General Principles of Private International Law of Tort in Europe

KADNER GRAZIANO, Thomas
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THOMAS KADNER GRAZIANO *

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I. Starting Point:

Diversity of the Private International Law of Tort in Europe

For a long time the private international law of tortious or delictual liability in Europe has been largely left to the national legislators and courts. The rules currently in force in Europe differ very much from one country to another. In a specific case, the outcome may therefore largely depend on the country in Europe in which the claim is brought.

A short example may illustrate the current state of the private international law of tort in Europe:¹ Two tourists, both living in France, spend their winter vacation in the Swiss Alps. At the bottom of a ski-run they

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collide and one of them gets hurt. It is impossible to establish who is at fault.

According to the rules on international jurisdiction, which have been unified in Europe by the Brussels I Regulation and by the Lugano Convention, a claim for damages can be brought either in France where the defendant has his habitual residence (Art. 2.1 of the Brussels I Regulation) or in Switzerland where the accident happened (Art. 5.3 of the Lugano Convention). If the claim were brought in France, the French judge would apply the law of the place of the accident (the lex loci delicti). Since the accident in our example happened in Switzerland, Swiss tort law would be applied. According to Art. 41 of the Swiss Code of Obligations, fault needs to be proved and the action would fail. On the other hand, if the case were brought before a Swiss court, the judge would determine the applicable law by applying the rules of the Swiss Federal Private International Law Act. According to Art. 133 sect. 1 of this Act, French law would apply because both parties have their habitual residence in France. Under the French Code civil, the liability of the skier would most probably be strict and the claim would succeed. (In the field of torts, both French and Swiss PIL ignore a renvoi.)

The outcome of the case would therefore depend on where it is brought: If it were brought before Swiss courts, the claim would probably succeed; if it were brought before French courts, it would certainly fail. In such a case, lawyers should thus advise their client to file an action in Switzerland in order to increase the chances of winning the case. This is but one of many examples of forum shopping under the conflict-of-law rules currently in force in Europe.

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3 Convention of 16.9.1988 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Lugano Convention"), in force in Switzerland, see Systematische Sammlung des Bundesrechts (SR) 0.275.11.
4 Leading cases: French Cour de Cassation 25.5.1948 (Lautour c. Veuve Guiraut), Rev. crit. 1949, 89 case note BATTIFOL; Cour de Cass. 30.5.1967 (Kieger c. Amigues), Rev. crit. 1967, 728 case note BOUREL.
5 See, for skiing accidents, e.g., Swiss Federal Court 7.2.1956, BGE/ATF 82 II 25.
6 See, e.g., the case Cour d’appel de Colmar 18.9.1992 (New Hampshire Unat SA c. Hugel), Juris-Classeur périodique, La Semaine Juridique (JCP) IV 1711: application of the strict liability system of Art. 1384 of the French Civil Code, i.e., liability for damage caused by objects a person has under his control, such as the skis in the present case that permitted rapid movement and thereby contributed to causing the accident.
7 Art. 14(1) of the Swiss PIL Act; for France, see, e.g., Tribunal de grande instance de Paris 21.6.1969, Dalloz Sirey 1970, Jur. 780 case note PRÉVAULT.
II. Uniform Rules de lege lata and de lege ferenda

The state of the law has long been considered unsatisfactory. That is why initiatives to unify the private international law rules in the field of torts have been taken, first by the Hague Conference on Private International Law, then by the European Community/European Union.

Common rules on the applicable law in international tort cases lead to the application of the same law wherever in Europe a claim is brought. If appropriately drafted, common private international law rules lead to foreseeability of the applicable law and to legal certainty. Forum shopping is avoided, and the actors on the international scene know the applicable law before a case goes to court.

In the early 1970s, the Hague Conference adopted two Conventions in the field of tort law: First, the “Hague Convention on the law applicable to traffic accidents” of 1971, which is in force in 12 of the 27 Member States of the European Union; and second, the “Hague Convention on the law applicable to products liability” of 1973, which has been less successful and which is in force in only 6 Member States of the EU.8 Neither of these Conventions is in force in Germany or, for example, in the United Kingdom since the system of connecting factors used in both Conventions has been considered too complicated by the national legislators.9

In the 1970s, the European Community made its first attempt at unifying the private international law on contractual and extra-contractual obligations.10 When the United Kingdom joined the EC, the project was limited to contractual obligations and finally led to the “Rome I” Convention on the law applicable to contractual obligations.

