WHAT IS WRONG WITH THE BETTER LAW APPROACH?

Sagi Peari

This paper is perhaps the least-known approach to the choice-of-law question: that of better law. That is to say that in private law cases involving a foreign element, the court must apply the law of the state that is “better”. Take for example a tort law dispute involving drivers who are from Arizona and California, which took place in Oregon. According to this approach, the Oregon court must apply the substantive tort law of the state that it considers to be the “better” of the respective tort law provisions of Arizona, California, and Oregon.

Historically, better law approach did not receive much support in official court decisions and usually was quickly dismissed by choice-of-law commentators on grounds of the objection to use of subjective judicial discretion. However, in recent years we have witnessed a change in direction. Professor Robert Leflar's “better rule of law” consideration has been officially adopted by the courts of the states of Minnesota and Wisconsin in the areas of tort and contract law. The courts of New Hampshire, Rhode Island and Arkansas have also adopted it with respect to the area of tort law. Although in all these states the “better rule of law” has been incorporated as merely one of five “choice-influencing considerations” in Leflar's choice-of-law approach, it is the one that has attracted the most judicial attention.

1 See, e.g., Paul H. Neuhaus, Legal Certainty Versus Equity in the Conflict of Laws, 28 LAW & CONTEMP. PROBS. 795, 802 (1963); Albert A. Ehrenzweig, PRIVATE INTERNATIONAL LAW 102 (1967); Brainerd Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS 153-154 (1963).
Most recently, the better-law approach has gained significant support in the academic arena. Professor Louise Weisberg has suggested that this method be integrated within Section 6 of the Second Restatement and thus officially extended to the majority of states. Similarly, Professor Symeon Symeonides has recommended the integration of the better law approach to a certain extent in the choice-of-law process, and Professor Ralf Michaels has commented on the apparent central importance of this method to the essence of recently emerging economic analysis of the subject.

However, this is just the tip of the iceberg. For decades choice-of-law scholars have been pointing to better-law approach as ultimately lying at the basis of courts’ decisions and that this is the approach that truly determines the way in which the courts decide private law cases involving a foreign element. Despite the official reasoning of the courts referring to other choice-of-law methodologies, the courts do not actually follow them. Rather, in substance, they are deeply engaged in evaluation of the substantive merits of the laws involved. In other words, the claim is that better-law approach is widely applied in courts’ daily practice. The judges ‘pick on’ the content of applied laws, despite the imperative under the choice-of-law rules to not do so.

However, what do we really know about the better law approach? Here lies a paradox. Despite its apparent importance in court decisions and the revived interest in it

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5 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
8 Ralf Michaels, Economics of Law as Choice-of-law, 71 LAW AND CONTEMP. PROBS. 73, 89 (2008).
amongst academic circles, this choice-of-law method that is so unique to the American landscape\(^{10}\) has not yet been seriously discussed. From this perspective, the theoretical and practical necessity for a comprehensive account of this method seems pressing.

This paper attempts to take a first step towards addressing this challenge. It outlines the distinctive nature of the better law approach and lays a foundation for further comprehensive treatment of its fundamental elements. Section I outlines the main features of alternative choice-of-law approaches, both classical and modern;\(^{11}\) Section II focuses on the works of the American\(^{12}\) fore-fathers of the better-law approach – Professors Robert Leflar and Friedrich Juenger – and delineates the conceptual distinctiveness of this approach relative to other approaches. Lastly, Section III makes several preliminary suggestions for the further development of the better law argument.

I. CLASSICAL AND MODERN CHOICE-OF-LAW APPROACHES

A. The Classical Choice-of-Law Approach

The classical choice-of-law approach which has dominated since Savigny’s seminal work\(^{13}\) is one of the connecting factors. One can dissect this method into a three-stage analysis. In dealing with a private law case involving a “foreign element”, the court must first of all classify it within one of the recognized private law categories. The law of property, and the sub-categories of the law of obligations, which include the law of contract, unjust

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\(^{10}\) See, e.g., MATTHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 118 (1995); Alex Mills, The Dimensions of Public Policy in Private International Law, 4 J. PRIV. INT. L. 201, 209 n. 44 (2008).

\(^{11}\) I generally follow here the conceptual distinction made by Perry Dane at Conflict of Laws, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 197 (Dennis Patterson ed. 2010).

\(^{12}\) For useful overview of better-law roots within European choice-of-law thought, see Gerhard Kegel, The Crisis on Conflict of Laws, 112 RECUEIL DES COURS 95, 238-263 (1964) [hereinafter Kegel, Hague Lecture].

enrichment, and torts, are all currently recognized categories of private law. Then, in the second stage of the analysis, the classical choice-of-law methodology makes reference to the relevant connecting factors. These factors represent a broad spectrum of possible links the case has with legal systems. The list of connecting factors is endless: *lex domicilii* (the law of the domicile of the parties), the *lex fori* (the law of the court handling the case); *lex loci contractus* (the law of the place where the contract was signed); *lex loci actus* (the law of the place where a transaction was carried out); *lex loci celebrationis* (the law of the place of celebration of a marriage); *lex loci delicti* (the law of the country where the tort is committed) - are representative Latin terms for just some of the possible connecting factors. In other words, this stage in the analysis is seeking a link to a specific factual element of the case: the event, thing, transaction, domicile, nationality and so on. While some of the abovementioned connecting factors (such as domicile) have traditionally been popular among the common law jurisdictions, others (such as nationality) have been invoked only relatively recently. Each legal category has its relevant “connecting factor” which directs the judge to the application of a given law. Thus, for example, in cases of property law, the law of the geographic place of the land usually governs the case.

Finally, the wide range of doctrinal exceptions to the ordinary choice-of-law process such as “public policy”, “international public policy”, “human rights”, or “constitutional constraints” constitute the third stage of the classical method. This stage only applies when

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15 For the full list of the connecting factors, see Lawrence Collins (ed.), Dicey, Morris and Collins on the Conflict of Laws 33-34 (14th ed. 2006); Adrian Briggs, The Conflict of Laws 20 (2nd ed. 2008).

16 For a proposal that makes a conceptual distinction between “territorial” and “personal” connecting factors, see Symeon C. Symeonides, Territoriality and Personality in Tort Conflicts”, in Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter Nygh 401, 401 (T. Einhorn & K. Siehr eds., 2004); Lea Brilmayer, Conflict of Laws 19-20 (2nd ed. 1995).

17 See e.g., Lea Brilmayer et al., Conflict of Laws, Cases and Materials 87-104 (6th ed. 2011); Briggs, supra note 15, at 22.
the connecting factor points to the application of a foreign law provision. If this provision conflicts with one of the doctrinal exceptions of the domestic system that is processing the case, the court refuses to follow the connecting factors that point to foreign law. Thus, for example, if the judge thinks that the foreign law provision is incompatible with “some prevalent conception of good morals”, some “deep-rooted tradition of the common weal”\(^{18}\) or when the foreign private law provision “shocks the morals of the forum”\(^{19}\) - the application of domestic law consequently follows.\(^{20}\) In other words, the various doctrinal exceptions to the choice-of-law process have been designed to serve as a “superimposition tool”\(^{21}\) for judges to disqualify the application of foreign law in favour of domestic law - the *lex fori*.

