

# Tort Conflicts and Rome II: A View from Across

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## 1. INTRODUCTION

1.1. On July 22, 2003, the Commission of the European Communities submitted a *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations*<sup>1</sup> (hereafter "Rome II"). When it goes into effect on January 1, 2005, this Regulation will unify the conflicts rules of the European Union's member states on non-contractual obligations arising from torts and from acts other than torts. This essay, which is written only a few days after the publication of this proposal (Aug. 5., 2003), discusses some of its provisions on tort conflicts. It is a view from across the Atlantic, from someone who is not versed in the intricacies of European Union law, but who

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1. See COM(2003) 427 final, 2003/0168(COD), Brussels, 22.7.2003.

has the highest regard for the richness and sophistication of modern European private international law (PIL). To the extent this essay criticizes Rome II, it is not for failing to emulate any American models but rather for not taking full advantage of the advances of European conflicts thought of the last three decades.

1.2. From a process perspective, Rome II is an admirable exemplar of European democracy at work. In May 2002, the European Commission published a preliminary draft proposal<sup>2</sup> and invited comments from the public. In addition to holding public hearings, the Commission received and posted on the internet more than 80 written commentaries from interested parties, including trade and industry groups, professional organizations, governments, practitioners, and academics. Although the majority of the commentaries came from industry groups and tended to support the most regressive elements of the preliminary draft, the final proposal is more balanced than the preliminary draft and omits some of those elements, such as the extremely dangerous idea of allowing the parties to agree *ex ante* on the law that will govern future torts between them, without any meaningful restrictions for the protection of weak parties.

1.3. On the whole, the present version of Rome II is much better than it could have been, simply because the starting point, the preliminary draft, was nothing short of atrocious. At the same time, Rome II illustrates the difficulties of the process of law making in a democratic society. Sometimes the need to obtain a consensus, which is so important and healthy in a democratic society, necessitates compromises that disturb the coherence and consistency of the final scheme.<sup>3</sup> In this sense, it is interesting to contrast Rome II with an independent proposal put forward in 1998 by the Groupe européen de droit international privé (GEDIP).<sup>4</sup> That proposal was as close to perfection as humanly possible, and the

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2. See Preliminary Draft Proposal for a European Council Regulation on the Law Applicable to Non-Contractual Obligations, posted at [http://europa.eu.int/comm.justice\\_home/unit/civil/consultation/index\\_en.html](http://europa.eu.int/comm.justice_home/unit/civil/consultation/index_en.html)

3. This author can empathize with the drafters' unenviable position, having found himself in a similar situation in drafting two PIL codifications (for Louisiana and Puerto Rico) and being currently involved in a third one (Oregon). For the political difficulties encountered in the process of enacting the Louisiana codification, see Symeonides, Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis, 66 *Tulane L. Rev.* 677, 712-14, 742-48 (1992) (hereafter "Exegesis"). For the other far less acrimonious codifications, see Symeonides, Revising Puerto Rico's Conflicts Law: A Preview, 28 *Columbia J. Trans'l L.*, 601 (1990); Symeonides, Codifying Choice of Law for Contracts: The Oregon Experience, 67 *RebelsZ* 726 (2003).

4. See *Proposal for a European Convention on the law applicable to non-contractual Obligations adopted at the Luxembourg meeting of 25-28 September 1998* at <http://www.drt.ucl.ac.be/gedip/gedip-documents-8pe.html>

reason for that had as much to do with the homogeneity of the group as with the fact that it encompasses la creme de la creme of European conflicts thought. The GEDIP proposal was an elegant, sophisticated document that presupposed a high degree of sophistication on the part of judges whom it was willing to entrust with the degree of discretion necessary for making the kind of fine balancing that the proposal envisioned. In contrast, Rome II is a pragmatic document that seeks to preserve rather than to improve the status quo.<sup>5</sup> Which of the two approaches is likely to prove practically more workable in the long run is a matter of opinion and to some extent guesswork.

## 2. SOME GENERAL FEATURES

Before discussing the operative provisions of Rome II, it would be helpful to identify some of its general methodological features, beginning with the balance it strikes between certainty and flexibility.

2.1. *Certainty vs. Flexibility.* Every PIL system encounters the perennial tension between two conflicting needs—the need for certainty and predictability on the one hand, and the need for flexibility and equity on the other. Each system responds differently and strikes a different equilibrium between the two needs.<sup>6</sup> For example, the GEDIP proposal, which consisted of a series of cascading presumptions rather than rules, was a deliberate and brave choice of flexibility over certainty. Although the GEDIP scheme was nearly perfect, the potential for uncertainty must have alarmed the Rome II drafters who moved sharply in the opposite direction of adopting a system of tightly written black-letter rules with relatively few escapes and little room for judicial discretion.

The reasons for this political choice of certainty over flexibility are obvious. The primary motive behind the movement to draft Rome II, as well as the choice of the particular instrument for its implementation—a Regulation as opposed to a Directive—was the need to ensure uniformity of choice-of-law decisions within the European Union.<sup>7</sup> The drafters

must have concluded that uniformity would be in jeopardy if Rome II were to have too many flexible rules or too many escape clauses. This was a reasonable conclusion. However, while no one would question the desirability of uniformity and certainty, one can question the extent to which these values should displace all other values of the choice-of-law process, such as the need for sensible, rational, and fair decisions in individual cases. As is often the case, the question is one of degree, and in turn this is a matter on which reasonable opinions can differ. For what it is worth, and for reasons that will become obvious from the following discussion, this author's opinion is that a scheme that is closer to the GEDIP proposal—or for that matter the Rome Convention, which has worked reasonably well—would have been preferable.

2.2. *Jurisdiction-Selection or Content-Oriented Law-Selection.* One difference between traditional and modern PIL is the extent to which they consider the content of the substantive laws of the involved states before choosing the law that would govern the case at hand. In traditional PIL, the choice was based exclusively on the physical contacts of the involved states (“jurisdiction-selection”) and without regard to the content of their substantive laws. In contrast, in modern PIL the choice is based on not only on physical contacts but also on the content of the laws of the contact states and their underlying policies (“content-oriented law selection”).<sup>8</sup> Content-oriented law selection is easier when the court is not bound by statutory choice-of-law rules. When such rules exist, however, a content-oriented law selection is possible only to the extent these rules allow it. The question here is to what extent the rules of Rome II require a jurisdiction-selection and to what extent they permit a content-oriented law selection.

Under Rome II, jurisdiction-selection is the norm and content-oriented law selection a very limited exception. The majority of the dispositive articles of Rome II designate the country whose law would govern because of that country's physical contacts rather than because of the content of its law. This alone is not a reason to criticize Rome II. After all, in most codified PIL systems, jurisdiction-selecting rules are bound to outnumber content-oriented rules. Secondly, as documented elsewhere,<sup>9</sup> carefully crafted, narrowly tailored jurisdiction-selecting rules can achieve functionally sound results. For this to

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5. In the middle of the two proposals stands the pragmatic but incisive proposal of the Hamburg Group of Private International Law, which accepted the political reality of the preliminary draft's general direction and structure and sought to improve both with constructive suggestions for changes. See Comments on the European Commission's Draft Proposal for a European Council Regulation on the Law Applicable to Non-Contractual Obligations (29/10/2002), 67 *RebelsZ* 1 (2003).

