

# The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?\*

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## I. DRAFTING CHOICE-OF-LAW RULES

The European Community Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”) will take effect on January 11, 2009.<sup>1</sup> This regulation is part of a widespread effort to draft new choice-of-law rules. For example, in 2007 a new conflict-of-laws code took effect in Japan.<sup>2</sup> China is drafting a comprehensive civil code, which includes

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1. Council Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations, art. 32, 2007 O.J. (L 199) 40, 48 [hereinafter Rome II].

2. *Translation of Japan’s Private International Law: Act on the General Rules of Application of Laws* [Hō no Tekiyō ni Kansuru Tsūsokuhō], *Law No. 10 of 1898 (As Newly Titled and Amended 21 June 2006)* (Kent Anderson and Yasuhiro Okuda, trans.), 8 ASIAN-PAC. L. & POL’Y J. 2 (2006), available at [http://www.hawaii.edu/aplpj/pdfs/APLPJv8.01\\_Fall2006\\_JapanPrivateInternationalLaw\\_AndersonandOkuda.pdf](http://www.hawaii.edu/aplpj/pdfs/APLPJv8.01_Fall2006_JapanPrivateInternationalLaw_AndersonandOkuda.pdf) (citing Application of Laws Act, Fusoku [Supplementary Provisions], art. 1; Seirei [Cabinet Order], No. 289 of

choice-of-law rules.<sup>3</sup> What should be the objectives of these drafting projects? Should the new rules, as law-and-economics scholars urge, be simple and afford clearly predictable results? Or should choice-of-law rules endeavor to select the jurisdiction that experiences the consequences when the chosen law is applied? A third possibility is to draft rules that provide substantial predictability and are likely to be consistent with a consequences-based approach. Rome II falls into this third category: reasonably predictable results that are likely to give effect to the policies of the jurisdiction that will experience the consequences when the chosen law is applied.

There is now an extensive law-and-economics literature devoted to choice of law. Sections II and III summarize this economics approach to drafting conflicts rules and evaluate Rome II under this perspective. Sections IV and V outline a consequences-based approach to choice-of-law and appraise the extent to which Rome II is consistent with this methodology. The Appendix contains the complete text of the Regulation.

## II. LAW-AND-ECONOMICS SCHOLARSHIP ON CHOICE OF LAW

In the third edition of his classic work, *Economic Analysis of Law*,<sup>4</sup> Judge—formerly Professor—Richard A. Posner, inserted a one-page section on “Choice of Law.”<sup>5</sup> He poses a case in which “a resident of State A, while driving in State B, injures a resident of B who sues.”<sup>6</sup> He states that the law of B should apply because that state has “a comparative regulatory advantage in regard to accidents which occur in B.”<sup>7</sup> It is likely that by “comparative regulatory advantage” he is referring only to rules of the road, such as speed limits: “Presumably B’s Rules are tailored to driving conditions—the state of the roads, weather, etc.—in B.”<sup>8</sup>

Judge Posner goes on to decry the fact that the place of tort rule “has given way in most states to a more complex analysis of the respective ‘interests’ of the states affected by the suit.”<sup>9</sup> He then states, “The issue ought not to be interests; it ought to be which state’s law makes the best ‘fit’ with the circumstances of the dispute.”<sup>10</sup> When explaining what he means by “fit,” however, he engages in the very interest analysis that he purports to

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2006 (Sept. 8, 2006)).

3. See Weidong Zhu, *China’s Codification of the Conflict of Laws: Publication of a Draft Text*, 3 J. PRIVATE INT’L L. 283, 283 (2007). See also Contract Law of the People’s Republic of China ch. 8, art. 126 (adopted and promulgated by the Second Session of the Ninth Peoples’ Congress, Mar. 15, 1999, effective Oct. 1, 1999), translated in THE CONTRACT LAW OF THE PEOPLE’S REPUBLIC OF CHINA 61 (Wei Luo trans., 1999) (“Parties to a foreign related contract may choose a country’s law as an applicable law for contract dispute resolution unless there is a different provision in any Chinese laws. If parties to a foreign contract fail to choose an applicable law, the laws of the country which has [sic] the closest relation to the contract shall be applicable. The laws of the People’s Republic of China shall be applied to all Sino-foreign equity joint venture enterprise contracts, Sino-foreign cooperative joint venture enterprise contracts and exploration and development of natural resources contracts which are performed within the territory of the People’s Republic of China.”).

4. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3rd ed. 1986).

5. *Id.* at 553–54.

6. *Id.* at 553.

7. *Id.* at 554.

8. *Id.* But see Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1147 (2007) (stating that Posner’s “comparative regulatory advantage argument for *lex loci* is suspect” and preferring the reason that applying the law of the place of injury ensures “that all firms are subject to the same standard of liability for torts committed in a particular place”).

9. POSNER, *supra* note 4, at 554.

10. *Id.*

disapprove, including an inquiry into the purposes of the rule in question.<sup>11</sup> He concludes by changing the hypothetical with which he began to “a case where two residents of state A are involved in a collision in state B.”<sup>12</sup> Judge Posner then departs from the place-of-tort rule in a manner that devotees of interest analysis would applaud: “The tort rules of B will be better adapted to location-specific factors such as the state of the roads and climate conditions, but the tort rules of A will be better adapted to person-specific factors such as ability to take care.”<sup>13</sup>

This short and somewhat self-contradictory statement prompted many law-and-economics scholars to apply their analyses to choice of law. The key difference between “traditional” and law-and-economics conflicts scholarship is the importance given to choice-of-law rules that produce easily predictable results. In *Reich v. Purcell*, Chief Justice Traynor of the Supreme Court of California, a devotee of interest analysis, states, “Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated to the objective of proper choice of law in conflict cases, i.e., to determine the law that most appropriately applies to the issue involved.”<sup>14</sup> Most law-and-economics scholars would disagree. They prefer clear choice-of-law rules, such as the place of injury for torts and the situs of land for issues concerning real estate.<sup>15</sup> Clear rules, they contend, are efficient because they enable the parties to know before they act which law will apply and to conform their conduct to that law. After a claim arises, clear choice-of-law rules facilitate settlement and reduce the costs of litigation.<sup>16</sup> For the same efficiency reasons, law-and-economics scholars would permit contracting parties complete freedom in choosing the law to apply to their transaction.<sup>17</sup> Some would permit no judge-made exceptions to enforcement of choice-of-law agreements and reserve to legislatures the power to indicate what mandatory rules are not subject to avoidance.<sup>18</sup>

Most law-and-economics scholars find modern approaches to choice of law unpredictable, chaotic,<sup>19</sup> and prejudiced in favor of plaintiffs and forum law.<sup>20</sup> They reject

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11. *Id.*

12. *Id.*

13. *Id.* See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 65 (1989) (stating that a “criticism of Judge Posner’s economic analysis of choice of law is that it utilizes the tools of interest analysis, the very theory he is criticizing”).

14. 432 P.2d 727, 730 (Cal. 1967).

15. See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1191 (2000); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 819 (2006) (stating that application of the law of the place of injury “is the most efficient way to handle the dispute”). But see Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT’L L. 1, 77 (2001) (“[I]f clear entitlements do not match well with the distribution of effects, then under high transaction costs circumstances, another arrangement may be preferable.”).

16. See Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example*, in AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 143, 156 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

17. See O’Hara & Ribstein, *supra* note 15, at 1152 (explaining that an “efficient choice-of-law system should start with a presumption in favor of enforcement of choice-of-law clauses in contracts”).

18. See *id.* at 1153.

19. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 430 (1990) (decrying “the destruction of certainty in the field of conflict of laws as a result of the replacement of the mechanical common law rules by ‘interest analysis’”); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002); O’Hara & Ribstein, *supra* note 15, at 1164 (“[P]ublic policy inquiries thwart certainty and predictability.”).