The above-presented three-stage structure of classical choice-of-law methodology is closely associated with provisions adopted in the American First Restatement.\(^ {22}\) Once universally adopted by all fifty American states, the First Restatement presented an illustrative example of classical choice-of-law methodology. It almost completely reflected Joseph Beale’s version of “vested rights” theory\(^ {23}\) under which the plaintiff’s right does not exist until it has “vested” under the positive law of the country where the “last act” occurred.\(^ {24}\) Thus, the single connecting factor of territoriality played a crucial role in Beale’s choice-of-law approach and in the provisions of the First Restatement. Accordingly, the First

\(^{18}\) As stated famously by Cardozo J. in Loucks v. Standard Oil Co., 224 NY 99, 110. (N.Y.1918)
\(^{20}\) For an overview of the public policy exception rule within the American tradition, see EUGENE SCHOLES ET AL., *CONFLICT OF LAWS* 143-145 (4th ed. 2004); BRILMAYER ET AL., *supra* note 17, at 161-164. It should be noted that I do not address here the possibility that exists in European public policy doctrine tradition of applying a law other than the forum’s law; see Mills, *supra* note 10, at 208.
\(^{21}\) See BRIGGS, *supra* note 15, at 51.
\(^{22}\) *RESTATMENT (FIRST) OF CONFLICT OF LAWS* (1934).
\(^{24}\) Id. at 45-47, 58, 62-63. For an overview of Beale’s work and its significant influence on the drafting process of the First Restatement, see Symeon Symonides, *The First Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 SOUTHERN ILLINOIS UNIV. L. J. 39 (2007); see also BRILMAYER, *supra* note 16, at 20-25.
Restatement adopted the rigid rule of the place of injury\textsuperscript{25} in determining the law in tort cases, the place where the contract was signed\textsuperscript{26} to determine the law in contract cases, and the place of the property\textsuperscript{27} to determine the law in property cases. Finally, §612 of the First Restatement adopted the “public policy” exceptional rule. According to this rule, in “extreme cases” the court is entitled to disqualify a foreign law provision that has followed from the application of a relevant connecting factor.\textsuperscript{28}

\textbf{B. The Modern Choice-of-Law Methodology}

With the fierce attack by legal realists\textsuperscript{29} on Beale’s version of classical choice-of-law method, American scholarship entered the era of “interest analysis” or so-called “modern” choice-of-law thinking.\textsuperscript{30} As an integral part of the Second Restatement,\textsuperscript{31} the interest analysis’s vision continues to dominate American choice-of-law thought today.\textsuperscript{32} Furthermore, several states explicitly adopted the interest analysis as an appropriate framework for the choice-of-law question.\textsuperscript{33}

The basic presupposition of this approach lies in the argument that the courts in general and the choice-of-law question in particular are supposed to serve as means for

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    \item \textsuperscript{25} RESTATMENT (FIRST) OF CONFLICT OF LAWS §377 (1934); see also Symeon Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiff Win, and Should, 61 HASTINGS L.J. 337, 344-346 (2009).
    \item \textsuperscript{26} RESTATMENT (FIRST) OF CONFLICT OF LAWS §311(1934).
    \item \textsuperscript{27} Id. §208.
    \item \textsuperscript{28} Id. §612; see also BEALE, supra note 23, at 1651, 1939-1941.
    \item \textsuperscript{29} See especially WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).
    \item \textsuperscript{30} For a classical exposition of interest analysis, see BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). For the purposes of this paper I focus exclusively on Currie’s work, without delving into further variations of his approach.
    \item \textsuperscript{31} RESTATMENT (SECOND) OF CONFLICT OF LAWS § 6 (2) (b) (c) (1971). Nevertheless, interest analysis must not be equated with the Second Restatement. A by-product of a major compromise between different approaches, the Second Restatement reflects a broad spectrum of frequently self-contradictory approaches and principles: the centre-of-gravity principle, interest analysis, the classical “connecting factors” approach etc. For discussion of these issues, see, e.g., Symeon C. Symeonides, A New Conflicts Restatement: Why Not?, 5 J. PRIV. INT. L. 383, 391 (2009) [hereinafter Symeonides, Why Not].
    \item \textsuperscript{32} For an incomplete list of theoretical accounts that accept on a fundamental level Currie’s basic presuppositions, see William F. Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1 (1963); ARTHUR T. VON MEHREN AND DONALD T. TRAUTFAN, THE LAW OF MULTISTATE PROBLEMS 341-375 (1965); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277 (1990).
    \item \textsuperscript{33} SYMEONIDES, REVOLUTION, supra note 3, at 64-65.
\end{itemize}
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promoting and effectuating states' policies.\textsuperscript{34} Since the states in certain situations are inherently interested in the application of their laws in private international law cases, choice-of-law methodology necessarily has to take these interests into account.

One may recognize three conceptual stages at the implementation level of interest analysis methodology. The first stage deals with the identity of the involved states where the framework of “competing” positive laws is unidentified.\textsuperscript{35} Secondly, interest analysis purports to track the underlying policies of each one of the competing laws. Third, the interest analysis divides the results of this tracking process into three conceptually different groups: “false conflicts” (cases where only one state has an interest in applying its law), “true conflicts” (cases where a number of states have an interest in applying their law) and “no-interest pattern” (cases where none of the involved states is interested in applying its law), and offers pre-determined solutions for each case.\textsuperscript{36}

Take for example the well-known Babcock v. Jackson.\textsuperscript{37} In this case, a tort had been committed between two New York residents during their short trip to Ontario. First, the interest analysis identified the relevant negligence law provisions of Ontario and New York as potentially conflicting provisions. This methodology then examined the underlying policies of each of the positive provisions. Finally, the quest for legislative intent led the interest analysis’ commentators to conclude that this case represented a “false conflict”: whereas the underlying policy of the Ontario statute is not interested in its application to non-residents, the policy of the New-York tort law provision is.\textsuperscript{38}

\textsuperscript{34} CURRIE, supra note 30, at 64.
\textsuperscript{35} Id. at 83-87.
\textsuperscript{36} Id. at 152-156, 589-590.
Without delving into the extensive criticism that has been raised by academic scholars against the interest analysis both on the theoretical and implementation levels, its relation to classical methodology reveals several points. In contrast to classical choice-of-law methodology, this analysis produces ad-hoc solutions to private international law cases. While it rejects the “connecting factors” path of the classical methodology, cases are resolved on a case-by-case basis through realization of statutes’ underlying policies in particular factual situations. Furthermore, the conceptual shift goes even deeper. Similarly to the classical realist claim, interest analysis also even rejects classification into private law categories as a preliminary stage of choice-of-law analysis. The view declared by interest analysis is that the classification of the case as a “tort law case” or “contract law case” does not play any significant role. What matters is the effectuation of relevant governmental policies on an ad hoc basis. In other words, Currie’s famous statement “We would be better off without choice-of-law rules,” refers to both stages of classical choice-of-law methodology: the classification into private law categories and the reference to connecting factors.