6. For a comparative discussion of the various choices, see S. Symeonides, *Private International Law at the End of the 20th Century: Progress or Regress?*, 21-35 (1999) (hereafter *PIL*).

7. See Rome II Preamble, clause (4) (“The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of  
(continued...)”)

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7. (...continued)  
laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.”)

8. For a full discussion of these concepts, see Symeonides, *American Conflicts Law at the Dawn of the 21st Century*, 37 *Willamette L. Rev.* 1, 46-60 (2000).

9. See S. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 *Recueil des Cours* 1, 394-397 (2003) (hereafter “*The Revolution Today*”).

happen, however, the drafter must identify all possible law-fact patterns and consider whether the application of a given country's law produces an equally good result regardless of the content of that law. If the answer to this question is affirmative, a jurisdiction-selecting rule would be acceptable.<sup>10</sup> If the answer is negative, then one should draft one or more content-oriented rules to accommodate the various patterns. One question explored in this essay is whether the jurisdiction-selecting rules of Rome II meet this test.

Before addressing this question, it is worth noting that Rome II contains several provisions that, directly or indirectly, allow consideration of the content of the substantive laws of the involved countries. The clearest example are those provisions that allow the victim to choose between two laws—Article 7, which allows the victim to choose between the law of the place of conduct and the law of the place of injury, and Article 14, which allows the victim to choose between the law governing the tort and the law governing the insurance contract. Another example are provisions that allow the court to apply a law other than the one designated in the pertinent rule, such as, Articles 12 and 10(2) with regard to mandatory rules, and Article 13, with regard to the conduct rules of the country of state. Finally, a third category are those provisions that allow the forum to invoke its own policies as the reason for refusing to apply the otherwise applicable foreign law, such as Article 6(1), with regard to violation of personality rights, Article 24 with regard to punitive damages, and Article 22, the general *ordre public* article. Although this is a long list, it does not answer the question of whether Rome II attains the “right” mix between jurisdiction-selection and content-oriented law selection. However, the list does support the observation that Rome II is not as bad as it might have been.

**2.3. State Interests.** A casual look at Rome II confirms the suspicion that, like most traditional PIL systems in Europe, Rome II does not subscribe to the notion that ordinary conflicts disputes at the private-law level implicate the interests of the contact states. Indeed, none of Rome II's articles refer to state policies, much less interests, and both the Preamble and the Explanatory Report (hereafter “Report”) contain several statements describing Rome II's goal as one of “ensur[ing] a reasonable balance between the interests of [the *parties*, i.e.,] the person claimed to be liable and the person who has sustained damage.”<sup>11</sup> Yet, one who looks behind the surface would discover that Rome II is not oblivious to state inter-

ests. In several instances, both the Report and the Preamble refer to broader societal interests that go beyond the interests of the private litigants. For example, with regard to products liability, clause 10 of the Preamble speaks of the policies of “fairly spreading the risks, . . . protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade.” With regard to unfair competition, clause 11 speaks of the need to “protect competitors, consumers and the general public and ensure that the market economy functions properly.” Likewise, clause 16 recognizes the need to impose certain restrictions to the parties' power to choose the governing law so as to protect weaker parties.

More importantly, some of Rome II's dispositive articles can only be explained in terms of public (and thus state) interests, rather than in terms of private interests. The clearest example is Article 7, on environmental torts, which is discussed *infra* at 8.1-8.3. Besides the traditional *ordre public* article (Art. 22), another example is Article 6(1) which allows the forum to interpose its own policies regarding freedom of expression as the basis for refusing to apply the otherwise applicable foreign law. Article 12 does likewise with regard to the forum's mandatory rules, but also those of a third country. Finally, a less obvious example is Article 10, to the extent it: (a) does not sanction *ex ante* choice-of-law agreements; (b) does not allow such agreements in intellectual property cases; and (c) restricts other *ex post* agreements through the mandatory rules of another country or of the Community.

**2.4. Issue-by-Issue Analysis and Dépeçage.** Modern choice-of-law doctrine and practice have come to recognize that in many cases the conflict is confined to only some aspects or “issues” of the case, and that in other cases the involved states may be interested in different aspects of the case. Consequently, rather than seeking to choose a law as if all aspects of the case were in dispute, the modern decision-maker focuses on the narrow issues with regard to which a conflict exists and proceeds accordingly. This issue-by-issue analysis is easier and more likely when the decision-maker is not bound by statutory choice-of-law rules. When such rules exist, however, such an analysis is possible only to the extent the rules permit it. In turn, this depends on whether these rules are phrased in broad terms designating the law that would govern the case as a whole, or whether they are phrased in narrower terms.

On the whole, Rome II takes a negative stance towards issue-by-issue analysis, apparently because of the drafters' desire to avoid as much as possible one of its byproducts—the phenomenon of *dépeçage*, namely the application of the laws of different states to different issues of the same case. Indeed, most of Rome II's articles are phrased in broad terms designating the law that would govern the case as a whole, while Article 11 reaffirms this holistic approach by

10. One example of such a rule is the common-domicile rule for loss distribution conflicts. As explained *infra* at 5.2, this rule produces good results not only when the law of the common domicile favors the victim, but also when it favors the tortfeasor.

11. Rome II Preamble, clause (8).

providing a long list of issues that comprise the scope of the law applicable law under these articles.

Nevertheless, a closer look at some of the other articles reveals that Rome II does not entirely avoid an issue-by-issue analysis and thus the possibility of *dépeçage*. To begin with, most of Rome II's articles speak of the law applicable to the "obligation" arising out of a tort or delict, rather than to the tort or delict as a whole. This is a wise choice of terms, which will enable courts to engage in a more individualized evaluation of the multiple obligations that may arise from the same events. Moreover, if Rome II uses the term obligation in its original sense of the legal bond between the obligor and the obligee that encompasses both the obligor's duties and the obligee's rights, the court will be able to further differentiate among the rights of the individual victims and proceed accordingly. Rome II consciously stops short of the next logical step of encouraging or even permitting an issue-by-issue analysis of the various aspects of the obligation. Even so, however, some of Rome II's other articles contain the possibility of further splitting of the issues. Among the latter articles are Articles 6,<sup>12</sup> 8(2),<sup>13</sup> 10,<sup>14</sup> 12,<sup>15</sup> 13,<sup>16</sup> 14,<sup>17</sup> 15,<sup>18</sup> 22, 23,<sup>19</sup> and 24.<sup>20</sup> This is a long list, but one provision that is missing

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12. Article 6(1) allows a court to refuse to apply provisions of the otherwise applicable law that are contrary to the forum's fundamental principles regarding freedom of expression and information. The article does not prohibit the court from applying the other law on other issues. If the court does so, this would produce a *dépeçage*. Also Article 6(2) can lead to *dépeçage* between the right of reply and other issues in the case .

