



The European Legal Forum

Forum iuris communis Europae

Hay, Peter

**Contemporary Approaches to Non-Contractual Obligations in
Private International Law (Conflict of Laws) and the European
Community's "Rome II" Regulation**

The European Legal Forum (E) 4-2007, 137 - 152

© 2007 IPR Verlag GmbH München

stacles', such as those pleaded in the main proceedings, are beyond the control of the trade mark proprietor, since those obstacles must, moreover, have a direct relationship with the mark, so much so that its use depends on the successful completion of the administrative action concerned.

53. It must be pointed out, however, that the obstacle concerned need not necessarily make the use of the trade mark impossible in order to be regarded as having a sufficiently direct relationship with the trade mark, since that may also be the case where it makes its use unreasonable. If an obstacle is such as to jeopardise seriously the appropriate use of the mark, its proprietor cannot reasonably be required to use it none the less. Thus, for example, the proprietor of a trade mark cannot reasonably be required to sell its goods in the sales outlets of its competitors. In such cases, it does not appear reasonable to require the proprietor of a trade mark to change its corporate strategy in order to make the use of that mark none the less possible.

54. It follows that only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unrea-

sonable, and which arise independently of the will of the proprietor of that mark, may be described as 'proper reasons for non-use' of that mark. It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make the use of that mark unreasonable. It is the task of the national court or tribunal, before which the dispute in the main proceedings is brought and which alone is in a position to establish the relevant facts, to apply that assessment in the context of the present action.

55. Having regard to the foregoing considerations, the answer to the second question referred for a preliminary ruling must be that Article 12(1) of the Directive must be interpreted as meaning that obstacles having a direct relationship with a trade mark which make its use impossible or unreasonable and which are independent of the will of the proprietor of that mark constitute 'proper reasons for non-use' of the mark. It is for the national court or tribunal to assess the facts in the main proceedings in the light of that guidance. (...)"

EUROPEAN CONSUMER LAW

Collective actions and EU strategy for consumer protection: The draft bills introducing the class action in Italy

Gaetano Iorio Fiorelli*

1. The class action and the EU Consumer policy strategy 2007-2012

By means of the EU Consumer Policy Strategy 2007-2012, published on 13 March 2007, the European Commission outlined the guidelines for the protection of consumers over the next 6 years.

Among the various issues considered in the document, great attention has been paid to the paragraph regarding the possibility of class action for dissatisfied consumers across the European Union.¹ In that paragraph, the Commission restated its intention to consider action on collective redress for consumers both for infringements of consumer protection rules and for breaches of competition rules, as per the Green Paper on private damages action of 2005,² by which the Commission had indicated the class action as an effective instrument for private antitrust enforcement.

As is well known, collective actions mentioned in the document of the Commission resembles US class action suits that allow consumer groups to join together and claim compensa-

tion from companies that provided flawed products or services. By so doing, class actions allow concentrating a number of separate civil actions against the same defendant into a single proceeding, with the result of significantly improving the efficacy of the procedural protection granted to consumers.

Over the past decades, class actions have not rarely proven to be a vexatious instrument,³ to such an extent that they have been criticised by many commentators in the US, who highlighted that consumers actually have often collected small amounts of money in comparison with higher and higher costs of class action proceedings, especially the attorneys' fees.⁴ Furthermore, as regards the possible (un)fairness of the

* Gaetano Iorio Fiorelli, Assistant researcher in International Law at Bocconi University, Milan (IT) - Avvocato in Milan.

¹ See para. 5.3.

² See COM(2005) 672 def.

³ Among the elements enhancing litigiousness in the US, punitive damages are one of the most important. On this issue, see *Frata*, Il Class Action Fairness Act of 2005: problemi e prospettive, in *Danno e responsabilità*, 2006, n. 1/2006; *Hensler*, Revisiting the Mosnter: New Myths and Realities of Class Action and Other large Scale Litigation, in 11 *Duke Law Journal of Comparative and International law*, 2001, p. 179; *Hensler*, Class Action Dilemmas: Pursuing Public Goals for Private Gains, Rand Institute for Civil Justice, 2000.

⁴ *Eisenberg, Miller*, Attorney Fees in Class Action Settlements: an Empirical Study, in 1 *Empirical Legal Study* 27, 2004; *Priest*, What We Know and What We Don't Know About Modern Class Actions: A Review of the *Eisenberg-Miller* Study, Civil Justice Report no. 9/2005, Center for Legal Policy at the Manhattan Institute, 2005; *Priest*, Tackling Tort Reform, in *National Review*, 11 February 2005.

class action system, some US studies showed that - once the lawsuit passed the preliminary stage and the class is finally certified by the court - companies are led to voluntarily accommodate consumers' claims, even in the case where the chain of causation between the conduct of the defendant and the damages is very weak. In supporting such decisions, a big role is often played by the repercussions in terms of a negative reputation for a company involved in a class action, as well as the uncertain outcome of the litigation, left to a jury composed of citizens.

As was foreseeable, the program announced by the Commission gave rise to concerns among the industry sectors, although the European Commissioner in charge of the consumer policies, Magdalena Kuneva, assured that the European Commission is not willing to propose in Europe a class action model analogous to the US one.⁵ In any case, Commissioner Kuneva clarified that the mechanisms according to which consumers should be allowed to bring a collective action will be decided upon consultations with industry and consumer groups, to be carried out over the next months.⁶ According to the Commission's stated intentions, collective actions should prospectively allow overhauling the bloc's consumer protection rules with the aim to increase confidence in online shopping and boost cross-border sales. The proposed changes should address e-commerce, telesales, mail order shopping, doorstep selling, international sales and the travel industry. The aim is to harmonise rules across the EU and give consumers more rights when shopping across borders, while a lack of consumer confidence over issues such as product guarantees and return policies has largely confined online sales within national borders.⁷

For the time being, collective consumer actions are allowed only by some EU nations. At present, 15 of the 27 EU Member States have no provisions for a joint consumer action, and the remaining 12 EU nations only provide for mere domestic collective actions which may not be brought in cross-border transactions.

2. The class action within the Italian legal system

Italian law does not allow class action litigation analogous to the models in force in the US or in other European countries.

By Legislative Decree no. 224 of 23 April 2001, Italian legislators implemented EC Directive no. 1993/13/EEC and established the possibility for the consumers' associations to take action to prevent the continued use of unfair contractual terms. However, Decree 224 did not introduce an actual class action proceeding, as it only enables a number of qualified entities (e.g. consumer associations) to start a legal action to prevent companies from carrying on unfair activities, without any possibility to have the defendant ordered to pay consumers a

compensation for damages.⁸

The above-mentioned Decree is one of the several provisions introduced in Italy to implement the EC Directives aiming at protecting consumers. None of these provisions however, established a procedural mechanism for a collective action.

In this context, in July 2004 the Italian Chamber of Deputies approved a draft bill to establish a *kind* of collective action.⁹ However, the draft bill was later not voted by the Senate, the upper House of the Italian Parliament, and thus never became applicable.¹⁰ After the political elections held in April 2006, the newly elected left-wing Government decided to promote the class action, and presented a new draft bill,¹¹ which is still under examination by the competent Parliament Commissions. At the same time, other draft bills were introduced in the Italian Parliament. The draft bills concerning the class action, currently under examination by the Parliament, can be ideally classified into two groups, depending on the breadth of the objectives that they intend to achieve.

Some draft bills, among which, one was introduced by the Government, are structured in a way similar to the draft bill approved during the previous parliamentary term. The key feature of these draft bills is the fact that only some qualified entities would be entitled to start a class action.¹² By way of example, under the Government draft bill, only consumer associations, professionals associations and chambers of commerce are entitled to put forward a class action. The scope of the legislation is wider, as a class action can be started for contractual and non-contractual liability, including damages arising from a breach of competition law.¹³ If the claim is accepted, the judgment shall indicate the criteria according to which the compensation can be quantified for any consumer who should decide to voluntarily accept the decision of the court. The Government draft bill provides also for a mediation phase, where the parties (i.e. the defendant on one side and the entity promoting the class action on the other one) will try to agree on the amount, terms and timing for the defendant to pay damages. If the mediation is not successful, consumers are enabled to start a legal action *per se*, to seek compensation on the basis of the favourable judgment of the

⁵ See Herald Tribune of 13 March 2007.

⁶ Under the Commissioner's expectations, a concrete proposal for EU class action model should come in 2008.

⁷ In this respect see *Monti*, Competition for Consumers' benefit, European Competition Day, Amsterdam, 2004.

⁸ Decree no. 224 of 2001 has been recently abolished, as its content converged into Decree no. 206 of 2006, the Code of Consumers, which gather all the previous rules concerning the consumer protection.

⁹ See draft bill no. C.3838 approved by the House of Representative on 21 July 2004. The draft was then transmitted to the Senate with no. S.3058. All the documentation relating to the draft bills presented to the Italian Parliament are available at the web addresses www.camera.it and/or www.senato.it, depending on which branch of the Parliament is in charge.

¹⁰ The Italian Parliament consists of two houses: the Chamber of Deputies and the Senate of the Republic. According to the principle of full bicameralism, the two houses perform identical functions.

¹¹ See the draft bill no. 1495 of 27 July 2006, introduced before the House of Representatives by the Minister for Economic Development, Pierluigi Bersani, the Minister of Justice, Clemente Mastella and the Minister of Finance, Tommaso Padoa Schioppa.

¹² See draft bills no. 679, no. 1289, no. 1662 and no. 1883.

¹³ Please note, however, that some other draft bills, such as the one introduced by Senator Benvenuto (no. 679), would limit the scope of the class action only to the contractual liability arising from contracts executed by means of standard forms on the basis of Articles 1341 and 1342 of the Italian Civil Code. Following this option, the class action would apply only within specific fields such as, first of all, insurance and banking contracts entered into by consumers.

court. On the contrary, in case of a negative outcome of the litigation, the consumer is not bound by that judgment and may freely decide to go to court.¹⁴

Other draft bills are clearly inspired by the US model.¹⁵ One of the most important characteristics of those draft bills is the possibility granted to any citizens to start a class action. Being in the same position as the promoter of the class action, other consumers are allowed to join it according to an opt-in mechanism. It has to be noted that these draft bills, differently from the Government draft bill, take into consideration a critical point, i.e. the need for a previous assessment of the admissibility of the legal suit as a class action. For this purpose, draft bill no. 1443, introduced by deputies Poretti and Capezone, provides for a preliminary stage of the proceeding, where the court is to rule if the action meets the requisites of a class action. If so, the proceeding will go on and a receiver will be appointed to deal with the requests of the various plaintiffs and the distribution of the amount due for compensation, in the event that the outcome is in favour of the consumers. Another important point concerns the role of the attorneys, who are granted the possibility to be remunerated according to a contingency fees mechanism, although within the limit of 10-15%, depending on the draft bill.

3. Preliminary comments on the class action hypothesis under discussion by the Italian Parliament.

As everyone knows from the US experience in this field, the issue of legal costs is a crucial point to assess the equity and effectiveness of the class action mechanism. The Government draft bill does not provide for a specific discipline concerning legal costs, which should therefore fall under the legal provisions normally applicable to civil litigation. In that respect, effective 1st January 2007, the legal prohibition of champerty has been generally abolished.

As regards the draft bills inspired by the US model, the rules concerning the legal costs give rise to a number of doubts, as they risk being an incentive to put forward groundless actions. By way of example, Article 15 of draft bill no. 1443 provides that, if the claim is rejected, the State legal aid will reimburse the legal costs bore by the defendant and the fees due to the receiver, while the promoter's attorneys will not be entitled to any remuneration. Otherwise, should the action be successful, even if only partially, the defendant will have to reimburse all the costs of the proceeding, including the fees due to the promoter's attorneys, to be quantified on a contingency fee agreement, within a limit of 10%. Under such a mechanism, the plaintiff may be stimulated to start legal actions even if they are not duly grounded, since, even in the event of a negative outcome of the litigation, he will not face any negative patrimonial consequence.¹⁶

Another issue concerns the admissibility of class actions in Italy, in connection to the constitutional right granted to everyone to start a legal action to protect their rights and interest on the basis of Article 24 of the Italian Constitution. The class action mechanism could imply a kind of limitation of this right, which includes, for instance, the freedom to choose a lawyer and to start (or not to start) a litigation, to settle (or refuse to settle) at certain terms and conditions. For these reasons, under the Italian Constitution an opt-out mechanism would not likely be permissible.¹⁷ Even the softer models of class action, however, imply a sort of limitation for the damaged party, such as, for example, the effect of the mediation phase provided by the Government model, which would prevent the individuals from autonomously starting a legal action while the mediation is pending. It is not completely clear if the settlement reached by mediation would be binding on everyone or not. If so, this would result in a strong limitation of the individual rights.

Finally, a technical point should be addressed. Any class action should provide a preliminary phase where the admissibility of the action is to be assessed. Otherwise, the outcome of a lengthy action could be a final judgment rejecting the claim on the basis that the action did not meet at the outset the class action legal requirements. This would clearly result in a dangerous boomerang for the same persons who should get benefit from such an instrument.

