The European Legal Forum
Forum iuris communis Europae

Dornis, Tim W.

"When in Rome, do as the Romans do?" – A Defense of the Lex Domicilii Communis in the Rome-II-Regulation

The European Legal Forum (E) 4-2007, 152 - 159

"When in Rome, do as the Romans do?" – A Defense of the Lex Domicilii Communis in the Rome-II-Regulation

Dr. Tim W. Dornis, LL.M. [*]

I. Introduction

On 15 May 2007 the European Parliament and the Council, meeting in the Conciliation Committee, eventually approved the final version of the *Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome-II").*[1] The purpose of the Regulation is to unify the choice-of-law rules in the European Community's Member States on non-contractual obligations. Following its adoption, the Regulation will be applicable in the Member States' courts from the beginning of 2009.[2] The lawmaking process of the Regulation formally started on 22 July 2003, when the Commission of the European Community submitted a draft proposal.[3] Initial public consultation and discussion brought up criticism and numerous suggestions to alter and amend the draft. In addition, the European Parliament's Committee on Legal Affairs, the Parliament itself, the European Economic and Social Committee, the Council, and the Commission presented several alternative drafts and amendments[4] trying to compromise on the contentious topics and to adapt the Regulation's provisions to the interests involved and to the practical needs. The discussion inter alia unearthed disputes concerning media violations of privacy, unfair competition or traffic accidents to name but a few. Moreover, one critique by commentators concerned the implementation of the lex domicilii communis or the common residence rule in the general rule for tort conflicts of Article 3(2) of the initial proposal and its final version of Article 4(2).[5] Being more doctrinal than based on political interests, this criticism has not been extensively discussed in the formation process of the Regulation. Nevertheless, the arguments brought up against an application of the common residence rule warrant consideration as they reflect a traditional and oft-enunciated unease with the lex domicilii communis, and as the European context of the Regulation's application provides a new perspective on the rule's potential implications.

II. The Situation of Several Parties to a Multi-State Tort

Critics of the common residence rule refer to the seminal New York case *Tooker v. Lopez*[6] to illustrate the problems allegedly arising from cross-border torts. In *Tooker*, a New York domiciled driver of a New York licensed car caused an accident with fatal effects for himself and his New York domiciled guest in Michigan. Both driver and guest where attending college in Michigan. In addition, another guest driver of this car, a Michigan resident, was injured. The driving was ordinarily negligent. While New York law granted guest passengers a claim for ordinary negligence, Michigan law required gross negligence for compensation of gratuitous passengers (so-called 'guest statute immunity'). Under New York conflict rules, the case comprised the application of different laws for each of the two victims. Whereas the New York passenger's claim was successful under New York tort law, there was no claim for the Michigan victim under the tort law of her state of domicile.

It has been said that an application of Article 4(2) *Rome-II* would yield the same result and that this would be hard to accept.[7] The criticism is founded on the potential inequality which an application of different laws on a single incident could bring out between the victims involved in the accident: While one victim might recover, the other victim's damage might be left uncompensated. In the same vein, some critics argue that the existence of two or more tortfeasors can also result in different applicable laws. While one tortfeasor might be fully liable, the other could walk free. It is contended that this would not only be unfair but also practically inadequate as regards joint tortfeasors' indemnification or compensation.[8] Finally, as an allegedly general downside of the rule, critics contend that an application of the lex domicilii communis would in certain cases be an unjustifiable disregard for the territorial sovereignty of the locus state.[9] Therefore, at least for conduct-oriented rules, the lex loci delicti[10] should prevail.

---

[*] *Dr. Tim W. Dornis, LL.M. (Columbia University).*

1 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007, L 199, at 40).

2 See Article 32 *Rome-II*.

3 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427 final.

4 For a detailed overview on the legislation process and development see the European Commission's PreLex site under http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=184392 (last visit on 25 July 2007).

5 See Article 3(2) of the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427 final, and Article 5(2) of the Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 83 final; for the critics: *Peter Stone*, The Rome II Proposal on the Law Applicable to Non-Contractual Obligations, [2004] EuLF (E) 213, 219; *Peter Huber & Ivo Bach*, Die Rom II-VO – Kommissionsentwurf und aktuelle Entwicklungen, 25 IPRax 73, 76 (2005); *Gerhard Wagner*, Internationales Deliktsrecht, die Arbeiten an der Rom-II-Verordnung und der Europäische Deliktsgerichtsstand, 26 IPRax 372, 378 (2006).

6 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

7 With reference to the initial location of the rule in Article 3(2) of the 2003 draft proposal: *Stone*, *supra* at 219.

8 *Huber & Bach*, *supra* at 76.

9 Stone, *supra* at 218.

10 Properly understood, Article 4(1) *Rome-II* does not provide for the 'lex loci delicti (commissi)' but for the 'lex loci damni'. It is not the law of the place where the tort has been committed but *„the law of the country in which the damage occurs*". For the purpose of this article, however, the universally acknowledged notion of the 'lex loci delicti' will be used for the rule in Article 4(1) *Rome-II*. See for the 2003 draft

As the Commission's justification for the inclusion of the rule is meagre,[11] this criticism warrants a closer look on the lex domicilii communis in Article 4(2) *Rome-II* and in general. As far as European critics refer to U.S. conflicts law[12] to argue against the rule, a quick look at the American experience with the common domicile rule will be illustrative for the analysis as well as a review of the rule's general advantages and disadvantages.

