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THE PURPOSE OF UNIFORM CHOICE-OF-LAW RULES: THE ROME II REGULATION

by **Th.M. de Boer***

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1. METHODOLOGICAL BACKGROUND

Poor Savigny! Not only did it take more than a century and a half before his expectations on the inevitable convergence of European choice-of-law systems were gradually being fulfilled, but the criteria embodied in the newly adopted uniform choice-of-law rules also belie the validity of his views on the ‘inherent nature of the legal relationship’ as a localizing factor. Savigny believed that his approach to the choice-of-law problem – focusing on the localization of legal relationships rather than on the scope of conflicting rules of decision – would result in uniform decisions, regardless of the country where suit is brought.¹ To that end, he made a classification of various types of legal relationships, for each of which he determined the proper ‘seat’ by following the directions he found in the ‘nature’ of a specific type of relationship. Thus, family relationships were thought to have their seat at the domicile of the father or husband. Matters of succession had their roots in the country of the decedent’s domicile at the time of death. Contractual obligations indicated a natural link with the country where the obligation at issue was carried out. With regard to delictual obligations, however, Savigny advocated a *lex fori* approach, as the rules governing such matters were meant, in his view, to protect public interests and could not be displaced, therefore, by choice-of-law rules.² In the course of time, Savigny’s inferences from the ‘*Natur der Sache*’ have been disproved by the discrepancies that existed and continue to exist between national choice-of-law rules. History has also proved him wrong in his approach to torts: the *lex loci delicti* rule, already popular in his own days,³ has survived all kinds of objections, none of them based on public policy notions.

1. Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, Vol. VIII (Berlin, Veit 1849) pp. 27 et seq. (§ 348): ‘Denn diese Gleichheit muß in vollständiger Ausbildung dahin führen, daß ... die Rechtsverhältnisse, in Fällen einer Collision der Gesetze, dieselbe Beurtheilung zu erwarten haben, ohne Unterschied, ob in diesem oder jenem Staate das Urtheil gesprochen werde.’ In the translation by William Guthrie, *A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time by Friedrich Carl von Savigny*, 2nd rev. edn. (Edinburgh, T & T Clark Law Publishers 1880) pp. 69/70: ‘For it is the necessary consequence of this equality in its full development, that ... in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or that.’

2. Ibid., pp. 275/276: ‘Wenn nämlich der Gültigkeit der Obligation ein Gesetz von streng positiver, zwingender natur entgegengesetzt wird, so ist nicht das eben erwähnte örtliche Recht, sondern vielmehr das am Ort der angestellten Klage geltende Recht, das Recht des jetzt urtheilende Richters, anzuwenden. ... Die angegebene Ausnahme ist nun ferner anzuwenden auf die Obligationen aus Delicten, und zwar ganz allgemein, da die auf Delicte bezüglichen Gesetze stets unter die zwingenden, streng positiven, zu rechnen sind’ (p. 278). Translation by Guthrie, *supra* n. 1, p. 251: ‘If a law of a strictly positive and obligatory (coercitive) nature is opposed to the validity of the obligation, then not that local law, but rather that of the place where the action is raised, the law of the court that judges the matter, is to be applied. ... This exception is further to be applied to the obligations arising from delicts, and that universally, since the laws relating to delicts are always to be reckoned amongst the coercitive, strictly positive statutes’ (p. 253).

3. Cf. G. Hohloch, *Das Deliktsstatut, Grundlagen und Grundlinien des internationalen Deliktsrechts* (Frankfurt-on-Main, Metzner 1984) pp. 42 et seq.

On the other hand, by shifting the focus from conflicting laws to the seat of legal relationships Savigny conceived a choice-of-law method which came to be universally adopted, as were his views on the desirability of decisional harmony and the necessity of relying on dispassionate geographical facts to achieve it. Not even the turbulent 1960s could upset the stability of Savigny's tenets. Mounting criticism of a 'blind' choice-of-law process may have produced quite some upheaval in the United States, but after a few decades of experimentation with interest analysis and other policy-oriented approaches, the 'conflicts revolution' seems to have petered out, leaving in its wake a confusing mix of traditional conflicts rules, choice-influencing considerations and proper law notions.⁴ Europe, on the other hand, has always remained faithful to Savigny's jurisdiction-selecting method, the recurrent debate on its underlying principles notwithstanding. The achievement of decisional harmony may no longer be the predominant choice-of-law objective, it is still a strong motive for the unification efforts of both the European Community and the Hague Conference on Private International Law. While the 'inherent nature' of a legal relationship is no longer thought to be a dependable standard to determine its 'seat', most choice-of-law criteria are still based on the premise that forum law and foreign law are equally suited for application and that any choice between them should be made on a neutral basis.⁵ In the meantime, however, European choice of law became gradually more receptive to the suggestion that substantive values and interests cannot be ignored altogether and that, in some areas at least, forum policies should be allowed to influence the outcome of the choice-of-law process. This development resulted in a special treatment of 'internationally mandatory rules', the adoption of 'functional conflicts rules' and the use of alternative reference rules as a means to further commonly accepted social policies. The doctrine of the '*Sonderanknüpfung*' or '*règles d'application immédiate*', already advocated in various forms by Dutch, German and French scholars since the 1940s,⁶ has been incorporated

4. S.C. Symeonides, W.C. Perdue and A.T. von Mehren, *Conflict of Laws: American, Comparative, International, Cases and Materials*, 2nd edn. (St. Paul, Minn., Thomson/West 2003) p. 299: '... eclecticism may well be the dominant choice-of-law methodology in the United States today'. See generally: S.C. Symeonides, 'The American Choice-of-Law Revolution in the Courts, Today and Tomorrow', 298 *Recueil des Cours* (2002) pp. 94 et seq.

5. A predilection for the *lex fori* would defeat the ambition to achieve decisional harmony. Yet, forum bias is inherent in all approaches to choice of law. Cf. Th.M. de Boer, 'Forum Preferences in Contemporary European Conflicts Law: The Myth of a Neutral Choice', in H.-P. Mansel, et al., eds., *Festschrift für Erik Jayme*, Vol. I (Munich, Sellier European Law Publishers 2004) pp. 39-55.

6. In the Netherlands: L.I. Barmat (de Winter), 'De grenzen van de contractsvrijheid van partijen in het internationaal privaatrecht', *WPNR* no. 3675 (1940) pp. 245 et seq. and no. 3676 (1940) pp. 257 et seq.; J.E.J.Th. Deelen, *Rechtskeuze in het Nederlands internationaal privaatrecht, een jurisprudentie-onderzoek* (Amsterdam, Scheltema & Holkema 1965) pp. 171 et seq. In Germany: W. Wengler, 'Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht', 54 *Zeitschrift für vergleichende Rechtswissenschaft* (1941) pp. 168 et seq.; K. Zweigert, 'Nichterfüllung auf Grund ausländischer Leistungsverbote', 14 *Rebels Zeitschrift* (1942) p. 283;

in most modern conventions on choice of law, including the Rome Convention on the Law Applicable to Contractual Obligations, and has also found its way into the Rome I and Rome II Regulations. ‘Functional conflicts rules’ translate the function of the corresponding substantive law – generally protection of the weaker party – into a connecting factor that refers to the social environment of the person to be protected.⁷ Alternative reference rules allow the choice of a law achieving a particular material result, as defined by the rule itself.⁸ Such rules are usually based on domestic social policies that are deemed compelling enough to merit application of the law that suits them best. What these new approaches have in common and sets them apart from traditional choice-of-law rules is the fact that they take account, one way or another, of the contents of the eligible laws in relation to the *lex fori*, which implies that the rule of decision is no longer chosen on a neutral basis. Like public policy, these ‘content-oriented’⁹ choice-of-law devices must be viewed as exceptions to the principle that legal systems are interchangeable. Their introduction meets the need for equitable decisions, which could not always be achieved by the neutral approach that has dominated conflicts law until the 1960s.

These developments have turned contemporary choice of law into a hybrid: some of its rules are meant to further substantive policies, other ones are still indifferent to the end result and serve no further purpose, apparently, than the achievement of uniform results. Thus, the question arises which type of rule

K.H. Neumayer, ‘Autonomie de la volonté et dispositions impératives en droit international privé des obligations’, 46 *Revue critique de droit international privé* (1957) pp. 579 et seq., 47 *Revue critique de droit international privé* (1958) pp. 53 et seq. In France: Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (Paris, Sirey 1958) pp. 11 et seq.; id., ‘Quelques précisions sur les “lois d’application immédiate” et leurs rapports avec les règles de conflits de lois’, 55 *Revue critique de droit international privé* (1966) pp. 1 et seq. See generally: L. Strikwerda, *Semipubliekrecht in het conflictenrecht, verkenningen op een kruispunt van methoden* (Alphen aan den Rijn, H.D. Tjeenk Willink 1978) pp. 58 et seq.

7. Well-known examples are the rules referring to the consumer’s domiciliary law for consumer transactions, or to the place of work for employment contracts: Arts. 5(3) and 6(2)(a) Rome Convention 1980, Arts. 6(1) and 8(2) Rome I Regulation. Cf. Th.M. de Boer, ‘The EEC Contracts Convention and the Dutch Courts: A Methodological Perspective’, 54 *Rabels Zeitschrift* (1990) pp. 25-62. It should be noted that the applicable law may be less favorable to the weaker party than the *lex fori* or any other of the eligible laws. What this type of rule does achieve, however, is equal treatment of consumers and employees living or working in the same country, regardless of whether their contract qualifies as international or domestic.

8. This kind of rule is geared to designate either the ‘better law’, or the law achieving a specific result. Art. 7 Rome II Regulation (allowing the victim of environmental damage a choice between the law of the country in which the polluter acted and the law of the country in which the damage occurred) is an example of the first type. Arts. 5 and 6 of the Hague Convention of 1973 on the Law Applicable to Maintenance Obligations only allow an alternative choice ‘if the creditor is unable ... to obtain maintenance from the debtor’ by virtue of the creditor’s domiciliary law or the law of their common nationality. Whether the creditor would be better off under one of the alternative laws, is irrelevant as long as he/she is entitled to any amount at all.

9. I am borrowing the phrase from Symeonides 2002, *supra* n. 4, pp. 385 et seq., who makes a distinction between ‘jurisdiction-selection’ and ‘content-oriented law-selection’.

should be preferred when lawmakers decide to draft a new statute or – on an international or supranational level – a convention or regulation on some topic of private international law. How do they determine whether a policy-oriented rule is called for, or whether a neutral approach will do? When do they opt for one type of rule rather than another one, and why? Do they articulate their views on the objectives of the rules to be created? Is their final draft consistent with those views? And to what extent does political compromise taint the coherence between the purpose of the rules as originally conceived and their expression in subsequent amended versions?

In this article, I will try to shed some light on the methodological problems confronting EU lawmakers in their efforts to ‘harmonize’¹⁰ the choice-of-law rules of the Member States. As my primary source of information I have chosen Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations, commonly known as the ‘Rome II’ Regulation.¹¹ As this enactment resulted from the Commission’s first proposal for a choice-of-law regulation, it may be assumed that careful thought was given to the objectives the regulation was meant to achieve and to the most suitable choice-of-law techniques to achieve them. I will first examine the objectives enumerated in the preamble and other relevant sources,¹² and then assess the way they have been translated into the rules that were finally enacted. As we shall see, the objectives mentioned in the preamble and the Commission’s explanatory memorandum can be grouped into two main categories. The main

10. ‘Harmonisation’ is the term commonly used to denote all efforts to achieve an approximation of the laws of the EU Member States, either by directives or regulations. Since a regulation – as opposed to a directive – does not leave any room for different implementations, it results in the creation of uniform law. So far, all measures ‘promoting the compatibility of the rules ... concerning the conflict of laws and of jurisdiction’ (Art. 65 EC Treaty) were geared to unification rather than harmonization.

