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## GROWING CONVERGENCE, CONTINUING DIVERGENCE: COMPARATIVE REMARKS ON THE AMERICAN AND EUROPEAN PRIVATE INTERNATIONAL LAW OF TORTS

### Abstract

*The Restatement Second and Rome II are representatives of two different legal cultures. While Rome II, as the representative of the EU private international law of torts, appears in a formalist way to achieve 'private international law/conflicts justice', the American Restatement Second, which adopts an eclectic system of various approaches, appears as a 'result-oriented' legal instrument with the underlying idea of achieving 'substantive justice'. Although these systems have mainly preserved their unique characteristics, they have converged with each other over time. New approaches on both sides of the Atlantic indirectly support this convergence. This article identifies and critically evaluates the main convergent and divergent features of the EU and the US private international laws of torts comprehensively in line with the primary legal sources of information and practice.*

### Keywords

*Rome II – Restatement Second – private international law justice – substantive justice – private international law of torts – Restatement Third*

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## INTRODUCTION

Tort litigation has – always – indubitably been the principal battlefield of private international law (PIL).<sup>1</sup> Determining the applicable law in tort litigation and setting the rules for determination are far more complex than in other fields of PIL (*i.e.*, disputes arising out of contracts) owing to several reasons. The primary reason for this is that, although torts are influenced strongly by territorial cornerstones,<sup>2</sup> determining the “place of the tort” is more complicated when conduct and injury have occurred in different countries/states. The variety of tortious issues is another factor that renders setting the rules for the determination of the applicable law challenging. Moreover, in most cases, parties of a tortious relationship cannot choose the applicable law in advance, which is not the case in contractual relationships. Finally, in the field of PIL of torts, countries or states can adopt convenient legal policies for themselves regarding the determination of the applicable law, which also constitutes a compelling ground for setting uniform rules.<sup>3</sup> Therefore, the regulations related to the PIL of torts have always been controversial and challenging.

Despite extensive studies and focus on the field, the PIL of torts still preserves its significance because of its ever-changing nature. This can be partly attributed to the growing insignificance of national borders in

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<sup>1</sup> Regarding determination of the applicable law See A. Mills, *Party Autonomy in Private International Law*, Cambridge University Press, 2018, p. 395. Regarding determination of the jurisdictional principles see C. McLachlan, “Transnational Tort Litigation: An Overview”, in C. McLachlan and p. Nygh (eds.), *Transnational Tort Litigation: Jurisdictional Principle*, 1996, p. 3.

<sup>2</sup> M. Zhang, “Party Autonomy in Non-Contractual Obligations: Rome II and Its Impact on Choice of Law”, *Seton Hall Law Review*, 2009, Issue 39, p. 867; T.M. de Boer, “The Purpose of Uniform Choice-of-Law-Rules: The Rome II Regulation” *Netherlands International Law Review*, 2009, Issue 56, p. 297.

<sup>3</sup> C.H. Kaminsky, “The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law”, *Tulane Law Review*, 2010, Issue 85, p. 63–64. For more reasons See e.g., p. Torremans, “Non-Contractual Obligations” in p. Torremans, U. Grušić, C. Heinze, L. Merrett, A. Mills, C.O. García-Castrillón, Z.S. Tang, K. Trimmings and L. Walker (eds.), *Cheshire, North & Fawcett: Private International Law*, Oxford University Press, 2017, p. 776–777. See also, Restatement (Second) of Torts 1977 Section 6: “(A)ny rule of choice of law (...) represents an accommodation of conflicting values”.

tort litigation owing to globalization. In today's world, it is recorded that a wrongful act committed in one place can cause damage on the other side of the world within seconds.<sup>4</sup> In the light of this challenging situation, classical instruments of PIL of torts need to be constantly reconsidered.

The development of the PIL of torts has not occurred regionally or independently from other legal systems around the world, at least when considering the two leading legal systems of the PIL world. On the one hand, the PIL of torts of the United States of America (the US) and the European Union (the EU) showed many similarities until the twentieth century, particularly regarding the common methodological and philosophical reasoning.<sup>5</sup> On the other hand, they started showing serious divergence as of the twenty first century, with the diversion of the systems in legal reasoning. From that time on, a considerable amount of work has been carried out to compare these systems with each other from various aspects<sup>6</sup> within the scope of the primary

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<sup>4</sup> See e.g., probably the most famous case in the European PIL of torts: Case 21/76 *Bier v. Mines de Potasse d'Alsace* [1976] ECLI:EU:C:1976:166. For relatively recent examples see Case C-509/09 *eDate Advertising v. X and Société* [2011] MGN ECLI:EU:C:2011:685; Case C-523/10 *Wintersteiger AG v. Products 4U Sondermaschinenbau* [2012] ECLI:EU:C:2012:220; Case C-170/12 *Pinckney v. KDG Mediatech* [2013] ECLI:EU:C:2013:635; Case C-387/12 *Hi Hotel v. Uwe Spoering* [2014] ECLI:EU:C:2014:215; Case C-360/12 *Coty Germany v. First Note Perfumes* [2015] ECLI:EU:C:2015:485; Case C-441/13 *Pez Hejduk v. EnergieAgentur* [2015] ECLI:EU:C:2015:28; Case C-350/14 *Lazar v. Allianz SpA* [2015] ECLI:EU:C:2015:802.

<sup>5</sup> See S. Symeonides, *The New European Choice-of-Law Revolution: Lessons for the United States? Contract & Tort Law*, Duke University School of Law, 2008, available at: <https://web.law.duke.edu/video/new-european-choice-law-revolution-lessons-us-contract-tort-law-panel-1/> [last accessed 6.11.2021]; T.W. Dornis, "Local Data in European Choice of Law: A Trojan Horse from Across the Atlantic", *Georgia Journal of International Comparative Law*, 2016, Issue 44, p. 306.

<sup>6</sup> See F.K. Juenger, "American and European Conflicts Law", *The American Journal of Comparative Law*, 1982, Issue 30, p. 117; F.K. Juenger, *Choice of Law and Multistate Justice*, Brill, Special ed., 2005, p. 45-46; M. Reimann, "American Private Law and European Legal Unification - Can the United States be a Model?" *Maastricht Journal of European and Comparative Law*, 1996, Issue 3, p. 217; M. Reimann, "Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues", *Tulane Law Review*, 1998-1999, Issue 73, p. 1337. The scope of the scholarly work widened especially after the publication of the two very important articles published in 2008: See R. Michaels, "The New European Choice-of-Law Revolution" *Tulane Law Review*, 2008, Issue 82, p. 1607 and S. Symeonides, "The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons", *Tulane Law Review*, 2008, Issue 82, p. 1.

sources of information (*i.e.*, the Restatement Second<sup>7</sup> and the Rome II Regulation).

As explained below, there are two major – and some minor – divergence points between the US and the EU’s PIL of torts. Owing to the influence of the *Savignian approach*, the legal instruments of the EU PIL of torts appear in a *formalist* way to achieve “*private international law/conflicts justice*”.<sup>8</sup> Meanwhile, the American Restatement Second, which adopts an *eclectic system of various approaches*, appears as a ‘*result-oriented*’ legal instrument with the underlying idea of achieving *substantive justice*.<sup>9</sup>

Despite the abovementioned continuing divergence, it is indubitable that there has also been a growing convergence at some points between these two major PIL systems over the years. Nevertheless, today, the US and the EU systems are intertwined with each other in so many aspects that interpreting and evaluating each has become inconceivable without referencing the other.<sup>10</sup> The ‘conscious paralle-

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<sup>7</sup> Restatement (Second) of the Law Conflict of Laws as adopted and promulgated at Washington, D.C., May 1969. Although the Restatements are not binding, nearly half of all American jurisdictions follow the Restatement Second. Kaminsky, *supra* note 3, p. 77; S. Symeonides, “A New Conflicts Restatement: Why Not?”, *Journal of Private International Law*, 2009, Issue 5, p. 391–392. Therefore, it is the functional equivalent of Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, 40 for the purposes of comparison. For the other approaches in the US see, Mills, *supra* note 1, p. 411. Moreover, Rome II is accepted as one of the predecessors of the choice of law revolution in the US, which overlaps with the promulgation of the Restatement Second. Thus, for the sake of explaining the growing convergence as well as continuing divergence, Rome II and the Restatement Second should be melt in the same pot. See Symeonides, ‘Why Not’, *supra* note 7, p. 384.

<sup>8</sup> Savigny has built his theory on a perspective that would result in a locally-centred uniformity based on the nature of things (*Natur der Sache*). With regard to delictual obligations, however, he advocated the *lex fori* approach based on the fact that tort rules protect the public interest and cannot be circumvented by choice of law rules. See de Boer, *supra* note 2, p. 296.

<sup>9</sup> P. Hay, “European Conflicts Law After the American “Revolution” – Comparative Notes”, *University of Illinois Law Review*, 2015, p. 2055.

<sup>10</sup> Even the adopted terminology was shaped with reference to the other. For instance, some scholars describe the evolvement in conflict of laws of the EU as “revolution”, while others claim that it can only imply an “evolution” compared to the US. For the idea of “revolution”, See e.g., R. Michaels, “Die europäische IPR-Revolution: Regulierung, Europäisierung, Mediatisierung” in D. Baetge, J. von Hein and M. von Hinden (eds), *Die richtige Ordnung – Festschrift für Jan Kropholler zum 70. Geburtstag*, Mohr Siebeck, 2008, p. 151. See also von Hein’s, Symeonides’ and Solomon’s speeches, *supra* note 5. For

lism<sup>11</sup> of the two systems is therefore not a coincidence considering the serious amount of work by twenty first century jurists from both sides of the Atlantic, who strongly agree that they have much to learn from each other. As an outcome of this endeavour, the PIL of torts has experienced a two-sided convergence: in some states of the US, codification showed up as an increasing trend,<sup>12</sup> while the EU experienced a far-reaching shift away from the formalist approach and the emphasis on ‘*private international law/conflicts justice*’.<sup>13</sup> However, neither of these trends progressed as quickly and effectively as hoped, mainly because the theoretical consensus required for codification has not been reached in the US and the goal of achieving substantive justice is not yet fully adopted by the courts in the EU. So, it is still early to neglect the divergence between the systems.

This paper begins with a study of the legal roots of the abovementioned primary sources of information to set forth the historical diversities. Then the provisions revealing the above-mentioned characteristic of the Restatement Second are explained. The systems are compared as to various major and minor aspects in the light of the relevant articles of Rome II. Finally, a current analysis of the systems is made while giving reference to new approaches. In our opinion, this analysis reflects the growing convergence and – at the same time – the continuing divergence between the American and the European PIL of torts. To allow for a focused discussion, explanations and discussions in this paper are limited to determining the law applicable in tort cases.<sup>14</sup>

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a different opinion, see e.g., P.M. North, “Reform but not Revolution: General Course on Private International Law”, in *Collected Courses of the Hague Academy of International Law Volume 220*, Brill | Nijhoff, 1990. See also Hay, *supra* note 9, p. 2053.

<sup>11</sup> Hay, *supra* note 9, p. 2056.

<sup>12</sup> Kaminsky, *supra* note 3, p. 102.

<sup>13</sup> Hay, *supra* note 9, p. 2054.

<sup>14</sup> In addition, the relationship between Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351 and Rome II, is not addressed in this study, as it is comprehensive enough to be the subject of a separate study. For a current work on the subject, see E. Fronczak, “*Cuius legislatio, eius iurisdictio? The Emerging Synchronisation of European Private International Law on Tort*” *ERA Forum*, 2016, Issue 17, p. 173. See also A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford Private International Law Series, 2010, p. 30–85.

# I. AMERICAN PRIVATE INTERNATIONAL LAW OF TORTS: STORY OF A “REVOLUTION”

## 1. TRADITIONAL APPROACHES

The US PIL system – or ‘conflict of laws’, as it is described in the American literature – is based on the traditional approaches followed in the US for many years.<sup>15</sup> Although various approaches have influenced the US PIL of torts, it is widely accepted that there are three dominant approaches, which have brought the system into its current state: (i) the *lex loci delicti* rule of the Restatement First,<sup>16</sup> (ii) Currie’s governmental interest analysis, (iii) Leflar’s choice influencing considerations.

The *lex loci delicti* rule (i.e., applying the national law of the state in which the last event gave rise to an obligation, in cases of tort: *the law of the place where the tort was committed*), was applied by the US courts for the first time in 1880 in the case of *Dennick v. Central Railroad Co.*<sup>17</sup> In 50 years, having the support of a large amount of scholarly work,<sup>18</sup> it had become a black-letter rule in the Restatement First (1934)<sup>19</sup> and had a monolithic following in the United States until the early 1960s.<sup>20</sup> The rule was based on the ‘vested rights theory’, which argues that every

<sup>15</sup> See Symeonides, *Contract & Tort Law*, *supra* note 5.