13. This provision can lead to the application of Community law on some issues and national law on other issues.

14. Article 10 can lead to *dépeçage* through several different routes. For example, the parties may choose different laws for different aspects of the case, or they may choose one law for some issues and none for others. Even when they choose one law for all issues, that law will not be applied to the extent it violates the mandatory rules described in Art. 10(2) or the Community rules described in Art. 10(3).

15. Article 12 allows a court to "give effect" to certain mandatory rules of a country other than the one whose law governs the obligation under Rome II.

16. Article 13 allows the court to "take account" of the conduct rules of the conduct state when the rest of the case is governed by the law of another state.

17. Under Article 14, the victim's right to directly sue the insurer may be governed by the law of a country other than the one whose law governs the tort, if the victim so requests.

18. Under Article 15, the rights of subrogation, indemnification, and contribution between the parties mentioned in the article may be governed by a law other than the one that governs the victim's claims against these parties.

19. Articles 22 and 23 can lead to *dépeçage* if the otherwise applicable law is only partly incompatible with the *ordre public* of the forum or with overriding provisions of Community law.

20. Article 24 can lead to *dépeçage* because it prohibits the application of only that part of foreign law that imposes punitive damages.

is Article 3(3) which contains the general escape. The resulting problems are discussed *infra* at 6.4.

### 3. THE GENERAL RULE

3.1. *The Lex Loci Rule.* Rome II's central provision is Article 3, which contains the general rule.<sup>21</sup> Paragraph 1 of Article 3 provides that the applicable law shall be the law of the country in which "the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise."

This terminology is an improvement over the preliminary draft, but it is still not entirely clear. Suppose, for example, that blasting operations in country A cause a snow avalanche in country B, which injures a group of tourists from Country C. One surmises that the drafters of Rome II would consider country A as the country of the "event giving rise to the damage," country B as the country in which "the damage arises," and country C as the country in which "the indirect consequences of that event arise." However, this phraseology leaves room for contrary arguments that can cause needless litigation.<sup>22</sup> The French text is more helpful, at least to the extent it speaks of the "conséquences indirectes *du dommage*." Under this text, one can more safely assume that, in the above hypothetical, A is the country in which "le fait générateur du dommage se produit," B is the country in which "le dommage survient," and C is the country in which "des conséquences indirectes du dommage surviennent." Thus, relying partly on the French text and partly on elementary logic, this author assumes that Article 3(1) intends to say that the applicable law shall be the law of the country in which the *injury* occurs, irrespective of the country in which the *conduct* occurred and irrespective of the country in which the indirect consequences of the *injury* are felt.

If this assumption is correct, then the general rule of Rome II is nothing but a restatement of the traditional *lex loci delicti* rule, with its "last event" sub-rule. This alone is not a sufficient reason to criticize Rome II, at least not before identifying and

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21. It is merely a semantical question whether the general rule is that of paragraph 1 or paragraph 2. Paragraph 2 takes precedence over paragraph 1 if the parties have their habitual residence in the same country, and in this sense one could characterize it as the general rule. Paragraph 1 is the general rule for all other cases, except those for which Rome II provides special rules such as those in Arts. 4-8.

22. For example one could argue that A and B both qualify as countries of the injurious event, albeit a different one (the explosion for country A and the avalanche for country B), and that, if country B is the country of the injurious event of avalanche, then country C is the country of the damage to the victims and their families.

evaluating the exceptions to which Rome II subjects the rule. Despite the recent tendency, especially among American academics, to summarily reject the *lex loci* rule as an outmoded remnant of the past, a dispassionate examination of actual cases indicates that this rule produces good or defensible results in several patterns of cases, although by no means all. As is often the case, the difficulty lies in delineating which is which. The discussion below attempts to do so, after listing the exceptions that Rome II carves out of the *lex loci* rule.

3.2. **The Exceptions.** These exceptions, which are more numerous than it appears at first glance, can be divided into general exceptions, namely those that apply to all cases, and specific exceptions, namely those that apply to specific torts. The general exceptions include the following:

- (1) The application of the law of the parties' common habitual residence under Article 3(2);
- (2) The application of the law of a country that has a "closer connection" under the escape clause of Article 3(3);
- (3) The application of the mandatory rules of the country that has a "closer connection" or of the forum country under Article 12;
- (4) The "taking into account" (and possible application) of the safety and conduct rules of the country of conduct under Article 13;
- (5) The application of the law chosen by the parties after the occurrence of the tort under Article 10;
- (6) The non-application of the *lex loci* (or of any other law) to the extent it imposes punitive damages;<sup>23</sup> and
- (7) The non-application of the *lex loci* (and any other law) when it is manifestly incompatible with the *ordre public* of the forum.

The special exceptions include:

- (8) The application of the law of the victim's or the defendant's habitual residence in products liability cases under Article 4;
- (9) The application of the law of the forum in certain cases of violation of personality rights under Article 6; and
- (10) The application of the law of the country of conduct at the victim's behest in environmental torts under Article 7.

Because of space limitations, this essay discusses only some of the above exceptions.

#### 4. RULES OF "SAFETY AND CONDUCT"

4.1. The least prominent, but in one sense more general exception that is relevant in all cross-border torts, is provided in the least popular provision of

Rome II—Article 13. Echoing similar provisions in the Hague conventions on traffic accidents (Art.7) and products liability (Art.9) as well as in some national codifications,<sup>24</sup> Article 13 provides that, regardless of which law governs the non-contractual obligation, in determining the actor's liability "account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage."

This is a timid and grudging recognition of the basic fact that not all tort rules are created equal or serve the same function. Some rules directly regulate conduct and safety, while others regulate the financial and other legal consequences of conduct that violates the rules of conduct and safety. This distinction corresponds to the two main objectives of tort law—deterrence and reparation or compensation.

4.2. In the United States, this distinction is now universally recognized, explicitly or implicitly, despite difficulties regarding its exact demarcation in certain cases.<sup>25</sup> The prevailing terminology is "conduct-regulating" rules versus "loss-distributing" or "loss-allocating" rules. According to the New York Court of Appeals, which first articulated this distinction in the 1963 landmark case *Babcock v. Jackson*,<sup>26</sup> conduct-regulating rules are those that "have the prophylactic effect of governing conduct to prevent injuries from occurring."<sup>27</sup> This category (which may be broader than the "rules of safety and conduct" as used in Article 13) includes not only "rules of the road" like speed limits and traffic-light rules, but also rules that prescribe the civil sanctions for violating traffic rules, including presumptions and inferences attached to the violation;<sup>28</sup> rules that prescribe safety standards for work sites, buildings, and other premises; rules that impose punitive damages; and rules defining as tortious conduct such as "alienation of affections," "interference with marriage," or "interference with contract," and granting an action against the actor. In contrast, loss-distributing rules are those that "prohibit, assign, or limit liability after the tort occurs."<sup>29</sup> They include not only guest statutes, which now are virtually extinct, but also rules that define the amount of compensatory damages, and rules of interspousal

24. See Swiss codification, art. 142(2); Portuguese Civ.Code, Art. 45(3); Hungarian codif. §33.1.

25. See S. Symeonides, W. Perdue & A. von Mehren, *Conflict of Laws: American, Comparative, International* 283-286 (2d ed. 2003).

