from the scope of P.A.?**
- **(b) Which contractual issues, if any, are exempted from the scope of P.A.?**
- **(c) Which state's standards are used for determining the limits of P.A. (*lex limitativa*)**
- **(d) How high is the threshold for employing those limits? and**
- **(e) How often is the threshold employable or employed in practice?**

The Ranges of Party Autonomy in Three Model Systems



Three Model Systems

- **Traditional Systems:**
  - **Wide range of P.A. because they do not exempt any contracts from the scope of P.A.; and**
  - **High threshold for limiting P.A.: *Ordre public*, if properly applied.**
- **Restatement 2nd (and UCC):**
  - **Same wide range because it does not exempt any contracts, but**
  - **Low threshold, despite the word "fundamental."**
- **Rome I:**
  - **Special treatment and low threshold for consumers, employees, passengers and insureds.**
  - **High threshold for "all other contracts"**

A Study in Contrast: The American Side

- The Restatement (2nd) reflects a typical American skepticism toward categorical *a priori* rules and a high degree of confidence in the courts' ability to develop appropriate solutions on a case-by-case basis.
- Prefers under-regulation to over-regulation.
- Only a single P.A. rule (§187) for all contracts.
- Section 187 imposes only two flexible limitations to party autonomy:
  - (1) the easily met requirement for a "substantial relationship" to the chosen state or another "reasonable basis" for the choice, and
  - (2) the requirement that the application of the chosen law should not violate a "fundamental policy" of the *lex causae*.
- U.C.C. Section 1-301 is even more laconic and elliptical. A "reasonable relationship" and a judicially engrafted public policy exception are the only limitations to P.A.

A Study in Contrast: The European Side

- **Legislative timidity has never been a problem on the European continent, certainly not *in Brussels*.**
- **Rome I is the culmination of the rich continental experience in crafting *a priori* rules.**
- **The fact that Rome I is designed to serve a plurilegal and multiethnic Union may explain why the drafters opted for more black-letter rules and so few escapes.**
- **The result is greater predictability, but less judicial flexibility.**
- **Over-regulation. Rome I is a detailed, sophisticated system that employs multiple layers of substantive restrictions on party autonomy and differentiates among three types of contracts: (a) consumer and employment contracts; (b) passenger and insurance contracts; and (c) all other contracts.**
- **In the abstract, the Rome I scheme seems perfectly logical, indeed brilliant, because there is every good reason for a liberal treatment of contracts that do *not* involve weak parties.**
- **However, despite its structural and conceptual perfection, this scheme may well be flawed in significant respects.**
- **It overprotects consumers and employees and under protects passengers, insureds, and small commercial actors, such as franchisees.**

A Study in Contrasts

- The drafters of Rome I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect weak parties.
- These rules work well for consumers and employees, but not for passengers, insureds, and other presumptively weak parties, such as franchisees.
- Even so, it is preferable to have rules protecting weak parties in *most* cases (even if they do not work well in *some* cases) rather than to not have any such rules.
- One hopes that someday American drafters will muster the courage to draft similar rules for the US.
- Fortunately, American judges can do what legislatures cannot: My own study of the myriad American cases involving choice-of-law clauses shows that judges do a commendable job in protecting the weak parties.
- In the final analysis, each system plays to its own strengths.
- The American strength is a strong tradition of judicial independence and creativity.
- The European strength is a rich tradition in statutory rule crafting.
- Unfortunately, one rarely finds both of these strengths in the same system.

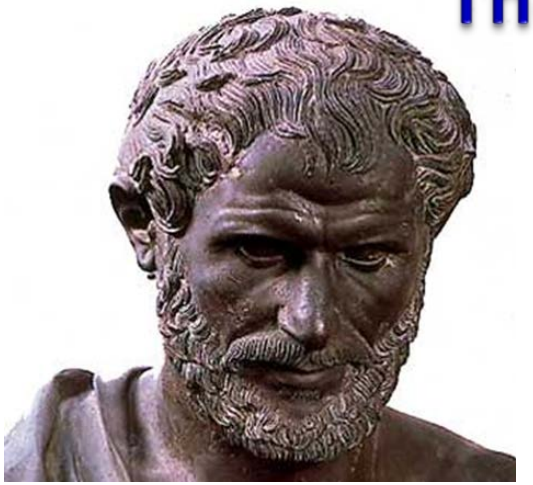
Flexibility

in PIL Codifications

FLEXIBILITY

Certainty vs. Flexibility:

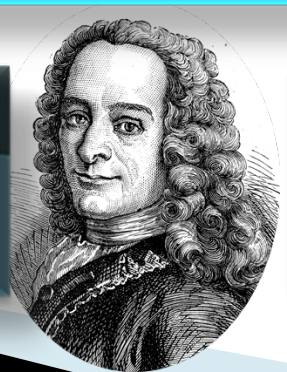
The Perennial Tension



- This tension is as old as law itself.
- Aristotle identified it 23 centuries ago when he spoke of the role of equity (*epieikia*) as a corrective of positive law.

"There is and will always be, in all countries, a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable to circumstances on the other ." René David

Uncertainty is an uncomfortable position.
Voltaire
But certainty is an absurd one.



PIL is not immune to this tension; In fact, it is particularly susceptible to it.

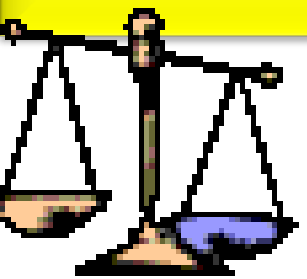
The Mother of All Conflicts

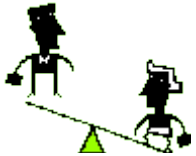
The two perpetually competing needs

Law must be certain and predictable

Law must be flexible and adaptable to individual cases and changing conditions.

What is the proper balance between certainty and flexibility?