In light of the US experience, it has to be hoped that a European model of class action could be structured in a way to avoid the problems with the US model of class action. Nobody could doubt that the EU legislation established a wider protection of consumers as regards the substantial law. In 2000, the Green Paper on legal aid on cross border controversies was published¹⁸ and in 2003 an EC Directive was issued to set the minimum standard to be assured by the Member States concerning the access to justice.¹⁹ In such a legal framework favourable to consumers, we need to avoid creating a procedural instrument able to simply boost the judicial unrest, without any significant benefit for consumers.

All the above considerations would suggest adopting a prudent approach in introducing the class action in Italy. A good solution could be to fix a period to test the system, similarly to the mechanism provided by German law.

¹⁴ In that respect, it has to be noted that starting a class action automatically imply an interruption of the statute of limitation period, according to Article 2945 of the Italian Civil Code.

¹⁵ See the draft bills no. 1330, no. 1443, no. 1834 and no. 1882.

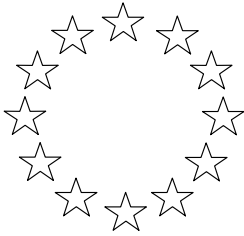
¹⁶ In that respect see *Hodge*, Multi-Party Actions: a European Approach, in *Duke Law Journal of Comparative and International Law*, 2001. The author highlights that in the eighties and nineties the legal aid system

enabled many United Kingdom law firms to promote, by means of advertising campaigns, a number of groundless legal actions.

¹⁷ As regards the problems with class actions in relation to Article 24 of the Italian Constitution see *Assonime*, L'azione collettiva per il risarcimento del danno: elementi di riflessione, Note e studi n. 85, 13 November 2006.

¹⁸ Doc. COM(2000) 51 def.

¹⁹ See the Directive 2003/8/CE.



The European Legal Forum

Forum iuris communis Europae

4-2007

pp. I-137 - I-196
7th Year July/August 2007

Section I

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation**

Peter Hay*

Introduction

Traditional Private International Law (Conflict of Laws or, shorthand, "conflicts law," in Anglo-American usage) was relatively straightforward in determining the law applicable to non-contractual obligations, particularly torts (*delict*): the "law of the place of the tort" was applicable, as a logical consequence of *Savigny's* focus – in Germany – on the "seat" of a legal relationship, *Story's* views on the comity of nations, and, almost a century later, of *Beale's* "vested rights" theory in the United States.¹ The applicable law was a *single* law (i.e., there was no *dépeçage*, as in modern American torts conflicts law,² except for that caused by the characterization of an issue as "substantive," subject to a choice-of-law inquiry, or as "procedural," to which forum law applied). The goal of Private International Law was – and in many respects it still is – to achieve "*conflicts justice*,"³ that is, to provide a system of

(substantively) value-neutral conflicts rules, thus leading to foreseeable and uniform results.

However, even then, things were not that easy, for legal systems differed both with respect to the definition of "non-contractual obligations" and, with respect to tort, on the definition and application of the place-of-tort rule. In civil law countries, the subject encompasses not only tort, but also unjust enrichment and agency without mandate (*negotiorum gestio*), while the common law treats unjust enrichment quite separately⁴ and traditionally does not provide a claim for *negotiorum gestio*.⁵ The "place of tort" was variously defined (and still is today) as the place of conduct,⁶ or as the place of injury,⁷ or as both (with either the injured party⁸ or the court

* L.Q.C. Lamar Professor of Law, Emory University (Atlanta, Ga., USA); Honorarprofessor, Universität Freiburg, Germany. – Alumni Distinguished Professor of Law Emeritus, University of Illinois (USA); Universitätsprofessor Emeritus, Technische Universität Dresden, Germany. © 2007 Peter Hay

** This paper was invited by the Chinese Association of Private International and Comparative Law for its annual meeting in September 2007 and will also appear in the Association's 2008 *Yearbook*.

¹ See *von Savigny*, *System des römischen Rechts*, Vol. 8, at 108 (1849), *Story*, *Commentaries on the Conflict of Laws – Foreign and Domestic* (1834), and *Beale*, *3 Cases on the Conflict of Laws* 517 (1901), respectively. *Beale's* views were reflected in the *First Restatement of Conflict of Laws* (1934), for which he had served as Reporter. See also *Kegel*, *Story and Savigny*, 37 *Am.J.Comp.L.* 37 (1989). See also *infra* I(B)(1).

² See *infra* I(B)(2).

³ "Conflicts justice," as distinguished from "substantive [or: "material"] justice," was central to the conflicts methodology of *Gerhard Kegel*,

the leading and very influential German conflicts scholar of his time (1913-2006): *Kegel*, *The Crisis in the Conflict of Laws*, Hague Academy, 112 *Recueil des Cours*, 95 (1964-II); *Kegel*, *Paternal Home and Dream Home: Traditional Conflicts Law and the American Reformers*, 27 *Am.J.Comp.L.* 615 (1979); *Kegel*, in *Juenger* (ed.), *Zum Wandel des Internationalen Privatrechts* 35 (= 113 *Schriften der Juristischen Studiengemeinschaft* 35 et seq. (1974).

⁴ See *infra* at n. 105. See also the new *Restatement on Restitution: Restatement of the Law (Third), Restitution and Unjust Enrichment – Tentative Draft No. 5* (2007).

⁵ See *D. Keehan*, *Negotiorum Gestio: A Civil Law Concept in the Common Law?*, 55 *Int'l & Comp. L. Q.* 253 (2006). For comparative treatment of the concept in various civil-law systems, see *Dawson*: *Negotiorum Gestio: The Altruistic Intermeddler*, 74 *Harv.L.Rev.* 817 (1961).

⁶ The place of conduct has been the reference point since "time immemorial" ("*seit Urzeiten*"): *Raape*, *Deutsches Internationales Privatrecht* 365 (2nd ed. 1945). *But see infra* at n. 55.

⁷ See *infra* nn. 22, 26.

⁸ See *infra* nn. 23, 26.

given the right to choose).⁹

Modern torts conflicts law is much more varied and differentiated, therefore also more complex. Legal systems seek to respond in their *substantive* laws to various and different party needs (e.g., consumer protection) and party expectations (e.g., in products liability, the expectation of the manufacturer of internationally distributed goods).¹⁰ In order to achieve these goals, conflicts law – in defining connecting factors for the determination of the applicable law – needs to reflect these concerns,¹¹ rather than develop or pursue a separate methodology (such as do the few American states that employ the “better law”-approach to choice of law).¹² Value goals may often be very similar, but there may be disagreement (and hence divergence of rules) as to how to achieve them. Yet – and a thought not unrelated to the idea of “conflicts justice” (above) – conflicts law should seek to *bridge differences*, to harmonize if possible, rather than accentuate them.¹³

A number of countries have recently codified their conflicts law.¹⁴ The European Union has adopted its first conflicts statute – the “Rome II” Regulation – to deal with choice of law in tort.¹⁵ The United States – mainly a case law-based system¹⁶ – has undergone a fifty year evolution in tort conflicts law on the basis of the *Restatement (Second) of Conflict of Laws*,¹⁷ the wide adoption of “interest analysis,” and the

influential case law of New York’s highest court.¹⁸

This essay explores some of these approaches and the central issues they address. The emphasis is on the European Community’s “Rome-II” Regulation, unifying¹⁹ the torts conflicts law of the Member States (except Denmark)²⁰ and, by way of comparison, the American approach, with side glances to other legal systems. Because of the systemic differences noted above, the discussion focuses on *tort*, with only brief discussion of unjust enrichment, *negotiorum gestio*, and *culpa in contrahendo*.

I. The Law Applicable to Tort – In General: Pervasive Problems

A. The Historic Default Rule: The Law of the Place of the Tort

1. Place of Conduct or Place of Injury?

Special rules – to be discussed later – today deal with particular tort situations, such as products liability, defamation, and others. Historically, the general starting point for all torts, however, has been the “law of the place of the tort.” Where is that? An early American decision focused on the place of injury as the last element necessary to establish a claim against the defendant: wrongful conduct without injury does not support a claim.²¹ Other systems focused on the place of conduct.²² German law before 1999, in contrast, called for the application *either* of the law of the place of injury *or* of the wrongful conduct, whichever was the more favorable to the plaintiff (“*Günstigkeitsprinzip*”).²³ In view of

⁹ See *infra* n. 25.

¹⁰ For the possible increasing convergence of national substantive tort law in the European Community, see *Jansen*, Principles of European Tort Law?, 70 *Rabels Zeitschrift* 732 (2006) (in German). For a comprehensive analysis of French tort law and its values, see *Corbè-Chalon and Rogoff*, *Tort Reform A La Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, [2007] *Columbia J. European L.* 231.

¹¹ See *Wagner*, Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäische Deliktsgerichtsstand, [2006] *IPRax* 372, 374 et seq., whose contribution is a comprehensive analysis of the Rome-II Regulation while it was still in draft form.

¹² See *infra* n. 39.

¹³ See *Berman*, Is Conflict-of-Laws Becoming Passe?, in *Rasmussen-Bonne et al.* (eds.), *Balancing Interests – Festschrift für Peter Hay* 43, 48 (2005). *Hay*, Flexibility versus Predictability and Uniformity in Choice of Law, *Hague Academy*, 226 *Collected Courses* 281-412 (1991-I).

¹⁴ For *Russia*, see *Sadikov*, Die Kodifikation des Internationalen Privatrechts Russlands, 67 *Rabels Zeitschrift* 318 (2003); *Mayer and Breig*, Das internationale Privatrecht im Zivilgesetzbuch der Russischen Föderation, [2006] *Zeitschrift für Europäisches Privatrecht* 847, with references to other East European codifications in footnote 1. *German* conflicts law in tort was uncodified case law until 1999 when the conflicts statute was amended: *Hay*, From Rule-Oriented to “Approach” in *German Conflicts Law*, 47 *Am.J.Comp.L.* 501 (1999). For a more comprehensive list, see *Scoles, Hay, Borchers, Symeonides*, *Conflict of Laws* § 2.27, at pp. 112-16 (4th ed. 2004).

¹⁵ Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007, L 199 at 40). A “Regulation,” in European Community law, “shall have general application. It shall be binding in its entirety and directly applicable in all Member States. EC Treaty, Art. 249, para. 2. It thus has the (preemptive) effect the same as an American federal statute.

¹⁶ Exceptions: Louisiana and Oregon have codified their conflicts law: La. Civil Code, Book 4 (1992); Oregon (only with respect to contracts): O.R.S. §§ 81-100 to 81-135 (2002). A Puerto Rican codification is pending.

¹⁷ So-called “Restatements of the Law,” often in a second or third edition, are issued – for many fields of law – by the American Law Institute, a private organization comprised of judges, law professors, and attorneys. Restatements undertake to summarize systematically American case law. They are not official sources of law, but many of them have been quite influential in the development of American law. See *Hay*, *Law of the United States* No. 32, at pp.14-15 (2nd ed. 2005).

¹⁸ For all see below at nn. 38-48.

¹⁹ Unlike the “Brussels-I” and “Brussels-II” Regulations (dealing with jurisdiction and judgment recognition in civil and commercial matters and in divorce and child custody, respectively, *within* the European Community), the Rome-II Regulation has “universal application.” Art. 2. As such, it replaces, within its sphere of application, the conflicts law of the member states (except Denmark, see next n.) not only in cases involving other member states, but also with respect to third countries. The proposed “Rome-I” Regulation on the Law Applicable to Contractual Obligations, like the “Rome Convention” (OJ 1980, L 266 at 1) which it will replace, similarly is to be universally applicable. COM(2005)650(final), 2005/0261 (COD), Art. 2. – The Brussels-I Regulation (EC No. 44/2201) of 22 December 2000 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters may be found in (OJ 2001, L 012 at 1); the Brussels-II Regulation (EC No. 2201/2003) of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for children of both spouses may be found in (OJ 2003, L 338 at 1).

²⁰ Denmark, Ireland, and the United Kingdom were given the right not to be subject to Regulations promulgated by virtues of the powers now conferred on the Community by Art. 65 EC Treaty. Denmark, but not Ireland or the United Kingdom, exercised this right with respect to Brussels I and II and Rome II. As to Brussels I, Denmark has entered into a *Agreement* with the European Community adopting that Regulation’s provision, subject to certain rights of cancellation: (OJ 16 November 2005), L 299 at 62.

²¹ See, e.g., *Alabama Great Southern Railroad Co. v. Carroll*, 97 Ala.126, 11 So. 803 (1892).

²² Within the present European Community, see, e.g., *Poland*, *Private International Law Act of 1965*, Art. 33 § 1. See also *infra* n. 26.

