

Tort Conflicts and Rome II: Impromptu Notes on the Rapporteur's Draft

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DISCLAIMERS. As the above title suggests, these are impromptu notes simply recording first impressions from the first reading of the Rapporteur's Draft, dated November 11, 2004. The notes appear more critical than they are intended to be, if only because they concentrate on the few points of disagreement rather than on the many points of agreement. Indeed, the Rapporteur's Draft is in some respects an improvement over the Commission's original proposal, which was a huge improvement over an atrocious previous draft. For this author's views on the Commission's proposal, see Symeonides, "Tort Conflicts and Rome II: A View From Across," in *Festschrift für Erik Jayme* 935-954 (2004) (referred to hereafter as "*A View from Across*").

<i>Rapporteur's Text</i>	Notes
<p>ARTICLE 2A (NEW). FREEDOM OF CHOICE. 1. The parties may agree, by an agreement entered into after their dispute arose or, where there is a pre-existing arms-length commercial relationship, by an agreement entered into before the dispute arose, to submit non-contractual obligations to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties and shall be without prejudice to the application of mandatory rules within the meaning of Article 12.</p>	<p>I. Choice <i>ex post</i> (after the dispute) — Good idea. After they become aware of their rights, the parties are in a position to make an informed and intelligent choice, including a choice of law. By sanctioning such a choice, the proposed provision will promote judicial economy.</p> <p>However, this provision must address more explicitly all the remaining practical questions. For example, is an <i>ex post</i> choice-of-law agreement subject to the limitations of Rome I? The Commission's report seems to suggest that it should not be, and there are good arguments in favour of that position, as well as its opposite. In any event, this question should be answered in the text of the article so as to avoid uncertainty.</p> <p>II. Choice <i>ex ante</i> (before the dispute) — Plausible idea in the abstract — Terrible idea in practice. It will become the vehicle for taking advantage of the weak parties (many of whom are parties to "commercial" relationships). The argument that the "mandatory rules" of Art. 12 and the <i>ordre public</i> of Art. 22 will protect the weak parties is overly optimistic. Many of these parties will fall between the cracks.</p> <p>Limiting <i>ex ante</i> choice to "commercial" relationships is a small step in the right direction, except that:</p> <ol style="list-style-type: none"> (1) this limitation may not survive until the final version of Rome II; (2) the text of Art. 2(a) does not define the meaning of "commercial" and its meaning differs from one EU country to another; and (3) even if the term "commercial" was clearly defined and uniformly adhered to, it would still include within its scope relationships that are quite one-sided, such as those arising from insurance, franchise, or licensing contracts. For example,

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	<p>a franchise contract is clearly commercial, yet the franchisee is usually in a very weak bargaining position (which is why so many states have enacted consumer-protection type statutes to protect franchisees).</p> <p>III. Suggestions:</p> <p>1. Delete the reference to pre-existing relationship and limit the scope of this whole article to <i>ex post</i> choice-of-law agreements. An <i>ex ante</i> choice of law should rarely be controlling; at most it could be a presumption under Art. 3 (more on that later);</p> <p>2. If the above suggestion is rejected, then:</p> <p>(a) provide a very clear definition of “commercial” (although this will hardly avoid all problems); <i>and</i></p> <p>(b) provide explicit, direct, and potent means of “policing” <i>ex ante</i> choices. For example, it is unclear (at least to the undersigned) whether even the mild safeguards of Rome I (e.g., the exclusion of consumer and employment contracts, etc.) would apply to the choice-of-law agreements that Art.2(a) contemplates. It is equally unclear whether an <i>ex ante</i> choice can override the rules of “conduct and safety” of Art. 13 (unless of course they qualify as “mandatory rules” under Art.12).</p>
<p>2. If all the other elements of the situation at the time when the loss or damage is sustained are located in one or more of the Member States of the European Community, the parties' choice of the applicable law shall not debar the application of provisions of Community law.</p>	<p>This provision seems to conflate paragraphs 2 and 3 of Art. 10 of the Commission's Draft, but it does so in a way that (1) eliminates the substance of former paragraph 2; and (2) changes (for the better) the substance of former paragraph 3.</p> <p>1. The eliminated paragraph 2 of Art. 10 provided that, when “all the other elements” were located in one country and the parties chose the law of another country, the choice of law could not override the mandatory rules of the first country. If this limitation was necessary in <i>ex post facto</i> choices (the only ones the Commission's Draft allowed) then <i>a fortiori</i> it would seem necessary under this Draft which allows <i>ex ante</i> choices. Query whether Art. 12 paragraph 2 can fill the resulting gap.</p> <p>2. Former paragraph 3 of Art. 10 was poorly drafted to the point of being incomprehensible. The proposed paragraph does not suffer from that infirmity. To prove or disprove the point, I venture interpreting the latter. I believe it means that in intra-EU contracts (be they intra-national or international), a choice-of-law clause may not displace provisions (whether mandatory or not?) of community law. Is this correct?</p> <p>If the above interpretation is correct, then it would seem, <i>a contrario</i>, that if <i>some</i> “of the other elements of the situation” are located in a non-EU country, then a choice-of-law clause may debar provisions of Community law—at least those whose application is not preserved by other articles of Rome II, such as Arts. 1, 12, 22, and 25.</p>