11. To date (August 2009), Rome II has spawned an incredible amount of legal literature. An 8-page bibliography can be found in A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford, Oxford University Press 2008) pp. 771-778. A first update (May 2009) has been published on the companion website <www.romeii.eu>. Unfortunately, since there are hardly any comments in English on the relation between the objectives of the Rome II Regulation and the rules by which they should be achieved, there were relatively few academic sources I could cite, either to support my findings or to contradict them.

12. The Commission’s original proposal – COM (2003) 427, 22 July 2003 – is preceded by an ‘Explanatory Memorandum’. After the European Parliament had suggested no less than 58 amendments – *Official Journal* (2006), C 157E, p. 371 – the Commission submitted an amended proposal: COM (2006) 83, 21 February 2006. Other sources to be examined are: the Common Position adopted by the Council – *Official Journal* (2006), C 289E, pp. 68-75 – and a Communication from the Commission to the European Parliament concerning the Common Position of the Council: COM (2006) 566, 27 September 2006. Furthermore, occasional reference will be made to Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’), *Official Journal* (2008), L 177, p. 6, and Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *Official Journal* (2009), L 7, p. 1.

distinction to be made is the one between the objectives of choice-of-law unification in general and the particular objectives of the Rome II Regulation.

2. A CATALOGUE OF OBJECTIVES

In the preamble of both ‘Rome I’ and ‘Rome II’, the first six recitals – virtually identical – address the question why the European Community has a need for uniform ‘conflict-of-law rules’.¹³ To me, the arguments are a bit contrived, but the line of reasoning unfolds as follows. *Recital 1*: the European Community intends to maintain and develop ‘an area of justice’. To establish such an area, measures should be taken to further judicial cooperation in cross-border cases, to the extent that such cooperation is necessary for the proper functioning of the internal market. *Recital 2*: one of those measures aims at ‘promoting the compatibility’ of the rules on jurisdiction and choice of law in the Member States. *Recital 3*: the cornerstone of judicial cooperation is the principle of mutual recognition of judgments in civil and commercial matters. *Recital 4*: mutual recognition can be facilitated by the ‘harmonisation of conflict-of-law rules’. *Recital 5*: the area of non-contractual – or, in Rome I, contractual – obligations has been selected ‘for work to be pursued actively’. *Recital 6*: the internal market has a need for uniform conflicts rules, because it cannot function properly without ‘predictability of the outcome of litigation, certainty as to the law applicable, and the free movement of judgments’. In recital 13 of Rome II, an extra, slightly different argument is advanced: uniform rules ‘may avert the risk of distortions of competition between Community litigants’.

The other recitals in which something can be found about the aims and purposes of Rome II either reiterate the benefits of uniform choice of law in general, or try to explain the rationale of one or more of the proposed conflicts rules. ‘Legal certainty’ is mentioned in recital 14 as an essential element of an area of justice. In recital 16, it is said that uniform rules are expected to enhance the ‘foreseeability of court decisions’. In essence, they repeat what already has been said in recital 6 on the merits of uniform choice of law. More interesting, then, are the observations on the objectives of the regulation’s choice-of-law rules, in support of the solutions they are meant to provide. Apart from legal certainty, the regulation purports to achieve ‘justice in individual cases’, another essential element of an area of justice. To this end, recital 14 continues,

13. In the EU vernacular, the phrase ‘choice of law’ is reserved for situations in which the parties are free to choose the applicable law. Hence the use of the rather awkward term ‘conflict-of-law rules’ for all rules designating the applicable law in the absence of a (valid) choice by the parties, obviously a literal translation of the French *règles de conflit de lois*. It tends to ignore the fact that the parties’ freedom of choice also depends on a ‘conflict-of-law rule’. In my opinion, a ‘choice-of-law rule’ (or ‘conflicts rule’) would have been a better translation, for both types described. To distinguish between them, one could use the expressions ‘subjective choice-of-law rule’ as opposed to ‘objective choice-of-law rule’.

the regulation provides for a 'flexible framework of conflict-of-law rules', i.e., a general rule, several specific rules, and, in certain provisions, an 'escape clause'. Recital 16, while explaining the rationale of the main rule for torts laid down in Article 4(1), starts with a general observation: 'Uniform rules should ... ensure a reasonable balance between the interests of the person claimed to be liable and the person who sustained damage.' The same 'reasonable balance between the parties' interests' is mentioned in recital 34, as a reason why account should be taken of the rules of conduct and safety of the *lex loci delicti*, even where the law of another country applies.

Particular purposes are mentioned in the recitals on specific rules. According to recital 16, on the *lex loci damni* rule for torts in general, the rule 'reflects the modern approach to civil liability and the development of systems of strict liability', suggesting that the choice of the place of injury as a connecting factor was inspired by the function of the substantive law of torts. In the other recitals, such interest in the contents of substantive law is remarkably absent. Only in recital 25, justifying a *favor* approach to environmental torts, reference is made to the principles laid down in Article 174(2) of the EC Treaty, supporting 'a high level of protection'. Recital 20 expects the choice-of-law rule for product liability cases to meet no less than five highly ambitious objectives: (1) fairly spreading the risks inherent in a modern-technology society, (2) protecting consumers' health, (3) stimulating innovation, (4) securing undistorted competition, and (5) facilitating trade. Recital 21, on the function of the rule on unfair competition, is equally ambitious. It should 'protect competitors, consumers and the general public and ensure that the market economy functions properly'. Recital 31, finally, referring to the principle of party autonomy, expresses the view that freedom of choice will 'enhance legal certainty'. Restrictions on this freedom are explained by the protection that should be given to the weaker party.

3. THE NEED FOR UNIFORM CHOICE-OF-LAW RULES

Choice of law owes its very existence to the fact that there is no world-wide system of private law: the rules of private law vary from state to state. Therefore, whenever a private law issue must be solved in an international context the question arises which substantive rule of decision should be selected. Should the law of the forum be applied as a matter of principle, regardless of the international aspects? Or should somehow a choice be made between the eligible laws, and if so, by which criteria? Would it be possible to solve the problem by a cumulative application of all laws concerned, or by striking a balance between them? If all states concerned were to apply their own law, a calculating plaintiff could influence the outcome of the litigation by seizing a court in the country whose law is most favorable to his cause. Since the rules of jurisdiction in most countries tend to afford the plaintiff a choice between different

fora, the defendant, who has no option but entering an appearance in the court seized by the plaintiff, is put at a disadvantage. That is why a *lex fori* approach to the choice-of-law problem is generally rejected.¹⁴ However, very little is gained if the courts in state A adhere to some form of interest analysis, while the courts in state B have remained faithful to Savigny's method: the methodological differences are bound to lead to different results. And even if they all follow the same method, they may have different solutions for true conflicts, or use different criteria to determine the closest connection. In other words, a calculating plaintiff would still benefit from forum shopping, and the defendant would still suffer the result.

3.1 Certainty and predictability

If choice-of-law rules are primarily meant to achieve decisional harmony and to discourage forum shopping they do not serve their purpose if they are not identical in all states with which a case is connected. The emphasis on predictability or legal certainty in the Rome II preamble should not blind us to the fact that the outcome of the litigation cannot be predicted until a specific court in a specific jurisdiction has been seized by the plaintiff. Rome II and other EC regulations on choice of law will not be able to achieve uniform results if the case could be litigated both in a non-member state and in the EU. Certainty and predictability can only be guaranteed in intra-community cases, in which the plaintiff has no access to a court outside the EU.

But even then, decisional harmony may still escape us.¹⁵ Uniform choice-of-law rules will fail to produce uniform results if the general principles of conflicts law are used in different ways in different countries. By their nature, the doctrine of public policy and the special position of 'overriding mandatory provisions' are bound to preclude uniformity of result, as they give precedence to the interests of the forum state in the non-application of foreign law or, respectively, the application of its own law. Despite their restrictive wording – 'may be refused only', 'manifestly incompatible' – the public policy clauses in EC regulations¹⁶ do leave room for conflicting court decisions. As far as

14. Yet, I am not convinced that a *lex fori* approach could not be justified at all. If the rules of jurisdiction were to designate exclusive fora – such as the *forum rei sitae* for rights pertaining to real property – *Gleichlauf* between jurisdiction and applicable law would be a sensible solution in most choice-of-law categories.

15. See, generally, R.J. Weintraub, 'Rome II and the Tension between Predictability and Flexibility', 41 *Rivista di Diritto Internazionale Privato e Processuale* (2005) pp. 561-572 at p. 561: 'Attempts to achieve absolute predictability in choice of law for torts by rigid rules have failed. When the result appears unwise because another jurisdiction rather than the one the rules selected will bear the long-range social consequences if its law is not applied, courts have avoided the seemingly certain rules.'

16. Art. 26 Rome II; Art. 21 Rome I. The modern Hague Conventions on choice of law contain virtually identical provisions. In its original proposal for a regulation on maintenance obligations, the Commission attempted in vain to rule out the use of the public policy exception in

overriding mandatory rules are concerned, the definition in the Rome I Regulation¹⁷ – absent in ‘Rome II’ – does not rule out a difference of opinion on their ambit: the ‘public interests’ they are meant to protect may be unduly inflated if the court is bent on applying its own law. Characterization could be another disturbing factor.¹⁸ Every rule in Rome I and Rome II refers to legal concepts that may differ from one Member State to another. Even if those concepts should be interpreted autonomously it will take a long time before the European Court of Justice will have settled all possible differences of interpretation. In the meantime, a legal relationship may be characterized as ‘contractual’ in one Member State, and as ‘non-contractual’ in another. Similarly, the description of specific torts (such as product liability or unfair competition) and other non-contractual obligations (such as unjust enrichment) leaves ample room for national differences in the characterization of the issue.¹⁹ The procedural status of choice of law and foreign law may also have an impact on the outcome of the litigation.²⁰ A judgment rendered in a jurisdiction in which choice-of-law rules and foreign law are applied *ex officio* is likely to be different from a ruling by a court bound to apply forum law unless the choice-of-law issue is raised by one of the parties, or obliged to apply foreign law as ‘proved’ by (one of) the parties.²¹ And even if foreign law must be applied *ex officio*, perhaps with a little help from the parties, there may be differences of interpretation between the actual decision and the decision as it would be rendered by a court applying its own law.

intra-community cases. In later drafts, this restriction was deleted. In its final form, adopted by the Council and the European Parliament, the chapter on choice of law was reduced to a reference to the Protocol on the Law Applicable to Maintenance Obligations of 2007, in which Art. 13 covers public policy.

17. Art. 9(1) Rome I: ‘Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.’ The French term is ‘*lois de police*’. The German text refers to ‘*Eingriffsnormen*’.

18. Cf. Dickinson, *supra* n. 11, pp. 147-156 and *passim*. See, generally: C. Parra Rodríguez, ‘Characterisation and Interpretation in European Family Matters’, in A. Malatesta, S. Bariatti and F. Pocar, eds., *The External Dimension of EC Private International law in Family and Succession Matters* (Padova, Cedam 2008) pp. 337-355.

19. Cf. G. Carella, ‘The Law Applicable to Non-Contractual Obligations other than Tort or Delict’, in A. Malatesta, ed., *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe, The ‘Rome II’ Proposal* (Padova, Cedam 2006) pp. 72 et seq., on ‘the problem of conflicts of characterisation in non-contractual obligations other than tort or delict’.

20. Cf. Dickinson, *supra* n. 11, pp. 597-606. See also: Weintraub, *supra* n. 15, pp. 562-567, on the divergent national views on the quantification of damages.

21. Obviously aware of this threat to decisional harmony, the European Parliament proposed two amendments to Rome II on pleading and proof of foreign law: the first one (amendment 42) required the plaintiff to state his opinion on the law to be applied, the second (amendment 43) required the court seized to apply foreign law *ex officio*. Neither amendment was enacted.