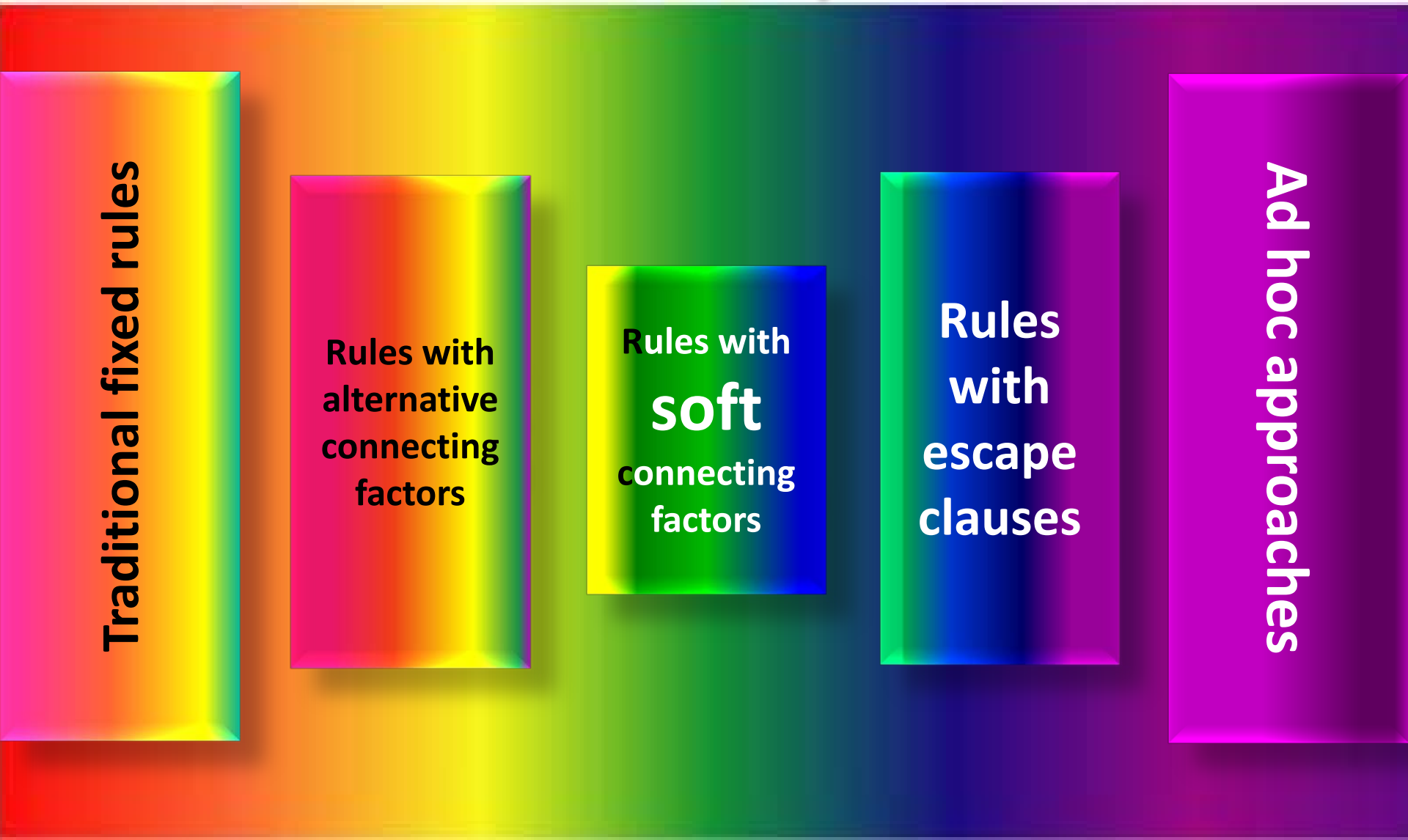
Standard Arguments Against Codification

1. It is "inherently incapable of capturing the nuance and sophistication necessary for just and satisfactory choice-of-law solutions"
2. It petrifies the law, it impedes its smooth development and adaptation to changing conditions;
3. It impedes the individualized handling of unanticipated or exceptional cases.

Flexibility Tools
in Modern Codifications

1. Rules with soft or flexible connecting factors
2. Rules with alternative connecting factors
3. Escape clauses
4. Combination of rules with “approaches”

