Choice of law in copyright and related rights: alternatives to the lex protectionis

van Eechoud, M.M.M.

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Chapter 2
Characteristics of the Choice-of-Law Process

2.1 Introduction

In a study devoted to appropriate choice-of-law rules for contemporary copyright and related rights, it helps to have a reminder of what the objectives of choice of law are and what the distinguishing features of the dominant method—the allocation method—are. More importantly, it will help to put in perspective common place notions about the applicable law for intellectual property. As we shall see in Chapter 3, these notions have developed simultaneously with, but largely outside, the allocation method. They have their basis in the territorial view of intellectual property, the awkward position of foreign authors in national copyright laws that results from it and the remedies developed by way of multilateral treaties against discrimination of foreign authors.

More often than not, the issue of the applicable law in copyright matters is treated exclusively within the framework of international conventions on copyright and related rights, from the 1886 Berne Convention to the 1996 WIPO treaties on copyright and performances and phonograms. But the basic characteristics of these conventions do not immediately bring to mind associations with choice-of-law rules. Their shared essentials, i.e., a minimum of protection by way of substantive provisions, coupled with national treatment of foreign creators or creations, are testimony to what was in the past (that is to say: well over a hundred years ago), the preferred solution in international intellectual property generally. This solution is in part harmonisation of national substantive copyright laws, in part harmonisation of (domestic) laws on aliens as far as intellectual property is concerned.

A more detailed analysis of the position of foreign authors, both before and after the rise of international copyright instruments, is the subject of Chapter 3. That will be followed by a chapter devoted to the determination of the choice of

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28 Strictly speaking intellectual property treaties do not harmonise national laws, because contracting parties are not required to give their own creators-creations the minimum protection that the treaties provide for. But in practice the substantive provisions in international instruments also form the minimum protection provided for in domestic laws. See Chapter 3.

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law calibre of the Berne Convention and subsequent copyright and neighbouring rights treaties.

This Chapter is dedicated largely to the objectives and development of choice of law (Paragraphs 2.2 and 2.3) and the characteristics of the allocation method (Paragraph 2.4). This is the dominant choice-of-law method in Europe and most other countries. The allocation method, as originally conceived by Savigny (1779-1861), is based on the premise that all legal relationships can be divided into categories, for example issues relating to property of immovables, or succession, or contractual obligations. The assignment of a suitable connecting factor for every category (e.g., the location of the property, nationality or last habitual residence of the deceased, place of performance of a contract or place of establishment of the characteristic performer) leads to identification of the jurisdiction whose law should be applied.

The allocation method has been substantially modified since its inception. However, the basic idea that one should take the legal relationships as a starting point and not the territorial scope of a (domestic) rule of law, still stands.

Because the principal traits of the international copyright system developed in the course of the 19th century, some attention will be given to Statutist theory, which was the dominant approach to choice of law in most countries for the better part of the 19th century (Paragraph 2.3). The Statutist approach is not to take a legal relationship and find the applicable law, rather it starts at the other end: it seeks to ascertain the spatial reach of a certain rule of law. As we shall see in Chapters 3 and 4, the Statutists' way of thinking is persistent in copyright, especially in the tenet that copyright is 'territorial'.

The focus on unilateral conflict rules as opposed to the allocation method's focus on multilateral conflict rules, has made a comeback in the shape of priority rules (see Paragraph 2.4.3). These rules – together with the public policy doctrine – serve as devices to adjust unwanted results of the application of normal multilateral conflict rules. These escape mechanisms will be discussed in Paragraph 2.4, after a review of the structure of multilateral conflict rules and their underlying principles. Paragraph 2.5 contains the conclusions of this Chapter.

2.2 Objectives of Choice of Law

In a very general sense, the function of choice of law is to provide an efficient and just solution for situations in which the law of more than one country would be eligible for application, due to the international aspects of the case at hand. Such a solution is needed to accommodate cross-border social and commercial intercourse. It should accommodate demands of utility, legal certainty and substantive justice.

Considerations of utility and legal certainty are incorporated in the quest for decisional harmony, or uniformity of result. This has always been the central
OBJECTIVE OF THE ALLOCATION METHOD. That the choice-of-law process should also yield a result that is just, from the perspective of the individual parties involved, is a relatively novel idea.

2.2.1 DECISIONAL HARMONY

Traditionally, the goal of an efficient solution to choice-of-law problems is incorporated in the notion of decisional harmony. Simply put: if all states adhere to the same conflict rules or principles, every dispute will be subject to the same (substantive) law regardless of where a claim is brought or a dispute arises. This contributes to legal certainty for parties involved, because they will be able to predict which law governs their relationship. In theory at least, decisional harmony has two other important beneficial effects: it discourages forum shopping and prevents limping legal relationships.26

Of course these advantages only fully materialise in an ideal Savignian world. All jurisdictions involved must share the same conflict rules. These choice-of-law rules must address well-defined categories of relationships and have clear connecting factors. In addition, courts should have little or no opportunity to get round the outcome of the selection process by using an escape device such as public policy or priority rules.

2.2.1.1 FORUM SHOPPING

Plaintiffs may shop around for a court that they expect will apply a law favourable to their case. But if all fora were to apply the same choice-of-law rules, they would apply the same rules of substantive law and there would be decisional harmony. In theory it would not matter where a plaintiff brought the claim. In practice of course decisional harmony alone is unlikely to prevent forum shopping, since parties can favour particular courts for a number of reasons. The expectation that a certain law will be applied is only one of them.

For instance, in the past years Dutch courts have been a popular forum for patent-infringement claims brought by and against foreign companies, because local courts have been quite willing to issue cross-border injunctions, at least until recently.30 These injunctions can be relatively easily enforced in most of Europe

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29 De Boer 1996b, pp. 283-290.
30 The Hague Court—which on the basis of Art. 80 Rijksoctrooiwet 1995 (Dutch Patent Act) has exclusive jurisdiction over most patent litigation involving Dutch or European patents within the
on the basis of the Regulation on Jurisdiction,\(^1\) which replaced the Brussels Convention 1968,\(^2\) and the Lugano Convention on Jurisdiction and Enforcement of Judgements. In product liability cases, the willingness of American juries to award large amounts of damages combined with local attorneys' ability and willingness to work on a no cure no pay basis, makes US courts attractive fora.\(^3\)

Other reasons to favour one forum over the other may be the expediency of proceedings, the cost of litigation, language and advantages in procedural law (since the forum applies its domestic rules of procedure to a case).

In short, decisional harmony in choice of law does not necessarily have a significant effect on the practice of forum shopping. A more direct way to reduce forum shopping would probably be to limit the number of courts that have jurisdiction.

### 2.2.1.2 Limping Legal Relationships

Decisional harmony can help prevent so-called limping legal relationships. Relationships 'limp' whenever the legal position of parties varies when considered from the viewpoint of different legal systems. For example, under the law of one country an author's illegitimate child may be the heir (and inherit copyright upon the author's death) while under the law of another State off-spring born out of wedlock do not inherit. If all states were to use the same criterion to determine the law that governs the question of capacity to inherit –for example, the law of the country where the deceased had her or his last domicile– the late author's child would not find that in one country he or she can exploit the copyright in the parent's works, while in another country another person is recognised as copyright owner.

Another example concerns ownership of works made for hire, an increasingly important issue as more and more works such as databases and software are produced by companies (more precisely: their employees) and exploited

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2. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels 27 September 1968. Of the EU Member States, Denmark is not bound by the Regulation, but only by the Brussels Convention.
INTERNATIONALLY. Under Dutch and US copyright law the employer is invested with copyright in works made by employees in the course of their duties. As a result, corporate persons in their capacity as employers, can be owners of initial copyright. In Germany and in many other countries however, the initial copyright owner must by definition be a physical person, since only a physical person can actually create a work and thus be an author. A corporation or other legal person cannot, therefore, own the initial copyright in works created by employees.

From an international perspective, an employer and his employees may find a shift in their position as copyright owner(s) with regard to the same work: in this respect their relationship is ‘limping’. A Dutch company that wants to exploit the intellectual property in works created by its employees could assume that it owns the rights world-wide, but it may find that under German law it cannot exploit the intellectual property as it wishes without the employee’s consent.

If all countries were to follow a common rule, e.g., that the law of the country where the employee habitually carries out his duties governs the question whether the employer or employee has initial ownership of copyright, the problem appears to be solved. Such a uniform rule would not only create more certainty for employers and employees, but also for subsequent acquirers downstream from the initial copyright owner.

