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“Bringing Locus into Focus”:
A Choice-of-Law Methodology for CISG-based
Concurrent Contract and Product Liability Claims

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I. Introduction

Conflict of laws principles for choice-of-law traditionally fall into two discrete categories: tort or contract. The place where the tort, offense, or injury has been committed (the “*locus delicti*”) is the prevailing doctrine in many common law

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jurisdictions (including Canada) for choice-of-law in tort (the “*lex loci delicti commissi*”).² Conversely, where the contract was made (the “*locus contractus*”) and its corollary, the law of the place where the contract is formed (the “*lex loci contractus*”) is the traditional or classical theory for choice-of-law in contract.³ Alternatively, where the contract was to be performed (the “*lex solutionis*”) is problematic, particularly in circumstances involving complex international transactions and class action litigation.⁴

Much legal academic commentary has been devoted to development of choice-of-law rules informed by principles culled from traditional conflict of laws theory,⁵ private international law,⁶ UNIDROIT principles⁷ and the *lex mercatoria*.⁸

² BLACK'S LAW DICTIONARY 820 (5th ed., 1984).

³ BLACK'S LAW DICTIONARY 911 (6th ed., 1990).

⁴ See Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the Convention*, 20 J.L. & COM. 155, 170 (Spring 2001).

⁵ For a Canadian conflict of laws perspective on choice-of-law, see Joost Blom, *Choice-of-law Methodology*, in PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT, AND MATERIALS 475-508 (2d ed. 2003); Janet Walker, “Are We There Yet?” *Towards a New Rule for Choice of Law in Tort*, 38 OSGOODE HALL L.J. 331 (2000); Robin M. Junger, *A Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches*, 26 OTTAWA L. REV. 75 (1994).

⁶ Mather, *supra* note 4, at Part III, “Alternatives to American Choice-of-Law Methods” (discussing the *Lex Mercatoria*, the 1955 and 1986 Hague Conventions and the 1980 Rome Convention). For a critique of The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the 1980 Rome Convention on the Law Applicable to Contractual Obligations, see Friedrich K. Junger, *Two European Conflicts Conventions*, 28 VICTORIA U. OF WELLINGTON L. REV. 527 (1998), at <http://www.upf.pf/recherche/IRIDIP/RJP/RJP4/05Juenger.doc>.

⁷ The Preamble to the UNIDROIT PRINCIPLES provides: Preamble

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

According to the Preamble Official Comment:

Recourse to the Principles as a substitute for the domestic law otherwise applicable is of course to be seen as a last resort; on the other hand it may be justified not only in the

From a contractual perspective, the *United Nations Convention on Contracts for the International Sale of Goods, 1980*⁹ (hereinafter the "CISG"), maintains its ascendancy as the most widely adopted international convention dealing with international business transactions.¹⁰ Conversely, efforts to establish a comparable international convention on products liability law have not been met with the same degree of success. To date, *The Hague Convention on the Law Applicable to*

event of the absolute impossibility of establishing the relevant rule of the applicable law, but also whenever the research involved would entail disproportionate efforts and/or costs. The current practice of courts in such situations is that of applying the *lex fori*. Recourse to the Principles would have the advantage of avoiding the application of a law which will in most cases be more familiar to one of the parties.

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Preamble, at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>. See UNILEX ON CONVENTION & UNIDROIT PRINCIPLES, Centre for Comparative and Foreign Law Studies, at <http://www.unilex.info>; The International Institute for the Unification of Private Law (UNIDROIT), at <http://www.unidroit.org>; Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), Vienna International Centre, at <http://www.uncitral.org>.

⁸ For bibliographic references, see CISG database, Pace University School of Law (Pace Law School Institute of International Commercial Law), at <http://cisgw3.law.pace.edu>.

⁹ United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S.3, incorporated by, International Sale of Goods Act, R.S.O., ch. I-10 (1990) (Can.), available at www.e-laws.gov.on.ca/DBlaws/statutes/English/90i10_e.htm. For links to other Canadian provincial versions of the Convention, as well as related Canadian case law and academic commentary, see the CISG Canada website, (hosted by Osgoode Hall Law School, York University – member of the autonomous network of Convention websites), available at <http://www.cisg.ca>; <http://www.yorku.ca/osgoode/cisg>.

¹⁰ The Rome Convention, the continental European treaty covering the application of a particular national law to an international transaction, is distinguished from choice of forum and, in its current form, applies only to business or non-consumer transactions. However, negotiations continue to extend the Convention to business-to-consumer transactions, colloquially referred to as "Rome II." For the current draft of the Rome II Convention, see Hague Conference on Private International Law, Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters Proposal on Exclusive Choice of Court Agreements, Apr. 27, 2004, Work Doc. No. 110 E Revised, at http://www.hcch.net/doc/dgm_wd110_e.pdf.

Products Liability, 1972¹¹ has garnered accession from only a handful of countries.¹²

Moreover, along with the development of concurrent liability in both contract and tort, we observe various *lacunae* in the CISG which raise significant choice-of-law issues. The best example is product liability law, which was first described by Dean Prosser as being on the “borderland of tort and contract.”¹³

In Part II of this article, I discuss negligent tort liability under the CISG in the context of choice-of-law theories, informed by application of Articles 4 and 5 of the CISG. The need for international or domestic conflict of laws rules for CISG-related concurrent claims in contract and negligent tort is identified. In Part III, I compare Article 7 of the CISG with Canadian choice-of-law in contracts which firmly entrenches the *lex loci contractus* rule.

In Part IV, the article considers choice-of-law for tort/product liability claims. I first preview Canadian product liability law stemming from three types of obligations: contractual, statutory and negligent tort liability (including manufacturing defects, negligent design and duty to warn). In reviewing leading Canadian jurisprudence on choice-of-law in tort, the conceptual distinction between choice of forum and choice-of-law issues is compared and contrasted by analysis of the factors underlying both the jurisdiction *simpliciter* and *forum non conveniens* doctrines.

The Supreme Court of Canada’s recognition of private international law principles of sovereignty, territoriality and comity, transfused by the CISG’s principles

¹¹ Hague Conference on Private International Law, Convention of 2 Oct. 1973 on the Law Applicable to Products Liability (1973), at <http://www.hcch.net/e/Conventions/text22e.html> (Convention # 22).

¹² Member States of the Hague Conference which are Contracting States to, or have signed the Hague Convention on Products Liability – Belgium, Croatia, Finland, The former Yugoslav Republic of Macedonia, France, Italy, Luxembourg, Netherlands, Norway, Portugal, Serbia and Montenegro, Slovenia and Spain, at www.hcch.e-vision.nl/index_en.php?act=states.listing (Reference: Hague Conference on Private International Law website: Full Status Report, Convention #22).

¹³ Peter Schlechtriem, *The Borderland of Tort and Contract – Opening a New Frontier?*, 21 CORNELL INT’L L.J. 467, n. 1 (1988), available at <http://cisg.law.pace.edu/cisg/biblio/schlechtriem.html#ps1> (citing the phrase borrowed from Prosser’s famous essay, William Prosser, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1953)). See also, Mather, *supra* note 4.

of freedom of contract, uniformity and good faith, lends credence to the *lex loci contractus* as the choice-of-law rule for CISG-based concurrent liability in contract and negligent tort/product liability.

Part V of the article applies private international law principles and policies identified by the Supreme Court of Canada to concurrent claims in contract and negligent tort (specifically, product liability property damage claims). There is an inherent tension between first order principles of tort and contract liability and second order principles (remedies). Based upon the dictates of order and fairness as the super-ordinate principle, order is best achieved by application of the *lex loci contractus* for CISG-based concurrent contract and negligent tort claims.

I argue that injustice does not include prescription or limitation expiry which is a substantive (rights-based) rather than procedural (remedies-based) issue, and would, otherwise, lead to forum shopping or multiplicity of claims instituted in jurisdictions favourable to the putative plaintiff. Thus, the concept of injustice should be restricted to access to justice issues and policy-oriented or legislative initiatives adopted by the *lex fori*. A review of pleading and evidentiary issues for product liability claims is also provided.

The article offers in Part VI a choice-of-law methodology based upon three general rules of application. Overall, this article presents a model choice-of-law for concurrent or alternative liability in contract and negligent tort/product liability where the CISG applies, based upon the following set of conditions:

1. The plaintiff's (Buyer's) claim against the defendant (Seller/Distributor/Manufacturer) is framed in both contract and negligent tort (product liability/property damage);
2. The CISG applies (whether by express agreement or by default);¹⁴

¹⁴ For an excellent discussion on contractual drafting issues, including "opting in" or "opting out" of the CISG, see John P. McMahon, *Guide for Managers and Counsel, Drafting Convention Contracts and Documents and Compliance Tips for Traders*, at <http://cisgw3.law.pace.edu/cisg/contracts.html> (particularly discussion on "Article 6 – Excluding the Convention or Parts of it"). With respect to default application of the CISG, it is assumed that either sub-Article 1(1)(a) (both parties are from Contracting States) or sub-Article 1(1)(b) (the rules of private international law lead to the CISG's application and neither party is from a Contracting State which has made an Article 95 Declaration that it will not be bound by Article 1(1)(b)) applies.

3. The international sales contract does not include a forum selection clause, such as “governing law,” “choice-of-law,” “exclusive jurisdiction” or “choice of forum”;¹⁵
4. The international sales contract contains no exclusions regarding implied warranties or product liability claims.¹⁶

Although the “*locus delicti*” and “*locus contractus*” remain static categories for choice-of-law in tort and contract respectively, this article suggests that where an action is instituted or commenced is a neutral factor and the “*lex fori*” (or “domestic law”) should be the law of last resort, when either gaps¹⁷ or exclusions,¹⁸ in the CISG exist.

¹⁵ The Twentieth Session of the Hague Conference on Private International Law concluded on June 30, 2005 with the signing of the *Hague Convention on Choice of Court Agreements* [the “Hague Choice of Court Convention”]. This new multilateral treaty represents a significant step forward towards improved harmonization of international trade law by providing greater certainty and predictability for parties involved in business-to-business (“B2B”) agreements and transnational litigation. The text of the Hague Choice of Court Convention, including preliminary documents and legislative history, is available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98%20.

¹⁶ This article considers concurrent contract and negligent tort (i. e. product liability-property damage) claims from the perspective of application of Articles 4 and 5 of the CISG. For general issues on scope of application, exclusions and gap-filling, see Article 1 (basic rules of applicability, internationality and relation to Contracting States); Article 2 (Exclusions from the Convention); Article 3 (Goods to be manufactured; services). CISG, *supra* note 9.

¹⁷ Prof. Ferrari notes:

These issues, as well as all the other issues that are excluded from the Convention’s sphere of application (which have been referred to as “external gaps,” “*lacunae praeter legem*” or, simply, “issues not governed by the Convention”), must be distinguished from the matters governed by the Convention but which are not expressly settled in it (which have been referred to as “internal gaps” or “*lacunae intra legem*”). This distinction is necessary since different types of gaps are dealt with differently. Whereas the “external gaps” are to be filled by resorting to the “law applicable by virtue of the rules of private international law,” the internal gaps “are to be settled in conformity with the general principles on which the Convention is based.” Only where internal gaps cannot be settled in conformity with the general principles on which the Convention is based should recourse to the law applicable by virtue of rules of private international law be possible.