26. 191 N.E.2d 279 (N.Y. 1963).

27. *Padula v. Lilarn Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994).

28. Examples include rules providing that a person involved in a collision while driving in excess of the speed limit, or while being intoxicated, is presumed to be negligent, and rules providing that, in a rear-end vehicular collision, the driver of the rear car is presumed to be at fault.

29. *Padula*, supra n. 27 at id.

23. For a critique of similar provisions in European codifications, see Symeonides, *Resolving Punitive-Damages Conflicts*, 5 *Ybk. P.I.L* 1 (2004).

immunity, parent-child immunity, worker's compensation immunity, and loss of consortium.

As documented elsewhere,<sup>30</sup> the changes wrought by the phenomenon figuratively known as the American conflicts revolution were confined primarily to conflicts between loss-distribution rules, and more specifically to cases in which both parties were domiciled in the same state. In these conflicts, American courts abandoned the principle of territoriality that underlied the traditional conflicts system and, drawing from the opposite principle of personality, have almost unanimously applied the law of the parties' common domicile.<sup>31</sup> In contrast, in loss-distribution conflicts in which the parties are not domiciled in the same state, as well as in conflicts between conduct-regulating rules, American courts have not abandoned the principle of territoriality. In cases in which the conduct and the injury occurred in the same state, most courts apply the law of that state. This leaves cross-border torts in which the conduct and injury occur in different states (cross-border torts). Rather than *a priori* choosing the law of the state of injury, as does Article 3(1) of Rome II, American courts reserve the right to choose between the laws of these two states on a case-by-case basis, after taking into account the laws of those states and their underlying policies. We shall return to this point after discussing Article 13 of Rome II.

4.3. First, one should note that, despite the use of the imperative "shall", Article 13 does not require the court to *apply* the rules of conduct and safety of the place of conduct, but only to "take them into account." Does Article 13 *prohibit* the application of these rules? The Explanatory Report is rather cryptic,<sup>32</sup> but it acknowledges the origin of Article 13 in, among others, Article 9 of the Hague Products Liability Convention, which does "not preclude consideration being given" to the rules of conduct and safety prevailing in the State where the product was introduced into the market. Despite this equivocal phrasing, however, the Explanatory Report of the Hague convention states that a court could well *apply* the conduct rules of that state.<sup>33</sup> This suggests an affirmative answer to the question posed above with regard to Article 13—in appropriate circum-

stances, a court may not only take into account, but also may apply the conduct rules of the country of conduct.

4.4. If this answer is correct, then the next question is whether a court may apply these rules only when they favor the tortfeasor, but not when they favor the victim. Ordinarily, there would be no reason for such an one-sided reading of Article 13, but for the fact that the tenor of both Rome II and the Report point to such an interpretation. Rome II's preamble places Article 13 in the context of "[t]he concern to strike a reasonable balance between the parties,"<sup>34</sup> while the Report seems to be preoccupied with the plight of "the perpetrator [who] must abide by the rules of safety and conduct in force in the country in which he operates."<sup>35</sup> Elsewhere, the Report describes a situation falling within Article 7 in which the perpetrator complied with the lower environmental standards of the state of conduct but not with the higher standards of the state of injury and concludes that in such a situation, "[u]nder Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business."<sup>36</sup>

4.5. The view of this author is that, in cases such as the one described above, the concern for the perpetrator is excessive if not misplaced. The key question in such cases should be whether, under these facts, a reasonable person should have foreseen that his conduct in the one state would produce injury in the other state. For example, one who operates a chemical factory in proximity to the border should foresee that the wind will likely carry the factory's emissions across the border. Under these circumstances, Article 13 should not allow him to seek refuge behind the lower standards of the state in which the factory operates. Article 7, which applies to violations of the environment, prevents this result by allowing the victim to choose the law of the country of injury, without even conditioning the choice on foreseeability. If a court were to *apply* the low standards of the conduct state through the back door of Article 13, then the court would defeat not only the victim's choice but also the spirit of Article 7.

4.6. On the other hand, Article 13 would prove to be a very useful provision if courts were allowed to employ it in the converse situation—cross-border torts in which the tortfeasor violates the higher standards of the state of conduct, but not the lower

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30. See Symeonides, Territoriality Versus Personality in American Tort Conflicts, in *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter Nygh* (T. Einhorn & K. Siehr, eds) 405 (2004).

31. See *infra* 5.2.

32. See Report, Art. 13, p. 25 ("Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages.")

33. See W. Reese, Explanatory Report to the Hague Products Liability Convention, *Acts and Documents of the Twelfth Session*, v.III, 251, 268 (1972).

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34. Rome II, Preamble, clause 18 ("The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligations is governed by another law.")

35. Report, Art. 13, p. 25.

36. Report under Art. 7.

standards of the state of injury. For example, if in the snow avalanche hypothetical described at the beginning, the law of country A imposed strict or absolute liability on one who engages in blasting operations, then the court should not require the victim to prove negligence, even if the internal law of country B normally requires showing such negligence. The fact that the tortfeasor violated the standards of country A implicates the policies of that country in policing conduct within its borders, even though the consequences of that conduct materialized in another country. Conversely, this case does not implicate the policies underlying the lower-standard rule of country B because that rule is designed to protect or encourage conduct within and not beyond the borders of country B. In other words, this is what is known in the American conflicts lexicon as a classic “false conflict.”

To be sure, the quoted term may be anathema to Rome II given its limited recognition of the role of state interests, despite, for example, embracing the concept of mandatory rules (Art. 12). Instead, Rome II places a high premium on the need to “ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage,”<sup>37</sup> and the Report purports to explain most of Rome II’s rules in terms of the parties’ expectations. For example, in explaining why Rome II has rejected a general rule of allowing the victim to choose between the laws of the places of conduct and injury in cross-border torts other than environmental torts, the Report states that such a solution “would go beyond the victim’s legitimate expectations.”<sup>38</sup> However, one can turn the question around. Does the application of the law of the state of conduct go against the legitimate expectations of the *tortfeasor* who violated the conduct standards of that state, just because the injury occurs across the border? At present, the only Rome II provision that can provide a negative and, in this author’s view, justified answer to this question is Article 13. If the intent of the drafters was to use this article only when it helps the tortfeasor but not when it helps the victim, then it would be preferable to suppress the article in the final text.

## 5. THE COMMON HABITUAL-RESIDENCE RULE

5.1. The first official exception to the *lex loci* rule is found in paragraph 2 of Article 3, which provides that if, at the time of the injury, the tortfeasor and the victim have their habitual residence in the same country (hereafter “common residence”), then the law of that country applies to the exclusion of the *lex loci*. The preliminary draft limited the scope of the common-residence exception to cases falling

within the general *lex loci* rule of Article 3(1), and to product liability cases. The final proposal expanded the scope of the exception to cases covered by Articles 5 (unfair competition) and 6 (violation of personality rights). This is a welcome change. It is also interesting to note that this exception does not apply to cases falling within Article 7 which deals with violation of the environment. Although the Explanatory Report is silent on this point, one can infer that the reason for this exclusion is an implicit recognition that cases involving violation of the environment implicate broader societal interests that go beyond the interests of the parties.

