



International Comparative Law

One-Day Course of
The Hague Academy of International Law

1. General Part

Professor Dr Matthias Lehmann, D.E.A., LL.M., J.S.D.
University of Vienna / Radboud University Nijmegen

Overview

- A. Introduction
- B. Legal Traditions of the World
- C. Sources of Private International Law
- D. Methods of Private International Law

Introduction

Function of Private International Law (from a national point of view)

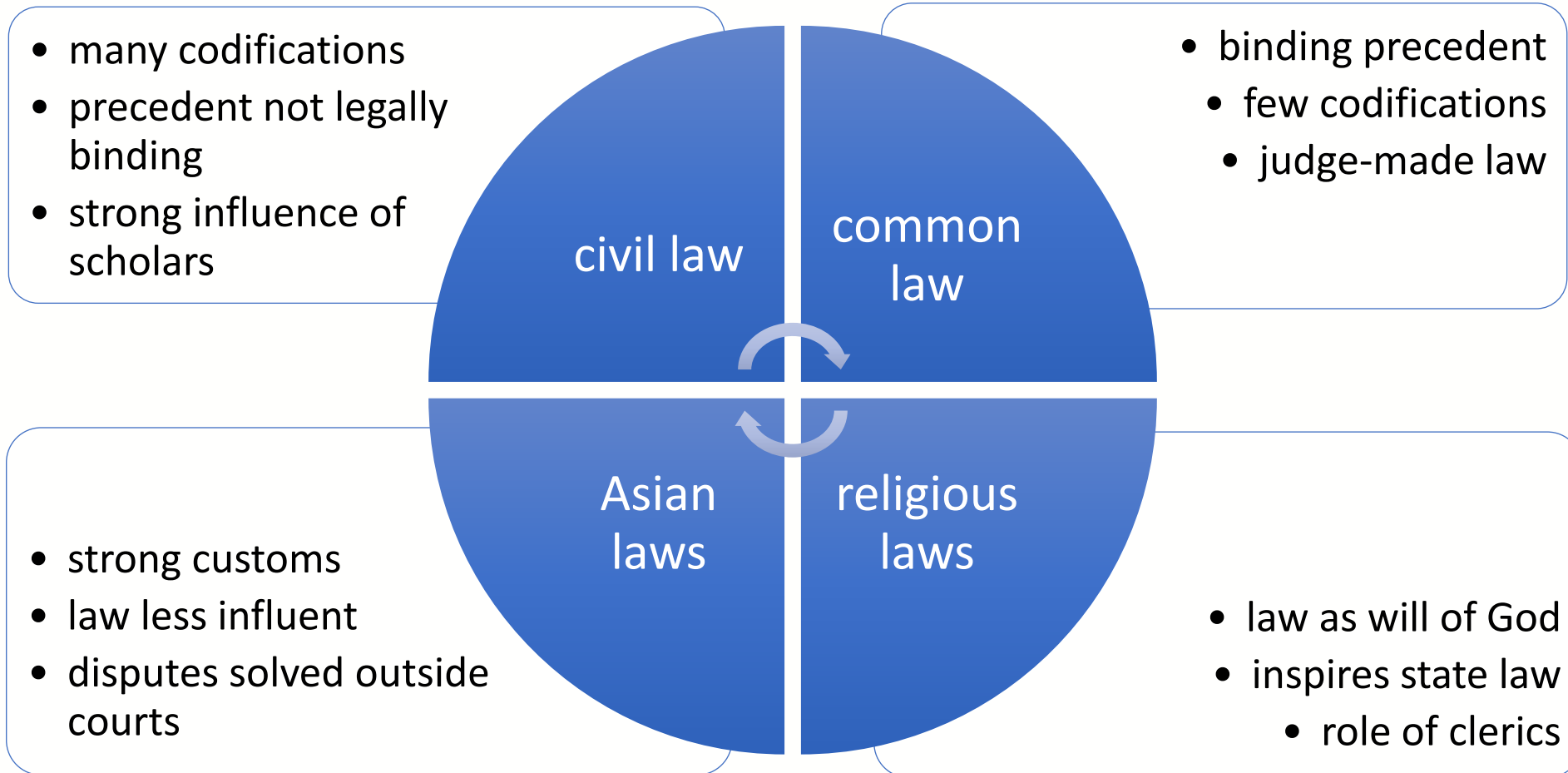
- determine the law applicable to private relationships
- solve “conflicts” with other laws
- to be distinguished from
 - international administrative law
 - international criminal law
 - international civil procedure

Function of Private International Law (from an international point of view)

1. avoid limping relationships
 - legal relationships need stable environment
2. avoid applicable law shopping
 - claimant should not determine the outcome of the case by choosing a particular court
3. “decisional harmony”
 - same case shall be decided under the same law everywhere