20. See Goldsmith & Sykes, *supra* note 8, at 1137; Rühl, *supra* note 15, at 828 n.109 (citing the empirical studies by professors Borchers and Solimine). See also Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992) (stating that modern approaches favor forum law,

any analysis that focuses on the purposes of underlying conflicting rules because of the difficulty of determining those purposes.<sup>21</sup>

### III. ROME II THROUGH THE LAW-AND-ECONOMICS LENS

Does Rome II satisfy the law-and-economics demand for simple rules leading to easily predictable results? “[P]redictability of the outcome of litigation” is the aim of the regulation.<sup>22</sup>

Article 4 of Rome II states the “general rule”:

Article 4: General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.<sup>23</sup>

Article 4 governs choice of law for non-contractual liabilities that are not covered by other articles on specific forms of liability.<sup>24</sup> Four of the articles covering specific liabilities

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recovery, and less clearly, residents); Solimine, *supra* note 13, at 86–87. *But cf.* Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000) (stating that after correcting the Borchers and Solimine data to take account of differences in legal culture, *id.* at 307, he finds “relatively strong support for the ‘pro-recovery’ bias of courts, weaker support for ‘pro-forum-law’ bias, and reject[s] the ‘pro-president’ bias,” *id.* at 291). Professor Solimine, however, noted these differences in legal culture. *See* Solimine, *supra* note 13, at 79 (“[S]tate courts low on prestige or reputation, tort law innovation, and legal professionalism tend to have retained the *situs* approach in choice of law.”).

21. *See* Guzman, *supra* note 19, at 893; Erin Ann O’Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME V 631, 641; Rühl, *supra* note 15, at 836.

22. Rome II, *supra* note 1, preliminary recital 6.

23. *Id.* art. 4.

24. *See, e.g., id.* art. 5 (product liability), art. 6 (unfair competition and acts restricting free competition), art. 7 (environmental damage), art. 8 (infringement of intellectual property rights), art. 9 (industrial action); art. 10 (unjust enrichment), art. 11 (*negotiorum gestio*), and art. 12 (*culpa in contrahendo*). Article 1(2)(g) excludes nine non-contractual liabilities from the scope of the regulation, including “violations of privacy and rights relating to personality, including defamation.” *Id.* art. 1. Article 30(2) requires the European Commission, to which each member state appoints one commissioner, to submit to the European Parliament, the European Council, which is made up of the heads of government in member states, and the European Economic and Social Committee “a

have references to Article 4.<sup>25</sup> Thus Article 4 is of central importance in evaluating the regulation.

Subsection 1 (place of damage) and subsection 2 (unless plaintiff and defendant have the same habitual residence) provide a simple and predictable rule. The problem is the exception in subsection 3 if another country is “more closely connected” to the tort. There is no magic ruler to measure this distance. If Community courts make much use of this exception, the outcomes in similar fact situations are likely to vary. The power of the Court of Justice of the European Communities to forge uniform interpretations of the Regulation will restore predictability,<sup>26</sup> but that is likely to be a gradual process over many years. This same “more closely connected” exception also appears in Article 5(2) on product liability, by reference in Article 6(2) on unfair competition affecting exclusively the interests of a specific competitor, and in Articles 10 on unjust enrichment, 11 on *negotiorum gestio*, and 12 on *culpa in contrahendo*.

Article 26 provides a “public policy” exception to Rome II’s choice-of-law rules.<sup>27</sup> Public policy is a wild card. Judges have disagreed whether applying the law of another jurisdiction violates the forum’s public policy.<sup>28</sup> Moreover, what is a court to do if it rejects the otherwise applicable law under Article 26? Should it dismiss the case without affecting the merits or should it use this excuse to apply its own law? During the time when U.S. courts were in transition from the place-of-wrong choice-of-law rule to a consequences-based approach, some opinions used public policy to reject the law chosen by the territorial rule and applied forum law instead.<sup>29</sup> Currently the Supreme Court of Georgia clings to the place-of-wrong conflicts rule for torts, declaring, “The relative certainty, predictability, and ease of the application of *lex loci delicti*, even though sometimes leading to results which may appear harsh, are preferable to the inconsistency and capriciousness that the replacement choice-of-law approaches have wrought.”<sup>30</sup> Yet, when the mood moves it, that court uses “public policy” to reject the law of the place of wrong and substitute Georgia law in its stead.<sup>31</sup> The court thus creates the very uncertainty that it purports to eschew, instead of articulating a clear consequences-based reason for the result.