5.2. In adopting the common-residence exception, Rome II joins the majority of recent PIL codifications and international conventions that have also accepted the premise that when both the tortfeasor and the victim are affiliated with the same state or country (through nationality, domicile, or habitual residence) that country has the best claim to determine their respective rights and obligations, even if the tort occurred entirely in another country. This notion is implemented either through a common-domicile rule (as in the codifications of Louisiana, Puerto Rico, Switzerland and Quebec, and the Hague Convention on Products Liability),<sup>39</sup> or through an exception from the *lex loci* rule. The exception is phrased either in common-domicile or common-habitual residence language (as in the German and Hungarian codifications),<sup>40</sup> or in common-nationality language (as in the Italian, Polish, and Portuguese codifications).<sup>41</sup>

Article 3(2) also mirrors parallel developments in the United States. As documented elsewhere,<sup>42</sup> 32 of the 42 cases decided since the 1960s in which an American court of last resort abandoned the *lex loci* rule involved the common-domicile pattern. Subsequently, an additional 18 common-domicile cases have reached the highest courts of the states that had previously abandoned the *lex loci* rule, thus raising to 50 the total number of common-domicile cases that have reached state supreme courts in the post-*lex loci* era. Of these 50 cases, 44 cases (or 88%) have applied the law of the common domicile, *regardless*

37. Rome II, Preamble clause (8), *et passim*.

38. Report, Art. 3. p. 11-12.

39. See La. Civ. Code art. 3544(1); Puerto Rico Draft Code Art. 47(a); Swiss codif. Art. 133; Quebec Civ.Code, Art. 3126; Hague Products Liability Convention, Art. 5.

40. See EGBGB Art. 40(2); Hungarian codif., §32(3); European Union Draft Regulation on the Law Applicable to Non-Contractual Obligations (2002), Art. 3(2).

41. See Italian codif., Art. 62; Polish codif., Art. 31(2); Portuguese Civ.Code, Art. 45. For an exception that displaces the *lex loci* when the parties have *either* a common nationality or a common habitual residence, see China’s Model Draft Law of PIL, art. 114 (6th Draft 2002).

42. For citations and discussion, see Symeonides, *The Revolution Today*, §§ 129-33. See also E. Scoles, P. Hay, P. Borchers & S. Symeonides, *Conflict of Laws*, 767-72 (3rd ed. 2000).

of the particular choice-of-law methodology the court followed.<sup>43</sup> The majority of these cases (35 out of 50) involved the *Babcock v. Jackson* pattern in which the law of the common domicile favors recovery more than the law of the state of conduct and injury. These cases present the classic false conflict paradigm in which only the state of the common domicile has an interest in applying its law. The remaining cases involved the converse-*Babcock* pattern in which the law of the common-domicile prohibits or limits recovery more than the law of the state of conduct and injury. These cases are not as clear false conflicts as *Babcock* was because the accident state arguably has an interest in applying its law to compensate those injured in its territory and to facilitate recovery of local medical costs. On balance, however, the application of the law of the common domicile in both the *Babcock* pattern and its converse is entirely justified. In that sense, a common-domicile rule that does not depend on the content of the law of the common domicile (i.e. a jurisdiction-selecting rule) is preferable to any other iteration.

5.3. However, a common-domicile rule that applies across the board, to any and all issues, goes a bit too far. In the United States, the scope of this rule is limited to conflicts between loss-distribution rules. The better view is that in conflicts between conduct-regulating rules the parties' domicile is in principle irrelevant. As a general proposition, a state has an interest in enforcing its conduct-regulating rules even if neither the violator nor the victim is domiciled in that state. For example, a foreigner may not claim exemption from a state's traffic rules, and if injured by conduct that violates these rules, the state may not deny her the benefit of their protection. Even if both parties are domiciled in the same other state, the state of conduct has the exclusive claim to apply its law to the conduct-regulating aspects of the case. Consequently, a rule that *requires* the application of the law of the parties' common residence in these conflicts is problematic. The rules of the Italian, Quebec, and Polish codifications,<sup>44</sup> fall in this category because they do not provide any escapes. From this perspective, the scheme of Rome II is better, because it provides two vehicles for avoiding the application of the common-residence law in these cases. The first is the "closer connection" escape of Article 3(3), which is discussed below. The court may conclude that, with regard to issues of conduct and safety, the state of the conduct and injury has a "manifestly closer connection" than the state of common-residence and thus its law should govern.

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43. The six cases that applied another law are distinguishable, overruled, or discredited. See Symeonides, *The Revolution Today*, § 129 n. 659, § 139.

44. See Italian PIL Act, Art. 62(2); Quebec Civ. Code, Art. 3126(2); Polish PIL Act, Art. 31(2).

The second vehicle is Article 13, which will prove very useful if the court is unable to use the Article 3(3) escape either because of its tight phrasing, or because of its failure to allow an issue-by-issue analysis. In such a case, the court may use Article 13 as the vehicle for not only considering, but also applying, the conduct rules of the conduct state.

5.4. A variation of the common-residence pattern appears when the tortfeasor and the victim reside in different countries which, however, adhere to loss-distribution rules that produce the same result. The better view is that these cases are functionally analogous to common-residence cases and should be treated accordingly.<sup>45</sup> Unfortunately, Rome II does not permit this result. None of its exceptions to the *lex loci* rule would be operable in this case, and the general escape would also be inapplicable because, as explained below, it is phrased in geographical terms. Because the parties do not reside in the *same* country, geography would work in favor, not against, the *lex loci*.

## 6. THE GENERAL ESCAPE

6.1. Paragraph 3 of Article 3 provides an escape from both the *lex loci* rule of paragraph 1 and the common-residence rule of paragraph 2. The escape allows the court to apply the law of another country if "it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with [that other] country." This phraseology is familiar to the European legal profession because it is similar to escapes found in several national codifications and international conventions.<sup>46</sup>

Escapes clause are necessary in any statutory scheme that is not perfect. Since perfection is not for this world and more and more modern legislatures have come to recognize their fallibility, escapes have

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45. The Louisiana codification provides that "[p]ersons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state." La. Civ. Code art. 3544(1). This legal fiction, which is particularly useful in cases with multiple victims or defendants, enables a court to resolve these false conflicts by applying the law of the domicile of either party, unless the general escape clause of the codification dictates a different result. For pertinent discussion, see Symeonides, *Exegesis*, 759-63. The American Law Institute has recommended a similar rule for mass tort cases. See American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 6.01(c)(2) and (3) (1994). In addition, in certain cases involving corporate tortfeasors, the Louisiana common-domicile rule is subject to further expansion, or contraction, through Article 3548 which provides that a juridical person that is domiciled outside the forum state but transacts business in that state and incurs a delictual obligation arising from such activity may be treated as a domiciliary of that state, if such treatment is appropriate under the principles of Article 3542.