One might argue that, in practice, employers will have secured copyright through clauses in employment contracts, so that there is no ‘limp’ to speak of. But of course the question of exactly which rights have been acquired by the employer depends on whether the contract is valid to begin with, on which rights can be and have been assigned, etc. The applicable law for these issues may not be the same under national choice-of-law rules. Decisional harmony —this time achieved through uniform acceptance and application of a conflict rule, for example, for the validity and scope of (copyright) transfers alike— would ensure employer and employees stable positions and advance legal certainty for third parties who seek authorisation for the use of the work involved.

The quest for decisional harmony has not been very successful because it not only requires that all states adopt the same conflict rules, but also that their courts apply them in a uniform manner. Even though decisional harmony has been a primary objective of choice of law for at least a century and a half, there is little

34 Unless employer and employee have agreed otherwise: Art. 7 Auteurswet, Sec. 201 sub b US Copyright Act (17 USC §§ 101–810).
reason to assume that it will ever be attained at a substantial level. The relatively small numbers of parties to the various Hague Conference treaties are indicative in this respect.

It is unlikely that all states will ever agree on conflict rules for all areas of private law, if only because notions of what belongs to the realm of private or public law differ. Even if states were to agree, one can hardly expect that such conflict rules will be interpreted and applied in a uniform manner, particularly if—as is the case with most choice-of-law treaties—there is no single body that has the ultimate authority to interpret its provisions.

Another factor that complicates the quest for decisional harmony is that the allocation method has never become the sole choice-of-law method practised. Particularly in the United States, where conflict of laws is a state rather than federal matter, there is a plurality of methods. Since the 1960’s, governmental interest analysis has been especially influential and has caused major changes to classic American choice of law and in a few states has virtually replaced it.

2.2.1.3 European Developments

Even among countries sharing the same method, such as the Member States of the European Union, achieving decisional harmony is a formidable task. Since the 1997 Treaty of Amsterdam came into effect 1 May 1999, a new Article 65 of the EC Treaty explicitly mentions the task of the EU in harmonisation of private international law. Before the Treaty of Amsterdam, harmonisation of private international law at the EU level took place through conventions on the basis of Article 293 (ex 220) EC Treaty. Since then, the EU institutions have an

36 Symeonides in his General report of the 1998 International Congress of Comparative Law 2000, gives an overview of the recurrent tug of war between legal certainty (served by decisional harmony) and flexibility (necessary among other things to achieve substantive justice).
37 Cf. De Boer 1993b, pp. 1–13. Of the 18 Hague Conventions on applicable law concluded since the Second World War, 6 are not yet in force. Most others have between 3 and 19 signatories. The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 1961 is relatively successful, with 40 contracting states. See <www.hcch.net/e/conventions/index.html> [last visited 1 November 2002].
38 The Brussels Convention 1968 is an exception, since the European Court of Justice rules on its interpretation. In the near future European instruments will increasingly be in the form of EU regulations (like the recent Regulation on Jurisdiction) and thus automatically be subject to the European Court of Justice’s jurisdiction.
39 For a recent review of changes in conflicts law in the US, see Peterson 2000, pp. 413–444.
40 Trb. 1998, 11. Article 73 M (currently Art. 65 EC) juncto Art. 73 O Treaty of Amsterdam provides that any private international law—harmonisation proposal voted upon before May 1st 2004 requires a unanimity vote in the Council; after that date a qualified majority suffices.
independent, more broadly defined role to play. They can further unification and harmonisation of national private international law using regulations or directives, or other Community instruments (recommendations, resolutions). 41

Recent EU regulation tends to deal with jurisdiction and recognition rather than applicable law. New instruments include the Regulation on jurisdiction and enforcement in matters of matrimonial and parental responsibility (in force since March 1, 2001) 42 and -based on the Brussels Convention 1968– the already mentioned Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in force since 1 March 2002).

In its fifty odd years of existence, the EU has not been able to produce a coherent set of choice-of-law rules for an important area such as non-contractual obligations (torts, unjust enrichment). This area of conflicts law is particularly relevant for copyright and related rights, because an infringing act could be categorised as a tort. Initially planned to be incorporated in what became the Rome Convention of 1980, the drafting of conflict rules for non-contractual obligations ('Rome II') has been a work in progress since the late 1960's. The Groupe européen de Droit International Privé (GEDIP; European Group for Private International Law) presented a draft in 1998 for a European Convention on the law applicable to non-contractual obligations. 43 This proposal has been considered by the European Commission in its 'preliminary draft proposal' for a Rome II Regulation. 44

The proposed draft attracted mixed criticism during a first consultation round in the autumn of 2002. The business community especially, argued that the Rome II Regulation should not extend to intellectual property. 45 When the EU will have harmonised rules on choice of law for torts is still uncertain, even though Rome II

41 The precise extent of the EU’s authority in the area of private international law, particularly as to the instruments that can be used, is still debated, see: Basedow 2000; Boele-Woelki 2000 and 1999; Fallon & Franceq 2000, pp. 172–177; Kessedjian 2000, pp. 331–335; Remien 2001; Thoma 2002.


43 For a discussion of the proposal, see Fallon 1999. From here on the proposal will be referred to as: GEDIP Rome II proposal.


45 See the ‘Follow-up of the consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations (“Rome II”)’ and comments at <www.europa.eu.int/comm/justice_home/index_en.htm> [last visited 1 November 2002].
should have been completed before 1 May 2001. The Commission plans to present a revised proposal in the course of 2003.

The EU difficulties in drafting common choice-of-law rules for torts illustrate the difficulty of achieving decisional harmony. If the Member States of the EU, despite their longstanding cooperation in economic, social and political matters, their considerable common legal roots and their mutual interest in harmonisation, require such a lengthy process to agree on choice-of-law rules for an area as important as non-contractual obligations, it is unrealistic to think that decisional harmony will be achieved at the global level any time soon. Of course, this is not to say it is not a goal worth striving for, especially since modern communication technologies have allowed for such a substantial increase of cross-border activity in the supply and use of information services and goods. This in turn means a rise in the potential number of cross-border torts, not only in the area of intellectual property, but also with regard to advertising law, unfair competition etc.

2.2.2 **Substantive Justice**

In Europe, the call to accommodate substantive values in choice of law became loudest in the 1960's and 1970's, following earlier and more radical objections in the US against the neutral, hard and fast choice-of-law rules that the goal of decisional harmony required.

Traditionally, the allocation method, with its orientation towards selecting a jurisdiction rather than on the result a choice produces, was considered as serving justice at an abstract level (so-called conflicts justice). Following its basic assumption that all legal systems are equal, domestic conceptions of material or substantive justice must be regarded as equally valid. That in turn means that a choice between jurisdictions cannot be based on considerations of substantive

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47 The European Group on Private International Law, at its 1999 Oslo meeting, called upon the EC to favour a solution developed in a wider international framework and to adopt appropriate procedures to ensure the realisation of this objective, when considering action in the field of choice of law or jurisdiction. <www.drt.ucl.ac.be/gedip/gedip-reunions-9t.htm> [last visited 1 November 2002].


49 Conflicts justice is a notion elaborated upon particularly by Kegel 1995, pp. 106–108.
Justic in individual cases. Justice in the abstract is served because the neutral conflict rule identifies the proper jurisdiction in the standard case, particularly through the use of the appropriate connecting factor for each type of legal relationship.

The widely accepted contemporary view is, as Symeonides aptly summarises, that ‘a judge’s duty to resolve disputes justly and fairly does not disappear the moment the judge encounters a case with foreign elements. Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of PIL as much as it is of internal law.\[50\]

Sure enough, in practice the judiciary do strive for a result that is just in their (particular) view. As traditional conflict rules in theory leave little room for considerations of substantive justice, courts have been creative in their application and interpretation of choice-of-law rules. This includes the use of escape devices such as the public policy exception.

The call for the accommodation of substantive justice and the corresponding level of flexibility that choice-of-law rules need, has not gone unheeded. Increasingly, traditional multilateral conflict rules are revised or replaced by ones that do reflect the need to achieve substantive justice.\[51\] This change is particularly clear in areas of private law that have undergone the most profound process of socialisation (Sozialbindung, vermaatschappelijking).

In substantive private law, it has become a matter of legislative policy to protect people who are relatively vulnerable in their relationship to (contractual) counterparts, such as children, consumers and employees. This has led to restrictions on the freedom of disposition in contractual matters,\[52\] e.g., in the black- or grey listing of (potentially) onerous conditions of sale of goods and services to consumers. Or, to give an example from the copyright field, in the author and performing artist’s unalienable right to equitable remuneration for exploitation of their creative efforts through the rental of films or sound recordings, in case they have assigned their rental right to a film- or record producer (Art. 4 Rental and Lending directive).\[53\]

This type of ‘interference’ of public policy goals in private law has left corresponding marks on private international law. For instance, where the contractual freedom of disposition has been curbed (e.g., in employment and consumer contracts), so has the freedom to choose the applicable law. In addition.