²³ BGH, [1964] *NJW* 2012; [1981] *NJW* 1606. See also *Lüderitz*, *Internationales Privatrecht* No. 301 (1987) (= *Juristische Lernbücher* vol. 29); *Hay*, *Internationales Privatrecht* No. 149 (PdW-Series, 3rd ed. 2007). The Supreme Court for Civil and Commercial Matters (BGH) limited this rule for claims arising out of unfair competition: for them the applicable law (without choice) was that of the place where competition was affected (the market). BGHZ 35, 325, [1962] *NJW* 37. For unfair competition under the Rome-II Regulation, see *infra* at n. 92 et seq.

the burden that this rule entails for the judiciary in possibly having to determine the content of two foreign legal systems, the 1999 reform opted for the law of the place of conduct, but permits the plaintiff to invoke (and prove) the other law.²⁴ Other systems adopted variations of the German approach.²⁵

The European Community's Rome-II Regulation deliberately rejects, except for claims for environmental damage, a reference to the place of conduct²⁶ and, with it, the applica-

²⁴ Art. 40(1) EGBGB (Introductory Law to the Civil Code), English translation in *Hay*, *supra* n. 14.

²⁵ See, e.g., *Serbia*, International Private Law Act, Art. 28(1). See also *People's Republic of China*, Model Law of Private International Law (Sixth Draft 2000), Art. 112.

Some legal systems refer both to the laws of the places of conduct and of injury, without providing how or by whom the choice is to be made. See, e.g., *Czech Republic* and *Republic of Slovakia*, Act on Private International and Procedural Law, respectively, Art. 15 (Czech Act no. 97 (1963 Coll.)). In both cases, the Rome-II Regulation now eliminates the choice, as it does in the case of Germany.

²⁶ Art. 7 preserves application of the law of the place of conduct, at the plaintiff's option, for cases of environmental damage. The exception takes account of the wide differences in the existing laws of the member states and also guards against the possibility that "a victim in a low-protection country would not enjoy the higher level of protection in neighboring countries. Considering the Union's ... general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts and delicts, generally derives an economic benefit from his harmful activity." EC Commission, Explanatory Memorandum to 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), 2003/0168 (COD), at p. 19. It has been suggested that generalizing the application of the more favorable law (i.e., the adoption of a general *Günstigkeitsprinzip*) would similarly advance the interests of conduct-regulating states. *Symeonides*, Tort Conflicts and Rome II: A View from Across, in: *Festschrift für Erik Jayme* 935, at para. 8.3 (2004). This may be true. *But see infra* text preceding n. 89. An answer may be that Art. 7 addresses, in the main, intra-Community environmental damage claims and, through retention of the *Günstigkeitsprinzip*, seeks to raise the standards of environmental protection, while a general reference to the more favorable law is not only burdensome, but, when applied to non-EC tortfeasors may not give the EC plaintiff the benefit of higher liability standards. See the text. Moreover, Art. 16 (on mandatory rules), could have provided a means to give effect to particular and specified regulatory interests of a state other than that of the place of injury or of the forum; the final version, however, restricts the provision to the mandatory rules of the forum. See below text following n. 118. See also Art. 18 (the injured party may bring a direct action against an insurer if either the law applicable to the insurance contract or the law applicable to the non-contractual obligation so provides).

The place of injury is also the primary rule in, among others, *Australia: John Pfeiffer Pty. Ltd. v. Rogerson*, 172 A.R. 625, 648 (Austl. 2000); *Regie Nationale des Usines Renault SA v. Zhang*, [2002] HCA 10; *Canada: Tolofson v. Jensen*, 120 D.L.R.4th 289 (Can. S.Ct. 1994); *Japan: Art. 17*, Act on the General Rules of Application of Laws, effective Jan. 1, 2007, English translation in *Anderson & Okuda*, [2006] Asian-Pacific L. & Pol. J. 138 (2006).

Outside the European Community (where the Regulation now refers to the place of injury), reference to the place of conduct is the rule in a number of states, among them: *Russia*: (Art. 1219, Chapter VI of Part III of the Civil Code, entered into force 1 March 2002, German translation in *Mayer & Breig*, 14 *Zeitschrift für Europäisches Privatrecht* 847, 848 (2006); *Ukraine*: Private International Law Act of Ukraine, *Vidomosti Verkhovnoji Rady Ukrainy*, 2005, No. 32, St. 422, Art. 49(1); cf. *Switzerland*: Art. 133(2) Statute on Private International Law of 1989, 29 I.L.M. 1254 (*but see* the alternative reference to the foreseeable place of injury in subsection (3)).

With respect to *jurisdiction*, the European Court of Justice had interpreted Art. 5(3) of the Brussels Convention to permit the exercise of specific jurisdiction in tort both at the place of conduct and of injury. *Case 21/76 (Bier)*, [1976] ECR 1735. The Brussels-I Regulation retains the provision unchanged. The prior decision therefore presumably also applies to its interpretation. As a result of Art. 4(1) of the Rome-II Regulation, a court exercising jurisdiction at the place of conduct in tort cases, other than for environmental damage (Art. 7, *supra* this n.), will therefore not have the option of applying the *lex fori*.

tion of the more favorable law.²⁷ The intent is to focus on the liability standards of the victim's law (presumably an EC country) rather than on the potentially lesser liability standards of the defendant's state of conduct.²⁸ The place of conduct, however, does furnish "the rules of safety and conduct" in force at the relevant time.²⁹ In this context it is noteworthy that the draft does not contain a requirement that, whatever the applicable law is, the event must also constitute a tort under the *lex fori*. Such a requirement (known as "double actionability") was long part of English conflicts law, but has now been abandoned there; it survives today in some other laws.³⁰ As a defensive mechanism against the recognition of an unpalatable claim under foreign law, "double actionability" adds nothing that the conventional public policy exception or the application of the mandatory rules of the forum cannot also achieve. The advantage of having to invoke the latter – over a general "double actionability requirement" – is their narrower scope, their exceptional character.

2. What Is "Injury"?

The "Place of Injury," in its generic sense, may refer to the injury's first manifestation, to subsequent complications, in other words: to any number of things. In the civil law it has always been quite clear that it is the invasion of the plaintiff's legally protected right (his "*Rechtsgut*", in German)³¹ that constitutes the "injury," not its subsequent manifestation. Illustratively: the injury is the blow to the head (= the violation of the victim's right to corporal integrity), not his subsequent death (in another state). The common law did not develop an equally clear doctrinal definition, thus leaving open whether "consequential damage" – as in the law of damages relating to contract – were part of the definition of "injury" (a substantive question) or part of the *quantification* of damages, which some systems characterize as "procedural" and therefore governed by the *lex fori*.³² Under the Rome-II Regulation,

²⁷ See *infra* at n. 76. See also *infra* n. 85, 114-117 for a possibly victim-favoring rule in the case of traffic accidents.

²⁸ *Wagner*, *supra* n. 11, at 376-77.

²⁹ Art. 13. The rule was the same in Germany: see *Junker*, in: *MünchKer Kommentar*, anno. 84 to Art. 40 EGBGB (2001). This is usual. Like all references to foreign law, the rules invoked by Art. 13 of course remain subject to the mandatory rules of the forum and to the public policy exception. On mandatory rules, see *infra* II(E)1.

³⁰ For "double actionability" in prior English law, see *Chaplin v. Boys*, [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085; cf. also *Red Sea Insurance Co. v. Bouygues SA*, [1994] 3 W.L.R. 926, [1994] 3 All E.R. 749 (P.C. 1994). The requirement was abolished by Part III, § 10, of the Private International Law (Miscellaneous Provisions) Act of 1995. In *Canada*, the requirement was disapproved in 1994: *Tolofson*, *supra* n. 23.

The Model Law of Private International Law of the *People's Republic of China*, *supra* n. 25, Art. 117, adopts the "double actionability" requirement as an expression of local public policy. – For the older Japanese law, see Art. 11(2) *Horei* (2002), English translation in 45 *Japanese Annual of International Law* 166 (2002). The 2006 revision, retains the requirement also on public policy grounds. Art. 22, English translation in *Anderson & Okuda*, *supra* n. 26, at 153. "Double actionability" continues to be a requirement in Europe – outside the European Community – in the *Ukraine*, *supra*, n. 26, Art. 49 § 3. – Comment: To the extent that the foreign tort claim does not violate local public policy *specifically*, it is hard to see how systemic differences, in the abstract, can or should lead to a determination of violation of local public policy.

³¹ *Lüderitz*, *supra* n. 23, at No. 300; *Hay*, *supra* n. 23, at No. 152.

³² See *Hay*, *Weintraub*, *Borchers*, *Conflict of Laws* 410, Note (7), 673 Note (2) (12th ed. 2004); *Dacey & Morris*, *The Conflict of Laws* 170 (13th ed. by Collins et al., 2000). For further discussion, see *infra* at nn. 110 et seq.

the matter is one of interpretative difficulty, to be discussed in Part II below. However, the Regulation does expressly recognize that a court may refuse, on public policy grounds, to give effect to “non-compensatory exemplary or punitive damages of an excessive nature”, for which the applicable law provides.³³

However, even a characterization of damages as “substantive” does not answer the question about the time and event that determine “injury” and, with it, its “place.” Art. 3(1), in providing for the reference to the law of the “country in which the damage arises,” as distinguished from the country “in which the event [conduct] occurred,” limits the reference by excluding from it consideration of the law “of the country ... in which the indirect consequences of that event [conduct] arise.” Which consequences are “direct” (and presumably included in the reference) and which are “indirect” and therefore excluded? However imprecise the formulation, it appears to be generally accepted that “direct” damage is the violation of the victim’s legally protected right (see above).

B. Alternatives to the Historic Default Rule

1. The American Experience: *Restatement Second* and “Interest Analysis”

The American conflicts “revolution”³⁴ sought to replace, or at least ameliorate, the rigid rules (for instance, “law of the place of injury”), embedded in the First Restatement of Conflict of Laws (1932), with a flexibility that would achieve more satisfactory (“just”) results in the individual case.³⁵ The *Second Restatement* (1972) both reflected the then emerging case law and proved extraordinarily influential in its further development. For tort (and contract),³⁶ the Second Restatement (§ 145) calls for the law of the place of the “most significant relationship.” However – and unlike the Rome Convention for the Law Applicable to Contractual Obligations (supra n. 19) – it gives little guidance as to where that place is. While the Convention establishes “presumptions” for the determination of the “characteristic performance,” the Restate-

ment’s tort and contract sections provide a *non-exclusive* list of contacts, *without* assignment of any *priority*, that should be considered for the determination of the *particular issue*. The contacts listed (and any others that might seem relevant) are to be evaluated in light of the “general principles” of § 6.³⁷ The Restatement *approach* (it does not state a *rule*) thus calls for (1) an issue-by-issue (*dépeçage*) determination of the applicable law – the splitting of the tort (or contract) into its component parts, for (2) the consideration of all contacts of the parties or the tort deemed relevant to the issue in question, (3) and for the observance of the principles of § 6.

The principles of § 6, quoted in the note, are very general and therefore allow for different emphases, i.e. they can accommodate virtually all methodological “schools.” “Interest analysis,” in its original form,³⁸ as well as the “better law approach,”³⁹ tend to be homeward looking, i.e. to favor application of the *lex fori*. A more restrained use of “interest analysis” evaluates the policies of the legal rules of the involved states in order to assess whether there might be a “false conflict”⁴⁰ and how possible true conflicts might be resolved.⁴¹ At the same time, the principles of § 6 will also support the application of the traditional rule or a mere counting of “con-

³⁷ They are: “(2) ... (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 administration of justice.”

³⁸ “Interest analysis,” as first developed by *Brainerd Currie*, resolved cases with contacts to the forum in favor of the *lex fori*, whether case presented a “false conflict,” *infra* n. 40, or a “true conflict” between forum law and the respective other law. He rejected a weighing of interests unless the forum was not involved, was “disinterested.” As one court put it: “Courts are instruments of state policy. The Oregon [forum state] Legislature has adopted [the] policy [underlying the statute in issue in the case]. ... In litigation Oregon courts are the appropriate instruments to enforce this policy.” *Lilienthal v. Kaufman*, 239 Or. 1, at 16, 359 P.2d 543, at 549 (1964). See *Currie*, Notes on the Methods and Objectives in the Conflict of Laws, 1959 Duke L. J. 171, 178. A summary statement, prepared by *Currie*, appears in *Hay, Weintraub, Borchers, supra* n. 32, at 501-02. For extensive treatment of interest analysis and related approaches, together with further references, see *Scoles, Hay, Borchers, Symeonides, supra* n. 14, §§ 2.9-2.11. For a modification of the approach, see *infra* n. 41.

³⁹ Application of the (substantively) “better law” was one of Leflar’s five “choice-influencing considerations,” but soon became the dominant one. For discussion and references, see *Scoles, Hay, Borchers, Symeonides, supra* n. 14, § 2.13. For possible constitutional limitations on too free-wheeling choice of law (often of the *lex fori* as the “better law”), see *infra* n. 91.

