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

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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 unreasonable, 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. (...)”

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**European Consumer Law**

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

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


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. 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, 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-

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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. 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. 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.

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-borders 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. 1999/13/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 this 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. However, the draft bill was later not voted by the Senate, the upper House of the Italian Parliament, and thus never became applicable. 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. 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. 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

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

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.
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.\(^\text{14}\)

Other draft bills are clearly inspired by the US model.\(^\text{15}\) 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 Capezzzone, provides for a preliminary stage of the proceedings, 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 1\(^{\text{st}}\) 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 borne 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.\(^\text{16}\)

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.\(^\text{17}\) 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 published\(^\text{18}\) 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.\(^\text{19}\) 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. 1350, 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 rimborso del danno: elementi di riflessione, Note e studi n. 85, 13 November 2006.


\(^{19}\) See the Directive 2003/8/CE.
**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. The applicable law was a single law (i.e., there was no dépeçage, as in modern American torts conflicts law, 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,” 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 separately and traditionally does not provide a claim for negotiorum gestio. The “place of tort” was variously defined (and still is today) as the place of conduct, or as the place of injury, or as both (with either the injured party or the court 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).

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 Conflicts Law, 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,
given the right to choose). 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). In order to achieve these goals, conflicts law – in defining connecting factors for the determination of the applicable law – needs to reflect these concerns, 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). 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.

A number of countries have recently codified their conflicts law. The European Union has adopted its first conflicts statute – the “Rome II” Regulation – to deal with choice of law in tort.


German conflicts law in tort was uncodified case law until 1999 when the conflict statute was amended: Hay, From Rule-Orientation to “Approach” in German Conflicts Law, 47 Am.J.Comp.L. 501 (1999). For a more comprehensive list, see Secords, Hay, Barthes, Symeonides, Conflict of Laws § 2:27, at pp.112-16 (4th ed. 2004).

Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007, L 199 at 49). A “Regulation,” in European Community law, shall have general applicability. 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.

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

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).

Influential case law of New York’s highest court.

This essay explores some of these approaches and the central issues they address. The emphasis is on the European Community’s “Rome-II” Regulation, unifying the torts conflicts law of the Member States (except Denmark) 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 contrabando.

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. Other systems focused on the place of conduct. 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”). In view of

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9 See infra n. 25.
11 See Wagner, Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europaische Deliktsgerichtsbarkeit, [2006] JPRax 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.
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 49). A “Regulation,” in European Community law, shall have general applicability. 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.
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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)05(final), 2005/0261 (COD), Art. 2. – The Brussels-I Regulation (EC No. 44/2001) of 22 December 2000 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters may be found in (OJ 2001, L 212 at 1); the Brussels-II Regulation (EC No. 2201/2003) of 29 May 2003 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 virtue 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 Rome II. As to Brussels I, Denmark has entered into an 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. 825 (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) [w Juristische Lernbucher vol. 29]; Hay, Internationales Privatrecht No. 149 (PdW-Serien, 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 39, 125, [1962] NJW 37. For unfair competition under the Rome-II Regulation, see infra at n. 92 et seq.
The place of injury is also the primary rule in, among others, the European Community’s Rome-II Regulation deliberately rejects, except for claims for environmental damage, a reference to the place of conduct and, with it, the application of the more favorable law. 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. The place of conduct, however, does furnish “the rules of safety and conduct” in force at the relevant time. 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. 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) 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. Under the Rome-II Regulation, •

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

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

Art. 13. The rule was the same in Germany: see Junker, in: Münchner 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).


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 older Japanese law, see Art. II(2) Horei (2002), English translation in 45 Japanese Annual of International Law 166 (2002). The 2006 revision, reiterates 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.

Liederitz, supra n. 23, at no. 300; Hay, supra n. 23, at No. 152.