46. For a comparative discussion, see Symeonides, *PIL*, 31-35.

become a common feature of almost all recent codifications. As Aristotle recognized many centuries ago, any pre-formulated rule, no matter how carefully or wisely drafted, may, “due to its generality,”<sup>47</sup> or because of its specificity, produce results that are contrary to the purpose for which it was designed. This “is a natural consequence of the difference between *law making* and *law application*.”<sup>48</sup> With some notable exceptions, most modern legislatures seem to be fully aware of the inherent limitations in their ability to anticipate everything. In recent years, PIL codifiers have recognized these limitations and have taken the previously unprecedented step of expressly granting judges the authority to adjust or avoid altogether the application of a rule when the circumstances of the individual case so dictate. This grant of authority takes the form of escape clauses attached to the rules.<sup>49</sup>

6.2. In contrast to the preliminary draft, which limited the scope of the escape to cases covered by Article 3, the final proposal expanded the scope of the escape to cases covered by Articles 4-6. This is definitely a positive development. The escape of the preliminary draft was very problematic in one other respect. It consisted of two independent prongs, both of which had to be satisfied for the escape to apply. One had to show (a) that there was “no significant” connection to the country whose law governed under the draft’s rules; and (b) that there was a substantially “closer” connection with another country. If taken literally, the first prong would rarely be satisfied, and thus the second prong would be no more than cosmetic. The problem was confounded by the fact that the escape did not contemplate a comparison of the two connections, but rather an independent determination that the first connection was not significant. Only when that determination confirmed the insignificance of the first connection did the escape allow examination of the closeness of the other connection. The final proposal resolved much of the problem by eliminating the first prong and by encouraging a comparison between the two connections. Under the new text, a party that invokes the escape need not show that the connection of the country whose law governs under the rule is “insignificant.” All that one needs to show is that the connection with another country is “manifestly closer” and this of course can only be determined after comparing the two connections. This is another significant improvement for which the drafters deserve praise.

6.3. Even with these changes, however, the escape remains problematic because it is phrased in exclusively geographical or quantitative terms that are not correlated to an overarching principle and do not permit an issue-by-issue evaluation.

In one sense, it is logical that a system of geographically-based rules would also rely on geography in formulating escapes from those rules. Indeed, most of Rome II’s dispositive rules depend on the place in which a single critical event occurred, or in which one or both parties reside. Very few non-geographical factors affect the choice, and the content of the conflicting laws is a factor that appears only in some narrow exceptions. In one sense it appears logical that a system that relies primarily on geography must also rely on geography to handle the exceptional cases and overcome the inevitable impasses. Thus, if the geographically chosen place of injury or the parties’ common residence turn out to have a non-significant connection, one must search for a place that has a “closer” connection. This logic, however, will rarely overcome the impasses. Escapes are designed to cure the rule’s deficiencies, not to reproduce them. To intelligently employ the escape, one must know the reasons for which the drafter made the choices embodied in the rule and the values and goals the rule seeks to promote. To simply say that one should look for a “closer” connection gives the judge little meaningful guidance and entails the risk of degenerating into a mechanical counting of physical contacts. This risk is reduced when the escape is correlated to the overarching principles that permeate the rules, and/or when the escape allows an issue-by-issue evaluation.

For purposes of illustration, not emulation, one can consider the schemes of the Restatement (Second) and the Louisiana codification. The Restatement provides in § 6 that the goal of the choice-of-law process is to identify the state that has the “most significant relationship.” Although literally the quoted phrase appears to contemplate a determination based on geography, the content of § 6 negates any such inference because it lists a series of substantive policies that should guide this determination. The subsequent sections of the Restatement provide specific rules, most of which contain an escape authorizing the judge to apply the law of another state if “with respect to the particular issue” that state has a more significant relationship “under the principles stated in § 6.”<sup>50</sup> Similarly, Article 3542 of the Louisiana codification enunciates the general goal of the choice-of-law process for tort conflicts as one of identifying the state whose policies would be most seriously impaired if its law were not applied. After establishing specific rules based on that goal, the codification also provides an escape clause in Article 3547 which authorizes the judge to apply the

47. Aristotle, *Nicomachean Ethics*, V.x 7.

48. Hay, Flexibility Versus Predictability and Uniformity in Choice of Law, 226 *Recueil des cours* 281, 291 (1991-I).

49. For comprehensive discussions of this subject, see D. Kokkini-Iatridou, *Les Clauses d’Exception en matière de Conflits de Lois et de Conflits de Juridictions – ou le principe de proximité* (1994).

50. Restatement (Second), § 146 (emphasis added).

law of another state if, “*under the principles of Article 3542,*” the policies of that other state “would be more seriously impaired if its law were not applied to the particular issue.”<sup>51</sup>

The italicized phrases signify what is missing from the escape of Article 3(3) of Rome II—issue-by-issue evaluation and correlation to non-geographical factors. Because one can safely assume that emulating American models is the last thing on Rome II drafters’ wish list, it bears repeating that the above examples are presented here not as ideal models regarding the specifics but rather as illustrations of a basic scheme that the drafters of Rome II could implement in their own way based on the overarching principles of Rome II.

6.4. Even if the escape retains the geographic terminology, the escape can be improved considerably if its phrasing is changed as to allow an issue-by-issue evaluation. Suppose for example that in the above described snow avalanche hypothetical, the avalanche caused the death of one of the tourists, and one of the issues in the case is who is entitled to compensation for his wrongful death. Suppose that country B provides that this compensation is due to the victim’s surviving spouse and children together, whereas country C, the victim’s residence, provides that this compensation is due to the surviving spouse to the exclusion of the children. Under Article 3(1) the applicable law shall be the law of the country in which “the damage arises” (country B) “irrespective of the country or countries in which the indirect consequences of that event arise” (country C). Yet country C is the country most intimately involved and has the best claim to apply its law to *this issue*. Rules designating the beneficiaries of a wrongful death action reflect a society’s assumptions regarding how a person’s death impacts his survivors and which of his survivors are likely to have the highest need for the compensation. These assumptions and value judgments belong to the society in which the victim lived, not to the society in whose territory the injury occurred. In Rome II’s terminology, country C is “manifestly more closely connected” with regard to the *issue* of wrongful death beneficiaries, even if its connections with regard to other issues may not be the closest. Yet, the phrasing of the escape clause does not permit this focus on the specific issue, and thus does not allow a court to cure the rule’s deficiency.

6.5. In the final analysis, a good escape clause can bring substantive improvements to even a bad rule system, in addition to helping attain the proper equilibrium between the two perpetually competing goals of certainty and flexibility. However, to perform this role the escape must have some built-in flexibility. The drafters’ preference for a tight escape that does not swallow the rules is understandable.

51. La. Civ. Code Art. 3547 (emphasis added).

However, an escape that is so tight as to be rarely utilized, or one that is phrased in broad all-or-nothing terms is only slightly better than no escape at all.