Finally, Currie’s classical version of interest analysis rejects the “public policy” doctrine. While the classical methodology enabled a resort to substantive evaluation of foreign provisions, the interest analysis objects to the “public policy” exception as a

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39 Thus, Gerhard Kegel challenged the underlying fundamentals of interest analysis. First, he questioned Currie’s conception of the relation between the judicial branch and politics. Second, Kegel argued in favour of the conceptual disinterest of the legislative branch in the private interaction of individuals. See Kegel, Hague Lecture, supra note 12, at 112-207.

40 See generally Lea Brilmayer, Interest Analysis and Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980) (arguing that practically the legislators mostly have no intent with respect to the extra-territorial scope of legislative provisions. Furthermore, as Brilmayer shows, the attempt to deduce “constructively” the legislative intention led the interest analysis to be highly biased (i.e. pro-local residents, pro-lex fori rule, and pro-recovery, leading to unpredictable results)); see also Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts, 97 Mich. L. Rev. 2448, 2477-2479 (1999); Alan Reed, The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora’s Box?, 18 ARIZ. J. INTL & COMP. LAW 867, 896-905 (2001).


42 But see Hanoch Dagan, Legal Realism and the Taxonomy of Private Law in STRUCTURE AND JUSTIFICATION IN THE PRIVATE LAW 147 (Charles Rickett & Ross Grantham eds., 2008) (defending private law traditional taxonomy from the realists’ perspective).

43 CURRIE, supra note 30, at 183.
legitimate inherent component of the choice-of-law process. Currie conceived “public policy” as a part of the broad spectrum of tools called “escape devices”, with which the courts equipped themselves in order to escape from the mechanical application of classical choice-of-law methodology.\textsuperscript{44} Since interest analysis has already by definition embedded policy-based analysis, it has left no room for any public policy exception in the choice-of-law process.\textsuperscript{45}

II. THE BETTER-LAW APPROACH

A. Robert Leflar & Friedrich Juenger

1. Robert Leflar

The American version of better law approach was borne out of the classical legal realists’ claim that denies any conceptual \textit{a priori} rules-based analysis. As is well-known, legal realism favors an unlimited judge’s discretion. Judges have been basing their decisions on the particular facts of particular cases regardless of the identity of pre-existing legal doctrines or concepts that traditionally apply to this case. From this perspective, legal realism views the adjudication process as a purely “fact-responsive” process.\textsuperscript{46}

\textsuperscript{44} Id. at 138-139; see also Russell J. Weintraub, \textit{Choosing Law with an Eye on the Prize}, 15 \textit{Mich. J. Intl L.} 705, 714-717 (1994) (demonstrating how the interest analysis methodology replaces the traditional escape device of “public policy” in many choice-of-law cases).

\textsuperscript{45} It should be noted that Currie’s rejection of “public policy” doctrine has generally not been followed even by interest analysis supporters. See, e.g., Kramer, \textit{supra} note 32, at 339. The Second Restatement also did not follow Currie’s precept and incorporated this doctrine in its provisions ((\textit{Restatement (Second) of Conflict of Laws} \textsection{90} (1971)); see also Louise Weinberg, \textit{Methodological Interventions and the Slavery Cases; Or, Nights-Thoughts of Legal Realist}, 56 \textit{Md. L. Rev.} 1316 (1997) at 1320-1321 ((arguing that in choice-of-law slavery cases, any “formalistic” approach \textit{inter alia} the interest approach according to which the slave states had a strong interest in the application of their laws) that ignores the content of the applied laws would be “disastrous”. As she states: “Too much was at stake, at least in the slavery cases, to make justice as blind as that”. \textit{Id.} at 1321)).

\textsuperscript{46} See, e.g., Brian Leiter, \textit{American Legal Realism}, in \textit{A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY} 249 (Dennis Patterson ed. 2010). As Leiter explains “All realists endorse the following \textit{descriptive} claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the underlying facts of the case, rather than legal rules and reasons” (\textit{Id.} at 252, emphasis in original); see also Perry Dane, \textit{Vested Rights, “Vestedness,” and Choice of Law} 96 \textit{Yale L. J.} 1191, 1236-1239 (1987).
This was precisely Robert Leflar's point of departure. He was the first\textsuperscript{47} to say something in 1966 that everybody else was reluctant to spell out. He pronounced loudly the biggest secret of choice-of-law process: despite the apparent irrelevance of a law’s contents, the judges do look at this content. Furthermore, they look at this content very closely. Leflar vigorously condemned what he called the “manipulative gimmicks” of choice-of-law practice.\textsuperscript{48} In common law courts,\textsuperscript{49} under the provisions of the Second Restatement\textsuperscript{50} and even under the rigid rules of the First Restatement,\textsuperscript{51} the judges were armed with a broad spectrum of “escape devices” that enabled them to reach desirable results. The process of characterization, the substance-procedure distinction, and the \textit{depecage} doctrine are representative examples of these devices.\textsuperscript{52} Thus, for example, the judges could classify a clearly tort law case under the contract law “hat”\textsuperscript{53} in order to manipulate the choice-of-law rules.\textsuperscript{54} In other words, “escape devices” had been designed as a means to cover up the real

\begin{footnotes}
\item[48] Leflar, More, supra note 2, at 1598.
\item[49] See, e.g., C.M.V. CLARKSON \& JONATHAN HILL, \textit{The Conflict of Laws} 20-57 (4\textsuperscript{ed} ed. 2011); BRIGGS, supra note 21, at 8-18.
\item[50] Accordingly William Reynolds explains the general popularity of the Second Restatement through the fact that this Restatement is armed with a greater arsenal of escape devices than under the First Restatement. See Reynolds, supra note 9, at 1394-1395.
\item[51] It should be noted that Cook criticized the First Restatement precisely on this ground. He argued that the apparent predictability of the First Restatement was false due to the multiplied choice of “escape devices”. See Walter Wheeler Cook, \textit{An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws}, U. ILL. L. REV. 418, 422 (1943).
\item[52] In particular Leflar viewed the process of characterization and the doctrine of \textit{renvoi} as the most vivid examples of what he coined “cover-up practice”. See Leflar, \textit{Considerations}, supra note 16, at 300-302; Leflar, More, supra note 16, at 1585-1586; see also Laura E. Little, \textit{Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism}, 37 U.C. DAVIS L. REV. 925, 957 (2004).
\item[53] See, e.g., J.H.C. Morris, \textit{The Proper Law of a Tort}, 64 HARV. L.REV. 881, 889-890 (1951); see also Reynolds, supra note 11, at 1377.
\item[54] Leflar, \textit{Considerations}, supra note 2, at 300-304.
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reasons that lay behind judicial decisions.\(^{55}\) And, as Leflar stated “everyone knows that this is
not what courts do…”\(^{56}\)