<sup>16</sup> US Restatement (First) of the Law Conflict of Laws 1934.

<sup>17</sup> The application of this doctrine was upheld in the famous case of *Alabama Great Southern R.R. Co. v. Carroll Supreme Court of Alabama* 97 Ala. 126, 11 So. 803 (1892). See Zhang, *supra* note 2, p. 876.

<sup>18</sup> This territorial approach has its origin in Huber’s doctrine. Then, J. Story, “the first great American conflicts scholar” followed his leads. Later, this approach paved the way to the development of “the theory of vested rights” by Joseph Beale. See Zhang, *supra* note 2, p. 874–875; L.C. Wolff, “Flexible Choice-of-Law Rules: Panacea or Oxymoron?” *Journal of Private International Law*, 2014, Issue 10, p. 445. The approach mainly asserts that the law of the place where an event took place should govern its legal consequences. See Zhang, *supra* note 2, p. 875.

<sup>19</sup> B. Hanotiau, “The American Conflicts Revolution and European Tort Choice-of-Law Thinking”, *American Journal Comparative Law*, 1982, Issue 30, p. 73.

<sup>20</sup> P.J. Borchers, “The Choice-of-Law Revolution: An Empirical Study”, *Washington & Lee Law Review*, 1992, Issue 49, p. 359; R.H. Chappell, Jr., “Lex Loci Delicti and *Babcock v. Jackson*” *William & Mary Law Review*, 1966, Issue 7, p. 249. See also Zhang, *supra* note 2, p. 877: “Further, given its axiomatic status in the conflict of laws doctrine in the United

state is under an obligation to recognize and enforce the rights that had been legally vested under a foreign law.<sup>21</sup> We should also note that the Restatement First has attempted to solve problems regarding conflict of laws by laying down the choice of law norms irrespective of the forum's substantive law.<sup>22</sup>

However, objections to the *lex loci delicti* rule had begun arising even before the Restatement First entered into force. Around 1920, following Cook and Lorenzen's suggestion of replacing the traditional *lex loci delicti* rule with a more flexible one,<sup>23</sup> criticisms against the principle gained momentum. The arguments of legal realists, two of whom were Cavers<sup>24</sup> and Cook,<sup>25</sup> paved the way for heavier critici-

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States and many civil law countries, the *lex loci delicti* was regarded as "one of the few rules of conflict of laws which are uniform throughout the world".

<sup>21</sup> Regarding the vested rights theory see Chappell, *supra* note 20, p. 249; Hanotiau, *supra* note 19, p. 73; W.A. Reppy, "Eclecticism in Choice of Law: Hybrid Method or Mishmash?", *Mercer Law Review*, 1983, Issue 34, p. 645; A.M. Sherwood, "Babcock v. Jackson: The Transition from the Lex Loci Delicti Rule to the Dominant Contacts Approach" *Michigan Law Review*, 1964, Issue 62, p. 1359.

<sup>22</sup> F.K. Juenger, "General Course on Private International Law", *Collective Courses of the Hague Academy of International Law*, 1983, Issue 193, p. 119, 220-1; Wolff, *supra* note 18, p. 444.

<sup>23</sup> W.W. Cook, "The Logical and Legal Basis of the Conflict of Laws", *Yale Law Journal*, 1924, Issue 33, p. 457; E.G. Lorenzen, "Territoriality, Public Policy and the Conflict of Laws", *Yale Law Journal*, 1924, Issue 33, p. 736. See also Chappell, *supra* note 20, p. 249; Hanotiau, *supra* note 19, p. 74; Kaminsky, *supra* note 3, p. 75; Zhang, *supra* note 2, p. 877-8.

<sup>24</sup> Cavers argued that it is not right to determine the applicable law without taking its merits into consideration. See D.F. Cavers, "A Critique of the Choice-of-Law Problem", *Harvard Law Review*, 1933, Issue 48, p. 208. See also Hanotiau, *supra* note 19, p. 80; Zhang, *supra* note 2, p. 877. This way, he raised criticism against the Restatement First which determined the applicable law based upon factors independent of the substantive content of each case. See Cavers, p. 181. See also Borchers, *supra* note 20, p. 360; B. Currie, "On the Displacement of the Law of the Forum", *Columbia Law Review*, 1958, Issue 58, p. 966.

<sup>25</sup> Cook mainly asserts that the right way to deal with conflict of laws problems is to reject the mechanical use of all principles and rules. He argues as follows: "[T]he danger in continuing to deceive ourselves into believing that we are merely applying the old rule or principle to a new case by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we ... fail to take into consideration all the relevant facts of life required for a wise decision." Cook, *supra* note 23, p. 487. Therefore, he suggests that "in many cases it makes little difference which rule is adopted, so long as it is reasonably simple and definite." Cook, *supra* note 23, p. 488. For the arguments in general and comments, See Borchers, *supra* note 20, p. 358; Zhang, *supra* note 2, p. 877-878. See also Currie, *supra* note 24, p. 966: "It has been some years since Walter Wheeler Cook

sms<sup>26</sup> and court decisions that reject the long-established *lex loci delicti* by using different instruments.<sup>27</sup> Soon, in 1963, these counterarguments bore their fruits for the first time in the famous case of *Babcock v. Jackson*, which is a cornerstone in the US PIL of torts.<sup>28</sup> In this case, New York Court of Appeals posed an essential question, which is well ahead of its time:<sup>29</sup> “Shall the law of the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?”<sup>30</sup> In the end, the court decided to apply the law of the state “because of its relationship or

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discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.”

<sup>26</sup> See Smith describing *lex loci delicti* as “an obligation springing to birth out of the soil at the possibly unsuspecting actor’s feet and hanging itself round his neck like an albatross (...)” J.A.C. Smith, “Torts and the Conflict of Laws”, *Michigan Law Review*, 1957, Issue 20, p. 457. See also A.A. Ehrenzweig, “American Conflicts Law in Its Historical Perspective Should the Restatement Be “Continued”?”, *University of Pennsylvania Law Review*, 1954, Issue 103, p. 133; A.A. Ehrenzweig, “The ‘Most Significant Relationship’ in the Conflicts Law of Tort. Law and Reason versus the Restatement Second”, *Law & Contemporary Problems*, 1963, Issue 28, p. 701–702. The author based his arguments on the legitimate expectations of the parties instead of the tort itself with reference to the principles of previsibility and calculability. According to the author, if the defendant has a legitimate reason to believe that a specific rule would be applied, the rule of *lex fori* should be disregarded. However, he claims that *lex loci* rule cannot be replaced by a restatement in situations where it is desirable. The award of *Babcock v. Jackson* was partially based on this reasoning. This way, Ehrenzweig’s theory had reached a far impact. See Borchers, *supra* note 26, p. 361.

<sup>27</sup> See i.e., *Levy v. Daniels’ U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928); *Parker v. Gordon* 178 F.2d 888 (1st Cir. 1949); *Grant v. McAuliffe*, 41 Cal.2d 859 (1953); *Dale System v. Time, Inc.*, 116 F. Supp. 527 (US District Court for the District of Connecticut 1953); *Walton v. Arabian American Oil Co.* 233 F.2d 541 (2d Cir. 1956); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Haumschild v. Continental Casualty Co.* 7 Wis. 2d 130, 95 N.W.2d 814 (1959); *Grant v. McAuliffe*, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Pearson v. Northeast Airlines* 309 F.2d 553 (2d Cir. 1962); *Griffith v. United Airlines, Inc.*, 416 Pa. 1 (1964); *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (N.Y. 1965). See in general Sherwood, *supra* note 21, p. 1361.

<sup>28</sup> Sherwood, *supra* note 21, p. 1358; Symeonides, ‘Why Not’, *supra* note 7, p. 387: “*Babcock v. Jackson* (...) marked the beginning of the choice-of-law revolution in tort conflicts”.

<sup>29</sup> Chappell, *supra* note 20, p. 254.

<sup>30</sup> *Babcock v. Jackson* 191 N.E.2d 279, 12 N.Y. 2d 473, 477 (1963).



contact with the occurrence of the parties has the greatest concern with the specific issue raised in the litigation".<sup>31</sup> This case has drawn much interest<sup>32</sup> and expedited the search for possible alternatives to the *lex loci delicti* rule of the Restatement First. Therefore, '41 other jurisdictions have followed New York's lead by abandoning the *lex loci delicti* rule'<sup>33</sup> and – mostly – adopted one of the approaches explained below.<sup>34</sup>

Brainerd Currie, whose 'governmental interest analysis' has had a significant effect on the US PIL of torts, is considered to be the scholar who presented 'the first real alternative' to the *lex loci delicti*.<sup>35</sup> As a starting point, Currie argued that PIL is interested – mainly – in the interests of states.<sup>36</sup> Accordingly, he divided the conflict of laws cases into three categories: False conflicts, true conflicts, and unprovided-for cases. False conflicts occur where only one state has a relevant interest<sup>37</sup> in applying its law to the case (which corresponds to the possibility where

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<sup>31</sup> *Ibid.*, para 481.

<sup>32</sup> See Chappell, *supra* note 20, p. 252 n. 15, 257.

<sup>33</sup> S. Symeonides, *Choice of Law*, Oxford University Press, 2016, p. 127.

<sup>34</sup> For the chronological order of the states, see *ibid* 128. However, the "aftermath of Babcock" did not take place as planned. Two generalizations can be made to summarize the situation after Babcock: the first group of US courts have misunderstood the governmental interest analysis and tried to determine the 'governmental interest' by counting the contacts between the state and the conflict. The second group of courts have seen Babcock as an exception and continued applying the *lex loci* rule. See S. Terzian, "The Aftermath of Babcock", *Chicago Law Review*, 1966, Issue 54, p. 1302.

<sup>35</sup> Zhang, *supra* note 2, p. 879, 888; Dornis, *supra* note 5, p. 311. Dornis states as follows:

By definition, interest analysis takes a quasi-statutist position: conflict resolution requires choosing between rules of decision, not between legal regimes. This choice is made with specific regard to—and ideally in accordance with—a balancing of substantive policies. At the same time, this means that interest analysis must reject the technical automatism of traditional choice of law, particularly Savignian concepts like the 'seat' of a relationship and other jurisdiction-selecting analyses.

<sup>36</sup> Currie, *supra* note 24, p. 1019.

<sup>37</sup> See Terzian, *supra* note 34, p. 1316:

When a jurisdiction is said to have an 'interest' in the resolution of an issue, it means that the policy underlying the value judgment its legislature or courts have crystallized into a rule of law would be effectuated by applying that rule of law to the particular parties and the particular set of facts in the case presented for decision. A jurisdiction does not have an 'interest' in the resolution of the issue simply because it has a policy with regard to this issue. For the jurisdiction to have an 'interest', the parties or operational facts must be, in the context of the particular case, subjects which are proper objects of its regulatory concern.

the parties have a common domicile), so no problems arise in determining the applicable law.<sup>38</sup> The opposite possibility, where two or more national laws may be applied as their legal policies are relevant to the facts of the case, constitutes a true conflict. As to unprovided-for cases, there are no states having an interest in the application of its law. *Currie* suggests applying the forum law to false conflicts and unprovided-for cases.<sup>39</sup> Many scholars adopted *Currie's* approach<sup>40</sup> and it had an impact on many court decisions.<sup>41</sup>

Leflar, whose arguments are considered to be one of the three dominant approaches that shaped the US PIL of torts, criticizes the strict rule of the Restatement First and defines five objectives as the sole basis upon which courts should be able to solve all conflict of laws problems:<sup>42</sup> (a) predictability of the legal results; (b) maintenance of interstate and international order; (c) simplification of judicial task; (d) the advancement of the forum's governmental interest; and (e) the application of the 'better' rule of law.<sup>43</sup> Based on these objectives, *Leflar's* choice of law approach is widely called 'choice-influencing considerations' or 'better law approach' and considered to be a remarkable success that impacted numer-

See also Cook, *supra* note 23, p. 459. In short, 'interest', in the sense of this theory, means the power to determine the legal consequences attached to given case. See also Reppy, *supra* note 21, p. 2055.

<sup>38</sup> Currie, *supra* note 24, p. 1021–1022. "Here the law of the forum ... was displaced not by a contrary foreign law, given preference by the system of conflict of laws, but the mere logic of the system itself": Currie, *supra* note 24, p. 965.