The Spectrum and Gradations of Flexibility



Soft or Flexible

Connecting Factors

Le principe de proximité dans le droit international privé contemporain

The Ubiquitous Close, Closer, or Closest Connection

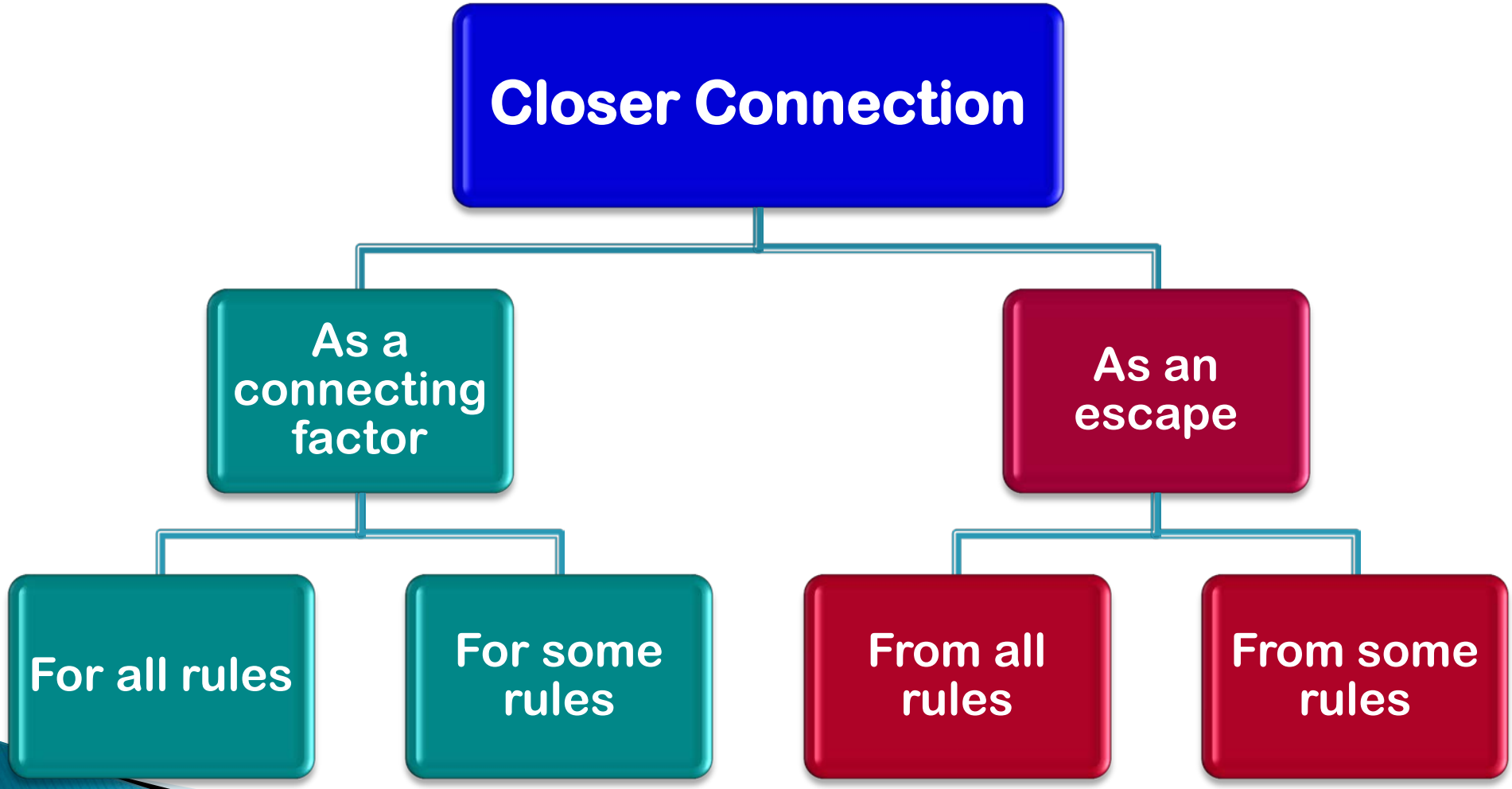
and its Varied Uses

Verbal Variations

Close	closer	closest	connection
			link
Strong	stronger	strongest	relationship
			tie

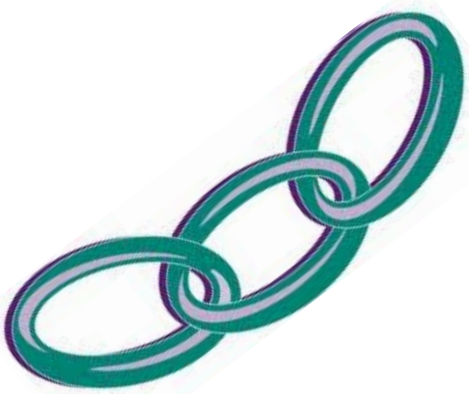
All are "physical" or "geographical," not necessarily qualitative.

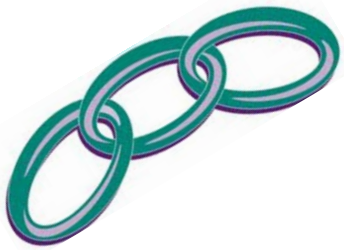
The Closer Connection and its Roles



Specific Uses of the "Closer Connection"

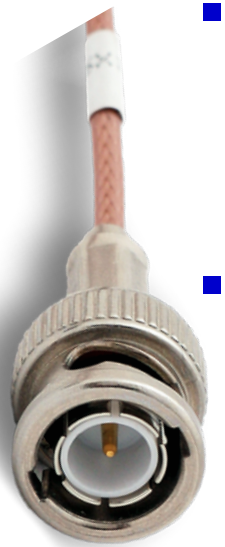
- As the principal connecting factor.
- As a general escape.
- As a presumption and an escape in contract conflicts.
- As a presumption and an escape in tort conflicts.
- As a connecting factor in other conflicts.
- Pointer to mandatory rules of a third state.
- Gap-filler for unprovided-for cases.
- Tie-breaker in limited circumstances.





The "Closest Connection" and its Varied Uses

- **1. As the principal connecting factor (Austria, Bulgaria, Burkina Faso, China).**
  - **Austrian codif.**, Art. 1: Multistate cases "shall be judged . . . according to the legal order with which the *strongest connection* exists," and the codification's choice-of-law rules "shall be considered as expressions of this principle."
  - **Bulgarian codif**. Art. 2: Multistate cases are governed by the law of the state with which they are *most closely connected*." The Code's choice-of-law rules "express this principle." . . . If the applicable law cannot be determined through those rules, "the law of the State with which the relationship has the closest connection by virtue of other criteria shall apply."
- **2. As a general escape (South Korea, Lithuania, Netherlands, Quebec, Slovenia, FYROM).**



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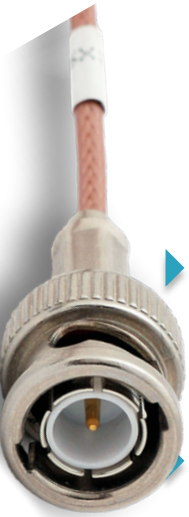
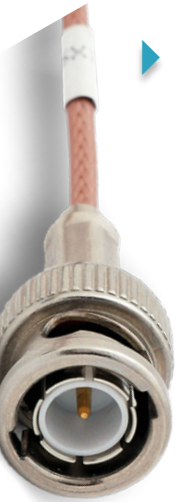


- **3. Presumption and escape in contract conflicts** (Rome I, Inter-Amer. Conv. , Arg. Draft, Armenia, Belarus, Japan, South Korea, Kyrgyzstan, Macau, Moldova, Quebec, Russia, Switzerland, Taiwan, Turkey, Ukraine Venezuela, FYROM)
- **4. Presumption and escape in tort conflicts** (Rome II, Japan, Taiwan, Turkey, FYROM)
- **5. Presumption and escape in other conflicts** (Succession Reg., Belgium, Burkina Faso, Taiwan).

Cont'd

- **6. Pointer to mandatory rules of a third state** (Inter-Amer. Conv., 3 Hague Conv., Belgium, Belarus, Bulgaria, Czech Rep., Kyrgyzstan, Lithuania, Netherlands, Poland, Quebec, Russia, Switzerland, Tunisia, Turkey, Ukraine, Uruguay).



- **7. As a tie-breaker in limited circumstances (e.g., dual nationalities** (**27** codifications) **or cases involving the personal or patrimonial effect of marriage or divorce** (**17** codifications).

8. As a pointer to subnational laws in non-unified legal systems that lack their own choice-of-law rules to that effect (**6** Hague Conv., Rome III, and 24 codifications).