III. U.S. and Europe: Different Laws Applicable on the Same Incident?

The critics' reference to U.S. case law illustrates that the common residence or the common domicile[13] is not only a notion in European private international law. The application of the common domicile's law is well established in the U.S. as a short overview on the pertinent American – mainly New York – case law shows.

A. U.S. Conflicts: The Lex Loci Delicti Rule, 'Common Domicile' and New York Case Law

From the late nineteenth century through the middle of the twentieth century, tort choice-of-law in the U.S. was almost uniform. Following the 'vested rights' theory, courts and scholarship were focused on the question where a claim was established first through the occurrence of a tort. The law of the state in which the right 'vested' governed the existence and the scope of the claim.[14] This territorial approach was reflected in the Restatement (First) of Conflict of Laws.[15] According to its pervasive rules, the lex loci delicti as the law of the place of the wrong governed in tort cases. Although most states have abandoned the First Restatement's approach, until recently – at least in some states – some remainders of a 'vested rights' theory could still be found.[16] The majority of states, in contrast, follow an 'interest analysis' approach.[17] This development started in 1963 in the New York Court of Appeals and the first explicit rejection of the traditional lex loci delicti rule in *Babcock v. Jackson.*[18] Only 15 years later, half of the states had already abandoned the rule of the lex loci delicti, and by the end of the century over 40 jurisdictions had done so.[19]

1. 'Common Domicile' and the 'Neumeier Rules'

In the *Babcock* case, the court applied a New York pro-recovery tort rule to a car accident occurring in Ontario in a tort where both victim and tortfeasor were New Yorkers and the car involved was insured, registered and garaged in New York. The Court of Appeals adopted what has been characterized as an 'interest analysis' for tort conflicts, and applied New York law which – unlike Ontario – did not have a guest statute immunizing a host driver against liability to an injured guest. Insofar, the court found the 'center of gravity' in the common domicile of the parties.[20] In a series of subsequent cases, the Court of Appeals and other New York courts struggled with the once established 'grouping of contacts' approach, trying to give special weight to those contacts which were deemed relevant to the policies underlying the particular rules in conflict.[21] The line of prominent guest-statute cases came to a preliminary end in *Neumeier v. Kuehner.*[22] The question at stake was what law applies when an Ontario guest is injured in Ontario while riding with a New York host. Again Ontario and not New York had a guest statute. The court brought up three succinct rules with a special emphasis on the parties' domicile:[23]

"*1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.*

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not – in the absence of special circumstances – be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the

proposal: *Janeen M. Carruthers & Elizabeth B. Crawford*, Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part II, 9 EdinLR 238, 242 (2005); *Angelika Fuchs*, Zum Kommissionsvorschlag einer „Rom II"-Verordnung 2 GPR 100, 101 (2003/04); *Cyril Nourissat & Edouard Treppoz*, Quelques observations sur l'avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non contractuelles, J.D.I. (Clunet) 7, 23-25 (2003); for the final version: *Peter Hay*, EuLF in this issue at 137, 138-140.

11 Explanatory Memorandum (COM(2003) 427 final), at 12: „[…] This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties."

12 The terms 'conflict of laws', 'choice-of-law', and 'private international law' are used interchangeably throughout this article. While 'conflict of laws' is common usage in the U.S., 'private international law' is the notion more commonly used in Europe.

13 For the difference between 'domicil(e)' and 'habitual residence' see *Peter North & J.J. Fawcett*, Private International Law 161-170 (13th ed. 1999); *C.M.V. Clarkson & Jonathan Hill*, The Conflict of Laws 43-44 (3rd ed. 2006). This difference may be important in common law and civil law systems. For the purpose of this article, however, there is no significant distinction and both terms will be used interchangeably.

14 See *Joseph H. Beale*, A Treatise on the Conflict of Laws 1287-1290 (1935); Annotation: 29 A.L.R.3d 603, § 3 (1970); *Richards v. United States*, 369 U.S. 1, 7 L.Ed. 492, 82 S.Ct. 585 (1962).

15 Restatement (First) of Conflict of Laws, § 377 (1934).

16 *Symeon C. Symeonides*, Choice of Law in the American Courts in 2000: As the Century Turns, 49 Am.J.Comp.L. 1 (2001).

17 *Symeon C. Symeonides*, Choice of Law in the American Courts in 2001: Fifteenth Annual Survey, 50 Am.J.Comp.L. 1, 13 (2002).

18 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

19 *Eugene F. Scoles & Peter Hay*, Conflict of Laws 69 (4th ed. 2004).

20 *Babcock*, 12 N.Y.2d at 481.

21 *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965); *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 266 N.Y.S.2d 513, 213 N.E.2d 796 (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 274 N.Y.S.2d 591, 221 N.E.2d 380 (1966); *Miller v. Miller*, 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968).

22 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

23 *Neumeier*, 31 N.Y.2d at 128.

state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."

In short, these rules meant that the general solution was still an application of the lex loci delicti, unless both tortfeasor and victim had the same domicile or substantive law purposes which required the application of a different law[24].