<sup>39</sup> See Currie, *supra* note 24, p. 1006–1017; Borchers, *supra* note 20, p. 360–361; Kaminsky, *supra* note 3, p. 76; Zhang, *supra* note 2, p. 881. Thus, Currie is "the creator of the personal-law based choice-of-law method of interest analysis": Reppy, *supra* note 21, p. 2082. For the problem of the disinterested forum, see Terzian, *supra* note 34, p. 1329.

<sup>40</sup> Kaminsky, *supra* note 3, p. 76; Terzian, *supra* note 34, p. 1301; Zhang, *supra* note 2, p. 882: "The distinctive contribution of Currie's approach was focusing on the content of the competing laws".

<sup>41</sup> See e.g., *Griffith v. United Airlines, Inc.*, *supra* note 27; *Dym v. Gordon*, *supra* note 27; *Babcock v. Jackson*, *supra* note 30. For the analysis of the last two cases, see Terzian, *supra* note 34, p. 1301. The author indicates that *Dym v. Gordon* case is not really grounded on any governmental interest analysis. Moreover, the case used misleading terms of governmental interest; and thus, took the approach "two steps backward" (after the *Babcock* case).

<sup>42</sup> R.A. Leflar, "The Torts Provisions of The Restatement (Second)", *Columbia Law Review*, 1972, Issue 72, p. 267.

<sup>43</sup> Hanotiau, *supra* note 19, p. 82; Reppy, *supra* note 21, p. 2055.

ous cases in the US. The unique feature of *Leflar's* 'better law' approach is that it aims to build a decision on an informed feeling of justice or equity. In practice, this approach encouraged the courts to determine the applicable law by taking the merits of the case into consideration. Despite this, some scholars criticized *Leflar's* approach as he put his objectives forward "in an unweighted and open-ended way".<sup>44</sup>

The approaches explained above are primarily reflected in the Restatement Second with the addition of some others. Therefore, it would not be false to claim that the Restatement' Second's uniqueness stems from this variety. The Restatement Second plays a vital role in developing the US PIL of torts by vesting the courts with the discretionary power to determine the applicable law based on the merits of the case. *Reese*, the reporter of the Restatement Second, explicitly stated that rules – and rules alone – cannot bring certainty and predictability to a subject in which some values do not exist. Therefore,

[o]f necessity, many conflicts' rules must be fluid in operation and leave much to be worked out by the courts. A Restatement, of course, must provide whatever guidance is possible. Hence the Restatement Second should state precise and definite rules in those few areas where this can be done. Elsewhere, broad, flexible rules must suffice. Such rules can be helpful, particularly if accompanied by a statement in the comments of the various policies that should guide the courts in applying them.<sup>45</sup>

The eclectic<sup>46</sup> system of the Restatement Second, which is fed from various approaches, is examined below.

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<sup>44</sup> Borchers, *supra* note 20, p. 363.

<sup>45</sup> W.L. Reese, "Conflict of Laws and the Restatement Second", *Law & Contemporary Problems*, 1963, Issue 28, p. 681.

<sup>46</sup> Reppy, *supra* note 21, p. 2056: "Eclecticism in choice of law occurs when a court combines (...) the theories for allocating sovereignty to create a modern method of choice of law to resolve a multiple-state claim or issue that is a part of the claim". The author identifies the Restatement's eclecticism as 'big-mix eclecticism' based on Section 145 and 188 that employs the mix of territorial and personal law contacts. See Reppy, *supra* note 21, p. 2057, 2097.

## 2. THE ECLECTIC SYSTEM OF THE RESTATEMENT SECOND

Section 145 of the Restatement declares: “The rights and the liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.”

The first part of Section 6 merely recognizes that the forum law is applied to cases where forum law has a relevant choice of law regulation. In cases where it has no such choice, Section 6 (2) foresees a solution by counting the factors relevant to the choice of applicable law:

[The] factors relevant to the choice of the applicable law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (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.

The Restatement is built on two cornerstones: (i) ‘*the most significant relationship*’, which is the core of the Restatement Second and (ii) a list of principles stated in Section 6 that provides guidance in pinpointing the applicable law. The ‘most-significant-relationship’ formula points out the judicial preference of ‘better law’ in itself. Judges are required to find the better law for the case by using one of the illustrative factors.<sup>47</sup> As can be seen from the Sections stated above, *lex loci delicti*, which stood as the fundamental rule of the Restatement First, is abandoned by the Restatement Second.<sup>48</sup> Considering the discretionary power vested to the judge, it is also clear that the Restatement Second is

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<sup>47</sup> Symeonides, ‘Why Not’, *supra* note 7, p. 388, 397. In fact, determination of the applicable law in the Restatement involves a two-step process: Identifying the relevant contacts and weighing their significance. See Zhang, *supra* note 2, p. 880, 885; Symeonides, ‘Why Not’, *supra* note 7, p. 397.

<sup>48</sup> Leflar, *supra* note 42, p. 268. However, the fact that the place of injury is still used as a parameter as the starting point of determining the applicable law. See Kaminsky, *supra* note 3, p. 71.

formulated in 'reaction' to the Restatement First's mechanical-formalist approach.<sup>49</sup> Emergence of the understanding that determines the applicable law according to the substantive law is defined as a 'revolution' in the US and therefore the Restatement Second is deemed the source of information which influenced and was influenced by the 'revolution' in the PIL of the US.<sup>50</sup>

In sum, as a result of the revolution in the US PIL of torts:<sup>51</sup>

- Approaches are adopted instead of rules,
- Flexibility is preferred instead of rigidity,
- Multiple factors are defined instead of a single connecting factor,
- Content selecting is based on policy instead of jurisdiction,
- 'Justice' is chosen as the goal instead of 'PIL justice'.

However, it is also stated that the Restatement Second failed to meet the '*great expectations*' expected from it, since it brought nothing but minor changes in terms of its outcomes.<sup>52</sup> The main points of criticism concentrate on its not offering the judge a precise guideline and leaving too much space for individual assessment.<sup>53</sup> According to a view, the criticized vagueness of the Restatement Second occurred, because six commentators having six different approaches '*could not come anywhere near agreement*'.<sup>54</sup>

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<sup>49</sup> Symeonides, 'Why Not', *supra* note 7, p. 392, 396.

<sup>50</sup> *Ibid.*, p. 386.

<sup>51</sup> See Symeonides, *Contract & Tort Law*, *supra* note 5. Although it will be examined in detail below, it is worth mentioning here that since both Rome II (the EU) and Restatement First (the US) use the *lex loci* rule, in a broad sense, these explanations can be adapted to the comparison of Rome II and the Restatement Second without any major modifications.

<sup>52</sup> See for instance Symeonides, *Contract & Tort Law*, *supra* note 5. According to the author this is the outcome of the distinction of conduct regulation rules and loss-distribution cases in the US law which is explained below. See also Zhang, *supra* note 2, p. 910.

<sup>53</sup> "Although printed in black-letters, the Second Restatement's tort provision is not much of a rule" Borchers, *supra* note 20, p. 365; F.K. Juenger, "Choice of Law in Interstate Torts", *University of Pennsylvania Law Review*, 1997, Issue 118, p. 212. For a similar conclusion, see Symeonides, 'Why Not', *supra* note 7, p. 389; Hay, *supra* note 9, p. 2059: "It provides a home or hiding place, for all comers".

<sup>54</sup> Leflar, *supra* note 42, p. 268, 270: "The Restatement Second (...) tend[s] to lump all the [approaches] together; with its effort to be all things to all theorists". See also Borchers, *supra* note 20, p. 362 n. 47: "Second Restatement is eclectic in nature [because it] reli[es] on a variety of different theories of any values".

It is also doubtful whether the Restatement Second (or eclectic approaches in general) is successful in practice. In 1992 *Borchers* conducted a study by examining many verdicts rendered in the US and concluded that courts do not take the new approaches seriously.<sup>55</sup> The same applies today, as well.<sup>56</sup>

Despite the criticisms, the techniques applied by the US courts following the Restatement Second are valuable in the sense that they are not mechanical and seek to evaluate directly whether it is *just* for the court to choose any applicable law. This is undeniably fruitful in terms of legal technique. Therefore, instead of simply ignoring the approach, the current trend in the US doctrine is to find the golden equilibrium between the approaches of the Restatements First and Second.<sup>57</sup>

## II. EUROPEAN PRIVATE INTERNATIONAL LAW OF TORTS: A SYSTEM BASED ON CONFIDENT HUMILITY

“While American conflicts law was stumbling through a loud ‘revolution’ ... [E]uropean PIL was going through a quiet evolution, gradually repairing the old system and producing several noteworthy PIL codifications.”<sup>58</sup>

Since the changes in European PIL occurred later than in the US, the Europeans had the chance to “pick the raisins” from the US system and

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<sup>55</sup> *Borchers*, *supra* note 20, p. 379. See also Symeonides, ‘Why Not’, *supra* note 7, p. 396: “If the principles stated in Section 6 were intended to limit the judge’s discretion, that message was lost on the vast majority of judges who have applied Section 6.”

<sup>56</sup> For a relatively recent evaluation, see Symeonides, ‘Why Not’, *supra* note 7, p. 394.

<sup>57</sup> *Ibid.*, p. 409. For example, Hartley demonstrates that, if the better law approach can clarify two issues, it has much to recommend: “(i) the criteria to determine the better law and (ii) the legal systems that the court chooses among”. See T.C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, Cambridge University Press, 3rd ed., 2020, p. 625.

<sup>58</sup> S. Symeonides, “Rome II and Tort Conflicts: A Missed Opportunity”, *American Journal of Comparative Law*, 2008, Issue 56, p. 173–175; R. Michaels, “After the Revolution – Decline and Return of U.S. Conflict of Laws”, *Yearbook of Private International Law*, 2009, Issue 11, p. 13.

built a unique one,<sup>59</sup> which is still thriving<sup>60</sup> in contrast to the current unproductive period of the US explained above.

## 1. "OMNIBUS VIIS ROMAM PERVENITUR"<sup>61</sup>

The European Community's harmonization of PIL in civil and commercial matters began in the late 1960s. In 1968, the European Economic Community adopted a "Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" (also called the "Brussels Convention").<sup>62</sup> Soon, in 1972, the six (original) Member States of the European Community prepared a preliminary draft of "Convention to Law Applicable to Contractual and Non-contractual Obligations".<sup>63</sup> Although the Convention on the law applicable to contractual obligations (also called the "Rome Convention")<sup>64</sup> was entered into force in 1991, the regulation regarding non-contractual issues fell into abeyance for some time.

The idea of addressing tort conflicts accelerated again with the Treaty of Amsterdam in 1997.<sup>65</sup> A Green Paper<sup>66</sup> published in 2002 with a preliminary draft proposal, paved the way for a regulation proposal

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<sup>59</sup> Hay, *supra* note 9, p. 2055; Kaminsky, *supra* note 3, p. 71-72. The American influence upon the Rome II Regulation is too obvious to ignore. For example, and especially, Art 4 of Rome II is nearly indistinguishable from "Neumeier choice-of-law rules for torts" (The rules used in *Neumeier v. Kuehner* were adopted by a majority of the New York Court of Appeals and began to be known as "the Neumeier rules") and 1991 Code of Louisiana. *Neumeier v. Kuehner* 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972). See Reppy, *supra* note 21, p. 2060; p. Stone, "The Rome II Regulation on Choice of Law in Tort", *Ankara Law Review*, 2007, Issue 2, p. 95, 102.

<sup>60</sup> Michaels, '2009', *supra* note 58, p. 13.

<sup>61</sup> "All roads lead to Rome".

<sup>62</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299.

<sup>63</sup> Torremans, *supra* note 3, p. 781.

<sup>64</sup> Rome Convention on the law applicable to contractual obligations [1980] OJ 266, 1.

<sup>65</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/01.

<sup>66</sup> Commission of the European Communities, *Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization* (Green Paper, 2003).

in 2003.<sup>67</sup> The Commission finalized this proposal on 22 July 2003 and it was also accompanied by a detailed Explanatory Report and an Article-by-Article Commentary.<sup>68</sup> In this proposal, the Commission stated that the proposed Convention (*i.e.*, ‘Rome II’) would be a natural extension of the unification of the rules of PIL relating to contractual and non-contractual obligations<sup>69</sup> in civil or commercial matters in the Community.<sup>70</sup> Even though the said purpose was shared in general, the proposal was criticized extensively. The European Parliament had proposed many amendments at the first reading,<sup>71</sup> mostly promoting more flexibility in the conflict of law rules.<sup>72</sup> The ensuing ‘*trialogue*’ bridged the disagreements with a compromise text that was adopted by the European Parliament on the third reading, on 11 July 2007.<sup>73</sup>

## 2. A BRIEF OVERVIEW OF ROME II

The rules on determining the applicable law<sup>74</sup> lie at the heart of Rome II,<sup>75</sup> since – as it is stated in the Explanatory Memorandum and Recital

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<sup>67</sup> Torremans, *supra* note 3, p. 781.