Franco Ferrari, *Burden of Proof Under the Convention*, PACE REV. OF CISG 1 (2000-2001) (citations omitted), available at <http://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html>.

¹⁸ Mather, *supra* note 4, at 155 (discussing filling interstitial Convention gaps and exclusions under Article 7(2)).

The "lex fori" doctrine is best suited for preliminary challenges to jurisdiction or *forum non conveniens*, rather than choice-of-law.¹⁹ The "lex foci conventionis," or simply the "lex foci," is a descriptive neologism meaning "the law of the place where CISG claims in contract and tort converge."²⁰ Applying this new paradigm, a choice-of-law methodology is proposed for concurrent contract and product liability claims. Where gaps, exclusions or conflicts arise, dispositive factors are offered to delimit the "core of the action."

II. Negligent Tort Liability under the CISG

The issue of applicability of the CISG to tort claims is by no means resolved. Academic debate centers on pre-emption versus non-pre-emption.²¹ In *Asante Tech., Inc. v. PMC-Sierra, Inc.*,²² the court also referred to the goals of uniformity and certainty underlying the CISG as sufficient grounds to pre-empt state contract causes of action:

¹⁹ For a critique of the application of the "lex fori" to conflicts in choice-of-law, see Fabrizio Marrella, *Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts*, 36 VAND. J. TRANSNAT'L L. 1137 (2003) (characterizing the judicial reflex to apply the law of the domestic forum as the "lex cognita" approach). See also Andreas F. Lowenfeld, *Editorial Comment: Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM J. INT'L L. 314 (1997). For a discussion of Canadian judicial approaches to recognition and enforcement of foreign judgments and the *forum non conveniens* doctrine, see Antonin I. Pribetic, "Strangers in a Strange Land": *Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario*, 13 J. TRANSNAT'L L. & POL'Y 347 (2004).

²⁰ Derived from a combination of the traditional conflicts of law terminology of "lex fori" (the "law of the forum") and "lex loci" (contractus or delicti commissi).

²¹ Albert Kritzer & Axel H. Baum, *Checklist on the Convention (Torts and Quasi-Contracts)*, in GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Albert Kritzer ed., 1994), at <http://cisgw3.law.pace.edu/cisg/biblio/kritzer2.html> (citing the two schools of thought on pre-emption under the Convention). Compare Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 407 (1991), at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky6.html> (who favours a home-ward trend) with JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 318 (2d ed., 1991) and FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 47 (1992), at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html> and Schlechtriem, *supra* note 13 (who favor varying degrees of universality).

²² *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001).

[t]he availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG. Allowing such avenues for potential liability would subject contracting parties to different states' laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid. As a consequence, parties to international contracts would be unable to predict the applicable law, and the fundamental purpose of the CISG would be undermined.²³

Article 4 of the CISG reads:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract, or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.²⁴

Article 5 of the CISG provides:

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.²⁵

²³ Schlechtriem, *supra* note 13, 473-74 (stating that the CISG does not preempt claims for "misrepresentation, fraud, betrayal and intentional harm to economic interests"). See Joseph Lookofsky, CISG Case Commentary on Preemption in Geneva Pharmaceuticals and Stawski (April 2004), at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky8.html>. See also *Caterpillar v. Usinor Industrieel*, 2005 WL 736550 (N.D. Ill. 2005), available at <http://cisgw3.law.pace.edu/cases/050330u1.html> (court declined to extend the preemptive force of the CISG to state law claims for promissory estoppel).

²⁴ CISG, *supra* note 9, art. 4.

²⁵ *Id.*, at art. 5. The only two cases published on the Pace University School of Law's CISG Database which mention article 5 are, [HG] [Commercial Court] Zurich, No. HG 920670, Apr. 26 1995 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426s1.html>; [OLG] [Provincial Court of Appeal] Düsseldorf No.17 U 73/93, 2 July 1993 (FR.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930702g1.html>. For leading scholarly commentaries on Article 5, see PETER SCHLECHTRIEM, UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/slechchtriem-05.html>; JACOB S. ZIEGEL, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (1981), available at <http://www.cisg.law.pace.edu/cisg/text/ziegel5.html>; WARREN KHOO, *Article 5*, in COMMENTARY ON THE INTERNATIONAL SALES LAW (1987) available at

For product liability issues excluded by Articles 4 or 5 of the CISG, Professor Mather identifies six policy goals for product liability under market theory as follows:

(1) providing compensatory damages to residents who are injured by defective products (the "narrow compensation" goal); (2) providing compensatory damages to nonresidents who are injured by defective products brought into the state (the "expansive compensation" goal); (3) imposing liability to discourage domestic sellers from selling defective products (the "narrow regulation" goal); (4) imposing liability to discourage foreign sellers from sending defective products into the state's stream of commerce (the "expansive regulation" goal); (5) protecting domestic sellers from excessive liability for product defects (the "narrow protection" goal); (6) protecting foreign sellers from excessive liability for product defects (the "expansive protection" goal).²⁶

Mather's argument that American courts should apply the law of the market state to substantive products liability issues excluded by Articles 4 or 5 of the CISG, for international sales contracts,²⁷ fits within Canadian and Australian jurisprudence supporting application of the *lex loci delicti* doctrine to multi-state torts.²⁸

With the inexorable expansion of business tort law categories, such as, negligent and fraudulent misrepresentation, interference with economic relations, breach of fiduciary duty and the duty of good faith, and directors' and officers' liability in tort, along with existing quasi-contractual claims (e. g. *quantum meruit*), restitution (unjust enrichment) and pure economic loss claims, non-privity or non-consensual liability of a contractual party appears to be developing into a judicial

bb5.html; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 71-76 (3d. ed. 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/ho5.html>; JOSEPH LOOKOFKY, *The 1980 United Nations Convention on Contracts for the International Sale of Goods* International-45-46, in 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS – CONTRACTS (Herbots and Blanpain eds.) (2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/loo5.html>; PILAR PERALES VISCASILAS, *EL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCANCIAS (CONVENCIÓN DE VIENA DE 1980)* (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/loo5.html>.

²⁶ Mather, *supra* note 4, at 189.

²⁷ *Id.* at 190-91.

²⁸ See discussion on Canadian Judicial Approach to Choice-of-Law in Tort, *infra* part IV.

fait accompli. Consequently, in many commonwealth jurisdictions, including Canada, the scope and applicability of the CISG will invariably come into conflict with extant choice-of-law issues.²⁹

Professor Gilead surmises that the combination of contract law and tort law, with different regimes for liability and remedies, "constitutes the best method for contending with non-consensual liability of contracting parties, with each branch supporting and supplementing the other."³⁰ He concludes that:

When both tort and contract apply, any potential conflict of inner rules can and should be solved by allowing the claimant to choose between them, or by conflict of law rules that determine which field is to prevail, or by better harmonization of tort and contract either through the existing inner flexibility of each field or through legislative reform.³¹

However, without the benefit of international or domestic conflict of laws rules for CISG-related concurrent claims in contract and negligent tort, and with legislative reform far away on the horizon, domestic and foreign litigants still face the prospect of uncertainty, unpredictability and increased transactional costs.

²⁹ As gaps exist within the CISG, this in turn brings into question which law applies as a gap-filler. Some of the gaps in the CISG include the following: pre-and post-judgment interest rate; trade terms; validity of penal clauses; burden of proof; transfer and/or retention of title; agency relationships; forum selection clauses; limitation periods/prescription; currency of payment; assumption of debt; set-off; legal capacity of individuals; legal personality of corporations; assignment of receivables; validity and enforceability of settlements. See, Franco Ferrari, *Assumption of Debts as a Subject Matter Excluded from the UN Sales Convention (Commentary on OGH, April 24, 1997)*, at <http://www.cisg.law.pace.edu/cisg/biblio/ferrar.html>. See also, Tom McNamara, *Graduating from Obscurity: the U.N. International Sale of Goods Convention*, at 12-13, paper presented at Second Annual Florida Bar, International Litigation Update Conference, International Law Section, Florida Bar Association, June 24, 2004, Boca Raton, Florida, available at <http://www.dgslaw.com/articles/565324.pdf>.

³⁰ Israel Gilead, *Non-Consensual Liability of a Contractual Party: Contract, Negligence, Both, or In-Between?*, 3 THEORETICAL INQUIRIES IN LAW 2, 511-44 (2002).

³¹ *Id.* at 533-34.

III. Choice-of-Law for CISG based Contractual Claims – The Lex Loci Contractus

In the absence of an *ex ante* agreement on choice-of-law, Canadian courts generally apply the *lex loci contractus*.³²

Article 7 of the CISG reads:

(1) In the interpretation of this Convention, regard is to be had to its *international character* and to the need to promote *uniformity* in its application and the observance of *good faith* in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.³³

The three main principles underlying Article 7(1) of the CISG are its "international character," "uniformity" and "good faith." Gap filling is dealt with under Article 7(2), which, although not expressly addressed, is based upon the premise that courts should first apply the CISG's general principles and policies and, if a gap exists, then resort should be made to the principles of "private international law."³⁴ Professor Hillman has identified four main policies underlying the rules of the CISG: (1) freedom of contract; (2) co-operation and reasonableness; (3) suc-

³² In *Canada (Attorney General) v. Nalleweg*, [1998] 165 D.L.R. (4th) 606, 612-13 (Alta. C.A.), Clark, J.A. held that:

[I]t is proper that any disputes arising out of that contract be governed by the *lex loci contractus*. The proper law of the contract is the system of law which has the closest and most real connection to the contract: See *Kenton Natural Resources v. Burkinshaw* (1983), 47 A.R. 321 at 329 (Q.B.); *243930 Alberta Ltd. v. Wickham* (1990), 73 D.L.R. (4th) 474 (Ont. C.A.); J.G. CASTEL & JANET WALKER, *CANADIAN CONFLICT OF LAWS* 559 (3d ed., 1994).

For a discussion of choice-of-law in contract, see DEAN EDGELL, *PRODUCT LIABILITY LAW IN CANADA* 276-77 (2000). For a discussion of choice of forum and exclusive jurisdiction clauses, and related discussion on choice-of-law in contract, see Pribetic, *supra* note 19, at 348-51, 359-60.

³³ CISG, *supra* note 9 (emphasis added).