Of course, the possibility of discrepancies due to national differences in the application of general principles should not be overrated. In most cases, there will be no cause for a displacement of the applicable law by the invocation of public policy or the intervention of overriding mandatory rules. In most cases, characterization will pose no problem, as there is no doubt that the issue falls squarely within the scope of the rule to be applied. In most Member States, conflicts rules are applied *ex officio* and foreign law need not be proved by the parties. Besides, there is no way to avoid *all* threats to decisional harmony, except by uniform rules on the general part of choice of law and the exclusion of any recourse to forum law through public policy or mandatory rules – not a very realistic prospect, I would say. At any rate, the Rome II Regulation cannot be faulted for not achieving uniformity of result in *all* cases.

3.2 Justified expectations

So far, it was assumed that uniform conflicts rules are meant to rob the plaintiff of the advantages he could gain from the differences between the laws of the jurisdictions in which he could sue the defendant. If this were their only objective they could be a lot simpler than they generally are. There would be no need for a general rule and various rules for specific situations. Exceptions would only complicate the choice-of-law process, and had better be left out. If uniformity of result were our only aspiration, we might as well rely on a single connecting factor, such as the tort victim's habitual residence, instead of combined contacts, such as the victim's habitual residence as long as it coincides with the country where the defective product was marketed, or where the tortfeasor acted, or the damage occurred. We might as well adopt Currie's alphabet solution,²² or some other hard-and-fast, easy-to-apply criterion, such as the law of defendant's home state, or the law of the place of injury. No exceptions would be allowed lest the ideal of decisional harmony be jeopardized.

The fact that uniform conflicts rules, such as those laid down in Rome II, are more complicated than that tends to prove that they are not justified by a need for uniform results alone. Obviously, we expect more from choice-of-law unification. One objective – not mentioned expressly in the Rome II preamble²³

22. B. Currie, 'The Verdict of Quiescent Years', in *Selected Essays on the Conflict of Laws* (Durham, N.C., Duke University Press 1963) pp. 609/610. Rather maliciously, he wrote: 'All that is required, then, is a way of determining, simply and certainly, what law will be applied, so that transactions can be planned and litigation undertaken with some confidence as to the outcome – and, in addition, assurance that the decision will not vary according to the forum. In all solemnity, I suggest that a nearly ideal choice-of-law rule for such cases would be that the governing law shall be that of the state first in alphabetical order.' In a footnote, he recommended a rule of inverse alphabetical order for transactions occurring in odd-numbered years, so as to reduce 'the undue hardship on the courts of states low in the alphabet, since they would be constantly burdened by the task of ascertaining foreign law, while states high on the list would have the advantage of frequently applying domestic law'.

23. In the Commission's original proposal, the phrase 'legitimate expectations' is not used in the preamble either. However, more than once the preamble (in its original *and* final version)

– can be found in the Commission’s explanation of its original proposal. In several places, it refers to the need for a conflicts rule that meets ‘the legitimate expectations of the parties’.²⁴ To me, this is not the same requirement as the one pertaining to predictability and legal certainty. Any uniform choice-of-law rule, however unsophisticated, will allow the parties to know with certainty which law will be applicable and to predict the outcome of the litigation. But it may not provide the *equitable* solution the parties have a right to expect. A uniform choice-of-law rule referring to the law of the country coming first in the alphabet will surely enhance certainty and predictability but it will fail to meet the parties’ justified expectations. To that end, the rule should not only be capable of cutting the Gordian knot of a conflict of laws but it should do so in a way that is acceptable to potential and actual litigants. International and European lawmakers should be able to explain why one connecting factor should be preferred to another, why an exception to a general rule is indispensable, and why there is a need for subcategories with their own special criteria. Their explanation should convince us that the rules adopted are not only efficient tools to discourage forum shopping but that they also meet reasonable expectations as to the equity of the choice-of law result.

3.3 Mutual recognition of judgments

While the preamble to Rome II does not mention the parties’ expectations as a factor to be taken into account, recital 6 does link mutual recognition of judgments to the goal of decisional harmony: the proper functioning of the internal market creates a need for uniform conflicts rules, which are supposed ‘to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments’. According to recital 3, the European Council meeting in Tampere in 1999 ‘endorsed the principle of mutual recognition of judgments as the cornerstone of judicial cooperation in civil matters’, and called for measures to implement that principle. One of those measures, apparently, is the creation of uniform choice-of-law rules, which are supposed to ‘facilitate’ the mutual recognition of judgments. This assumption,

refers to the ‘reasonable interests of the person claimed to be liable and the person who has sustained damage’. It is quite possible that this expression is meant to cover legitimate expectations. This question will be discussed *infra* section 4.1.

24. The legitimate expectations of the *parties* are mentioned in the Commission’s explanation (*supra* n. 12) of the common-domicile exception in Arts. 3(2) and 9(2) of the proposal, in its justification of an accessory choice of law in Art. 3(3), in the section on product liability (Art. 4), and in its comment on the reference to the habitual residence of a corporation’s subsidiary in the second sentence of Art. 19(1). The legitimate expectations of the *injured party* are referred to in the sections on the general *lex loci damni* rule (to reject an alternative reference rule favoring the injured party, a solution that ‘would go beyond the victim’s legitimate expectations’), and, in a positive way, in the sections on violations of privacy and violation of the environment. The expectations of *insurers* are mentioned in a comment on the alternative reference rule of Art. 14 (direct action).

first expressed in a 2001 program for the removal of obstacles still blocking the free movement of judgments, has become gospel truth by sheer repetition, but an explanation on what grounds it is based is nowhere to be found.²⁵

Yet, the link between choice of law and recognition is not as self-evident as it may seem. One might surmise that a foreign decision which is based on the same law our own courts would apply will be recognized more readily than a decision based on some other law. There seems to be no point in denying a foreign judgment the same legal effects we attribute to our own if we have no objection to the foreign court's line of (choice-of-law) reasoning and the outcome of the litigation. In many jurisdictions, this notion has led to the adoption of a 'choice-of-law test', to which a foreign decision is subjected as part of the recognition process: if the foreign court did not apply the same law as the one designated by our own choice-of-law rule (or, at any rate, if the law applied did not lead to the same material result), its judgment cannot be recognized or enforced. The modern trend, however, is towards a less parochial stance. Modern statutes on conflicts law generally list public policy, fair trial, inconsistency with domestic judgments, and the proper assumption of jurisdiction as the only criteria against which a foreign judgment should be tested. Similar criteria can be found in multilateral and bilateral treaties on recognition and enforcement. Failure to meet the choice-of-law standards of the jurisdiction where recognition is sought is not listed as a ground for refusal in any of them – with one exception. Article 27(4) of the Brussels Convention on jurisdiction and recognition did allow a choice-of-law test if the foreign court had ruled on a preliminary question concerning a matter of family law or succession. However, this ground for refusal is no longer included in Article 34 of the Brussels I Regulation, nor can it be found in Articles 22 and 23 of Brussels II-bis. It was thought, perhaps, that the choice-of-law test could be abandoned now that the creation of uniform conflicts rules for divorce, matrimonial property and succession was underway. Or, perhaps, the test was just considered obsolete. At any rate, the view that recognition of foreign judgments does not have to depend on choice-of-law considerations is now widely accepted.

25. Recital 4 of the Rome II preamble refers to 'a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters', adopted by the Council on 30 November 2000. A 'draft programme' was published in *Official Journal* (2001), C 12, pp. 1-10. In its introduction, it is said that '[t]he measures relating to harmonisation of conflict-of-law rules, which may sometimes be incorporated in the same instruments as those relating to jurisdiction, recognition and enforcement of judgments, actually do help facilitate the mutual recognition of judgments'. Under the heading 'Measures ancillary to mutual recognition', this statement is just repeated: 'Lastly, implementation of the mutual recognition principle may be facilitated through harmonisation of conflict-of-law rules.' In the 'Hague Programme', adopted by the European Council on 5 November 2004 (*Official Journal* (2005), C 53, pp. 1-14), plans for the unification of choice-of-law rules are listed under the heading '3.4.2. Mutual recognition of decisions'. It is now taken for granted, apparently, that uniform conflicts rules will help to implement the principle of mutual recognition.

There is another reason why the argument that mutual recognition will be facilitated by uniform choice-of-law rules is rather unconvincing, particularly when it is used to support the unification of conflicts rules for contracts and torts. Since 1973, we have been obliged to recognize and enforce judgments on those topics under the Brussels Convention, without any recourse to a choice-of-law test. The fact that there were no uniform choice-of-law rules for contracts until the Rome Convention entered into force in 1991, or the fact that we did not have uniform choice-of-law rules for non-contractual obligations at all, did not prevent the Member States from ratifying the Brussels Convention. In what way, then, would Rome I and Rome II 'facilitate' recognition? In what way would the unification of divorce choice of law – the unfortunate 'Rome III' project – be helpful to the recognition of divorce decrees, which is already guaranteed under the Brussels II-bis Regulation? I can think of only one reason. As envisaged by the Council, the free movement of judgments would be furthered, firstly, by 'limiting the reasons which can be given for challenging recognition or enforcement of a foreign judgment (for example, removal of the test of public policy ...)', and, at a later stage, by the 'abolition, pure and simple, of any checks on the foreign judgment'.²⁶ Ideally, all Member States should treat a ruling handed down in another Member State 'as if it had been delivered by one of its own courts', without any proceedings in which recognition can be challenged. Perhaps the authors of these lines believed their plans would be more readily accepted if they made the suggestion that, in time, the outcome of the litigation would no longer depend on the vagaries of national choice of law. Instead, it would be determined by one and the same law, designated by one and the same conflicts rule, leading to one and the same result, to which, therefore, no Member State could object.

If this was the Council's (implicit) line of reasoning, it is not very convincing. First of all, the abolition of exequatur proceedings does not depend, obviously, on uniform choice of law.²⁷ The Brussels II-bis Regulation has no rules designating the law governing visiting rights or the return of abducted children, yet it denies the parties the right to challenge a foreign court order on these topics. Similarly, exequatur proceedings were abolished in the Regulation on the European enforcement order for uncontested claims²⁸

26. Draft programme, *supra* n. 25, p. 5.

27. Cf. J. Meeusen, 'System Shopping in European Private International Law in Family Matters', in J. Meeusen, et al., eds., *International Family Law for the European Union* (Antwerp, Intersentia 2007) pp. 239-278 at pp. 265/266: 'the main contribution of the principle of mutual recognition is to bridge the disparities in the laws of the Member States. ... Therefore, and although the scope of application of the [Brussels II-bis] Regulation is limited to jurisdiction and recognition and enforcement, its broad approach unavoidably also affects conflicts of laws as the divergence of choice-of-law rules and the laws respectively referred to in the Member States of origin and destination must not have any effect on the effects granted to the judgment. This way, the impact and importance of choice-of-law rules is greatly reduced.'

28. Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims, *Official Journal* (2004), L 143, pp. 15-39.

even though no uniform choice-of-law rules existed for claims not sounding in contract. Furthermore, a uniform choice-of-law rule does not warrant the unconditional acceptance of any foreign judgment in which it was applied. It does not preclude the possibility of irreconcilable judgments, nor does it have any bearing on issues of due process. It may well refer to a law that passes the public policy test of the forum state, while the result is rejected by the state where recognition is sought. In short, choice-of-law unification does not obviate the need for the grounds of non-recognition listed in Brussels I and Brussels II-bis. If anything could 'facilitate' the free movement of judgments it would be the harmonization or unification of substantive law and the law of civil procedure. The adoption of uniform conflicts rules may lead to uniform *choice-of-law* results but that will hardly increase a Member State's willingness to accept a foreign judgment 'as if it had been delivered by one of its own courts'.