Legal Traditions of the World

Legal Traditions of the World



Sources of Private International Law

codification

e.g. China,
Japan,
Switzerland

dispersed
provisions

e.g. France,
Spain, Iran

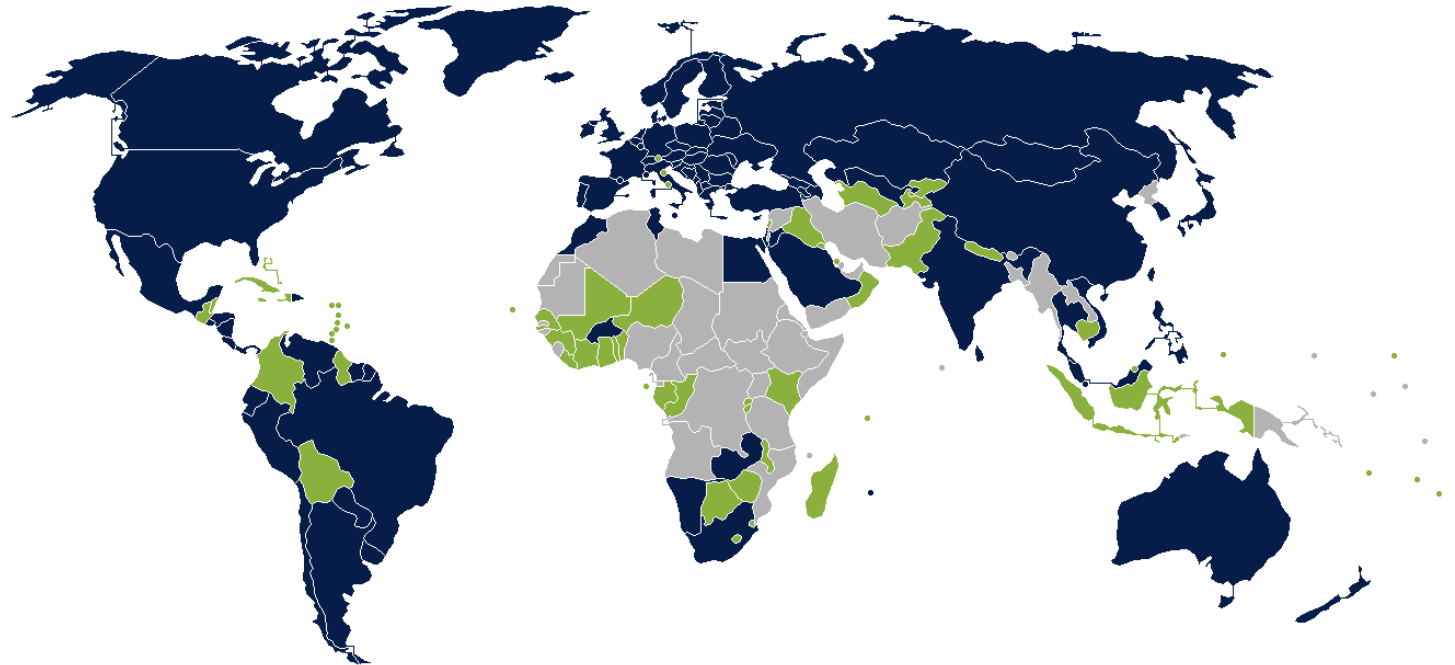
case law

e.g. Australia,
UK, USA

Influence of International Conventions

Global coverage of the HCCH

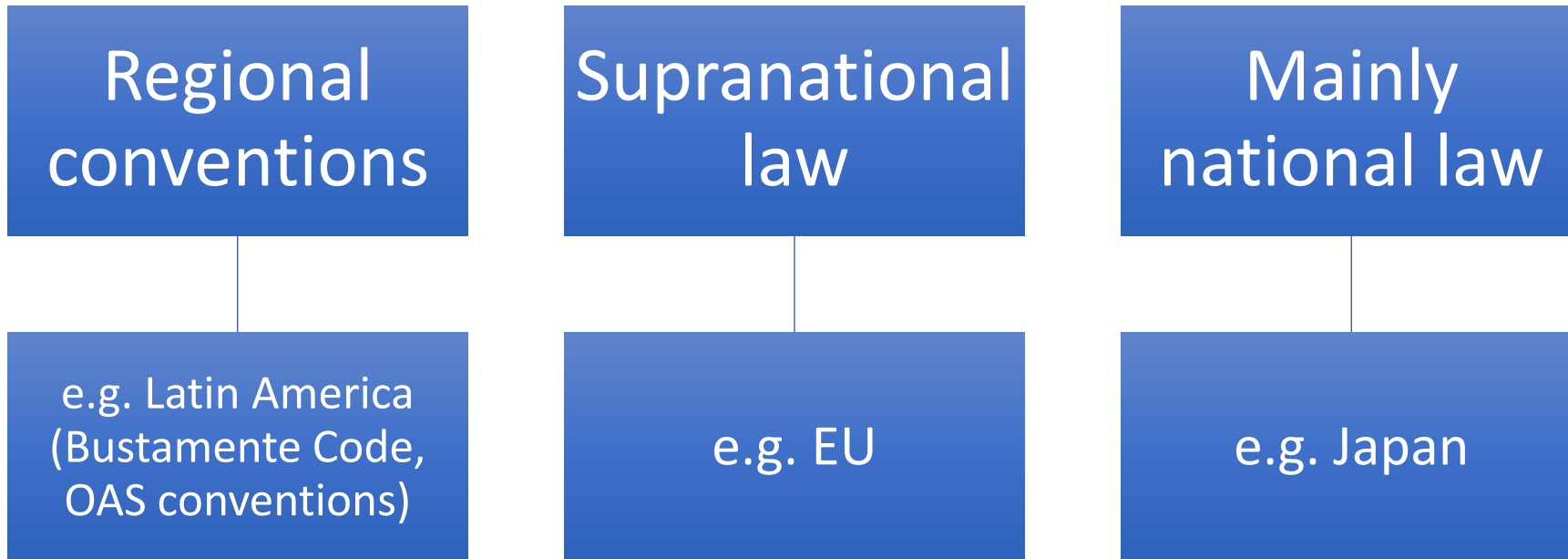
Members + Non-Member Contracting Parties* = 156 "Connections"