It was only in 1996 that the EU re-examined the question of the necessity and feasibility of common European rules on the law applicable to non-contractual obligations. Several proposals and recommendations for a “Rome II” Regulation “on the law applicable to non-contractual obligations” have been made, notably by the European Commission, the European Parliament, and by the Council of the European Union.11

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8 Text and Member States of both Conventions under www.hcch.net.
10 Text, for example, in: RabelsZ 38 (1974), 211; Rev. crit. 1973, 209.
issues, however, a compromise between the positions of the Commission and the European Parliament was not forthcoming and, for the first time, the newly established conciliation procedure had to take place in order to reach a compromise between the European law-making institutions. In May 2007, after long and difficult negotiations, a compromise on certain controversial issues was reached, whereas others were excluded and postponed to a future revision of “Rome II.” The “Rome II” Regulation on the law applicable to non-contractual obligations shall be applied from 2009 on.

The following contribution takes into consideration both the current state of the national rules for the private international law (PIL) of tort in Europe and the future regulation on “Rome II.” The presentation will start with some relatively uncontroversial issues and then focus on more disputed topics such as the role of party autonomy in the law of tort and the issues that have divided the European Commission and the European Parliament in the process leading to the adoption of “Rome II.”


12 OJ L 199/40, 31.07.2007. The most important documents produced during the procedure that lead to “Rome II” are accessible under http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=de&DosId=184392.
III. The *lex loci delicti commissi*

If we look for "General Principles of Private International Law of Tort in Europe" (and elsewhere), the first general principle we can identify is the application of the law of the place where the tort has been committed (the *lex loci delicti*). The *lex loci* rule is in force in almost all European countries (from Poland to Portugal, from the Netherlands to Greece, and from England to Lithuania).

The place where the tort has been committed is either used as the general rule – as, for example, in Art. 40(1) of the German EGBGB, just as in Art. 17(1) of the new Japanese "Act on the General Rules of Applications of Laws" (in the following: Japanese PIL Act) – or it plays a subsidiary role, used where no other connecting factor applies, as, for example, in Art. 133(2) of the Swiss Private International Law Act. All proposals for "Rome II" made by the legislative institutions of the EU as well as Art. 4(1) of the final text of the Regulation also provide for the application of the *lex loci delicti*.

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14 Sect. 11 of the *English* and *Scottish* Private International Law Act of 1995; Art. 40 of the German EGBGB; Art. 133(2) of the Swiss PIL Act; Art. 3(1) of the Dutch Act on PIL in the field of delictual liability; Art. 99 § 1(2) of the Belgian PIL Code; Art. 62 of the Italian PIL Act; Art. 10.9 of the Spanish Civil Code; Art. 45 of the Portuguese Civil Code; Art. 26 of the Greek Civil Code; Art. 31 § 1 of the Polish PIL Act; § 15 of the PIL Act of the Czech Republic and of the Republic of Slovakia; Art. 19 of the PIL Act of Albania; Art. 107 of the Romanian PIL Act; Art. 30 of the PIL Act of Slovenia; Art. 1219(1) of Part III of the Russian Civil Code; Art. 1.43(1) of the Civil Code of Lithuania; § 164(1) of the Law on the Principles of the Civil Code of Estonia; Art. 1128 of the Civil Code of Belarus; Art. 25 of the Turkish PIL Act.