Whereas the *Neumeier* court left open whether the rules enunciated could be extended to apply in other tort situations beyond guest-statute cases, the 1985 decision of *Schultz v. Boy Scouts of America, Inc.*[25] was more generous in its definition. In addition, *Schultz* was the first case to deal with more than one tortfeasor. In *Schultz*, the tort victim and one of the tortfeasors were domiciled in New Jersey, and the court found the injury to have occurred in New York. Whereas New Jersey granted 'charitable immunity' to the tortfeasor's institutions, New York did not.[26] Characterizing the issue of 'charitable immunity' as loss-allocating, the court found the first *Neumeier* rule applicable. Hence, the common domicile rule prevailed.[27]

2. The Distinction of 'Loss-allocating' and 'Conduct-regulating' Rules

From a doctrinal perspective, *Schultz* opened the door for an application of the *Neumeier* rules on a general basis for conflicts between loss-allocating rules other than guest statutes. The court's reasoning reflects the New York distinction between conduct-regulating and loss-allocating laws,[28] first enunciated in *Babcock* by way of dictum. For a general definition of the distinction, it can be said that loss-allocating rules are "*those which prohibit, assign, or limit liability after a tort occurs, such as charitable immunity statutes, guest statutes, wrongful death statutes, vicarious liability statutes, and contribution rules*".[29] In contrast, for "*rules [that] involve the appropriate standards of conduct […], the law of the place of the tort will usually have a predominant, if not exclusive, concern […] because the locus jurisdiction's interest in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance*".[30] In short: "*[C]onduct-regulating rules are territorially oriented, whereas loss-distribution rules are usually not territorially oriented*".[31]

3. The American 'Rule of Thumb'

Consequently, as a general rule, it can be stated that New York (and U.S.) conflicts law accepts a common domicile rule for conflicts concerning loss-allocating rules. Without a common domicile, the predominance in loss-allocating conflicts is on the lex loci delicti. For conflicts between conduct-regulating rules, however, the lex loci delicti is the only basic rule, or as stated in *Babcock*: "*[I]t would be almost unthinkable to seek the applicable rule in the law of some other place*".[32]

This overview illustrates that even though U.S. conflicts law, in contrast to European private international law's strict rules, is rule-selective and not jurisdiction-selective[33], and determines the applicable law in an issue-by-issue analysis,[34] multi-victim or multi-tortfeasor cases will be treated similar to the *Rome-II* approach. Hence, in both *Tooker*-like and *Schultz*-like fact patterns the applicable law for each pair of party is determined separately,[35] and under the common domicile rule different laws will be applied.

B. European Private International Law and Criticism

Article 4(2) *Rome-II* provides for the lex domicilii communis as an amendment to the general rule of the lex loci delicti in Article 4(1). This reflects the national laws' provisions in most European Member States.[36] In addition, for companies and other bodies, corporate or unincorporated, the place of central administration shall be considered to be the habitual residence (Article 23(1) *Rome-II*). The fact that these rules can lead to an application of different laws as between different pairs of party even though the claims arise out of the same incident has been named a "*strange result*".[37] Repeating the unease of the *Tooker* dissent,[38] modifications and amendments have been suggested.

---

[24] *Scoles & Hay*, *supra* at 776: „This rule of course gives new vitality to the lex loci delicti, but does call for consideration of 'relevant substantive law purposes'".

[25] 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

[26] In the case, it was the Brothers of the Poor of St. Francis, Inc., and the Boy Scouts of America. Both institutions were deemed 'charitable' in the sense of the rule and thus entitled to immunity to tort claims.

[27] Even though the court undertook a separate choice-of-law analysis for the second tortfeasor, eventually the same law was applied on both claims.

[28] See also *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 72, 612 N.E.2d 277, 280, 595 N.Y.S.2d 919, 922 (1993).

[29] *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 521, 644 N.E.2d 1001, 1003, 620 N.Y.S.2d 310, 312 (1994).

[30] *Schultz*, 65 N.Y.2d at 198.

[31] *Scoles & Hay*, *supra* at 793.

[32] *Babcock*, 12 N.Y.2d at 483; for additional references concerning other states' courts' application of the common domicile rule: *Scoles & Hay*, *supra* at 799-800; *Harold L. Korn*, The Choice-of-Law Revolution: A Critique, 83 Colum. L.Rev. 772, 788-789 (1983).

[33] See *North & Fawcett*, *supra* at 24.

[34] *Tolek Petch*, The Rome II Regulation: An Update, 21 Journal of International Banking Law 449, 455 (2006); *Symeon C. Symeonides*, Tort Conflicts and Rome II: A View from Across, in: Festschrift für Erik Jayme, 935, 940 (2004).

[35] *Viera v. Uniroyal, Inc.*, 142 Misc.2d 1099, 1104, 541 N.Y.S.2d 668 (N.Y. Supr.Ct. 1988).

[36] Explanatory Memorandum (COM(2003) 427 final), at 12.

[37] *Stone*, *supra* at 219.

[38] *Tooker*, 24 N.Y.2d at 597 (Breitel, J., dissenting): "To be sure, there is no total escape from considering the policies of other States. But this necessity should not be extended to produce anomalies of results out of the same accident, with unpredictability, and lack of consistency in determinations. Thus, it is hard to accept the implicit consequence that Miss Silk, the Michigan resident injured in the accident, should not be able to recover in Michigan (and presumably in New York) but a recovery can be had for her deceased fellow-passenger in the very same accident. If the trend continues uninterruptedly, the shift to a personal law approach in conflicts law, especially in the torts field, will continue apace [...]. Apart from the fact that such a development is not logically consistent with Anglo-American jurisprudence, it would create a sharp division between intra-national conflicts rules and extra-national conflicts rules. It is most unlikely that such a development would be recognized elsewhere. Inevitably, the goals of uniformity, let alone predictability, in conflict rules would be frustrated, and the arbitrary results produced by forum-selection would be proliferated beyond tolerable limit". For the Tooker dissent in general see Korn, supra at 876.