Had it stopped at this point, Leflar’s work would have followed a perfectly realist
claim according to which judicial decisions cannot be predicted.\(^{57}\) However, Leflar did
something else. Although he agreed with realists that in practice the courts actually are not
doing what they say they are doing, his argument did not follow entirely the traditional
realists’ claim of the impossibility of predicting or developing any organizing principles for
the choice-of-law question. Rather, Leflar introduced a list of five “choice-influencing
considerations” that should determine the governing law in private international law cases:
(1) “predictability of results”; (2) “maintenance of inter-state and international order”; (3)
“simplification of the judicial task”; (4) “advancement of the forum’s governmental interests”;
and (5) “application of the better rule of law”.\(^{58}\)

Although Professor Leflar did not accord any order of priority among the five
considerations,\(^{59}\) legal academics and judicial decisions have primarily focused on the “better
rule of law” consideration and perceived this consideration as the core concept of Leflar’s
legacy.\(^{60}\) Further, when one examines Leflar’s own examples, it is difficult to miss the
central role that this consideration had in Leflar’s choice-of-law determination process. Thus,
through analysing several private international law cases, Leflar labelled Spanish property

\(^{55}\) Leflar, More, supra note 2, at 1585-1586.
\(^{56}\) Id. at 1587.
\(^{57}\) Indeed, some scholars have referred to the apparently realist roots of Leflar’s scholarship, see e.g., William L. Reynolds & William M. Richman, Robert Leflar, Judicial Process, and Choice of Law, 52 Ark. L. Rev. 123, 134-138 (1999).
\(^{58}\) Leflar, Considerations, supra note 2, at 282-304.
\(^{59}\) See Leflar, Considerations, supra note 2, at 282; see also Stanley E. Cox, Applying the Best Law, 52 Ark. L. Rev. 9, 16-17 (1999) (stressing the equal normative significance of each one of Leflar’s five considerations).
\(^{60}\) See e.g., Brilmayer, supra note 16, at 70-73; Symeonides, Revolution, supra note 3, at 26-28; Mills, supra note 4, at 138-139; Weintraub, supra note 4, at 468-472. For a different view, see Robert L. Felix, Leflar in the Courts: Judicial Adoption of Choice-Influencing Considerations, 52 Ark. L. Rev. 35 (1999).
law as “pretty medieval”, 61 the Pennsylvania tort law provision as a “modern civilized rule” 62 and the application of the New York liability negligence standard as a “fair result”. 63

2. Friedrich Juenger

The seeds of Leflar’s ideas sown in the mid-sixties are clearly evident in Friedrich Juenger’s work. 64 In many respects Juenger was Leflar’s successor. While praising Leflar, 65 he invested considerable effort in demonstrating the flaws of both classical 66 and modern 67 choice-of-law methodologies. In a manner akin to Leflar, Juenger focused on the actual mechanics used in the adjudication process when deciding choice-of-law cases. And like Leflar, Juenger argued that despite the declarative line of reasoning taken by the courts of the classical or modern methodologies, choice-of-law cases have been decided on the basis of the “better-law” approach. 68 From here follows the greatest challenge of choice-of-law jurisprudence, or as Juenger put it “the drift apart between theory and practice”. 69

However, in contrast to Leflar, Juenger also made some important points on the theoretical underpinnings of better-law approach. He recognized that the adoption of this methodology means a complete re-orientation of the choice-of-law discipline. 70 By demonstrating the centrality of states’ sovereignty principle in the fundamentals of classical

61 Leflar, More, supra note 2, at 1590.
62 Id. at 1593.
63 Id. at 1595.
64 See generally Friedrich K. Juenger, General Course on Private International Law, 193 RECUEIL DES COURS 119 (1985) [hereinafter Juenger, Hague Lecture]. This work was reprinted with slight changes in FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993) [hereinafter JUENGER, MSJ].
65 Friedrich K. Juenger, Leflar’s Contributions to American Conflicts Law, 34 ARK. L. REV. 205, 206 (1999) (“There are good oracles and bad oracles, and I consider Leflar a good one”).
66 See JUENGER, MSJ, supra note 64, at 47-86.
67 Id. at 88-145.
68 Juenger, Hague Lecture, supra note 64, at 299-318.
69 JUENGER, MSJ, supra note 64, at 153, 207.
and modern choice-of-law methodologies,\textsuperscript{71} he challenged the conceptual relevance of this principle for the choice-of-law question. While the states do not have interests in multi-state private law disputes,\textsuperscript{72} the justice between private individuals is what must be at stake. Accordingly, other considerations (such as sovereignty or inter-state relationships) are merely foreign to the ultimate goal of the discipline.\textsuperscript{73} What choice-of-law is about is achieving justice in a particular case. And the “better-law” approach is the appropriate candidate for achieving this goal.

This strong theoretical underpinning of the choice-of-law question led Juenger to make a further argument regarding the conceptual purity of “better-law” approach. What had been offered now was the abandonment of the classical and modern approaches altogether and to substitute them with the “better-law” method. Accordingly, Juenger unequivocally rejected the now popular argument regarding the “value pluralism”\textsuperscript{74/} “amalgam”\textsuperscript{75/} “golden medium”\textsuperscript{76} of choice-of-law approaches.\textsuperscript{77} This argument, which favors

\textsuperscript{71} Juenger, MSJ, supra note 64, at 159-161. For a similar argument regarding the centrality of the sovereignty principle for classical and modern choice-of-law methodologies, see Kegel, Hague Lecture, supra note 12, at 184.

\textsuperscript{72} For a rejection of the sovereignty principle for the choice-of-law question along somewhat similar lines, see Kegel, Hague Lecture, supra note 12, at 180, 198 (“the legislator is far more interested in affairs of state than with matters concerning individuals”).

\textsuperscript{73} This position of viewing the choice-of-law question as fundamentally grounded in the notions of “individual justice” and “parties’ reasonable expectations” has a particularly strong grasp in English choice-of-law literature. See, e.g., Clarkson & Hill, supra note 49, at 9-12. Even Alex Mills, perhaps nowadays the greatest challenger of these concepts, openly admitted to their centrality to choice-of-law. See Mills, supra note 4, at 3. For the significance of the “individual justice” notion in the American context, see Cheatham & Reese, supra note 47, at 961; see also Patrick J. Borchers, Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note”, 56 Md. L. Rev. 1232, 1238 (1997); Weinberg, supra note 6, at 486, 498.


\textsuperscript{75} Id. at 28.

\textsuperscript{76} Symeonides, Why Not, supra note 31, at 409-411, 417-418.