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<p>ARTICLE 3. GENERAL RULE. 1. <i>Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort or a delict shall be the law of the country with which the non-contractual obligation is most closely connected.</i></p>	<p>On the whole, the concept of the “most closely connected” country is a more appropriate general principle upon which to construct the general rules of Rome II than the <i>lex loci delicti</i> rule of the Commission’s Draft.</p> <p>However this principle continues to suffer from three main deficiencies:</p> <ul style="list-style-type: none"> (1) it implies that the search for the applicable law is to be based exclusively on factual factors or contacts; (2) it does not take account of the content and policies of the laws of the involved countries; and (3) it does not expressly authorize issue-by-issue analysis and the possibility of <i>dépeçage</i>. <p>All three points are discussed in Symeonides, <i>A View from Across</i> §§ 2.2-2.4, 6.1-6.5. Regarding point (3), the Rapporteur’s statement that the proposed text is “intended to allow for <i>dépeçage</i>” is reassuring, but it is unclear how the text does so. It is true that in cases in which a single tort gives rise to multiple obligations, the proposed text would allow a separate analysis of each obligation, and this could lead to applying the law of a different state to each obligation. However, it is unlikely that the proposed text would also allow a separate analysis of each <i>issue</i> in the same obligation—which is what most people call <i>dépeçage</i>.</p>
<p><i>2. In order to determine the applicable law in a particular case, the following presumptions shall be applied, individually or severally:</i></p>	<p>Suggestions: (1) Replace the phrase “in order to determine the applicable law” with the phrase “in identifying the above country” or “the country with which the obligation is most closely connected;” and (2) Rephrase accordingly each of the following presumptions.</p>
<p>(a) where the person claimed to be liable and the person sustaining <i>loss or</i> damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country;</p>	<p>On the whole, the common-residence rule is a very good idea. For a comparative discussion of the pros and cons of this rule, see Symeonides, <i>A View from Across</i>, §§ 5.1-5.4. However, as explained in that discussion, Rome II’s version of this rule is too broad in some respects and too narrow in others. Accordingly, this author recommends that the scope of the common residence rule be:</p> <ul style="list-style-type: none"> (1) narrowed down as to apply only when the issue at stake is one of loss-distribution (and not conduct-regulation); and (2) expanded so as to apply to loss-distribution conflicts in which the parties reside in different countries which, however, have a law that produces the same result. <p>[Point (1) is less of a problem under the Rapporteur’s Draft under which (unlike the Commission’s Draft) the common-residence rule is stated as a mere presumption. Otherwise Art. 13 would not do the trick.]</p>
<p><i>(b) subject to Article 13, where the harmful event results in a claim for damages for personal</i></p>	<p>Although the Rapporteur states that this presumption is “calculated to cater for traffic accidents,” nothing in the text suggests such a limitation or orientation.</p>

<p><i>injuries, the non-contractual obligation shall be governed by the law of the victim’s country of residence;</i></p>	<p>In explaining the rationale of this rule, the Rapporteur provides two good examples that are valid as far as they go.</p> <p>However, the first example (regarding the victim’s rehabilitation expenses) seems to assume that the law of the victim’s residence will be more protective of the victim than the laws of the other involved countries. Unfortunately, the text of 2(b) is not so limited—the law of the victim’s residence applies for better or worse, whether it favors the victim or the tortfeasor.</p> <p>The second example, involving an accident aboard a vessel flying a flag of convenience, suggests that one should not apply the law of the flag. Indeed, one should not, but the only vehicle for doing so would be an artificial reading of the <i>lex loci</i> rule of Art. 3(2)(c).</p> <p>In any event, before adopting an across the board victim’s residence rule (or even presumption), one should consider the pros and cons of applying a different law (based on residence) to people injured in the same accident and sitting next to each other in a vessel, bus, or airplane.</p> <p>Suggestion: This author’s reading of the American choice-of-law experience suggests that the law of the country in which the victim resides should not automatically govern, unless that country is also the country:</p> <ul style="list-style-type: none"> (1) in which both the conduct and the injury occurred; or (2) in which the injury occurred and its law favors the victim more than the law of the other involved countries.
<p><i>(c.) where appropriate, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, irrespective of the country in which the event giving rise to the damage occurred;</i></p>	<p>It is difficult to surmise the meaning of this presumption. It seems to attempt to say that, in principle, one should apply the law of the place of injury rather than the law of the place of the conduct that caused the injury. If so, there is much to be said against this <i>a priori</i> preference. See Symeonides, <i>A View from Across</i> §§ 3.1, 8.1-8.3. But, then again, this presumptive preference is introduced by the qualifier “where appropriate,” thus raising the question of whether this presumption is needed at all.</p>
<p><i>(d) a manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.</i></p>	<p>This is a plausible and to some extent useful presumption. However, particular caution is due when the contract contains a choice-of-law clause. For reasons stated in connection with proposed Art. 2(a), <i>supra</i>, the contractually chosen law should not automatically apply to the non-contractual obligation.</p> <p>Grammatically, a comma placed after the word “contract” would make it clear that it is the <i>relationship</i> (not the contract) that must be closely connected.</p>
<p>3. Notwithstanding <i>paragraph 2</i>, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country</p>	<p>1. The general escape. This escape is discussed in detail in Symeonides, <i>A View from Across</i> §§ 6.1-6.5. In brief, this author suggests that:</p> <ul style="list-style-type: none"> (1) the escape should be drafted so as to be applicable on an issue-by-issue basis. This can be accomplished by rephrasing it as follows: “where it is clear from all the circumstances