To avoid this descent into chaos, Article 26 should make it clear that when a court refuses on public policy grounds to apply the law specified by the regulation, it should dismiss the case without prejudice, unless the court applies internationally recognized principles to resolve the dispute. In *Kuwait Airways Corp. v. Iraqi Airways Co.*,<sup>32</sup> the House of Lords rejected Iraqi law that would justify the conversion of aircraft belonging to the Kuwaiti State. Lord Hope

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study on the situation in the field of the law” excluded under art. 1(2)(g). *Id.* art. 30.

25. *Id.* arts. 5(1), 6(2), 7, 9.

26. Treaty Establishing the European Economic Community art. 177, Mar. 25, 1957, 298 U.N.T.S. 4 (Treaty of Rome), now Consolidated Version of the Treaty Establishing the European Economic Community art. 234, Oct. 2, 1997, 1997 O.J. (C 340) 3 (Treaty of Amsterdam).

27. Rome II, *supra* note 1, art. 26.

28. *See, e.g.*, *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 214 (N.Y. 1964) (indicating that majority and dissent differ as to whether applying Puerto Rican law to permit recovery of gambling debt violates N.Y. public policy).

29. *See, e.g.*, *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 528–29 (N.Y. 1961) (rejecting Massachusetts limit on wrongful death recovery on both public policy and “procedural” grounds).

30. *Dowis v. Mud Slings, Inc.*, 621 S.E.2d 413, 419 (Ga. 2005).

31. *See Alexander v. Gen. Motors Corp.*, 478 S.E.2d 123, 124 (Ga. 1996) (rejecting Virginia law and applying the Georgia rule of strict liability to permit recovery by a Georgia citizen who purchased the allegedly defective automobile in Georgia).

32. [2002] UKHL 19, [2002] 2 A.C. 883, 1078–81 (appeal taken from Eng.) (U.K.).

of Craighead noted that the public policy under which the Lords refused to apply Iraqi law was “based on the Charter of the United Nations and the resolutions which were made under it.”<sup>33</sup> He stated “[A] principle of English public policy which was purely domestic or parochial in character would not provide clear and satisfying grounds for disapplying the primary rule which favours the *lex loci delicti*.”<sup>34</sup>

Related to the public policy exception in Article 26 is the “mandatory provisions” exception in Article 16.<sup>35</sup> Differences among EU states on what are mandatory provisions of forum law are likely to lead to nonuniform results and forum shopping.<sup>36</sup> When a court rejects the law chosen under the regulation because that law violates mandatory provisions of forum law, the court will apply those mandatory provisions. Article 16 is an overriding choice-of-law principle. The uncertainty created by the mandatory law exception can be alleviated by giving guidance as to what laws can qualify as internationally mandatory.<sup>37</sup>

#### IV. A CONSEQUENCES-BASED APPROACH TO CHOICE OF LAW

Not all scholars who apply economic analysis to choice of law agree that conflicts rules should be simple, predictable, and disregard consequences. For example, Professor Ralf Michaels states that if only one jurisdiction is likely to experience the consequences of choosing law, it is “efficient” to apply that jurisdiction’s law.<sup>38</sup> Judicial decisions that appear to be chaotic and unpredictable are often the result of misunderstanding and misapplying consequence-based approaches rather than defects inherent in those approaches.<sup>39</sup> Determining the policies served by a common-law rule or a statute requires thoughtful research and analysis. Identifying those purposes, however, is essential to proper

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33. *Id.* at 1116.

34. *Id.*

35. Rome II, *supra* note 1, art. 16.

36. This has been the case in the United States. *Cf.* *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681 (Tex. 1990) (refusing to enforce provision choosing Florida law, which would enforce noncompetition agreement of Texas employee and violate “fundamental” Texas policy); *In re Autonaton*, 228 S.W.3d 663, 668–70 (Tex. 2007) (enforcing provision choosing Florida forum even though Florida court will enforce noncompetition agreement invalid under Texas law).

37. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971) [hereinafter RESTATEMENT (SECOND)] (describing when the parties’ choice of law is ineffective because the chosen law violates a “fundamental policy” of another state).