Interest Analysis

development. For tort (and contract), of the victim’s legally protected right (see above). to be generally accepted that "direct" damage is the violation fore excluded? However imprecise the formulation, it appears
arise." Which consequences are "direct" (and presumably in-
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”64 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. The Second Restatement (1972) both reflected the then emerging case law and proved extraordinarily influential in its further development. For tort (and contract),” 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 Restatement’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 § 6.35

The Restatement approach (it does not state a rule) thus calls for (1) an issue-by-issue (dépêçage) 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, as well as the “better law approach,” 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” 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-
tacts,” both of these value-neutral and not result-selective, perhaps in order to emphasize systematic values over substantive individual justice. 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 loci 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. 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 topology 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: the application of the law of the common domicile of the parties instead of the lex loci. Neumeier was later restricted (in Schultz) to rules of law that are “loss allocating,” while the lex loci (or the lex fori) would apply to “conduct-regulating” rules. 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. The “common domicile” rule will always create problems whenever there are third parties or other public interests involved. 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), 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) and becomes a “rule” as the result of the...
common law’s strict adherence to precedent, 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. 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 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 commonly 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.” In World War II, Germany promulgated an administrative regulation (Verordnung), providing for the application of German law to tort claims between Germans arising abroad. 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 systems and has been adopted by the Rome-II Regulation.

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.” 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.” 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. In its defensive form, invocation of the public policy of the lex loci 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. This may result in dépeçage and, in the United States, may raise a due process problem.

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 contrahendo, respectively). For comprehensive discussion, see Dornis, “When in Rome, do as the Romans do?” – A Defense of the Lex Domiciliarum Communs in the Rome-II-Regulation, EuLF in this issue at 1-152.

59 Supra n. 40.

60 Scoles, Hay, Borchers, Symeonides, supra n. 14, at § 17.42, with reference to cases. Wendtlaub 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 Lienenthal 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 decision, and thereby affects, perhaps even alters, the party’s claims or defenses.

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,67 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).68 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).69 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.”70 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,66 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. 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 dépêçage,71 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.”72

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.73

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).74 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. Rassegna, 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.”
72 Supra at nn. 59-60.
good result and, in the interest of legal certainty, indeed even a future Rome I may depart from it. 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." 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 ... ." 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." This or similar consequences-oriented language was suggested as a substitute for the exception now contained in Art. 4(3). Arts. 5(2) on product liability, 10(4) on unjust enrichment, 11(4) on negotiorum gestio, and 12(2)(c) on culpa in contrabendo 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 statutory direction to do so, 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. 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 Obligations

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 system 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’ “Neumeyer-Rules” had their genesis in traffic accident cases and were later extended to torts in general, subject to the limitation in the Schulz decision. The Model Law of the People’s Republic of China provides special rules for a number of torts, including traffic accidents. 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.
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 aftercare 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, 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) 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, 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. 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.

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?

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, 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 or 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

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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. 32(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.
formed by them" (e.g., selling a defective product). 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. Conflicts systems that, like the former German system, basically refer to the place of conduct 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. 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 plaintiff sues several defendants (as permissible under the Brussels I Regulation), the law of the country where the defendant was formed by them” (e.g., selling a defective product). The “common domicile”-rule and the substitution of a market.

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 torts 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 where 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: 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 determine which law that defines whether a tort has occurred.

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. 102, 101 S.Ct. 633 (1981); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2963 (1985). – Hague and Shutts concern application of the lex fori when the forum did have jurisdiction. Jurisdictional options also exist under the Brussels-I Regulation. They are narrowly drawn so as not to raise a foreseeability requirement, 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 second 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 = Gunstigkeitsprinzip) 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 Detloff, Discussion Contribution, in [2006] IPRax 391.

95 Scoles, Hay, Borchers, Symeonides, supra n. 14, § 17.53. See Reeston v. Hustler Magazine, Inc., 468 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, 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 (\textit{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, 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 \textit{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.” 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, and, in the latter case, what about particularly restrictive laws that might be viewed as violations of the forum’s public policy?