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50 Symeonides 2000, p. 45.
51 De Boer 1996b, pp. 290–296; Symeonides 2000, pp. 46–60
52 Conversely, in areas of (substantive and procedural) private law where freedom of disposition has increased, persons concerned tend to gain a corresponding right to choose the applicable law. See Paragraph 2.4.2.2 on party autonomy.
special allocation rules have been developed that accommodate the protective function of, for example, labour and consumer law (so-called functional allocation, see Paragraph 2.4.2).

2.3 The Development of Choice of Law

The history of the conflict of laws predates the invention of the printing-press. Roughly speaking, from the late Middle Ages to the late 19th century the prevailing doctrine in continental Europe was the so-called Statutist theory. Statutists endeavoured to find rules that would determine the (extra)territorial scope of domestic rules of law, which in essence was a unilateralist method of determining the applicable law.

In the second half of the 19th century a shift of paradigm took place under the influence of the German scholar Savigny. His allocation method is a multilateral approach. The starting point in the allocation method is not the territorial scope of domestic rules of law, but the nature of a legal relationship. As has been said above, this method has come under fierce criticism mainly because it cannot deliver the uniformity of result it promises and does not allow for considerations of substantive justice. Neither does the allocation method take account of the particular interests states may have in seeing their law applied.54

In the first decades of the 20th century, a multilateral method based on Beale’s vested rights theory was dominant in the United States, which like the European allocation method had as its principal objective decisional harmony. The vested rights theory shone through in the hard and fast choice-of-law rules of the (first) Restatement of the Law of the Conflict of laws (1934). The inflexibility of these rules, combined with the influence of Legal Realism, caused a more extreme reaction against the multilateral approach in the US than elsewhere. Especially from the 1950’s onwards different alternatives were put forward55 of which governmental interest analysis gained the most influence. Interest analysis, first elaborated by Brainerd Currie, starts with the assumption that every court has a duty to implement the policies of the forum state. There is only room for the application of the law of a foreign state if that state has an interest in having its

54 On the history of private international law up to the late 19th century, see Kollewijn 1937, on subsequent developments, see Steenhoff 1994.

55 Consistent with the anti-rule attitude that flowed from Legal Realism, alternatives put forward were mainly ‘approaches’, i.e., a set of principles or preferences that the judiciary is supposed to use when deciding an international case. For a short history see: Symeonides 2000, pp. 23–24; Peterson 2000, pp. 418–423.
CHARACTERISTICS OF THE CHOICE-OF-LAW PROCESS

policies upheld in the dispute at hand while the forum state does not.\textsuperscript{56} It shares with Statist theory the unilateral approach, i.e., the focus is on determining the (extra)territorial scope of domestic rules of law.

Even though in most American States, interest analysis has not replaced the multilateral method, it has been very influential and is reflected in the \textit{Restatement of the Law of the Conflict of Laws (Second, 1971)}. In the general principles of the Restatement, factors listed as relevant to the choice of the applicable law include the relevant policies of the forum state and of other interested states and the basic policies that underlie a particular field of law.

The specific choice-of-law rules that the Second Restatement contains for various issues (torts, contracts, etc.) are based on the idea that the choice-of-law process must identify the state with the most significant relationship to the issue at hand. This is done through a number of rebuttable presumptions, e.g., that the state where a (personal) injury occurred has the most significant relationship with the case.

While various choice-of-law methods co-exist in the United States today (some states adhere to governmental interest analysis, some to the Restatement Second, a few still cling to the Restatement First, others have adopted a mix),\textsuperscript{57} in Europe the allocation method predominates, albeit in variations that reflect local colours and taste.

In the following paragraphs, a closer examination will be mounted of both the Statist theory and the allocation method, since the international copyright system formed against the backdrop of the transitional phase from Statism to the allocation method in the second half of the 19th century.

2.3.1 STATIST THEOR Y

The term ‘Statist theory’ does not refer to one particular theory of the conflict of laws, but to methods and solutions that were mostly developed in medieval Italy, sixteenth century France and seventeenth century Netherlands. What Statists shared is the concept that the applicable law must be determined by looking at the spatial reach of a certain rule of substantive law: over which (cross-border) legal situations does it claim application? The legal rule, not the legal relationship, is the point of departure in Statist theories.

The lively flow of persons and goods between medieval Italian city-states caused Italian scholars to address the question of if and when the law of one city-

\textsuperscript{56} Peterson 2000, pp. 418-420.
\textsuperscript{57} Peterson 2000, pp. 422-423.
state had cross-border effects and whether a particular law of a city-state applied to foreigners that found themselves within its territory. For answers to these questions, scholars looked to the corpus juris civilis, since this 6th century collection of Roman law was shared by the city-states."

Although the Italian scholars did not construct a comprehensive choice-of-law method, a number of the principles they developed have had a long-lasting effect on private international law. The notion that the law of the state whose court adjudicates a case (lex fori) governs rules of procedure, for instance, was accepted then as it is now. Equally, the lex rei sitae, i.e., the law of the place where an object is situated, continues to be a common choice-of-law rule. The locus regit actum principle, i.e., that the form of a legal act is to be judged by the law of the place where it took place, was also known to Statutists and has remained an important principle in later centuries."

16th century French jurists, such as Dumoulin and D'Argentré, re-organised and systemised the Italian accomplishments. A well-known French doctrine is that which classifies rules of private law into three categories:"

- **Real statutes**, i.e., laws relating to objects (e.g., immovables). These were deemed territorial in scope and thus governed any issue concerning objects situated within the territory.

- **Personal statutes**, i.e., laws that deal with the state and capacity of persons. These included rules defining someone's legal capacity and rights and obligations as a parent, child, spouse, etc. Issues in these areas were governed by the law of the person's domicile, i.e., the place where someone stays on a regular basis and which is the centre of his or her social and economic activities.

- **Mixed statutes**: as its name suggests this category contains laws that address both persons and objects.

Since it was a residual category, it was the most problematic of the three. There was no general consensus on whether all mixed statutes should be governed by the principle of territoriality. The French scholar d'Argentré - whose work was popular in the Lowlands, but not so much in his native France - seems to have

60 Considering that the Statutist method was developed over a period of centuries in different countries, the description given here is evidently a considerable simplification.
61 Batin 1935, pp. 143–144.
favoured the territorial approach. Others argued that mixed statutes that predominantly addressed persons, should in their application follow the person.

Examples of all three types of statutes can be found in the Dutch Wet Algemene Bepalingen of 1829 (General Provisions Act, or Wet AB), which is still in effect. Articles 6, 7 and 10 of the Wet AB are inspired by Article 3 of the French Code Civil, which is also still in effect. Article 6 Wet AB prescribes that Dutch law is binding upon Dutch nationals at home and abroad where the legal capacity and status are concerned (personal statute). Article 7 states that in respect of real property, the law of the country where the property is situated is the applicable law (lex rei sitae, real statute). Article 10, which states that the form of acts shall be governed by the laws of the country or place where the act takes place, can be traced back to the Statutist criterion with respect to mixed statutes.

The next stage in the development of Statutist theory took place in the Netherlands. Whereas the Italians had focused on conflicts of laws between city-states and the French on conflicts of laws between provinces, the Dutch addressed conflicts of law at the international level. The most renowned of the seventeenth century Dutch school were Voet the elder and the younger and Huber. They showed a profound interest in the (territorial) scope of rules of substantive private law in relation to the sovereign state. In short, they asked themselves on what grounds foreign law was to be applied. The Dutch school held that a state’s sovereignty entails that all persons and objects within a state’s territory are subject to its laws. A sovereign state cannot be under any obligation to apply foreign law in its own territory.

Recognising that international traffic and commerce can call for the application of foreign law, Voet Sr. argued that the basis for doing so must be found in courtesy (comity) that States observe towards each other. This ‘comity doctrine’ lost its significance in 19th century Europe, particularly as Savigny’s theory gained influence. In the United States, it influenced conflicts of laws for a longer period, largely through the work of Story (1834).

The notion that conflict of laws is national law, was accepted by many in the late 19th century and is commonplace today. This is not to everyone’s liking. Frankenstein exclaimed after having established that 19th century choice of law is national law: ‘On avait substitué à la territorialité du droit matériel la

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63 Bar 1862, pp. 20–40: Kosters/Dubbink 1962, pp. 17–43
64 Battifol 1949, p. 17.
65 Kosters 1917, pp. 9–11.
Territorialité des normes de conflit, résultat bien maigre de 600 ans de travail et de dévotion de tant d'hommes illustres.