\textsuperscript{77} The “golden medium” argument has been fiercely defended by Professor Symeon Symeonides at Dawn, supra note 74; Symeonides, Why Not, supra note 31, at 409-411; 417-418 (defending a proposal for integration of all three of the choice-of-law methodologies in the Third Restatement of Laws). For other “mixed” approach proposals, see Bruce Posnak, Choice-of-Law: A Very Well-Curried Leflar Approach, 34 Mercer L. Rev. 731, 778 (1983) (suggesting determination of “true” and “un-provided” patterns of interest analysis based on Leflar’s choice-influencing considerations); Ralf U. Whitten, Improving the Better Law System: Some Impudent Suggestions for Reordering and Reformulating Leflar’s Choice-Influencing Considerations, 52 Ark. L. Rev. 177, 229 (1999) (offering the better law method as a tool for resolving the “true conflict” pattern of interest analysis). In this respect, the Second Restatement deserves special attention. The combination of Section 6 of the Second Restatement with its other

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the integration of several (often self-contradictory) approaches into choice-of-law jurisprudence, is notably at odds with Juenger’s conception of the subject. Since the internal logic of the choice-of-law question inherently follows the logic of purely domestic cases in their pursuit of individual justice, Juenger’s version of “better-law” method insists on its absolute normative primacy over other approaches.

This defense of a single normative principle explains Juenger’s rejection of Leflar’s list of “five choice-influencing considerations” which Juenger condemned as: “[N]o less eclectic than the Second Restatement.” A cursory glance at the list of these considerations reveals the multiplicity of methods and approaches: the modern methodology (“advancement of the forum’s governmental interests”), the better-law method (“application of the better rule of law”) and other principles. For Juenger, this artificial “amalgam” of principles is inconsistent with the fundamental goal of the choice-of-law question — the achievement of “fair results” and “individual justice” in private international law cases. While, “better-law” method in its purest form meets this goal, the influence and the process of mixing with other provisions represents a mixed symbolism of the classical and modern choice-of-law approaches. See Restatement (Second) of Conflict of Laws §6 (1971). On the Second Restatement’s “syllogism” of approaches, see William M. Richman & William L. Reynolds, Prologomenon to an Empirical Restatement of Conflicts, 75 Ind. L.J. 417, 419-420 (2000); Symeonides, Why Not, supra note 31, at 386-394, 415. See, e.g., Juenger, Third Restatement, supra note 70, at 405-406; Friedrich K. Juenger, How Do You Rate A Century?, 37 Willamette L. Rev. 89, 116 (2001) (rejecting Symeonides’ eclecticism) [hereinafter Juenger, Rate]. It should be noted that this was not always Juenger’s view. For discussion of the progression of Juenger’s thought from the “value-plurality” approach towards a unifying choice-of-law concept of “individual justice”, see Patrick J. Borchers, A Look Forward, A Look Back in International Conflict of Laws for the Third Millennium 3 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

As Juenger put it “[T]he subject matter of our discipline is not at all complex; at issue are commonplace transactions such as contracts, torts, marriages and divorces” (JUENGER, MSJ, supra note 64, at 163). Cf. Adrian Briggs’ somewhat similar comment on the nature of the discipline at BRIGGS, supra note 15, at 2.

Juenger, Third Restatement, supra note 75, at 410.

JUENGER, MSJ, supra note 64, at 173 (criticizing Leflar on the grounds of flexible multiplicity of “choice-of-law considerations”). For additional discussions of the conceptual difference between Juenger’s and Leflar’s positions on this point, see: Symeonides, Dawn, supra note 74, at 26; Joachim Zekoll, A Review of Choice of Law and Multistate Justice in International Conflict of Laws for the Third Millennium 9 n.15 (Patrick J. Borchers & Joachim Zekoll eds. 2001).

See also Symeonides, Dawn, supra note 74, at 28, 38-39.

Juenger, Third Restatement, supra note 70, at 415-416.
approaches only distances choice-of-law jurisprudence from its stated goal. And only in this way will the “better-law” method work not just in practice, but also in theory.

I think that legal commentators were not completely fair to Juenger with respect to the identity of the particular version of the better-law approach that was favored by him. They have classified Juenger’s work as unequivocally supporting a “constructive version” of better-law approach. According to this version, a special non-state law must be constructed from the involved laws in the particular case.\textsuperscript{84} Thus, for example, in the case of product liability, Juenger proposed to construct from among the involved states a new law provision that “best accords with modern substantive law trends and standards”.\textsuperscript{85} In this process of intermingling involved laws, a new form of previously non-existent law was created.\textsuperscript{86}

However, Juenger’s position seems to be much less determinative than had originally been thought. Indeed, Juenger clearly did not share Leflar’s view according to which the identity of the applicable law has to be positive law of one of the states.\textsuperscript{87} However, this does not mean that Juenger viewed the “constructive” version as the only possible version of better-law method. The contrary is true. A careful examination of Juenger’s work reveals that he viewed a wide range of court decisions, traditional doctrines and concepts as ultimately grounded in better-law method. In all these cases the choice was executed in the form of a choice between two or more national laws, without the construction step.

\textsuperscript{84} See, e.g., Symeonides, Dawn, supra note 74, at 13.

\textsuperscript{85} JUENGER, MSJ, supra note 64, at 197, 236. There is a clear resemblance between this version of better-law approach and von Mehren’s version of “interest analysis”.

\textsuperscript{86} This “constructive version” of better-law approach was apparently applied in Roman Empire times in adjudicating disputes between Roman and Non-Roman citizens. See Friedrich Juenger, \textit{Page of History} 35 MERCER L. REV. 419, 422-423 (1981). This also seems to be Luther McDougal’s position with respect to his version of better-law approach. See McDougal, supra note 9, at 483-484. In the European context such “constructive” approach was supported by Ernst Steindorff (\textit{discussed} in Kegel, Hague Lecture, supra note 12, at 238-251).

\textsuperscript{87} JUENGER, MSJ, supra note 64, at 161, 164, 171, 192 (objecting to the “all or nothing” or “guillotine” method of choosing between the national laws).
The reason for Juenger’s apparent indeterminacy lies in the main focus of his argument. What really matters for Juenger is not which type of “better-law” method is to be adopted (although he preferred the “constructive version”), but rather the wholesale theoretical re-orientation of the choice-of-law discipline in a way that would be compatible with practice. The main focus of this argument is on the conceptual flaws of the classical and modern choice-of-law methodologies and the insistence on the normative purity of “better-law” method, rather than a fierce defense of its particular form. Juenger seems to be clear on this point, by stating that “theology takes different forms...”\(^8\). Indeed, a review of Juenger’s publications following his main work of Multistate Justice, reveals that both the “constructive” and “à la Leflar” (relating to choice between state laws) versions of the better-law method were supported by him equally.\(^9\)

B. The Relation to Classical and Modern Methods

Complete reliance on the substantive evaluation of the involved provisions is what lies within the revolutionary nature of better-law method. Both classical and modern choice-of-law methodologies are grounded on the shared premise of indifference to the content of applied laws. The classical choice-of-law methodology follows the patterns of pre-determined connecting factors, irrespective of the outcomes that it produces. The modern

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\(^8\)&nbsp;Juenger, MSJ, supra note 64, at 213.