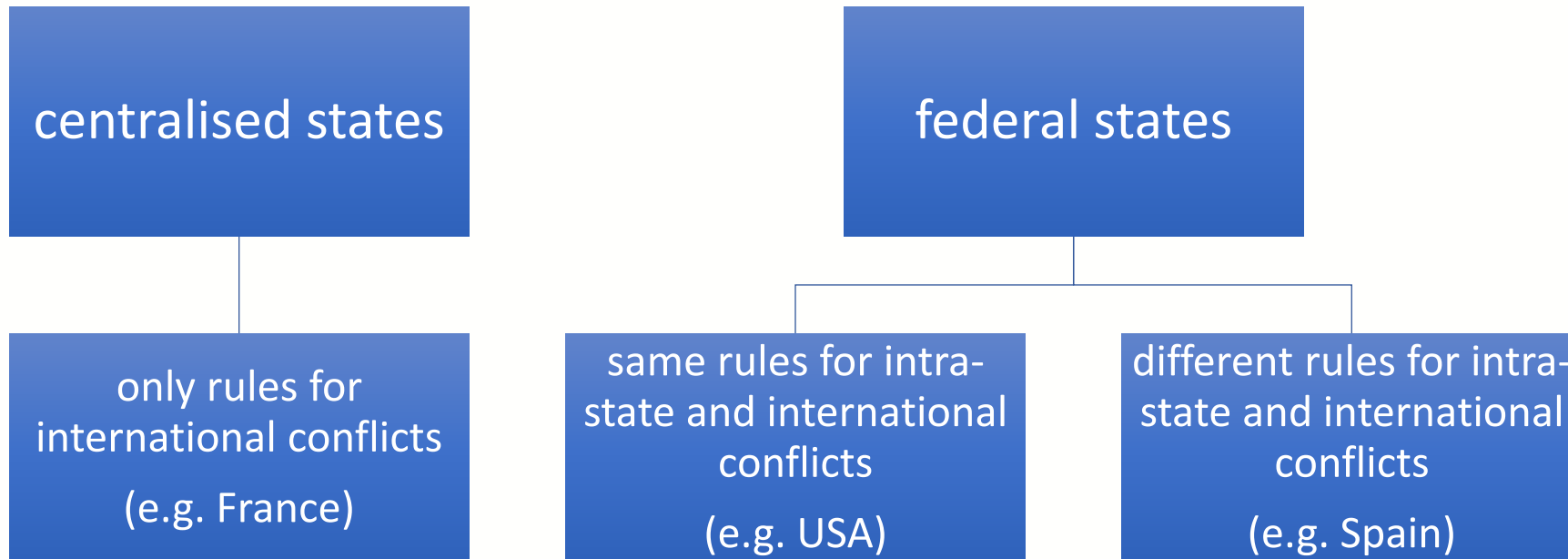
91 Members:
90 States, plus the European Union

Non-Member that is a Contracting Party
(or signatory) to at least 1 HCCH Convention
or in the process of becoming a Member
(65 in total)