- **9. As a gap-filler for unprovided-for cases** (Armenia, Austria, Belarus, Bulgaria, Burkina Faso, China, Kyrgyzstan, Liechtenstein, Moldova, Poland, Russia, Ukraine, FYROM).

Other Soft Connecting Factors

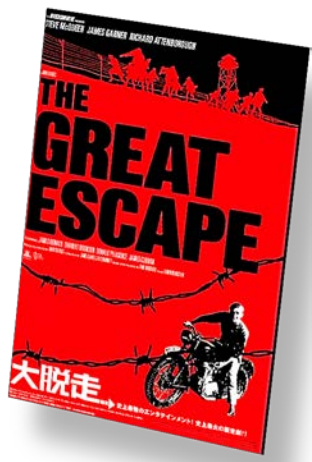
- **1. As the principal connecting factor:**
  - State whose policies would be *"most seriously impaired"* if its law is not applied. (Louisiana).
  - State of the "proper" or "most appropriate" law (Oregon).
  - La connexión más significativa (Puerto Rico).

- **2. As a gap-filler for unprovided for cases:**
  - "Principles of PIL" (Jordan, Slovenia, Qatar, UAE, Yemen).
  - "Reasonable settlement of dispute" (Czech Rep.)
  - "The nature of law" (Taiwan).

Escape

Clauses

Escape Clauses



A. General Escapes

- Explicit general escapes (11 codif.)
- Oblique general escapes (4 codif.)

B. Specific Escapes

- Based on the “closer connection” (33 codif.)
- Based on other factors (8 codif.)

1.General Escape Clauses
(applicable to the entire codification)

a. Explicit General Escapes

- **Law of designated state does not apply if that state has a "very slight" connection and another state has a "much closer" connection.**

  Belgium, South Korea, Lithuania, Netherlands, Quebec, Slovenia, Switzerland, FYROM.

Common Features of General Escapes

- Comparison of connections ("very slight" vs. "much closer").
- Can displace either foreign or forum law.
- Exceptional, with high threshold ("manifestly" closer).
- Geographical rather than qualitative; "conflicts justice" not "material justice".
- Holistic (whole case) rather than issue-by-issue.
- Do not apply against rules that are not based on the proximity principle.
- Do not apply if applicable law is validly chosen by the parties.

b. Subtle or Oblique General Escapes

- **Austria:** The law of the state of the "closest" connection governs, and the rules of this codification "*are expressions of this principle*."
- **China:** Same as above, but if these rules do not designate the applicable law for a particular relationship, "the law of the country that has the closest connection with [that] relationship . . . shall be applied."
- **Bulgaria:** Same as Austria, but if these rules do not designate the applicable law, the law of the state of the "closest connection by virtue of other criteria shall apply."
- **Burkina Faso:** Same as Austria, but in case of gaps or insufficiency in those rules, the judge should be "inspired" by and "draw from this principle."

2. Specific Escapes
(applicable to specified cases)

(a) Escapes based on the "closer connection"

- **Law of designated state does not apply if another state has a "manifestly closer connection" with the case.**
  - **Contracts:** Rome I, Hague Sales Conv. Austria, Bulgaria, Estonia, Germany, Lithuania, Romania, Taiwan, Turkey.
  - **Torts:** Rome II + 15 other codifications
  - **Property:** Germany
  - **Successions:** Succession Reg., Hague Conv., Finland, Burkina Faso
  - **Maintenance:** Hague Convention
  - **Protection of children:** Hague Convention.

(b) Specific Escapes Based on Factors Other Than the Closer Connection

- State X has closest connection, **"*unless it otherwise follows . . . from the totality of the circumstances*"** (Russia, FYROM), or **"the *peculiarities of the case*"** suggest otherwise (Argentine draft).
- Designated law applies *"as a rule."* (Czech Republic).
- Designated law does not apply if it denies certain acquired rights in a way that constitutes an **"*unacceptable violation of the parties' justified expectations or of legal certainty*."** (Netherlands).
- Designated law does not apply if, in the circumstances, it is **"*clearly inappropriate*"** to apply it (Oregon contracts statute), or if it is **"*substantially more appropriate*"** to apply another law (U.K. and Oregon torts statutes).
- Law of designated state does not apply if the policies of another state would be **"*more seriously impaired*"** if its law were not applied (Louisiana), or another state has a ***"more significant connection"*** (Puerto Rico).

"Approaches"

A non-exhaustive list of principles and factors to guide the *judicial* selection of the applicable law.

Approaches Combined with Rules

Combination of "Approaches" and Rules

Louisiana, Puerto Rico, Oregon

- General approach articulates the general principles and philosophy of codification.
- Followed by specific rules extracted from the general approach for some (but not all) cases or issues.
- General (and residual) approach for all other cases or issues.
- Escapes clauses anchored on general approach.

Approaches in the Absence of Choice-of-Law Stipulation

Inter-Am. Contracts Convention and Venezuelan Codification

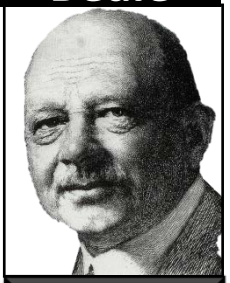
- In the absence of choice-of-law agreement, contracts are governed by the law of the state of the closest connection, which is determined after considering "all objective and subjective elements" of the contract, the customs, usages, and general principles of international commercial law “in order to discharge the requirements of justice and equity in the particular case.”

Hague Trust Convention

- In the absence of a choice-of-law stipulation, a trust is governed by the law of the state of the closest connection, which is determined by considering certain specified factors.

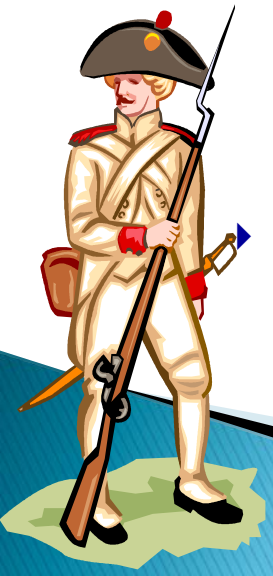
A Comparison with US Developments:
From Rigidity to Revolution

Beale



The Traditional System

- Legal certainty and uniformity were the supreme values.
- The system consisted of fixed, rigid and mechanical choice-of-law rules, with no exceptions.
- Because the rules were bad, judges began deviating from them through several escape devices.
- This gradual dissent became an open revolution in the 1960s.