⁴⁰ An initial step in Currie’s interest analysis is the determination of whether there is conflict at all. The conflict is “false” (i.e., there is none) if the laws of the involved states are the same, if they are different but lead to the same result, or if – expressly or as result of an examination of the underlying policy – one law does not mean to apply to a case like the one at bar. The “false conflict” concept has been a lasting contribution of Currie’s system, although it frequently also leads the court to conclude that the other state’s law addresses, in its underlying policy, a problem different from that presented by the case at bar, that there is thus a “false conflict,” justifying the application of the *lex fori*. A clear example of a “false conflict” is remission in renvoi (i.e., the foreign conflicts rule refers back to the *lex fori*). Usually, the determination of a law’s underlying policy is difficult, indeed. It becomes a matter of “constructive intent.” *Hay, supra* n. 13, at 354.

⁴¹ The “comparative-impairment” approach, for instance, asks which state’s law would be *more* impaired by *not* being applied. The approach has been adopted by case law in California (*Bernhard v. Harrah’s Club*, 16 Cal.3d 313, 128 Cal.Rptr. 215, 546 P.2d 719 (1976), cert. denied 429 U.S. 859 (1976); *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 148 Cal.Rptr. 867, 583 P.2d 721 (1978)) as well as by the Louisiana codification *supra* n. 16. See also Restatement (Second) of Conflict of Laws § 145, Reporter’s comment (i).

³³ Introductory Recital No. (32) in combination with Art. 26. National laws also generally regard the heads of damage as substantive, but similarly make exceptions in favor of the *lex fori*: German law (until the entry into force of Rome-II), for instance, does not apply foreign damage standards that go beyond what is required for “appropriate compensation” and that “serve purposes other than ... compensation” (i.e., punitive damages). Art. 40(3) Nos. 1 & 2 EGBGB, English translation in *Hay, supra* n. 14. See also, *Hay*, *Entschädigung und andere Zwecke*, in: *Hobloch, Frank, Schlechtriem* (eds.), *Festschrift für Hans Stoll* 521 (2001). For additional discussion, see *infra* at nn. 68, 122, 127 et seq.

³⁴ See *Symeonides*, *The American Conflicts Revolution: Past, Present, and Future*, Hague Academy, 298 *Collected Courses*1 (2003), also published in revised and expanded book form in 2006; *Scoles, Hay, Borchers, Symeonides, supra* n. 14, §§ 2.9-2.25.

³⁵ In the rule-based system of the First Restatement, avoidance of unpalatable results was achieved with the aid of “escape devices” (*Hay, Weintraub, Borchers, supra* n. 32, at 479), such as re-characterization of the subject matter (bringing about the application of a different choice-of-law rule), renvoi, or the public policy exception). See also *Weintraub*, *Rome II and The Tension Between Predictability and Flexibility*, in: *Rasmussen-Bonne et al.* (eds.), *Balancing of Interests – Festschrift für Peter Hay* 451, at 452. Introductory Recitals Nos. 14 and 18 of Rome II also refer to “escape clause[s].”

³⁶ Section 188 for the law applicable to contract is an exact counterpart of § 145 for tort.

tacts,” both of these value-neutral and not result-selective, perhaps in order to emphasize systematic values over substantive individual justice.⁴² Invocation or adoption of the Second Restatement by a court therefore does not, in itself, say much about the decision’s methodological underpinnings. For that, a more extensive analysis of the particular state’s case law is required. As of late 2006, some 23 states purported to follow the Restatement Second in tort cases, three each relied on “significant contacts” and straightforward interest analysis, two favored the *lex fori* and five the “better law,” while six followed a combination of the elements of the modern approaches. Only ten continued to adhere to the traditional rule.⁴³ Except for the last group (the traditional states), it is therefore often difficult to predict where a court’s “approach” will take it in any given case.

Faced with case law that had developed almost in an *ad hoc* fashion, the New York’s highest court (the Court of Appeals) attempted in its important *Neumeier* decision to establish a topology⁴⁴ of cases and applicable law. Perhaps the most successful was the first “*Neumeier*-rule,” a rule that had of course precursors in European, particularly German law:⁴⁵ the application of the law of the common domicile of the parties instead of the *lex loci*. *Neumeier* was later restricted (in *Schultz*)⁴⁶ to rules of law that are “loss allocating,” while the *lex loci* (or the *lex fori*) would apply to “conduct-regulating” rules.⁴⁷ *Schultz* itself demonstrated the difficulty with this distinction when it held that a charity’s statutory immunity was loss-allocating (society bears the loss as the price for encouraging charitable activity within the state) and thereby ignored the possibility that the *absence* of a charitable immunity rule in New York – the place of the tort – might well be

conduct regulating (because resulting in liability). At the same time, *Schultz* also demonstrated a problem with the first *Neumeier*-rule (applicable because of the loss-allocation characterization of the immunity rule): *Schultz* involved a plaintiff and defendant from the same state, but also a defendant from another state. The Court invoked the proviso of the third *Neumeier*-rule and applied the same law to all three under the first *Neumeier*-rule.⁴⁸

The “common domicile” rule will always create problems whenever there are third parties or other public interests involved.⁴⁹ This is true, of course, of any system that attempts to establish *a priori* rules but, like modern European law, pursues substantive justice along with “conflicts justice:” the law must provide a *corrective* mechanism, an escape clause. However, too frequent resort to such individualizing solutions substitutes flexibility for predictability and leads to the *ad hoc* decision-making that characterized so much of American conflicts law during the period of its evolution.

2. *Dépeçage* or a Single Rule?

While American law is “approach”-oriented and European (and other) systems remain rule-based, the systems do converge some. In the United States, a slight trend toward a topology has been noted; in Europe, corrective mechanisms soften the impact of pre-formulated rules. A profound difference, however, remains the American emphasis on *dépeçage*, the issue-by-issue approach.

Different laws may apply to different aspects of a conflicts case for a number of reasons, for instance when forum law applies to procedural aspects of a case otherwise governed by the substantive law of another state (the substance/procedure characterization), or when aspects of the applicable foreign law are rejected on public policy grounds (see below),⁵⁰ or when – in Convention or Regulation practice – one claim in a case is not covered by the instrument and is thus subject to national conflicts law. As a general rule, however, classic conflicts law has applied a *single* law to the *substance* of a case.

American “interest analysis”, with its absence of *a priori* rules (except for those that emerge from a case law topology, as noted), individualizes the decision-making process. Its emphasis on *issues* is the tool to achieve the most appropriate decision for the individual case. This issue-by-issue approach may *routinely* result in the application of more than one law to substantive aspects of a case (*dépeçage*). Except when a case law topology emerges (as in the example of the *Neumeier* decision)⁵¹ and becomes a “rule” as the result of the

⁴² For a detailed early review and overview, see *Hay*, *supra* n. 13.

⁴³ *Symeonides*, Choice of Law in American Courts: Twentieth Annual Survey, 54 Am.J.Comp.L. 697, 712-13 (2006).

⁴⁴ *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128, 335 N.Y.S.2d 64, 70, 286 N.E.2d 454, 457 (1972):

1. When the guest-passenger [in an automobile accident case] 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 state where the accident occurred but not if it can be shown that displacing that normally applicable law will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for the litigants. ...

On the question of a case topology, see also *Borchers*, Flexibility and Predictability: The Emergence of Near-Universal Choice of Law Principles, in: *Rasmussen-Bonne et al.* (eds.), *supra* n. 35, 49.

⁴⁵ *Infra* n. 56. In New York, the rule had its origin in *Babcock v. Jackson*, 240 N.Y.S.2d 743, 191 N.E.2d 279 (N.Y. 1963).

⁴⁶ *Schultz v. Boy Scouts of America, Inc.*, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985).

⁴⁷ On conduct-regulating and loss-allocation rules, see *Symeonides*, *supra* n. 34, at 136-140, 205-210 (loss distribution), 257-263 (conduct regulation),

⁴⁸ Similarly, the distinction between *Neumeier* and *Schultz* may not work and therefore may be disregarded when interest analysis favors the application of the *lex fori*. See, for instance, the application of the law of the common domicile (New York) to conduct in Brazil when New York had an interest in compensation and application of its law “would not threaten the policy” underlying Brazilian law: *K.T. v. Dash*, 827 N.Y.S.2d 112 (App. Div. N.Y. 2006), quoting from *Schultz*, 65 N.E.2d at 195. See also the interest-analysis language in the third of the *Neumeier* rules, *supra* n. 44.

⁴⁹ See previous n. and also *infra* text following n. 60.

⁵⁰ See *supra* n. 33 and *infra* nn. 126 et se.

⁵¹ *Supra* n. 44.

common law's strict adherence to *precedent*,⁵² issue-oriented interest analysis seeks to achieve individual justice at the price of predictability.

Modern rule-based systems also need means to effectuate overriding forum policies and to avoid the application of a particular rule to an atypical case. Societal interests underlie the public policy exception (common to all systems) and the related concept of "mandatory rules" (for both see below). The direction to substitute the occasionally (even) "more closely related" law to the case for the law, to which the rule would refer, affords relief for the decision of the atypical case. It thus serves a *corrective* function in the otherwise rule-based system. This type of provision is found today in the Rome Convention (Art. 4(5)), the Rome-II Regulation (Art. 4(3)), as well as in national laws.⁵³ While, as discussed, the public policy exception (as well as mandatory rules) may bring about a *dépeçage*, the substitution of a more closely related law does not: the reference is to a *single* law that will govern the case, not just to an individual issue. Even the Rome Convention, which envisions the application of a different law by party choice (Art. 3(1)) or by judicial choice (Art. 4(1)), limits this substitution to a *part of the* contract and, in Art. 4(1), emphasizes that this is to be done only "exceptionally." The Rome II Regulation does not contain this additional adjustment device.

Except in the areas discussed, modern systems largely seek to keep *dépeçage* to a minimum. They thereby further predictability of result, to the extent possible.

3. The "Common Domicile"-Rule

In place of the *lex loci commissi*, the first of the New York *Neumeier-Rules*⁵⁴ calls for application of the law of the parties' common domicile: they are presumably familiar with it, in any case its application does not cause unfair surprise, and the societal interests of the common domicile (e.g., in the kind and amount of compensation) are greater than those of the place of acting, at least so long as no third parties are involved.

The common domicile-rule is not new. Consistent with the development of conflicts law from references to "nationality" to "domicile" or "habitual residence", the earliest departures from the *lex loci* were those of the parties *common nationality*: "...neither Roman nor Greek law applied foreign law in cases involving only their own citizens."⁵⁵ In World War II, Germany promulgated an administrative regulation (*Verordnung*), providing for the application of German law to tort claims between Germans arising abroad.⁵⁶ It was designed to deal with claims between German military personnel for acts committed in occupied territories. The rule was later extended apply to parties with *any* common nationality, not

just the German; later common domicile became the substitute for common nationality. This is the form in which this exception to the *lex loci* today exists in many legal systems⁵⁷ and has been adopted by the Rome-II Regulation.⁵⁸

As noted, one aspect of the common-domicile rule is the protection of party expectations or, at least, avoidance of unfair surprise. This works well, and avoids difficult inquiries into the content of foreign law, when only two parties are involved and no other interests are at stake. In fact, in terms of American "interest analysis," such a case presents a "false conflict."⁵⁹ Viewed in this way, the rule is still too narrow: instead of being limited to the "law of the *common domicile*," the rule would serve the same goals if extended to the "*common law* of the parties' (*different*) domiciles."⁶⁰ Neither the current rule nor the suggested extension works well when other parties or societal interests are involved. In such cases, the *lex loci*, however, defined (by rule or American-type approach), will need to apply. Even if the *lex loci* is part of a rule-based system as in Europe and now in the Rome-II Regulation, the question remains when and to what extent it should be displaced by the societal interests of the forum or a third state, a matter addressed in the next section.

4. Public Policy and Mandatory Rules

A state will not apply a foreign law nor enforce a foreign judgment that violates its domestic public policy, variously defined as the basic values underlying the forum's legal and societal system.⁶¹ In its *defensive* form, invocation of the public policy of the *lex fori* closes the forum's court's doors to the claim or judgment recognition request, leaving the party's claim or judgment unaffected and the party free to seek relief elsewhere. In its *offensive* form, the forum substitutes its own law for the otherwise applicable foreign law, renders a decision and thereby affects, perhaps even alters, the party's claims or defenses.⁶² This may result in *dépeçage* and, in the United States, may raise a due process problem.⁶³

⁵² See *Hay*, *supra* n. 17 Nos. 20-24, pp. 9-12.

⁵³ See, e.g., Art. 101, last paragraph, of the *Chinese Model Law*, *supra* 25.

⁵⁴ *Supra* n. 44.

⁵⁵ *Berman*, *supra* n. 13, at 47 n. 15.

⁵⁶ Germany, Reichsgesetzblatt 1942, I, 706. See *Raape*, *supra* n. 6, at 365.

⁵⁷ Outside the European Community, see e.g., Art. 49(2) of the *Ukrainian Law*, *supra* n. 26, and Art. 114 of the Model Act of the *People's Republic of China* (which refers to common nationality or common domicile in the alternative). The *Polish Private International Law Act* of 1965 (Journal of Laws 1965, No. 46, Item 290), Art. 33 § 2, had referred *cumulatively* to common nationality and common domicile: this has now been superseded by the Rome-II Regulation. (next n.).