\(^9\)&nbsp;See, e.g., Juenger, Rate, supra note 78, at 97-98, 118-120; Juenger, Third Restatement, supra note 70, at 415-416. To be most careful with Juenger’s argument, one should mention what seems to be Juenger’s “ideal version” of better-law approach. This “ideal” version supports the establishment of special international or domestic tribunals to hear exclusively private international law cases. Further, these tribunals shall operate on the basis of some supra-national, universal principles - the so-called true private international law or new mercatoria. See Juenger, MSJ, supra note 64 at 185, 192, 195; Friedrich K. Juenger, American Conflicts Scholarship and the New Law Merchant, 28 Vand. J. Transnat’l L. 487 (1994); Friedrich K. Juenger, The Lex Mercatoria and Private International Law, 60 La. L. Rev. 1133, 1141 (2000). Although this paper does not discuss this “ideal” version of Juenger’s better-law method, it is worth mentioning that Juenger himself seems to acknowledge the practical and theoretical difficulties involved in the establishment of such supra-national tribunals that will apply supra national law which, in contrast to the well-developed system of contemporary international arbitration, does not rely on the independent normative force of parties’ consent. See Emmanuel Gaillard, Legal Theory of International Arbitration (2010).
methodology follows the same course: it applies the law that will give effect to its underlying policies in a particular situation, regardless of the substantive merits of the law itself.\textsuperscript{90} This was precisely the point made by the better-law method’s supporters. As Juenger put it, addressing both classical and modern choice-of-law approaches “The proposition that judges should be oblivious to the outcomes of the cases they decide is unique to the conflict of laws; no other discipline harbours such a strange idea”.\textsuperscript{91} Furthermore, the modern methodology seems to be even more formal than classical. While, the classical methodology enables resort to evaluation of the merits of substantive content in highly exceptional cases, the indifference of modern methodology to that content is absolute.

There is, however, a conceptual similarity between the “better-law” and modern methodologies. Both methodologies apparently refer to the “substance” of the applied laws. Furthermore, Juenger’s “constructive version” of better-law methodology\textsuperscript{92} is suspiciously reminiscent of a well-known version of modern methodology which favours the creation of special substantive rules for particular cases.\textsuperscript{93} However, the terminological usage of the word “substance” here would be misleading. Under the modern methodology, the inquiry into the content of positive laws is strictly limited to the question of scope of application of these laws in light of their underlying policies. This process best effectuates the policies of the state rather than makes a substantial argument regarding the merits of the laws themselves.\textsuperscript{94}

\textsuperscript{90} Laura Little makes this same point in terms of the “formalistic nature” of classical and modern choice-of-law methodologies. See Little, supra note 52, at 958-960.
\textsuperscript{91} Juenger, Third Restatement, supra note 70, at 415. Kegel described the special nature of choice-of-law jurisprudence in terms of “conflicts justice” of classical and modern methodologies in contrast to the “material justice” of better-law approach. See G. Kegel, Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers, 27 AM. J. COMP. L. 615, 616-617 (1979).
\textsuperscript{92} See supra notes 84-86 and the accompanying text.
\textsuperscript{94} It seems that Lea Brilmayer makes the same point in somewhat different terms. See Lea Brilmayer, Rights, Fairness, and Choice-of-law, YALE L. J.1277, 1288 (1989).
Once it is agreed which state’s policy is best realized, the modern methodology (like the classical methodology) is indifferent to the result it produces.

Better-law approach offers something radically different. It does not entail a process of classifying a given factual situation into private law categories and applying pre-determined connecting factors to them, as the classical methodology does. Nor does it involve a process of tracking the underlying policies of the involved laws in particular factual situations, as the modern methodology does. What better-law method is about is the evaluation of the substantive merits of the involved laws. Whilst classical and modern approaches do not make a claim of how “bad” or “good” laws are, for better-law method, this is all that matters.

Accordingly, the better-law method has nothing to do with the policy-based debates that are internal to modern methodology. Thus, it does not concern the debate of policy analysis of pre-existing choice-of-law rules versus ad hoc policy analysis of the interest approach. Nor does it concern the debate regarding the means of accommodation of conflicting policies: the all or nothing approach, the weighting and balancing approach or the above-mentioned method of creating new ad-hoc rules based on the compromise of the competing policies. Despite the frequent usage of the word “substance”, these debates are foreign to the very nature of better-law approach. It denies at its most fundamental level the very presupposition under which the law serves as an effectuation of certain policy.

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95 See Brilmayer, Hague Lecture, supra note 41, at 37-97.
96 Currie is very concise on this point. According to his view, the courts are not just equipped with the capabilities of balancing and weighing policies, but the very possibility of weighing contradicts liberal democracy and would be overstepping courts’ authority. See: CURRIE, supra note 30, at 182, 601.
97 Baxter, supra note 32.
98 von Mehren, supra note 93.
99 See also Robert A. Sedler, Interest Analysis, Multistate Policies, and Considerations of Fairness in Conflicts Torts Cases, 37 WILLAMETTE L. REV. 233, 235 (2001) (framing the difference between interest analysis and better-law approach in the following terms “It does not classify a rule of substantive tort law as ‘progressive’ or ‘regressive,’ ‘good or bad’. It looks only to the policy reflected in a state’s law and that state’s interest in applying its law in order to implement that policy in the particular case”).
At the implementation level one can identify two conceptual stages in the application of better-law method. In the first stage, similarly to the modern methodology, the relevant framework of the involved laws is established. Both Leflar and Juenger explicitly mentioned this stage in their expositions of better-law approach.\textsuperscript{100} At the second level, the applicable law is determined according to the substantive criteria of the “better law”. Thus, in the above-mentioned Babcock v. Jackson,\textsuperscript{101} the “better law” method would first identify the framework of the competing laws: that of New York and Ontario. Then, in the second stage, the New York provision would probably be preferred over the apparently discriminatory Ontario provision.\textsuperscript{102} The Ontario “guest statute” represented - the proponents of better-law method would claim - an “anachronistic”, “bad law” that must be excluded from choice-of-law process because of its substantive merits.\textsuperscript{103}

This example also reveals an analogy between better-law method and other methods at its implementation level. Similarly to the “public policy” exception rule of the classical methodology, better-law approach engages in an evaluation of the involved laws. However, the subsidiary doctrine of classical methodology becomes the primary rule in the better-law methodology. Similarly to modern methodology, better-law methodology is (or at least declares it is) disinterested in private law classification into legal categories. And similarly to

\begin{footnotesize}
\begin{enumerate}
\item[100] Leflar, More, supra note 2, at 1592 (disqualifying Maryland law from the framework of the involved laws based on the lack of “substantial connection with the facts”); Juenger, MSJ, supra note 64, at 206 (identifying the framework of the involved laws according to the “sufficiently close relationship with the lawsuit”).\textsuperscript{101} See supra note 37.
\item[101] For an exposition of “guest statutes” as discriminatory provisions against foreign domiciles, see Donald T. Trautman, Two Views on Kell v. Henderson: A Comment, 67 COLUM. L. REV. 465, 469 (1967); Symeonides, Revolution, supra note 4, at 105.
\item[103] Indeed, along these lines several commentators have raised objections to Ontario’s tort “guest statute” provision of that time. See Weintraub, supra note 4, at 469-470; Borchers, supra note 78, at 7; Felix, supra note 60, at 48 (“The better law consideration clearly militates against the application of a guest statute”).
\end{enumerate}
\end{footnotesize}
modern methodology, it identifies the framework of the involved laws and produces *ad-hoc* solutions\(^\text{104}\) to choice-of-law cases.