In the past decades, Statutism has made a comeback of sorts, not only in the United States with the advent of governmental interest analysis (see Paragraph 2.3), but also in States following the allocation method. There, so-called ‘neo-statutism’ is reflected in scope rules and in priority rules (see Paragraphs 2.4.1 and 2.4.3 respectively).

2.3.2 The Allocation Method

By the late 19th century, the Statutist system in Europe had begun to give way to Savigny’s allocation method. In the second half of the 19th century, it had to compete with the conflict-of-laws doctrine that has become known as the Romanist School, of which Italian scholar and politician Mancini was the central figure.

The Romanist approach was based on a distinction between personal and territorial laws. The former category was closely associated with a person as citizen of a nation, the latter was composed of laws aimed at guaranteeing public order and decency and did not warrant application outside a nation’s borders. According to Mancini, choice of law was part of international law, so states were obliged to respect a person’s national law (for most family matters, succession, etc.). The Romanist school remained influential particularly in Italy and France into the 20th century, but by the end of the 19th century Savigny’s ideas had become dominant in Germany, Austria-Hungary and elsewhere in Europe.

Savigny belonged to the school of jurists who felt that (private) law is not ‘made’ by the legislature, but emanates from the Volksgeist. It is merely to be elaborated and shaped in positive law. His 1849 theory is based on the assumption that all Christian order societies share a common legal foundation (i.e., the reception of Roman law) and that this enables the solution of conflict of laws issues through uniform rules at the regional and international level.

Savigny held that every legal relationship has a ‘Sitz’ (a sort of natural seat). The objective of his method was to direct every (international) legal relationship ‘home’ to where it has its natural seat, i.e., to the legal system with which it is deemed to have the closest connection.

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70 Strikwerda 2000a, pp. 18–19.
To achieve this, legal relationships are divided into major categories, e.g., those that deal with family relations, real property, or contractual obligations. For each (sub)category a connecting factor is selected that is thought to refer to the national legal system with which in a normal typical case the relationship may be deemed to be the most closely connected.

For matters dealing with the status and capacity of persons, Savigny claimed that the domicile of a person would typically indicate the legal system most closely connected, since by choosing his domicile a person expresses the will to comply with local law.

For all relationships that involve more than one person, he proposed that the closest connection may be established through one of four connecting factors: domicile of parties involved, place where an object is situated, place where an event or legal act took place, or place of the forum. For instance, in matters of inheritance the domicile of the testator at the time of death was to be the connecting factor. For movable and immovable property the law of the place where the property is situated is viewed to be the most closely connected (which corresponds to the Statutist’s lex rei sitae). For contractual obligations, Savigny argued that the place of performance should be the connecting factor.71

Cases of tort were to be governed by the law of the forum. (In Savigny’s day a tort usually corresponded with a delict, i.e., a criminal offence, and since the courts can only apply their own criminal law, it follows that if the case concerns a tort, they should do the same).72

Savigny’s conflict rules are neutral and abstract. Abstract, because the ‘centre of gravity’ of an individual case is decided beforehand with the aid of objective connecting factors. Whether an actual case is, in reality, most closely connected with the law indicated by the connecting factor is not relevant. His rules are also neutral, because they can in principle result in the selection of any local law, regardless of its content. Thus, in the traditional theory, uniformity of result and legal certainty come before substantive values. The orientation of the selection process is on jurisdictions, not on the content of laws.

2.4 Characteristics of the Present Day Allocation Method

Since the days of Savigny, the allocation method has undergone significant changes. The point of departure - identifying the legal system with which a legal relationship has the closest connection – remains, but less abstract conflict rules

71 Koster 1917, p. 743.
72 Koster 1917, p. 791.
have been developed and considerations of policy and substantive justice are now explicitly recognised. In this Paragraph, the main features of the contemporary allocation method will be described: the structure of conflict rules, the principles underlying them and the instruments used to adjust the outcome of the selection process.

2.4.1 TYPES OF CONFLICT RULES

A difference that has already been referred to above is between multilateral and unilateral conflict rules. The former are the essence of the allocation method and identify the applicable law from among any number of legal systems. The latter - also called scope rules - only reflect the claim to application of a specific (rule of) law, e.g., Article 6:247 of the Dutch civil code for instance. states inter alia that the Civil Code’s rules on general terms and conditions apply in case of contracts concluded with consumers that are resident in the Netherlands, regardless of the otherwise applicable law of the contract.

The traditional, multilateral abstract conflict rule consists of three elements. It delineates the subject-matter of the rule, i.e., the type of legal relationship with which it deals (e.g., tort, matrimonial property, contractual obligations). The second element is the connecting factor, which points to the law with which the legal relationship is deemed to have the closest connection, or where its centre of gravity is supposed to be (e.g., ‘the law of the country where the harmful event took place...’). The third element links the issue and the connecting factor by designating the applicable law.

The connecting factor often is factual or geographical in nature: the place where a harmful event occurred, the place where a legal act was done; the place where a contractual obligation has to be performed; the place where an object is situated; the habitual residence, domicile73 or nationality of persons involved. If we were to accept that for copyright the lex protectionis is the conflict rule, its structure would be for instance: ‘the subsistence, initial ownership, scope and duration of copyright is governed by the law of the country for whose territory protection is sought.’

73 Savigny gave preference to domicile as a connecting factor, but nationality became a much used allocation factor instead due to the influence of Savigny’s Italian contemporary Mancini and his Romanist/Italian school. Since every person that belongs to a nation has a natural right to ‘share’ that nation’s laws, they in principle should follow a person in international relationships. Strikwerda 2000a, p. 39. In recent decades habitual residence has increasingly replaced nationality as a connecting factor, since the former often reflects a person’s connection to a legal system more accurately.
CHARACTERISTICS OF THE CHOICE-OF-LAW PROCESS

The attraction of the traditional conflict rule is that it is objective and easily identifies the applicable law. It can, however, also yield strange results. Notably, it can designate the law of a certain country as applicable even though this country has very few real ties to the case, e.g., if the issue whether moral rights can be exercised by the heirs of the copyright owner were to be governed by the national law of the copyright owner, even though he or she has never lived or published in the country of which he or she is a national. To ensure that there is a real connection between the applicable law and the relationship it governs, abstract conflict rules are increasingly replaced by two other types of conflict rules.

One is the ‘open’ or ‘proper law’ conflict rule, the other the ‘semi-open’ conflict rule. An open conflict rule simply states that the applicable law is the law with which the case has the closest connection, all circumstances considered. What it provides in flexibility it lacks in furthering legal certainty.

Open conflict rules that are combined with an abstract criterion allow for more legal certainty. Such semi-open conflict rules feature in important conventions like the Rome Convention 1980. Article 4(1) of the Rome Convention states that the law applicable to contractual obligations is that of the country with which the contract is most closely connected. Article 4(2) contains the presumption that this is the country in which the party who has to carry out the characteristic performance has his habitual residence or principal place of business.

Modern choice-of-law rules often contain more than one connecting factor. These can be alternatives, tiered or cumulative. An example of a conflict rule with alternative connecting factors is Article 1 of the Hague Convention on Testamentary Dispositions. The validity of wills is governed by the law of the country where the will was made, but the will is also valid if it conforms to the demands of either the law of the country of which the testator is a national, or to the law of the country where he had his domicile or habitual residence (in case of immovable property: the law of the country where the property is situated). This type of rule often reflects the desire to achieve a certain result, in the example given: that a will is considered formally valid (see Paragraph 2.4.2.4 on the favour principle below).

An example of the use of cumulative connecting factors is the Hague Convention on the Law Applicable to Succession (1989): according to Article 3(1) the applicable law is that of the country where the deceased had his habitual residence and of which he was a national at the time of death.

Conflict rules with tiered connecting factors have an ‘if not... then...’ structure. The Dutch conflict rule for divorce, for instance, states that the question if and on what grounds divorce can be requested, is governed by the law of the country of which the spouses are both nationals. If the spouses do not share a
common nationality, the applicable law is that of the country of their common habitual residence. Dutch law applies if the spouses share neither a common nationality nor a habitual residence (Art. 1 Wet Conflictenrecht Echtscheiding 1981).

2.4.2 PRINCIPLES UNDERLYING CONNECTING FACTORS

While the ‘closest connection’ – to be determined by the use of factual-geographical connecting factors – may be the central principle of choice of law, it is not the only principle underlying conflict rules. Party autonomy is one of the oldest, while the favour principle and functional allocation are relatively new and reflect the growing influence of (substantive) justice and policy considerations on the modern allocation method.