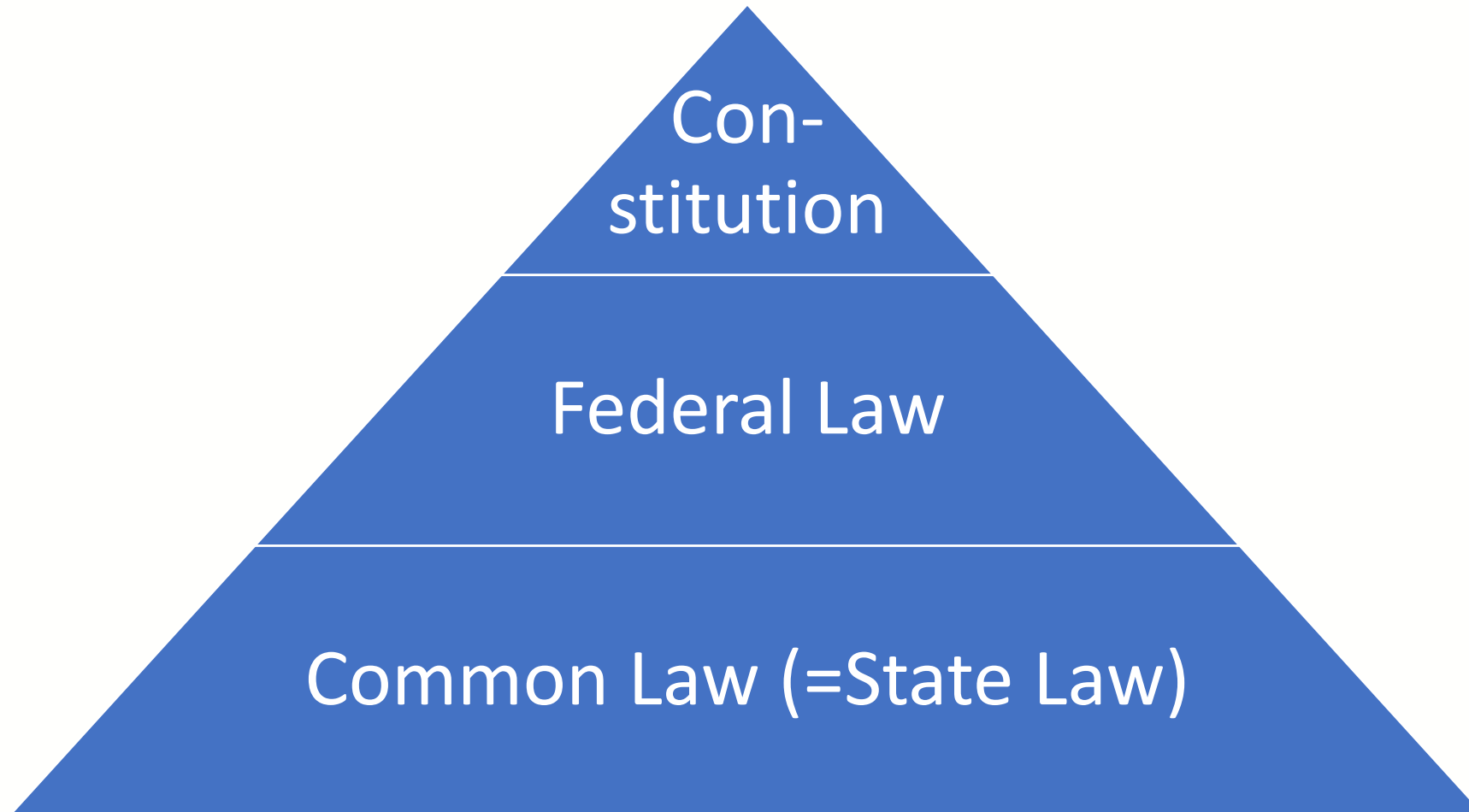
Influence of Regional Harmonisation



Influence of Federal Law



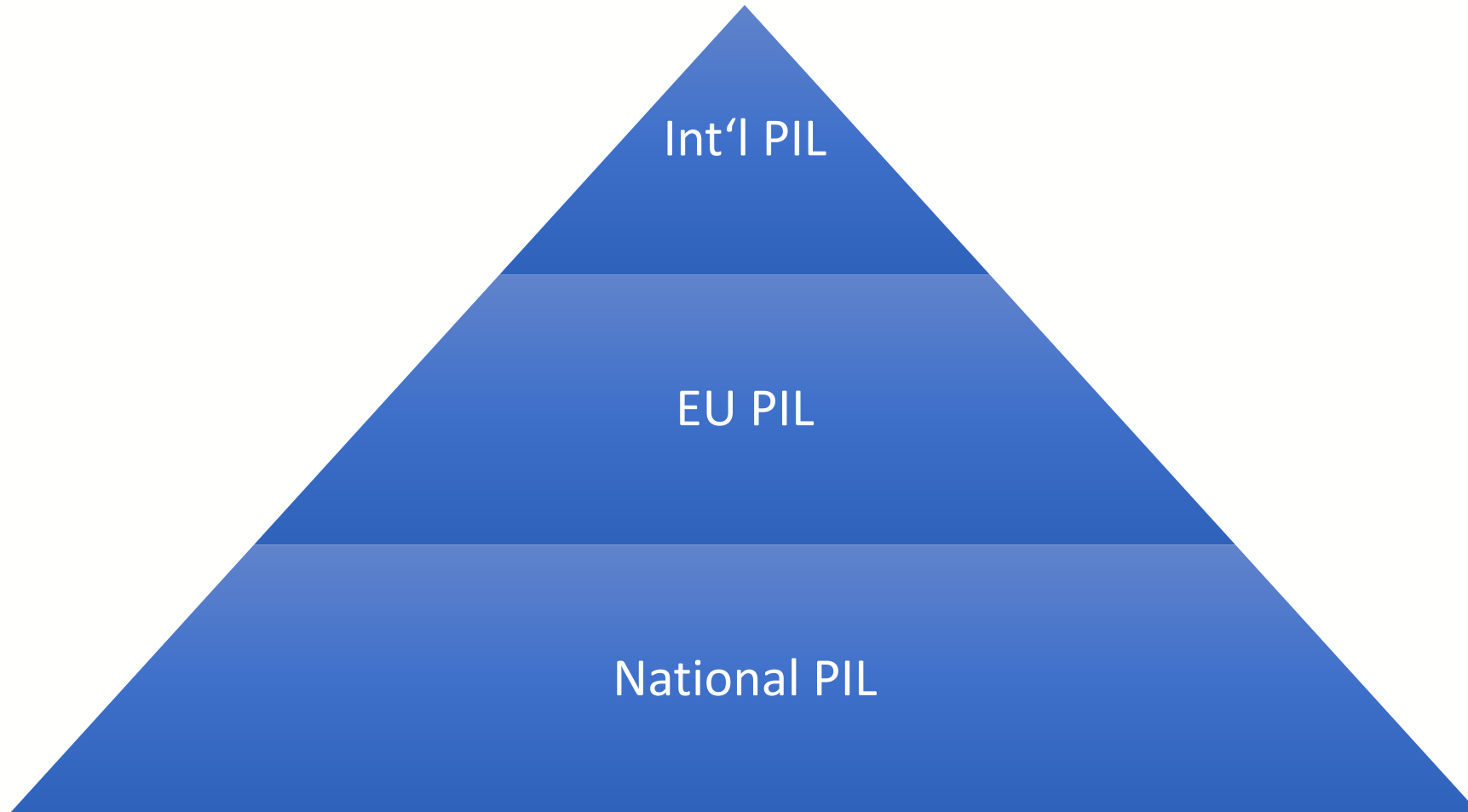
Federal Structure: US



Federal Structure: US

1. Erie Railroad v. Tompkins (U.S. 1938): “There is no federal general common law.”
2. also no federal rules on conflict of laws
 - each state follows own principles
 - only some restrictions by the Constitution (e.g. Full Faith & Credit Clause)
 - a number of different approaches are reigning today among states (see below)
3. state practice summarised in Restatement on Conflict of Laws (Second) (1971)