3.4 The proper functioning of the internal market

According to recital 6 of the preamble to both Rome I and Rome II, the proper functioning of the internal market creates a need for uniform choice-of-law rules. In view of the characteristics of the internal market as described in the EC Treaty,²⁹ such rules would have to support the free movement of goods, persons, services and capital in an area without internal frontiers. Obstacles to this freedom of movement would hamper free trade and fair competition, and should therefore be removed. 'Approximation of laws' is one of the means by which the proper functioning of the internal market can be furthered.³⁰ In this light, the urge to 'harmonise' European choice of law implies that disparities between national choice-of-law rules are viewed as impediments to the internal market. This is confirmed by a paragraph in the Explanatory Memorandum accompanying the original Rome II proposal, emphasizing the need for uniform conflicts rules for torts:

'Despite common principles, there are still major divergences between Member States, in particular as regards the following questions: the boundary between strict liability and fault-based liability; compensation for indirect damage and third-party damage; compensation for non-material damage, including third-party damage; compensation in excess of actual damage sustained (punitive and exemplary damages); the liability of minors; and limitation periods. During the consultations undertaken by the Commission, several representatives of industry stated that these divergences made it difficult to exercise fundamental freedoms in the internal market. They realised that harmonisation of the substantive law was not a short-term prospect and stressed the importance of the rules of conflict of laws to improve the foreseeability of solutions.'³¹

29. Arts. 3(1)(c) and 14(2) EC Treaty.

30. Arts. 3(1)(h) and 94 et seq. EC Treaty.

31. Explanatory Memorandum, *supra* n. 12, p. 5, under the heading 'General purpose: to improve the foreseeability of solutions regarding the applicable law'.

In fact, many ‘representatives of industry’ had no need for a choice-of-law regulation at all: ‘[it] was argued that in practice business does not have problems with diverging rules on conflict of laws in the Member States.’³² In their view, the proper functioning of the internal market would be better served by ‘a European Civil code on the law of tort and delict’, but since ‘harmonisation of substantive private law is unlikely to happen in the near future, the Rome-II-Regulation would make solutions more predictable and be a step towards increasing legal certainty’.³³

Supported by these reactions, the Commission’s line of reasoning seems to run like this: (1) divergences between national tort laws affect the fundamental freedoms on which the internal market is based; (2) for a proper functioning of the internal market, such divergences must be mitigated or eliminated by harmonization of substantive law; (3) harmonization of substantive law is not feasible in the short term; (4) in the meantime, choice-of-law harmonization will at least lead to predictable solutions of conflicts cases and thus enhance legal certainty.

The jump from fundamental freedoms to predictable solutions and legal certainty is rather smart, but the whole argument is spurious. While certainty and predictability may be values that should be supported in an area of freedom, security and justice, they have little bearing on the four freedoms of the internal market. Even if the choice-of-law outcome of a tort case could be called ‘unpredictable’ on account of the divergences between national conflicts rules,³⁴ it is hard to see how this could affect the free movement of goods, persons, services or capital.³⁵ More to the point, therefore, is the Commission’s next argument:

32. On its own website, the European Commission published a summary of about 80 reactions to its call for comments: ‘Summary and contributions of the Consultation Rome II, Follow-up of the consultation on a preliminary draft for a Council Regulation on the law applicable to non-contractual obligations (“Rome II”)', <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm>.

33. *Ibid.*, under the heading ‘1. Interest of a Rome-II-Regulation for the EU’.

34. Before Rome II, business and industry would have had no great difficulties in calculating the choice-of-law outcome of a case against them if it were adjudicated in one of the jurisdictions where suit could be brought: their own home state, the state where the damage occurred and/or the state where the event giving rising to the damage occurred: Arts. 2 and 5(3) Brussels I Regulation in light of ECJ 30 November 1976, Case 21/76, *Bier v. Mines de Potasse d’Alsace*, [1976] ECR 1735. Only if the damage occurred in more than one Member State, more than three (possibly divergent) choice-of-law systems would have to be taken into account. However, since the ECJ has ruled that in a libel action the courts of the country where the damage occurred ‘have jurisdiction solely in respect of the harm caused in the state of the court seised’ (ECJ 7 March 1995, Case 68/93, *Shevill v. Press Alliance*, [1995] ECR I-415), forum shopping for the most favorable *forum damni* may have lost most of its attraction, if it may be assumed that the *Shevill* rationale extends to all bi-local torts and not to libel actions only.

35. Cf. M. Bogdan, ‘General Aspects of the Future Regulation’, in Malatesta, ed., *supra* n. 19, pp. 33-44 at p. 35: ‘Although there can be no doubt that common conflict rules are desirable and will be useful, one may doubt whether they are really “necessary” in the sense that the internal market cannot properly function without them. It is worth noticing that there are important differences with regard to both substantive law of torts and conflict rules on torts between the more than

‘Harmonisation of the conflict rules helps to promote equal treatment between economic operators and individuals involved in cross-border litigation in the internal market. ... Given that there are more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts would have different conflict rules applied to them, which could provoke a distortion of competition. Such a distortion could also incite operators to go forum-shopping.’³⁶

An example may help us to check the validity of this statement. The defendant is a firm in country C, let us say Cyprus. The plaintiff is either a firm in country A (Austria), or a firm in country B (Belgium). Since the dispute must be ‘the same’ and must be brought ‘before their respective courts’, we have to assume that the first case is about damage the Cypriot firm has caused in Austria, and the other about damage caused in Belgium, otherwise the Austrian and Belgian courts would have no jurisdiction. Since we are talking about ‘different systems of conflict rules’, let us assume that an Austrian court would apply the law of the place of the wrong, that under Belgian choice of law the case would be governed by the law of the victim’s place of business, while the Cypriot conflicts rule would refer to the place of business of the tortfeasor. Let us further assume that the tort victim would recover 100 % of the damage under Austrian law, 75 % under Belgian law, and only 25 % under the law of Cyprus. In the first case (Austrian plaintiff, Cypriot defendant), Austrian law would apply and the plaintiff would recover 100 %. In the second case, the Belgian plaintiff would recover 75 % under the applicable Belgian law. Forum shopping would not help much in this case, since the only available forum next to the *forum delicti* of Article 5(3) of the Brussels I Regulation would be the Cypriot *forum rei* of Article 2, and then the law of Cyprus (only 25 %) would be applied. So it is true that the Austrian firm will have an advantage over its Belgian competitor.

However, under the uniform regime of Rome II the same ‘distortion of competition’ would occur. The *lex loci damni* rule of Article 4(1) would require application of Austrian law in the first case, Belgian law in the second, regardless of where the action is brought. Obviously, the ‘distortion of competition’ is not caused by the ‘different systems of conflict rules’ but by the fact that the *locus damni* was located in different countries. So we must change the facts to make the two cases truly identical. Suppose that the damage did not occur in Austria or Belgium but in Cyprus. Since the *forum delicti* and the *forum rei* then coincide, suit can only be brought in Cyprus, and the same conflicts rule (uniform or not) will be applied in both cases: no distortion of competition here. If the tort occurred in a fourth state, say D for Denmark, both plaintiffs would have the same jurisdictional options. Again, whether they bring suit in Denmark

fifty jurisdictions within the United States, without any significant negative effect on the internal market in that country.’

36. Explanatory Memorandum, *supra* n. 12, p. 7, now under the heading ‘Legal basis’.

or in Cyprus, each court would apply its own conflicts rule in both cases. If the Danish rule differs from the one applied in Cyprus, both plaintiffs have the option to proceed in the forum that will give them the greatest choice-of-law advantage. No unequal treatment here either.

It must be concluded that possible distortions of competition are caused by the divergences between substantive laws, not by the lack of uniform choice of law. The proper functioning of the internal market cannot be used, therefore, as an argument supporting the unification of tort choice of law. To the extent that the rules of Rome II are intended to 'avert the risk of distortions of competition between Community litigants', as recital 13 asserts, their objective is based on a false premise.

4. THE NEED FOR EQUITABLE CHOICE-OF-LAW RULES

It will be recalled that the Rome II preamble starts with a list of objectives that could be achieved by any kind of uniform rule, however absurd. In the next series of recitals, starting with no. 14, the emphasis is on justice, the interests of the parties, or other values embodied in substantive law. In this respect, the choices made by the drafters of Rome II can be considered as an effort to meet the justified expectations of potential litigants.³⁷ The preamble does try to give us a reasoned explanation of the choice of the various connecting factors. Some of those arguments may not be very convincing, or even clearly wrong, but they do help us to understand and evaluate the final result.

4.1 Doing justice in individual cases

The objective of 'doing justice in individual cases' must be seen as a general objective, underlying all of Rome II's choice-of-law rules. According to recital 14, it calls for a 'flexible framework of conflict-of-law rules', which 'enables the court seised to treat individual cases in an appropriate manner'. That is why there are, apart from a general rule for torts, special conflicts rules for specific categories of non-contractual obligations, and that is why most provisions contain one or more exception clauses.³⁸ Even more flexibility could have been achieved if the European Parliament had had its way after the first reading of the Commission's proposal.³⁹ Amendment 26 gave a list of 'choice-influencing

37. *Supra* section 3.2.

38. Neither the 'common residence exception' nor the 'proper law escape' will affect the choice in cases governed by Art. 6 (unfair competition), Art. 7 (environmental damage), or Art. 8 (infringement of intellectual property rights). Art. 9 (industrial action) does not allow a 'proper law escape' as described in Art. 4(3), but a common residence exception is acceptable: 'Without prejudice to Article 4(2), ...'. The provisions on torts in general, product liability, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* allow both exceptions.

39. Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) No. .../2005 of the European Parliament and of the Council

considerations' not unlike those enumerated in § 6 of the American Restatement Second of Conflict of Laws. In determining the applicable law the courts should take account of (a) the fact that the parties are domiciled in the same country, or that the laws of their respective home countries are substantially identical; (b) a pre-existing relationship between the parties; (c) the need for certainty, predictability and uniformity of result; (d) protection of legitimate expectations; and (e) the policies underlying the foreign law to be applied and the consequences of its application.⁴⁰ This amendment did not survive the second reading, but it would have given the courts a far greater measure of discretion – therefore more leeway to do justice in the individual case – than the final text of Rome II now allows them. On the other hand, predictability and uniformity of result would be jeopardized by too much flexibility.⁴¹

The antagonism between certainty and flexibility is a well-known problem in the conflict of laws.⁴² As history has taught us, the abstraction inherent in choice-of-law rules covering a broad category of law (such as 'torts' or 'contracts') can lead to unacceptable results in atypical cases. One way to solve this problem is the creation of special conflicts rules for any number of subcategories ('product liability', 'unfair competition', 'defamation', 'environmental damage', 'industrial action', etcetera). Another solution, in tune with the Savignian aspiration of designating the closest geographical connection, either calls for an *ad hoc* determination of the center of gravity, or refers to the law of the country with which the case is *presumed* to be most closely connected, subject to one or more exceptions allowing application of another, more closely connected law. Since the latter solution is focused on the closest connection in

on the law applicable to non-contractual obligations ('Rome II'), *Official Journal* (2006), C 157E, p. 371.

40. Cf. § 6 Restatement Second of Conflict of Laws: The 'factors relevant to the choice of the applicable rule of law' are: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

41. In the opinion of S.C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity', 56 *AJCL* (2008) pp. 173-222 at p. 216, Rome II 'could have been much better' if some of the suggestions by the European Parliament had been adopted: 'The amendments injected more flexibility, introduced issue-by issue analysis, and differentiated between issues of conduct-regulation and loss distribution. Had any of these amendments survived, they would have considerably improved Rome II. Unfortunately, the Council and Commission rejected these and other amendments. In the end, Rome II is what it is. In this author's view, it is a missed opportunity to do much better.' *Contra*: K. Kreuzer, 'Tort Liability in General', in Malatesta, ed., *supra* n. 19, pp. 45-70 at p. 68.

