

Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow* (2002) 298 *Recueil des Cours*. Pp. 448.

Unlike the European Union, where a common market is seen as necessarily entailing the harmonization of laws, the North American free trade area assumes ongoing legal diversity amongst participating countries. Informal convergence is of course possible, and the dynamic of NAFTA has contributed to this, but there is no mechanism, in place or foreseen, for eliminating so-called conflicts of laws or harmonizing the treatment of them. Europe, in contrast, has implemented major instruments of harmonization of rules of jurisdiction, recognition of foreign judgments, and choice of law in matters of contract, and is now well on the way to formulation of uniform rules for conflicts in matters of tort and delict. (The Rome II proposals for a pan-European regulation are now going through the legislative process.) The contrast with North America is particularly striking in these fields since, given the number of North American jurisdictions and volume of case law, it is even difficult to know what is going on in North America, let alone think of eventual uniform rules.

The underlying diversity of North American law is made manifest by the remarkable volume which Professor Symeonides has contributed to the Hague Academy of International Law on the so-called “American revolution” in matters of choice of law. Known both for his work in codifying choice of law rules in Louisiana, Puerto Rico, and Oregon, and for his annual survey in the *American Journal of Comparative Law* of some 1,500 U.S. conflicts cases per year, Professor Symeonides here provides a splendid overview of all that has gone on in U.S. conflicts law since 1963. That was the year of Brainerd Currie’s famous statement that “We would be better off without choice-of-law rules”¹ and of the decision of the New York Court of Appeals in *Babcock v. Jackson*,² which rejected the *lex loci delicti* in matters of tort in favour of application of the law of the state with the greatest interest in the particular issue raised by the case. Much has been said of the ensuing “revolution” but it is striking, and indicative of current diversity, that the “traditional” *lex loci delicti* rule still prevails in ten states and that this group of states is the second largest in terms of adherence to a particular conflicts methodology, surpassed only by those states—twenty-two in number—which adhere to the Restatement Second. Professor Symeonides identifies five further methodologies (92) and the states adhering to them (from three to six in number) such that in the United States alone the diversity is far greater than anything which might have previously prevailed in Europe. The situation is exacerbated, moreover, by the degree of flexibility associated with many of the new methodologies. The author described the Restatement Second as implying “virtually unlimited discretion” (120) in a way that “does not require hard thinking” (122).

¹ “Notes on Methods and Objectives in the Conflict of Laws” in *Selected Essays on the Conflict of Laws* (Durham, N.C.: Duke University Press, 1963) 177 at 183.

² 240 N.Y.S.2d 743 (N.Y.C.A. 1963).

There would be some identifiable trends in the case law, identified not from judicial reasons but from actual results of cases, notably a general pattern of application of the law of a common domicile of parties in single-vehicle accidents (at least where favourable to the plaintiff) (179, 180) and absolving a defendant from liability where the act and injury occur in the defendant's jurisdiction and immunity is there enjoyed (202).

In general, however, Professor Symeonides is very critical of the results of the so-called "revolution". He sees a movement from radical certainty to radical flexibility (414); suggests that "to prevail is one thing and to *succeed* is another" (417 [emphasis in original]); and concludes that the revolution "went too far" since "too much flexibility can be as bad as no flexibility at all" (417). It would therefore be time for an "exit strategy" (419) and indeed the pendulum would now be "swinging back" towards "issue-specific" rules, often combined with escape clauses which would allow deviation in appropriate, exceptional cases (430, 431). The conclusion should give pause to those in Canada who would expand the notion of the "real and substantial connection"³ (implying "virtually unlimited discretion" (120)) out of the field of recognition of foreign judgments, where it originated, and generally into that of domestic jurisdiction, where there is no need for it whatsoever. *En revanche*, the counter-revolution of the Supreme Court of Canada in *Tolofson v. Jensen*⁴ in adopting in common law Canada a *lex loci delicti* rule with very limited possibilities of exception, here achieves unexpected support. The same can be said of the overall process of codification of choice-of-law rules in Book Ten of the *Civil Code of Quebec*.

The reduced levels of diversity and flexibility that prevail in Canada must be situated, however, within the broader cadre of the North American countries, and increasing numbers of conflicts cases in North America are now transnational in character. Paradoxically, in attempting to lessen diversity and flexibility within Canada, Canadian courts and legislators contribute to ongoing diversity within North America. The same is true for recent Mexican efforts to develop reliable choice-of-law rules. The North American experience thus demonstrates that common markets may be remarkably robust, and that diversity of laws is not a major impediment to intensification of cross-border trade. This is most obviously the case if practicing lawyers have some basic familiarity with the laws in presence, such that false conflicts can be avoided. There is an obvious role for cross-border legal education in this process.

H. Patrick Glenn

³ *Maguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1108, 76 D.L.R. (4th) 256, La Forest J.

⁴ [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.