15 Einführungsgesetz zum Bürgerlichen Gesetzbuch = Introductory Act to the German Civil Code.

IV. Exceptions to the *lex loci delicti* Rule

A second general principle common to almost all modern European private international law acts in the field of tort is that, under certain circumstances, exceptions to the *lex loci* rule are made.\(^{17}\)

The European countries in which the *lex loci delicti* rule is applied without any exceptions are rare today. Examples are *France*, *Spain*, and *Greece*. Most modern European codification of the private international law of tort provide for exceptions to the *lex loci delicti* rule, particularly in cases where the parties have their habitual residence in the same country when the damage occurs,\(^ {18}\) or in cases in which the parties are in a close relationship with each other (such as a contractual relationship) and the tort violates this relationship; in this case the law governing this relationship is also applied to liability in tort (the so-called *rattachement accessoire*).\(^ {19}\)

The "Rome II" Regulation follows these examples and provides for several exceptions to the *lex loci delicti* rule (see Art. 4(2): in the case of a habitual residence of the parties in the same country, and Art. 4(3): in the case that “the tort […] is manifestly more closely connected” with a country other than the country of the place of accident which may in particular be the case if there is “a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question”).

The exception clause in Art. 20 of the *Japanese* Act of 2007 which provides for similar exceptions to the *lex loci delicti* rule is therefore totally in line with modern European tendencies.

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\(^{18}\) Art. 40(2) of the *German* EGBGB; Art. 133(1) of the *Swiss* PIL Act; Art. 1(3) of the *Dutch* PIL Act in the field of delictual liability (2001); Art. 99 § 1(1) of the *Belgian* PIL Code; § 32(3) of the *Hungarian* Act (Magyar Közölöny); § 165(1) of the Act on Principles of the Civil Code of Estonia (1994); Art. 1.43(4) of the Civil Code of Lithuania (2000). General exception clauses have been adopted in *England*, Sect. 12 of the Private International Law Act (1995); in *Germany*, Art. 41(1) of the EGBGB; *Switzerland*, Art. 15(1) of the PIL Act; *Liechtenstein*, Art. 52(1) of the PIL Act; *Turkey*, Art. 25(3) of the PIL Act.

\(^{19}\) Art. 133(2) of the *Swiss* PIL Act; Art. 41(2) of the *German* EGBGB; Art. 5 of the *Dutch* Act on PIL in the field of delictual liability; Art. 100 of the *Belgian* PIL Code; the solution was also adopted in *Austria*, Supreme Court (OGH) 29.10.1987, IPRax 1988, 363 (364); OGH 30.3.2001, ZfRV 2002, 149 (152).
V. Party Autonomy

Other issues are more controversial. The first and most fundamental of these disputed issues is the question of whether and to what extent the parties should have the freedom to choose the law applicable to their extra-contractual relationships.

In the rules on private international law of all European countries that have already addressed this problem, the parties are free to choose the applicable law both in contracts and in tort.\(^{20}\) Thus the freedom of choice is undoubtedly part of the general principles of private international law of tort in Europe.

However, in many countries, this freedom is limited. As far as the limits to choose the applicable law in tort are concerned, the current situation in Europe is very diverse.

Some national systems allow the choice of the applicable law only after the tort has occurred (this is the position in Switzerland, Belgium, Germany, Lithuania, and Russia\(^{21}\) – just as in Art. 21 of the new Japanese Act). Very few national systems further limit the freedom of the parties and allow only the choosing of the law of the forum (this is the case in Switzerland, Lithuania, and Russia\(^{22}\)).

In contrast, according to the rules on PIL of Austria, Liechtenstein, and the Netherlands, the parties may choose the applicable law ex post and ex ante, i.e., after or before the injury occurs, if they are already in contact at that time, and they do not limit the laws that might be chosen.\(^{23}\) In these countries the parties have, in principle, the same freedom of choice in tort as in contracts. In the private international law codes of Austria, Liechtenstein, and Switzerland, the choice of the applicable law by the parties is the primary connecting factor in tort, just as in contracts. Only if the parties have not agreed on the applicable law, are other factors (such as the loci delicti or the habitual residence of the parties in the same country) taken into consideration. In European case law, it seems that not a single case in which this freedom of choice has been misused has been reported.

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\(^{20}\) Cf., with further references, KADNER GRAZIANO, Gemeineuropäisches Internationales Privatrecht, supra note 1, p. 170 et seq. and p. 491, Leitsätze § 1; IDEM, Europäisches Internationales Deliktsrecht, supra note 1, p. 26 et seq. and p. 146, Leitsätze § 1.