The implementation analysis of the three above-presented choice-of-law methodologies can be summarized in the following chart:

<table>
<thead>
<tr>
<th>Stage</th>
<th>Classical Methodology</th>
<th>Modern Methodology</th>
<th>Best-Law Methodology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage I</td>
<td>Classification into Private Law Categories</td>
<td>Identification of the Involved Laws</td>
<td>Identification of the Involved Laws</td>
</tr>
<tr>
<td>Stage II</td>
<td>Reference to Connecting Factors</td>
<td>Identification of the Underlying Policies</td>
<td>Determination of the applied law according to substantive criteria of the “best-law”</td>
</tr>
<tr>
<td>Stage III</td>
<td>Various Doctrinal Exceptions to the Ordinary Choice-of-Law Process</td>
<td>Determination of the applied law following realization of the underlying policies</td>
<td></td>
</tr>
</tbody>
</table>

Armed with these very brief insights on the conceptual differences between the three methods, I shall outline several preliminary points with respect to proceeding further with the argument:

\(^{104}\) It should be mentioned that with respect to the solution that it produces, the better-law method is actually situated “in between”. On the one hand, similarly to classical choice-of-law methodology, it has a choice-of-law rule of “better-law” criteria. However, on the other hand, since it requires a case-by-case analysis for the purposes of identification of the involved laws, it also (similarly to modern methodology) depends on the factual situation of the particular case.
3. Some Preliminary Thoughts for Argument Development

1. Better-Law as an underlying rationale of many choice-of-law decisions - I am quite convinced that there is much that is sound in the fundamental claim of the those who support the better-law approach that this approach lies frequently at the core of the courts’ reasoning. For this purpose, and as an example, I suggest an examination of perhaps one of the most significant judicial decisions in common law tort choice-of-law history: Chaplin v. Boys.\(^{105}\) My analysis of this case will seek to illustrate the apparent triumph of the better-law approach. The judges’ continuous reference to the content of the involved laws and the judicial acrobatics in attempts to escape from the application of previously chosen rules seem to lead to the conclusion that this case was ultimately grounded on the better approach. Leflar’s and Juenger’s vision, in which the courts struggle in choice-of-law cases against their inherent tendency to pursue “individual justice”, is quite evident in this case. The applications of modern and classical choice-of-law methodologies are an illusion, a myth that hides the real methodology behind courts’ decisions – the better-law approach.

   Of course, the practice by which the courts do not explicitly state the underlying basis of their decisions is not plausible and it is even harmful. It challenges the transparency and legitimacy of judicial authority and the stability of the legal system generally. However, the fact that the courts tend to ignore traditional rules in favour of the better law approach points to further inquiry about the nature of this approach and its possible express application in the courts.

2. The conception of judicial authority - one of the most central issues of better law seems to relate to the very conception of the judicial authorities in their dealing with private

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international law cases, and more generally the question of separation of powers. Can
domestic judges, in the first place, apply any law other than its domestic law - lex fori, or, even
more radically, declare that a foreign private law provision is better than that of his or her
own system? What do judges do in private international cases? Do they act via long-arm
sovereign representatives who effectuate, on an ad-hoc basis, the states’ laws’ underlying
policies, pursuant to the modern approach? Or do they act as enforcers of a pre-established
system of certain connecting factors (which may or may not reflect certain policies or certain
underlying normative jurisprudence), pursuant to the traditional approach? The supporters
of the better-law approach might say that the judges are doing what they are trained to do in
every private law litigation: to do justice between the particular plaintiff and the particular
defendant. Some scholars have expressed a view that in private international law cases, the
judges should not be conceived of as sovereign representatives of a particular system, but
rather as global adjudicators. This position fits well with the better law approach.

However, putting aside the question of the nature of this ‘justice’ for a moment, one
may question whether the choice of “better-law” can actually guarantee the desirable ‘just’
results for the litigating parties. Consider the situation when the application of the ‘better
law’ approach will not be the appropriate tool for achieving individual justice in particular
cases. In other words, is there always a correlation between the application of what in the
judges’ view is the “better law” and the “best result” for the litigation?

3. **The inconsistency with the ‘state equality’ principle** - according to the ‘state
equality’ principle, the contemporary international order consists of a multiplicity of
sovereign states that are situated in equal relation to each to other despite their size, wealth
and power. One might extend this argument with respect to the legislative private law
provisions of various systems and as a possible challenge to the better-law approach. Even
adopting the above-mentioned role of global adjudicators, can a judicial authority say that the
law of one state is better than the other? Since the provisions of various systems are situated
in equal relation each to other – the very nature of the better-law approach is at odds with
the state equality principle. Although this is perhaps the least-known objection to the better-
law approach, I regard it as a very serious hurdle based on a principle that has deep roots in
European thought and American federalism.

4. The “involved” word puzzle - notably however, both Juenger and Leflar subordinated
their versions of the better-law method to the requirement of “sufficient connection” or
“reasonableness”, according to which the “pool” of involved laws is identified based on the
degree of connectedness to the event and to the parties. This subordination should be
explained in some way. In modern choice-of-law method, for example, the states simply do
not have an interest in the application of their laws to the factual situation where no
sufficient link exists between them and the case. In other words, the requirement of
“sufficient connection” or “reasonableness” follows from the theoretical basis of the modern
methodology itself.

The better law (or more precisely a pure version of the better law) should take a
similar conceptual step within its own theoretical basis. Why must only the laws of
“sufficiently closely related” systems be considered as relevant for this approach? The law of
one state might be bad in the courts’ eyes, and the law of the other state might be bad as well.
Since the pool of the laws involved has been filtered through the reasonableness requirement,
what the adoption of the “involved” word does for the better law approach is approximate
and strive towards a certain ideal. Indeed, the ‘constructive’ version of the better-law
approach takes a step (or even several steps) closer towards this ideal conception of private
law and the private law categories, but in most of the cases the gap remains unclosed.
What better-law seems to need is a qualification of its argument. Even a purely theoretical justification of “individual justice” cannot rest on the sole normative element of “justice”. This purely “justice”-based account will lead to a universal conception of private law and leave no room for the choice-of-law question. As a matter of fact, such approach has rarely been defended even by the most prominent natural rights supporters, who focused rather on the normative justification of classical legal positivism or ultimately confined the scope of their argument to extreme cases of “great injustice”. The “individual justice” component has to be integrated with notions such as ‘parties reasonable expectations’, ‘predictability’, and ‘stability’ of judicial systems, a notion that seems to represent the underlying basis of the word “involved”.