<sup>68</sup> Rome II Regulation; Explanatory Memorandum of the Memorandum Commission of the European Communities accompanying the Proposal for a Rome II Regulation, p. 2.

<sup>69</sup> Rome II has separate provisions that are applied respectively to torts and other non-contractual obligations including unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. However, it is widely accepted that the rules are “far from well-established”. See Zhang, *supra* note 2, p. 864, 869. For the sake of comparison, this paper is limited to issues related to torts.

<sup>70</sup> Explanatory Memorandum, p. 3.

<sup>71</sup> EP JURI Committee, *First Reading Report of the on the Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations* (2005, Diana Wallis: Rapporteur, EP document A6- 0211/2005).

<sup>72</sup> X.E. Kramer, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, 2008, available at: [www.dianawallis.org.uk](http://www.dianawallis.org.uk) [last accessed 5.5.2021].

<sup>73</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 7.

<sup>74</sup> The focus of the Regulation is the conflict of law rules laid down in articles 4–14. Kramer, *supra* note 72, p. 8. Particularly, Chapter II (Articles 4–9) of the Regulation provides the rules for torts/delicts and Chapter III which contains the provisions for non-contractual obligations rather than torts/delicts are not in the scope of this paper.

<sup>75</sup> Torremans, *supra* note 3, p. 781–782. However, controversy on the subject had arisen years ago. Especially under the intellectual leadership of the courts of England,



6, 14 and 16 – the aim of harmonizing the conflict of laws rules is to promote equal treatment in the EU by standardizing the Member States' conflict of laws rules regarding non-contractual obligations.<sup>76</sup> Its practical goals of providing foreseeability and legal certainty as well as reducing litigation costs are supported by such harmonization, which ensures the application of the same substantive national law irrespective of the Member State in which the action is brought.<sup>77</sup> Even though this is not an undisputed conclusion,<sup>78</sup> this purpose should always be considered when interpreting the provisions of the Regulation.

Article 4, the general provision regarding torts in Rome II, is formulated as 'rule(s)-plus-exception', which is common in the design of PIL rules.<sup>79</sup> This article adopts the principle of *lex loci damni* (the law of the place where damage occurred) and therefore determines the localizing factor as the place of injury (Article 4(1)).<sup>80</sup> Simply put, as a general rule, in case the parties have not chosen the applicable law (Article 14),<sup>81</sup> the law

the *lex loci delicti* rule was held to be applicable in international tort disputes. See Mills, *supra* note 1, p. 396.

<sup>76</sup> Explanatory Memorandum, p. 5. For the argument that the promises in question are unrequited in most cases and can have contradictory results in itself, see de Boer, *supra* note 2, p. 300.

<sup>77</sup> Torremans, *supra* note 3, p. 782; Explanatory Memorandum, p. 5; Kaminsky, *supra* note 3, p. 78: "Indeed Rome II took the form of a self-executing regulation rather than the generally preferred directive form". See also de Boer, *supra* n 2, p. 331: He argues that "the approximation of European choice of law serves no purpose beyond itself, which is the achievement of uniform results."

<sup>78</sup> See e.g., de Boer, *supra* note 2, p. 300. For a criticism against the "mixing of personal-law and territorial theories in tort cases under Rome II", see Reppy, *supra* note 21, p. 2069.

<sup>79</sup> R. Fentiman, "The Significance of Close Connection" in W. Binchy and J. Ahern (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations – A New International Litigation Regime*, Brill | Nijhoff, 2009, p. 86.

<sup>80</sup> M. Mandery, *Party Autonomy in Contractual and Non-Contractual Obligations*, Peter Lang, 2014, p. 99; *Ibid.*, p. 87; Dickinson, *supra* note 14, p. 296, para 4.01, p. 309, para 4.28. However, the "forum" has not lost its grip. As Carruthers states "(...) there are many provisions, (...) in the Rome II Regulation which will afford Member State forums a measure of discretion having potentially fundamental effect on the outcome in choice of law terms and in absolute terms". See J. Carruthers, "Has the Forum Lost Its Grip?", in W. Binchy and J. Ahern (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations – A New International Litigation Regime*, Brill | Nijhoff, 2009, p. 45.

<sup>81</sup> Mills, *supra* note 1, p. 404; Mandery, *supra* note 80, p. 99–100. In Art 4, an indirect effect is given to the party autonomy by accepting the contractual relationship between the parties to be "manifestly more closely connected".

applicable to a non-contractual obligation arising out of a tort is the law of the country in which the damage occurred (Article 4(1)) unless the parties had a common residence in another country at the time when the damage occurred (Article 4(2))<sup>82</sup> or the tort is manifestly more closely connected with another country (Article 4(3)).<sup>83</sup>

In order to avoid repetition, detailed explanations about Rome II will be given below while comparing it with its US-counterpart.

### III. COMPARATIVE NOTES

As mentioned above, the major differences between the systems produce various minor divergence points. The explanations concerning these points below are presented under the six primary (minor) matters representing the divergence of PIL in the US and the EU: (a) legal certainty v. flexibility, (b) jurisdiction v. content-oriented law selection, (c) state interests, (d) issue-by-issue analysis and '*dépeçage*', (e) party autonomy and (f) rules of safety and conduct.

#### 1. THE EVERLASTING STRUGGLE: LEGAL CERTAINTY V. FLEXIBILITY

Perhaps the most important structural divergence between the systems is based on the discussion of flexible v. rigid rules.<sup>84</sup> In particular, the

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<sup>82</sup> Although the rule is based on the parties' reasonable expectations, it is asserted that it would be preferable if a common habitual residence were identified in Art 4(3) as a factor to justify the displacement of the general rule. See Dickinson, *supra* note 14, p. 336–337, para 4.82.

<sup>83</sup> Rome II contains separate provisions that are applied respectively to special types of torts. See e.g. Art 5, 6, 7, 8 and 9.

<sup>84</sup> What is certain about all discussions carried out in the general thought of law is that it is not easy to determine the optimum balance between the principles of legal certainty and flexibility. Generally speaking, the former provides for legal predictability whereas the latter equity. Kaminsky, *supra* note 3, p. 81; Zhang, *supra* note 2, p. 908; de Boer, *supra* note 2, p. 301; Symeonides, 'Why Not', *supra* note 7, p. 423; Wolff, *supra* note 18, p. 437–438. For a detailed analysis of "flexibility" in this sense, see Wolff, *supra* note 18, p. 431.

struggle between ‘*approaches*’ and ‘*rules*’ is in the nature of the comparison of the Restatement and the Regulation.<sup>85</sup>

Considering the perennial tension between the aims of the US and the EU PIL of torts, choosing flexibility over legal certainty may be considered as a brave choice of a rule.<sup>86</sup> The US conflict of laws system has given preference to flexibility with the Restatement Second whereas the EU has adopted a stricter system with tightly written black letter rules that have relatively few escapes and little room for judicial discretion.<sup>87</sup> The preference of Rome II is reasonable for harmonizing the member state laws. Uniformity would be in jeopardy – at least *prima facie* – if Rome II were to have too many flexible rules or escape clauses.<sup>88</sup> If it is seen from another angle, although flexibility is favoured instead of

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<sup>85</sup> Zhang, *supra* note 2, p. 908.

<sup>86</sup> *Ibid.*, p. 906-7. However, not all authors welcomed this understanding. In particular, it has been suggested that the thinking adopted in the *Babcock* case will cause forum shopping and uncertainty. See B.S. Sparks, “*Babcock v. Jackson* - A Practicing Attorney’s Reflections Upon the Opinion and Its Implication”, *Insurance Counselling Journal*, 1964, Issue 31, p. 428. For the argument that forum shopping cannot be prevented by using rigid rules, see de Boer, *supra* note 2, p. 302, 304; Reppy, *supra* note 21, p. 2081; R.J. Weintraub, “Rome II: Will It Prevent Forum Shopping and Take Account of The Consequences Of Choice Of Law?” in W. Binchy and J. Ahern (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations – A New International Litigation Regime*, Brill | Nijhoff, 2009, p. 47.

<sup>87</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 8; Hay, *supra* note 9, p. 2055; Kaminsky, *supra* note 3, p. 72-73, 79. This does not mean that certainty is not valued in the US PIL. The phrase is used for purposes of comparison.

<sup>88</sup> *Ibid.*, p. 9; Zhang, *supra* note 2, p. 906. Having said that, it is not accurate to specify Rome II as a supporter of the mechanical enforcement of the law. Rome II attempted to provide some degree of flexibility by giving the opportunity to evaluate relevant substantive laws such as in Art 14, 7, 12, 10(2), 13, 6(1), 24 and 22. See S. Symeonides, “Tort Conflicts and Rome II: A View from Across” in H.P. Mansel, R. Hausmann, C. Kohler, H. Kronke, T. Pfeiffer (eds.), *Festschrift für Erik Jayme*, Sellier European Law Publications, 2004, p. 937. Accordingly, some assert that attempts to achieve absolute predictability in choice of law for torts by using rigid rules have failed in the scope of Rome II, as well. See R.J. Weintraub, *Direction versus Strict Rules in the Field of Cross-Border Torts*, 2005, p. 3, available at: <https://dianawallis.org.uk/cy/document/seminar-14-march/weintraub-discretion-vs-strict-rules-in-the-field-of-cross-border-torts#documenttp> [last accessed 5.5.2021]. See also de Boer, *supra* note 2, p. 332. For the understanding of the escape clauses being inflexible, See Wolff, *supra* note 18, p. 457-458.

legal certainty, it is undeniable that precedents have brought a certain amount of stability and legal predictability to the US PIL,<sup>89</sup> which results – at the same time – in a convergence between the two systems.

*Lex loci damni* adopted under Article 4(1) of Rome II seems to be the exact implementation of the principle of legal certainty. Recital 16 explains that this provision ensures a reasonable balance between the interests of the person claimed to be liable and the person who has sustained the damage.<sup>90</sup> This provision purports to be as rigid as the abovementioned – corresponding rule of the Restatement First.<sup>91</sup> Nevertheless, Article 4(2) refers to the common habitual residence as a “consequence-based”<sup>92</sup> exception,<sup>93</sup> that deviates from the principle of legal certainty and seems to show similarities with the system of the Restatement in general. The same exception appears in Article 5 (product liability), Article 6 (unfair competition), and Article 9 (industrial action) of the Regulation, as well.<sup>94</sup>

A more complex exception is contained in Article 4(3) of the Regulation. Since this provision orders the judge, where applicable, to take into account and apply the ‘*manifestly more closely connected law*’, it is referred to as ‘*the general escape clause*’ and it consequently enables the court to apply the rule which reflects the centre of gravity of the case.<sup>95</sup> In general, Article 4(3) regulates that when it is clear from all the circumstances

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<sup>89</sup> Hay, *supra* note 9, p. 2067.

<sup>90</sup> Rome II, Recital 16.

<sup>91</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 16.

<sup>92</sup> Kramer, *supra* note 72, p. 14.

<sup>93</sup> However, this exception is criticized being “too broad and at the same time too narrow”. Symeonides states that it is too broad because it encompasses not only “loss-distribution” issues but also “conduct regulation” ones, which is a serious defect. For a detailed explanation about the terms, see Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 17. Also, he asserts that this common domicile rule of Rome II is too narrow in that it applies only when the parties are domiciled in the same *state* but not when they are domiciled in different *countries* that have the same laws. Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 24; Torremans, *supra* note 3, p. 813.

<sup>94</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 22.

<sup>95</sup> See Explanatory Memorandum, p. 12; Kaminsky, *supra* note 3, p. 85; Dickinson, *supra* note 14, p. 340–341, n. 4.85. The justification to this exception presented on the Explanatory Memorandum is as follows: ‘having the same law apply to all their relationships, this solution respects the parties’ legitimate expectations and meets the need for sound administration of justice’, Explanatory Memorandum, p. 13.

of the case that the tort/delict is manifestly more closely connected with a country other than the one specified in paragraphs 1 and 2, the law of that country shall apply. A manifestly closer connection might be based, in particular, on a pre-existing relationship between the parties such as a contract that is clearly more closely connected with the tort/delict in question.<sup>96</sup> This exception reveals a high convergence with the ‘better law’ system of the Restatement Second and deemed to be the product of the newer trend of aiming to achieve greater flexibility that has become widespread in PIL.<sup>97</sup>

However, as explained in the Explanatory Memorandum, the scope of the escape clause must be truly exceptional.<sup>98</sup> The word ‘*manifestly*’ emphasizes this requirement,<sup>99</sup> which – *prima facie* – gives the impression that there is an extent of divergence between the systems. But, although a judge in the EU has some discretion in applying the escape clause to the cases before him/her, such discretionary power is not as wide as in the US’ (ad hoc) judicial system. As a result of the long-lasting civil law tradition, the EU judge has to act within the lines of the relevant provision and its built-in values.<sup>100</sup> It should be noted that despite its wording, this escape clause is accused of being far from a real exception in the sense of *substantive law* analysis<sup>101</sup> and

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<sup>96</sup> Kramer, *supra* note 3, p. 14; Hay, *supra* note 9, p. 2057. The forerunner of this principle is Swiss case law of 1934. See Hay, *supra* note 9, p. 2057–2058, n. 16.