Supranational Structure: EU



Supranational Structure: EU

Binding on all
Member States
except Denmark

- Rome I Regulation on contractual obligations
- Rome II Regulation on non-contractual obligations

Binding on all
Member States
except Ireland and
Denmark

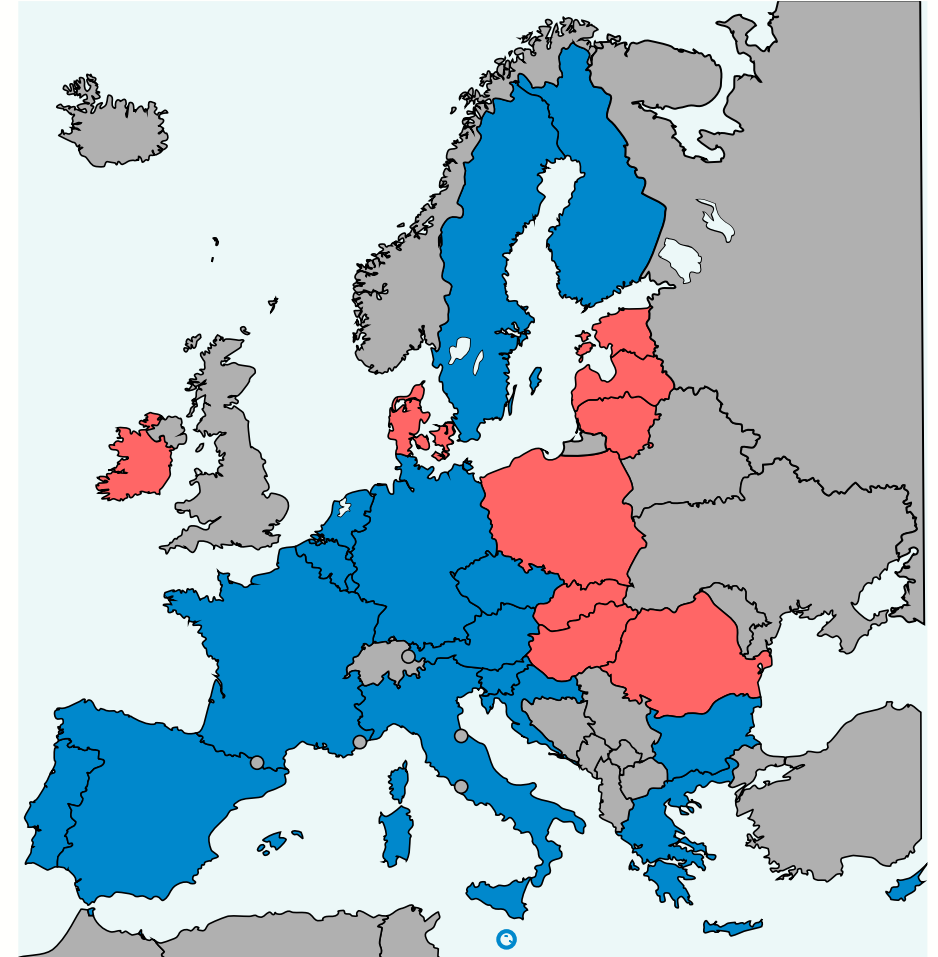
- Maintenance Regulation
- Succession Regulation