2.4.2.1 Closest Connection

The allocation method traditionally shows a preference for the use of connecting factors that relate to a place where an event or fact occurs: the place where an object is situated, where an obligation must be performed, or where a (legal) act takes place. These places are supposed to reflect the legal system with which a legal relationship has the closest connection.

In modern choice of law, the place of habitual residence or the principal place of business of the parties to a legal relationship have become important connecting factors, equally because these factors generally reflect the closest connection from a factual-geographical perspective. For example, in the traditional conflict rule for contracts, the place of performance or place where the contract was concluded were used as connecting factors, whereas modern rules use the place of habitual residence or establishment of the party that has to deliver the characteristic performance as connecting factor (e.g., Art. 4(2) Rome Convention 1980; similarly §28(2) German EGBGB. §36 Austrian IPRG). Nationality as a connecting factor became popular in the 19th century particularly under the influence of the Romanist School (see Paragraph 2.3.2), but has since been increasingly replaced by habitual residence.

In the area of torts, the place where a harmful event occurred is still the predominant connecting factor used to determine the applicable law (lex loci delicti commissi). In the case of bi-local torts, i.e., if the place of the harmful event

74 Stb. 1991, 166.
occurred (*Handlungs ort*) and the place where the effects of the harmful event are felt (*Erfolgsort*) do not coincide, or if one harmful act produces damage in various countries, it is more difficult to establish which country is most closely connected. In some countries the *Erfolgsort* is presumed to indicate the closer connection, in others *Handlungs- and Erfolgsort* are considered as equals, while in further countries the *Handlungsort* is predominant.

The use of the connecting factor ‘place where a tort was committed or resulted in damage” does not necessarily lead to the identification of the country with which the case at hand has the closest connection. Some laws contain a general proper law escape (*Ausweichklausel*), which allows for the application of the law of another country if it is more closely connected to the case. For example, Article 3(4) of the GEDIP Rome II proposal, states that the presumption of Article 3(3) that the place where the harmful event occurred (or threatens to occur) or where the damage materialised reflects the closest connection, is set aside if, all circumstances considered, the non-contractual obligation at issue has a closer connection to another country. The preliminary draft Rome II Regulation lays down a more strict proper-law escape. Article 3(3) of the draft states: ‘... if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under Paragraphs 1 [country in which the loss is sustained, i.e., Erfolgsort. mve] and 2 [common habitual residence exception, mve], the law of that other country shall be applicable.’

The German *EGBGB* states in §40(1) that torts are governed by the law of the country where the unlawful act took place, but §41 allows for this law to be replaced by the law of another country with which the case has a significantly closer connection.

Another important exception to the traditional *lex loci delicti* rule is that if the parties involved share a place of habitual residence, this factor is considered to reflect the closer connection. The reason is that the (legal) consequences of the tort – particularly the claim for restitution of damages by the victim and the liability for damages of the tortfeasor – will (mostly) be felt in the country where the parties reside, more so than in the place where the event occurred. This ‘common

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75 E.g., in Italy, see Pocar 1996, pp. 59–61, the Netherlands, see Pontier 2001 at 159.
77 See on the justification of the ‘common habitual residence’ exception and its role in national private international law acts: De Boer 2002 at 4 and 1998, p. 39; Pontier 2000, pp. 373 et seq. and 2001, at 132–135; Strikwerda 2000a, pp. 176 et seq.; Sonnenberger 1999, p. 647 et seq.; Pocar 1996, p. 59 et seq. In its *Kusters v. ABP* ruling the Dutch Hoge Raad confirmed that application of the common–habitual–residence exception (*Gevolgenwachtzondering* in Dutch) does not require that victim and tortfeasor themselves are parties to the proceedings (i.e., the plaintiff and defendant,
habitual residence' exception is enshrined for instance in Article 3(3) Dutch WCOD, § 40(2) German LGBGB; and Article 62 Italian PIL Act 1995. It also features in Article 3(2) of the GEDIP Rome II proposal and has been retained in Article 3(2) of the draft Rome II Regulation.

2.4.2.2 Party Autonomy

The principle of party autonomy played a role in private international law long before the allocation method was developed. That parties to a contract are free to decide which law should govern their mutual rights and obligations was already recognised by 17th century Statistists. This freedom of disposition in choice of law matters mirrors the freedom of disposition that parties have in substantive law, mainly in the area of contracts. The opportunity to choose the applicable law increases legal certainty in international legal transactions, because if parties know what law governs their contractual relationship they are of course better informed of their legal position.

That parties do, through their choice of the law of a given country, also set aside mandatory rules of the law that would be applicable had they not made a choice, is not a foregone conclusion everywhere. According to Fromm & Nordemann, German conflicts law does not allow parties to override mandatory rules of German copyright through their choice of law. Among these mandatory rules are the right of the author to renegotiate a publishing contract, the transferability of exploitation rights and some moral rights.

Suppose for instance that a novelist who is domiciled in Germany enters into an agreement with a Dutch publisher. who, in exchange for a lump-sum and royalties, acquires the exclusive rights to publish the work. According to Fromm & Nordemann, a choice by the parties for Dutch law would not affect the author’s right to renegotiate the contract even though Dutch law does not provide for such a right. Assuming that the author is the characteristic performer, German (contract) law would be the law governing the publishing agreement following Article 4(2) of the Rome Convention 1980, had parties not made a choice for Dutch law.

1 For example the tortfeasor’s insurance company, need not share the same habitual residence). HR 23 November 2001 [2002] NJ 181 (with comment De Boer), at 3.7.2.
78 See Spickhoff 2000, p. 3.
79 Art. 62 of the Italian LDIP requires that tortfeasor and victim share both habitual residence and nationality.
80 Kosters 1917, pp. 733–734.
81 Fromm & Nordemann 1998, at Vor §§120 rmd 8.
CHARACTERISTICS OF THE CHOICE-OF-LAW PROCESS

Under Article 3(1) of the Rome Convention, however, the law chosen by parties does set aside mandatory provisions of the otherwise applicable law. If the German right to renegotiate a publishing contract is to be seen as a rule belonging to contract law rather than to copyright law proper, the author would not retain his renegotiation right. If, however, the renegotiation right is viewed as a copyright rule (this seems to be Fromm & Nordemann’s position), the issue if and to what extent the author has a renegotiation right would of course depend on whether the conflict rule for copyright issues designates German copyright law as applicable.\(^8^2\)

Dutch courts have long displayed a liberal attitude towards party autonomy and this case-law has influenced the 1980 Rome Convention on the Law Applicable to Contractual Obligations (which did not enter into force until 1991).

In its Alnati decision, the Dutch Supreme Court ruled that in principle, parties to an international contract can agree to have their contract governed by the legal system of their choice, to the exclusion of mandatory rules of other legal systems.\(^8^3\)

The Rome Convention 1980 allows parties to a contract the same choice, with some exceptions for consumer and employment contracts. As a rule, the consumer cannot be denied the mandatory protective rights of his ‘home country’, i.e., the place of habitual residence (Art. 5(2) Rome Convention 1980). Likewise, the employee is entitled to the (mandatory) protection of the law that would be applicable if no choice was made; usually this will be the law of the country where he habitually carries out his duties (Art. 6(1) Rome Convention 1980, see Paragraph 2.4.2.3). The restrictions on the freedom to choose the applicable law could have consequences for clauses in employment contracts that deal with the transfer or licensing of exploitation and moral rights of works created by employees. These consequences are to be explored in later chapters.

The trend towards more freedom of disposition in areas of private law besides contracts, is mirrored in modern choice of law. Article 5 of the Hague Convention on the Law Applicable to Succession (1989) allows the testator to make a choice for either the law of the country where he or she had his or her habitual residence or of which he or she was a national (either at the time the choice was made or at the time of death).

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82 On the characterisation of new German copyright contract rules (Urhebervertragsrecht), see Hilty & Peukert 2002. In published Dutch case-law I have found no cases where party choice and the status of mandatory rules of copyright were at issue.