\(^{21}\) Art. 132 of the Swiss PIL Act; Art. 101 of the Belgian PIL Code; Art. 42 of the German EGBGB; Art. 1.43(3) of the Civil Code of Lithuania; Art. 1219(3) of the Russian Civil Code.

\(^{22}\) Art. 132 of the Swiss PIL Act; Art. 1.43(3) of the Civil Code of Lithuania; Art. 1219(3) of the Russian Civil Code.

\(^{23}\) § 35(1) of the Austrian PIL Act; Art. 39(1) of the PIL Act of Liechtenstein; Art. 6 of the Dutch Act on PIL in the field of delictual liability.
The proposals for a "Rome II" Regulation differed as far as the role of party autonomy was concerned: In the Commission's proposal of 2003, party autonomy was limited to a choice of the applicable law ex post (Art. 10). In its resolution on "Rome II" of 2005, the European Parliament proposed the choice of the applicable law ex post and, under some conditions, also ex ante and placed the "freedom of choice" of the applicable law in the first position of all connecting factors in tort. In its proposal of February 2006, the Commission took inspiration from this proposal and from the experiences in countries with a very liberal attitude toward party autonomy in tort. The Commission's proposal provided, as a starting point, that "[t]he parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations to the law of their choice." The proposal continued, thereby closely following Art. 3 of the Rome I Convention, that "[t]he choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case." Like all modern laws in this field, including the new Japanese Act (Art. 21 2nd sent.), the proposal made clear that the choice "may not affect the rights and obligations of third parties."

The Commission's proposal of February 2006, like the Parliament's resolution of 2005, extended the freedom of the parties, under some circumstances, to a choice ex ante. The Commission thereby proposed a modern approach, centering on the freedom of choice of the parties. Parties who are in a pre-tort relationship (for example, parties to a complex construction contract or parties in a long-lasting business relationship) may have a strong interest in determining the law applicable to all their relationships, including future extra-contractual liabilities, in advance. They will usually know best what the most appropriate solution is for them. By limiting the freedom of choice ex ante to parties exercising "a commercial activity" and to agreements "freely negotiated," the proposal made sure that the freedom would not be used to the detriment of one of the parties.

Finally, by placing the "freedom of choice" clause in the first position of all connecting factors, the Commission's proposal of 2006 and the prior

27 Amended proposal, supra, note 16, Art. 4 (2).
resolution of the European Parliament clearly emphasized the freedom of the parties to negotiate and to come to an agreement about the law applicable not only to their contractual, but also to current or future extra-contractual relationships. In order to justify party autonomy as the primary rule in the field of tort, the reporter of European Parliament stated that:

"[i]t seems more logical to move the [freedom of choice] to the beginning of the Regulation, since it is clear that if the parties have reached an agreement between them as to the applicable law, account should be taken of the parties' intention before applying exogenous rules in order to determine the applicable law. This also promotes judicial economy." 28

The European Council's “Common Position” on “Rome II” of September 2006 and – finally – Art. 14 of the new “Rome II” Regulation largely follow the Commission’s proposal of February 2006; however, with a more conservative approach, they place the “freedom of choice” not in the first position, but in the last place of the connecting factors. Still, if the parties have used their freedom of choice ex post, or under certain conditions, already ex ante, their choice prevails over any other connecting factor.

The modern national rules described above, all proposals on “Rome II,” and the final text of the “Rome II” Regulation thus confirm that the freedom of choice counts among the central general principles of modern European private international law in tort.

It may be argued 29 that if parties are in a relationship before the damaging event occurs, rattachement accessoire 30 may often achieve the same results as party autonomy in tort: If the parties are in a contractual relationship before the tort occurs and if they choose the law applicable to their contract, this choice will – by way of rattachement accessoire – extend to liability in tort. Thus, a rule providing for party autonomy ex ante is, it is argued, superfluous.