1. Fundamental Criticism and the Alternative 'Single Law' Rule

Primarily, it has been demanded to alter Article 4(2) from a strict common residence rule to require that "*the person claimed to be liable and the person sustaining damage, and all other persons whose entitlement or liability arising from the same incident is seriously arguable, all have their habitual residence in the same country [or countries with equivalent laws]*[39] *when the damage occurs*".[40] As an example, it is contended that a common residence rule would be acceptable in a case comprising "*a collision in a country whose law reduces the standard of care owed by a driver to his gratuitous passenger, between a car registered in, driven by a resident of, and containing a passenger from, a country whose law makes no such reduction, and a car registered in and driven by a resident of the country of the collision, but containing no passenger*".[41] In this case, the guest passenger issue would allegedly not affect the rights or liabilities of the driver from the state of the collision – even as regards the passenger in the other car. Consequently, it should be acceptable to allow the application of the common residence law as between the passenger and his co-domiciled driver. This unease with the lex domicilii communis is not new. Even before a unified system of tort conflicts came into discussion, commentators rejected the idea of giving regard to a common residence with reference to the potential inequality that could result from the application of different laws to the claims of the victims to a single tort.[42] Especially for cases where co-domiciled parties encounter in a foreign state without a pre-tort relation, the application of different laws was said to unnecessarily complicate the enforcement of compensation claims and the handling of corresponding insurance matters.[43]

In addition, the draft of *Rome-II* has been criticized as regards the application of different laws for different tortfeasors with reference to the issue of contribution. For illustration, critics referred to the example of a tortfeasor – being liable under the lex loci delicti – trying to achieve contribution from a co-tortfeasor that otherwise would have been immunized from liability under the common residence law. To avoid this allegedly inadequate and impractical result, it has been enunciated that a single law should be applicable to all existing relationships between parties requiring a restriction of the scope of Article 4(2) *Rome-II* in cases where all tortfeasors share a common residence with the victim.[44]

2. Preliminary Rejection of the 'Single Law' Alternative

At a first glance, the practical problems and the potentially unequal results appear to render a common residence rule inapplicable. However, on closer examination, this criticism proves to be unconvincing.

First, when the *Tooker* result – and thereby the common residence rule in Article 4(2) – is said to lead to "*arbitrary results*" when treating the victims' claims differently, it must be stated that the suggested alternative cannot avoid this pitfall either. Why should a tortfeasor – in a *Tooker* setting – benefit from the fact that there is an additional victim to the co-domiciled victim? Whereas she would be liable under the common residence law, the existence of an additional victim would allow her to walk free due to the fact that an application of two different laws was too burdensome or complicated and therefore the non-recovery rule of the lex loci delicti applied. Calling the result of the *Tooker* case arbitrary implies that the existence of co-victims is generally deemed fortuitous. A restriction of the rule to cases without co-victims or to cases where all victims are from the same state or from states with identical laws is the only way to avoid this inequality. For the *Tooker* example, however, this would disadvantage the co-domiciled victims compared to single victim cases.

Surprisingly, none of the critics suggests an application of a pro-recovery common residence law to all party relations. Neither should there be an application of the law respectively more favorable to all victims. Insofar, the criticism seems to miss an opportunity to favor recovery and thereby protect all victims equally. Nevertheless, if vice versa the pro-recovery rule of the common residence (or of the respectively more beneficial law) applied to all victims' claims, the tortfeasor could justifiably complain about arbitrary discrimination due to the happenstance of his carrying a co-domiciled passenger. Hence, in respect of the parties' equal treatment, a 'single law' rule is not helpful.

Second, the given example of a case where the application of the common residence law would not affect other parties' rights or liabilities is not convincing. Even though there may be no direct effect on third parties' obligations or entitlements in the example given by Professor *Stone*, there are inevitable consequences as regards the claims' enforcement and in the case of insolvency: If the common residence rule in the example requires the co-domiciled tortfeasor to compensate the passenger victim, he still might successfully sue for contribution even though the second tortfeasor was shielded from liability under the lex loci delicti. Moreover, the second driver – even though entitled to damages or indemnification – might sue the first driver in vain as the co-domiciled passenger claim's execution might have already exhausted the first driver's assets. Consequently, there is an inevitable correlation unaffected by any common residence rule's restriction.

---

[39] In respect of the 'equivalence' of laws, Professor Stone's proposal for a change alludes to the corresponding Louisiana 'same law' rule in La. Civ. Code Article 3544 (1) providing that "*[p]ersons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state*". See *Scoles & Hay*, *supra* at 808.

[40] *Stone*, *supra* at 219.

[41] *Stone*, *supra* at 219-220.

[42] See *inter alia A.J.E. Jaffey*, Topics in Choice of Law 102-103 (1996); Günther Beitzke, *Das Deliktsrecht im Schweizerischen IPR-Entwurf*, in: Schweizerisches Jahrbuch für internationales Recht, 93, 107-108 (1979); Karl Kreuzer, *Wettbewerbsverstöße und Beeinträchtigungen geschäftlicher Interessen (einschl. der Verletzung kartellrechtlicher Schutzvorschriften)*, in: Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse, 232, 279 (1983).

[43] *Beitzke*, *supra* at 108.

[44] *Huber & Bach*, *supra* at 76; but see (for a different approach in general) *Max Keller*, Die Subrogation als Regreß im Internationalen Privatrecht, 71 SJZ 305, 312 (1975).