C. Other Non-Contractual Obligations

As noted initially, \textit{negotiorum gestio} as such is not known to the common law,\(^{101}\) indeed he who performs another’s duties or renders him services might well be regarded an “office intermeddler,” to whom no compensation is due.\(^{102}\)

\textit{Culpa in contrabendo}, which the German émigré Friedrich Kessler sought to introduce into American legal thought, 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.\(^{103}\)

It is a welcome feature that the Rome-II Regulation deals with all three. The solutions are consistent with its other provisions. For \textit{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 \textit{culpa in contrabendo} (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.\(^{104}\) Art. 10 for unjust 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.\(^{105}\) 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.\(^{106}\) 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-

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\(^{97}\) \textit{Supra} at nn. 34 et seq.

\(^{98}\) See \textit{Weintrab}, \textit{supra} n. 77, § 6.32, and \textit{supra} n. 95.


\(^{100}\) This is the “mosaic”-approach favored by German law. See \textit{Wagner}, \textit{supra} n. 11, at 384.

\(^{101}\) 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 \textit{supra} n. 84.

\(^{102}\) See \textit{Rofraver} and \textit{Sroicky}, Contracts § 12.13 (Nutshell Series, 6th ed. 2006); \textit{Huy}, \textit{supra} n. 17, Nos. 347-351. The matter is treated as either a form of implied contract or as one of restitution.


\(^{104}\) See \textit{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)).

\(^{105}\) 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-651, 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 \textit{Kessler} and \textit{Bernstein}, \textit{supra} n. 104.

\(^{106}\) \textit{Supra} at n. 30.

quirement.

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. 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.

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).

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.” Throughout, the Legal Affairs Committee was concerned with insufficient compensation of traffic accident victims, injured away from home, but incurring after-care expenses there. 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.” 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.

The ultimate compromise is the present Art. 15(c) without qualifying language, the horatory 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-

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110 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 exceeded that which is needed for appropriate compensation of the victim or when the applicable law serves purposes other than compensation (e.g., punitive damages).

111 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.

112 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 suggesting, 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-siginificantly related to the occurrence and the one most interested in providing compensation: Scales, Hay, Borchers, Symeonides, supra n. 14, § 17.9.

113 See also nn. 33, infra nn. 126-127.


115 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/.


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, 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 stated 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.”

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. Earlier discussion, in the context of American interest analysis, 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,” 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. 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. 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.

\[117\] Wintraub, supra n. 35, 454-56.
\[118\] Supra at n. 61.
\[119\] Loucks 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.
\[122\] Wintraub, 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 employees 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-9305.

\[125\] 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 public policy exception, and there are indeed “penal elements” in the law of legal systems that nonetheless expressly reject punitive damages.\(^{127}\)

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.”\(^{129}\) 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 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, 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) \(^{135}\) 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 contrast, the right of the parties to choose the applicable law (partly 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 system with such liberal provisions limit the freedom for the protection of weaker parties (such as consumers, insured persons, or employees) when parties to purely domestic transactions seek to avoid the rules of the local ius cogens.

127 For comment, see Hay, supra n. 33.
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.
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] Versicherungskreuzt 442, 443.
132 For the former, see Hay, 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.
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 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, 102 to address the whole question of damages by the end of 2008. (OJ, 6 July 2006, C 157/371 at 380.}

137 See Brussels-I Regulation, supra n. 19, Arts. 36 and 34(1), respectively.
138 Supra n. 129.
139 See supra at nn. 107 et seq.
140 Supra at nn. 33, 112.
In contrast, provision for party autonomy in tort is rare. When there is provision for it, it is limited, usually to a selection made after the occurrence, perhaps with additional restrictions (e.g., that the parties may only choose the lex fori).

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)). 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.

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.”

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.

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137 Dutch law permits a practically unlimited choice: The Netherlands, Act of 11 April 2001, Art. 6, Staatsblad 2001, 190. For comparative treatment, see Hoblitzel, Die 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. Scales, Hay, Borchers, Syneconides, supra n. 14 § 17.45, at 810-11.

138 E.g., Germany, EGBGB Art. 42.


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.