In certain cases a rattachement accessoire will indeed allow the parties to indirectly “choose” the applicable law ex ante also for tortious relationships. Party autonomy is hereby, however, introduced only “through the backdoor” into the law of tort. Moreover, in certain situations – for example, in complex construction contracts – parties may be working on the same project but may not be in direct contractual relationships so that there is no contractual basis for rattachement accessoire between these parties.

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29 As it has, in fact, been argued at the Hamburg Conference by several participants.
30 Supra, IV.
A rule that extends party autonomy in tort to the choice of the applicable law ex ante and that clearly defines the limits of this freedom is, arguably, preferable to introducing party autonomy only "through the backdoor." Such a rule clearly contributes to legal certainty and gives clear incentives to the parties to benefit from party autonomy in the field of tort.

VI. Public Policy of the Forum

The issue of public policy has long been very delicate in the field of transboundary torts. For centuries, liability in tort has been closely connected to criminal liability and to public order (ordre public).

In cases in which the private international law leads to the application of foreign laws, some PIL rules, mainly in central and eastern Europe, limit liability to cases where the act is also illegal under the lex fori, or they limit damages to the amount that would be due under the lex fori.

Starting with two famous cases of 1868 and 1870, English law went a step further and took the position that, in order to succeed, a tort claim must satisfy the conditions for liability both of the (foreign) lex loci delicti and of English law. According to this "double actionability rule," the plaintiff thus had to clear the hurdles of the liability laws of two countries in order to succeed with his claim.

In all other European countries, including Ireland, this approach was rejected as going too far in the application of the lex fori. In order to

31 § 34(1) of the Hungarian Act on PIL (Magyar Közlöny); Art. 1129(3) of the Civil Code of Belarus.
32 § 165(2) of the Act on Principles of the Civil Code of Estonia; for product liability claims and for certain claims for unfair competition also according to the Swiss PIL Act, Art. 135(2), 137, and according to the Romanian PIL Act, 116, 119.
35 Patrick Grehan v. Medical Incorporated and Valley Pines Associates [1986] I.L.R.M. 627 (S.C.) (Finlay, C.J., Walsh and Griffin, J.): "The rule in Phillips v. Eyre has nothing to recommend it because it is capable of producing quite arbitrary decisions and it is a mixture of parochialism and a vehicle for being, in some cases, unduly generous to the plaintiff and, in others, unduly harsh."
36 See, e.g., ANTON / BEAUMONT, Private International Law, Edinburgh 1990, p. 398: "The requirement of actionability by the lex fori is inconsistent with the very premises of private international law"; McCLEAN, Morris: Conflict of Laws, 4th ed., London 1993, p. 282: "the whole of the conflict of laws should be scrapped"; CARRUTHERS / CRAW-
prevent the application of foreign laws that lead to results manifestly incompatible with the public policy of the forum, these countries use general *ordre public* clauses. Some national legislators have added specific *ordre public* clauses to torts, excluding the application of foreign laws that award payments going far beyond the damage suffered or that award damages serving aims other than reparation or compensation.\(^{37}\) An analysis of the European case law shows that these *ordre public* clauses are applied carefully and that reported cases in which the courts held that the *ordre public* of the forum was violated are extremely rare in Europe.\(^{38}\) Thus, the very cautious application of the national *ordre public* may be another strong characteristic, if not a general principle, of private international law on tort in Europe.

In 1995, after more than 100 years of its application, *England*, *Scotland*, and *Wales* abandoned the *double actionability rule* (except for defamation cases).\(^{39}\) Instead, the *lex loci delicti* rule was reintroduced, accompanied by a very flexible public policy clause.\(^{40}\)

For European lawyers it is interesting to see that in Japan a very controversial discussion about the justification and the necessity of a *double actionability rule* has been taking place,\(^{41}\) just as it has taken place in England, and to observe that the Japanese legislators finally adopted such a rule in Art. 22 of the new *Japanese Act*.

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\(^{37}\) See Art. 40(3) of the German EGBG.