IV. Are Different Laws Adequate or "*Arbitrary*"?

Even though it can be shown that the suggested restriction of the lex domicilii communis to a 'single law' rule is not foolproof, some doubts remain as to the general justification of the common residence rule. In addition, it is arguable whether the effects criticized as arbitrary or impractical in the multi-victim or joint tortfeasors' context can and should be avoided.

A. Is the Common Residence Rule Justified in Practice?

The gist of criticism on the application of different laws on different pairs of party is the allegedly unpractical and inadequate treatment of the parties to a single tort. A deeper analysis shows that even though giving regard to the parties' common residence can distort a simple conflicts determination, its disregard cannot avoid the unwanted result of a split application of different laws either. In contrast, however, recourse to the common residence is justified in respect of the parties' expectations and the economic and social effects of a tort.

1. The 'Place of the Wrong' Conundrum

As far as the allegedly more practical application of a single law – usually the lex loci delicti – is concerned, it must be stated that the 'place of the wrong' is not always foreseeable. The injury might occur in a state fortuitous for all (or most of the) parties involved. Product liability or airplane wreck cases of this kind abound. Insofar, different laws might be applied on almost identical factual settings – with the same victim, the same tortfeasor, and the same tortious conduct – only due to the happenstance of an incident's occurring a few kilometres across the state border.

Moreover, the place of the wrong might be difficult to determine. Especially in cases of defamation, invasion of privacy, unfair competition or fraud, the 'place of injury' can not always be determined easily.[45] Besides, even when the place of the wrong is undoubted, it can still happen that the lex loci delicti cannot be ascertained. An example from U.S. conflicts law is *Day & Zimmermann, Inc. v. Challoner,*[46] a personal injury case arising from the explosion of an artillery shell in Cambodia. Following the then valid Texas choice-of-law rule in torts, the court found the products liability claim of the American plaintiff against the American manufacturer to be governed by Cambodian law as the lex loci delicti. This law's content, however, was difficult to determine due to the unstable and changing political situation in Cambodia with different eligible laws to apply.[47]

Finally, a closer examination of the argument that disregarding the common residence rule or applying the alternatives suggested was a panacea for the split law disease raises additional doubts. The general rule in Article 4(1) *Rome-II* provides for the law of the place of injury to apply in tort conflicts. Consequently, especially in cases where a single conduct causes damage or injury in different states, there is no 'single law' to apply. In these cases, already the general rule of the lex loci delicti provides for different laws.

Against this background, it can hardly be stated that the common residence rule is the only or main factor that can result in impractical or unforeseeable constellations of multi-party cases.

2. Parties' Expectations

As far as the parties' expectations are concerned, the common residence rule is not inapt either. The main argument against the parties' expecting the common residence law to be applied is that in many constellations the victim and tortfeasor may meet by accident without any pre-tort relationship or contact.[48]

Whereas this argument bears some justification, it cannot prevail in the analysis of the *Rome-II* lex domicilii communis. Even though some party expectations might be territorially oriented[49] (e.g. concerning the locus state's rules of the road), the expectations as regards the outcome of a tort case are regularly connected to the parties' residence. This is due to the difference between conduct-regulating and loss-allocating rules. Even though European private international law does not openly acknowledge the American distinction for substantive rules and their different conflicts treatment, the difference is inherently accepted. In most European legal systems, it is acknowledged that the locus state's rules of the road and its safety rules have to be drawn into account as 'local data' when assessing a tort case and determining liability, even if applying a different state's law to the tort claims.[50] While this approach has not been implemented in all Member States' codified law;[51] Article 17 *Rome-II* similarly provides for taking into account "*as a matter of fact and in so far as appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*". In this respect, the Regulation corresponds to the Hague Conventions on Traffic Accidents (Article 7) and Products Liability (Article 9). The Commission made clear that taking account of foreign law according to Article 17 *Rome-II* is not the same as applying it but only taking account of the other law *as a point of fact*.[52]. Nevertheless, even though the locus state's rules are accord-

---

45 *Heinz Binder*, Zur Auflockerung des Deliktsstatuts, 20 RabelsZ 401, 475 (1955); *Scoles & Hay*, *supra* at 720.

46 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975), on remand 546 F.2d 26 (5th Cir. 1977).

47 *Scoles & Hay*, *supra* at 721-722.

48 *Petch*, *supra* (n. 34) at 455; *Jan Kropholler*, Ein Anknüpfungssystem für das Deliktsstatut, 33 RabelsZ 601, 619-620 (1969); *Binder*, *supra* at 462; *Beitzke*, *supra* at 106-107; *David F. Cavers*, The Choice-of-Law Process 302-303 (1965).

49 *Stone*, *supra* at 218; *Michael Sonnentag*, Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II-Verordnung, 105 ZVglRWiss 256, 272 (2006).

50 *Staudinger/von Hoffmann*, BGB, Vorbem zu Art 40 EGBGB, no. 58 (new ed. 2001); *Hans Stoll*, Die Behandlung von Verhaltensnormen und Sicherheitsvorschriften, in: Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse, 160, 174 (1983).

51 For codified examples see Article 142(2) Swiss codification, Article 45(3) Portuguese Civil Code, and § 33.1 of the Hungarian codification; for Germany (without a codified rule): Staudinger/von Hoffmann, *supra* no. 60.