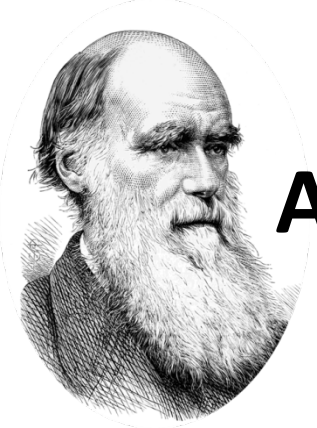


The Revolution

- Led to the abandonment of all rules, not just the bad ones.
- Produced not a new *system* but several flexible and malleable "approaches."
- Each case is decided *ad hoc*.
- Too much flexibility led to unpredictability and anarchy.
- American conflicts law is now a story of a thousand-and-one cases.

Currie

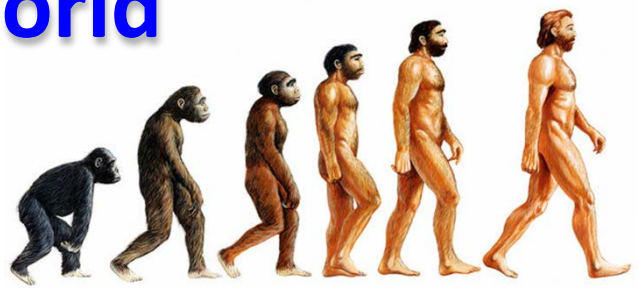
بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ



In the Rest of the World

A Quiet Evolution

…. Toward Flexibility

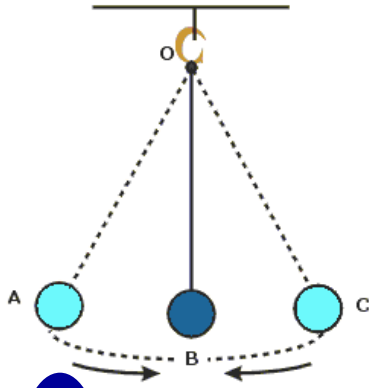


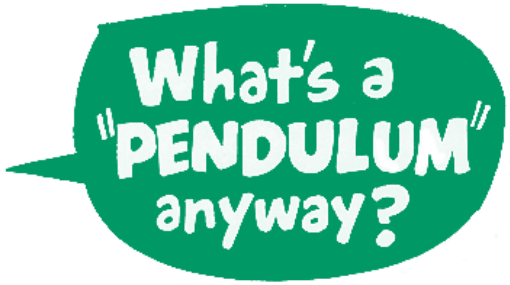
- Most choice-of-law rules were statutory and almost none of them were as bad as the American rules.
- Bad rules have been gradually repaired rather than demolished.
- The new rules provide small and controlled dosages of flexibility through alternative or soft connecting factors or through carefully crafted escape clauses.

From Portalis . . . . to . . . Lagarde, Fallon, Bucher . .

Certainty vs. Flexibility

Where is the Pendulum Now?





Legal Certainty

US

R W

EU

R W

US

Flexibility

New Uniformity and Flexibility

Certainty vs. Flexibility

- **Modern PIL codifications demonstrate that this is not an "either/or" choice. Codification need not petrify the law, nor render it unduly inflexible for exceptional cases. It need not outlaw judicial discretion.**
- **Modern codifications have developed tools that provide controlled dosages of flexibility and thus help attain an equilibrium between the perpetually competing needs for certainty and flexibility.**

Cont'd

- This is an apt lesson for US PIL, which has careened from the excessive rigidity of the first Restatement to the anarchy of the choice-of-law revolution, without considering any intermediate stops.

- Personal criticism: Some codifications do not provide enough flexibility, especially because their escape clauses are phrased in holistic (whole case) and geographic terms ("closer" connection) rather than in terms of issues and policies.

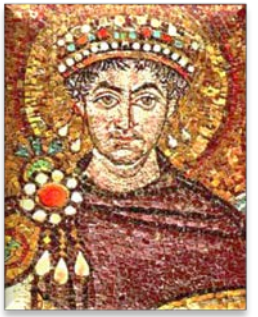
Nevertheless, modern codifications are much more flexible than the traditional ones.

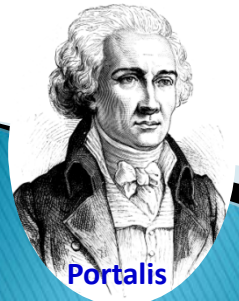
- And this is a sign of maturity and progress.

Cont'd

- Unfortunately, sometimes the EU refuses to allow any flexibility.
- <u>Example:</u> The proposed Regulation on Matrimonial Property Regimes calls for the application of the law of the first matrimonial domicile, without exceptions or adjustments (immutability).
- A system that is fixated on too much certainty to the exclusion of other values is a deficient system that is bound to fail.
- A system that does not entrust judges with authority to equitably resolve the exceptional cases (e.g., through appropriate escape clauses) does not belong in the 21st century.
- Europe, the cradle of the codification science, can do better.
  - The Union can and must do better.

Bismarck



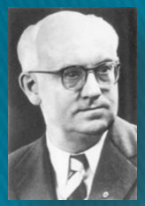


Portalis

Remember Portalis and trust . . .

Codification and Result-Selectivism

Conflicts Justice vs. Material Justice



Kegel v. Leflar

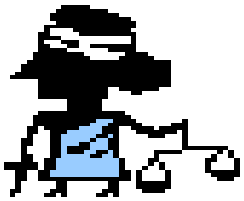
Codification and Result Selectivism:
"Conflicts" Justice vs. "Material" Justice

- Should the choice-of-law process aim for the proper law, *i.e.*, the law of the state that has the most pertinent *contacts* with the case and regardless of the quality of the result that law produces?

OR

Should the choice-of-law process aim directly for the proper *result*, i.e., a result that produces the same quality of justice as the one for which we strive in domestic cases?