42. Cf. Symeonides 2002, *supra* n. 4, pp. 405-417 at p. 406: 'The tension between the need for legal certainty, predictability, and uniformity on the one hand, and the desire for flexible, equitable, individualized solutions on the other, is as old as law itself. ... The law of conflict of laws is not immune from this contradiction [between certainty and flexibility], and perhaps it is particularly susceptible to it.' See also: Weintraub, *supra* n. 15, p. 561; Symeonides, *supra* n. 41, pp. 179 et seq.

terms of geography, it cannot be used to give precedence to the law of a country that may be deemed to have a superior interest in its application, or to a law better geared to achieve the substantive objectives⁴³ of a particular choice-of-law rule than the law of the country with which the case is presumed to be most closely connected. For instance: suppose that a harmful product is marketed in a country with a high level of safety and consumer protection (country A), that it has been acquired there by someone who lives in a country with a low level of safety and protection (country B), and that the producer is established in country B as well. In this case, the law of country B would apply,⁴⁴ despite the fact that Article 5, Rome II's provision on product liability, is meant to further 'a high level of protection of consumers' health', and that it 'should meet the objective of securing undistorted competition' on the market of country A, as recital 20 insists.⁴⁵ In short, choice-of-law rules whose flexibility is based on the principle of the closest connection may not only jeopardize decisional harmony, they also tend to defeat the substantive purposes they were thought to achieve.

'Doing justice in individual cases' is a nice phrase, but it should not lull us into thinking that Rome II will help to achieve 'just results' in terms of substantive justice. 'Doing justice' should be understood as 'selecting the proper law', regardless of the material result of its application.⁴⁶ The 'flexible framework of conflict-of-law rules' Rome II is said to be does not allow a choice of the applicable law on a teleological basis, it just refines the mechanics of a value-free

43. To be discussed, *infra* section 5.

44. Although in this case Art. 5(1)(b) Rome II would refer to the law of the country in which the product was acquired, it does so 'without prejudice' to the common-domicile exception of Art. 4(2). The 'cascade of connecting factors' listed in Art. 5(1) is even more complex, as it should include not only Art. 4(2) but Art. 14 as well; cf. P. Huber and M. Illmer, 'International Product Liability: A Commentary on Article 5 of the Rome II Regulation', 9 *Yearbook of Private International Law* (2007) pp. 31-47 at p. 39.

45. *Infra* section 5.2.

46. In traditional conflicts theory, choice-of-law rules were supposed to achieve 'conflicts justice' rather than 'substantive justice'. Cf. Symeonides 2002, *supra* n. 4, pp. 397-405. With the advent of various types of result-oriented rules (*supra* section 1), the distinction would seem to be obsolete. Yet, the aspiration 'to do justice in individual cases' expressed in the Rome II preamble obviously refers to 'conflicts justice' only. On the other hand, Symeonides, *supra* n. 41, pp. 199/200, suggests that recital 14 'can be viewed as providing instruction to the courts on when and how to use the escape Thus, a court could resort to the escape when the law designated as applicable by the general rule leads to a result that is incompatible with "the need to do justice in individual cases"'. This interpretation can hardly be squared with the express requirement in recital 14 that 'the tort/delict is manifestly more closely connected with another country', which suggests precisely the 'quantitative employment of the escape' Symeonides would gladly exchange for 'an employment of the escape with a view toward doing justice in the individual case'. Cf. Dickinson, *supra* n. 11, pp. 128 et seq., rejecting Symeonides's suggestion: '... the requirement that a non-contractual obligation be "manifestly more closely connected" to another country leaves no room for assessing the impact that the application of that country's law would have in terms of satisfying the "ends of justice" in a specific case. The Regulation identifies the legal system whose rules will apply to non-contractual obligations by reference to objective connecting factors, not the content of their rules' (at p. 130).

choice-of-law technique.⁴⁷ In this light, the juxtaposition of ‘the requirement of legal certainty’ and ‘the need to do justice in individual cases’ in recital 14 is not as antithetical as it may seem. Both objectives can be achieved by a refined set of rules, flexible enough to accommodate all kinds of ‘individual cases’, and totally blind to the material results they produce.⁴⁸

4.2 **Striking a reasonable balance between the interests of the parties**

Another objective mentioned in justification of more than one specific conflicts rule is to strike ‘a reasonable balance between the interests of the person claimed to be liable and the person who sustained damage’.⁴⁹ It is not at all clear what kind of ‘interests’ are actually meant. The interest either party may have in the application of the most favorable law? An interest in the application of their own (national or domiciliary) law? An interest in a ‘just’ solution? Normally, one would assume that the word ‘interest’ has a material connotation, referring to some benefit a person is entitled to. Where the phrase ‘the collective interests of consumers’ is used in recital 19 and Article 6(1), the word ‘interests’ obviously refers to the collective welfare of consumers. In this sense, the ‘reasonable balance between the interests of the person claimed to be liable and the person sustaining damage’ promised in the preamble either suggests a choice between the law that favors one party and the law that benefits the other, or a compromise between them.⁵⁰ In other words, the outcome of the choice-of-law process would be determined by the contents of the eligible laws. Since the Rome II provisions are obviously not content-oriented, the ‘reasonable balance’ must be struck some other way, and the ‘interests’ the preamble refers to must stand for something less tangible. A clue to its real meaning can be found in the Commission’s explanation of the general *lex loci damni* rule:

‘The rule also reflects the need to strike *a reasonable balance between the various interests at stake*. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law

47. Cf. Ph.J. Kozyris, ‘Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ “Missed Opportunity”’, 56 *AJCL* (2008) pp. 471-497 at p. 475: ‘But when the issue is deciding which of the potentially applicable laws should be chosen (*i.e.*, an issue of authority) teleology has to focus on “conflicts justice”, *i.e.*, on the question of which contacts are more related to the purpose of the law, rather than on whether the judge prefers one over another substantive outcome as more just.’

48. Kozyris, *ibid.*, at p. 479: ‘The issue is one of connection, not content. In this private law sphere, each potentially applicable rule is by definition to be respected and to be treated as “just”.’

49. A ‘reasonable balance’ or ‘balanced solution’ is mentioned in recitals 16, 19, 20 and 34.

50. Such as Von Mehren’s ‘multistate rule’, special substantive rules effecting a compromise between conflicting laws: A.T. Von Mehren, ‘Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology’, 88 *Harv. L. Rev.* (1974) p. 347 at pp. 366/267.

most favourable to him. It considers that this solution would go *beyond the victim's legitimate expectations* and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation.'

As described in this quotation, the interest of a tort victim is not supposed to extend beyond the choice of the law he would have (rightfully) *expected* to apply. Or, to put it the other way round: the victim has no *legitimate* interest in the application of the most favorable law. Thus, it would seem that 'interests' should be equated with 'legitimate expectations'. If this is true, the regulation purports to strike a reasonable balance between the expectations the person claimed to be liable and the person sustaining the damage may have (or rather: *should* have) with regard to the law governing their relationship.

As noted before,⁵¹ the 'legitimate expectations of the parties' were invoked in justification of several of the conflicts rules the Commission originally proposed. The common-domicile rule of Article 4(2), for instance, is said to 'reflect the legitimate expectations of the two parties'. Parties living in the same country have a right to expect (and in most cases probably *do* expect) that their delictual relationship is governed by the law of their common domicile. In that respect, they both have an 'interest' in the application of that law, and the common-domicile rule reflects that interest. Even so, 'in order to strike a reasonable balance between the parties', the court should take account of the rules of safety and conduct in force at the place of the event giving rise to the liability.⁵² Assuming that we are still talking about a balance of *interests*, I would say that the parties have a *right to expect* that conduct-related issues will be considered in the light of the *lex loci delicti*, even if their relationship is governed by a different law.

In this interpretation, Rome II is not meant to achieve 'just' results in terms of substantive law. Where its conflicts rules seek to strike a reasonable balance between the parties' interests, they do not reflect any interest the parties may have in the final outcome of the litigation, but only their interest in a reasonable choice of the applicable law. From the drafters' perspective, these rules must be seen as normative expressions of party expectations: they do not refer to the law the parties actually expect to apply, but the law they *should* expect to apply. What they ought to expect is anybody's guess. That is why 'a reasonable balance of interests' could be used in justification of both the *lex loci delicti* and

51. *Supra* section 3.2.

52. Art. 17 in conjunction with recital 34. See also: Symeonides, *supra* n. 41, p. 213, on the question of whether Art. 17 is meant 'as a tool for helping the tortfeasor, but not necessarily the victim'. There are strong indications that the Commission only had the interests of the tortfeasor at heart. If so, Art. 17 does not strike a reasonable balance between the interests of the parties, certainly not in terms of justified expectations. This is made clear by the rhetorical question posed by Symeonides at p. 214: 'Does the application of the law of the state of conduct violate the legitimate expectations of the *tortfeasor* who violated the conduct standards of that state, just because the injury occurs across the border?' See also: Kozyris, *supra* n. 47, p. 483: '... this clause should be available for the benefit of not only the actor but also of the victim when appropriate.'

the *lex loci damni*, or even the law of the victim's habitual residence. Insofar as the parties have a right to expect a reasonable solution of the choice-of-law problem, each of these alternatives and any of their combinations would meet that test. Much could be said to support the choice of the place of injury as the connecting factor in Article 4(1), but as far as party expectations are concerned the other solutions would be just as plausible. For that reason, I am afraid that the intention 'to ensure a reasonable balance between the interests of the person claimed to be liable and the person sustaining damage' does not say much about the reasons why a particular connecting factor was preferred to another. In that respect, this objective carries considerably less weight than recital 16 suggests.

5. TAKING ACCOUNT OF SUBSTANTIVE POLICIES

Not all of Rome II's provisions rest on the parties' interests in the application of the law they (should) expect to apply. According to the preamble, some rules are inspired by loftier goals. What they have in common is a concern for a specific policy underlying a particular area of substantive law in all or most Member States. Generally, such rules either refer to the law of the country that, in the light of a particular policy, may be deemed to have a superior interest in the application of its law, or they allow a choice of the law that is best equipped to further the policy in question. In the Dutch literature on private international law, rules of the first type are said to be based on the 'principle of functional allocation', as they reflect the function of the corresponding substantive law.⁵³ The other type of rule gives expression to the so-called 'favor principle', as it favors a pre-determined substantive result. In Rome II, Articles 7 and 14 belong to this category. Recitals 16, 20, and 21 suggest that the *lex loci damni* rule, as well as the special rules on product liability and unfair competition reflect the function of the corresponding substantive law. Recital 31, finally, explains the restriction on party autonomy for the benefit of the weaker party. In the next paragraphs, I will examine the relation between the objectives of substantive law and the choice-of-law rules just mentioned.

5.1 'The modern approach to civil liability' and the *lex loci damni* rule of Article 4(1)

In recital 16, several arguments are advanced in support of the designation of the law of the place of injury as a proper choice-of-law solution for torts in general. Apart from enhancing the foreseeability of court decisions and ensuring a reasonable balance between the interests of the parties, the *lex loci damni* rule is also meant to reflect 'the modern approach to civil liability and

53. *Supra* section 1. Since these rules usually reflect a protective policy (particularly with regard to the weaker party), the expression 'protection principle' is now more common. See, however, *supra* n. 7.

the development of systems of strict liability'. This statement would be rather incomprehensible without the Commission's explanation preceding its original Rome II proposal, where it says:

'Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.'⁵⁴

Thus, on the choice-of-law level, the compensatory function of modern tort law (indemnifying the victim) is translated into a connecting factor which is focused on the victim as well. Unfortunately, this functional line of reasoning is not brought to its logical conclusion. A functional conflicts rule reflecting a compensatory policy would have referred to the victim's domiciliary law rather than the law of the place of injury. By contrast, a functional conflicts rule based on a regulatory policy (focusing on the deterrence of wrongful conduct) would refer to the law of the place of the wrong. It will be clear that these contrasting policies cannot be served by the same functional conflicts rule. In cases in which the place of the wrong coincides with the place of the injury – and the *lex loci damni*, therefore, coincides with the *lex loci delicti* – it cannot be maintained that a choice of the *lex loci* is based on the compensatory function of modern tort law, as it would serve a regulatory function just as well.