⁵⁸ Arts. 4(2) (general rule for delict) and 10(2), 11(2), and 12(2)(b) (subsidiary rules for unjust enrichment, *negotiorum gestio*, and *culpa in contrabendo*, respectively). For comprehensive discussion, see *Dornis*, "When in Rome, do as the Romans do?" – A Defense of the *Lex Domicilii Communis* in the Rome-II-Regulation, *EuLF* in this issue at I-152.

⁵⁹ *Supra* n. 40.

⁶⁰ *Scoles, Hay, Borchers, Symeonides*, *supra* n. 14, at § 17.40, with reference to cases. *Weintraub* adopts this view specifically with reference to the Rome-II Regulation and suggested a corresponding change in Art. 4(2). *Supra* n. 35, at 461.

⁶¹ See *infra* at n. 119.

⁶² In the *Lilienthal* decision, *supra* n. 38, application of Oregon's law to a loan agreement made and to be performed (repaid) in California resulted in the avoidance of the contract and the loss of the plaintiff's claim. The German review of foreign damage law for excessiveness, *supra* n. 33 and *infra* nn. 126 et seq., may similarly affect the plaintiff's claim.

⁶³ *Scoles, Hay, Borchers, Symeonides*, *supra* n. 14, §§ 3.17 n. 5, 3.28 nn.3-5.

Mandatory rules are different methodologically: while public policy is the last step in the choice-of-law analysis (i.e., finding the result to be unacceptable), the application of mandatory rules precedes any conflicts analysis. When a mandatory rule applies, no choice of law need be made. A clear example is Art. 102 of the Model Act of the *People's Republic of China*,⁶⁴ providing that specified contracts “shall be governed [exclusively] by the PRC law.” Similarly, the European Court of Justice has held that the law on compensation of commercial agents upon termination was beyond the ability of the parties to stipulate another law (under which such compensation would not have had to be paid).⁶⁵ Mandatory rules are thus also an expression of the forum’s public policy: they specify the application of local law *in advance*, rather than correct a choice-of-law result at the end.

The Rome Convention, additionally, called on the forum to consider also the mandatory rules of another state (i.e., not only its own), a provision not accepted by all Convention members (for instance, Germany).⁶⁶ The Rome-II Regulation does not provide for the consideration of third country mandatory rules, but limits them to those of the *lex fori* (Art. 16).

II. Particular Aspects of the Rome-II Regulation

A. Methodology and the Basic Rule of Art. 4

Modern American conflicts law in tort and contract focuses on substantive *issues*, as discussed earlier. The purpose of such a focus may be to determine, in a neutral fashion, the most closely connected law or to effectuate governmental interests or, for the sake of substantive justice, to apply the “better law.”⁶⁷ In European law (as originally in American law), conflicts law had a *territorial* orientation. Rigid rules may produce harsh results. The “common domicile” exception, review of foreign damages for excessiveness,⁶⁸ the accessory treatment of torts related to an underlying contract, and the like “softened” (the German “*Auflockerung*”) the effects of the territorial orientation.

The most far-reaching departure in European law came with the Rome Convention on Contracts Conflicts (supra n. 19) and its primary rule (Art. 4(1)) for the application of the law of the closest connection. It resembled the American Restatement’s call for the application of the law of “the most

significant relationship” (in its § 188), but avoided the Restatement’s issue-by-issue approach and omitted directions to be guided by governmental interests or other policy considerations.⁶⁹ It preserved a slight rule-orientation by providing presumptions (in Art. 4(2-4)), but softened their impact as well by means of the corrective provision of Art. 4(5), calling for the application of a more closely connected law than that to which the presumption would lead. Art. 4 of the Rome Convention thus represented a significant *Auflockerung* of traditional conflicts law in contract, but is far more principled than its American counterpart.

The Rome-II Regulation adopts neither the Rome Convention’s primary rule nor its very limited acceptance of *dépeçage*,⁷⁰ but provides *territorially*-oriented rules, albeit subject to some possibility for correction. Particularly noteworthy in this connection: the current draft for a Rome-I Regulation (which would replace the Rome Convention) would similarly largely abandon the closest-connection test of the Convention’s Art. 4(1). Instead, the draft provides definite rules for the most important types of contracts in the “interest of legal certainty.”⁷¹

As previously discussed, the basic rule (the “General Rule”) of Rome II is the law of the place of injury. Art. 4(1) refers to “the law applicable to a non-contractual obligation” (emphasis added) and makes no provision for the exceptional application of another law to *part* of the substance of the claim. Art. 4(2) provides the – now standard – exception in favor of the law of the parties’ common habitual residence. Previous discussion suggested that this exception might be framed too narrowly.⁷²

Art. 4(3) provides the second exception: in favor of the law of the country that is “manifestly more closely connected” to the tort. The provision goes on to suggest that such a determination “might be based in particular on a pre-existing relationship between the parties,” such as a contract that is connected to the tort. Making the tort choice-of-law determination accessory to an underlying contract relationship and the law applicable to it, is surely a good idea. At the same time, the quoted language does not add much: in a way, it states the obvious and, moreover, is only illustrative (“*in particular*”). What remains is the basic “manifestly more closely connected law”-exception.

The Draft Report of the Legal Affairs Committee had originally suggested making a “most closely related”-test the main rule, followed by presumptions (i.e., on the model of the current Rome Convention).⁷³ This would not have been a

⁶⁴ *Supra* n. 25.

⁶⁵ *Infra* n. 124.

⁶⁶ Traditional German doctrine has held that the relevant *ordre public* (as an exception to a claim or to judgment recognition or in form of a mandatory rule) is always only that of the forum, not of another state. *Raape*, *supra* n. 6, at 67. The German exception to Art. 7(1) of the Rome Convention and the elimination of the provision in the Rome II Regulation, see above, adopt that view. When local public policy has been violated, what law applies? The traditional German response has been to try to fill the gap from the policy of the foreign legal system or a related system and, failing success, to apply the *lex fori*. *Id.* at 68. The last step then resembles the *offensive* use of the public policy defense and, from an American point of view, might raise due process problems. The same, of course, holds true for the aggressive application of local mandatory rules to claims and parties that may be unrelated to the forum.

⁶⁷ For all of the foregoing, see *supra* at nn. 36-43.

⁶⁸ For these see also *supra* at n. 33.

⁶⁹ *Supra* at nn. 37 et seq.

⁷⁰ Rome Convention, Art. 4(1), 2nd sentence: “Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that country.”

⁷¹ *Freitag*, Tagungsbericht zum Symposium “Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom-Verordnung,” [2007] IPRAx 269, 270 citing *Ms. Claudia Hahn* of the EC Commission. An interesting example of providing a detailed list of types of contracts and the law applicable to them is the Model Law of the *People's Republic of China*, *supra* n. 25, Art. 101 (24 types of contracts, followed in favor of an escape provision in favor of a more closely connected law).

⁷² *Supra* at nn. 59-60.

⁷³ European Parliamentary Committee on Legal Affairs and the Internal Market, Draft Report on Rome II, Eur. Parl. Doc. (PR\546929EN) at 13 (2004).

good result and, in the interest of legal certainty, indeed even a future Rome I may depart from it.⁷⁴ It is true, of course, that terms like “manifestly more closely related” are “subject to various interpretations” and that “absent a statement of a specific rationale guiding the choice of law, they are likely to confuse rather than assist courts.”⁷⁵ Instead, it has been suggested that the focus of the exception should be “on the policies underlying conflicting laws and [on] which countries will bear the consequences of applying those laws”⁷⁶ In fact, an earlier version of Rome II had contained a provision (similar to Art 7(1)) of the Rome Contracts Convention) concerning the application of another country’s mandatory rules and had stated that “in considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”⁷⁷ This or similar consequences-oriented language was suggested as a substitute for the exception now contained in Art. 4(3).⁷⁸ Arts. 5(2) on product liability, 10(4) on unjust enrichment, 11(4) on *negotiorum gestio*, and 12(2)(c) on *culpa in contrahendo* all repeat the exception of Art. 4(3).

The language of the earlier draft, together with the general consideration of another country’s mandatory rules, were dropped from the Rome-II Regulation. The only reference to such mandatory rules is now in Art. 14(2): when the parties have chosen a law other than that of the country where “all the elements” relevant to the tort are located, the choice “shall not prejudice the application of [the mandatory rules] of that country.” This amounts to an *a priori* determination of the most closely connected (and interested) law, but no specific consequence-based assessment or policy analysis is envisioned.

The “escape clause” of Art. 4(3) is indeed general and somewhat open-ended, even though the illustration (accessory treatment of tort) may discourage courts from using it in an unprincipled way. Unfortunately, however, courts can just as readily seize upon the Regulation’s Introductory Recital para. (14): The “‘escape clause’ allows a departure from these rules where it is clear from all the circumstances ... that the tort ... is manifestly more closely connected with another country. This set of rules [referring to the Regulation as a whole] thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seized to treat individual cases in an appropriate way.”

In dealing with the *lex loci*-rule, the court could indeed engage in policy and consequences-based thinking in order to resort to the exception in Art. 4(3). However, absent a statu-

tory direction to do so,⁷⁹ the Continental judge is less likely to do so than his or her American counterpart. To the European judge, exceptions, “softening,” *Auflockerung* within a rule-based system are one thing, individualized decision-making quite another.⁸⁰ The price for some softening or *Auflockerung* then lies in the unavoidable generality of the “escape clause,” lest detailed statements of exceptions create a rigid system of another kind.

The Rome Convention excludes *renvoi* for contracts. Several conflicts statutes of EC Member States originally provided for it and continued to retain it for tort. Art. 24 of the Regulation now excludes it for non-contractual obligations as well. This makes the primary rules more rigid (for instance, disregard of the foreign conflicts rule might have disclosed a “false conflict” in American terms), but also more predictable. In the European view, conflicts rules reflect one’s own value judgments, and flexibility or exceptions should have their genesis in the same system.

B. Specific Torts and Other Non-Contractual Obligations⁸¹

1. Traffic Accidents

The question arises whether the “General Rule” of Art. 4, including its escape clause in Art. 4(3), are sufficient to address all tort problems or whether specific torts call for special treatment. Different legal systems give different answers – some provide special rules, others do not. Those that do differ as to what torts receive special treatment. Claims arising from road accidents are an example. The *New York* Court of Appeals’ “*Neumeier*-Rules” had their genesis in traffic accident cases and were later extended to torts in general, subject to the limitation in the *Schultz* decision.⁸² The Model Law of the *People’s Republic of China* provides special rules for a number of torts, including traffic accidents.⁸³ Previous German law does not.

Traffic accidents were the subject of several proposals and counterproposals in the work of the European Parliament. The interrelationship of this type of tort claim and divergent national insurance systems presented serious problems. In the end, the Rome-II Regulation contains no special

⁷⁴ *Supra* n. 71.

⁷⁵ *Weintraub, supra* n. 35, at 459.

⁷⁶ *Id.*

⁷⁷ Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), Eur. Parl. Doc. (COM 427 final) (2003), Art. 12. This language, as well as *Professor Weintraub’s* consequences-based approach, resemble the American “comparative-impairment” approach, *supra* n. 41. For *Professor Weintraub’s* “consequences-based” approach to choice of law in tort, see his Commentary on the Conflict of Laws §§ 6.2 et seq. (5th ed. 2006, with 2007 Supp.).

⁷⁸ *Weintraub, supra* n. 35, at 458-60.

⁷⁹ An isolated concern for consequences is specifically stated in Introductory Statement para. (33): In traffic accidents, “the court seized should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and the cost of after-care and medical attention.” This provision is also discussed *infra* at nn. 85, 114-116.

⁸⁰ *Professor Weintraub* acknowledges this. His disagreement is on methodological principle: “[A] consequences-based approach is most likely to provide the predictability that will be absent from attempts to impose rigid territorial rules or to provide exceptions from those rules that cannot be tested empirically.” *Supra* n. 35, at 452.

⁸¹ Special treatment of Art. 8 (Infringement of Intellectual Property Rights) and Art. 9 (Industrial Action) is omitted here. Art. 8(1) refers to the law of the country for which protection is claimed; Art. 9 refers to the country “where the [industrial] action [e.g., a strike] is to be, or has been, taken.”

⁸² *Supra* at nn. 46-48.