<sup>97</sup> T.K. Graziano, “Freedom to Choose the Applicable Law in Tort- Articles 14 and 4(3) of the Rome II Regulation” in W. Binchy and J. Ahern (eds.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations – A New International Litigation Regime*, Brill | Nijhoff, 2009, p. 124.

<sup>98</sup> “Conservative escape”: Kaminsky, *supra* note 3, p. 73.

<sup>99</sup> See Explanatory Memorandum, p. 12.

<sup>100</sup> Torremans, *supra* note 3, p. 816–817; Kaminsky, *supra* note 3, p. 64, 80; Hay, *supra* note 9, p. 2055, 2062–2064: “The European answers (...) are to make substantive law-oriented in the formulation of rules, provide for additional adjustment possibilities through a variety of escape clauses, but to avoid a general ad hoc approach for the determination of the applicable law.”

<sup>101</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 26; Hay, *supra* note 9, p. 2058; Fentiman, *supra* note 79, p. 89. Also, this escape clause is considered as an “all or nothing” proposition and criticized for not being an “actual” exception. See Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 31. See also Hay, *supra* note 9, p. 2060, The author claims that this provision is not concerned with substantive justice.

it is considered to be problematic in the literature as it includes obscure concepts.<sup>102</sup>

All in all, Article 4 of the Regulation, with its aforementioned principle, exception and escape close, constitutes the foremost example of the discussion regarding the principles of legal certainty and flexibility.<sup>103</sup>

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<sup>102</sup> Fentiman, *supra* note 79, p. 88: “Although superficially attractive, the provision [Art 4(3)] is oddly opaque.” The author finds the provision “profoundly unsatisfying” since it offers no guidance to determine the significance, Fentiman, *supra* note 79, p. 103. See also Weintraub, ‘Rome II’, *supra* note 86, p. 52: “Here is no magic ruler to determine when a country is more closely connected.” The argument which claims Art 4(3) will have a consistent meaning with a “consequence-based” approach, see Weintraub, ‘Rome II’, *supra* note 86, p. 55. For a three-stage test to determine the “closeness” see Fentiman, *supra* note 79, p. 92. For the argument that ‘closeness’ should be applied objectively and not by the reference to the parties’ private motives, see Dickinson, *supra* note 14, p. 347, n. 4.95.

<sup>103</sup> See Wolff, *supra*, note 18, p. 457–458. Nevertheless, Art 5, which deals with product liability, must not be overlooked. In this provision, the Regulation has created a gradual system of connecting factors together with a foreseeability clause. Art 4(2) applies as the primary rule, then, Art 5(1)-a applies as the second and subparagraphs b and c apply as the third and fourth-ranking rules. See Hartley, *supra* note 57, p. 559. According to this system, primarily, the law of the victim’s habitual residence applies. Failing that, the law of the country in which the product was acquired applies and finally, failing that, the law of the country where the damage occurred applies. However, if the tortfeasor could not reasonably foresee the marketing of the product in the countries stated above, his habitual residence law applies. The Explanatory Memorandum states that this provision strikes a reasonable balance between the interests and that it 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. See Explanatory Memorandum, p. 14–15. This provision is deemed satisfactory as it is party-neutral (both regarding the content of the law chosen and both parties’ having the right to choose) See P.J. Kozyris, “Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ ‘Missed Opportunity’”, *American Journal of Comparative Law*, 2008, Issue 56, p. 493. This provision is worth mentioning here owing to its gradual structure and the ‘however’ part of the clause which orders the judge to take substantive issues into account. The other provision that is worth mentioning in the scope of this discussion and the forthcoming analysis about competition law is Art. 7 of Rome II dealing with environmental damage. This article is considered as a reflection of the better law approach (of the Restatement Second) because the claimant has the opportunity to predicate his claim on the law of the country in which the event giving rise to the damage occurred. See Hartley, *supra* note 57, p. 553. It is clearly explained in the Explanatory Memorandum that the point here is not only to respect the victim’s legitimate interest, but also to establish a legislative policy that contributes to raising the general level of environmental protection. See, Explanatory Memorandum, p. 19. Indeed, if the victim could only rely on the law of the place of

The last words about this discussion will be *Weintraub's* arguments. According to *Weintraub*, “the goal of choice of law rules should be [...] providing flexibility to adjust to changed law-fact circumstances, but directing that flexibility so as to provide reasonable predictability”.<sup>104</sup> Since things are not as black and white as they used to be,<sup>105</sup> it can be deduced that both systems still have a long way to go.

## 2. JURISDICTION V. CONTENT-ORIENTED LAW SELECTION

In both the US and EU, the difference between traditional and modern understanding of the PIL arises at the point where they consider the content of the substantive laws of the involved states when choosing the law to govern the case at hand.<sup>106</sup> While the applicable law depends on the involved states' physical contacts under the traditional understanding of the PIL (*i.e.*, jurisdiction selecting), the modern understanding bases the choice on physical contacts *and* the content of the laws of the states (*i.e.*, content-oriented law selection).<sup>107</sup> Many systems, especially those that are consequence-based, such as the US, take the content of laws and their policies into account when choosing the applicable law.<sup>108</sup> Under Article 4 of Rome II, the main principle is to choose jurisdiction –

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damage, this would encourage businesses to establish their facilities on the border of low protection countries *Torremans*, *supra* note 3, p. 830. It should also be noted that this article is not subject to any exceptions such as foreseeability. See *Symeonides*, 'A View From Across', *supra* note 88, p. 14. However, there is an important point of divergence between the typical appearance of the “better law” approach and this provision of the Regulation. Here, it will be for the victim rather than the court to determine the “most favourable” law. Enabling the victim to choose the applicable law also differentiates it from other provisions of the Regulation. Some scholars claim that this provision opens up a hole in the system of liability under the more pro-plaintiff law regardless of foreseeability, which calls for some balancing. See *Kozyris*, p. 496.

<sup>104</sup> *Weintraub*, 'Direction', *supra* note 88, p. 2. Accordingly, the author makes four main proposals at page 19.

<sup>105</sup> *Dornis*, *supra* note 5, p. 309. For a criticism of this understanding in general, see *Wolff*, *supra* note 18, p. 439.

<sup>106</sup> *Symeonides*, 'A View from Across', *supra* note 88, p. 12.

<sup>107</sup> *Cavers* simulates contacts as coins that activate doctrinal slot machine that produces the appropriate jurisdiction. See *Cavers*, *supra* note 24, p. 191.

<sup>108</sup> *Weintraub*, 'Direction', *supra* note 88, p. 12; *Kaminsky*, *supra* note 3, p. 73.

not the rule or the result.<sup>109</sup> Content-oriented law selection is an exceptional result for the Regulation, which appears in a limited number of provisions counted above.

This choice is closely connected with the adopted legal policy of a state and the PIL justice as well as the EU policies. As known, one of the main principles of the PIL of the EU is to constitute an area of freedom, security, and justice with respect for the fundamental rights and different legal systems and traditions of the Member States.<sup>110</sup> Therefore, as explained in Recital 1 in general and 14 in a specific way, Rome II, as an EU instrument, has the major objective to achieve PIL justice. This objective makes choosing legal certainty and foreseeability over flexibility rational, as explained above. So, the provisions of the Regulation, their jurisdiction-selecting character, and its related points of discrepancies between the Restatement are consequences of this understanding.

### 3. STATE INTERESTS

State interests are one of the main factors considered during the legislating process of the US PIL.<sup>111</sup> As *Currie*, the founding father of the theory, explained, in cases of PIL, there is usually one state which has an interest in applying its national law to the case.<sup>112</sup> This is the main reason why there is a distinction between ‘true’ and ‘false’ conflicts as well as ‘unprovided-for’ cases under the US PIL, as explained above.

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<sup>109</sup> Fentiman, *supra* note 79, p. 87:

Article 4 represents a jurisdiction-selecting regime, not one which is either rule- or result- selecting. Its purpose is to identify the country with which the tort is best connected, not the state most interested, or the rule that best governs, or the result that is most apt. Importantly, it rejects prominent rule-centred approaches such as governmental interest analysis, or reliance on ‘principles of preference’. It is possible, however, that elements of those alternative approaches may be relevant to the operation of Article 4(3) exception.

<sup>110</sup> Treaty on the Functioning of the EU [2012] OJ C 326/47, Art 67: “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.”

<sup>111</sup> Zhang, *supra* note 2, p. 914.

<sup>112</sup> See, *Currie*, *supra* note 24, p. 966.



Not surprisingly, in the EU PIL of torts, which does not take substantive outcomes into account as a principle, there is no such distinction. Indeed, none of the provisions of Rome II refers to the state policies and neither the Preamble nor the Explanatory Memorandum contains any statements about the interests of the states. Instead, the Preamble and Explanatory Memorandum define the aim of the Regulation as ensuring a reasonable balance between the interests of the *parties*.<sup>113</sup> Differently from the US' understanding,<sup>114</sup> the parties' expectations are favoured rather than the state interests in Rome II.<sup>115</sup> However, in very limited cases such as torts arising from the violation of competition law rules (Article 6(2)), public policy (Article 26), and in environmental torts (Article 7), state interests are prioritized. Within the scope of these provisions in particular, the similarity between the two systems become apparent.

#### 4. "DÉPEÇAGE" AND ISSUE-BY-ISSUE ANALYSIS

Although modern European choice of law has become more policy-oriented over the decades, many aspects, one of which is *dépeçage*, have remained untouched.<sup>116</sup> "Dépeçage describes the separate treatment, for choice-of-law purposes, of one issue or part of a case (*i.e.*, tort), while another law applies to the rest or to other separable parts."<sup>117</sup> The question as to how to approach *dépeçage* concerns legal policy preference. In this sense, *dépeçage* is neither a goal nor an anathema.<sup>118</sup> However, as a com-

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<sup>113</sup> Symeonides, 'A View From Across', *supra* note 88, p. 3. See, e.g. Recital 16: "balance between the interests of [tortfeasor] and [victim]" and Recital 20: "fairly spreading the risks [between consumer and producer]".

<sup>114</sup> The acceptance of the party autonomy is limited to the cases in which it meets the condition of reasonable connection or state interests. See Zhang, *supra* note 2, p. 915.

<sup>115</sup> Kaminsky, *supra* note 3, p. 82. However, there is a huge vagueness about what kind of "interests" are actually meant. See de Boer, *supra* note 3, p. 315: "Interests should be equated to 'legitimate expectations' [of the parties]".

<sup>116</sup> Dornis, *supra* note 5, p. 309.

<sup>117</sup> Hay, *supra* note 9, p. 2065. See also, Symeonides, '2016', *supra* note 33, p. 125; Dornis, *supra* note 5, p. 310.

<sup>118</sup> For the "traditional European *dépeçage*-phobia" see Dornis, *supra* note 5, p. 313. Additionally, in some cases, it is possible to defeat the policies of both states by "*dépeçage*".

mon understanding, the EU PIL avoids *dépeçage* as much as possible and provides rules for the law applicable to “THE tort” (not the particular issue in a tort).<sup>119</sup>

Issue-by-issue analysis, however, lies at the heart of modern US PIL<sup>120</sup> – which is not surprising for a system that determines state interests as the basic criterion for determining the law to be applied. Especially in the scope of the Restatement Second, the judge is obliged to determine the applicable law to the *particular issue* of a tort. Indeed, this type of analysis is one of the few breakthroughs of choice-of-law thinking in the US and therefore, has become the integral feature of all approaches comprising or produced by the revolution (*i.e.*, the most significant relationship).<sup>121</sup>

In the process of legislation, the European Parliament has also made an attempt to introduce the issue-by-issue analysis to the Regulation and thus paved the way for allowing *dépeçage*. This approach, however, was not adopted in the amended Commission proposal.<sup>122</sup> The text seems to refer only to a situation in which the (entire) tort/delict is manifestly more closely related to another country (Article 4(3)), intentionally.<sup>123</sup> In addition to that, in Article 15, by encompassing virtually all the issues likely to arise in tort litigation, Rome II reaffirms its policy against *dépeçage*.<sup>124</sup> Therefore, still, this constitutes an important divergence point of the two systems.