\(^{38}\) For examples, see the French case *Antunes c. dame Bakhyoko*, Cour de Cass. 21.3.1979, Rev. crit. 1981, 81 case note DAYANT: the victim was a minor, short limitation period (one year) of the Spanish Civil Code held to be in violation of the French *ordre public*; BGH 4.6.1992, BGHZ 118, 312: Punitive damages under the law of California held to be contrary to the German *ordre public*; BGH 16.9.1993, BGHZ 123, 268: a German schoolchild was killed while in a camp with his class in Italy. Held: it violates the German *ordre public* to hold the teacher personally liable for damages under a foreign law since the victim and his relatives benefit from a state liability scheme which excludes personal liability of teachers.


VII. Complex Torts: Application of the General Rule or Specific Connecting Factors?

In some cases a person acts in one country (or several countries) and the damage occurs in another country (or in several other countries). We call these situations "multilocal torts," "double or multiple locality cases," or "complex torts." The selection of the law which is to govern "multilocal" or "complex" torts is probably the most difficult in the project on the unification of the choice-of-law rules in tort. The issue of complex torts will be dealt with in another contribution to this publication. The present contribution thus deals only with the fundamental question of whether the general rule (i.e., the lex loci delicti rule) should be considered sufficient to cover specific torts, or if special rules are needed to govern specific torts such as

- product liability,
- violations of the right of privacy or of other personality rights by mass media,
- environmental damage,
- unfair competition and acts restricting free competition,
- infringements of intellectual property rights.

In the area of product liability, of violations of the right of privacy or personality rights, and of unfair competition, the criteria of the "place where the damage occurred" is, as a connecting factor, extremely vague. For these specific torts, the place of the tort either needs further specification or is simply inadequate, as in the case of product liability.

The new Japanese Act therefore takes the position that at least some specific torts need to be governed by specific rules. The Japanese Act

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42 For the current situation in the PIL in Europe, see KADNER GRAZIANO Gemein­europäisches Internationales Privatrecht, supra note 1, p. 195-362; IDEM, Europäisches Internationales Deliktsrecht, supra note 1, p. 45-109.
43 See MARC FALLON'S contribution, infra, Part V.
44 See for these groups of specific torts, from a European perspective, KADNER GRAZIANO, Gemein­europäisches Internationales Privatrecht, supra note 1, p. 236 et seq. (damages to the environment), 258 et seq. (product liability), 294 et seq. (personality rights), 324 et seq. (unfair competition), 341 et seq. (pure economic loss) and p. 491 et seq. Leitsätze §§ 5-8; IDEM, Europäisches Internationales Deliktsrecht, supra note 1, p. 55 et seq. (damages to the environment), 63 et seq. (product liability), 79 et seq. (personality rights), 90 et seq. (unfair competition), 100 et seq. (pure economic loss) and p. 146 et seq. Leitsätze §§ 5-8.
provides for specific rules for the two most difficult issues of multilocal torts (i.e., product liability and defamation, Art. 19 and 20 of the Japanese Act). It seems that it is widely acknowledged in Japan that a third group, the infringement of intellectual property rights, also calls for special treatment, but discussions on this issue have not yet been concluded.46

Most European legislators today share the view that at least certain specific torts need to be governed by specific rules, and they have introduced particular rules for specific torts. This is the case for Switzerland, Austria, Liechtenstein, the Netherlands, Belgium, Spain, Italy, and for many central and eastern European countries such as Estonia, Lithuania, Romania, Russia, and Belarus.47 In addition, for example in Germany and Austria, the courts have applied specific criteria for specific torts.48 These particular criteria and rules for specific multilocal torts make clear and leave no doubt that certain categories of torts merit specific considerations which differ considerably from multilocal torts in general and from one specific group of these torts to the other.

“Rome II” is based on the same conviction and provides for specific rules in the fields of product liability (Art. 5), unfair competition and acts restricting free competition (Art. 6), environmental damage (Art. 7), infringement of intellectual property rights (Art. 8), and industrial action (Art. 9).