³⁴ *Id.*, art. 7(2).

cessful completion of exchanges and (4) compensating injured parties for breach.³⁵

Since the CISG is an international Convention which has been adopted into the Canadian federation generally, and within each of Canada's constituent provinces, it is self-evident that the foregoing principles and policies must inform any judicial analysis of choice-of-law for concurrent contractual and product liability claims governed by the CISG brought within the domestic forum.³⁶

In Castel and Walker, Canadian Conflict of Laws, 6th ed., Professor Walker notes:

If the parties have not expressed their choice, they may, nevertheless, have demonstrated it with reasonable certainty in a number of different ways ... [i]f the parties have agreed that the court of a particular place shall have jurisdiction over the contract, there is a strong inference that the law of that place is the proper law. Other factors from which the court have been prepared to infer the intentions of the parties as to the proper law are the *legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, the connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government* ... Where the parties have not expressed a choice as to the proper law and no such choice

³⁵ Robert A. Hillman, *Cross-reference and Editorial Analysis of Convention Article 7*, at <http://cisgw3.law.pace.edu/cisg/text/hillman.html>, 1-10 (emphasis added, citations omitted). Peter J. Mazzacano comments:

Hopefully, guidance will be given to lower courts to utilize the interpretive methodology embodied within the CISG. Regard must be had to its international character and the need to promote uniformity in its application at the international level. This dictates that the CISG be interpreted by courts in an autonomous manner, and not through the lens of domestic law. However, as the *Brown & Root* case illustrates, this is where errors most often seem to arise. To echo the words of Ziegel, unless legal practitioners develop a better understanding of this autonomous interpretive methodology—or unless the Supreme Court puts them straight—the future of the Convention in Canadian law will continue to languish.

Peter J. Mazzacano, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada*, PACE REV. OF THE CISG (2004-2005).

³⁶ International Sale of Goods Contracts Convention Act, S.C., ch. 13(1991) (Can.), an Act to implement the United Nations Convention on Contracts for the International Sale of Goods [Assented to 1st February, 1991], available at <http://www.cisg.ca>.

can be inferred from the circumstances of the case, the proper law of their contract is the system of law with which the transaction has the *closest and most real connection*. The court does not seek to find some presumed or fictitious intention of the parties, but rather holds the contract to be governed by the system of law with which, in all the circumstances it is most closely and really connected. Whilst firm rules cannot be laid down, the court will look to such factors as the *place of contracting, the place of performance, the place of residence, or business of the parties, and the nature and subject matter of the contract*. When the place of contracting is the same as the place of performance, the court may find it difficult to determinate that any other law is the proper law of the contract.³⁷

While a non-Convention case, the reasoning of Cummings, J. in *ABB Power Generation Inc. v. CSX Transp.*,³⁸ is instructive of how a preliminary challenge of *forum non conveniens* may inform the "*lex foci*" approach proposed herein.

ABB Power involved an application by a defendant for a stay of proceedings on the ground of *forum non conveniens*. The plaintiff, ABB Power, was an American corporation that manufactured and sold industrial products. Asea Brown Boveri Inc. (ABB Inc.), a Canadian corporation, was an affiliate of ABB Power. ABB Power manufactured a gas turbine for ABB Inc. for installation at a power plant in Windsor, Ontario. The moving party, co-defendant, CSX Transportation, was a U.S. railway carrier. ABB Power contracted with the defendant to transport the turbine to Windsor. A limitation of liability clause was contained in the transportation terms. The bill of lading provided that there was to be no "humping,"³⁹ since that could damage the turbine. ABB Power alleged that the rail car was humped, probably in Ohio, which resulted in damages to the turbine. A majority of the witnesses resided in the U.S., the majority of evidence was in the U.S. where the contract was negotiated and the investigation of the loss claim was made in the U.S. The governing law was American.

³⁷ J.G. CASTEL & JANET WALKER, *CANADIAN CONFLICT OF LAWS* 31-5 – 31-6 (6th ed., 2005) (emphasis added, citations omitted). See also *Bank Van Parijs en de Nederlanden Belgie N.V. v. Cabri* [1993] O.J. No. 1786 per O'Connor J., paras. 5, 8.

³⁸ *ABB Power Generation Inc. v. CSX Transp.*, [1996] O.J. No. 952, 47 C.P.C. (3d) 381.

³⁹ "Humping" is a railway term to describe the positioning of rail cars within a given grouping. This involves a built up area of ground, or hump, with track leading up the hump and down the other side. An engine up the track pushes the rail car on one side of the hump and then gravity causes the car to move down the track on the other side. Several alternative tracks are available at the bottom of the hump. Switching determines which track the car will exit upon at the bottom of the hump and, hence, to which particular train the rail car will be coupled. *Id.* at para. 7.

Justice Cumming granted the defendant's motion and held:

Where the contract and alleged tort involved are governed by the laws of another country, where there are relatively few witnesses from Ontario, where Ontario has the least connection with the principal facts in dispute giving rise to the claim, where the geographical factors suggest any one of three American states as a natural forum (as compared to Ontario), and where the plaintiffs have not established any loss of a juridical advantage by not having their jurisdiction of choice, then Ontario is not the convenient forum. The existence of a more appropriate forum than Ontario has been established clearly.⁴⁰

Professor Lookofsky notes that in *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*,⁴¹ the U.S. Federal District Court distinguished between intentional and negligent torts, "whereas B's negligence-based (domestic law) claims were held preempted by the Convention, B's "business tort" claims for tortuous [sic] interference with contract and business relations were not."⁴²

The doctrine of pre-emption is attractive, insofar as it simplifies choice-of-law rules in concurrent contract and product liability claims under the CISG. Moreover, the reasonable expectation of the parties is irrelevant in a tort action, since no contracting party would "reasonably expect" to injure another. Finally, contractual privity is required under the CISG, which excludes third party claims for property damage, not directly arising from the contract, albeit arising from the contractual relationship in some variation or context.

However, based upon the Supreme Court of Canada's *imprimatur* of concurrent liability in contract and tort, coupled with the extra-territorial reach of Canadian courts in recent product liability class actions,⁴³ it is unlikely that Canadian

⁴⁰ *Id.*

⁴¹ See *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 285-86 (2d Cir. 2002), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>.

⁴² Joseph Lookofsky, *CISG Case Commentary on Preemption in Geneva Pharmaceuticals and Stawski* (Apr. 2004), available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky8.html>.

⁴³ Class action claims relating to pharmaceutical products have been certified in Ontario and British Columbia. See *Wilson v. Servier* [2000] 50 O.R.(3d) 219, *rehearing denied* [2000] 52 O.R.(3d) 20 (Ont. SCJ.) (diet drugs); *Tesluk v. Boots Pharmaceutical PLC* [2002] O.J. No. 1361 (S.C.J.), *sub nom.* *Sutherland v. Boots Pharm. PLC* (approval of a settlement agreement in a misrepresentation action in the marketing and sale of *Synthroid*); *Bouchanskaia v. Bayer Inc.* [2003] B.C.J. No. 1969 (B.C.S.C.) (cholesterol-redu-

courts will be inclined to follow either the French doctrine of "*cumul non cumul*"⁴⁴ or the German doctrine of "*Anspruchskonkurrenz*" for outright exclusion or preemption of product liability claims, whether included or excluded by Articles 4 or 5 of the CISG.

Professor Schlechtriem, in his article, *The Borderland of Tort and Contract—Opening a New Frontier*, suggests the following choice-of-law compromise:

There remains the rather technical question of how the necessary adjustments of domestic tort law to the contractual interests and respective CISG remedies could be achieved. Should the priority of CISG remedies as under the French rule of *non-cumul* lead to inapplicability of tort rules altogether, where CISG governs matters exclusively? *It has already been mentioned that an overall exclusion of tort remedies among contractual partners would overshoot the mark. But even a limited exclusion seems to be unnecessary. If a domestic tort law protects the expectations of a buyer with regard to the quality of goods and thereby concurs with matters genuinely governed by CISG, it is sufficient to adjust the "concurring" tort action to the rules of CISG. It could not be maintained, if the notice requirement was neglected, and it could not extend to damages beyond the contemplation of the parties or include punitive damages (unless there is an intentional violation under aggravated "tortuous" circumstances). However, the injured parties could still sue in tort in a forum having jurisdiction only for tort actions, for jurisdiction and venue are not matters governed exclusively by CISG.*⁴⁵

cing agent *Baycol*); *Olsen v. Behr Process Corp.* [2003] 17 B.C.L.R. 1252 (B.C.S.C.) (product liability claim for defective wood stain products resulting in mildew). In *Wilson v. Servier*, the court refused to give effect to a French "blocking statute," which granted the French courts exclusive jurisdiction over claims involving French corporations.

⁴⁴ This may also explain why courts in the province of Québec, (a civil law system) apply "dépéçage" – the conflict of laws rule that the laws of different states may be applied to different issues – while courts in the Canadian common-law provinces do not.

⁴⁵ Schlechtriem, *supra* note 13, at 475. See also, SONJA A. KRUISINGA, (NON-) CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 187-213 (2004).

IV. Choice-of-Law for Product Liability Claims – The Lex Loci Delicti Commissi

Product Liability from a Canadian perspective

In Canada, product liability law remains governed by the common law tort of negligence. In a product liability lawsuit, the plaintiff has the burden of proof in establishing that the defendant's product is defective, and that the defendant failed to meet the standard of reasonable care in preventing the defect. Accordingly, there are three sources of product liability – contract, statute and negligent tort.

Contractual Obligations

The first source of liability is the contract by which the product is sold. If that agreement promises that the equipment will perform certain functions and it does not, then the manufacturer can be held liable for damages. However, only a person who is a party to that agreement can make a claim under a contract. When a product causes personal injuries, it is unlikely that the victims are parties to the original sale agreement and could claim it was breached.

Statutory Obligations

The second source of liability is statute. In Ontario there are several implied warranties under the *Sale of Goods Act*.⁴⁶ Sections 15 and 16 of the *Ontario Sale of Goods Act* provide:

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show

⁴⁶ Sale of Goods Act, R.S.O., ch. S. 1, §§ 15(1), 15(2) (1990)(Ontario, Can.), available at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s01_e.htm. Under section 9(3) of the new Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A (2002) (Ontario, Can.): "Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void." See *infra*, note 52.

that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.⁴⁷

Sale by sample

16. (1) A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied, to that effect.

Implied conditions

(2) In the case of a contract for sale by sample, there is an implied condition,

- (a) that the bulk will correspond with the sample in quality;
- (b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) that the goods will be free from any defect rendering them unmerchantable that would not be apparent on reasonable examination of the sample.⁴⁸

In particular, Section 15 of the *Ontario Sale of Goods Act* provides implied warranties that goods will be fit for a particular purpose and that goods bought by description would be of a "merchantable quality." If these warranties are breached, then damages arise under Section 51 (2) and 51 (3) of the *Ontario Sale of Goods Act*, however, parties can agree to exclude these warranties under Section 53. According to the Supreme Court of Canada in *Hunter Eng'g Co. v. Syncrude Canada Ltd.* to exclude these warranties the language used must be clear and

⁴⁷ Sale of Goods Act § 15.