52 Explanatory Memorandum (COM(2003) 427 final), at 25.

ingly only considered on a factual basis, this provision resembles the issue-by-issue approach of U.S. conflicts law as regards the distinction of conduct-regulating and loss-allocating rules. Whereas the parties' obligations and entitlements might be considered applying a different law, the concrete wrong – i.e. the breach of a rule of conduct or safety – would still be determined under locus law. Regardless of the question whether this is an *application* or a mere *taking account of* locus law,[53] both legal systems' rules are considered when determining liability. The parties' expectations are divided accordingly. The expectations as regards the rules that are intended to regulate their conduct are connected to the locus state. Their expectations as regards the final allocation of the losses, however, are focussed on their habitual residence. Hence, applying common residence law on the parties' rights and obligations stemming from an out-of-state tort provides both victim and tortfeasor with the legal standard of compensation they usually expect as residents of a certain state.[54] With regard to Article 17 *Rome-II*, it is clear that application of the lex domicilii communis corresponds to the parties' expectations without impairing the locus state's interests in giving regard to its conduct-regulating rules.

3. Economic and Social Justification

In the same vein, asking for the justification of a common residence rule, one should look at the case's social embedding and the economic background.[55] The notion of 'habitual residence' is not only a legal concept but primarily the expression of a factual connection. In order to prove habitual residence, there must be a concurrence of both the physical element of residence and of the mental state of having a settled purpose.[56] Similarly, the American concept of 'domicile' requires a place "*where [a person] has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning*".[57] Insofar – apart from potential differences – both habitual residence and domicile correspond as regards the required factual and territorial connection. It is obvious that both notions' essence is the relationship relating an individual to a certain place.[58] An inevitable emanation of this relationship between place and person is the social and economic interplay of the person's life with the state. Two practical aspects illustrate the public policy of this connection.

First, an oft-enunciated argument in favor of the common residence rule is its practicability. For practical reasons, tort victims will usually sue in their residence state even though the tort may have occurred out-of-state. Applying the common residence law then enables the residence state's courts to decide the case under the lex fori.[59] Besides, the common residence rule – as it can be found in many states' conflicts laws – reduces the incentive for forum shopping. Insofar, reliance on the common residence reflects the yearning for international harmony of decisions. Identifying the law of the 'seat' of a relationship and the law to which the relationship belongs has always been said to further equal decision finding regardless of the forum.[60] Consequently, in most cases the common residence rule guarantees lower litigation costs, more efficient court administration, and international harmony of decisions.

Second, at least for loss-allocating rules' conflicts, the state of residence can usually not be indifferent to the outcome of a tort suit as far as the rights and duties of its residents are concerned. The victim will demand compensation on the basis of the damages she incurred. These damages have to be assessed as regards the victim's legal, social and economic position – hence mainly on the basis of the residence state's reality.[61] Compensation for the victim's lost income (in her residence state) due to the tort would be an illustrative example. In addition, defaults in compensation might result in the residence state providing support to the victim. Vice versa, excessive liability might affect the tortfeasor's economic situation and will influence her residence state's interests. In sum, the parties' residence states will at least indirectly be affected by the outcome of any tort dispute.[62] Applying common residence law, therefore, is socially and economically sound with regard to public policy interests.

4. Multi-Tortfeasor Cases

Finally, there is no difference as regards multi-victim or multi-tortfeasor cases. According to the criticism on the lex domicilii communis, multi-party cases should regularly result in an application of the lex loci delicti for practical reasons. Especially when more than one tortfeasor exists, this has been

---

53 For an 'application' – instead of the mere 'taking into account' – of conduct and safety rules: *Symeonides*, *supra* (n. 34) at 942-945; but see Andrew Dickinson, Cross-Border Torts in EC Courts – A Response to the Proposed "Rome II" Regulation, 13 E.B.L. Rev. 369, 375 (2002).

54 See *North & Fawcett*, *supra* at 640; *Thomas Kadner Graziano*, Gemeineuropäisches Internationales Privatrecht – Harmonisierung des IPR durch Wissenschaft und Lehre (am Beispiel der außervertraglichen Haftung für Schäden) 388 (2002). This is different, if both parties have also adapted to the loss-allocating rules of the locus state (e.g. as regards their insurance coverage). See *Wagner*, *supra* at 378; *Jaffey*, *supra* at 21-22. Insofar, the escape clause of Article 4(3) Rome-II will apply.

55 *Binder*, *supra* at 480-484; *Gerhard Hohloch*, Das Deliktsstatut – Grundlagen und Grundlinien des internationalen Deliktsrechts 255 (1984).

56 *Clarkson & Hill*, *supra* at 45; *Shah v. Barnet London Borough Council* [1983] 2 AC 309, at 344.

57 *Rodriguez Diaz v. Sierra Martinez*, 853 F.2d 1027 (1st Cir. 1988) citing *Joseph Story*, Conflict of Laws § 41 (8th ed. 1883).

58 *Scoles & Hay*, *supra* at 229, 242-243; *David McClean & Kisch Beevers*, The Conflict of Laws 26 (6th ed. 2005).

59 *Yvon Loussouarn & Pierre Bourel & Pascal de Vareilles-Sommières*, Droit international privé 199-200 (8th ed. 2004); *Stefan Leible & Andreas Engel*, Der Vorschlag der EG-Kommission für eine Rom II-Verordnung – Auf dem Weg zu einheitlichen Anknüpfungsregeln für außervertragliche Schuldverhältnisse in Europa, 6 EuZW 7, 11 (2004); *Martin Fricke*, Kollisionsrecht im Umbruch, 35 VersR 726, 739 (2005); *Beitzke*, *supra* at 106-107; *Kropholler*, supra at 618; *Kadner Graziano*, supra at 388.