5. The subjectivity issue - there is no doubt that the most pressing challenge that the better-law approach has encountered is the challenge of subjectivism. From the very beginning, this approach has been accused of so-called unpredictable “khadi justice” whereby the judges decide cases based on their subjective opinions, rather than on certain objective criteria. It seems that had one been capable of addressing this challenge, the better-law approach would have been much more appealing to us.

I do have a suggestion on this matter. Let me say something about terminology. When choice-of-law commentators debate the question of whether the discipline is “value free” or not “value free”, I recommend focusing not on the word “value” in these phrases, but rather on the word “discipline”. What is striking is that in the context of the better-law method, the word “discipline” does not refer to the normative dimensions of the choice-of-law question, but rather to the normative dimensions of private law. I think that one might argue that the normative theories of private law are able to supply the missing normative dimension for the better-law approach. After all, this discipline, as some scholars have mentioned, is first of all
about private law and an inherent analysis of the private law categories of tort law, contract law, property, restitution, and their doctrines and concepts. This suggests a comparative normative analysis of various private law provisions as a central element of its jurisprudence. I have in mind here what appear to be the two leading contemporary normative perspectives of private law: economic analysis and corrective justice, which in turn have much to say about the ideal versions of private law and each of the private law categories.

Take, for example, the perspective of economic analysis. Under this analysis, the judges are equipped with an ability to evaluate the consequences of their decision on future cases and on people’s behaviors. Further, they must consider these consequences when they consider alternative decisions. They are viewed as active economists that have not just the ability to evaluate the efficiency of certain decisions, but also a duty to make and promote decisions that will maximize overall efficiency. Richard Posner, perhaps the most eminent law & economics scholar, launched his attack against Friedrich Hayek’s passive conception of judicial authority precisely along these lines. Accordingly, the claim according to which the judges are not capable of estimating the aggregated efficiency of the involved laws’ provisions seems to be at odds with the very fundamentals of the role of judicial authority under economic analysis of law. In this way, economic analysis seems to follow precisely the conceptual structure of the better-law method and was supposed to have warmly embraced it through the application of the most efficient law.

The suggestion to leave the determination of the better law to corrective justice’s and economic analysis’ ideas raises, of course, many issues. First, the approximation process itself should be explained and conceptualized within the theoretical framework of economic analysis (perhaps because of the burden of enormous transitional costs involved in the establishment of the global empire governed by unifying private law) and corrective justice (perhaps because of the conception of certain international order that inherently follows
from the fundamentals of this theory). Secondly, there a possibility of leaving judges to do the work of approximating towards corrective justice or economic analysis. Quite surprisingly however, the approximation process can be easier than one might think. Although grounded on a different theoretical basis, both corrective justice and economic analysis support a wide range of common law traditional private law (especially contract law) doctrines. Furthermore, in this respect, the various unification projects of private law, such as the UNIDROIT Principles of International Commercial Contracts, come to mind, which in turn also seem to receive the blessing of both normative theories of private law. Although I not sure how to proceed from here, I do think that the notion of the relation of better law to economic analysis and corrective justice brings us closer to understanding how to decide choice-of-law cases based on the better-law method.

6. The *lex-fori* “fig-leaf” explanation of the better-law approach - the “better rule” has been interpreted by many courts and scholars as a mere *lex fori* rule that directs the courts to apply their domestic law in private international law cases. For this apparently inherent forum favouritism, the better-law method has been heavily criticized by academic scholars, as well as in judicial decisions. Understood as *lex fori*, the better law indeed deserves criticism. This understanding runs into serious conceptual problems related to *lex fori* as a legitimate solution to the choice-of-law question (such as the total equation of the question of jurisdiction with that of choice-of-law) and practical problems (such as creating the negative phenomenon of forum shopping). This interpretation seems too simple. The court practice indicates that many judges were brave enough to apply foreign private law provisions under the better–law approach. At least in theory, the better law seems to be much more than a hidden version of *lex fori*.
7. Better-Law Supporters' Examples - I am troubled by the examples that the better-law approach adherents provided in support of their argument: the cases of aerial disasters that involved multiple plaintiffs; cases of distribution of workers' compensation; and cases of enforcement of antitrust law. There is no doubt that their concerns reverberate today in relation to a wide spectrum of global problems that domestic courts have encountered. However, the question here is whether these cases can be taken as representative examples for developing a conceptual account of the discipline. If we perceive the nature of the choice-of-law question as ultimately grounded in the normative notion of individual justice, the case of private law interaction between (usually) two individuals from different territories appears to be a paradigmatic case of such conception. The above-mentioned cases seem to be of a different order involving distributive justice considerations that are alien to the nature of the discipline. From this perspective, reliance on such unrepresentative cases might create a “bad theory”. Furthermore (and more radically), it is highly doubtful whether such cases belong to private international law in the first place. As I have mentioned above, one might argue that this discipline is about contracts, torts, and property. The other subjects such as workers’ compensation, antitrust, slavery, and criminal law cases seem to be for the most part simply too foreign to the nature of the discipline.

8. The positivity issue - the possibility of application of any law other than domestic law in domestic courts has created for centuries a serious headache for traditional positivistic thought. Significant efforts have been invested to justify classical and modern methods in positivistic terms. The various models of the ‘constructive’ version of the better-law supporters, in which the choice-of-law process involves a construction from the laws involved of a new form of previously non-existent law provision, creates an even more serious challenge to traditional positivistic thought. In the manner that the better law supporters
put their argument, I think the following points deserve to be mentioned: (1) this anti-
positivism has nothing to do with the traditional positivist-natural law debate regarding
certain moral tests of legality; (2) if any, the argument is reminiscent of what is now known
as a “legal pluralist” argument, which challenges the states’ monopolistic power to create law;
(3) this argument seems not to challenge the existing international order as comprising
politically independent units, but rather has a more narrow focus on defending the existence
of a special non-state law strictly for private international law cases; (4) as a defender of non-
state orders, this argument is exposed to the harmful criticism that has been raised against
legal pluralism, namely the fatal failure to provide a comprehensive account of the
phenomenon called “law”, in several further related conceptual, practical, and historical
objections; (5) the unpredictability inherently involved in the constructive version of the
better-law approach is perhaps the worst scenario from the theoretical perspective of the
word “involved” which seems to be very central to the choice-of-law process, even (as we
have seen) within the better-law approach.

9. Better-Law Approach as a doctrinal exception - the last point that I would like to make
addresses the justification of a limited version of the better-law approach as a doctrinal
exception to the choice-of-law process. Even if we are not willing to accept better-law as a
primary source for choice-of-law process, because of the above-mentioned objections, only a
few scholars would deny the centrality of the better law approach as a secondary source
under a wide range of choice-of-law doctrinal exceptions. The question is why accept the
better-law approach as a doctrinal exception to the choice-of-law process vis-à-vis better-law
as a primary source of choice-of-law?