Spatial, geographical, or "Conflicts" Justice



Kegel

Savigny

"Real," "material", or substantive justice

Magister Aldricus

Leflar

Inroads by Material Justice:

Result-Selective Choice-of-Law Rules

A. Alternative-Reference Rules

- 1.Favoring the Validity of Certain Juridical Act
- 2. Favoring a Certain Status

B. Rules Favoring One Party

- 1. Pre-Dispute Choice by One Party
- 2. Post-Dispute Choice by One Party
- 3. Choice by the Court for the benefit of one party.
- 4. Protecting Consumers or Employees from the Consequences of an Adverse Choice-of-Law Clause

1. Rules Favoring Validity of Testaments

A. Form: Hague Convention (8 potential validating choices)

1. Place of making	
2. Testator's nationality	(a) at time of making
	(b) at time of death
3. Testator's domicile	(a) at time of making
	(b) at time of death
4. Testator's habitual residence	(a) at time of making
	(b) at time of death
5. Situs (for immovables)	

The Convention is in force in 41 countries.
44 other countries and all USA states have similar laws

B. Substance: Alternative validating references to two or three laws (9 codifications).

2. Rules Favoring Validity of Other Juridical Acts

A. Form: Rome I, Inter-Amer. Conv., and 55 codifications

	Lex loci actus	*Lex causae*	*Lex solutionis*	*Lex fori*	Common dom. or nat.	Either party's dom.	Dom. of exec. party	Either party's presence	Other
8	X	X							
19	X	X				X		X	
8	X			X					
3	X				X				
1	X	X	X						
1	X	X	X		X				X
5	X	X			X				
1	X	X		X					X
1	X	X				X			
4	X	X					X		
1	X	X							X

B. Capacity (*Lizardi* rule): 43 codifications

3. Rules Favoring a Certain Status

- 1. Legitimacy: alternative reference to 2 or 3 laws, whichever favors legitimacy (8 codifications)
- 2. Filiation: alternative reference from 3 to 6 laws, whichever favors filiation (16 codifications)
- 3. Acknowledgment: alternative reference from 2 to 4 laws, whichever favors the child (16 codifications)
- 4. Adoption: alternative reference to 2 laws, whichever favors the adoptee (6 codifications)
- 5. Marriage: alternative reference from 3 to 6 laws, whichever favors validity (21 codifications)
- 6. Same Sex Unions: same as marriage (2 codifications)
- 7. Divorce: alternative reference to 2 to 4 laws, whichever allows divorce (23 codifications)

4. Rules Favoring One Party

- 1. "Pre-Dispute" choice by testator (Hague Conv., Succession Reg., Uniform Prob. Code, N.Y., 24 other codifications).
- 2. Post-Dispute Choice by One Party
  - a. Cross-Border Torts (see previous slide).
  - b. Products Liability (see previous slide).
  - c. Choice by Owner of Stolen Property (Albania, Belgium, Bulgaria, Romania).
  - d. Choice by Unwed mother (Czech Rep.)
- 3. Choice by the Court for the benefit of:
  - a. Tort victims (see previous slide)
  - b. Maintenance Obligees (19 codifications, 4 Hague Conv., Inter-Amer. Conv., EU Regulation);
  - b. Children and other weak parties (16 codifications, 2 Hague Conv.).
- 4. Protecting Consumers or Employees from the Consequences of an Adverse Choice-of-Law Clause (Rome I, 14 codifications).

Inroads of Material Justice into Conflicts Justice:

Not "Only in America"

In the US:

Better-law approach (Leflar).

All other modern approaches resolve conflicts on a case-by-case basis, without pre-established choice rules. This *ad hoc* basis allows judges to consider the justness of the result before choosing the applicable law.

In the rest of the World:

Virtually all new codifications contain choice-of-law rules designed to produce a pre-selected substantive result.

The difference

Choice made by judge *a posteriori* and *ad hoc*

Choice made by legislature in advance.

Conflicts Justice vs. Material Justice

Then

Now

Conflicts Justice

R W

US

R W

US

Material Justice

It's Not an "Either Or"

PIL is not indifferent to material justice

Savigny

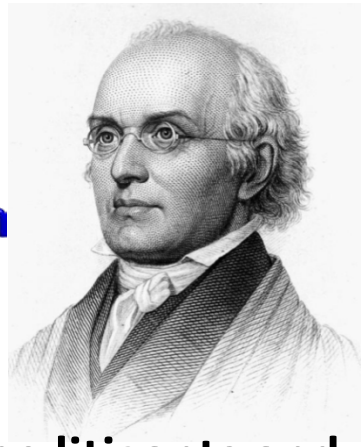
The Politicization of PIL:

International Uniformity vs. Ethnocentricism

Currie

Private vs. Public Law
Multilateralism vs. Unilateralism
Internationalism vs. Ethnocentricism

The Classical View of PIL
(Savigny-Story)



- PIL is *private* law. It implicates only the interests of the litigants and not their states' (save in a few exceptional cases).
- PIL is *international* law, not in the sense of its sources, but in terms of its aspirations.
- Although PIL is formulated by national lawmakers, they should act as noble surrogates of an international lawmaker.
- Their principal goal should be to produce international (interstate) uniformity of result, regardless of where the case is litigated.
- If uniformity is achieved, forum shopping can be avoided.
- Uniformity can be achieved if all countries:
  - Give no preference to their own law;
  - Adopt the same choice-of-law rules; *and*
  - Apply these rules in the same way.

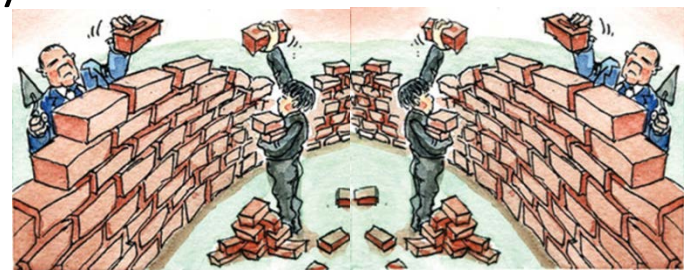
Private vs. Public Law
Multilateralism vs. Unilateralism
Internationalism vs. Ethnocentricism
A Heretical View

- PIL is the law of *conflicts* of laws.
- Conflicts exist because the involved countries have different laws, reflecting different values, policies, and yes "interests."
- States do have an interest in the outcome of PIL disputes.
- The private-public law division is meaningless. Legal rules always embody public interests, even when they appear to protect only private persons.
- In each conflict, each state wants to see its interests vindicated, or at least not sacrificed.
- Those interests must be taken into account in properly resolving PIL disputes.
- Conflicts law is very much *national* law.
- International (intrastate) uniformity is illusory.
- PIL should focus on other goals, including *intra-state* uniformity and the protection of national (state) interests . . .