Enhanced
Cooperation

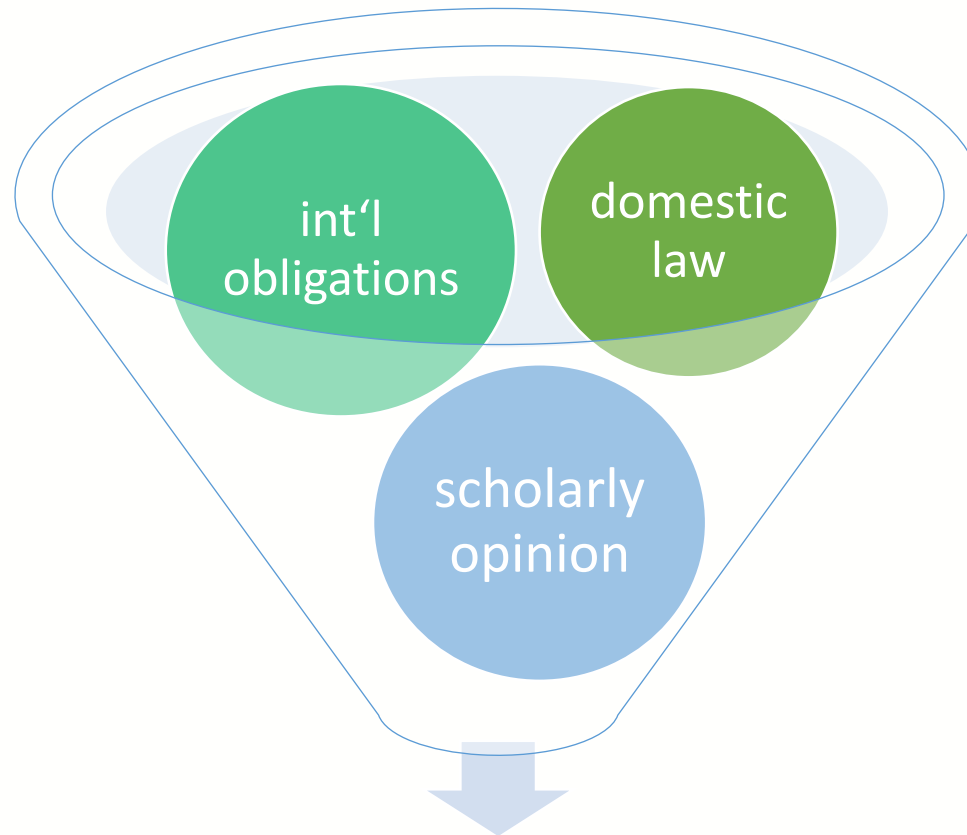
- Rome III Regulation on divorce
- Regulation on matrimonial property
- Regulation on property of registered partnerships

Supranational Structure: EU

- Fragmented EU PIL -
Example:
Regulation on matrimonial property
(participating Member States in blue)



The Influence of Legal Formants



all go into private international law

on the concept of legal formants: Sacco, 39 American Journal of Comparative Law 1 (1991)

Intermediate Summary

- PIL can be found in different levels of law
 1. international law
 2. supranational law
 3. federal law
 4. state law
- the different legal traditions only partially shape PIL
- other influences are more important
 - e.g. regional harmonisation; federal or central system

Methods of Private International Law

Multilateralism vs. Unilateralism I

- **Multilateral method**

1. private relationships distinct from sovereignty
2. domestic courts can apply foreign law
3. in principle, domestic and foreign law are treated the same

- **Unilateral method**

1. each country decides scope of its own law
2. no country can decide for the other
3. consequently, PIL only determines the application of domestic law in int'l cases

Example of a Unilateral Rule

Art 3 French Code civil:

... Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française. ...

... French law governs immovables, even those possessed by aliens. ...

Example of a Multilateral Rule

Art 13 Japanese Act on the General Rules of Application of Laws:

Rights in rem to movables and immovables and any other rights requiring registration shall be governed by the law of the place where the property is situated (lex rei sitae).

Multilateralism vs. Unilateralism II

- **Multilateral method**

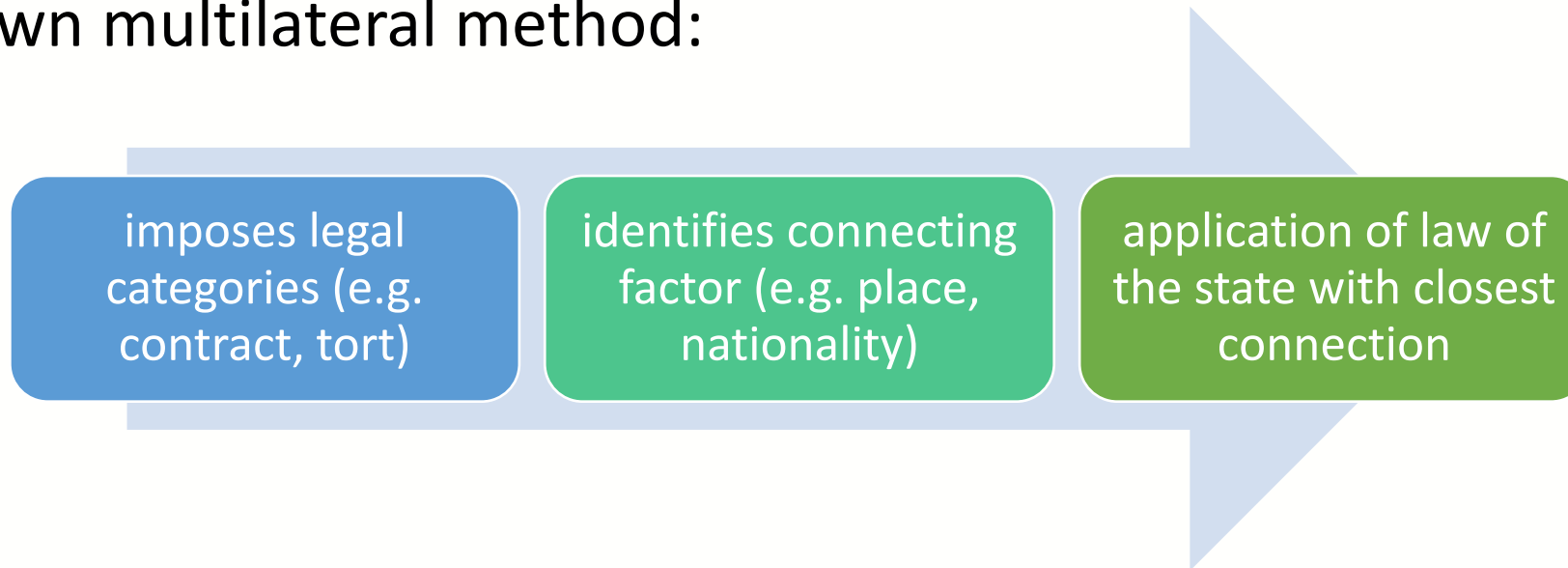
1. focuses on global governance
2. emphasises world community
3. more idealistic
4. prevails today