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This possibility is deemed inappropriate and must be avoided: Symeonides, ‘Lessons’, *supra* note 6, p. 37. According to Symeonides, rather than precluding issue-by-issue analysis the better approach is simply to guard against the possibility of inappropriate *dépeçage*. See Symeonides, ‘Lessons’, *supra* note 6, p. 38; Symeonides, ‘2016’, *supra* note 33, p. 125.

<sup>119</sup> Hay, *supra* note 9, p. 2066. However, there are cases of “principled *dépeçage*” which are dealt specifically with. See, Hay, *supra* note 9, p. 2066.

<sup>120</sup> *Ibid.*, p. 2065; Symeonides, 2016, *supra* note 33, p. 125; Symeonides, Why Not, *supra* note 7, p. 388.

<sup>121</sup> Symeonides, ‘Lessons’, *supra* note 6, p. 37; Hay, *supra* note 9, p. 2065-6. See also Symeonides, ‘2016’, *supra* note 33, p. 125: This approach “is more conducive to a nuanced, individualized and thus more rational, resolution of conflicts problems”.

<sup>122</sup> Dickinson, *supra* note 14, p. 334, n. 4.78.

<sup>123</sup> Kramer, *supra* note 72, p. 15; Fentiman, *supra* note 79, p. 87, 101; Dickinson, *supra* note 14, p. 342, n. 4.89.

<sup>124</sup> Dickinson, *supra* note 14, p. 335, n. 4.79. However, in the present regulation, there are some provisions that contain the possibility for further splitting the issues: Art 8(2),

## 5. PARTY AUTONOMY

The principle of party autonomy is evaluated as “the most widely accepted private international rule of our time”,<sup>125</sup> but still, this premise is worth examining in a few aspects. In evaluating whether a choice of law agreement is binding or not, the first step is to determine whether such agreement is related to contractual or non-contractual disputes. Even though party autonomy has traditionally had a very limited role outside contract law,<sup>126</sup> at least in the EU, the modern approach tends to widen its role in non-contractual disputes within special limits.<sup>127</sup> That brings us to scenarios regarding party autonomy in non-contractual (tort) disputes:<sup>128</sup> the first and rather uncommon scenario is when the tortfeasor and the victim agree on the law that governs the dispute *after having knowledge of the events giving rise to the dispute (i.e., post-dispute (post delictum) agreements)*.<sup>129</sup> The second and increasingly more common scenario is when the eventual tortfeasor and the victim agree *in advance* on the law that governs their rights and obligations<sup>130</sup> (*i.e., pre-*

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14, 16, 17, 18, 19 and 20, Recital 33. Symeonides, ‘A View From Across’, *supra* note 88, p. 14–5.

<sup>125</sup> S. Symeonides, “Party Autonomy in Rome I and Rome II from a Comparative Perspective”, in K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides (eds.) *Convergence and Divergence in Private International Law- Liber Amicorum Kurt Siehr, Schulthess*, 2010, p. 514; de Boer, *supra* note 2, p. 19.

<sup>126</sup> Mills, *supra* note 1, p. 390; Graziano, *supra* note 97, p. 113. This is the result of the assumption of greater public interests and policies and thus no opportunity for the exercise of prior party autonomy in tort law.

<sup>127</sup> Mills, *supra* note 1, p. 390; Graziano, *supra* note 97, p. 114.

<sup>128</sup> The concept of “non-contractual obligation” has an autonomous meaning under EU law, which potentially includes all civil obligations that are not “contractual obligations”. See Dickinson, *supra* note 14, p. 298, n. 4.06.

<sup>129</sup> Mandery, *supra* note 80, p. 103. Legal characterization of the case is controversial, where the agreement on choice of law is made after the event giving rise to the damage occurred, but before the damage arose. See Mills, *supra* note 1, p. 407; Mandery, *supra* note 80, p. 107; Graziano, *supra* note 97, p. 117.

<sup>130</sup> Determining the exact scope of the choice of law agreement (whether it covers non-contractual claims) is a matter of interpretation. See Mills, *supra* note 1, p. 392; Mandery, *supra* note 80, p. 130.

dispute (*ante delictum*) agreements).<sup>131</sup> An evaluation regarding whether each of these agreements is binding or not reveals a point of divergence between the US and EU PIL of torts.

In general, the approach to party autonomy in the US is considerably vague, given that the Restatement Second is silent on the validity of choice of law agreements regarding torts. Indeed, Section 187 of the Restatement regulates that parties' choice of law adjudicates their '*contractual rights and duties*'. Two different conclusions may be drawn from this: either choice of law agreements can solely encompass contractual claims and have no validity regarding torts<sup>132</sup> or choice of law agreements for contractual disputes also apply to non-contractual disputes in some cases, where the contractual intent so allows. The latter approach has two problems. First, the instruments to determine the contractual intent are significantly vague. The wording of the contract (*i.e.*, 'disputes arising from the agreement/the contract' or 'the relationship') can only constitute a starting point in evaluation. In most cases it would not – obviously – prove useful owing to uncertainties about whether the wording actually reflects the parties' real intent or not. Indeed, neglective or pre-prepared contracts may produce unfair/random results.<sup>133</sup> On the other hand, it is not straightforward to determine the parties' real intents in each and every case. The second problem is that, in many cases, the choice of law clause is generally drafted by the party with a stronger bargaining power. Therefore, in order to protect weaker parties, certain legal safeguards should be laid down.

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<sup>131</sup> Symeonides, 'Party Autonomy', *supra* note 125, p. 540; Mandery, *supra* note 80, p. 103; Graziano, *supra* note 97, p. 117. At this point, Rome II makes a distinction between the parties pursuing a commercial activity and the parties who do not. Nevertheless, pre-dispute agreements are enforced only if the parties are pursuing a commercial activity, the agreement is freely negotiated, and the choice of law is expressed or demonstrated with reasonable certainty by the circumstances of the case and does not prejudice the rights of third parties. See Symeonides, 'Party Autonomy', *supra* note 125, p. 545; Mandery, *supra* note 80, p. 104.

<sup>132</sup> Therefore, 'at the time of the Restatement's drafting, the principle of party autonomy, which had been born in the contracts arena, had not migrated outside that arena'. Symeonides, 'Party Autonomy', *supra* note 125, p. 541. See also Mills, *supra* note 1, p. 413.

<sup>133</sup> Symeonides, 'Party Autonomy', *supra* note 125, p. 542.

Owing to these problems, the codifications<sup>134</sup> and case law on this issue is still unsettled in the US.<sup>135</sup>

However, since Section 145 (2) counts “the place where the relationship, if any, between the parties is centered” as a factor, which, with respect to that issue, has the most significant relationship and therefore a way to choose its law as the applicable law, it is not right to assume that party autonomy is fully excluded from Restatement Second.<sup>136</sup>

As evidence of the “conscious parallelism” of the systems,<sup>137</sup> there had been particular interest on the part of the drafters of Rome II in adopting a clear-cut rule regarding party autonomy in torts.<sup>138</sup> Article 14 of Rome II, which was inspired by German law,<sup>139</sup> enables the parties to choose the law applicable to all non-contractual obligations within the scope of Rome II (except for unfair competition, competition law, and intellectual property rights).<sup>140</sup> This way, the Regulation ensures the parties a heightened degree of clarity and predictability regarding the applicable law.<sup>141</sup> Indeed, Recital 31 of the Regulation justifies allowing

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<sup>134</sup> *Ibid.*, p. 541-2.

<sup>135</sup> *Ibid.*, ‘Party Autonomy’, *supra* note 125, p. 542-544; Mandery, *supra* note 80, p. 203; Symeonides, ‘Why Not’, *supra* note 7, p. 404.

<sup>136</sup> Mills, *supra* note 1, p. 412.

<sup>137</sup> See, *supra* note 11. On this subject, there is a conscious parallelism with respect to the law-making process of Rome II. The uncertainties in the US have highlighted the need for a clear rule on this issue, which prompted Rome II legislators to regulate in such a manner.

<sup>138</sup> Symeonides, ‘Party Autonomy’, *supra* note 125, p. 546. For the legislative developments preceding the present Art 14 (1) (b) see Mandery, *supra* note 80, p. 111.

<sup>139</sup> Art 42 of EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*: Introductory Act to the German Civil Code): “*Nach Eintritt des Ereignisses, durch das ein außervertragliches Schuldverhältnis entstanden ist, können die Parteien das Recht wählen, dem es unterliegen soll. Rechte Dritter bleiben unberührt*” (“After the event giving rise to a non-contractual obligation occurred, the parties may agree to submit it to the law of their choice. Rights of third parties shall not be prejudiced”).

<sup>140</sup> The relationship of this provision with Art 4 is controversial. Although not entirely clear from the text of Art 4, the better view is that this refers to supremacy of contractual relationship to objective connections in determining the applicable law. See Mills, *supra* note 1, p. 404; Mandery, *supra* note 80, p. 100: “Hence, methodologically speaking, Article 14 precedes the general rule in Article 4”.

<sup>141</sup> Kaminsky, *supra* note 3, p. 68.

parties to choose the law applicable: the principle of party autonomy and enhancement of legal certainty.<sup>142</sup>

Post-dispute agreements are enforced without further limitations on their parties.<sup>143</sup> However, pre-dispute agreements are enforced under some conditions, one of which is related to the parties. Pre-dispute agreements are valid and must be respected under four (cumulative) conditions: the parties shall ‘pursue a commercial activity’ (Article 14(1)(b)), the agreement shall be ‘freely negotiated’ (Article 14(1)(b)), the choice of law shall be ‘expressed or demonstrated with reasonable certainty’ (Article 14(1)) and shall not ‘prejudice the rights of third parties’ (Article 14(1)). It is clear that the aim is to protect the weak party in the first three conditions and the third parties in the fourth.<sup>144</sup> The protection offered through these may be sufficient in some cases, but the article may pose some problems,<sup>145</sup> especially when one of the parties to a commercial relationship has weaker bargaining power than the other.<sup>146</sup> Additionally, the phrase ‘freely negotiated’ seems overly vague and thus has potential to create inconsistencies with Rome I.<sup>147</sup> Moreover, it is possible to determine the law agreed upon by the parties as the applicable law through Article 4, indirectly, even if the agreement itself does not meet these conditions.<sup>148</sup> Therefore, it becomes apparent that neither restriction is free of problems.

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<sup>142</sup> See also Torremans, *supra* note 3, p. 854–855; Graziano, *supra* note 97, p. 115.

<sup>143</sup> Mandery, *supra* note 80, p. 106-7: “In other words, all parties, whether commercial or non-commercial may enter into an ex-post agreement”. For divergent opinions, see Y.L.Tan, “Post-dispute Agreements on Choice of Law”, *Journal of Private International Law*, 2017, Issue 1, p. 61.

<sup>144</sup> Zhang, *supra* note 2, p. 898-9; Mills, *supra* note 1, p. 405; Mandery, *supra* note 80, p. 107; Graziano, *supra* note 97, p. 120.

<sup>145</sup> See for instance Symeonides, ‘Party Autonomy’, *supra* note 125, p. 547; Mills, *supra* note 1, p. 405; Zhang, *supra* note 2, p. 899.

<sup>146</sup> Therefore, a further definition is required. See Zhang, *supra* note 2, p. 899-900; Mills, *supra* note 1, p. 406; Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 44; Mandery, *supra* note 80, p. 114; Symeonides, ‘Why Not’, *supra* note 7, p. 404–405. Cf. Graziano, *supra* note 97, p. 120.

<sup>147</sup> Mills, *supra* note 1, p. 406; Mandery, *supra* note 80, p. 117. Thus, based on the wording of Art 14 (1) (a), the prevailing opinion appears to be that only *ex ante* agreements need to be freely negotiated. However, it is irreconcilable with teleological reasoning. For a wide interpretation of the article see Graziano, *supra* note 97, p. 121.

<sup>148</sup> See Mandery, *supra* note 80, p. 108–109, 122; Graziano, *supra* note 97, p. 125.

Nevertheless, by adopting the general principle of party autonomy as a rule of choice of law in non-contractual obligations, Rome II has created a historic and long-lasting impact<sup>149</sup> while the US practice remains uncertain.