According to the Commission, however, the *lex loci damni* rule does favor the application of the victim's domiciliary law, for 'in most cases [the *lex loci damni*] corresponds to the law of the injured party's country of residence'.⁵⁵ At the root of this assumption must be the Commission's preoccupation with the problem of bi-local torts, i.e., the situation in which the place of conduct and the place of injury are located in different countries. It is true that in this fact pattern the *lex loci damni* will usually coincide with the victim's domiciliary law. In that respect, the *lex loci damni* rule can be justified by invoking the compensatory function of modern tort law. Even so, if that function had been taken seriously, the general rule would have referred to the law of the victim's habitual residence, perhaps subject to a foreseeability exception similar to the one laid down in the provision on product liability.

By its focus on bi-local torts, the Commission obviously lost sight of all tort cases in which the places of conduct and injury do coincide in the same country. They can be divided into three groups:⁵⁶ (1) cases in which the victim

54. Explanatory Memorandum, *supra* n. 12, p. 12.

55. *Ibid.*, p. 11.

56. Strictly speaking, there are five different fact patterns, two of which need not be discussed: (1) domestic cases: the situation in which the *locus delicti* is situated in the country where both the victim and the tortfeasor are habitually resident, and (2) the common-domicile situation, covered by Art. 4(2).

is habitually resident in the country where the tort occurred, (2) cases in which the tortfeasor is habitually resident in that country, and (3) cases in which the place of the tort, the habitual residence of the victim and that of the tortfeasor are all located in different countries. In the first group of cases, there is no difference between the *lex loci damni* and the victim's domiciliary law, but a conflicts rule referring to the latter would have been more in line with the compensatory function of the law of torts. In the other two groups, the *lex loci damni* rule will either refer to the law of the tortfeasor's home country, or to a law with which neither party has a domiciliary connection. At least for these two categories any link between the *lex loci damni* and the function of 'modern tort law' is spurious.⁵⁷

All in all, the reference to substantive policies in recital 16 must be considered as totally meaningless. If the drafters of Rome II intended to justify their choice of a connecting factor for torts in general by relying on the policies underlying the modern law of torts, they chose the wrong criterion. The *locus damni* may be a plausible connecting factor if it is meant to identify the closest geographical connection, but it is not supported by any function that could be attributed to the substantive law of torts.

5.2 Product liability: the objectives of Article 5

In the preamble of Directive 85/374,⁵⁸ several reasons are given for the harmonization of the *substantive laws* concerning product liability. It is deemed necessary 'because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property'. Furthermore, liability without fault is said to be 'the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risk inherent in modern technological production'. The objectives listed in recital 20 of the Rome II preamble, as well as the language in which they are couched, are remarkably similar:

'The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting

57. Cf. L. de Lima Pinheiro, 'Choice of Law on Non-Contactual Obligations – Between Communitarization and Globalization, A First Account of EC Regulation Rome II', 44 *Rivista di Diritto Internazionale Privato e Processuale* (2008) pp. 5-42 at p. 16: 'This solution, as well as its justification is clearly inspired by the main French literature' (with references to Batiffol/Lagarde, 1983, pp. 246-247 and Mayer/Heuzé, 2004, pp. 505-506). '... it does not seem accurate to generalize the domination of the compensatory function and the proliferation of no-fault liability schemes. Punitive, deterrent and compensatory functions, although with varying degrees, are generally important within the legal systems of the Member States.'

58. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, Regulations and administrative provisions of the Member States concerning liability for defective products, *Official Journal* (1985), L 210, pp. 29-33.

consumers' health, stimulating innovation, securing undistorted competition and facilitating trade.'

'Stimulating innovation' is the only objective not already mentioned in the Directive. In the first Rome II proposal, it is explained along with the other objectives of the proposed conflicts rule:

'The rule in Article 4 corresponds not only to the parties' expectations but also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.'⁵⁹

The objectives listed in recital 10 of the Commission's original proposal were identical to the ones now enumerated in recital 20. Oddly enough, the original conflicts rule was quite different from the one eventually adopted. If the Commission had had its way, the law to be applied in most product liability cases would be the law of the victim's habitual residence. By way of exception, the domiciliary law of the person claimed to be liable would be applicable if he could prove that his product was marketed in the victim's home country without his consent. This rule has been transformed into the present 'cascade of connecting factors' subject to a foreseeability exception. If the defective product was marketed in the country in which the victim was habitually resident when the damage occurred, or the country in which it was acquired, or the country in which the damage occurred, the law of that country applies. If the producer could not reasonably foresee that the product, or a product of the same type, would be marketed in that country, the law of his own habitual residence applies. According to recital 20, this combination constitutes a 'balanced solution' with regard to the rule's objectives. The same was said in recital 10 of the original proposal on the designation of the victim's domiciliary law subject to a (rather different) foreseeability clause. Could it be that the same objectives can be achieved by two quite different rules?

An analysis of the various objectives brings to light that the first one – 'fairly spreading the risks inherent in a modern high-technology society' – is probably nothing but a rephrased version of the general objective to strike 'a reasonable balance between the interests of the parties'. This is confirmed by the Commission's explanation of its original proposal: legitimate expectations are equated with legitimate interests and the proposed rule is said to strike 'a reasonable balance between the interests in issue'.⁶⁰ As noted in section 4.2, those interests

59. Explanatory Memorandum, *supra* n. 12, p. 15.

60. *Ibid.*: 'Apart from respecting the parties' legitimate expectations, the conflict rule regarding product liability must reflect also the wide scatter of possible connecting factors ... Article 4 [of the original proposal] strikes a reasonable balance between the interests in issue. Given the

can be balanced by any conflicts rule leading to a choice the Community legislator deems to be 'reasonably foreseeable'. In this light, both the originally proposed rule and the one preferred by the Council easily meet the test of a 'reasonable balance of interests', or, to quote from the preamble again, they are both capable of 'fairly spreading the risks inherent in a modern high-technology society'.

The next objective is the protection of consumers' health. The plural (*'la santé des consommateurs'*) suggests that Article 5 is meant to protect a *collective* interest: not the health of the individual consumer who acquired a defective product and was injured by it, but the physical well-being of every potential victim would seem to be at stake. One of the main aims of the directives on product liability and general product safety is the protection of consumers.⁶¹ By establishing a regime of strict liability for defective products and by the harmonization of safety standards, the Community aspired to 'ensure a high level of consumer protection', as Article 153 EC Treaty now requires. If there are, despite all Community efforts, still differences between the product liability laws of the Member States, the collective interest of European consumers is not served by a conflicts rule that is blind to the level of protection the designated law happens to afford. If Article 5 was meant to contribute to the goal of protecting the health and safety of consumers as a class, it should have allowed a choice of the law most favorable to the victim.⁶² Thus, it could have been an incentive for producers to maintain a higher standard of care than they would be required to observe under their own law.⁶³

Even if Article 5 was only meant to contribute to the protection of an *individual* consumer's health – the consumer who was unfortunate enough to be harmed by a defective product – it can only achieve that objective if the product was marketed in the victim's home country. In that case a parallel can

requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable, the solution is foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product that is lawfully marketed in his country of residence.'

61. Directive 85/374/EEC on product liability, *supra* n. 58; Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, modifying Council Directive 92/59/EEC of 29 June 1992 on the same topic, *Official Journal* (2002), L 11, pp. 4-17.

62. The most obvious alternatives would be: the law of either the victim's or the producer's habitual residence, the law of the place where the product was acquired, the law of the place where the product was manufactured, or the law of the place of injury. To achieve a 'reasonable balance', a foreseeability exception might be considered, even if it might defeat the rule's purpose of protecting the consumers' collective interest in acquiring and using products that are not hazardous to their health.

63. *Contra*: Kozyris, *supra* n. 47, pp. 485/486: 'Obviously, consumer protection is one of the major objectives of product liability law. But this does not necessarily call for maximizing liability as the only way to protect such interests. After all, we do not necessarily want to end up with more expensive products or a lesser variety of goods, nor should product liability law retard technological progress or distort competition.'

be drawn with the functional conflicts rule for consumer contracts, referring to the law of the consumer's habitual residence. Under both choice-of-law rules, the consumer will be protected according to the standards prevailing in his own social environment – nothing less, nothing more – therefore on an equal footing with all other consumers living in that country, regardless of any cross-border elements. However, this result cannot be achieved if the victim is not a resident of the country where the product was marketed, or if the producer successfully invokes the foreseeability exception. If the law of the country in which the product was acquired, or in which the damage occurred, or in which the producer is habitually resident affords less protection than the law of the victim's home country, it eludes me how these solutions could possibly contribute to the protection of the consumer(s)' health.

The other objectives mentioned in recital 20 belong to the 'European Union's more general objectives',⁶⁴ as expressed in the EC Treaty: undistorted competition,⁶⁵ facilitating trade,⁶⁶ and innovation.⁶⁷ According to the Commission, the latter objective could be achieved by a conflicts rule 'ensuring that all competitors on a given market are subject to the same safety standards'.⁶⁸ In my view, equal treatment of all producers marketing their products in the same country may help the free movement of goods and reduce distortion of competition, but I do not quite see how it would stimulate innovation. If the product is marketed only in 'low-protection countries', there would be no incentive for producers competing on those markets to find new ways to improve the quality of their products. Innovation is a public interest which is best served by application of the law most favorable to the victims of defective products. The 'market rule' of Article 5(1) is blind to the standards of safety to be met under the applicable law, therefore not suited to stimulate innovation.⁶⁹

64. Explanatory Memorandum, *supra* n. 12, p. 15.

65. Art. 3(g): 'a system ensuring that competition within the internal market is not distorted', elaborated in Arts. 81 et seq.

66. I must confess I am not quite sure what exactly is meant by the phrase 'facilitating trade' in recital 20: the free movement of goods within the Community to which Art. 23(1) EC Treaty refers, or 'the need to promote trade between Member States and third countries' mentioned in Art. 27(a). If it can be traced to the preamble of the product liability directive, the objective of 'facilitating trade' can probably be equated with the aspiration to diminish substantive law divergences 'affect[ing] the movement of goods within the common market'.

67. The promotion of 'research and technological development' is mentioned in Art. 3(n) as one of the Community's activities. In its explanation of the objectives of the conflicts rule on product liability, *supra* n. 12, p. 15, the Commission refers to 'innovation and scientific and technical development'. It may be assumed that there is no real difference between 'stimulating innovation' in recital 20 and the 'promotion of research and technological development' in the EC Treaty.

68. Explanatory Memorandum, *supra* n. 12, p. 15.

69. Symeonides, *supra* n. 41, p. 209, is not altogether happy with the results of Art. 5(1), 'to the extent that product liability law is also designed to serve other objectives, such as deterring the manufacture and proliferation of unsafe products'. Such objectives are not served by a rule that 'does not differentiate between cases in which the law of the victim's domicile favors and those in which it disfavors the victim' (at p. 208).

To sum up: the only objectives that can actually be achieved by the ‘cascade of connecting factors’ of Article 5 are fair competition and the ‘facilitation of trade’, if the latter objective can be equated with the removal of obstacles to the free movement of goods. Since each sub-rule of Article 5(1) refers to the country in which the product was marketed, all competitors on that market are subject to the same product liability law.⁷⁰ The other objectives listed in recital 20 are either meaningless, or not achievable by the type of conflicts rule laid down in Article 5.

5.3 Infringements of competition law: the objectives of Article 6

The provision on unfair competition as originally proposed by the Commission and adopted without amendment in Rome II was said to reflect ‘the three-dimensional function of competition law’.⁷¹ Not only does it protect competitors who do ‘play the game by the same rules’ against those who do not, it is also meant to protect the interests of consumers collectively and those of the market in general. The conflicts rule to be adopted should reflect all three objectives.⁷² In the Rome II preamble, recital 21, this ambition is expressed thus:

‘In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly.’