⁸³ *Supra* n. 25, Art. 118.

rules,⁸⁴ although two (general) rules are particularly relevant to these claims. Art. 18 gives the injured party a direct action against the insurer of the tortfeasor, if the law applicable to the tort or the contract of insurance so provide. The Introductory Recital para. (33)⁸⁵ encourages the court to consider (“*should take into account,*” emphasis added) the law of the victim’s habitual residence (if different from the place of injury) for purposes of compensation. Underlying this direction is the concern that it is the state of residence that will bear the burden when compensation is measured by the possibly lesser standards of the place of the injury. This is “consequences-based” thinking,⁸⁶ which however, as one critic showed, can also be turned around: the tortfeasor in a “poorer” state with consequently lower compensation standards will ultimately pay higher insurance premiums to satisfy claims of a victim visiting from and habitually resident in a “richer,” high-compensation state.⁸⁷ In the same vein, one can ask why the extent of the tortfeasor’s liability should depend on whether the victim is local or from another state. This, then, is another vestige, however limited, of the *Günstigkeitsprinzip* of prior German and some other laws.⁸⁸

2. Environmental Damage

An express retention of the *Günstigkeitsprinzip* is the provision on environmental damage (Art. 7): the injured party may choose the law of the place of conduct instead of the law determined by Art. 4(1). In addition to allowing the choice of the higher level of compensation, the provision is also intended to raise standards of environmentally responsible conduct. As to the second, the rationale seems flawed: the tortfeasor who acts in a high-liability state will already conform his conduct to local standards. If, in contrast, he acts in a low-liability state, Art. 4(1) by itself makes the higher standard of the state of injury applicable, thus requiring no choice. The claimant will indeed benefit if the injury results from acts in a state with higher standards than his own. But will that prompt his own state to improve its standards? If not, what then justifies possibly higher compensation when the injury is caused by a foreign rather than a domestic enterprise?⁸⁹

⁸⁴ Article 28 provides that the Regulation does not prejudice the application of international conventions to which member states are parties. One of these conventions is the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. Only half the EC members (not counting Denmark) are members of this convention (of the large EC states, for instance, Germany, Greece, Italy, Sweden, and the United Kingdom are not members). Art. 30(1), 2nd indent, directs the Commission to submit a report within four years of the Regulation’s entry into force “on the effects of Article 28 with respect to the Hague Convention (...).”

⁸⁵ See also *supra* at n. 79.

⁸⁶ *Supra* at nn. 75-77.

⁸⁷ *Wagner, supra* n. 11, at 379.

⁸⁸ *Supra* at n. 23. The other vestige is Art. 7 regarding claims for environmental damage. See *supra* n. 26 and text immediately following.

⁸⁹ Accord: *Wagner, supra* n. 11, at 380; contra: *Symeonides, supra* n. 26, at 951.

3. Product Liability

A general rule applying either the law of the place of conduct or of injury or a combination of both will generally leave gaps because factors such as standards in force in the state of acquisition, concern about compensation according to standards of the victim’s domicile, and, on the other hand, avoidance of unforeseen and unforeseeable liability may not be appropriately addressed.

The Rome-II Regulation (Art. 5) provides a largely commendable solution. It retains the “common domicile” rule of Art. 4(2) as well as the escape clause of Art. 4(3), but modifies Art. 4(1) by providing three rules, in order of priority, subject to one exception: (a) the law of the victim’s habitual residence at the time of injury, if the product was marketed there; (b) the law of the place of acquisition, if the product was marketed there; (c) the law of the place of injury, if the product was marketed there. The exception benefits the “person claimed to be liable” who could “not reasonably foresee the marketing of the product in the country whose law would be applicable” under the foregoing rules: in such a case the law of the place of his habitual residence is applicable.

As in most conflicts systems,⁹⁰ the main focus in product liability is on the consumer and the desire to give him the benefit of his home law. Several points are noteworthy. The condition “if the product was marketed there” does not mean that this must be the specific product that caused the damage. Instead, the language expresses a market orientation, such that *if these products* are marketed in that country, then the respective rule applies to this particular product. Whether the second and third rules might best have been reversed, is a matter of emphasis: is the focus on the consumer or more equally on the market, the transaction? In the former case, a reversal in the order might be indicated.

The exception protects the defendant. It is unclear, however, whether it should be his home law when liability under the three rules was not foreseeable or rather the law of the country where the product was actually marketed. Market protection speaks for the latter, but does not help when none of the three rules applies but the product was actually marketed in *several* countries. A single reference is needed, and this suggests that the present exception is appropriate.

Finally, the provision does not refer to the “producer,” but to the “person claimed to be liable,” which is broader and includes parties in the chain of distribution (and the longer the chain, the more remote the producer will be from the actual place of marketing – hence the exception). To what parties does possible liability extend? Art. 15(a) expressly provides that the law applicable under the Regulation extends to “the determination of persons who may be held liable for acts per

⁹⁰ For a review of substantive product liability law, see *Reimann, Harmony and Chaos in Products Liability: The Divergent Paths of Europe and the United States*, in: *Faust and Thüsing* (eds.), *Beyond Borders: Perspectives on International and Comparative Law – Symposium in Honor of Hein Kötz* 91 (2006).

formed by them” (e.g., selling a defective product).⁹¹ National laws that become applicable in this way, of course, may differ.

4. Unfair Competition

Unfair competition claims, like products liability, implicate both private concerns to be free from unfair interference with one’s business and the public’s interest in a free and non-manipulated market.⁹² Conflicts systems that, like the former German system, basically refer to the place of conduct may or may address these concerns in a given case: escape devices like the “common domicile”-rule and the substitution of a more closely related law may help, but are *ad hoc* solutions and give no guidance for future cases. The more modern practice, both in codified systems and in American case law, has therefore been to focus primarily on the law of the state where the claimant was injured in his business.⁹³ Art. 6 of the Rome-II Regulation adopts the latter approach.

Art. 6(2) logically incorporates Art. 4 for cases involving claims by only a single competitor. The primary rule (Art. 6(1) = “where competitive relations ... are, or are likely to be, affected”) is more difficult to apply in the case of multi-country market situations or multiple defendants. For these cases, Art. 6(3) offers two alternatives: the law of the defendant’s domicile if suit is brought there and it is one of the markets affected and, if the claimant sues several defendants (as permissible under the Brussels I Regulation), the law of the court seized applies, but only if each defendant affected the market in that country. These rules strike a balance between private and public interests in the market affected by

the alleged tort and the interest of the defendant against global liability, except in cases of Art. 6(3), first alternative: that liability comes as no surprise.⁹⁴

The public interest aspect of this Article is emphasized by the provision that the “law applicable under this Article may not be derogated from by an agreement [of the parties].” Art. 6, last paragraph. The public interest orientation is further underlined by the reference in Art. 6(1) to acts of unfair competition affecting competitive relations (between actual competitors) and those affecting “collective interests of consumers.” The quoted language is not defined. However, the Introductory Recital, at para. (21), refers to the protection that is due “consumers, competitors and the general public,” while para. (23) makes express reference to the Community’s antitrust law, particularly Arts. 81 and 82 EC Treaty. “Collective interests of consumers” may therefore envision actions by groups of consumers or competitors, perhaps a distant cousin of the American “class action.”

5. Reputational Torts: Invasion of Privacy and Defamation

Violations of the rights to privacy and personality raise difficult conflicts problems, particularly when the media are involved. The victim enjoys an often constitutionally protected right to privacy and freedom from defamation and a right to compensation for their violation, while the media enjoy the equally protected freedom of the press. Application of the General Rule of Art. 4(1) seemingly addresses the first problem. The matter is more complicated when the plaintiff’s reputation has been violated (when the injury has been suffered) in more than one country: does alleged defamation give rise to one or to several tort claims? If only to one, where may it be brought and may that court give relief for the injury suffered everywhere? The second problem must be concern for the protection of the defendant’s freedom of expression: may it be curtailed by strict defamation rules in a country of injury when the expression was perfectly legal in the country where the defendant uttered it?

In the United States, the majority of states subscribe to the “single publication” rule:⁹⁵ the conduct constitutes a single tort for which the court may award damages for all injuries, regardless of where suffered. The plaintiff therefore will often have a choice of a number of courts in which to bring his single tort claim. What law will the court apply? It will deter-

⁹¹ The “foreseeability” requirement protects everyone in the chain of distribution. American law is similarly concerned with foreseeability (for due process reasons) and denies courts the exercise of judicial jurisdiction when a defendant could not foresee to be sued there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980). This “foreseeability-of-suit” requirement also reflects a market orientation. *Hay*, Conflict of Laws 75 (5th ed., Black Letter Series, 2005). – European law does not have an equivalent requirement for the exercise of judicial jurisdiction. See Art. 5(3), Brussels-I Regulation (*supra* n. 19). For choice of law, American case law requires “a significant contact or a significant aggregation of contacts, creating state interests, that such a choice [usually of forum law] is neither arbitrary nor unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985). – *Hague* and *Shutts* concern application of the *lex fori* when the forum did have judicial jurisdiction. Jurisdictional options also exist under the Brussels-I Regulation. They are narrowly drawn so as not to raise a foreseeability problem, *except* when jurisdiction is posited, without a foreseeability requirement, at the place of injury. The Rome-II Regulation assures some protection, but perhaps to a lesser degree. Its market-orientation, without more, merges the jurisdictional and choice-of-law standards.

The Model Law of the *People’s Republic of China*, *supra* n. 25, Art. 121 also refers to the “person claimed to be liable.” In other respects, Art. 121, 1st paragraph, looks principally to the law of the place of conduct in combination with an additional factor: only one of these alternatives is directly consumer and not mainly market-oriented. The 2nd paragraph calls for the consumer’s home law, but again in combination with market-oriented factors directly related to the particular product. Additionally and in contrast to the first paragraph, this paragraph is a “may” provision.

⁹² See *Scoles, Hay, Borchers, Symeonides*, *supra* n. 14, § 17.53 at 870.

⁹³ *Id.*, at 870-71, with further references. Note also that the Model Law of the *People’s Republic of China*, *supra* n. 20, departs in Art. 122 from the basic rule of Art. 112 (either place of conduct or injury = *Günstigkeitsprinzip*, *supra* at nn. 23-26) by providing only for the “law of the place where the result of the tort occurs.” Presumably, it is also that law that defines *whether* a tort has occurred.

⁹⁴ The market-orientation of Art. 6 may cause conflicts with the EC’s E-Commerce Directive which has a place-of-origin orientation. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000, L 178 at 1). In addition, but prior to the adoption of the Regulation, it had been suggested that, for multi-state unfair competition claims, the focus should not be on the individual markets but adopt a center-of-gravity orientation. For both, see *Dethloff*, Discussion Contribution, in [2006] IPRax 391.

⁹⁵ *Scoles, Hay, Borchers, Symeonides*, *supra* n. 14, § 17.55. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473 (1984): plaintiff was time-barred in all states except New Hampshire where she could proceed as a result of the (general) American characterization of statutes of limitations as “procedural.” The court, using the “single publication”-rule, awarded damages under the *lex fori* for damages suffered everywhere. See text at n. 95.

mine the applicable law on the basis of the current methodology, described above,⁹⁶ which may be the victim's domicile (as having the most significant relationship to the claim) but it also may be a different law, including the less significantly related *lex fori*. Possibilities for forum-shopping abound.⁹⁷

On the procedural side, the EC Court of Justice has held that the court at the place of injury has jurisdiction (under Art. 5(3) of the Brussels Convention, now Brussels I Regulation) but only with respect to the injury suffered in its state (*Shevill*).⁹⁸ Jurisdiction to give relief for all injuries, wherever suffered, lies at the defendant's place of business (place of acting). What law would it apply: a single law (which one?), the laws of involved states cumulatively for the injuries suffered in each of them,⁹⁹ and, in the latter case, what about particularly restrictive laws that might be viewed as violations of the forum's public policy?

The Commission's draft proposal adopted the place of injury as determining the applicable law, but only for the injury suffered there: it applied *Shevill*, adding to it the choice-of-law dimension (essentially the *lex fori* of each state in which suit is brought), except for the court at the place of conduct which could give cumulative relief under all of the involved laws. The problem of the possibly unconstitutionally strict law was to be solved by a special public policy provision. The Parliament disagreed, as did the press and other media. They sought to define *one* principal place of injury and define that place, not on the basis of the victim's habitual residence, but from the perspective of the defendant's intended audience to whom he sought to direct his communication.

The impasse was not resolved and coverage of defamation was deleted from the Regulation. Art. 30(2) now merely provides that the Commission shall submit "a study" by the end of 2008 on "the law applicable to ... violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict of laws issues related with Directive 95/46/EC."¹⁰⁰ In the meantime, national law remains applicable, within the jurisdictional strictures of *Shevill*.¹⁰¹

C. Other Non-Contractual Obligations

As noted initially, *negotiorum gestio* as such is not known to the common law,¹⁰² indeed he who performs another's duties or renders him services might well be regarded an "officious intermeddler," to whom no compensation is due.¹⁰³

⁹⁶ *Supra* at nn. 34 et seq.

⁹⁷ See *Weintraub*, *supra* n. 77, § 6.32, and *supra* n. 95.

⁹⁸ ECJ 7 March 1995 – 68/93 – *Shevill* [1995] ECR I-0415, at para. 33.

⁹⁹ This is the "mosaic"-approach favored by German law. See *Wagner*, *supra* n. 11, at 384.