## 6. RULES OF SAFETY AND CONDUCT

It is generally accepted in the US that the substantive law of torts has two general objectives: deterrence and compensation. Therefore, a rule of tort law may be primarily conduct-regulating or loss-distributing.<sup>150</sup> The main difference is that conduct-regulating rules are territorially oriented while loss-distributing rules are not necessarily so.<sup>151</sup>

In the EU, Article 17 of Rome II regulates explicitly that the court will take rules of safety and conduct into account while assessing the conduct of the person claimed to be liable. The fact that the traditional and formalist Rome II contains a separate article dealing with these rules is an oblique and grudging recognition of the distinction between conduct-regulating and loss-distributing tort rules.<sup>152</sup> Therefore, “a theoretically consistent and workable application is still hindered by structural, if not cultural, obstacles”<sup>153</sup> in the EU.

This twofold distinction of tort rules can be found in the nature of Articles 4 and 20, as well.<sup>154</sup> Since Rome II uses vague language and

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<sup>149</sup> Zhang, *supra* note 2, p. 905; Mills, *supra* note 1, p. 403; Graziano, *supra* note 97, p. 114.

<sup>150</sup> Terzian, *supra* note 34, p. 1321-1322; Zhang, *supra* note 2, p. 883; Dornis, *supra* note 5, p. 311, 324.

<sup>151</sup> Currie, *supra* note 24, p. 1021; Symeonides, ‘Lessons’, *supra* note 6, p. 11-12; Kaminsky, *supra* note 3, p. 83; Symeonides, ‘2016’, *supra* note 33, p. 126; Dornis, *supra* note 5, p. 311, 324.

<sup>152</sup> Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 40; Kaminsky, *supra* note 3, p. 71-72; Symeonides, ‘2016’, *supra* note 33, p. 126; Dornis, *supra* note 5, p. 311. For a comparative analysis of conduct-regulating rules of the US and the EU, See Reppy, *supra* note 21, p. 2087. While it is relatively easy to distinguish these torts conceptually, it is not always straightforward to apply in practice since ‘in essence virtually all rules on tort liability are, if not primarily, at least *also*, loss allocating’. See Dornis, *supra* note 5, p. 325. See also Zhang, *supra* note 2, p. 883.

<sup>153</sup> Dornis, *supra* note 5, p. 312.

<sup>154</sup> Kaminsky, *supra* note 3, p. 84-87.

does not limit the scope of Article 4 to loss-distributing rules, a need for regulating Article 17 has arisen. Accordingly, in Rome II, the rules of safety and conduct of the place of tort can only be “taken account of” “as a point of fact”<sup>155</sup> – as clearly stated in Recital 34 – “in so far as appropriate”.<sup>156</sup> Despite many criticisms,<sup>157</sup> the European Commission still underlines that “taking account of foreign law is not the same thing as applying it”.<sup>158</sup> The prevailing continental view tends to prioritize the compensatory function of tort law<sup>159</sup> and by precluding the direct application of conduct-regulating rules, aims to “stem the potential for uncertainty and uneven application”.<sup>160</sup> In other words, unlike the Restatement Second, Rome II deliberately subordinates state interests to other values of Regulation, *i.e.*, European Community values including concern for certainty and uniformity.<sup>161</sup> However, forming a hierarchy of values in this sense is deemed as inaccurate in the light of modern tort doctrine, which is based on the understanding that “the modern tort law no longer primarily serves to compensate for the victim’s injury; it also aims to regulate conduct and activity”.<sup>162</sup>

Notwithstanding that, Rome II shows convergence with the Restatement Second by excluding its scope in Article 1(3) for limited areas such as evidence and procedure.<sup>163</sup> In any event, the essential difference between the systems regarding rules of safety and conduct is that Rome II neither mandates nor guarantees the application of these rules, but rath-

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<sup>155</sup> Torremans, *supra* note 3, p. 871.

<sup>156</sup> Symeonides, ‘Lessons’, *supra* note 6, p. 14.

<sup>157</sup> See e.g. Dornis, *supra* note 5, p. 319: “A Terminological Masquerade: Taking Account of vs. Application”. See also Reppy, *supra* note 21, p. 2086–2087; Fentiman, *supra* note 79, p. 90.

<sup>158</sup> See Explanatory Memorandum, Art 13.

<sup>159</sup> Symeonides, ‘Lessons’, *supra* note 6, p. 13; Dornis, *supra* note 5, p. 321. For the historical evolution of this understanding, see Mills, *supra* note 1, p. 396–397.

<sup>160</sup> Kaminsky, *supra* note 3, p. 91. For counterarguments see Kaminsky, *supra* note 3, p. 92.

<sup>161</sup> Kaminsky, *supra* note 3, p. 101.

<sup>162</sup> Dornis, *supra* note 5, p. 321. For a consistent theory of correlation between norm categories and party expectations, See Dornis, *supra* note 5, p. 331.

<sup>163</sup> Therefore, since Art 15 (c) includes quantification of damages as well, the regime Art 1 has brought is deemed a “revolutionary improvement in choice of law”: Weintraub, ‘Rome II’, *supra* note 86, p. 50.



er invites the judge to consider, whereas it creates a typical ‘false conflict’ according to the Restatement.<sup>164</sup>

#### IV. THE RISE OF NEW APPROACHES AND RESTATEMENT (THIRD)

The *lex loci delicti* rule of the Restatement First has not lent predictability and certainty to PIL to the extent anticipated.<sup>165</sup> Its counter-understanding, which was led by *Babcock v. Jackson*, is more than 50 years old now. The answer to the question of how the US revolution has evolved in this period is not as exciting as one might think.<sup>166</sup> It would not be an exaggeration to call this a ‘stagnation period’ of the US PIL law of torts. As of 2015, 24 of the 42 jurisdictions of the US have abandoned the *lex loci delicti* rule<sup>167</sup> and followed the Restatement Second.<sup>168</sup> Although it was argued strongly by US scholars that as a result of the Restatement Second, substantive justice was put in the centre of the US while the EU was following a naïve formality in order to achieve PIL justice,<sup>169</sup> the march of events over time did not lead to the expected ending, at least for the US: “The chaotic array of approaches (...) has created uncertainty and driven up litigation costs”.<sup>170</sup> Therefore, the revolutionary momentum of the US slowed down considerably in the last years of the twentieth cen-

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<sup>164</sup> Hay, *supra* note 9, p. 2057.

<sup>165</sup> Sherwood, *supra* note 21, p. 1360.

<sup>166</sup> See Michaels, ‘2009’, *supra* note 58, p. 12: “The U.S. conflicts revolution has aged, and it has not aged well.” See also the ideas in Zhang, *supra* note 2, p. 910-911.

<sup>167</sup> The states which are still following the *lex loci* rule “reveals many more cases of evading the *lex loci delicti* rule than applying it”: See Symeonides, ‘2016’, *supra* note 33, p. 142.

<sup>168</sup> Symeonides, ‘2016’, *supra* note 33, p. 132.

<sup>169</sup> Michaels, ‘2009’, *supra* note 58, p. 13; de Boer, *supra* note 2, p. 297.

<sup>170</sup> Kaminsky, *supra* note 3, p. 102. See also de Boer, *supra* note 2, p. 297:

[M]ounting 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.

ture.<sup>171</sup> In short, the choice of law rules whose flexibility is based on the approaches applied randomly, did not only jeopardize decisional harmony, but also failed to achieve the substantive purposes they were expected to achieve.<sup>172</sup>

In the last decade, efforts have been made – at least – to change the perspective of the US PIL through different approaches, one of which – perhaps the most striking – is law and economics.<sup>173</sup> This approach is based on the understanding that the law applied to the case must be suitable for ensuring *efficiency*.<sup>174</sup> In terms of determining the law to be applied to the tort, this approach seeks to find a balance between the victim and perpetrator or the states that have an interest in applying their national law to the dispute arising out of this tort or (by taking the regulatory competition as the starting point) incentives of the states in applying their substantive law to the case.

The approaches such as law and economics of PIL are not worth evaluating owing to the possibility of their influence replacing the traditional PIL theory, but owing to their impact in raising the question as to whether it is still accurate to maintain the assumption that “rigid rules cannot provide fairness”.<sup>175</sup> Instead, the view that advocates the use of “a refined set of rules, flexible enough to accommodate all kinds of individual cases and totally blind to material results they

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<sup>171</sup> Symeonides, ‘2016’, *supra* note 33, p. 141.

<sup>172</sup> Symeonides, ‘Why Not’, *supra* note 7, p. 394.

<sup>173</sup> See e.g., R. Michaels, “Economics of Law as Choice of Law”, *Law & Contemporary Problems*, 2008, p. 71, 73, 77–78; R. Michaels, “Two Economists Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example” in J. Basedow, T. Kono and G. Rühl (eds.), *An Economic Analysis of Private International Law*, Mohr Siebeck, 2006, p. 143; K. Kagami, T. Kono and Y. Nishit, “Economic Analysis of Conflict-of-Laws Rules in Tort – Lex Loci Delicti Principle vs. Interest Analysis Approach”, in J. Basedow, T. Kono and G. Rühl (eds.), *An Economic Analysis of Private International Law*, Mohr Siebeck, 2006, p. 121; E.A. O’Hara and L.E. Ribstein, “From Politics to Efficiency in Choice of Law”, *University of Chicago Law Review*, 2000, Issue 67, p. 1151.

<sup>174</sup> See e.g., O’Hara and Ribstein, *supra* note 173, p. 1191; G. Rüle, “Methods and Approaches in Choice of Law: An Economic Perspective”, *Berkeley Journal of International Law*, 2006, Issue 24, p. 801, 819. But see J.P. Trachtman, “Economic Analysis of Prescriptive Jurisdiction”, *Virginia Journal of International Law*, 2001, Issue 42, p. 77.

<sup>175</sup> Michaels, ‘2009’, *supra* note 58, p. 30; Symeonides, ‘Why Not’, *supra* note 7, p. 408: “anti-rule syndrome”. See also Wolff, *supra* note 18, p. 453–454.

produce<sup>176</sup> in achieving PIL's goals should be adopted. New approaches would most probably enhance the influence of this justified view.

At this point, should the US put its hopes on a new Restatement in order to achieve the desired result, as the Reporter Willis suggested nearly 60 years ago?<sup>177</sup> There has been an increasing interest over the last decade in replacing the Restatement with a more concrete framework of rules.<sup>178</sup> At present, the US has a draft of Restatement (Third) of Conflict of Laws. As of 17 July 2022, the Restatement is not finalized. However, it is important to include a few remarks on the Restatement (Third) of Conflict of Laws based on three published Drafts.<sup>179</sup>

The Restatement (Third) is deemed to be a huge success since it has been prepared carefully by examining the problems in practice as well as the sources of them, and has developed solutions to many issues mentioned above as the extreme points of the US system that need to be smoothened.<sup>180</sup> The first step was taken regarding flexibility. Black-letter rules were maintained in line with the goal of creating easily administered and predictable rules.<sup>181</sup> However, similarly to the Restatement Second, the Restatement (Third) mainly aimed to create a *system* consisting of factors that guide the judge.<sup>182</sup> In other words, flexibility – once again – prevailed over rigid rules.<sup>183</sup> However, the *extreme* under-

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<sup>176</sup> de Boer, *supra* note 2, p. 314. For a similar approach see Symeonides, 'Why Not', *supra* note 7, p. 406. The author also underlines that "none of [the schools] alone has the answers to all conflicts problems. When properly co-ordinated with each other, ideas derived from different schools can produce a much better system than any school alone", see Symeonides, 'Why Not', *supra* note 7, p. 410–411.

<sup>177</sup> Reese, *supra* note 45, p. 56.

<sup>178</sup> Kaminsky, *supra* note 3, p. 57; Symeonides, 'Why Not', *supra* note 7, p. 420; Zhang, *supra* note 2, p. 912.

<sup>179</sup> Available at: <https://www.ali.org/publications/show/conflict-laws-3d/#drafts> [last accessed 2.10.2022].

<sup>180</sup> See e.g., p. J. Borchers, "How 'International' Should a Third Conflicts Restatement Be in Tort and Contract?", *Duke Journal of Comparative and International Law*, 2017, Issue 27, p. 477, 483; S. C. Symeonides, "The Third Conflicts Restatement's First Draft on Tort Conflicts", *Tulane Law Review*, 2017, Issue 1, p. 48–49; J.W. Singer, "Choice of Law Rules", *Cumberland Law Review*, 2020, Issue 2, p. 347.

<sup>181</sup> K. Roosevelt III and B.R. Jones, "The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa", *The Yale Law Journal Forum*, 2018, p. 301.

<sup>182</sup> K. Roosevelt III and B.R. Jones, *ibid*, p. 299, 310–312.