83 HR 13 May 1966 [1967] NJ 3 (already similarly decided, but less unequivocal, in HR 12 December 1947 [1948] NJ 608). The application of the (substantive) law chosen can however be frustrated by means of the public policy doctrine or priority rules, see Paragraph 2.4.3.
The Dutch Supreme Court recognised in its COVA ruling\(^8\) that parties\(^x\) involved in a dispute over a tort are free to choose the applicable law. This rule has been incorporated in the Dutch WCOD. In the recently introduced §42 of the EGBGB, the German legislator also acknowledged a party choice. There are however some restrictions;\(^8\) the choice can be made only after the injury has occurred and does not affect the rights of third parties.\(^8\) The latter restrictions are also advocated by the European Group for Private International Law, in Article 8 of its Rome II Proposal. The EC has adopted the GEDIP approach in Article 11(1) of the Preliminary Draft Rome II regulation. Some states restrict the jurisdictions which parties can choose: Swiss law, for instance, only allows a choice of forum law (Art. 132 LDIP).\(^8\)

Other areas in which Dutch private international law recognises (a restricted) freedom for parties to choose the applicable law are matrimonial property, divorce and maintenance obligations between adults. In the area of property rights party autonomy is also on the rise, albeit modestly. Some freedom of disposition with regard to proprietary aspects can be called for, especially in situations where there is a close relationship between contractual rights and obligations on the one hand and property rights on the other (e.g., reservation of title made in the sale of goods).\(^8\)

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\(^x\) In the COVA-ruling the Supreme Court did not specify whether ‘parties’ refers to the tortfeasor and the injured party, or to parties to the proceedings. According to the Explanatory Memorandum to the WCOD (Kamerstukken II 1998-99, 26 808, nr. 3, p. 9) not just the tortfeasor and injured party can choose the applicable law, but also plaintiff and defendant (e.g., the insurance company as subrogee of the victim). Id.: Pontier 2001 at 153; Vlas 1998, p. 24.

\(^8\) Under Dutch law, it seems a choice made before the tort has occurred is possible: see Vlas 1998 at pp. 19–20; Strikwerda 2000a, p. 180, who notes in 2000b, p. 776 that the WCOD does not exclude the possibility.

\(^8\) Heini 2000, p. 252.

\(^8\) For some torts, such as the infringement of personality rights, the victim has a (limited) choice (Art. 139 LDIP), but this type of provision does not so much reflect the principle of party autonomy as the favour principle, discussed in Par. 2.4.2.4 below.

\(^8\) In the Dutch draft proposal for an Act on the applicable law for property (ontwerp Wet Conflictenrecht Goederen), the Dutch Staatscommissie voor het Internationaal Privaatrecht has advised the government that parties to a contract should be able to designate that the law of the country of destination of goods in transit governs the issue of reservation of title (Rapport Internationaal Goederenrecht, 1998, Article 3(2)). Rules on reservation of title under Dutch law are considered as forming part of property law, not contract law. The draft Act is still in its preparatory stages and has not been introduced to Parliament yet (Kamerstukken II 1999–2000, 26 800 VI nr. 3, p. 13).
2.4.2.3 Functional Allocation

The principle of *functional allocation*, that underlies quite a number of modern choice-of-law rules, reflects the social policy interests of states. As stated above (Paragraph 2.2.2), the socialisation of private law has been an important factor in the advent of functional allocation. As the term suggests, a choice-of-law rule based on this principle takes account of the function of the particular field of law to which it relates.\(^90\)

Cases of functional allocation typically involve areas of substantive law whose objective it is to protect weaker parties (children, consumers, employers). There functional allocation is used to guarantee that the "weaker" party is protected to the extent that the legislator of the country in which the party is habitually resident intended.

Thus, the European rule for the law applicable to employment contracts is that of the country where the employee habitually carries out his duties (Art. 6(2) sub a Rome Convention 1980).\(^91\) For consumer contracts the Rome Convention contains a similar provision in Article 5(3): the law of the country where the consumer has his habitual residence governs certain consumer contracts.\(^92\) Article 4 of the Hague Convention on the Law Applicable to Maintenance Obligations (1973) is yet another example of functional allocation. It prescribes that the law applicable to maintenance obligations among relatives or between parents and illegitimate children, is that of the country where the maintenance creditor has his or her habitual residence.

In practice the principle of functional allocation plays its role in areas of law that have a particular protective function towards what are normally the weaker parties. One could however imagine functional allocation not just in this narrow sense, but in the broader sense, where there is not a weaker party to protect, but a more general policy interest (e.g., the public’s interest in a public domain of information and knowledge).

As regards functional allocation in the narrow sense, it should be borne in mind that even though functional allocation reflects the protective function of an area of law, the outcome is by no means the ‘best’ from the weaker party’s point

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\(^90\) Compare §6 at 2e of the American Law Institute’s Restatement of the Law on the Conflict of Laws (Second), which provides that where there is no statutory conflict rule, one of the factors in the selection process to be considered are ‘the basic policies underlying the particular field of law.’

\(^91\) The Convention also contains conflict rules for employment contracts in situations where the employee does not habitually work in one country; these are based on factual allocation.

\(^92\) E.g., Article 5 Rome Convention 1980 does not apply to conditions for the carriage of goods, or the sale of immovables. There also must have been some activity in the consumer’s country of residence (advertising by the seller, or order received there, etc.)
of view. If an employee works in a country with relatively low levels of worker protection, it is not functional allocation that gives him an opportunity to benefit from higher standards, but the freedom of disposition he and his employer have to choose a more advantageous law. The favour principle also, may provide the best of both worlds for the weaker party.

2.4.2.4 Favour Principle

More so than is the case with functional allocation, conflict rules whose underlying principle is the favour principle are geared towards achieving a preconceived result. The two main groups are rules that favour the validation of legal acts and rules that give one of the parties to a relationship preferential treatment.

Rules in the first group have a long history. They contain alternative connecting factors ('or' constructions) to ensure that certain juridical acts are considered valid. The favor negativii is possibly the oldest and is designed to validate legal acts as to form. Article 9 of the Rome Convention 1980 contains a contemporary version for contracts and one-sided legal acts relating to contracts. The favor testamentii does the same for wills (Art. 1 of the Hague Convention on Testamentary Dispositions, mentioned earlier). In the area of family law, i.e., for issues such as the validity of a marriage, or divorce, or the legitimacy of children, the favour principle is also advancing.

The most far-reaching application of the favour principle is in a second group of conflict rules, that are designed to benefit one particular party. An example of such an alternative reference rule is contained in the Hague Convention on the Law Applicable to Maintenance Obligations (1973). If the maintenance creditor (e.g., child) has no claim on the basis of the law of its habitual residence (Art. 4), the claim is governed by the law of the country of which it and the alleged debtor are nationals (Art. 5). If that still does not result in a right to support, the maintenance law of the forum seized is applicable (Art. 6). In this way, the conflict rules are geared towards a preconceived substantive result: that the maintenance creditor does receive financial support, however little.

Other rules that favour weaker parties are the Rome Convention's provisions on consumer contracts (Art. 5(2)) and on employment contracts (Art. 6(1)). They provide that if a choice for the applicable law has been made, this cannot override mandatory provisions of the law of the habitual residence of the consumer, or the

94 See the country reports in Symeonides 2000.
law that is objectively applicable to the employment contract (usually the law of the place where the employee works) respectively.\footnote{One could also view this type of rule as reflecting functional allocation, not the favour principle. See Strikwerda 2000a, pp. 168–169.}

In a number of countries, preferential treatment is also given to victims of tort \((favor laesi)\).\footnote{See Pocar 1996 on the 1995 Italian rules in this respect, on the German rules introduced in 1999, Spickhoff 2000 and extensively: Von Hein 1999.} Under certain conditions, tort victims are allowed to choose the applicable law from a number of connected jurisdictions. For example, the Swiss federal law on private international law \((LDIP)\) gives the victim a choice in the case of certain infringements of personality rights. Thus in the case of defamation through the media, the victim has a choice between the law of his habitual residence, the habitual residence of the tortfeasor, or the law of the place where the damage resulted if this was foreseeable for the tortfeasor (Art. 139 \(LDIP\)).

In the area of product liability, where national conflict rules give the victim a choice, it is typically between the (principal) place of business of the tortfeasor, or the place where the product was acquired. The Hague Convention on the law applicable to products liability of 1973 allows the victim to choose the law of the state of the place of injury (Art. 6)\footnote{The tort victim is given this choice only if the objective allocation as prescribed by Articles 4 and 5 does not identify the applicable law. Both articles contain cumulative connecting factors, with the place of injury and the place of establishment of the tortfeasor as principal connecting factors.}. In other torts a choice exists between the place where injury occurred and where damage resulted \(\text{(e.g., § 40(1) German \textit{EGBGB})}\). Alternatively, some national laws instruct courts to make the choice for the victim’s benefit.\footnote{Symeonides 2000, pp. 56–59.}

In keeping with the general international trend, the European Group for Private International Law, in its 1998 Rome II proposal, does not support the \(favor laesi\) as a general rule. Instead, the Group promotes the use of special rules for a limited number of torts, such as a presumption that the injury to personality rights occurs in the country of habitual residence of the victim \(\text{(Art. 4a Proposal)}\).\footnote{Proposal for a European Convention on the law applicable to non-contractual obligations (text adopted at the Luxembourg Meeting of 25–27 September 1998); see also European Group for Private International Law 1996 and 1997.} The Commission’s Preliminary Draft Rome II regulation goes further than a mere presumption: Article 7 designates the law of the habitual residence of the victim as applicable in the case of infringement of personality rights.\footnote{Much to the dismay of the publishing industry, who would much rather see a ‘country of origin’ approach whereby the law of the place where a publisher is established governs the question whether the tortious character of a publication. See the ‘Follow-up of the consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual

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Articles seem to reflect functional allocation, not the favour principle. The place of habitual residence of the victim should be the connecting factor because these days the settlement of damages rather than the prevention of illicit acts is considered to be the primary objective of civil liability. Unlike rules based on the favour principle, rules based on functional allocation do not give the victim the best protection of alternative laws (e.g., law of the place where the harmful event occurred or law of the place of habitual residence of the injured party).