¹⁰⁰ The reference is to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data: (OJ 23 November 1995, L 281). See also *supra* n. 84.

¹⁰¹ For a review of European conflicts law and the attempts to agree on a formulation for the Rome-II Regulation, see *Kunke*, Rome II and Defamation: Will the Tail Wag the Dog?, 19 *Emory Int'l L. Rev.* 1733 (2005).

¹⁰² *Supra* at n. 5.

¹⁰³ See *Rohwer* and *Skerocki*, *Contracts* § 10.13 (Nutshell Series, 6th ed. 2006); *Hay*, *supra* n. 17, Nos. 347-351. The matter is treated as either a form of implied contract or as one of restitution.

Culpa in contrahendo, which the German émigré *Friedrich Kessler* sought to introduce into American legal thought,¹⁰⁴ also never took hold. Appropriate cases were solved with a variety of constructs drawn from both tort and contract law (e.g., estoppel, a concept originating in equity jurisprudence). The common law did, of course, address unjust enrichment. The theoretical bases of solutions, however, were equally varied.¹⁰⁵

It is a welcome feature that the Rome-II Regulation deals with all three. The solutions are consistent with its other provisions. For *negotiorum gestio*, Art. 11(1) selects the law of the underlying contract or tort relationship. When this does not furnish a solution, subsequent paragraphs refer to the common habitual residence, then to the place where the act was performed, and ultimately pick up the escape clause of Art. 4(3). For *culpa in contrahendo* (Art. 12), the primarily applicable law is that which governs the contract or would have governed it if it had come about. Failing a resolution, Art. 12(2) then picks up Art. 4 in its entirety.¹⁰⁶ Art. 10 for unjustment enrichment follows a similar pattern, selecting first the law governing the underlying relationship, failing that the common domicile (as in Art. 4(2)), then the place where the enrichment took place, and ultimately once again the escape clause of Art. 4(3).

D. Characterization: The Problem of Quantification of Damages

Earlier discussion referred to the difference between *heads* (types, categories) of damages and their *quantification* (measurement) and the law applicable to each.¹⁰⁷ There is agreement that heads of damage are "substantive" for choice-of-law purposes. Thus, Justice Holmes did not question that Mexican law applied to the remedy for personal injury suffered in Mexico (damages paid out over time, as in a maintenance situation), but denied relief because the remedy was unknown to the American common law.¹⁰⁸ The forum must have a counterpart to the remedy of the applicable law, otherwise it cannot give it: a form of a "double actionability" re-

¹⁰⁴ *Kessler* and *Fine*, *Culpa in contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 *Harv.L.Rev.* 401 (1964)(contract-oriented characterization). See also *Bernstein*, *Kollisionsrechtliche Fragen der culpa in contrahendo*, 41 *Rechtszeitschrift* 281 (1977), perhaps leaning toward a characterization of this action as "non-contractual."

¹⁰⁵ See *Hay*, *Unjust Enrichment in the Conflict of Laws – A Comparison of German Law and the Restatement Second*, [1978] *Am.J.Comp.L.* 1-49 (also in German as Vol. 88 of *Arbeiten zur Rechtsvergleichung* (1978)).

¹⁰⁶ The provision was introduced for the first time in the Common Position of the Council (OJ of 28 November 2006) in consequence of the EC Court of Justice's case law under the Brussels Convention (now Brussels-I Regulation) that regards claims of this kind to be "non-contractual": ECJ 27 October 1998 – C-51/97 – *Réunion Européenne SA* [1998] ECR I-6511, paras 17, 26. The provision thus proceeds from a tort-orientation, but picks up the law applicable to the actual or intended contractual relationship, if there was one, referring to Art. 4 for all other cases. It thus combines the approaches of *Kessler* and *Bernstein*, *supra* n. 104.

¹⁰⁷ *Supra* at n. 30.

¹⁰⁸ *Slater v. Mexican National Railroad Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904).

quirement.¹⁰⁹

What about quantification of the damages to be awarded for a claim governed by foreign law? Under a territorial (in the United States, perhaps the “vested- rights”) approach, foreign law would apply as well.¹¹⁰ Modern American courts, whether they purport to follow the Restatement Second’s most-significant-relationship test or apply interest analysis, will focus on the issue and, as to both aspects, apply the law they consider most appropriate under the approach applied. This may or may not be the law of the place of injury: characterization is not part of these methodologies for tort liability.¹¹¹

In European law with its territorial orientation, characterization of the quantification of damages is an issue. The traditional answer has been that it is substantive. German law may illustrate once again: Prior to the conflicts law reform of 1986, the statute provided (in its Art. 12) that a court could not award higher damages under foreign law against a *German* defendant than possible under German law: the *lex fori* displaced the otherwise (by implication) applicable foreign law, and that only in favor of German defendants. The provision was retained (now as Art. 38) in the 1986 revision of the statute. In 1999, conflicts provisions for non-contractual obligations were added to the statute. The protectionist provision of the former law (Art. 38) was replaced by a neutral and potentially broader provision in favor the *lex fori*. Art. 40(3) EGBGB now provides that claims under foreign law may not exceed that which is needed for appropriate compensation of the victim or when the applicable law serves purposes other than compensation (e.g., punitive damages).¹¹²

The Rome II Regulation presents a confusing picture. On the one hand, the terminology is not consistent: in one context, Introductory Recital para. (33) refers to “quantifying damages,” while Art. 15(c) provides that the law applicable under the Regulation “shall govern ... the nature and the assessment of damage or the remedy claimed.” Is “assessment” the same as “quantifying?”

The answer emerges from a look at legislative history. The Rome Contracts Convention defines the applicable law as including the “assessment of damages *insofar as it is governed*

by rules of law” (Art. 10(1)(c), emphasis added). The italicized language thus contains a condition or, stated differently, represents an exception to the law that would otherwise apply: the *lex fori*. The European Commission’s first draft of the Rome-II Regulation contained the same qualifying language as part of what is now Art. 15(c). It was dropped. Does this mean that quantification of damages is now substantive – without precondition –, assuming that quantification is the same as “assessment”? The intent of the Parliament’s Legal Affairs Committee seems to have been contrary. It had proposed that “the court seised shall apply its national law relating to the quantification of damages, unless the circumstances of the case warrant the application of another State’s rules.”¹¹³ Throughout, the Legal Affairs Committee was concerned with insufficient compensation of traffic accident victims, injured away from home, but incurring after-care expenses there.¹¹⁴ The Commission resisted the amendment. It acknowledged that “the evaluation of damages ... would generally ... be governed by the *lex fori*.... [Differences in national laws do present a problem, but] it is a vital question for victims not only of traffic accidents but of any other situation, in particular personal injuries.”¹¹⁵ It added subsequently that the Parliament’s proposal [e.g., consideration of a victim’s home law] would constitute “harmonization of the Member States’ substantive civil law which is out of place in an instrument harmonizing the rules of private international law.”¹¹⁶

The ultimate compromise is the present Art. 15(c) without qualifying language, the hortatory language in the Introductory Recital para. (33) that the court consider the victim’s circumstances, and the general call for review in Art. 30. Quantification of damages thus appears to be *procedural* for characterization purposes (subject to the limited relief a court may provide to traffic accident victims under the Recital). The unfortunate terminology in Art. 15(c) (“assessment”) does not change what seems to have been the common understanding of all parties (Council, Parliament, and the Commission): That the *lex fori* applies.

This would be an unfortunate result. It would provide an incentive for forum shopping within the limits of Arts. 2 and (3) of the Brussels-I Regulation. For another, it may not address, depending on the facts, several goals of substantive tort which conflicts law should seek to advance: compensation, regulation of conduct, and foreseeability.

The Commission’s point that a conflicts instrument should not deal with the harmonization of substantive law is inapposite in part: characterizing quantification of damages as sub-

¹⁰⁹ See *supra*, n. 30. In this form, a modern court would not have a problem with this type of case: it would fashion a similar, comparable remedy. As it was, the remedy sought in *Slater* was one in equity which a common law court could not give (but only lump sum damages). Law and equity jurisprudence have merged in American courts since that time. Furthermore, both plaintiff and defendant were Americans: a case for the application of an expanded “common domicile” rule. *Supra* n. 60. In cases, in which the foreign remedy could be given, but the claim conflicts with the values of the *lex fori*, the public policy would furnish the answer today.

¹¹⁰ See *Victor v. Sperry*, 163 Cal.App.2d 518, 329 P.2d 728 (Cal. App. 4th Dist. 1958): very low Mexican damage measures applied. All parties were California residents: once again, the “common domicile” rule or interest analysis would have suggested application of California law.

¹¹¹ In *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961), the New York Court of Appeal refused to apply a Massachusetts damage limitation on public policy grounds, also suggestion, however, that the question might be considered procedural. It has been suggested that – today – neither rationale would be needed: New York law would apply as the one most-significantly related to the occurrence and the one most interested in providing compensation: *Scoles, Hay, Borchers, Symeonides, supra* n. 14, § 17.9.

¹¹² See also nn. 33, *infra* nn. 126-127.

¹¹³ Position of the European Parliament, first reading, (OJ 6 July 2006, 157, at 371, 378.

¹¹⁴ See discussion *supra* at n. 84 and *infra* this Section. See also the statement by the rapporteur that there was concern about different levels of compensation in the various member states, a statement that assumes the application of the respective *lex fori*, unless other provision were made. Report of the Committee on Legal Affairs, 27 June 2005, Doc. A6-0211/2005, available at <http://www.europarl.europa.eu/>.

¹¹⁵ European Commission, Amended Proposal, (OJ 18 March 2006), C 67/39.

¹¹⁶ European Commission, Opinion on the European Parliament’s Amendments to the Council’s Common Position, 14 March 2007, Doc. COM/2007/0126(final), available at: <http://europa.eu.int/eur-lex/lex/>.

stantive would apply to the entire issue of damages (heads and quantification) the law applicable under the Regulation. No harmonization would take place. The Commission is right only when it rejects the Parliament's suggestion that quantification should address adequate after-care expenses of traffic victims.

At the same time, a substantive characterization, as it has been suggested,¹¹⁷ will not, necessarily advance the substantive-law goals of adequate compensation, conduct regulation, and foreseeability. It may or it may not. It depends on the place of the injury – which may be fortuitous. There would not be an incentive to forum shopping, but adequate compensation, for instance, would then be a matter of happenstance. It is indeed an intractable problem. Possibly “home law” is the answer for the entire question. But that would indeed be a matter of substantive law harmonization and introduces further problems of foreseeability.

E. Public Policy

1. Public Policy and Mandatory Rules

Earlier comment stated¹¹⁸ that, while the public policy exception and provision on mandatory rules in European conflicts law in general and in the Rome-II Regulation in particular (Arts. 26 and 16, respectively) are expressions of the deeply held values or binding norms of the forum, they are methodologically not the same. The public policy exception rejects a result arrived at *after* the choice-of law analysis has been made; mandatory rules obviate conflicts analysis: they *are* the applicable law.

There are at least two problems of interpretation. Do they differ qualitatively, i.e. what is the threshold for their application, and when are rules of the forum (or another legal system's) “mandatory?”

Art. 26 provides that the law of a country applicable under the Regulation “may be refused only if such application is manifestly incompatible with the public policy ... of the forum.” The Introductory Recital para. (32), further speaks of “exceptional circumstances.” Both the exceptional nature of the exception and that the threatened national policy is deeply held are common ground among legal systems. One of the classic formulations in the United States is Judge (later Justice) Cardozo's: “The courts are not free to refuse to enforce foreign rights at the pleasure of the judges, to suit the individual notion of expediency and fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”¹¹⁹

It is obvious that precise definitions are not possible. As a result, that which is “manifestly incompatible” will vary from state to state, although in the European Community, the Court of Justice in interpreting the Regulation on the basis of references by national courts under Art. 234 EC Treaty, may provide some guidance.

Hardly any system addresses the question *what* law applies in lieu of the law rejected.¹²⁰ Earlier discussion, in the context of American interest analysis,¹²¹ distinguished between the *defensive* and the *offensive* use of the forum's governmental interests and policies and suggested that the offensive use – i.e., substitution of forum law for the law rejected – might raise due process problems. Similarly, and with specific reference to the Regulation, it has been aptly suggested: “The invoking of public policy to reject the law selected by the Regulation should not permit application of forum law. If public policy is reflected in universal standards, the forum may employ these universal standards to adjudicate the case. In other situations the forum should dismiss the case and not reach the merits”,¹²² i.e. thereby leaving the party free (and not precluded by *res judicata*) to pursue his/her claim elsewhere.

The concept of “mandatory rules” is one of the most difficult (and uncertain) in European conflicts law. In contrast to the Rome Contracts Convention's Art. 7(1), Art. 16 only addresses the mandatory rules of the forum (= Art. 7(2)) of the Rome Convention).¹²³ The title of Art. 16 refers to “*overriding* mandatory provisions”, emphasis added, its text speaks of forum rules that “are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.” There are no definitions or illustrations.