- **Unilateral method**

1. focuses on national sovereignty
2. emphasises nation-state as creator of law
3. more realistic
4. makes significant inroads, e.g. in US and in EU

Closest Connection

- top-down multilateral method:



- spiritual father: Friedrich Karl von **Savigny** (1779-1861)
- today most widespread method around the world

Closest Connection

- example:

Art 11 Chinese Law on the Application of Laws

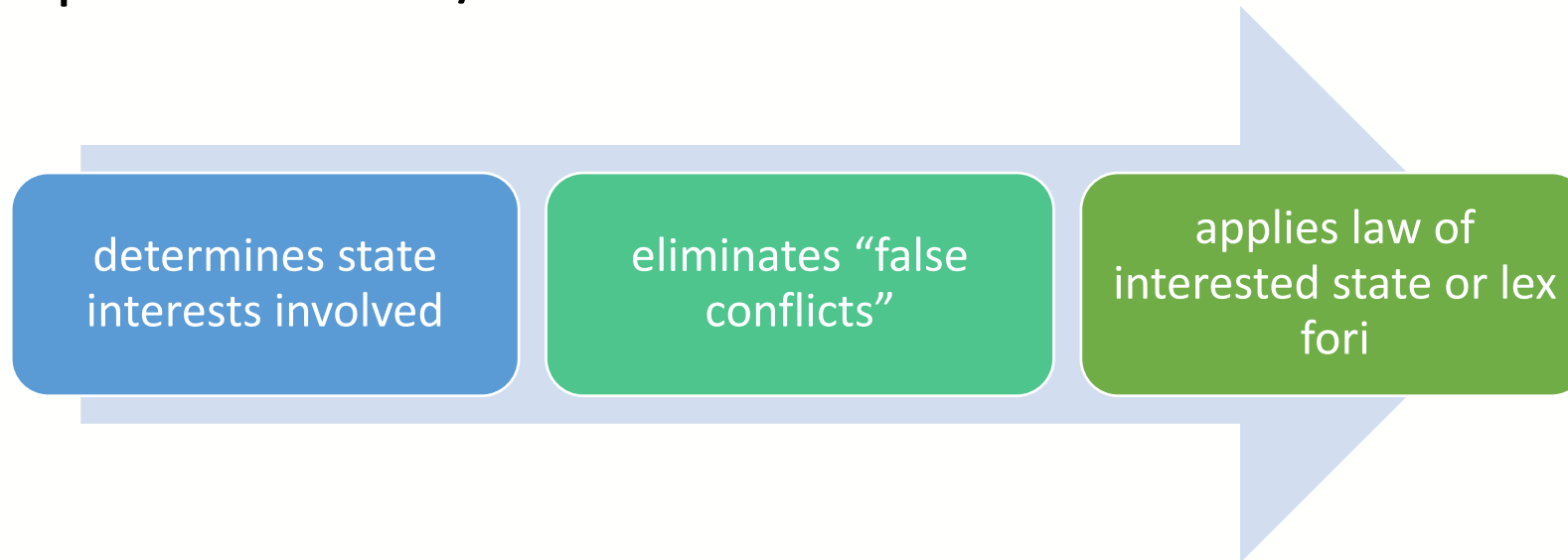
The civil legal capacity of a natural person is governed by the law of his/her habitual residence.

Closest Connection

- advantages:
 - provides **objective** way to determine the applicable law
 - treats **all law equally** because it is **neutral** to content of the rule
 - leads to **global decisional harmony**
 - **relatively easy to apply** because it refers to relations rather than rules
- disadvantages:
 - is **blind to interests** protected by law
 - **may lead to fortuitous results**
 - opens way to fraud (*fraude à la loi*)
 - creates **characterisation problems**

Governmental Interest Analysis

- bottom-up multilateral/unilateral method



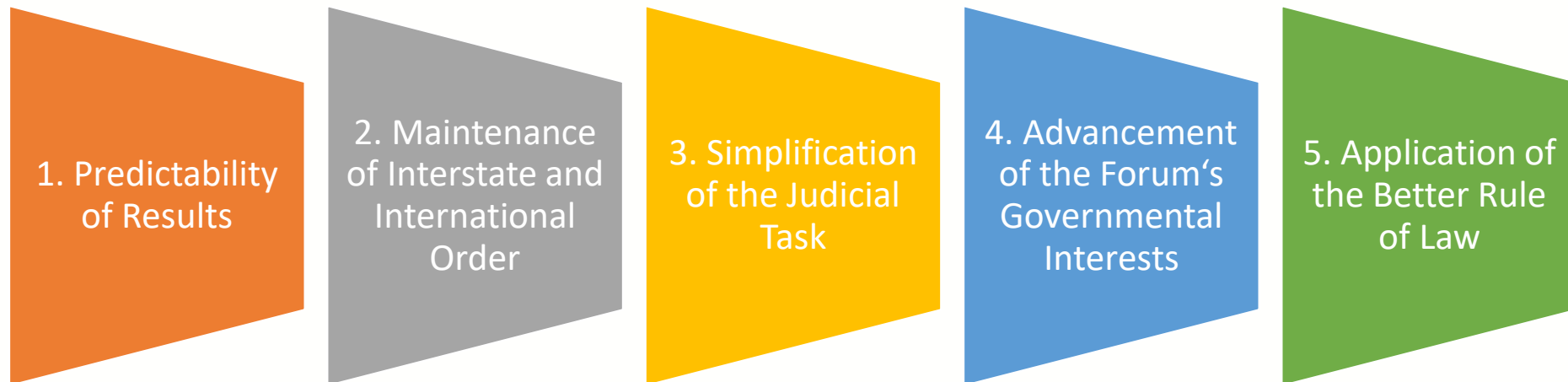
- spiritual father: **Brainerd Currie** (1912-1965)
- triggered the “American conflicts revolution”