American courts have not fully accepted this view, but they were influenced (or partly expressed) by it. In the rest of the world, this view was considered heretical. Yet, an examination of recent PIL codifications shows that it is not too heretical.

Rules Favoring Forum Law, Interests, or Values

- **1. "Localizing rules" in substantive statutes** outside PIL codifications
  - They mandate the statute's application to cases that have certain contacts with the enacting state. As *leges specialis,* these statutes displace the PIL codification.
- **2. Forum state's mandatory rules**
  - 46 recent codifications expressly give priority to the forum's mandatory rules. Many other countries do so through the jurisprudence or doctrine.
- **The difference:** Both types of rules have the same operative effect of displacing ordinary choice-of-law rules, but:
  - (1) Localizing rules do so because of their express mandate and without the need to examine whether the statute that contains them embodies a high level of public policy; whereas
  - (2) Mandatory rules do so, even in the absence of express wording, but only if they embody a high level of public policy.



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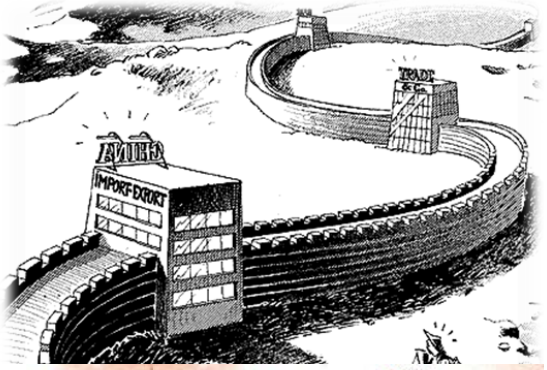
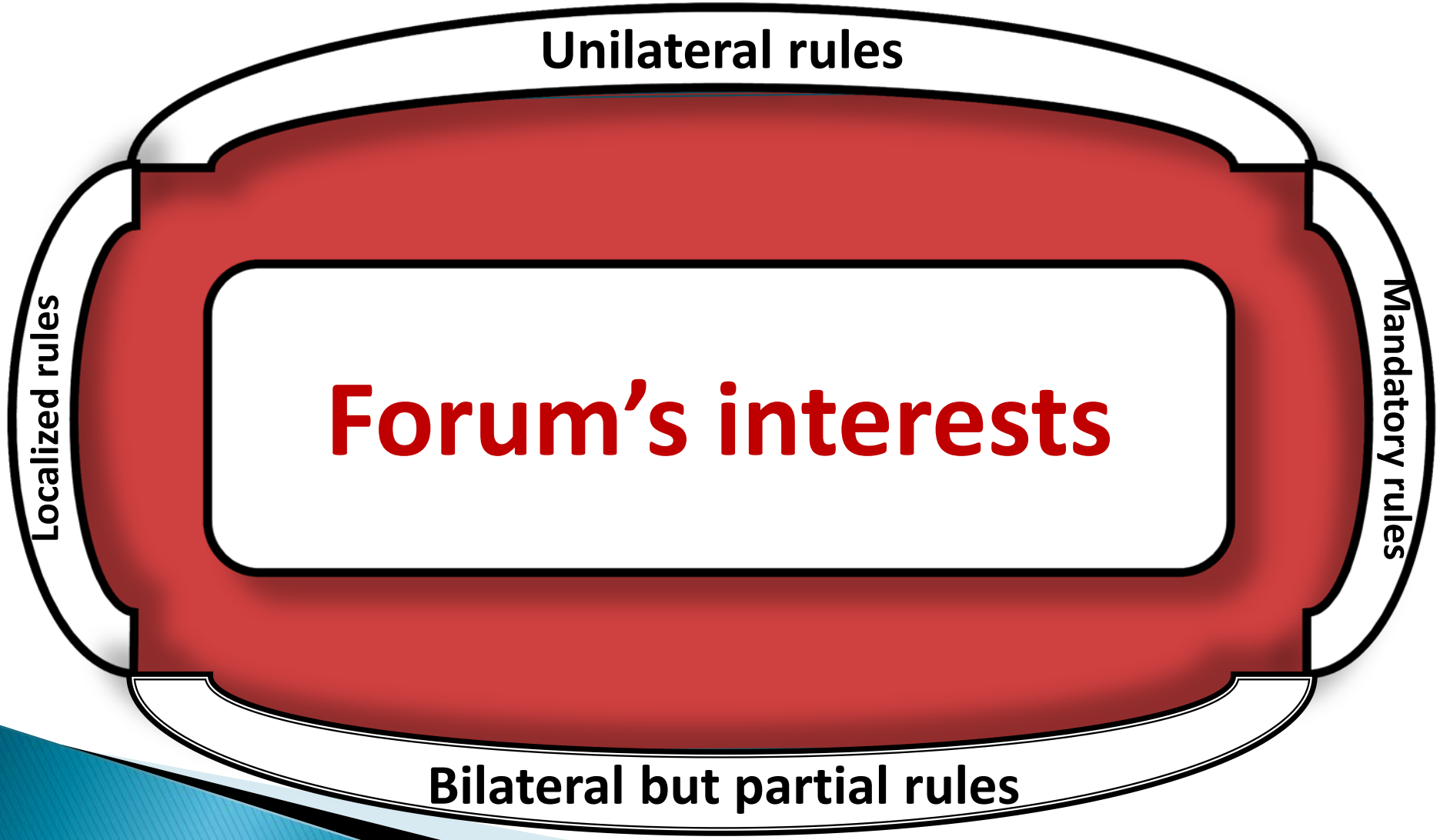
- **3. Inward-looking unilateral rules**, especially those displacing the otherwise applicable foreign law
  - Present in: in torts, products liability, contracts, multiple nationalities, marriage, divorce, adoption, maintenance, successions.
- **4. Multilateral but non-impartial rules**
  - Rules using nationality (or domicile) as a connecting factor for status and succession.
  - Product-liability rules:
    - Pro-consumer in import countries (e.g. Tunisia);
    - Pro-manufacturer in export countries (e.g. Japan);
    - Best of both worlds (Quebec, Rome II).
  - Double actionability rules (15 codifications)
  - *Lex fori* limitations on damages



Rules Protecting the Forum's Interests



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- Forum-protective rules exist in virtually every country.
- They may be methodologically or statistically "exceptional', but they are too numerous to be dismissed.
- They are employed not only in public-law fields, such as antitrust, but also in fields such as contracts, property, successions, marriage, divorce, and maintenance.
- They protect not only economic interests of the enacting state, but also certain strongly held societal values and beliefs.
- The multiplication of these rules in the last 50 years has produced a perceptible shift in the PIL landscape:
- Multilateralism is no longer the sole actor; it shares the stage with unilateralism; and
- International uniformity remains a lofty PIL goal among academics but has much less of a following among legislators or judges.