<p>shall apply. <i>In particular, in the case of a claim based on a non-contractual obligation arising out of damage caused by a defective product, regard may be had in determining the applicable law to the country or countries in which a product in respect of which a claim for non-contractual liability arises was intended to be marketed or to which it was specifically directed.</i></p>	<p>of the case that, <u>with regard to a particular issue</u>, the non-contractual obligation is manifestly more closely connected with another country the law of that other country shall apply to that issue”;</p> <p>(2) the escape should be tied to some overarching principle, whether that principle is drawn from EU ideals, Community ideals, or simply “conflicts justice” or even material justice. In the absence of such a principle, the courts’ employment of this escape will degenerate into a rudderless exercise of counting physical contacts.</p> <p>2. Products liability. It is possible to agree that the country in which the product was intended to be marketed has the best claim to apply its law to determine the producer’s liability. However, a rule or even a presumption to that effect should not be left hanging on paragraph 3 of Art. 3. A better place would be in paragraph 2, together with the other presumptions, or better yet in a separate article as in the Commission’s Draft. For a discussion of that article of the Commission’s Draft, see Symeonides, <i>A View from Across</i> §§ 7.1-7.2.</p>
<p>ARTICLE 6A. INDUSTRIAL ACTION. <i>The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country in which the action is to be taken or has been taken.</i></p>	<p>The meaning of “industrial action” is not clear, but whatever it means, the proposed rule is deficient in cases involving cross-border torts (i.e., cases in which the industrial action occurred in one country and caused injury in another country). In these cases, the governing law should be the law of whichever of those two countries prescribes a higher standard of conduct. This is exactly the solution prescribed by the deleted Art. 7 for violations of the environment, which was one of the best articles in the Commission’s Draft. See Symeonides, <i>A View from Across</i>, §§ 8.1-8.3. Otherwise, this rule would immunize those industrialists who, perhaps deliberately, engage in “industrial actions” in countries with low standards and cause predictable detrimental effects in other countries.</p>
<p>ARTICLE 12. OVERRIDING MANDATORY RULES. 1. <i>Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.</i></p>	<p>The new order of the two paragraphs is a clear improvement over the Commission’s Draft.</p>
<p>2. <i>Where the law of a specific country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far</i></p>	

<p><i>as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. 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</i></p>	
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<p>ARTICLE 13 – RULES OF SAFETY AND CONDUCT. Whatever may be the applicable law, in determining 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.</p>	<p>For discussion of this neglected but important provision, see Symeonides, <i>A View from Across</i>, §§ 4.1-4.6. In brief, the problem with Art. 13 is that (1) it is too timid; and (2) its tenor (or at least the tenor of the accompanying Report) suggests that the article is to be employed only when it benefits the tortfeasor, not the victim.</p> <p>Suggestions. (1) Move this article up front, next to Art. 3; and (2) Replace it with the following provision:</p> <p><i>1. For matters of safety and conduct, the law of the country in which the injurious conduct occurred applies.</i></p> <p><i>2. However, the law of the country in which the resulting injury occurred applies if: (a) the conduct violated the standards of that country; and (b) the actor should have foreseen the occurrence of the injury in that country.</i></p>
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<p>ARTICLE 14 – DIRECT ACTION AGAINST THE INSURER OF THE PERSON LIABLE. The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract <i>in so far as this possibility exists under one of those laws.</i></p>	<p>The italicized clarification is unnecessary and potentially confusing.</p>
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<p>ARTICLE 22 – PUBLIC POLICY OF THE FORUM. 1. The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (“<i>ordre public</i>”) of the forum.</p>	
<p><i>1a. In particular, the application of a rule of law of any country</i></p>	<p>The addition of this paragraph is a good idea. Query whether the word “may” should be replaced with the word “shall.” Indeed</p>

<p><i>specified by this Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions and international humanitarian law.</i></p>	<p>if the foreign law violates a fundamental right enshrined in the Convention why should the forum have any discretion to condone such violation?</p>
<p><i>1b. Furthermore, the application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy (“ordre public”) of the forum.</i></p>	<p>The Rapporteur should be applauded for taking the courageous position that there is no “Community public policy” against punitive damages. This means that it is up to each forum country to decide whether punitive damages are against its public policy. That being so, this provision is unnecessary, for it simply states the obvious, i.e., that a country “may” (or may not) regard punitive damages as against its public policy.</p>