2.4.3 ADJUSTMENT OF THE RESULT OF ALLOCATION

The 'normal' selection process through which the applicable law is determined, may yield a result that is unwanted. This may be the case if, for instance, standards of the applicable law are deemed unacceptable by the forum, or because the forum (or even another country) has a strong claim to have certain of its own rules applied regardless of the 'normal' applicable law. There are two ways in which the applicable law can be set aside: through the operation of the public policy doctrine, or the use of priority rules.

2.4.3.1 Public Policy

The public policy exception has long been present in private international law in one form or another. It can be distinguished in two functions, positive and negative.

In its positive function, the rules of the forum are deemed so important that they must always take precedence over the application of foreign law. Theory about which part of domestic law is of 'ordre public' has developed in broad lines from the notion that any (mandatory) rule that serves the public interest must take precedence over foreign law, to the idea that only 'super mandatory' rules must take precedence (so-called règles d'ordre public international).

In recent years the public policy exception in the positive sense has been replaced by the doctrine of priority rules, in the Netherlands and elsewhere (see obligations ("Rome II") with comments at <www.europa.eu.int/comm/justice_home/index_en.htm> [last visited 1 November 2002].

101 Pontier 2000, at p. 371, notes that it is strange that this argument is used to defend using the Erfolgsort rather than the Handlungsort as the connecting factor in the case of a tort with multiple locus, instead of using it for all torts (and making the habitual residence of the victim the connecting factor). See also De Boer 1998, pp. 40–45.

CHARACTERISTICS OF THE CHOICE-OF-LAW PROCESS

Paragraph 2.4.3.2 below). It has, however, not lost its significance everywhere: in the (in)famous Huston case concerning moral rights and the colourisation of films, the French Supreme Court seems to have qualified moral rights as a matter of public policy.

Another side to the public policy exception is ‘negative’: application of a certain rule of foreign law can be refused because it goes squarely against fundamental values of the law of the forum. It is these fundamental values that make up the public policy. The meaning of the term ‘public policy’ or ‘ordre public’ in private international law is therefore not the same as its meaning in other areas of law. To illustrate: the fundamental right to freedom of expression as laid down in Article 10 of the European Convention on Human Rights (ECHR) can be restricted if such a restriction is prescribed by law and is necessary in a democratic society for the protection of public order. That is not the ‘ordre public’ that the public policy exception envisages.

Since the 1930’s the Dutch Supreme Court has developed a two-step test to determine which rules of foreign law are not to be applied on public policy grounds. The first criterion is whether in making the rule at hand the foreign lawmaker has done what a reasonable legislator would be authorised to do. If this criterion is not met (which is very rarely the case), the foreign rule is not applied. If it is met, the next step is to determine whether, considering all the circumstances of the case at hand, the effect of applying the foreign rule produces

103 Strikwerda 2000a, pp. 55-56; Boschiero 1996, p. 148 et seq.
104 Cass. 28 May 1991 [1991] RIDA 149, pp. 197–199 (Huston v. TV5). Huston’s heirs successfully claimed moral rights, even though the film in question was made by the American director Huston in America, in the course of his duties as an employee of an American film company which under American copyright law owned the initial copyright on the basis of the work–for–hire clause in the US Copyright Act. American copyright law did not include moral rights at the time. In addition, the employment contract –governed by American law– contained provisions which ensured that any (residual) rights Huston may have had were assigned to the film producer. When the action was brought the Berne Convention was not in force for the US. Critical comments among others: Bertrand 1991, De Boer 1993a; Farchy & Rochelandet 2000, p. 37; Ginsburg & Sirinelli 1991, pp. 135–159; Seignette 1990b, pp. 221–222. Françon argued against the use of the ordre public exception in this case, in his comment on the earlier appellate court’s decision of 6 July 1989 [1990] RIDA 143, p. 329; id. De Boer 1993a, p. 6; see also the discussion of the Court of Appeal’s ruling by Seignette 1990a. Locher 1993, pp. 42–44 is of the opinion that the Cour de Cassation did not apply the ordre public exception, but considered the moral rights provisions of the French copyright act as priority rules (see next Paragraph).
105 See e.g., Boschiero 1996, pp. 149–151 on the public policy exception (negative function) and priority rules in the 1995 Italian Private International Law Act.
107 A gap that is caused by non-application of a foreign rule of law must be filled either by adapting the interpretation of the foreign rule, or applying the corresponding rule of the lex fori, see HR 9 November 2001 (Marokkaanse echtscheiding) [2001] RvdW 135.
an intolerable result. If that is not the case, the foreign rule is applied. As a rule of thumb, the weaker the connection of the case with the Netherlands, the less likely it is that the effect of applying a foreign rule of law will be judged contrary to public policy.\(^{108}\)

The fundamental rights\(^{109}\) of the ECHR, as incorporated and developed in Dutch constitutional law, are the most obvious candidates to serve as a shield against unacceptable foreign law, but the test as laid down in case-law is rather strict. As Advocate-General Franx put it in his opinion in the landmark *Saudi Independence* case: ‘invoking the public policy exception must remain an ultimate remedy, reserved for striking cases where on essential points foreign law deviates profoundly from Dutch law; the gap between both legal systems must be deep and wide.’\(^{\text{[my translation. mve]}}\)\(^{110}\)

The chances of such a gap existing are not very big, especially where states are concerned that recognise the fundamental rights of the Universal Declaration on Human Rights of 1948 (UDHR), the ECHR or other treaties. *A fortiori*, the Supreme Court’s test seems to leave precious little room for labelling provisions of foreign copyright law rules that contravene the forum’s public policy, certainly not if the foreign law involved respects the standards of international copyright treaties such as the Berne Convention and the TRIPs Agreement.\(^{111}\)

The public policy exception (in its negative function) can be found in various formulations in all modern choice-of-law treaties, such as the 1973 Convention on the Law Applicable to Liability for Products (Art. 10), the Hague Convention on the Law Applicable to Traffic Accidents 1971 (Art. 10), the Hague Convention on the Law Applicable to International Sale of Goods 1986 (Art. 18) and the Rome

108 Strikwerda 2000a, pp. 76–78.

109 In the area of recognition and execution of foreign judgments, the Dutch Supreme Court recently ruled that it can be against public policy to enforce a foreign judgment if this has been given with evident disregard for the fundamental principles of due process, especially that of hearing both sides (compare Art. 6 ECHR). HR 10 September 1999 [2000] NIPR 38 (*Triumph v. Cabana*). If the litigants did not appeal the decision, thereby having allowed the opportunity to have the foreign court’s disregard repaired pass, the public policy exception cannot be successfully invoked before a Dutch court in enforcement proceedings. (HR 5 April 2002, [2002] RvdW 265 (*LBIO v. W*).)


111 Fawcett & Lonemann 1998, pp. 502-503 consider moral rights of the author as fundamental rights, that should be applied as a matter of public policy by UK courts if the otherwise applicable law has a lower standard of protection. I would think that a lower standard of the *lex causae* is in itself not a sufficient reason to to invoke the public policy exception. In the past years, Dutch courts have used the public policy exception very sparsely and almost exclusively in the area of family matters. See Boele-Woelki, Joustra & Steenhoff 2000, p. 315.
Convention 1980 (Art. 16). The GEDIP Rome II proposal says in its Article 14:
‘The application of a rule of the law of any country specified by this Convention
may be refused only if such application is manifestly incompatible with the public
policy (‘ordre public’) of the forum.’

The public policy exception, or in German: ‘Vorbehaltsklausel’, is also
standard in national private international law codifications, such as Article 6 of the
Austrian IPRG. Article 17 Swiss LDIP. Article 16 Italian Private International
Law Act 1995. Article 6 German EGBGB and for torts Chapter 42. Part III.