## 7. PRODUCT LIABILITY

7.1. Article 4 provides that non-contractual obligations arising from injury caused by a product is to be governed by the law of the country in which the victim resides, unless the defendant can show that the product was marketed in that country without his consent, in which case the law of the defendant’s habitual residence governs. However, Article 4 applies “[w]ithout prejudice to Article 3(2) and (3),” and this means that, in appropriate cases, a court may: (a) apply the law of the parties’ common residence, even if the product was marketed there without the defendant’s consent; or (b) apply the law of a country that has a closer connection than the country or countries of either or both parties’ residence.

Products liability conflicts are inherently difficult and so far nobody has put forward the perfect formula for resolving them.<sup>52</sup> This includes the undersigned author who, in the course of the last fifteen years, has drafted two statutory rules for such conflicts<sup>53</sup> and has proposed two *other* rules for the same purpose.<sup>54</sup> The fact that each of those rules differs from the others is this author’s own admission that the search for the perfect formula must continue. Article 4 of Rome II is clearly far from the perfect formula, but the question is whether it is good enough.

Article 4 establishes a simple rule that seeks to avoid all the logistical difficulties that tend to characterize most products liability cases. For example, by not relying on the law of the place of conduct, Article 4 avoids all the practical difficulties of pinpointing the most pertinent conduct, e.g. the product’s design, testing, manufacture, or assembly, each of which may take place in a different country. By not relying on the place of injury, Article 4 avoids the difficulties that arise in so many cases of peripatetic injury, as in cases involving pharmaceuticals used by their eventual victims over long periods of time while residing in different countries. By not relying on the place of the product’s purchase, Article 4 avoids the question of identifying the pertinent purchaser as between the

52. For a comparative discussion of enacted and proposed rules for product liability conflicts, see E. Scoles, P. Hay, P. Borchers & S. Symeonides, *Conflict of Laws*, 848-55 (3rd ed. 2000).

53. See La. Civ. Code Art. 3545, discussed in Symeonides, *Exegesis*, 749-59; Puerto Rico Draft Code, Art. 48.

54. See Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 *Indiana L. J.* 437, 450-51, 472-74 (2000); Symeonides, *The Revolution Today*, §§ 254-61.

victim and a third party, or differentiating between products that are bought new or used.

7.2. However, the question is whether the contacts on which Article 4 relies are the most pertinent, or at least pertinent enough. For example, the habitual residence of the defendant (at least when the defendant is the manufacturer rather than the local importer or distributor) would seem to be the least relevant contact. In most cases, the manufacturer is likely to be a corporate entity whose “habitual residence” may be located in a country that has little relationship with the case, the product, or its manufacture. In today’s world of corporate mobility, this connecting factor would seem to be the least important.

Fortunately, under Article 4 and its cross-reference to Article 3(2) and (3), the law of the defendant’s residence will rarely apply, at least when that country does not have additional connections. In the vast majority of cases, courts will likely apply the law of the victim’s habitual residence, because the defendant will be unable to show that the product was marketed there without his consent. For example, a recent study covering products liability cases decided in the United States between 1990 and 2002 documents that in none of these cases did the foreign defendant invoke a similar defense.<sup>55</sup> There is no reason to assume that marketing patterns are too different in Europe. If this is true, then it is safe to assume that most European courts will apply the law of the victim’s residence and will look no further. The question is whether this is a good result. Fortunately again, in most cases, the country of the victim’s residence is likely to have one or more additional contacts which will make more defensible the application of its law. For example, the aforementioned study indicates that in 71% of the cases decided during the above period in the United States, the victim’s domicile had one or more additional contacts other than the fact that the product was marketed there.<sup>56</sup> The basic question, which cannot be explored here, is whether in the remaining 29% of the cases the application of the law of the victim’s residence is generally appropriate. The further sub-question is whether such application is equally appropriate when that law favors the victim as when it favors the defendant. For purposes of illustration, it is worth noting that American courts, which are often accused of favoring plaintiffs, applied that law in only in one fifth of the 29% of the cases and less than one tenth of all cases.<sup>57</sup> Under Article 4, all of

those cases will likely be governed by that law, unless the court employs one of the exceptions.

## 8. VIOLATIONS OF THE ENVIRONMENT

8.1. Rome II contains four special rules for particular types of torts (Arts. 5-8), in addition to products liability. These rules are a significant improvement over the corresponding provisions of the preliminary draft, which were only slightly different iterations of the *lex loci delicti* rule without exceptions. While some of these rules can benefit from further refinement, one of the new rules that deserves praise is Article 7, which deals with violations of the environment. The article gives the victim a choice between the law of the country of conduct and the law of the country of injury. Because this choice is meaningful only in cases of cross-border torts, the discussion below is limited to these cases. Further, because this choice will make a difference only when the two countries prescribe different standards of conduct for the defendant or of financial protection for the victim, the discussion is further limited to these cases.

The Explanatory Report provides an excellent explanation of why the article gives victims a choice. It is worth noting that, although at some point the Report speaks of “a victim in a low-protection country . . . enjoy[ing] the higher level of protection available in neighbouring countries,”<sup>58</sup> the *reason* for which Article 7 gives the victim a choice is not to benefit the victim *as such*. Rather, the reason is to promote the interests of the respective countries and of the Union as a whole in deterring pollution. Applying whichever of the laws of the two countries subjects the polluter to a higher standard promotes this interest. Giving the victim a choice is simply the vehicle for ensuring this result.

8.2. When the law of the country of injury prescribes a higher standard than the country of conduct, the application of the law of the former country is appropriate. As the Report points out, this application is “conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protec-

55. See Symeonides, *The Revolution Today*, § 243. Many of these cases involved products manufactured outside the United States by foreign manufacturers.

56. See *id.*, §§ 233-36, 239. American courts applied the law of the victim’s domicile in 76% of those cases. See *id.*

57. See *id.*, § 235. This may confirm the accusation in that in all of those cases that law favored the plaintiff. On the whole, (continued...)

57. (...continued)

American courts applied the law of the victim’s domicile in 63% of all the cases, but in all but 10% of those cases, that state had one or more additional contacts. However, the cases as a whole do not support the accusation of plaintiff favoritism because 53% of all the cases applied a law that favored the defendant. See *id.* at § 240.

58. Report, Art. 7. p. 19.

tion.”<sup>59</sup> It is significant to note that, because Article 7 is not subject to any exceptions, the polluter cannot avoid the application of the law of the country of injury by arguing, for example, that the occurrence of the injury in that country was not foreseeable. Apparently the article assumes that, regardless of distance, foreseeability is always present, or that it should make no difference.<sup>60</sup>

8.3. More importantly, in contrast to the preliminary draft, the final proposal recognizes that in the *converse* situation in which the law of the country of conduct has a higher standard of conduct or of financial protection than the country of injury the law of the former country should govern. As the Report notes, without this change, the operator would have “an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country’s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the ‘polluter pays’ principle.”<sup>61</sup> Indeed, the application of the higher standards of the country of conduct in this scenario is fully justified, whether one thinks in terms of party reliance or expectations or, more aptly, state interests. After all the operator should not be heard to complain for being subjected to the standards of the country in which he acted. Having violated those standards, he should bear the consequences of the violation and should not be allowed to invoke the lower standards of another state. In terms of state interests, the application of the higher standards of the first country promotes the policy of that country in policing conduct within its borders, *without* subordinating the policies of the second country because the latter country does not have an interest in applying its lower-standards to protect conduct occurring or tortfeasors acting beyond its borders. In other words, this is a case that in the American conflicts lexicon is a classic “false conflict.” The broader question is why the drafters of Rome II have not applied the same logic to other cross-border torts. This question is addressed below.