46 TAKAHASHI, supra note 41, 329.
47 PIL Act of Austria, § 48(2) (unfair competition); PIL Act of Liechtenstein, Art. 52(2) (unfair competition); PIL Code of Belgium, Art. 99 § 2(1) (defamation), (2) (unfair competition), (3) (damage to the environment), (4) (product liability); Art. 4 of the Spanish Act of 16.1.1991 on Unfair Competition; Estonian Act on Principles of the Civil Code, § 166 (damages suffered by consumers and caused by goods or services), § 167 (unfair competition); Art. 63 of the Italian Act on PIL (product liability); Art. 52(2) of the PIL Act of Liechtenstein (unfair competition); Civil Code of Lithuania, Art. 1.43(5) (product liability) and Art. 1.45 (violation of personality rights); Dutch Act on PIL in the field of delictual liability, Art. 2(2) (product liability), Art. 3(2) (damages to the environment), Art. 4 (unfair competition); Romanian PIL Act, Art. 112, 113 (personality rights), Art. 114-116 (product liability), Art. 117-119 (unfair competition); Art. 1221 of the Russian Civil Code (product liability); Swiss PIL Act, Art. 135 (product liability), Art. 136 (unfair competition), Art. 137 (restrictions of trade), Art. 138 (damage to the environment), Art. 139 (personality rights); Art. 1115 of the Civil Code of Belarus (personality rights).
48 In product liability cases, the place of acting or the place of injury is often replaced by the place of marketing of the product, see, e.g., the Austrian case OGH 29.10.1987, IPRax 1988, 363; in cases of injury to personality rights through mass media, the place of injury is often located at the place of the market where the publishe receives the information, see, e.g., the German case BGH 19.12.1995, NJW 1996, 1128; in cases of unfair competition, the tort is often located exclusively at the place of the market that has been affected, see, e.g., the German cases BGH 30.6.1961, BGHZ 35, 329; 23.10.1970, JZ 1971, 731; 13.5.1977, NJW 1977, 2211.
The introduction of specific rules for specific multilocality torts thus is at least another common feature, if not a general principle, of modern private international law on tort in Europe.

VIII. A Particularly Sensitive Issue: The Position of Victims in Personal Injury Cases

In the negotiations between the Commission and the European Parliament, two issues have been particularly difficult to solve:

- The first problem is the question of which law to apply to transnational violations of privacy, personality rights, and defamation, especially by mass media. The European institutions finally excluded this issue from the “Rome II” Regulation [Art. 1(2)(g) of the Regulation] and decided to examine this highly topical and controversial issue further before including it into the “Rome II” Regulation.
- The second issue is how to better protect the victims of road accidents and, more generally, of personal-injury cases.

This contribution will briefly deal with the second issue. During the final negotiations on “Rome II” one of the principal aims of the European Parliament and of its rapporteur, Diana Wallis, has been to strengthen the position of victims of road accidents in the “Rome II” Regulation. In the second reading, the Parliament recommended improving the position of victims in personal injury cases in general.


50 Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) No 861/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”), P6_TC1-COD(2003)0168. Art. 4(2) reads: “In the case of personal injuries arising out of traffic accidents [...] and with a view to the motor insurance directive, the court seized and the liable driver’s insurer shall, for the purposes of determining the type of claim for damages and calculating the quantum of the claim, apply the rules of the individual victim’s place of habitual residence unless it would be inequitable to the victim to do so. With regard to liability, the applicable law shall be the law of the place where the accident occurred.”

51 European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”) (9751/7/2006 – C6-0317/2006 – 2003/0168(COD)), Thursday, 18 January 2007 – Strasbourg, see Art. 21a (Damages): “In quantifying damages in personal injury cases, the court seized shall apply the
An analysis of the European case law in the field of PIL of tort reveals that under the tort laws in force in the different European countries, one of the most important hurdles for victims in transboundary road accident and personal injury cases is the difference in the national limitation periods. In Europe, limitation periods in tort cases vary considerably between the different legal orders.

In our case of the accident of the two skiers in the Swiss Alps, the limitation period of the Swiss Code of obligations is, for example, one year, whereas the limitation period of the French Civil Code is 10 years. If, for instance, a French and a Swedish driver have a car accident in Spain, the limitation period of the Spanish lex loci delicti is, as in Swiss law, one year, whereas the limitation periods of both French and Swedish law are, again, much longer. In a large number of cases that come before the courts in Europe, the parties are in dispute about the applicable law just because under one national tort law the action is time-barred, whereas under a different national law the limitation period has not yet expired.