During the negotiations on the text of (now) Article 6, the question arose whether restrictions on competition could, or should, be considered as ‘acts of unfair competition’ within the scope of the provision.⁷³ After much debate and disagreement among the national delegations, the Commission, the European Parliament and the Council, a special provision was finally adopted for ‘acts restricting free competition’, meant to cover claims based on an infringement of European or national antitrust law. There is little doubt that the laws on unfair competition in the traditional sense of the word as well as the laws on restriction of competition are not only meant to protect the interests of competitors operating on the same market, but also the interests of others whose

70. In this respect, Art. 5 does meet the critical comments on the Commission’s original proposal. See, e.g.: Th. Kadner Graziano, ‘The Law Applicable to Product Liability: The Present State of the Law in Europe and Current Proposals for Reform’, 54 *ICLQ* (2005) pp. 475-488 at p. 487: ‘An analysis of all interests concerned shows that the place where the defective product was marketed is the best connecting factor for product liability cases’; A. Saravalle, ‘The Law Applicable to Products Liability: Hopping Off the Endless Merry-Go-Round’, in Malatesta, ed., *supra* n. 19, pp. 106-125 at p. 123: ‘The presumption should be that the law of the country where the product was directly or indirectly marketed applies. This is in fact the only connecting factor that permits to take into account all the policies underlying product liability cases.’

71. Explanatory Memorandum, *supra* n. 12, p. 15.

72. *Ibid.*

73. Dickinson, *supra* n. 11, pp. 392-396.

economic position may be affected by distortions of competition: customers ('consumers'), suppliers, and the public in general. Competition law 'pursues a macro-economic objective'.⁷⁴

Article 6(1) refers to 'the law of the country where competitive relations or collective interests of consumers are, or are likely to be, affected'. With regard to restriction of competition, Article 6(3) is based on a slightly different connecting factor: 'the country where the market is, or is likely to be affected'. It is not quite clear whether the two criteria are meant to be different, and if so, how 'the country where the market is affected' can be distinguished from 'the country where competitive relations of collective interests of consumers are affected'.⁷⁵ Considering the Commission's explanation of the latter criterion⁷⁶ I presume that Article 6(1) is just a fancy variant of the traditional 'market rule', as it is known in many national choice-of-law systems.⁷⁷ In my view, it reflects the function of the substantive law of unfair competition, inasmuch as it focuses on the market to be protected. As a result, all participants in that particular market will be treated equally, regardless of any foreign connection.

Restrictions of competition may have an even stronger impact on public interests than acts of unfair competition in the strict sense. Antitrust laws could therefore be considered as overriding mandatory provisions within the scope of Article 16. Yet, a proper use of the doctrine underlying this provision precludes the application of the forum's overriding mandatory rules when the forum's public interests are not at stake. On the other hand, Rome II does not allow the

74. Explanatory Memorandum, *supra* n. 12, p. 16. As Dickinson (*supra* n. 11, p. 400, fn. 50) reminds us, a description of the triple objectives of competition law can be found in § 1 of the German Act on Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*): 'This Act is meant to protect competitors, consumers as well as other participants in the market against unfair trade practices. At the same time, it protects the interest of the public in undistorted competition.' In the German original: '*Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und Verbraucher sowie der sonstigen Marktteilnehmer vor unlauteren geschäftlichen Handlungen. Es schützt zugleich das Interesse der Allgemeinheit an einem unverfälschten Wettbewerb.*'

75. Dickinson, *ibid.*, pp. 412 et seq.

76. Explanatory Memorandum, *supra* n. 12, p. 16: 'Article 5 provides for connection to the law of the State in whose territory "competitive relations or the collective interests of consumers are affected or are likely to be affected by an act of unfair competition". This is the *market* where competitors are seeking to gain the customer's favour. This solution corresponds to the victims' expectations since the rule generally designates the law governing their economic environment. But it also secures equal treatment for all operators on the same *market* [emphasis added].' See also recital 11 of the original proposal: 'In matters of unfair competition, the conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant *market* generally satisfies these objectives, though in specific circumstances other rules might be appropriate [emphasis added].' In the amended proposal this sentence was replaced by: 'The provision in a specific Article that the place where the damage occurs is the place where the *market* is affected helps to increase certainty as to the law [emphasis added].'

77. Cf. M. Hellner, 'Unfair Competition and Acts Restricting Free Competition: A Commentary on Article 6 of the Rome II Regulation', 9 *Yearbook of Private International Law* (2007) pp. 49-69 at p. 56.

courts to ‘give effect’ to the mandatory rules of another jurisdiction, even if it does have a significant interest in their application, unless they are part of the law designated by one of the forum’s choice-of-law rules. Thus, with regard to unfair competition and infringements of antitrust laws the doctrine of overriding mandatory rules, as incorporated in the Rome II Regulation, is not very helpful. The ‘market rule’ adopted in Article 6(3) provides a better way to take account of the public interests of the country that may be deemed to have the greatest interest in the application of its law. If the restriction of competition affects the market of the forum state forum law will be applied. If it affects a foreign market, the issue will be governed by foreign law.

It can be concluded that, on the choice-of-law level, Article 6 does meet the objectives of competition law insofar as the interests of all possible victims of unfair trade practices or restrictions of competition are concerned, including those of consumers and the general public.⁷⁸ To the extent that competition law is meant to deter any conduct causing a distortion of competition, the results of the ‘affected market rule’ are satisfactory as well, insofar as it subjects all competitors in the same market to the same standard of conduct. If it is meant to elevate the standard of conduct of domestic competitors even when they are competing abroad, an alternative reference rule allowing a choice between the law of the affected market and the law of the defendant’s home country would have been more effective.⁷⁹

5.4 Environmental damage: the objectives of Article 7

Deterrence of harmful conduct is a major objective of environmental law. It is reflected in the principles supporting the European aspiration to achieve ‘a high level of protection’ of the environment: ‘the precautionary principle, the principle that preventive action should be taken, the principle that environmental damage should as a priority be rectified at source, and the principle that the polluter should pay’.⁸⁰ As the Commission rightly points out in its explanation

78. Cf. C. Honorati, ‘The Law Applicable to Unfair Competition’, in Malatesta, ed., *supra* n. 19, pp. 127-158 at p. 148: ‘There is general agreement that, on the private international law level, the tort of unfair competition is most suitably connected with the affected market, i.e. the place where the unfair competition act produces its effects. Indeed such a criterion allows – in a unique way – to take into account both the policies of unfair competition rules and the means by which these are pursued (i.e. the necessity that such rules receive uniform application on the relevant market.’

79. Art. 6(3)(b) does allow the plaintiff to base his claim on the *lex fori* when the affected market comprises more than one country, one of which must be the country where the defendant is domiciled and sued under Art. 2 Brussels I Regulation. Yet, it would seem that this conflicts rule is meant to mitigate the complexities of the application of different laws to one and the same claim, rather than that it was intended to allow the plaintiff a choice of the most favorable law.

80. Art. 174(2) EC Treaty, repeated in recital 25 of the Rome II preamble. See also: Th. Kadner Graziano, ‘The Law Applicable to Cross-Border Damage to the Environment: A Comment

of the corresponding conflicts rule, the *lex loci damni* rule can only contribute to this high level of protection if it obliges ‘operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries’.⁸¹ In the reverse situation – the law of the place of injury has a *lower* standard of protection – the primacy of the *lex loci damni* would give the polluter ‘an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country’s laxer rules’.⁸² That is why Article 7 allows the victim to choose between the *lex loci damni* and the law of the country in which the event giving rise to the damage occurred.

Protection of the environment is a substantive policy, which is furthered by substantive rules laid down in international, European and national enactments. The best way to further it on the level of choice of law is by letting the choice depend on the contents of the eligible laws and their capability to achieve the desired result. In that respect, the ‘favor approach’ on which Article 7 is based is quite justified. However, in light of the rule’s objective, one might well ask why its alternatives are restricted to a choice between the *lex loci damni* and the *lex loci delicti*. If the person claimed to be liable is domiciled in another country than the one in which the damage was caused or the one in which it occurred, the law of his habitual residence would present a reasonable alternative. If the environment is best protected by the strictest of all eligible laws, a favor-based conflicts rule should offer as many alternatives as possible, including the domiciliary laws of the person claimed to be liable and the person sustaining the damage.

5.5 Protecting the weaker party

In the Rome II preamble, the objective of protecting ‘the weaker party’ is mentioned only once. According to recital 31, the protection to be given to weaker parties requires a restriction of the principle of party autonomy as laid down in Article 14. Non-commercial parties – i.e., a party not pursuing a commercial or professional activity – are not allowed to enter into a choice-of-law agreement before the event giving rise to the damage occurred.⁸³ Although similar restrictions can be found in several national choice-of-law systems,⁸⁴

on Article 7 of the Rome II Regulation’, 9 *Yearbook of Private International Law* (2007) pp. 71-86 at p. 75.

81. Explanatory Memorandum, *supra* n. 12, p. 19.

82. *Ibid.*, pp. 19/20.

83. Cf. Th.M. de Boer, ‘Party Autonomy and its Limitations in the Rome II Regulation’, 9 *Yearbook of Private International Law* (2007) pp. 19-29.

84. In Switzerland, the parties are only allowed a *post factum* choice of Swiss law: Art. 132 *Bundesgesetz über das Internationale Privatrecht (IPRG)* 1989. German law also prohibits an *ex ante* choice by the parties, but does not limit their options to the *lex fori*: Art. 42 *Einführungsgesetz zum bürgerlichem Gesetzbuche (EGBGB)*. The Belgian *Wetboek van internationaal privaatrecht*

their effect is likely to be so limited that they might as well have been left out altogether. Most *ex ante* agreements are concluded between parties entering into a contractual relationship whose choice is meant to cover both contractual and delictual claims that may arise between them. If one of them brings suit against the other in contract and/or in tort, their choice-of-law agreement will be invalid under Rome II with regard to the tort claim. However, unless the parties have chosen different laws for the contractual and delictual aspects of their relationship, the tort action would still be governed by the law agreed upon since the tort is 'manifestly more closely connected' with the (chosen) *lex contractus* than with the law that would govern the tort in the absence of any agreement.⁸⁵ In other words, an *ex ante* agreement concluded by a non-commercial party will be invalid under Article 14(1)(a) but it could still determine the law to be applied under one of the provisions allowing an accessory choice of law.⁸⁶

Apparently, the concern for the protection of the weaker party has not moved the European lawmakers to adapt any of the other provisions of Rome II to achieve that purpose. If there is one area of tort law in which one of the parties is more than likely to be a consumer up against a commercial adversary it is product liability. Yet, Article 5 is not geared to the protection of the consumer as the structurally weaker party. The emphasis on the country in which the product was marketed has diluted the protective function of the rule, on which the Commission had based its preference for the law of the victim's habitual residence. Generally speaking, it could be argued that in any tort case in which a non-commercial party is up against a commercial opponent, the weaker party should be entitled, as a rule,⁸⁷ to the protection of his or her domiciliary law.

2004 contains a similar provision in Art. 101. Art. 6 of the Dutch *Wet conflictenrecht onrechtmatige daad*, on the other hand, allows the parties to choose the applicable law either before or after the event. None of the cited provisions distinguishes between parties acting for professional or private purposes.

85. Cf. Arts. 4(3) and 5(2): 'Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in [the previous paragraph(s)], the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a *pre-existing relationship between the parties, such as a contract*, that is closely connected with the tort/delict in question [emphasis added].' See also: Arts. 10(1), 11(1) and 12(1).

86. If the weaker party Art. 14(1) is meant to protect is a consumer or an employee, the provisions on consumer contracts and contracts of employment in the Rome Convention and the Rome I Regulation may achieve the same purpose. They do so even in a better way, as they allow the weaker party to rely on the chosen law if it does not deprive him or her of the protection afforded by the law that would apply in the absence of a party choice. Art. 14(1) Rome II does not even allow an anterior choice of a law *favoring* the weaker party. On the other hand, substantive tort law may contain few provisions specifically meant to protect consumers or employees, which will make it difficult to compare the levels of protection of the law (indirectly) chosen by the parties and the law that would apply on other grounds. In that respect, the restrictions on party autonomy in Rome I will not be of much help.

87. Exceptions could be based on a foreseeability clause, or on the right of a non-commercial *victim* to elect the law of the tortfeasor's habitual residence.

Whatever the merit of this suggestion, it is surprising that the concern for the interests of the weaker party did not extend to the solution of other choice-of-law problems than the one addressed in Article 14(1).