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59. Report, Art. 7, p. 19.

60. One avenue for providing some protection for the polluter in this case is Article 13, and the Report alludes to this possibility. See Report, Art. 7, p. 20. This author’s view is that an objective foreseeability proviso is a better vehicle for ensuring fairness. As argued earlier, if the polluter should have foreseen that his conduct in one country would cause injury in another country that has higher standards, the polluter should not be able to seek refuge behind the lower standards of the country of conduct. Conversely, when foreseeability is lacking, the court should be allowed to take account of this factor, without necessarily exonerating completely the actor. For, although the application of the law of the country of injury would be unfair to the polluter, this result would be defensible since the non-application of that law would be equally unfair to the victim who has no control over the situation.

61. Report, Art. 7, p. 19-20.

## 9. BACK TO THE LEX LOCI

9.1. It is now time to return to the basic *lex loci* rule of Article 3(1) and to examine the results this rule would produce. For reasons explained in detail elsewhere,<sup>62</sup> the view of this author is that the *lex loci* rule produces functionally defensible results in *intrastate* torts (i.e., cases in which *both* the conduct and the injury occurred in the same country) in which:

- (a) the issue is one of conduct regulation; or
- (b) the issue is one of loss distribution and the parties are domiciled in different states that have different laws.

In these cases the application of the law of the country of injury passes the scrutiny of a functional choice-of-law analysis, regardless of whether that law favors the victim or the defendant. Consequently, a jurisdiction-selecting rule like Article 3(1) that on its surface is indifferent to the content of the involved substantive laws is acceptable, besides being relatively easy to apply.

9.2. The *lex loci* rule also produces good results in *cross-border* torts in which:

- (a) the state of injury prescribes a higher standard of conduct for the tortfeasor or of financial protection for the victim than the state of conduct; *and*
- (b) in which the occurrence of the injury in the former state was objectively foreseeable.<sup>63</sup>

Here a jurisdiction-selecting rule that, like Article 3(1), requires the application of the law of the state of injury without regard to that law’s content is subject to the criticism explained below, while a content-oriented rule that omits the foreseeability defense is subject to a challenge from the perspective of fairness.

9.3. The *lex loci* does *not* produce good results in cross-border torts in which the state of conduct prescribes a higher standard of conduct for the tortfeasor or of financial protection for the victim than the state of injury.<sup>64</sup> The reasons for this should be obvious from the above discussion of Article 7 regarding environmental torts. The reasons for which Article 7 gives victims a choice between the two laws are equally valid in cases falling within the scope of Article 3(1). The drafters decided not to extend this notion (which the Report characterizes as “the principle of favouring the victim”)<sup>65</sup> to cases falling within Article 3(1), because “this solution would go beyond the victim’s legitimate expecta-

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62. See Symeonides, *The Revolution Today*, §§ 137-50, 162-65, 169-73, 181.

63. For a defense of this thesis, see *id.* §§ 152-57, 162-65, 174-81.

64. For a defense of this thesis, see *id.* §§ 158-59, 162-65, 174-77.

65. Report, Art. 3, p. 11.

tions.”<sup>66</sup>

However, as noted earlier, this is entirely the wrong dilemma. The dilemma is not whether one should favor victims over defendants, but rather whether—in a subject called “conflict of laws”—one should seek to first determine whether the involved laws actually conflict. As in the case of environmental torts, the reason for giving victims a choice is not to benefit victims as such, but rather out of deference to the policies of the state of conduct, which is the only state that has something to lose from the non-application of its law. Returning to the snow avalanche hypothetical described at the beginning, suppose that in order to protect its mining industry, country B limits the amount of damages one can recover for injury caused by mining operations. In contrast, country A in which the mining operation is located, does not limit the amount of damages and, in addition, imposes strict liability on mining operators who engage in blasting activities. In such a case, Article 3(1) calls for the application of the law of country B and specifically excludes the law of country A.

However, one would argue that exactly the opposite result would be more appropriate with regard to both the strict liability and damages issues. For reasons explained earlier, a court *should* be able to apply the strict-liability rule of country A through the vehicle of Article 13, because that rule could qualify as a rule of conduct and safety, despite plausible arguments to the contrary. However, Article 13 would be unavailable with regard to the issue of damages. The escape clause of Article 3(3) would also be unavailable because it would be difficult to convince a court that “the *obligation*” (as opposed to the specific issue of damages) “is manifestly more closely connected” with country B. Even if the victim’s domicile, country C, also allowed unlimited damages, the court could not avoid the application of country B law because the common-residence exception would be inapplicable (see *supra* 6.3-4) and the connection with country C (which Article 3(1) a priori condemns to a state of insignificance) will probably not qualify as “manifestly” closer than the connection with country B. Thus, none of the devices of Rome II can help a court avoid the application of country B law under the *lex loci* rule of Article 3(1). The drafters of Rome II consider this result appropriate because in their view to apply the law of country A would provide a windfall to the victim and “would go beyond the victim’s legitimate expectations.”<sup>67</sup>

Yet, if one were to think in broader terms such as state policies or interests, which Article 3(1) does not consider, there is little reason to apply the law of

country B. Its limited-damages rule was intended to protect mining defendants who operate within its territory, not foreign operators operating elsewhere. Conversely, there is good reason to apply the law of country A. Both its strict-liability rule and its unlimited-damages rule are intended to deter people from engaging in inherently dangerous operations like blasting. Since the defendant acted within the territory of country A, that country has every reason to insist in determining the legal consequences of that activity, even if *in this case*, the injury occurred across the border. The effectiveness of this policy of deterrence would be seriously impaired if exceptions to it were made for out-of-state injuries. Moreover, there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of that state, the tortfeasor should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state. Thus, in the final analysis, there is a good deal of wisdom in those rules that allow the victim or the court to choose between the laws of the state of conduct and the laws of the state of injury in cases of cross-border torts.<sup>68</sup> It is regrettable that the drafters of Rome II have chosen not to adopt a similar rule as they did with regard to environmental torts.

*Completed August 5, 2003 Symeon C. Symeonides*

66. Report, Art. 3. p. 11-12.

67. Report, Art. 3. p. 11-12.

68. See, e.g., EGBGB Arts. 40.1, 41; Swiss PIL Act Arts. 133(2), 136-39; Italian PIL Act Art. 62; Venezuelan PIL Act Art. 32(2); Hungarian PIL Act Art. 32(2).