<sup>183</sup> Although, this time, the "two stage theory" (explained below), which was adopted in line with the theoretical opinion of the reporter was criticized by some schol-

standing of flexibility seems to have been given up. “By recognizing the difference between conduct-regulating and loss-allocating tort rules as well as laying down some reasonable concrete rules”<sup>184</sup> such as §§ 6.02, 6.03, and by “choosing the law of the place of the injury in most cases involving a conflict of loss-allocating tort rules, unless the parties have a common geographical location such as a shared domicile or principal place of business”<sup>185</sup> the Restatement (Third) is a vast improvement in terms of legal certainty.

The approach that prioritizes state interests and the procedure of evaluating the content of the norms of the laws that may be applied continues to be adopted. This is attributed to the Reporter of the Restatement (Third), Kermit Roosevelt.<sup>186</sup>

In addition, the Restatement (Third) is clearer regarding allowing parties to choose the applicable law. Section 6.08 of the Second Draft gives the right to choose the law applicable to the injured. This rule is (in our opinion, rightly) criticized on the grounds that it may lead to an inappropriate type of *dépeçage*.<sup>187</sup> It must be admitted that this has not been given much attention because it is undeniable that compared to contract law, party autonomy plays a much reduced role in torts.<sup>188</sup>

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ars See e.g. L. Brilmayer and D.B. Listwa, *A Theory-Less Restatement for Conflict of Laws*, 2022, available at: <https://tlblog.org/a-theory-less-restatement-for-conflict-of-laws/> [last accessed 2.10.2022]. The authors define the “two step theory” as a repackaged version of governmental interest analysis (explained above). According to this view, only a theory-less restatement can achieve the stated aims of a restatement which is to guide the judges regardless of their state. A Restatement can only be persuasive if it draws from cases that represent prevailing opinions. Reporter Roosevelt disagreed strongly and claimed that the Restatement Third consists of rules derived from the practice of courts which is perfectly in line with the aim of explaining to the courts what they have been doing and enabling them to reach the same results in a more simple and consistent way. K. Roosevelt III and B.R. Jones, *supra* note 181, p. 298, 310. For a similar criticism, see Borchers, *supra* note 180, p. 478–479.

<sup>184</sup> *Ibid.*, p. 477.

<sup>185</sup> *Ibid.*

<sup>186</sup> R. Banu, “Conflicting Justice in Conflict of Laws”, *Vanderbilt Law Review*, 2021, Issue 53, p. 465.

<sup>187</sup> See, Symeonides, ‘Third’, *supra* note 180, p. 45-7. The Restatement (Third)’s approach to *dépeçage* is criticized in general. See for example, Borchers, *supra* note 180, p. 479–480.

<sup>188</sup> Borchers, *supra* note 180, p. 477.

Moreover, the difference between conduct-regulating and loss-distributing rules seems to become clearer under Restatement (Third).<sup>189</sup> According to the rule, “when the parties have a common domicile in one state or they have a relationship centred there (the Restatement Third uses the term “central link” in referring to both), and they are involved in an accident in another state”, the law of their common domicile (or the centre of their relationship) is applied “unless the legal rule at the place of conduct and injury is a conduct-regulating rule”.<sup>190</sup> Although the distinction is not undisputable,<sup>191</sup> it is sensible and practical to differentiate two kinds of tort provisions in the conflict of laws sense: “It stands for the simple proposition that in conflicts between conduct-regulation rules, one should focus on the place (or places) of conduct and injury, whereas in conflicts between loss-allocation rules, one should also focus on the parties’ connections, if any, with other states.”<sup>192</sup> In other words, the distinction “provides the proper starting point for determining when to apply the *lex loci* and when not to”.<sup>193</sup> However, this distinction is not adopted in every provision of the Restatement (Third). For example, when conduct and injury are in the same state as the domicile of one of the parties, the law of that state is applied, regardless of the rule having a loss allocating or a conduct regulating character (§§ 6.04 and 6.07). Another example is cross-border torts, for which the Restatement foresees the application of the law favouring the plaintiff unless the defendant cannot foresee the injury occurring there. This rule is also applied whether the rules in question are conduct-regulating or loss-allocating (§§ 6.05 and 6.07).<sup>194</sup>

In conclusion, as a new approach to the US PIL of torts, the Restatement (Third) should be read as an instrument that *shapes* – rather than *ends* – the debate about the subject. This is owing to several reasons.<sup>195</sup> First and foremost, like the others, the Restatement (Third) is an instrument that guides judges. It is neither binding nor suitable for mechani-

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<sup>189</sup> K. Roosevelt III and B.R. Jones, *supra* note 181, p. 309.

<sup>190</sup> Singer, *supra* note 180, p. 349.

<sup>191</sup> Symeonides, ‘Third’, *supra* note 180, p. 5 ff; Singer, *supra* note 180, p. 348.

<sup>192</sup> Symeonides, ‘Third’, *supra* note 180, p. 14.

<sup>193</sup> *Ibid.*, p. 15.

<sup>194</sup> Singer, *supra* note 180, p. 375.

<sup>195</sup> *Ibid.*, p. 347–348.

cal application. Moreover, like other legal instruments, the Restatement (Third) cannot claim to cover all cases. Each and every day has a potential to create legal problems that have never been thought of. Therefore, it is a mistake to consider any legal text as final on the subject. Also, as explained above, it is a challenging task to determine the 'right' way to choose between competing laws. Whether the way is 'right' varies according to the prioritized interest. Therefore, the 'right' way cannot be determined easily. At the very least, it takes time and practice.

## CONCLUSIONS

The Restatement Second and Rome II are the representatives of two different legal cultures of the PIL of torts. Considering all that has been said (including the drafts of Restatement Third), the main point of difference can be summarized as follows: The EU PIL of torts is *formalistic* and focuses on *PIL justice* whereas the US PIL of torts is *result-oriented* and tries to address *substantive law issues*.

The formalistic approach of the EU legislation is not a coincidence, but the result of the long-lasting Savignian tradition. Diana Wallis, the reporter of Rome II, wanted to disregard many provisions deriving from the Savignian approach, when a draft came before the Commission, in order to overcome formalistic and mechanical application of law. However, Rome II still followed the traditional path in the end. As a result, it contains many strict rules granting the judge nearly no discretion mostly for harmonizing Member State laws and creating predictability. In other words, the main concern in the EU regarding tort litigation is that the outcome of the case should be the same regardless of the forum, to provide foreseeability for the parties.<sup>196</sup> To sum up, adoption of Rome

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<sup>196</sup> See J. von Hein, *The New European Choice-of-Law Revolution: Lessons for the United States?*, *Contract & Tort Law*, 2008, available at: <https://web.law.duke.edu/video/new-european-choice-law-revolution-lessons-us-contract-tort-law-panel-1/> [last accessed 6.11.2021]. This does not come as a surprise since Rome II is a pragmatic document that aims at simplicity and uniformity, and primarily seeks to preserve the status quo rather than to dramatically alter it. See Symeonides, 'Missed Opportunity', *supra* note 58, p. 45; Symeonides, 'Party Autonomy', *supra* note 125, p. 549.

II mainly aims at turning ‘the private international laws of European countries’ into ‘a European private international law’.<sup>197</sup>

On the other hand, the abovementioned explanations show that even if the conflicts justice has – nearly – the same components on both sides of the Atlantic, the weights given vary greatly.<sup>198</sup> In the US, the common understanding is that broad-jurisdiction selecting rules may lead to unjust results in most cases and consequently, conflict rules should be issue-oriented and flexible. Indeed, the Restatement Second reflects a typical American scepticism towards *a priori* rules and a high degree of confidence on a case-by-case analysis. As a corollary, there has been a great degree of judicial flexibility.<sup>199</sup> All the approaches of the Restatement Second – but mainly the ‘*better law approach*’ – lead the judge to examine the substantive law related to the case and decide accordingly. This is what makes the Restatement Second ‘result-oriented’.

Risking oversimplification, it was even asserted that “while the Restatement deliberately opts for under-regulation, Rome (...) II necessarily opts for over-regulation”.<sup>200</sup> Yet, there are criticisms directed at both systems. It is widely claimed that Rome II is imperfect and it neither fulfils the requirement of legal certainty nor achieves substantial justice.<sup>201</sup> On the other side of the coin, recently, there has been an increasing interest<sup>202</sup> in formulating narrower rules of choice; and there has been some movement in this direction under some US jurisdictions.<sup>203</sup> Furthermore, many American scholars agree that Congress has the constitutional power to enact a statute with uniform choice-of-law rules, which would be the functional equivalent of an EU regulation<sup>204</sup> even

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<sup>197</sup> Zhang, *supra* note 2, p. 866.

<sup>198</sup> Hanotiau, *supra* note 19, p. 97.

<sup>199</sup> Symeonides, ‘Party Autonomy’, *supra* note 125, p. 549; Wolff, *supra* note 18, p. 450–451.

<sup>200</sup> Symeonides, ‘Party Autonomy’, *supra* note 125, p. 549.

<sup>201</sup> Kramer, *supra* note 72, p. 18; M Reimann, “Choice-of-Law Codification in Modern Europe: The Costs of Multi-Level Law-Making”, *Creighton Law Review*, 2016, Issue 49, p. 507; Zhang, *supra* note 2, p. 913. At the same time, based on more or less the same reasons, some may identify Rome II as ‘a missed opportunity’. See Symeonides, ‘Missed Opportunity’, *supra* note 58, p. 56.

<sup>202</sup> Zhang, *supra* note 2, p. 910.

<sup>203</sup> Symeonides, ‘2016’, *supra* note 33, p. 129 ff.

<sup>204</sup> Kaminsky, *supra* note 3, p. 102-103; Hay, *supra* note 9, p. 2071. For the opposite argument which argues that certainty and predictability is achieved -at least within

though it is not likely to reach an agreement on the main approach that governs the conflicts of law of torts. Although the rules will not be binding, the day when Restatement Third, which seems to smoothen the extreme flexibility of Restatement Second, will be finalized seems not too far away.<sup>205</sup>

Since the “choice of law rules owns its very existence to the fact that there is no world-wide system of private law”,<sup>206</sup> considering all the above, it is not (and should not be) the aim to create a hybrid at all costs. But it is undeniable that each system has its strong sides that inspire the other<sup>207</sup> and at the same time, has certain fragile points to be refrained from.<sup>208</sup>

While many things remain uncertain, one thing is certain today. As experience has shown, rigid rules are far from providing the desired legal certainty in the private international law of torts. Therefore, if the solution to be adopted does not consist of as flexible rules as possible, these discussions will not end for many years. However, as is also seen from experience regarding the Restatement Second, the solution cannot be found under excessive flexibility.<sup>209</sup> As Symeonides asserts “It is possible to have our cake and eat it too – namely, to have certainty tempered with flexibility.”<sup>210</sup> Therefore, each system should pick the cherries of the others while always considering the historical growth of its own system<sup>211</sup> to reach the ultimate goal of justice. Although a *perfect*

each state- by the results reached by the courts see R.A. Sedler, “Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?”, *Indiana Law Journal*, 2000, Issue 75, p. 615.

<sup>205</sup> For a view which has long supported the preparation of a new restatement, see among others Symeonides, ‘Why Not’, *supra* note 7, p. 383.

<sup>206</sup> de Boer, *supra* note 2, p. 301.

<sup>207</sup> Zhang, *supra* note 2, p. 917. For example, Symeonides asserts that Art 14 of the Regulation ‘is certainly worth considering drafting a new Restatement’, see Symeonides, ‘Why Not’, *supra* note 7, p. 404–405.

<sup>208</sup> Reimann, ‘Law-Making’, *supra* note 201, p. 507; Zhang, *supra* note 2, p. 916–7.

<sup>209</sup> Symeonides, ‘Third’, *supra* note 180, p. 48–49.

<sup>210</sup> S. Symeonides, *Choice of Law*, Oxford Commentaries on American Law, 2016, p. 702.

<sup>211</sup> For the US see Symeonides, ‘Why Not’, *supra* note 7, p. 419:

[T]hanks to the First Restatement, we now know what to avoid: broad, all-embracing, inflexible, monolithic rules, based on a single connecting factor selecting on metaphysical grounds, based on a single connecting factor selected on metaphysical grounds. Thanks also to the choice-of-law revolution, we know what to aim for: narrow, flexible,



system does not exist, theoretical consistency and practical workability are not beyond reach for both systems if the aim of maintaining the balance is not lost sight of.<sup>212</sup>

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content-sensitive and issue-oriented rules, based on experience, with occasional built-in escape clauses that would allow these rules to grow and to adjust to changing needs and values.

<sup>212</sup> This conclusion is also in line with the underlying logic of the rule of law: “The rule of law is not a law of rigid rules; it is the never-ending task of shaping law to fit current social conditions and values and using judgment and careful thinking to decide what cases actually deserve to be treated alike and which deserve to be treated differently.” Singer, *supra* note 180, p. 385.