⁴⁸ Sale of Goods Act § 16.

direct.⁴⁹ Article 35 of the CISG also imposes implied conditions of quality, similar to those contained in Sections 15 and 16 of the *Ontario Sale of Goods Act*.⁵⁰

Article 35 of the CISG reads:

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
 - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
 - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

- (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.⁵¹

Lack of conformity with the implied conditions of quality under either the provincial sale of goods regime or the CISG establishes liability, however, which legislative instrument governs will be dictated by the contract or choice-of-law rules. There may be other statutes that will apply to certain products.⁵² For any

⁴⁹ See *Hunter Eng'g Co. v. Syncrude Canada Ltd.*, [1989] S.C.R. 426, 430.

⁵⁰ See CISG, *supra* note 9, art. 35. Cf. *Sale of Goods Act*, §§ 15-16.

⁵¹ CISG, *supra* note 9, art. 35. For an analysis, see, René Franz Henschel, *The Conformity of Goods in International Sales an Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods* (2004), at <http://www.cisg.law.pace.edu/cisg/biblio/henschel.html#fh>. See also PETER SCHLECHTRIEM & INGEBORG SCHWENZER, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 410-433 (2d ed, 2005).

⁵² The new Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A (2002)(Ontario, Can.) ["CPA 2002"] came into force in Ontario on July 30, 2005. The CPA 2002 repeals, *inter alia*, the existing Consumer Protection Act, the Business Practices Act and Motor Vehicle Repair Act, consolidating them into one consumer protection statute. It also

other statutory obligations, it is important to bear in mind that if a manufacturer fails to comply, that does not create grounds for a legal action. On the other hand, compliance with statutory requirements does not reduce the liability of a manufacturer. A manufacturer could still be liable for causing personal injuries even if it has complied with the appropriate statute.⁵³

Negligent Tort Liability

The third and most important source of liability for a manufacturer is under tort law. In Canada, tort liability was established by the British House of Lords decision in *Donoghue v. Stevenson*.⁵⁴ In that case, a consumer found a decomposing snail at the bottom of a bottle of ginger beer and sued the manufacturer.⁵⁵ Lord Atkin, held that:

a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.⁵⁶

In a product liability case, a person claiming breach of this duty must prove, on the balance of probabilities that first, a defect in the defendant's product caused

extends the definition of "goods" to "any type of property" ("marchandises"). Further the CPA 2002 defines the "consumer" to mean, "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes" ("consommateur"). Cf. Article 2 of the CISG, *infra*. All Canadian Provinces have sale of goods legislation. In Ontario, see *supra*, note 46 ("goods" means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale; ("objets")). In Québec, see Book Five of the Civil Code of Québec. Certain Provinces have also enacted comparable extensive consumer warranty legislation. See, e. g., New Brunswick's Consumer Product Warranty and Liability Act, S.N.B., ch. C-18.1 (1978); Saskatchewan's Consumer Protection Act, S.S., Part III ch. C-30.1.

⁵³ S.M. WADDAMS, *PRODUCTS LIABILITY* 119, 123 (3d. ed. 1993).

⁵⁴ *Donoghue v. Stevenson*, [1932] ALL E.R. Rep. 1 [1932] A.C. 562 (H.L.).(cited to ALL E.R.) per Lord Atkin, Lord Thankerton and Lord MacMillan concurring (Lord Buckmaster and Lord Tomlin dissenting).

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 20.

injury to that person and second, that defect was caused by the defendant's negligence.⁵⁷ There is no concept of strict liability in Canada as there is in the United States.⁵⁸ Negligence must be proven although the courts will often infer negligence when an accident occurs which would not normally have happened "but for" the negligence.⁵⁹ However, the defendant can rebut that inference. Some common defences are that there has been some intervening event which has caused the injury or that the plaintiff voluntarily assumed the risk of injury or improperly used the product.⁶⁰

A claim that a manufacturer has been negligent is usually based on one of the following three grounds: defective design; manufacturing defects; or the manufacturer's failure to warn about dangerous products.⁶¹

Manufacturing defects

Manufacturing defects occur when a product is not made to its specifications.⁶² For example, a defect may include: faulty assembly; missing parts; or foreign elements. When such a defect arises it strongly infers that the manufacturer was negligent, because the manufacturer controls the manufacturing process.⁶³ According to the Supreme Court of Canada's decision in *Lambert v. Lastoplex Chemicals Co.*, through control of its manufacturing process, the manufacturer has a duty to ensure "that there are no defects in manufacture that are likely to give rise to injury in the ordinary course of (the product's) use".⁶⁴

⁵⁷ 3 KLAR & RAINALDI, REMEDIES IN TORT, ch. 20, § 8, (1987). States the elements of a cause of action in product liability are:

(i) the defendant owed a legal duty of care to the plaintiff in respect of the product; (ii) the product was defective; (iii) the defendant was negligent in failing to meet the requisite standard of care; (iv) the defect caused the plaintiffs injuries; and (v) the plaintiff suffered damage as a result of the defendant's negligence.

⁵⁸ *Id.* at § 55 "Canadian courts have been reluctant to impose on manufacturers a duty of care which, in effect, amounts to strict liability." (and citations therein).

⁵⁹ LEWIS N. KLAR, TORT LAW 388-89 (3d ed. 2003); *Snell v. Farrell*, [1990] 2 S.C.R. 311, 319-320 (S.C.C.) per Sopinka, J.

⁶⁰ KLAR & RAINALDI, *supra* note 57, at §§ 71-75.

⁶¹ See Denis W. Boivin, *Strict Products Liability Revisited*, 33 OSGOODE HALL L.J. 487, 504-18 (1996).

⁶² *Id.* at 510.

⁶³ C.S. Ritchie, QC, *Products Liability Litigation: A checklist of key considerations*, presented at a seminar "Perilous Products, Products Liability Litigation" 5 (The Law Society of Upper Canada, Department of Continuing Legal Education, 1994).

⁶⁴ *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569, 574.

Negligent design

The manufacturer also has a duty *not* to manufacture products which it knows or ought to know have inherent defects in their design.⁶⁵ Defective design occurs when a product is built to its specifications but the specifications are faulty.⁶⁶ It is often more difficult to prove than a manufacturing defect.

To allege a breach of this duty, the plaintiff must prove first, that there was a design defect and second, that the manufacturer knew, or ought to have known, about that defect.⁶⁷

A design defect is determined by Canadian courts using one of two tests. The first test is called the "Consumer Expectation Test." This test asks what a reasonable consumer would have expected in the design of the product.⁶⁸ The second test is called the "Risk Utility Test," which requires the plaintiff to show that the design presented an excessive risk given the feasibility and costs of potential alternatives.⁶⁹

In *Ragoonanan v. Imperial Tobacco Canada Ltd.*, Cumming, J. notes:

Canadian courts have also applied the risk-utility test: *Rentway Canada Ltd./Ltée v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150 at p. 164, 16 M.V.R. (2d) 86 (Ont. H.C.J.), *affd* [1994] O.J. No. 50 (C.A.); *McEvoy v. Ford Motor Co.*, [1989] B.C.J. No. 1639 (S.C.). In *Rentway v. Laidlaw*, *supra*, at p. 164, Granger J. compiled a list of factors similar to that in *Sacks v. Phillip Morris*, *supra*, which may be considered when "balancing the risks inherent in the product, as designed, against its utility and cost" (citing *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 at p. 208 (N.Y.C.A.):

⁶⁵ *Id.* at 574-75.

⁶⁶ Boivin, *Strict Products Liability Revisited*, *supra* note 61, at 507, 510.

⁶⁷ *Nicholson v. John Deere Ltd.* [1989] 58 O.R.2d 53, *rev'd on other grounds* [1989], 68 O.R.2d 19.

⁶⁸ *Cf.* RESTATEMENT (THIRD) OF TORTS § 2(b)(1998) which eliminates the "consumer expectations test" as an independent governing standard in determining whether a product is defectively designed:

A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design ... and the omission of the alternative design renders the product not reasonably safe.

⁶⁹ *Ritchie*, *supra* note 63, at A-6 – A-7, and Boivin, *Strict Products Liability Revisited*, *supra* note 61, at 510-12.

- (1) the utility of the product to the public as a whole and to the individual user;
- (2) the nature of the product – that is, the likelihood that it will cause injury;
- (3) the availability of a safer design;
- (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced;
- (5) the ability of the plaintiff to have avoided injury by careful use of the product;
- (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and
- (7) the manufacturer's ability to spread any costs related to improving the safety of the design.⁷⁰

Meeting either test usually requires expert evidence about the design of products and proof of alternative designs. The question of whether a design is defective is usually determined at the time that the product is manufactured, or in some cases, when it is distributed.⁷¹

It is important to add that compliance with industry standards is no defence for a manufacturer.⁷² A manufacturer will be held liable if it does not adopt a safe design which is readily available, even if that design is different than industry standard.⁷³

Duty to warn

Whenever a manufacturer discovers dangers in a product it has sold, it has a duty to warn the customers who purchased the product of those dangers. The warnings must be reasonably communicated and clearly describe the specific dangers.⁷⁴ They must be given whenever dangers are discovered whether at the time of sale or afterwards. This duty is greater when there is greater possibility of harm. It is especially important in products that are either inherently dangerous or manifestly dangerous when used.⁷⁵

⁷⁰ *Ragoonanan v. Imperial Tobacco Canada Ltd.* [2000] 51 O.R.3d 603.

⁷¹ See *Kreutner v. Waterloo Oxford Coop. Inc.*, [2000] 50 O.R.3d 140, *infra* note 134.

⁷² See A.M. LINDEN, *CANADIAN TORT LAW*, 105-15 (4th ed., 1988).

⁷³ In *Nicholson v. John Deere Ltd.*, [1986] 58 O.R.2d 53, 60, Smith J. stated:

A manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm. No amount of or degree of specificity of warning will exonerate him from liability if he does.

⁷⁴ *Rivtow Marine Ltd. v. Washington Iron Works* [1974] S.C.R. 1189, 1200 (S.C.C.).

For tort liability of the non-privity manufacturer of a defective product, Professor Feldthusen remarks that "the courts in the United States have recognized at least three avenues of recovery outside of statutory sales law – negligence, strict tort, and implied warranty – whereas only negligence is available in the Commonwealth."⁷⁶ The learned author concludes:

Perhaps the most interesting conclusion that emerges is that it matters little, if at all, which of the three basis positions the courts choose: the exclusionary rule; the imminent risk rule; or the full liability rule. This is because someone in the chain of distribution or construction will be liable for the product defence economic loss already, either by contract or statute. On balance, the case for permitting the direct suit is weak. There are many statutory remedies available to the user; direct tort liability is unlikely to increase deterrence a great deal or otherwise affect the ultimate allocation of the loss; compulsory loss spreading through the manufacturer is difficult and not necessarily desirable; and the convenience of the direct suit has offsetting complications. By the same token, if a satisfactory scheme can be devised whereby disclaimers and other relevant clauses in all contracts within the chain of sale can be taken into account in the direct suit, no great harm will come of it. Probably the strongest objection to the direct negligent suit is that it unnecessarily complicates product defect law by introducing issues of "imminent danger" or nebulous definitions of "defective." The most significant impact of allowing a claim in negligence is to provide the plaintiff with a solvent defendant if the party primarily liable by statute or contract is unavailable. To move in this direction requires the court to decide effectively that the legislative scheme is inadequate, something that many courts are reluctant to do for substantive and constitutional reasons.⁷⁷

⁷⁵ See *Bow Valley Husky v. Saint John Shipbuilding* [1997] S.C.R. 1210, 153 D.L.R. (4th) 385 (S.C.C.) (regarding the use of warranty, contracting out, or limitation of liability waiver clauses to negate a duty to warn consumers of potential risks in using a dangerous product). Edgell, *supra* note 32, at 149-55. A manufacturer's duty to warn consumers arises only where there is a danger it knows, or ought to know, is inherent in the product's use: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, 129.