The “Rome II” Regulation could address this issue and, for instance, provide that an action is time-barred only if both

- the limitation period of the law which governs it (for example the lex loci delicti)
- and the limitation period of the law of the country of the victim’s habitual residence at the time of the accident

have expired.

principle of restitutio in integrum, having regard to the victim’s actual circumstances in his country of habitual residence.”

52 Supra, I.
53 Art. 60 of the Swiss Code of Obligations; Art. 2270-1 of the French Civil Code.
54 Art.1.968 of the Spanish Código civil (1 year), Art. 2270-1 of the French Code civil (10 years), 2 § 1 of the Swedish Law on Limitation Periods (Preskriptionslag, 1981:130) (10 years).
This proposal would favor the actionability of claims. It is true that it would deviate from the general principle according to which private international law makes choices between several (national) laws instead of providing to apply them cumulatively. The suggested rule "favor actionis" could, however, take inspiration from Art. 9(2) of the Rome I Convention which states that "a contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries." This favor contractus rule of Rome I could find a parallel in the suggested "favor actionis" rule in "Rome II." If such a rule were introduced into the "Rome II" Regulation, one of the most obvious and important differences in the European national tort laws would be ironed out. The position of victims in personal injury cases would be considerably strengthened and, arguably, many fewer claims about the applicable law in personal injury cases would have to be brought before European courts.

The final text of the "Rome II" Regulation does not provide for such a rule. Instead, the European Parliament and the Commission agreed to prepare and present, by 2008, a study on the national differences in compensation levels. This study will focus on substantive law in the field of personal injury cases and will probably lead to a green paper in this field.

At the same time, the experiences with "Rome II" will be evaluated in order to revise and improve the Regulation. At the time of the first revision, the problem of different limitation periods could be solved at the private international law level (for a precise proposal, see the annex). A rule on the level of conflict of laws would have the advantage of providing a solution not only for situations in which the tort law of a Member State of the EU is applicable, but also for cases governed by the law of third countries, such as Swiss law in our example of the ski accident in the Swiss Alps (Switzerland not being a Member State of the EU).

The proposal to cumulatively apply two laws on the issue of limitation periods in favor of the victim obviously raises the question of why a victim should receive a more favorable treatment just because he has his habitual residence abroad. One argument to favor victims in transboundary cases is that short limitation periods of national tort laws are made for domestic cases. In transnational situations, clearing up the facts will often be more time-consuming, the parties will have to deal with language barriers and

56 See also Art. 21 of the "Rome II" Regulation: "Formal validity. A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed."

57 For details, see KADNER GRAZIANO, supra note 49.

58 See Art. 30(1) of the "Rome II" Regulation.
with different legal backgrounds. In such situations, short limitation periods will often be particularly harsh. Last but not least, the question of how to better protect victims of personal injury cases is a political issue that is currently on the agenda of the European Parliament. The suggested approach would achieve a better protection of victims in transnational cases whilst being perfectly in line with the traditional connecting factors of European private international law.

IX. Annex:

Proposal for a Rule on Limitation Periods in “Rome II”

The suggested rule on the protection of victims of transnational torts against short limitation periods of foreign laws could read, for example, as follows:

Limitation periods

The claim for extra-contractual liability is time-barred only if the limitation period of the applicable law and the limitation period of the law of the country of the victim's habitual residence at the time of the accident have expired.

Délais de prescription

L'action en responsabilité extracontractuelle n'est prescrite que si les délais de prescription de la loi applicable et de la loi du pays où la partie lésée a sa résidence habituelle au moment de l'accident ont expiré.

Verjährungsfristen

Der Anspruch aus außervertraglicher Haftung ist nur dann verjährt, wenn sowohl nach demjenigen Recht, nach dem der Anspruch zu beurteilen ist, als auch nach demjenigen Recht, in dessen Geltungsbereich der Geschädigte zum Zeitpunkt des haftungs begründenden Ereignisses seinen gewöhnlichen Aufenthalt hat, die Verjährung eingetreten ist.