Governmental Interest Analysis

- advantages:
 - **overcomes mechanical and sterile determination** of applicable law by spatial criteria
 - takes **substantive** interests into consideration
 - more fitting for modern rules of private law that are **policy-driven**
 - eliminates **false conflicts**
- disadvantages:
 - provides **less legal certainty**
 - **more complex** because more granular (rule-based and not relation-based)
 - emphasis on lex fori opens up way for **applicable law shopping**
 - **runs counter to decisional harmony**

Better Law

- self-centred method
- application of five different factors:



- spiritual father: **Robert Lefflar** (1901-1997)
- followed by a modest number of US states

Better Law

- advantages:
 - recognises **courts as instrumentalities** of state
 - leads to the **“just” result** from the perspective of the forum
 - **reflects practice** of homeward trend in case law
- disadvantages:
 - invites **applicable law shopping**
 - leads to **contradicting decisions**
 - **exacerbates** judicial conflicts
 - is **wholly subjective** criterion
 - **strengthens** homeward trend

Flexible Approach

- a compromise multilateral/unilateral solution
- **Restatement (Second) Conflict of Laws (1971)** – Choice-of-Law Principles
- leads to
 1. a **mix of methodologies**
 2. a **plethora of criteria**

Flexible Approach

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- a) the needs of the interstate and international systems,
- b) the relevant policies of the forum,
- c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- d) the protection of justified expectations,
- e) the basic policies underlying the particular field of law,
- f) certainty, predictability and uniformity of result, and
- g) ease in the determination and application of the law to be applied.

Flexible Approach

- advantages:
 - **integrates** different methods
 - greater adaptability to the **specifics of case**
 - **openness** to further developments
- disadvantages:
 - gives judge **broad discretion**
 - leaves the applicable law **uncertain**
 - leads to **unpredictability** for parties

Methodological Pluralism in USA

- source: Coyle, Dodge and Simowitz, 70 American Journal of Comparative Law 318, 321 (2022)

TABLE 1 States and Choice-of-Law Methodologies Followed

	Traditional	Significant Contacts	Restatement 2nd	Interest Analysis	Lex Fori	Better Law	Combined Modern
Alabama	T + C						
Alaska			T + C				
Arizona			T + C				
Arkansas		C				T	
California				T			C
Colorado			T + C				
Connecticut			T + C				
Delaware			T + C				
DC				T			C
Florida	C		T				
Georgia	T + C						
Hawaii							T + C
Idaho			T + C				
Illinois			T + C				
Indiana		T + C					
Iowa			T + C				
Kansas	T + C						
Kentucky			C		T		
Louisiana							T + C
Maine			T + C				
Maryland	T + C						
Massachusetts							T + C
Michigan			C		T		
Minnesota						T + C	
Mississippi			T + C				
Missouri			T + C				
Montana			T + C				
Nebraska			T + C				
Nevada		C	T				
New Hampshire			C			T	
New Jersey			T				C
New Mexico	T + C						
New York							T + C
North Carolina	T	C					
North Dakota		T					C
Ohio			T + C				
Oklahoma	C		T				
Oregon							T + C
Pennsylvania							T + C
Puerto Rico							T + C
Rhode Island	C					T	
South Carolina	T + C						
South Dakota			T + C				
Tennessee	C		T				
Texas			T + C				
Utah			T + C				
Vermont			T + C				
Virginia	T + C						
Washington			T + C				
West Virginia	T		C				
Wisconsin						T + C	
Wyoming			T + C				
Total Torts	9	2	25	2	2	5	7
Total Contracts	11	4	24	0	0	2	11

T = Torts
C = Contracts

Methodologies

Traditional. These states generally follow the rule of *lex loci delicti* for torts and the rule of *lex loci contractus* for contracts.

Significant Contacts. These states apply the law of the state that has the most significant contacts with the parties and the relevant events. They do not consider state policies or state interests.

Restatement Second. These states follow the approach set forth in the *Restatement (Second) of Conflict of Laws*.

Interest Analysis. These states apply a modified version of the governmental-interest analysis first proposed by Brainerd Currie.

Lex Fori. These states follow a strong presumption in favor of the law of the forum.

Better Law. These states apply the choice-influencing considerations first proposed by Robert Leflar, including the better law criterion.

Combined Modern. These states follow a combination of approaches that are not the traditional approach, e.g. interest analysis plus the *Restatement (Second) of Conflict of Laws*, functional approach, et al.