⁷⁶ Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* 173 (3d ed., 1994).

⁷⁷ *Id.* at 205.

Canadian Judicial Approach to Choice-of-Law in Tort

In *Moran v. Pyle*, the Supreme Court of Canada formulated a modern approach to product liability that focused on fairness:

[T]he following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. *This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered.* By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.⁷⁸

Clearly, Justice Dickson's reasoning demonstrated a "narrow protection" market state approach to interprovincial product liability, subsequently enshrined in provincial consumer protection legislation.

In *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, the Supreme Court of Canada articulated the policy considerations of certainty, ease of application, predictability and meeting normal expectations in holding that the *lex loci delicti* should be prevailing choice-of-law in tort:

I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of *certainty, ease of application and predictability*. Moreover, it would seem to meet *normal expectations*. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the

⁷⁸ *Moran v. Pyle Nat'l (Canada) Ltd.*, [1975] S.C.R. 393, 409-10 (emphasis added).

place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.⁷⁹

In *Hunt v. T & N plc*, Justice La Forest stated that the assessment of the "reasonableness" of a foreign court's assumption of jurisdiction was not a mechanical accounting of connections between a case and a territory, but a decision "guided by the requirements of order and fairness."⁸⁰ Thus, a plaintiff's decision to enter into an international sales transaction is at the core of the issue and unfairness to the defendant must be balanced in light of the precepts articulated by Justice La Forest in *Tolofson* wherein he states:

... it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. *While, no doubt, as was observed in Morguard, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.*⁸¹

In *Beals v. Saldanha*, the Supreme Court of Canada reinforced its earlier *obiter* comments in *Morguard Investments Ltd. v. De Savoye*:⁸²

⁷⁹ *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, 305-06 (La Forest, J.) (emphasis added).

⁸⁰ *Hunt v. T & N plc*, [1993] 109 D.L.R. (4th) 16, 42.

⁸¹ *Tolofson*, 120 D.L.R. (4th) 289, at 311 (La Forest, J.) (emphasis added).

⁸² *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1107-08:

The above rationale is not, as I see it, limited to torts. It is interesting to observe the close parallel in the reasoning in *Moran* with that adopted by this Court in dealing with jurisdiction for the purposes of the criminal law; see *Libman, supra*. In particular, barring express or implied agreement, the reasoning in *Moran* is obviously relevant to contracts; indeed, the same activity can often give rise to an action for breach of contract and one in negligence; see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. As Professor Sharpe observes [page1108] in *Interprovincial Product Liability Litigation*, *op. cit.*, at pp. 19-20: It is inconsistent to permit jurisdiction in tort claims on the basis that the defendant should reasonably have foreseen that his goods would reach the plaintiff and cause dam-

In *Moran*, [...] it was recognized that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced:

By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

*That reasoning is equally compelling with respect to foreign jurisdictions.*⁸³

The Supreme Court of Canada's majority rationale for applying the *Moran* approach to foreign jurisdictions, *a priori*, appears logically sound applying the preferred market-state theory,⁸⁴ over an interest analysis.⁸⁵

One argument is that the interposition of the CISG's principles of freedom of contract, uniformity and good faith with the Supreme Court of Canada's own observance of private international law principles of sovereignty, territoriality and comity,⁸⁶ points towards the application of the *lex loci delicti* for negligent tort claims.

In *Britton v. O'Callaghan*, Borins, J.A. of the Ontario Court of Appeal stated:

Although *Tolofson* was a case involving a domestic tort and the rigid choice of tort law rule that it established applies to domestic torts, it is clear that both trial and appellate courts have interpreted and applied *Tolofson* as also establishing the same choice of law rule in the case of foreign torts, the *lex loci delicti*, with the exception that in rare cases the court may exercise a discretion to choose the *lex fori* to prevent an injustice. The

age within the jurisdiction and, on the other hand, to refuse service out of the jurisdiction in contractual actions where the defendant clearly knows that his goods are going to the foreign jurisdiction.

⁸³ *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 435-36, [2003] 234 D.L.R. (4th) 1 (Major, J.) (cited to S.C.R.) (emphasis added).

⁸⁴ *Mather*, *supra* note 4, at 188.

⁸⁵ *Id.* at 175. (noting that the "interest analysis' approach to choice-of-law problems [proposed by Prof. Brainerd Currie] requires an attempt to discern governmental policy behind each state's legal rule and determine whether each state could reasonably assert an interest in having its own rule applied to the particular issue before the court ... usually results in the application of forum law.")

⁸⁶ *Tolofson*, 120 D.L.R. (4th), at 289.

motion judge was aware of his limited discretion and declined to exercise it. Although I would not endorse the motion judge's analysis in its entirety, I am of the opinion that he was correct to apply the choice of law rule mandated by Tolofson and to decline to exercise his discretion to declare that the substantive law of Ontario applied to the respondent's claim ...⁸⁷

In *Hanlan v. Sernesky*⁸⁸ the Ontario General Division held that it was entitled to depart from the requirement of applying the *lex loci* where the circumstances were such that "the operation of the *lex loci* rule would work an injustice."⁸⁹

Walker has proposed a choice-of-law rule for torts (including cross-border torts), emphasizing the social context in which a tort occurs as a general rule, with the geographical context as an exception:

1. Where the relationship between the parties makes it reasonable for liability and recovery to be governed by the standards of a particular legal system, those standards should apply to claims between them in tort.
2. Where no such relationship exists, the law of the place where the tort occurs should ordinarily apply.⁹⁰

Notwithstanding the reasonableness of the foregoing choice-of-law in tort approach, the *lex loci delicti* rule remains firmly entrenched in Canada.

Choice of Forum and Choice-of-Law Distinguished

In *Muscutt v. Courcelles*, the Ontario Court of Appeal identified eight relevant factors when applying the "real and substantial connection" test to the threshold issue of jurisdiction *simpliciter*.⁹¹

⁸⁷ *Britton v. O'Callaghan* [2002] 62 O.R.3d 95, 99, [2002] 219 D.L.R. (4th) 300, 305.

⁸⁸ *Hanlan v. Sernesky* [1997] 35 O.R.3d 603, *aff'd* [1998] 38 O.R.3d 479.

⁸⁹ *Hanlan*, 35 O.R.3d, at 610-11.

⁹⁰ Walker, *supra* note 5, at 358-59.

⁹¹ In *Lemmex v. Bernard* [2000] 51 O.R.3d 164, 172, Aitken, J. held:

[T]he question of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of jurisdiction *simpliciter* is different from that of *forum non conveniens*. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action.

- (1) [t]he connection between the forum and the plaintiff's claim;
- (2) [t]he connection between the forum and the defendant;
- (3) the [u]nfairness to the defendant in assuming jurisdiction;
- (4) the [u]nfairness to the plaintiff in not assuming jurisdiction;
- (5) [t]he involvement of other parties to the suit;
- (6) [t]he court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- (7) [w]hether the case is interprovincial or international in nature; and
- (8) [c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.⁹²

The "real and substantial connection" test factors (5) through (8) may all be conveniently categorized under the rubric of "private international law." On a motion to stay a proceeding on the basis of *forum non conveniens*, the test is whether there is clearly a more appropriate jurisdiction in which the case should be tried than the domestic forum chosen by the plaintiff.⁹³ As such, a certain degree of overlap exists between the "real and substantial connection" test and the *forum non conveniens* test when determining the most appropriate forum for the action.

In *SDI Simulation Group Inc. v. Chameleon Technologies Inc.*⁹⁴ Borins J. (as he then was) identified the pertinent connecting factors to be considered in determining the appropriate forum as follows:

- a) the location where the contract was signed;
- b) the applicable law of the contract;
- c) the location in which the majority of witnesses reside;
- d) the location of key witnesses;
- e) the location where the bulk of the evidence will come from;
- f) the jurisdiction in which the factual matter arose; and
- g) the residence or place of business of the parties.

⁹² *Muscutt v. Courcelles*, [2002] 60 O.R.3d 20, 35, 213 D.L.R. (4th) 577, 605-610 (*Muscutt* cited to D.L.R.); *see also* *Gajraj v. DeBernardo*, [2002] 213 D.L.R. (4th) 651; *Leufkens v. Alba Tours Int'l Inc.*, [2002] 213 D.L.R. (4th) 614; *Lemmex v. Sunflight Holidays Inc.*, [2002] 213 D.L.R. (4th) 627; *Sinclair v. Cracker Barrel Old Country Store Inc.*, [2002] 213 D.L.R. (4th) 643.

⁹³ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 921, 931; *Frymer v. Brettschneider*, [1994] 19 O.R.3d 60, 78, 84 (*Arbour J.A.*; *McKinlay J.A.* concurring); *E. Power Ltd. v. Azienda Comunale Energia & Ambiente*, [1999] 178 D.L.R. (4th) 409, 415 (*MacPherson J.A.*).

⁹⁴ *SDI Simulation Group Inc. v. Chameleon Tech. Inc.*, [1994] 34 C.P.C. (3d) 346 (Ont. Gen. Div.)

Similarly, in *ABB Power*,⁹⁵ Cummings, J. delimited the following connecting factors as:

- a) the governing law;
- b) the location in which the parties carry on business;
- c) the location in which the majority of the witnesses reside;
- d) the location from which the bulk of the evidence will come;
- e) the location of the core of the action (or where the principal facts in dispute are concentrated); and
- f) geographical factors suggesting a natural forum.⁹⁶

Both tests need to be contextualized in light of the overarching private international law principles of uniformity, harmonization of international rules, comity and reciprocity. On the issue of reciprocity, Justice Le Bel notes:

[T]he concept of reciprocity in the sense of equivalence of jurisdiction serve the purposes of private international law well. This idea fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. When a Canadian court takes jurisdiction over a foreign defendant, it need not inquire into the fairness of its own process, which can be taken for granted. Potential hardship to the defendant can be dealt with under *forum non conveniens*. The ultimate practical effect of the court's judgment will not be determined by its own decision to take jurisdiction, but by the decision of the courts in the defendant's home jurisdiction whether or not to recognize and enforce the Canadian judgment based on that jurisdiction's own domestic law and policy.⁹⁷

From a Canadian perspective, the application of choice-of-law rules vis-à-vis international product liability (negligent defect or manufacture) cases with a CISG component is a matter of constitutional and public importance, based upon the judicial recognition by Canadian courts for the principles of international comity and private international law. To date, Canadian jurisprudence, including landmark decisions from the Supreme Court of Canada, maintains a traditional resort to application of the *lex loci delicti* rule in international cases, premised upon public policy considerations of certainty, ease of application, predictability and meeting normal expectations extolled in *Tolofson*, which is thought to benefit both domestic and foreign litigants in Canada and abroad.