60 See already *Friedrich Karl von Savigny*, System des heutigen Römischen Rechts, Vol. VIII, 28 and 108 (1849); *F. Vischer*, General Course on Private International Law, 232 Recueil des cours 21, 28 (1992); for the 'seat' of a party relationship in U.S. doctrine: *Cavers*, *supra* at 166 and 300-303.

61 *Petch*, *supra* (n. 34) at 455; *Christian von Bar*, Internationales Privatrecht (Vol. II) 486-487 (1991); *Sonnentag*, *supra* at 271.

62 These post-tort effects were characterized in *Miller v. White* (167 Vt. 45, 702 A.2d 392, 395 (1997)) when the court applied the lex domicilii communis on the claim of a Vermont victim against a Vermont tortfeasor arising out of a Quebec car accident stating that Quebec has "*little interest in […] the rights of action of an United States citizen against another United States citizen in an United States court*".

named the preferable alternative.[63] That focus is unfortunate, however, as it distorts the analysis in the same way as in the multi-victim cases. The foregoing discussion on these cases has shown that application of different laws to different pairs of party is justified and that the practical benefits outweigh potential downsides of the common residence rule. The same is true for multi-tortfeasor constellations.

In addition, the critique overlooks that the 'single law' approach has been overcome not only in U.S. conflicts law but also in European private international law. For U.S. conflicts law, the *Schultz* reasoning illustrates that there is no doctrinal tenet to always apply the same law in multi-tortfeasor cases. Besides, §§ 172 and 173 of the Restatement (Second), concerning joint torts, contribution, and indemnity, clearly provide that the state of the applicable law should be determined in light of the general 'interest analysis' choice-of-law principles of § 6 and § 145, meaning that different tortfeasors may be liable under different laws and that the issues of contribution and indemnification will be determined independently from the lex loci delicti.[64] Consequently, under modern U.S. conflicts law the law applicable to each tortfeasor's obligation and to the issues of contribution or indemnification will be determined separately.[65] There is no 'simplification' by recourse to the lex loci delicti.

As for European private international law, the dominant opinion likewise argues in favour of a split application of each tortfeasor's 'own' law.[66] Moreover, what the critics seem to have overlooked, e.g. the application of different laws on different pairs of party, is already manifested in Article 20 *Rome-II*. The provision is implicitly founded on the expectation of an application of different laws in multi-tortfeasor cases. Hence, restricting the common residence rule in this respect is neither practically nor dogmatically required.

B. Multi-party Torts and European Substantive Law Harmonization

The only question remaining, however, is whether a different approach in multi-victim or multi-tortfeasor cases is warranted for reasons of unifying European substantive tort law. The topic of substantive laws' harmonization is discussed vividly at the European level.[67] As the Member State's legal systems still differ significantly, the application of a single law to all parties to a tort would seemingly help to overcome existing frictions. There would be a minimum of practical problems as regards the courts' determining and applying foreign laws. In addition, different results for the parties involved could be avoided. This approach, however, overemphasizes the importance and purpose of choice-of-law harmonization and the Community's need for unified substantive laws.

The current European situation as regards private international and substantive law harmonization resembles the U.S. federal system having significant experience with interstate and multi-state tort conflicts. Similar to the federal states in the U.S., the European Member States in joining the union and in shaping the union's concept retain broad state powers. Paramount in this residual area of state sovereignty is the states' police power, especially in the context of protecting the citizens' safety, health and welfare, an aim that is in part also fulfilled by their private law systems. This core of authority and sovereignty guarantees for each state to implement its citizens' political will and public policies for these aspects. As a result, granting each state independent power promotes union-wide competition as regards the substantive laws. Insofar, the different U.S. states' legal systems have been characterized as "*fifty laboratories*" that – through the process of experimentation and competition – gradually evolve better substantive rules of law.[68] In short, the states' independent law making is said to provide a system of constant development and amelioration to "*better substantive rules*".

Private international law is in contrast merely conceived to resolve conflicts on the application level and not to resolve the case on the merits.[69] Therefore, conflict rules are – in principle – indifferent to the content of the applicable law.[70] Consequently, their purpose cannot be to unify the different substantive laws or to provide unified results based on the individual facts of each case. This has been the gist of the *Tooker* majority's explanation when stating:[71]

"*It suffices to note that any anomaly resulting from the application of Michigan law to bar an action brought by Miss Silk [i.e. the Michigan victim] is 'the implicit consequence' of a Federal system which, at a time when we have truly become one nation, permits a citizen of one State to recover for injuries sustained in an automobile accident and denies a citizen of another State the right to recover for injuries sustained in a similar accident. The anomaly does not arise from any choice-of-law rule*".

---

63 *Huber & Bach*, *supra* at 76; but see *Hans Stoll*, Rechtskollisionen bei Schuldnermehrheit, in: Festschrift für Wolfram Müller-Freienfels, 631, 659-660 (1986); for a case law example: BGH 19 VersR 1989, 54.

64 § 173 Restatement (Second) of Conflict of Laws (1971), comment (a) and (b), concerning "Contribution and Indemnity Among Tortfeasors": "It may be questioned whether such decisions [i.e. applying the lex loci delicti] will invariably be followed in the future in view of the growing realization that all issues in tort need not be governed by the same law. The state where conduct and injury occurred will not by reason of these contacts alone be the state that is primarily concerned with the question whether one tortfeasor may obtain contribution against another".

65 See *Viera*, 142 Misc.2d at 1104; *Soo Line Railroad Company v. Overton*, 992 F.2d 640, 645 (1993); *Consolidated Railroad Corporation v. Allied Corp.*, 882 F.2d 254, 256-257 (7th Cir. 1989).