As Vrellis said . . .

PIL has "lost its innocence"

If it ever had it.

Internationalism vs. Ethnocentricism

Then

Now

International Uniformity

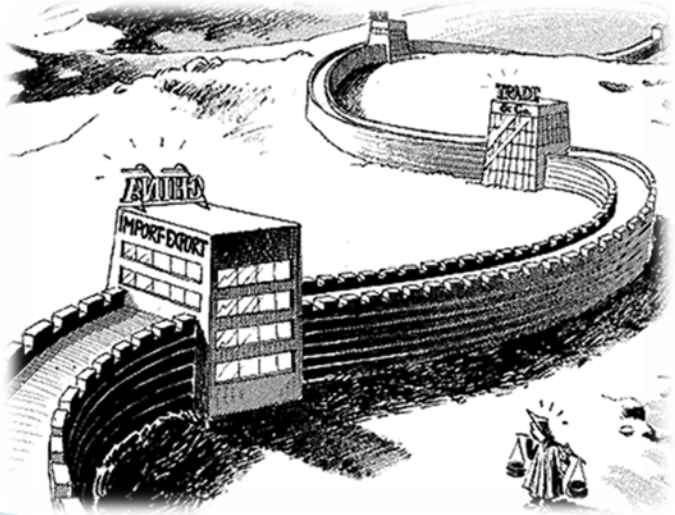
R W

US

R W

US

Ethnocentricism



Conclusions

General Assessment of New Codifications

- 1. It's not your grandfather's codification!
- 2. Today's codifications are much different than those of the previous generation. They are:

LESS
- Idealistic
- Pure
- Innocent

MORE
- Comprehensive
- Complex
- Flexible
- Pragmatic
- Clever
- Pluralistic
- Eclectic

A Digression: Eclecticism

purism

"Purism, whether in grammar or in vocabulary, almost always means ignorance."

or in law

In the 700 years since the birth of Bartolus, PIL has tried purism and, after finding it wanting, it moved to a *Pluralisme des méthodes* (Batiffol)

When pluralism is voluntary, rather than forced or accidental, it is called

Eclecticism

Eclectic is defined as SELECTING what **appears** to be BEST in *various* **doctrines**, methods, or **STYLES**

- **Eclecticism is bad when it is the result of subservient imitation or intellectual laziness. Uncritical, undigested, and uncoordinated "picking and choosing" can lead to internal contradictions and incoherence.**
- **But a studied, adapted, and thoughtful eclecticism can combine the "best of both worlds." It can live up to the true meaning of this Greek word, which literally means "choosing *well*."**

Eclecticism *Cont'd*

- For better or worse, contemporary PIL refuses to take the purist route that many academics passionately advocate. It has no qualms about combining ideas that their proponents have posited as polar opposites.
- Contemporary PIL is ***pragmatically eclectic*** and in that sense pluralistic.
- Perhaps the modern legal mind has come to realize that:
  - The complexity of contemporary PIL problems requires a **toolbox approach** -- the more tools the better--rather than a single tool or method;
  - No single theory or school of thought has all the right solutions to all PIL problems, but each school has something valuable to contribute; and
  - Rather than choosing a single school or method wholesale, it is better to draw the best ideas from each and properly combine them into a workable system.
- In the last 50 years, most PIL codifications have engaged in such an eclecticism.
- Whether they have chosen well is a matter of opinion; I believe that most of them have.

Vive le pluralisme!

Assessment, *cont'd*

- 5. Modern codifications provide certainty through black-letter rules;
  - BUT they also provide several flexibility tools, which will ensure adaptation to changing needs and individualized handling of exceptional cases.
- 6. They continue to aim for conflicts justice;
  - BUT they have also made serious targeted concessions to the desideratum of material justice.
- 7. They continue to engage in state-selection (rather than direct content-dependent law selection);
  - BUT they are far from indifferent to what is being selected.
- 8. They consist primarily of bilateral rules;
  - BUT they also selectively employ unilateral rules whenever important forum interests are at stake.

Assessment, *cont'd*

- **9. They continue to view PIL as "private" law;**
  - **BUT they also concede that PIL often implicates important public interests which must take precedence over other values.**
- **10. They continue to subscribe to the principle of equality of forum and foreign law;**
  - **BUT they also subtly protect the interests of the forum state in selected areas.**
- **10. In tort and contract conflicts, modern codifications have made significant substantive and methodological advances and have reached results similar to those reached in the US after the revolution, thus suggesting that progress can be achieved without revolutions.**
- **11. In tort conflicts, the most significant developments are the widespread acceptance of: the *favor laesi* principle; the common-party affiliation rule (or exception); and the closer connection exception.**

Assessment, *Cont'd*

- **12. In contract conflicts, the most significant developments are the dramatically increased acceptance of the principle of party autonomy and the refinement of its modalities and limitations.**
- **13. There is a great degree of emulation, borrowing and transplantation, especially from the sophisticated Western European codifications to eastern European and Asian codifications.**
- **For example the influence of the Rome Convention is pervasive.**

Lagarde's influence extends far beyond Europe

Assessment, *Cont'd*

- **14. However, more often than not, the borrowing is not mechanical or subservient. It is usually accompanied by shrewd adjustments carefully crafted to accommodate the national needs, interests, and values of the borrowing country.**
- **15. In terms of legislative activity, this 50-year period is more productive than all of the previous 650 years since Bartolus.**
- **16. In terms of the quality of the expended grey matter, this period may be comparable to the period when both Savigny and Story taught and wrote on PIL.**
- **17. It confirms that, 700 years after the birth of Bartolus,**

Our subject is not only alive and well, but also more vibrant, sophisticated, flexible, pragmatic, and richer than ever before.

ALIVE AND WELL

FOR LISTENING