2.4.3.2 Priority Rules

The public policy doctrine, especially in its ‘positive’ guise, has been fiercely
criticised from the early 20th century onwards. It could and did give the judiciary
a powerful mechanism to apply its own rather than foreign law, even where the
law of the forum did not exactly involve fundamental values. In practice the
public policy doctrine served as a way to let laws of the forum that serve certain
social or economic objectives of general interest displace the applicable law.

Public law (criminal law, tax law, etc.) is traditionally outside the scope of
private international law because it does not address private relationships.
However, the distinction between public law and private law has never been easy
to make. It is one for which no truly satisfactory criteria have ever been found,
particularly as the boundaries between public and private law have become
increasingly blurred due to the socialisation of private law. This incorporation of
the public interest (social, economic and cultural policies) in private law has been
taking place since the late 19th century, but has accelerated in the second half of
the 20th century, as the Welfare State reached maturity.

It has resulted in a growing body of semi-public law, i.e., law that can be
considered public because its main rationale is the protection of some public
policy or value (rather than serving the interest of parties) while affecting private

112 Strikwerda 2000a at p. 56 gives some examples of Dutch rules that in the past were regarded as
being of ‘ordre public’: certain regulations regarding the import and export of currency, prices of
fruit and vegetables, divorce law, etc.
113 For early criticism, see Bar 1862, pp. 109-110: Josephus Jitta 1916, pp. 54–58.
114 See Lokin & Jansen 1995, pp. 89–108 on the socialisation of private law, particularly in the area
of contracts; and Grosheide 1986, pp. 22–23, 87 et seq. on the impact of socialisation of private
law on copyright issues particularly in the Netherlands, id. Leinemann 1998 for a German
perspective.
relationships. The question is how rules of semi-public law should be accommodated in private international law. The growing role of freedom of disposition in choice of law has also played its part in the development of the priority rules doctrine. As it became accepted that a party choice also sets aside mandatory provisions of the otherwise applicable law, the question became to what extent this includes rules that are in the grey zone between public and private law. Moreover, if semi-public law is in principle set aside by a party-choice, is there a backdoor through which it can still successfully claim application?

There are basically three answers to the question of when and which semi-public law should be applied:

- no foreign rule of semi-public law should ever be applied because choice of law only involves (pure) private law.
- the semi-public law of the lex causae (i.e., the law identified on the basis of the relevant conflict rules) will be applied.
- each rule of semi-public law, whether it forms part of the lex causae, lex fori or other connected jurisdictions, should be independently judged on its claim to application. 115

The latter solution has become generally accepted. Among its early advocates were De Winter and Deelen in the Netherlands and probably best-known throughout Europe, Francescakis. 116 They developed (variations of) the doctrine of priority rules or, in France règles d’application immédiate or lois de police, in Germany Eingriffsnormen and in the Netherlands voorrangsregels. This doctrine has in the past decades practically replaced the positive function of public policy. Priority rules are rules of semi-public law that replace part of the otherwise applicable law, due to the interest a state has in having them applied in the case at hand.

The Dutch Supreme Court has elaborated that, for priority rule(s) to take precedence over the otherwise applicable law:117

- there must be a direct and close connection between the case and the (social or economic) general interest that the provision or statute purports to serve.

115 Strikwerda 2000a, pp. 65–68; more elaborate in 1978, p. 5 et seq.
117 HR 13 May 1966 [1967] NJ 3 (Abati); HR 23 October 1987, 1988 [NJ] 842 with comment Schultz (Sørensen v. Aramco); HR 16 March 1990 [1990] AA 556 with comment De Boer and [1991] NJ 575 with comment Schultz (Bredius museum). In countries with a Romanist tradition, there traditionally is less focus on application of priority rules on a case-by-case basis. In French literature, copyright scholars seem prone to think that if a rule can be considered a priority rule it should always be applied, regardless of the particulars of the individual case. Compare Plaisant 1962 (the author’s right to equitable remuneration is a loi de police, always to be applied) with Audit 2000, pp. 212–213 (whether a rule is to be applied as loi de police, is to be judged on a case-by-case basis). See also Fawcett & Torremans 1998, p. 582.
the interests the priority rules serve must be greater than the interest of comprehensive application of the otherwise applicable law.

The priority rules doctrine was accepted by the Dutch Supreme Court in its landmark Alnati decision, a decision that was also important in the area of party autonomy.\textsuperscript{118} Alnati was a ship used by a Dutch carrier for transport from Belgium (Antwerp) to Rio de Janeiro. On arrival the cargo was damaged and the carrier was sued for damages in the Netherlands. Lacking a party choice, Belgian law would have been applicable to the case. The question was whether a Belgian provision that declares certain exclusions of liability null and void had to be applied, despite the fact that the parties had chosen Dutch law as the applicable law. The District Court ruled that the Belgian provision applied. the Court of Appeal affirmed, but the Supreme Court quashed the ruling. It found that a party choice of law in principle sets aside mandatory provisions of the otherwise applicable law. Only if another state has a preponderant interest in having its law applied outside its own territory, should the Dutch courts respect this interest by giving priority to the relevant (foreign) rules. In Alnati this was not the case.

Although the Alnati case makes clear that priority rules are not only mandatory rules of the forum but can also be rules of another interested state, the Supreme Court to date has only sanctioned the designation of provisions of Dutch law as priority rules.\textsuperscript{119}

The doctrine of priority rules has found its way into an increasing number of conventions on private international law.\textsuperscript{120} Article 7(2) of the Rome Convention 1980 allows for the application of priority rules of the forum. Article 7(1) of the Rome Convention states that a court may apply the mandatory rules of a country with which the case has a close connection, even though this law is not otherwise applicable (e.g., because parties have chosen another law to govern their contract). This provision inspired Article 6 of the GEDIP Rome II proposal. Similarly, priority rules provisions can be found in the 1978 Hague Convention on the Law Applicable to Agency (Art. 16) and the 1985 Hague Convention on the Law Applicable to Trusts and their Recognition (Art. 16(2)). National private international law acts of course also contain priority rules clauses.\textsuperscript{121}

120 See also Kotting 1984, p. 118 et seq. and the debate on priority rules in Mededelingen NVIR 1985, pp. 13, 15–16, 19–21.
121 Art. 18 Swiss IPRG (not necessarily third country priority rules), for a critical comment see Sieth 2000, p. 395 et seq.; Art. 17 Italian private international law act 1995 (critical comments by Boschiero 1996, pp. 150–151); §34 German EGBGB. The German EGBGB does not provide for application of the rules of third countries as priority rules, even though this was proposed (see Paragraph 6.5.1. note 591). Likewise, the Preliminary Draft Rome II Regulation only deals with priority rules of the forum.
2.5 Conclusions

Although the backbone of contemporary choice of law is still the 150-year-old allocation method, it has been continually developing into a less neutral and objective mechanism for determining the applicable law. The objective of decisional harmony, all important in Savigny’s day, has never been realised. Important causes are the lack of uniform conflicts rules and the inclination of courts to apply their own law, or a foreign law that produces a result that is just in the individual case.

A substantial number of choice-of-law treaties have been drafted in the last century, but they usually do not have a large number of signatories, so unification is still a far away ideal. As the choice-of-law process becomes increasingly oriented towards reaching a just result (in the sense of substantive justice), which is reflected in the growing influence of concepts such as functional allocation and the favour principle, the quest for decisional harmony becomes even more difficult.

To the extent that decisional harmony aims to provide legal certainty as to the applicable law in international legal relationships, the growing possibilities for parties to designate the applicable law themselves partly counter the decrease in legal certainty that results from the use of (semi)open, alternative or cumulative connecting factors. As in modern choice of law, freedom of disposition is not only recognised in the area of contracts, but also in torts. It will be interesting to examine what role party autonomy can play in the cross-border exploitation of copyright and related rights (assignment of copyright, exploitation licences, infringement).

The concern about the position of ‘weaker’ parties in the information industry (e.g., individual creators or authors-employees versus businesses, private consumers versus producers) warrants a closer look at the potential significance of functional allocation and the favour principle for copyright and related rights issues.

The extent to which the public policy exception or priority rules should enable courts to apply their own copyright and related rights law (or the law of another interested state whose law is not applicable on the basis of the normal conflict rules) is another issue to be considered.

Before we can address the above mentioned issues, we should of course have a clear picture of which conflict rules are the starting point for the determination of the applicable law for issues of existence, scope, duration, ownership and transfer of intellectual property. A logical place to start looking for answers is in international copyright and related rights treaties. Their significance for choice-of-law issues will be examined in the next Chapters.