In the practice under the Rome Contracts Convention, a distinction has evolved between mandatory rules of the forum that are local (and would not apply in the face of an otherwise applicable foreign law) and those that are international.¹²⁴ Perhaps the use of the qualifier “*overriding*” in the title of Art. 16 is meant to reflect and continue the differentiation. It seems that, as in the case of the public policy exception, each state decides for itself which of its rules are internationally mandatory. Application of the forum's own rule, without the possibility of a different resolution elsewhere, may raise, just as in the public policy case, the due process concerns (from the American perspective) noted above.¹²⁵

¹¹⁷ Weintraub, *supra* n. 35, 454-56.

¹¹⁸ *Supra* at n. 61.

¹¹⁹ *Locks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918). Similarly, Art. 6, German EGBGB: “A legal norm of another state is not be applied if its application would lead to a result that is manifestly incompatible with the essential principles of German law. In particular, it is not to be applied if it is incompatible with the basic rights [of the Constitution].” (Author's translation). Similarly, Model Law of the *People's Republic of China*, *supra* n. 25, Art. 14: “...manifestly incompatible with the public order...”.

¹²⁰ *But see* Art. 14 of the *Chinese Model Law*, previous n.: “...and the analogous law of the PRC *may* apply” (emphasis added). What if it does not?

¹²¹ *Supra* at n. 62.

¹²² Weintraub, *supra* 35, at 461.

¹²³ *But see* Art. 14(2), discussed *supra*, text following n. 77.

¹²⁴ See, e.g., Cour d'Appel, Paris, Decision of 22 March 1990, D. 1990, Somm. At 176: a French law declaring a contract null and void in which an employee waives certain specified rights was not an internationally mandatory rule and did not invalidate a contract that was valid under the stipulated foreign law. In contrast, the stipulation of American law did not apply in a contract when a Community Directive provided for compensation for commercial agents when American law did not. Case ECJ 9 November 2000 – C-381/98 – *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* [2000] ECR I-09305.

¹²⁵ *Supra* at n. 91.

2. Public Policy and Punitive Damages

Much of European law is opposed to punitive damages: foreign judgments awarding them will not be recognized, foreign law that would award them will not be applied.¹²⁶ The function of private law is to compensate, not to punish, it is said. This view overstates: tort law not only compensates, it also regulates conduct and may therefore seek to *deter*. Deterrence and punishment may of course overlap, but the latter may simply be a consequence of the former, and there are indeed “penal elements” in the law of legal systems that nonetheless expressly reject punitive damages.¹²⁷

The draft of the Rome-II Regulation had declared punitive damages to be against “Community public policy.” This resulted in substantial opposition and exchanges of drafts between the European Parliament and the Commission and Council. Some argued against a specialized *ordre public* exception,¹²⁸ others disagreed altogether with the rejection of punitive damages, at least in some form.¹²⁹ The European Parliament’s Committee on Legal Affairs had proposed a compromise. To the usual public policy exception (Art. 26), it proposed the addition of a paragraph: if the application of a law designated by the Regulation would result in “non-compensatory damages, such as exemplary or punitive damages to be awarded, [this] may be regarded as being contrary to the public policy ... of the forum.”¹³⁰ The proposal thus gave up the idea of a “Community” public policy, instead shifting to the forum’s, and by making the whole paragraph discretionary with the forum (“may”).

The Regulation proceeded even more carefully: it contains only the standard public policy exception in its Art. 26. However, the Introductory Recital para. (32) states that punitive damages *may* be subsumed under a Member State’s public policy and therefore justify that state in not awarding them under the applicable law.¹³¹

This compromise does not satisfy. National laws differ as to their tolerance for exemplary or punitive damages under

¹²⁶ For the former, see *Hay*, The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court, [1992] Am.J.Comp.L. 729-50; for the latter, see *supra* at nn. 33, 119.

¹²⁷ For comment, see *Hay*, *supra* n. 33.

¹²⁸ See, e.g., *Mörsdorf-Schulte*, Spezielle Vorbehaltsklauseln im Europäischen Internationalen Deliktsrecht?, 104 Zeitschrift für Vergleichende Rechtswissenschaft 192 (2005).

¹²⁹ See particularly, *Wagner*, *supra* n. 11, at 388 et seq., who points to English practice of awarding *exemplary damages* for deterrence, as distinguished from purely *punitive damages*. – *Wagner* also points to jurisprudence of the European Court, in which the Court repeatedly endorsed sanctions that would *deter*. *Id.* at 389. These decisions, however, were rendered in public law contexts (e.g., labor law and competition law) and cannot/should not be regarded as interpretative precedents in private tort litigation, unless one subscribes to governmental interest analysis, *supra* at n. 38.

¹³⁰ European Parliament, Committee on Legal Affairs, Recommendation for Second Reading, Doc. A6-9999/2006, 22 December 2006, Amendment 23, at page 17.

¹³¹ The elimination of any reference to punitive damages in Art. 26 is said to be the result of British and Irish opposition. They had also opposed the consideration of mandatory rules of a country other than the forum’s. *Supra* nn. 77, 123. With both of these problems resolved in their favor, Ireland and the United Kingdom decided not to opt out (*supra* n. 20) of the Rome-II Regulation: *von Hein*, [2007] Versicherungsrecht 440, 443.

foreign law. National decision-making may thus diverge and become an incentive for forum-shopping.¹³² To the extent that the proceeding was governed by the Brussels-I Regulation, the ensuing judgment is entitled to recognition throughout the Community without review of the substance. But Brussels-I also has a public-policy exception to the duty to recognize and enforce: where is the line between the duty of unquestioning recognition (= no *révision au fond*) and the permissible review, and denial of recognition, for public policy reasons?¹³³ Brussels-I contains no Introductory Recital akin to para. (32) of Rome-II: is the forum’s freedom under Brussels-I to deny recognition therefore more restricted than under Rome-II with respect to the application of foreign law? To be sure, the problem is of lesser importance in Brussels-I since it does not provide for universal application. Nevertheless, there is the possibility of an English judgment awarding exemplary damages.¹³⁴

To the extent that the quantification of damages is characterized as procedural,¹³⁵ the compromise language is not needed. If the characterization is substantive, the provision also brings the matter back to the *lex fori* and, with that, no uniformity. A clearer rule – for or against use of punitive damages or one that weighs as did Art. 40(3)¹³⁶ of the prior German law – would have been preferable, however divergent in result even such weighing is bound to be. Divergence, finally, may also result from the lack of a definition: “non-compensatory” and “punitive damages” are quite general. A court may well regard a high level of damages, for instance, for pain and suffering, to go beyond compensation and therefore to be punitive. The German provision cited therefore was more forthright when it permitted review for “excessiveness” – of course, as seen by the forum.

F. Choice of Law by the Parties

In contract, the right of the parties to choose the applicable law (party autonomy) has been expanded significantly in recent times. While § 1-105 of the American Uniform Commercial Code still requires that the chosen law have a relationship to the transaction or that, otherwise, there be reason for its choice, its revision (to be § 1-301, not yet in force), expressly abandons that requirement. Similarly, Art. 3 of the Rome Convention gives the parties wide latitude. All systems with such liberal provisions limit the freedom for the protection of weaker parties (such as consumers, insured persons, or employees) or when parties to purely domestic transactions seek to avoid the rules of the local *ius cogens*.

¹³² The Rapporteur of the Parliament’s Legal Affairs Committee acknowledged that possibility and stated that it was the purpose of the special review clause of Art. 30, *supra* nn. 84, 100 to address the whole question of damages by the end of 2008. (OJ, 6 July 2006, C 157/371 at 380.)

¹³³ See Brussels-I Regulation, *supra* n. 19, Arts. 36 and 34(1), respectively.

¹³⁴ *Supra* n. 129.

¹³⁵ See *supra* at nn. 107 et seq.

¹³⁶ *Supra* at nn. 33, 112.

In contrast, provision for party autonomy in tort is rare.¹³⁷ When there is provision for it, it is limited, usually to a selection made *after the occurrence*,¹³⁸ perhaps with additional restrictions (e.g., that the parties may only choose the *lex fori*).¹³⁹

The Rome-II Regulation (Art. 14) permits party choice of law: by (a) private parties *after* the event occurred, between (b) merchants also “by an agreement freely negotiated *before* the event giving rise to the damage occurred” (emphasis added). The first of these perpetuates the usual restriction, but why? And how realistic is it anyway that parties to a traffic accident will subsequently agree on the applicable law over a cup of tea? The single motivation might be to get insurance companies to cooperate.

The case of the commercial trader is quite different. He can anticipate tort claims arising from his deals and might wish to have them governed by a foreseeable applicable law, e.g., the same that governs the contract. Art. 14(b) permits this: “by an agreement freely negotiated *before* the event ...” This makes sense. Merchants in on-going relationships do need certainty both as to the law applicable to their contracts, but also to tort claims (not *any*, but those arising out of the relationship). Art. 14(b) responds to this need but fails to address the usual case, in which choice-of-court and choice-of-law clauses are contained in “General Conditions.” Can they be said to be “freely negotiated,” as Art 14(b) seems to require? Or is there a gap so that the applicable national contract law governs the question when “General Conditions” become part of the contract?

There are exceptions. Art. 14 does not apply at all, i.e., no choice is permitted, with respect to claims for unfair competition (Art. 6(4)) and for infringement of intellectual property rights (Art. 8(3)).¹⁴⁰ Art. 14(2) reproduces Art. 3(3) of the Rome Convention: when all the relevant elements are connected to a law other than the one chosen, that laws mandatory rules may not be prejudiced by the choice. This limitation *prescribes*, in these particular circumstances, what Art. 7(1) of the Rome Convention *permitted* in a more general way: consideration of a third country’s mandatory rules. The forum’s own are safeguarded by Article 16.¹⁴¹

Art. 14(3) makes an exception in a situation not expressly covered by the Rome Convention: choice of a non-EC’s country’s law that is incompatible with a rule *Community* law that has been implemented by the member-state forum

and that “cannot be derogated from by agreement.”¹⁴²

Conclusion

The Rome-II Regulation is a major achievement, unifying for the first time the conflicts law for non-contractual obligations of 26 of the EC’s 27 Member States. There are shortcomings, as there were bound to be, both in coverage (e.g., defamation, media delicts) and in drafting that may lead to interpretative difficulties (e.g., with respect to quantification of damages and review of punitive damages). Over thirty years ago, efforts failed to produce a conflicts convention dealing, in one instrument, with both contracts and non-contractual obligations because of disagreement on the non-contractual obligations part. The result was the Rome Convention on contracts conflicts. Now, conflicts law with respect to non-contractual obligations has overtaken contracts and is binding Community law in the form of the Rome-II Regulation. To preserve the historical record, a “Rome-I” Regulation on contracts conflict is nearing completion.

An important factor for the successful completion of the work on Rome-II was, no doubt, acceptance of the realization that not everything could be regulated or formulated to everyone’s satisfaction at the same time. The Community’s conflicts law thus is not complete. Indeed, the shortcomings noted in the main text and in the preceding paragraph are major: resolution of the defamation (and media liability) issue is very much needed; the current state of the quantification-of-damages issue is wholly unsatisfactory (because of the forum shopping it will surely entail), but also quite an intractable puzzle, as discussed: hence, the inclusion of Art. 30, calling for a general review in four years and for the completion of a study on the omitted subject of defamation by the end of 2008.

How well Rome-II addresses conflicts problems within its coverage will evolve over the next four or more years as a result of legislative amendment or correction and the emergence of case law, especially by the European Court of Justice that will shape its interpretation. As it stands, the Regulation fits well within the traditional European conflicts system, while providing some added flexibility and by breaking new ground – for some legal systems – by making special provisions, fitted to the needs and interests at stake in particular areas of law for specific non-contractual obligations.

¹³⁷ Dutch law permits a practically unlimited choice: The Netherlands, Act of 11 April 2001, Art. 6, Staatsblad 2001, 190. For comparative treatment, see *Hobloch*, Das Deliktsstatut (1984). In the *United States*, in contrast, the Restatement and the codification of Louisiana do not address the matter, and in only relatively few cases has the case law considered a broadly drawn choice-of-law clause in a contract to encompass tort claims arising from the relationship. *Scoles, Hay, Borchers, Symeonides*, *supra* n. 14 § 17.40, at 810-11.

¹³⁸ E.g., *Germany*, EGBGB Art. 42.

¹³⁹ Model Law of the *People’s Republic of China*, *supra* n. 25, Art. 116.

¹⁴⁰ The exclusions and the requirement that non-merchants may make a choice only after the event are presumably for the “protection [of] weaker parties.” See Introductory Recital para. (31). The other two limitations (in the text next following) are based on “considerations of public interest.” *Id.* at para. (32).

¹⁴¹ *Supra* at nn. 123 et seq.

¹⁴² While not expressly addressed in the Rome Convention, this situation seems covered by its Art. 7(2) which is now Art. 16 of the Rome-II Regulation: implemented Community law *is* the law of the forum. In this view, Art. 14(3) states the obvious and is redundant.