⁹⁵ *ABB Power Generation Inc.* [1996] O.J. No. 952, at para. 33.

⁹⁶ See also *E. Power Ltd. v. Azienda Comunale Energia & Ambiente*, [1999] 178 D.L.R. (4th) 409, 415, [1999] 39 C.P.C. (4th) 160.

⁹⁷ *Beals*, 3 S.C.R., at 501-02.

Additionally, in *Muscutt v. Courcelles*, Sharpe, J.A. of the Ontario Court of Appeal included as a factor whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.⁹⁸

Of the numerous overlapping factors promulgated by Canadian courts under the “real and substantial connection” test for jurisdiction *simpliciter*, and the *forum non conveniens* doctrine, the “location of the core of the action (or where the principal facts in dispute are concentrated)” is a reasonable theoretical basis for determining the *lex loci* for three reasons.

First, there is usually no contractual nexus between the foreign, non-privity manufacturer on the one hand, and either the plaintiff or defendant, on the other. The essential elements of the transaction are likely unknown to the foreign manufacturer (i.e. the buyer’s identity, the place where the product ultimately will be used, shipping and intermediate inspection issues, etc.). Moreover, the plaintiff purchases the product directly from the foreign manufacturer, and then the nature of the relationship is primarily negligence-based rather than contractual, based upon principles of reasonable foreseeability and imminent danger. In these cases, the *lex loci delicti* should apply, unless the parties have incorporated any express or implied warranty exclusions or waiver clauses, limiting tortious liability.

Second, in jurisdictions that recognize concurrent liability in contract and tort, the litigants will incur lower transactional costs (i.e., legal and expert fees) when a clear set of choice-of-law rules for CISG-based international sales disputes are considered. An early determination of choice-of-law for the *lex loci*, will engender predictability, certainty, reduce transactional costs and potentially foster settlement opportunities, especially when both litigants are obliged to retain foreign legal experts to prove foreign law.⁹⁹

Finally, a peremptory ruling on choice-of-law through the domestic court’s scrutiny of the particulars of the plaintiff’s concurrent claim, may well serve as a judicial filter for contractual claims which have been “dressed up” as product liability claims to avoid lack of notice of defect under Article 39, or attempts at circumventing a shorter or prescribed limitation period in the foreign jurisdiction (i.e., the *lex loci delicti*).¹⁰⁰

⁹⁸ *Muscutt*, *supra* note 92, at 593.

⁹⁹ In Canada, judicial notice is not taken of foreign law, and evidence rules require experts to be qualified by the court to be permitted to prove the law of a foreign jurisdiction. See JOHN SOPINKA & SIDNEY N. LEDERMAN, *THE LAW OF EVIDENCE IN CIVIL CASES*, 311-12 (1974).

The Ontario Court of Appeal clarified the purpose and scope of the *lex loci delicti* rule in both *Wong v. Lee*¹⁰¹ and *Somers v. Fournier*.¹⁰² In *Wong v. Lee*, Feldman, J.A. writing for the majority, stated:

It is not mere differences in public policy that can ground the exception to the general rule of *lex loci delicti*; the exception is only available in circumstances where the application of the general rule would give rise to an injustice. Every difference in the laws of the two forums is going to benefit one side or the other and be perceived as unjust to the one not benefiting. Because La Forest J. [in *Tolofson*] anticipated the exercise of discretion being necessary only in a very unusual case, an injustice that would require a court to exercise the discretion must be something beyond ordinary differences between the laws of the forums. La Forest J. did not articulate the criteria he envisaged for any particular circumstance to qualify as an injustice. However, as an example, the type of injustice the court sought to remedy in *Hanlan* was the unavailability to an Ontario plaintiff of a complete category of claim or cause of action according to the *lex fori* – the claims of family members for damages pursuant to s. 61 of the Family Law Act.¹⁰³

In *Somers v. Fournier*, Justice Cronk, summarizes the guiding principles as follows:

Tolofson was a domestic litigation case arising from a motor vehicle accident in Saskatchewan. If the *lex loci delicti* applied, a limitation period applicable under Saskatchewan law would bar any claims by the infant plaintiff and by gratuitous passengers, whereas the applicable limitation period under the law of the forum (British Columbia) would not have that effect. The Supreme Court of Canada unanimously concluded that the law of Saskatchewan should apply, notwithstanding the expiry of the limitation period provided under Saskatchewan's law

Based on *Tolofson*, a majority of this court concluded that such a consequence was not an injustice that allowed for recognition of an exception to the *lex loci delicti* rule. Rather, the defendant's increased liability exposure was the necessary effect of applying the *lex loci delicti* rule:

¹⁰⁰ Cf. EDGELL, *supra* note 32, at 279 wherein the author notes, "The issue of choice of law, unlike jurisdiction, is not one that need be decided early in a law suit." (and cases cited therein).

¹⁰¹ *Wong v. Lee*, [2002] 58 O.R.3d 398, 211 D.L.R. (4th) 69.

¹⁰² *Somers v. Fournier*, [2002] 60 O.R.3d 225, [2002] 214 D.L.R. (4th) 611.

¹⁰³ *Wong*, 58 O.R.3d, at 405 (cited by Cronk, J.A. in *Somers v. Fournier*, at 237-8.)

[T]his articulation of the injustice appears to be merely another way of applying the public policy of Ontario as defined in its law, and effectively treating the fact that all of the parties are from the forum as in itself creating an injustice (at para. 17, per Feldman J.A.).¹⁰⁴

Therefore, Justice Cronk, concluded that the *lex loci delicti* rule applied in international litigation “notwithstanding a high degree of connection between the litigants and the place of the forum.”¹⁰⁵ It is noteworthy that in *Somers v. Fournier*, the defendants attorned to the jurisdiction of the Ontario Courts, such that there was no challenge in the action of Ontario as the proper forum, a distinguishing fact from “others in which this court had considered the question of whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damages sustained in Ontario as a result of a tort committed elsewhere.”¹⁰⁶

V. The Lex foci – Concurrent Contract and Negligent Tort (Product Liability) Claims

There is an inherent tension between first order principles of tort and contract liability (theories of causation) and second order principles (remedies). Damages are addressed in Articles 74-76 of the CISG which read:

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may

¹⁰⁴ Somers, 60 O.R.3d at 237-38.

¹⁰⁵ Somers, 60 O.R.3d at 238.

¹⁰⁶ Somers, 60 O.R.3d at 229.

recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Schlechtriem notes:

The assessment of the possible types of damages – which makes it possible to describe concretely the risk each party can be said to have assumed – will be especially difficult with respect to consequential damages caused by defective goods to the person or property of the buyer. In most domestic legal systems, such violations belong to the domain of non-contractual liability, including products liability for injuries caused by defective goods. Article 5 entirely removes personal injuries from the sphere of application of the Convention. But a broader formulation – which would have excluded product liability even for property damage – could not be agreed upon in Vienna. Therefore, in the event such damages were foreseeable to the seller, they can be awarded under CISG. In assessing this foreseeability, the usual or intended use by the buyer should be the decisive factor. Even in cases where there is contractual liability under the Convention, domestic provisions for liability in tort should not be displaced.¹⁰⁷

¹⁰⁷ PETER SCHLECHTRIEM, *Extent and Measure of Damages (Articles 74-76)*, in UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 96 (1986), at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-74.html>. Hans Stoll & Georg Gruber, (Art. 74-76) in PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE

Quoting the reasoning of Justice Le Dain in *Cent. Trust Co. v. Rafuse* best summarizes the Canadian judicial approach to concurrent liability in contract and tort:

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.¹⁰⁸

A defendant manufacturer's challenge to the plaintiff's choice of domestic forum on the grounds of jurisdiction *simpliciter* or *forum non conveniens*, is usually couched in terms of unfairness, injustice or "loss of juridical advantage."¹⁰⁹ While I have argued that the issues of choice of forum and choice-of-law should be considered contemporaneously, the Canadian judicial preference is to keep both issues conceptually distinct. As such, the application of the *lex loci contractus* as a general rule for CISG-based concurrent contract and negligent tort claims, with an injustice exception retained, is considered further below. Based upon the dictates of order and fairness, as the super-ordinate principle, order is best achieved by application of the *lex loci contractus* for CISG-based concurrent contract and negligent tort claims.

Dean F. Edgell suggests that in the case of concurrent contract and product liability claims, the court should resort to applying a "tort rule based upon the location of the 'defining activity that constitutes the wrong'."¹¹⁰ Professor Waddams supports allowing the plaintiff a choice of the "more favourable law"¹¹¹ based upon the *Moran* approach of "reasonable foreseeability of harm" caused by the defendant non-privity manufacturer's product, coupled with the jurisdiction "having a reasonably close connection with the cause of action."¹¹²

OF GOODS (CISG) 745 (2005). See also BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2005).

¹⁰⁸ *Cent. Trust Co. v. Rafuse* [1986] 2 S.C.R. 147, 206, [1986] 31 D.L.R. (4th) 481, 522 (Le Dain, J.).

¹⁰⁹ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 919-20, *infra*, note 93; *MacDonald v. Lasnier* [1994], 21 O.R.3d 177, 184-5; *Ferguson Bros. of St. Thomas v. Manyan Inc* [1999] 98 O.T.C. 265.

¹¹⁰ EDGELL, *supra* note 32, at 277.

¹¹¹ WADDAMS, *supra* note 53, at 161.

¹¹² *Id.*

If applied to inter-provincial product liability claims, both proposals are viable. Perhaps the nature of the product may be determinative, such that for products purchased for commercial purposes are markedly different from the types of personal goods normally contemplated in consumer protection legislation.¹¹³ More importantly, the types of goods covered under modern consumer protection legislation,¹¹⁴ or that are the subject-matter of class actions,¹¹⁵ derive from the product liability policy goals of compensation, regulation and protection (both narrow and expansive in scope). However, sales of such goods are expressly excluded under Article 2 of the CISG, which reads:

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.¹¹⁶

¹¹³ See *supra*, note 52.