6. THE OBJECTIVES OF THE ROME II REGULATION: PROMISE AND REALITY

If the preamble of Rome II should be taken seriously, the regulation serves all kinds of purposes, ranging from decisional harmony to the stimulation of innovation. In the preceding sections, I have tried to catalogue the various objectives the regulation is deemed to achieve, and to test them against the rules designed to achieve them. If my analysis is correct, it is hard to escape the conclusion that Rome II promises much more than it could possibly deliver.

The first set of objectives just calls for the creation of uniform choice-of-law rules, regardless of their contents. Such rules are needed, it is said, for the proper functioning of the internal market, which would require predictability of the outcome of the litigation, certainty as to the law applicable, the free movement of judgments, and undistorted competition.

- In section 3, I have argued that the proper functioning of the internal market and the removal of obstacles to undistorted competition are hampered by divergences between the substantive laws of the Member States, not by different choice-of-law rules. Uniform choice of law is no guarantee for an equal treatment of Community litigants. The free movement of goods and services and undistorted competition could only be furthered by a uniform conflicts rule placing all participants in the same market under the umbrella of the same substantive law, i.e., the law of ‘the market where competitors seek to gain their customer’s favour’.⁸⁸ The only rule in Rome II in conformity with this standard is Article 6.
- The mutual recognition of judgments could only be furthered by uniform choice-of-law rules if the Member States would still be testing the choice-of-law result of a foreign decision against the standard of their own conflicts law. However, not only has a ‘choice-of-law test’ become obsolete in most national systems, it is also excluded by the European rules on recognition and enforcement, which were enacted at a time when their acceptance could not be secured by a corresponding set of uniform conflicts rules.
- Thus, it would seem that the need for the ‘harmonisation of conflict-of-law rules’ does not stem from the exigencies of the internal market but rather from the same craving for stability, certainty and predictability that is at the root of any attempt to solve the choice-of-law conundrum. The only valid motive for the unification of European choice-of-law rules, I submit, is the

88. Explanatory Memorandum, *supra* n. 12, p. 16.

interest of potential litigants in uniform results: not only should they be able to ascertain by which law their rights and obligations are determined, they also have a right to expect that their relationship is governed by the same law, irrespective of the forum in which their dispute might be adjudicated.

Other general objectives underlying the provisions of Rome II support the choice of *equitable* criteria for a uniform designation of the applicable law. The regulation should not only be capable of achieving decisional harmony, it should also ensure that justice is done in individual cases. To that end, its rules should strike a reasonable balance between the interests of the parties. As we have seen in section 4, these objectives do not go beyond a general aspiration to designate the applicable law on a neutral basis, without taking account of its contents or the policies it is meant to further.

- As explained in recital 14, the objective of ‘doing justice in individual cases’ is just a promise to create ‘a flexible framework of conflict-of-law rules’, capable of accommodating various types of non-contractual obligations and open to exceptions for atypical situations. In this sense, ‘justice’ is done if, for each individual case, a ‘proper law’ can be found. The ‘proper law’, as determined by most of Rome II’s choice-of-law provisions, is the law of the country with which the case has, or is deemed to have, the strongest geographical connection. Whether or not the application of that law leads to substantive justice, is irrelevant.
- In this light, there is not much difference between a desire to do justice in individual cases and the ambition of striking a reasonable balance between the interests of the parties. Since the choice of the applicable law under most of Rome II’s provisions depends on geographical contacts, and not on the contents of the laws of the states involved, the concern for a reasonable balance must be focused on the interests the parties have in the way the choice is made rather than their interests in the substantive outcome of the litigation. I have argued that, in this context, ‘interests’ should be equated with ‘legitimate expectations’. What the parties have a right to expect, however, is nothing but a choice that can be rationalized in terms of foreseeability, or geographical proximity, or even substantive policies.⁸⁹ Within that wide margin, any solution the drafters of Rome II could have chosen would pass the test of legitimate expectations or a reasonable balance of interests.

89. The victim’s right to elect the most favorable law under Art. 7 is justified by a substantive policy of protecting the environment (*supra* section 5.4). It could be argued that the polluter ought to have expected the application of the ‘better’ law, whether it is the law of the place where the event giving rise to the damage took place, or the law of the place where the damage occurred. The choice of either law would have been foreseeable in most cases, but foreseeability is not the real issue here.

The remaining objectives, discussed in section 5, suggest that the policies underlying a specific area of substantive law are reflected in the corresponding choice-of-law provision. If this were true, the choice dictated by those provisions would depend, either directly or indirectly, on the contents of substantive law, and not on the significance attributed to one or more geographical contacts. A content-oriented choice-of-law rule would either refer to the law of the country that, in view of the substantive policy supported by the rule, may be deemed to have a superior interest in its application, or it would allow a choice between two or more alternative laws, depending on the preferred substantive result. The only provisions in Rome II answering this description are Articles 6 and 7.

- The connecting factor laid down in the provision on unfair competition and restrictions of competition focuses on the country where the market is (likely to be) affected by the competitor's wrongful conduct. Thus, Article 6 reflects the function of competition law, which is meant to protect competitors, consumers and the general public, and to safeguard the proper functioning of the market. On the choice-of-law level these goals are achieved by the designation of the law of the affected market. The 'market rule' contributes to fair competition by ensuring that all competitors in the same market must comply with the same rules of conduct and that all participants are equally protected from infringements of those rules.
- Article 7 contributes to the Community's aspiration of ensuring a 'high level of protection of the environment' by allowing the victim of environmental damage to elect the most favorable law. In my view, a wider choice of alternatives – including the domiciliary laws of the polluter and the victim in case they do not coincide with the *lex loci delicti* or the *lex loci damni* – would have made the rule even more effective.
- All other references to the function or objectives of substantive law are spurious. Article 4(1), said to reflect the compensatory function of modern tort law, is definitely not content-oriented. If it were, it would focus on the tort victim and refer to the law of his or her habitual residence. The exceptions in the second and third paragraph confirm that the whole provision is set in the key of the closest connection.
- The same can be said of Article 5. Set against the grand aspirations of recital 20, the solutions laid down in Article 5 are rather disappointing. If they are meant to promote various kinds of collective interests (protecting consumers' health, stimulating innovation, securing undistorted competition, facilitating trade), the focus on combinations of geographical contacts in paragraph 1, or on the closer connections privileged in paragraph 2, is hard to explain. Application of the law of the country in which the product was marketed (provided there is some other contact with that country) may contribute to undistorted competition, perhaps even to the facilitation of trade, but the protection of consumers' health and the stimulation of

innovation are best served by application of the law imposing the highest standards of conduct and safety.

- To protect the weaker party, Article 14(1) puts a limit on the freedom of choice: a choice-of-law agreement involving a non-commercial party is invalid if it was concluded before the event giving rise to the damage occurred. In most cases the restriction will prove to be meaningless, as the parties usually made their choice in connection with another relationship between them; an accessory choice then achieves the result intended by the parties and prohibited by Article 14(1). Curiously, the motive of protecting the weaker party does not recur in any other recital but the one on party autonomy, nor does it seem to have had an impact on any other provision.

7. CONCLUSION

The main purpose of uniform choice-of-law rules is to reduce uncertainty as to the law governing international legal relationships. If the rights and obligations of the parties are determined by one and the same law, irrespective of the jurisdiction in which the choice-of-law question is raised, there is neither gain nor loss in the divergences between substantive laws. Uniform conflicts rules ensure the stability of cross-border legal relationships, they reduce the attraction of forum shopping, and they enable prospective litigants to predict the choice-of-law outcome of their lawsuit. Not surprisingly, decisional harmony is viewed as an ideal worth striving for, even on the level of national conflicts law.

However, certainty, predictability and uniformity of result are not the only values conflicts law is meant to uphold. Since the second half of the 20th century, it has come to be accepted that substantive justice does play a role in the choice-of-law process, even when there is no recourse to public policy. Mounting criticism of the prevailing choice-of-law method and its rigid, mechanical rules has led to innovations characterized by increased flexibility on the one hand and a fresh orientation towards the policies of substantive law on the other. Naturally, these changes detract from the traditional ideal of decisional harmony: the achievement of uniform results is jeopardized both by flexible rules allowing a discretionary choice, and by rules inspired by substantive policies that may vary from state to state.

Such tensions between the objectives of conflicts laws cannot be ignored by lawmakers striving for the unification of choice of law. They must try to reconcile the need for certainty and predictability with the demand for flexible rules, and they will have to choose between uniform rules geared to blind jurisdiction-selection and rules oriented towards the objectives of substantive law. All these elements of contemporary choice of law can be found in the Rome II Regulation. Certainty and predictability are served by unambiguous connecting factors referring to specific locations (as opposed to open-ended criteria, as suggested by the European Parliament), while their rigidity is softened by special rules

for various subcategories and exceptional situations, and by the availability of fact-oriented escape clauses. The tension between legal certainty and substantive interests is reflected in the contrast between rules designed to provide a 'neutral' solution and those meant to achieve a preferred substantive result. Some rules, said to be geared to the promotion of substantive policies, feature exceptions based on an impartial center of gravity approach.

In this article, I have tried to answer the question which purpose is served by the unification of European conflicts rules in general and by the Rome II Regulation in particular. According to the opening recitals of both Rome I and Rome II, the proper functioning of the internal market creates a need for uniform rules, which are meant to 'improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments'. While the validity of these motives is beyond doubt, it is questionable whether the proper functioning of the internal market will be enhanced by uniform choice-of-law rules and to what extent the mutual recognition of judgments, already ensured by various regulations, depends on the unification of conflicts rules. In my view, the 'approximation' of European choice of law serves no purpose beyond itself, which is the achievement of uniform results. As for Rome II, there is an astounding discrepancy between the regulation's objectives as described in the preamble and the way they have been translated into concrete rules. Apart from ambiguous statements on 'the need to do justice in individual cases' and the intention 'to ensure a reasonable balance between the interests of the parties', there are various references to the objectives of substantive law, said to be reflected in specific conflicts rules. In reality, there are only two provisions fulfilling that promise: both the rule on unfair competition and the one on environmental damage express a concern for the substantive interests at stake. Since all other provisions are focused on the closest connection – as attested by a built-in common-domicile exception and/or a 'manifestly closer connection' escape – they are obviously not inspired by the function of substantive law, nor do they allow, save by coincidence, a choice of the law best suited to the objective the rule is supposed to promote. Their true achievement is an enhanced level of legal certainty.

If Rome II is any indication, decisional harmony is the principal aim of European choice-of-law unification. Whether or not it is true that uniform conflicts rules improve the proper functioning of the internal market and facilitate the free movement of judgments, it cannot be denied that certainty and predictability are values worth pursuing. On a national level, these objectives can only be achieved if the choice of the applicable law is made on the basis of strict neutrality with regard to substantive policies and the contents of the eligible laws. That is why Savigny came up with the concept of the 'seat' of a legal relationship: a neutral geographical criterion guiding us to the 'home country' of the relationship at issue. On the international level, however, decisional harmony can be achieved by conventions and regulations, even if the rule to be applied does not fit the paradigm of the closest connection. If there is consensus among a group of states – particularly the EU Member States – that

a substantive policy is worth pursuing, there is no reason why they should not adopt a uniform conflicts rule reflecting that policy. If the makers of Rome II had realized this, they might have been less reluctant to adapt the regulation's choice-of-law rules to the substantive objectives they are supposed to achieve. There is no need for a choice on a neutral basis if uniformity of result is ensured by choice-of-law rules laid down in international covenants or European regulations, even if those rules are geared to the advancement of substantive policies commonly supported in the participating states. Unfortunately, this simple truth is hardly reflected in the Rome II Regulation. Despite the preamble's bold policy statements, most of its choice-of-law provisions are blind to substantive values, therefore incapable of achieving anything but non-political, value-free results. If that is what the 'harmonisation' of choice of law is all about, it is high time the European legislature came back to the future.