66 See (for a codified example) Article 140 Swiss codification; (generally) Stoll, *supra (n. 63)* at 645-650; (restrictively) *Jan von Hein*, Das Günstigkeitsprinzip im Internationalen Deliktsrecht 278-284 (1999); MünchKomm/EGBGB-*Junker*, Art. 40 EGBGB no. 49 (4th ed. 2006) with further references.

67 See generally *Reinhard Zimmermann* (ed.), Grundstrukturen des Europäischen Deliktsrechts (2003).

68 *Lea Brilmayer & Ronald D. Lee*, State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws, 60 Notre Dame L.Rev. 833, 852 (1985) with reference to the U.S. Supreme Court (*Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 n. 20 (1982)).

69 For European private international law: *Gerhard Kegel & Klaus Schurig*, Internationales Privatrecht § 2 I (9th ed. 2004).

70 *Leo Raape & Fritz Sturm*, Internationales Privatrecht, Vol. 1 – Allgemeine Lehren 199 (6th ed. 1977): application of the foreign law applicable is similar to a „*leap into the dark*". For the *ordre public* exemption see *Clarkson & Hill*, *supra* at 484-490.

71 *Tooker*, 24 N.Y.2d at 580.

This is also true for the European Community. A unified system of conflict rules is not intended to directly unify the substantive laws.[72] In contrast, the harmonization of conflict rules – like the harmonization of jurisdiction – is only a single necessary step towards the unification of the Member States' substantive laws. The intention is that the harmonization of choice-of-law rules will intensify the need for a unified substantive system:[73] The facilitation of litigation by a unification of jurisdiction and conflicts rules can indicate existing differences in the states' substantive laws and thereby fuel the process of a separate substantive law harmonization. Insofar, the European approach is different to the U.S. concept. It is less the idea of continuing amelioration but of gradual harmonization from the outskirts to the center of the national legal systems. The substantive law's harmonization as the final step in this process is on a different agenda than the choice-of-law unification. The current harmonization's purpose is thus restricted to unifying the choice-of-law rules in order to avoid forum shopping and to provide for legal certainty and predictability. The substantive and material harmonization is still to come.

V. Conclusion

There is no need to further substantive law unification by altering choice-of-law rules in order to achieve certain results deemed to be more adequate. At least in multi-victim or multi-tortfeasor cases, application of the common residence rule and a split of the applicable laws will not contradict the requirements of fairness or practicability. In contrast, applying the 'single law' rule suggested by critics would yield results that are to the same extent unequal.

Even though, it can hardly be contested that a strict lex domicilii communis might be inadequate for conflicts of so-called 'conduct-regulating' rules, potential downsides are alleviated by giving regard to local rules according to Article 17 *Rome-II*. Finally, for unexpected cases Article 4(3) provides for an escape clause.

Consequently, it must be stated that existing differences in substantive state laws are the result of the European Community's supranational structure. Differences resulting from the application of more than one law are therefore not only materially justified but also evolutionary intended. Therefore, conflict rules cannot unify substantive laws, and there is no need to restrict or amend the common residence rule for multi-party cases.

[72] *Peter Hay & Ole Lando & Ronald D. Rotunda*, Conflict of Laws as a Technique for Legal Integration, in: Integration Through Law (ed. by *Mauro Cappelletti, Monica Seccombe, and Joseph Weiler*) 161, 169 (1986); as regards the '*competition of legal systems*': *Erik Jayme*, Ein Internationales Privatrecht für Europa 5, 15 (1991).

[73] So-called 'law of self-intensifying integration': *Ole Lando*, The EC Draft Convention on the Law Applicable to Contractual and Non-contractual Obligations, 38 RabelsZ 6, 7 (1974).

Civil Procedure

BGH (DE) 27 June 2007 – X ZR 15/05
Lugano Convention Article 18 – Challenge to international jurisdiction – Appellate proceedings – Appearance without repeating the challenge to jurisdiction

Within the scope of the Lugano Convention, international jurisdiction is established where the defendant enters an appearance in the appellate proceedings without repeating the challenge to jurisdiction he raised in first instance. (***Headnote of the Court***)

Discussion of the Decision

1. Facts

The plaintiff, a German company, sued a Polish company before the Landgericht of Aachen (DE) for payment relative to a sales and licence agreement regarding hard- and software. The defendant challenged the international jurisdiction of the court. The court of first instance accepted jurisdiction, inter alia, on the ground of a jurisdiction clause contained in the plaintiff's general terms and conditions. However, the court dismissed the claim on the merits.

The plaintiff appealed the judgment by the court of first instance. In the appellate proceedings, the defendant asserted that the court of first instance had justly held that the claim was unfounded. It did not make any pleadings regarding the question of international jurisdiction. The plaintiff's appeal also remained unsuccessful, as it was held that the German courts were competent, but the claim was unfounded. A further appeal was not allowed. The plaintiff appealed before the German Bundesgerichtshof (BGH) against denial of leave to appeal.

2. The Court's Decision

The BGH reverses the appellate judgment and remands the case to the appellate court as the latter has infringed the plaintiff's right to be heard in a way relevant for the holding. The BGH holds that the appellate court ignored the plaintiff's submissions regarding the course of negotiations as well as the conclusion of the contract and failed to consider them.

As for the further proceedings, the BGH (DE) makes additional observations regarding the question of international jurisdiction: As notice of the proceedings was served on 12. 02. 2003, and thus, before Poland's accession to the EU, international jurisdiction in the present dispute is determined according to the Lugano Convention, which entered into