¹¹⁴ The Federal Hazardous Products Act, R.S.C., ch. H-3, (1985)(Can.), and its related regulations provide for nationwide standards of safety for a wide variety of consumer products, ranging from child restraint systems for automobiles, to hockey helmets. The Food and Drugs Act, R.S.C., ch. F-27, (1985) (Can.) regulates the sale in Canada of food, drugs, cosmetics and medical devices. The Canadian Food Inspection Agency administers a number of statutes and regulations that are designed to ensure the safety of the food supply. Provincial governments may also administer extensive food inspection programs. The Federal Motor Vehicle Safety Act, R.S.C., ch. M-10, (1985) (Can.) requires automobile manufacturers to adhere to safety standards in manufacturing their products. The Federal Consumer Packaging and Labelling Act, R.S.C., ch. C-34, (1985) (Can) ensures that food packages properly identify products – in terms of quantity and ingredients – in both official languages.

¹¹⁵ Wilson, 50 O.R. (3d), at 219; Tesluk, O.J. No. 1361(S.C.J.); Bouchanskaia; Olsen v. Behr Process Corp., [2003] 17 B.C.L.R. 1252 (B.C.S.C.). The downside risk in a product liability class action is the spectre of substantial adverse costs awards if the plaintiffs are unsuccessful on the preliminary motion for certification. See *Gariepy v. Shell Oil Co.* [2002] O.J. No. 2766 (Ont. S.C.J.); *Pearson v. Inco Ltd.* [2002] O.J. No. 3532 (Ont. S.C.J.); *Bayer v. Chadha* [2003], 63 O.R.(3d) 22 (Ont. C.A.). Cf. *Caputo v. Imperial Tobacco Ltd.* [2005] O.J. No. 842 (Ont. S.C.J.) (no costs awarded).

¹¹⁶ CISG, *supra* note 9, at art 2.

Moreover, the *Moran* approach can easily result in a “slippery slope” argument against foreign manufacturers involved in Internet or web-based sales in cyberspace.¹¹⁷ Finally, complex international sales transactions may involve a large number of intermediaries, including, suppliers, distributors, franchisees and mercantile agents.

Although an international Convention on e-commerce or internet sales has been reached,¹¹⁸ it would be more internally consistent for product liability (property

¹¹⁷ Michael Whincop advocates an economic approach to choice of law for internet contracts:

... the place with the closest connection to the contract could only be known by considering where each party carries on business, the terms of the contract, the place of contracting, the place of performance, and so on. A repeated point made in this paper is that much of this information will be invisible in Internet contexts. The economic literature on contracts suggests a possible solution. This would involve supplementing choice of law rules with a proviso that if basic information required for the choice of law rule is not common knowledge between the parties, the plaintiff could invoke the law of his or her place of domicile. This would induce term offerors to specify that information or to offer explicit choice of law clauses. The rule functions as a tax on the party in the best position to fill a gap in the contract. (citations omitted).

Michael H. Whincop, in *CHOICE OF LAW, JURISDICTION AND THE INTERNET: A POLICY ANALYSIS*, (1999) NLR 10, § 52, (National Law Review) available at <http://www.lexisnexis.com.au/nlr/Articles/whincop/article.asp>. See also, The Uniform Electronic Commerce Act, which was adopted by the Uniform Law Conference of Canada on September 30, 1999, and recommended for implementation by governments in Canada; John D. Gregory, *The Proposed UNCITRAL Convention on Electronic Contracts*, 59 *BUS. LAW.* 313 (Nov. 2003), available at <http://www.yorku.ca/osgoode/cisg/writings/gregory.htm>; Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 *U. PA. L. REV.* (2005), available at <http://ssrn.com/abstract=691501>.

¹¹⁸ The United Nations Commission on International Trade Law (UNCITRAL) concluded its 38th session in Vienna Austria on July 15th, 2005 by adopting a *Draft Convention on the Use of Electronic Communications in International Contracting*, which will address issues of contract formation, jurisdiction and recognition and enforcement of contracts negotiated electronically.

According to the UNCITRAL web-site:

“The draft Convention will be submitted to the U.N. General Assembly for final adoption at its 60th annual session, which will begin at the Fall of 2005, in New York. The revised official text of the draft Convention, incorporating the changes agreed at the session, will be released as an annex to UNCITRAL’s report to the General Assembly (document A/60/17), which is currently being edited and translated. The final report is expected to be published in September 2005.” See <http://www.uncitral.org/uncitral/en/index.html>.

damage) claims to be preempted altogether, recognizing the "international character," "uniformity" and "good faith" principles of the CISG for choice-of-law in *lex foci* situations. If a foreign manufacturer is deemed to subject itself to *any* and every jurisdiction where its products ultimately are sold and used, then, it is respectfully submitted that the whole concept of international comity, jurisdiction *simpliciter* and principles of order and fairness mandated by the Supreme Court of Canada decisions in *Morguard*, *Hunt*, *Moran* and *Tolofson*, are rendered moot.

If Article 5 of the CISG contemplates product liability property damage claims, then the objective of "decisional harmony" between inter-provincial and international cases, and the goals of certainty, predictability and international comity, all favour the *lex loci contractus* over the *lex fori* for choice-of-law under the rubric of the CISG.

Alternatively, if the CISG applies and there is *ex ante* agreement on governing law or the *situs* of the contract, then a plaintiff's concurrent tort claim of negligent defect and manufacture should also be governed by the *lex loci contractus*, on the basis that Article 5 of the CISG expressly excludes *only* claims for death or personal injury caused by the defects in the goods sold, but *not* claims for damages to the product sold.¹¹⁹

The interpretation and application of Article 5 of the CISG to product liability damage claims in Canada has not yet been judicially considered in Canada, although one such Ontario case¹²⁰ dealt with concurrent claims in contract and product liability where the CISG applied in the context of a preliminary motion challenging jurisdiction. In that case, the motions judge left aside the "thorny issue"¹²¹ of choice-of-law, noting:

¹¹⁹ Academic support for the argument that Article 5 of the Convention extends to product liability damage claims can be found in Peter Schlechtriem, *Comments on Article 5*, in *UNIFORM SALES LAW – THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>. See also, Jacob S. Ziegel & Claude Samson, *July 1981 Report To The Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, available at <http://cisgw3.law.pace.edu/cisg/wais/db/articles/english2.html> (Last updated Feb. 19, 1999).

¹²⁰ *Shane v. JCB Belgium N.V.*, [2003] O.J. No. 4497 (unreported) (Smith, J.), available at <http://www.yorku.ca/osgoode/cisg/cases/shanejcb.htm>.

¹²¹ *Tolofson*, 120 D.L.R. (4th), at 307:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the

The contract is silent on the jurisdiction in which any claim for damages must be brought and is also silent on the applicable law. The contract is made in Belgium, but governed by the terms of the CISG. The law applicable to the tort is either Ontario, where the damages occurred, or in Staffordshire, England, where the design and manufacture took place. This factor is therefore neutral, but does not favour Belgium, as Ontario law may apply to the tort claim if the comments in the *Tolofson* decision are followed.¹²²

The CISG imposes a notice requirement under Articles 39(1) and 39(2) which foreign courts and international arbitrators have interpreted as requiring a high degree of specificity:¹²³

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.¹²⁴

The issue of whether the plaintiffs' claim for negligent defect and manufacture is subject to the CISG, and thus also subject to the notice requirements under Article 39(1) and (2) or domestic statutes of limitations, is pivotal to putative litigants involved in CISG-related litigation. The [Unamended] *Convention on the Limitation Period in the International Sale of Goods (New York, 1974)* [the "UN

law to be applied in torts is the law of the place where the activity occurred, i. e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case.

¹²² *Id.* at, para. 48 (Smith, J.).

¹²³ See also Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the Convention – Is Article 39(1) Truly a Uniform Provision?*, PACE REV. OF THE CISG 63 (1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/andersen.html>.

¹²⁴ CISG, *supra* note 9, at art. 39. See also *La San Giuseppe v. Forti Moulding Ltd.* [1999] O.J. No. 3352, paras. 28-31, 39 (Swinton J.).

Limitations Convention"), which has received accession from 18 countries, including the United States,¹²⁵ generally imposes a four-year limitation period.¹²⁶ However, most Commonwealth countries, including Canada, are not signatories to the *UN Limitations Convention*. Consequently, the issue of the applicability of domestic limitation or prescription periods remains nascent.¹²⁷ With the recent proclamation of the *Limitations Act, 2002* in Ontario, which generally applies a two-year limitation from the date on which the claim was discovered for most types of actions arising after December 31st, 2003,¹²⁸ perhaps judicial concern over injustice arising from prescription may be lessened.¹²⁹ Yet, the discoverability rule remains available to plaintiffs who have suffered damages as a result of a manufacturer's product liability.

It would appear that the two-year notice period under Article 39(2) is a substantive limitation defence, irrespective of the fact that the CISG does not contain a specific limitation period, *per se*.¹³⁰ Injustice does not include prescription or limitation expiry which is a substantive (rights-based), rather than procedural (re-

¹²⁵ Prof. Kazuaki Sono in his article, "The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility" notes:

At present, there are eighteen Contracting States to the Convention as amended by the Protocol (Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Paraguay, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, Uganda, United States, Uruguay, and Zambia). On the other hand, the number of Contracting States to the original 1974 Limitation Convention is twenty-five, i.e., eighteen above plus seven. Out of the latter seven States, four (Dominican Republic, Ghana, Norway, and Yugoslavia) are those which ratified or acceded to the Limitation Convention before the Protocol was adopted (and have not yet ratified the Protocol); two States (Ukraine and Burundi) ratified only the original Convention in 1993 and 1998 respectively, and Bosnia and Herzegovina declared succession of the original Convention in 1994, on the theory that former Yugoslavia was a Contracting State to the 1974 Convention. [citations omitted] available at <http://www.cisg.law.pace.edu/cisg/biblio/sono3.html>.

¹²⁶ See UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Status of Conventions and Model Laws, art. 8. available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html.

¹²⁷ See The text of the *UN Limitations Convention* as well as academic commentary is also available on the CISG database, Pace University School of Law, at <http://www.cisg.law.pace.edu/cisg/text/limitation.html>.

¹²⁸ *Limitations Act, 2002*, S.O. ch. 24, sched. B, § 4 (2002) (Can.).

¹²⁹ For a comprehensive review of the impact of the *Limitations Act, 2002* in Ontario, see ROSEMARY BOCSKA, *ONTARIO LIMITATION PERIODS* (2d ed., 2003).

¹³⁰ Section 23 of the *Limitations Act, 2002*, S.O. ch. 24, sched. B, § 23 (2002) (Can.), reads as follows:

medies-based), issue, and would otherwise lead to forum shopping or multiplicity of claims instituted in jurisdictions favourable to the putative plaintiff. Thus, the concept of injustice should be restricted to access to justice issues and policy-oriented or legislative initiatives adopted by the *lex fori*.

Forum shopping is also considered a negative by-product of unpredictability and uncertainty in choice-of-law rules, primarily due to increased litigation costs and overburdening of domestic and foreign courts.¹³¹ Resistant litigants will often resort to interlocutory tactics such as stay of proceedings motions based upon jurisdiction simpliciter or *forum non conveniens* doctrines, anti-suit injunctions, declaratory judgment actions or parallel proceedings.¹³²

The late Justice Sopinka, speaking for the unanimous Supreme Court of Canada, in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, suggested that the spectre of parallel proceedings and anti-suit injunctions did not loom very large:

It has been suggested that by reason of comity, anti-suit injunctions should either never be granted or severely restricted to those cases in which it is necessary to protect the jurisdiction of the court issuing the injunction or prevent evasion of an important public policy of the domestic forum. [...] A case can be made for this position. In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court's staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The con-

For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.

¹³¹ George D. Brown, *The Ideologies of Forum Shopping – Why Doesn't a Conservative Court Protect Defendants?* 649-720, N.C. L. REV. (1993) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=744704; Kimberley A. Moore and Francesco Parisi, *Rethinking Forum Shopping in Cyberspace* George Mason Law & Economics Research Paper No. 03-42 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=457500.

¹³² See *Pfeiffer Pty Ltd v. David Rogerson*, [2000] 172 A.L.R. 625, where the Australian High Court overturned prior authority that damages were “procedural” (*Stevens v. Head* [1992] 176 CLR 433) and held that the *lex loci delicti* rule should govern substantive issues for transnational tortious claims, including calculation of damages and application of limitation periods.

sequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.¹³³

Pleading Issues and Evidentiary Problems

In *Kreutner v. Waterloo Oxford Coop. Inc.*,¹³⁴ the Ontario Court of Appeal followed the Third Restatement of Torts (Product Liability)¹³⁵ pleading or evidentiary requirement of alternative safe design.

In *Kreutner*, the defendant's painters were painting the plaintiff's home.¹³⁶ While attempting to reconnect a propane tank to a barbeque, the tank tipped over and gas escaped and was ignited by a swimming pool heater underneath the deck where the barbeque was housed.¹³⁷ The plaintiffs' home was seriously damaged in the resulting explosion and fire. The plaintiffs sued the defendant paint company, the manufacturer of the tank, and the manufacturer of the valve installed in the tank.¹³⁸ The allegations against the valve manufacturer were that it had defectively manufactured and designed the valve and that it had failed to provide

¹³³ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 914 (emphasis added). See also, *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, [1999] B.C.C.A. 0134, *leave to appeal granted*, 86 A.C.W.S. (3d) 697, *rev'd* [1999] 173 D.L.R. 4th 498 (C.A.), *appeal dismissed*, [2001] S.C.C. 26, ["Westec"] where the Supreme Court of Canada declined to consider directly the relevance of parallel proceedings in determinations of appropriate forum. In *Westec*, Raytheon obtained summary judgment in its Kansas declaratory action and there was, accordingly, no parallel proceedings on which to base the appeal. See Janet Walker, *Parallel Proceedings- Converging Views: The Westec Appeal*, CANADIAN Y.B. INT'L LAW 155, 185. While forum shopping has many detractors, some commentators have suggested that resulting inefficiencies or perceived injustices are inherent in the system of private international law. For an economic law analysis based upon the theory of "spontaneous order" developed by the legal theorist, Friedrich Hayek, see Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, George Mason University School of Law, Law & Economics Working Paper Series No. 03-42, available at <http://ssrn.com/abstract=457500> and footnote 65 references therein.

¹³⁴ *Kreutner v. Waterloo Oxford Coop. Inc.* [2000] 50 O.R. (3d) 140.

¹³⁵ Restatement of the law, third, torts: products liability (drafts, 2001).

¹³⁶ *Kreutner*, 50 O.R.3d at 142.

¹³⁷ *Kreutner*, 50 O.R.3d at 142.

¹³⁸ *Id.* at 142.

any warning of the danger arising from defective design. The valve manufacturer moved for summary judgment dismissing the plaintiffs' claims, supported by uncontradicted evidence of an expert who opined that there was no design defect. The plaintiffs resisted the motion and provided a report obtained six years after the accident that contained a theory of how the explosion and fire occurred, but was silent on the issue of the design of the valve.¹³⁹

Whitten J. granted, in part, the valve manufacturer's motion for summary judgment, dismissing the plaintiffs' claim based on the valve manufacturer having negligently manufactured the valve. However, he dismissed the motion for summary judgment with respect to the allegations of negligent design and failure to warn.¹⁴⁰ The valve manufacturer appealed unsuccessfully to the Divisional Court. Leave having been granted, the valve manufacturer appealed to the Court of Appeal for Ontario, which allowed the appeal.¹⁴¹

Justice Borins on behalf of the Court of Appeal held that the essential purpose of a motion for summary judgment is to isolate and then terminate claims and defences that are factually unsupported.¹⁴² In the case of a defendant's motion for summary judgment, although the defendant has the onus of establishing the absence of a genuine issue for trial, the plaintiff bears an evidentiary burden of showing that the evidence adequately supports its claim.¹⁴³

Justice Borins noted that a motions judge is entitled to assume that the record contains all evidence that the parties will present if there is a trial.¹⁴⁴ More importantly, Justice Borins, confirmed that a bald assertion of defective design, without corroboration, would not survive a motion for summary judgment for dismissal. Justice Borins held that,

... to succeed in this case the plaintiffs are required to identify the design defect in [the defendant's product]; establish that the defect created a substantial likelihood of harm and that there exists an alternative design that is safer and economically feasible to manufacture.¹⁴⁵

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 142-43.

¹⁴¹ *Id.* at 140.

¹⁴² *Id.* at 143. (citing *Dawson v. Rexcraft Storage & Warehouse Inc.* [1998] 164 D.L.R. (4th) 257, 262.

¹⁴³ *Id.* at 143.

¹⁴⁴ *Id.* at 143-44.

¹⁴⁵ *Id.* at 143.

The plaintiffs in *Kreutner* presented no evidence of a design defect or of an alternative feasible design. For their claim based on a failure to warn, the plaintiffs were required to establish that the manufacturer knew or ought to have known of a danger inherent in the product's use.¹⁴⁶ The plaintiffs, however, provided no evidence of any such danger and, in any event, the manufacturer of the tank attached a warning to the tank about the dangers inherent in the use of propane.¹⁴⁷

The plaintiffs' claims for design defect and failure to warn were therefore not factually supported. This case presented a paradigm of when a defendant has successfully established the absence of a genuine issue for trial. In the result, the appeal was allowed and the claims against the valve manufacturer were dismissed in their entirety, with costs.¹⁴⁸

In a subsequent case, the plaintiff defeated a summary judgment motion seeking a dismissal of its claim based on defective design by introducing an expert report addressing the factors described in *Kreutner*. Even though the credibility of the plaintiff's assertions was suspect, the motion's judge deferred the matter to the trial judge for assessment.¹⁴⁹

An alternative theory of causation is now mandatory, insofar as the maxim of *res ipsa loquitur* is considered expired in Canada and no longer a separate component in negligence actions, following the Supreme Court of Canada's decision in *Fontaine v. British Columbia (Official Administrator)*.¹⁵⁰

VI. Conclusion

The underlying theme of this article has been that concurrent claims are not necessarily equivalent claims. While concurrent liability in contract and tort (namely, product liability) may be applicable or alternative remedies available, the "focus"¹⁵¹ of the CISG is the harmonization of rules governing international sales contracts. With respect to concurrent contractual and tortious liability

¹⁴⁶ *Id.* at 144.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Nadeau v. Nexacor Realty Mgmt. Inc.* [2002] O.T.C. 370 (Ont. S.C.J.)

¹⁵⁰ *Fontaine v. British Columbia (Official Administrator)* [1998] 1 S.C.R. 424 (S.C.C.).

¹⁵¹ The terms "locus" and "focus" have well-defined meanings and applications in the study of geometry, biology, anthropology, optics, and computer science (See, e.g., E.L. Water-

claims, the article proffers that the “place of injury” or “where the damages are sustained” are less relevant than the *situs* of the contract, based upon the view that without privity in contract, the concurrent tort would not arise. Where the damages were sustained, in the absence of injustice, should not be determinative by resort to parochial, territorial or domestic policy-driven application of procedural rules affording jurisdiction.

The following choice-of-law rules are proposed for concurrent claims based upon contract and negligent tort-based product liability (ie. property damage):

1. Where the international sales contract specifies that the CISG applies, but the parties have not addressed the issue of product liability claims, then any issues not governed by the CISG (i. e. gaps or exclusions) are to be determined by the *lex loci contractus*.¹⁵²
2. If the parties are both from contracting States but the international sales agreement has not expressly waived or varied application of the CISG under Article 6, then the *lex foci* – the point of convergence of contract or tort liability regimes – requires the domestic court to consider the following factors:
 - i. the factual characterization of the claim to determine the core of the action (contract or tort, or both?);
 - ii. If the nature of the claim is not readily discernable (i. e. the facts pleaded are neither dispositive nor determinative as to whether the claim is predominantly contractual or delictual (tortious)), then the court should assess whether the ground on which the remedy is based is contrary to the aims of the CISG. If so, then the *lex loci contractus* should govern.
3. If the concurrent claim is predominantly negligence-based, then the domestic court should apply the *lex loci delicti*, unless doing so would result in an injustice, determined with reference to the CISG, UNIDROIT Principles, PECL¹⁵³ and decisions of international courts and arbitrators.¹⁵⁴

worth & J.A. Waterworth, *Focus, Locus and Sensus: The Three Dimensions of Virtual Experience*, 4(2) CYBERPSYCHOLOGY & BEHAVIOR 203-14 (2001)).

¹⁵² While the defendant “Manufacturer” of the alleged defective product may or may not be related to the defendant “Seller/Distributor” and is from a non-Contracting State, there is no privity of contract with the “Buyer” such that non-consensual liability is manifest. See Gilead, *supra* note 30. Presuming both parties are from Contracting States and the international sales contract is governed by the Convention, *supra* note 14.

¹⁵³ Although limited in application to the European Union membership, the impact of *The Principles of European Contract Law* (PECL) on the CISG should not be overlooked. According to the Commission on European Contract Law:

While the *lex foci conventionis* is a new frame of reference, it is hoped that the foregoing discussion on choice-of-law methodology will provide insight to practitioners, judges and arbitrators dealing with CISG-based litigation involving concurrent contract and product liability claims.

The Principles have been drawn up by an independent body of experts from each Member State of the European Union under a project supported by the European Commission and many other organisations. The principles are stated in the form of articles with a detailed commentary explaining the purpose and operation of each article. In the comments there are illustrations, ultra short cases which show how the rules are to operate in practice. Each article also has comparative notes surveying the national laws and other international provisions on the topic.

The Principles of European Contract Law Parts I and II (hereinafter referred to as *PECL I and II*.) cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. The Principles previously published in Part I (1995) are included in a revised and re-ordered form. Part III covers plurality of parties, assignment of claims, substitution of new debt, transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest. *available at*, http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm.

¹⁵⁴ See CISG and UNILEX databases, *supra* note 7. WADDAMS, *supra* note 53, at 162, n. 69 (citing Pigeon, J. in *Interprov. Coop Ltd. v. R. n. 58* at 515 (S.C.R.)) confirming that the Moran decision did not apply to choice-of-law questions.