To be “fundamental,” a policy must in any event be a substantial one. Except perhaps in the case of contracts relating to wills, a policy of this sort will rarely be found in a requirement, such as the statute of frauds, that relates to formalities. Nor is such policy likely to be represented by a rule tending to become obsolete, such as a rule concerned with the capacity of married women, or by general rules of contract law, such as those concerned with the need for consideration. On the other hand, a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Statutes involving the rights of an individual insured as against an insurance company are an example of this sort. To be “fundamental” within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90 [“action contrary to public policy”].

*Id.* (citations omitted).

38. *See* Michaels, *supra* note 16, at 168 (“If only one state is interested in regulation (‘false conflict’), it is efficient, under both Pareto [everybody affected better off] and Kaldor-Hicks [benefits exceed costs] criteria, to give jurisdiction to that state.”); *see also* Trachtman, *supra* note 15, at 77.

39. *See, e.g.*, *Dym v. Gordon*, 209 N.E.2d 792, 795 (N.Y. 1965) (finding a spurious policy underlying the Colorado guest statute), *overruled by* *Tooker v. Lopez*, 249 N.E.2d 394, 397 (N.Y. 1969).

application of that rule or statute, even in a purely domestic context.<sup>40</sup> Often in cases confined to a single jurisdiction, the result of litigation is in doubt because there are conflicting reasonable contentions as to what rule applies or the result reached under that rule in a particular factual context.<sup>41</sup> Why should choice-of-law rules be singled out for reduction to rigid simplicity rather than rules of tort, contract, and other substantive areas? The answer may lie in the fact that some law-and-economics scholars do not regard choice-of-law rules as substantive, but as aspects of procedure: the simpler the better.<sup>42</sup> It is possible to shape choice-of-law rules that take account of consequences and that also provide reasonable predictability.

There are four main requirements for a consequences-based approach. First, the court must determine whether the states that have a contact with the parties or with the transaction have conflicting laws. Second, if there are conflicting laws, the court must determine the policies underlying those laws. Third, the court must decide whether, if a state's law is not applied, that state is likely to experience a consequence that its policy seeks to avoid. Fourth, application of the law of a state that will experience consequences must be fair to the parties in the light of their contacts with that state.

Ideally, the court should choose the law that will advance the policies of the chosen state and not cause consequences in any other state that the other state's laws are intended to avoid. If this is not possible, the court should explain the result in terms of consequences. Why has the court decided to avoid consequences in the chosen state and impose consequences on other states? Reasonable persons may disagree with the court, but at least the opinion will deal directly with the issues that are at the core of sensible choice of law.

## V. IS ROME II CONSISTENT WITH A CONSEQUENCES-BASED APPROACH TO CHOICE OF LAW?

Subsection 2 of Article 4, which chooses the law of the country "where the person claimed to be liable and the person sustaining the damage both have their habitual residence," is consequences-based. This is the jurisdiction most likely to have its policies affected by the determination of whether the injured party is to be compensated and by what amount. If Professor Joseph Beal, the reporter for the first Restatement of Conflict of Laws, had added this exception to his place-of-wrong rule,<sup>43</sup> there probably would have been no "conflicts revolution" in the United States. The common-residence exception would have eliminated the cases in which U.S. courts first perceived that it made no sense to apply the law of the place of injury.<sup>44</sup>

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40. See, e.g., *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998) ("Courts also look to legislative intent when construing a statute. To determine legislative intent, courts may consider the language of the statute, the legislative history, the nature and object to be obtained, and the consequences that would follow from alternate constructions." (citations omitted)).

41. See, e.g., *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962) (holding that land owner is only entitled to compensation in the amount of reduced market value when mining company did not perform promised restoration, though four justices dissented).

42. See O'Hara & Ribstein, *supra* note 21, at 639 ("[C]olleagues and higher courts are much less likely to attempt to vigilantly protect choice of law precedents than they are to protect precedents that shape forum substantive law.").

43. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

44. See, e.g., *Clark v. Clark*, 222 A.2d 205, 210 (N.H. 1966) (refusing to apply guest statute of state of injury to suit between forum residents); *Babcock v. Jackson*, 191 N.E.2d 279, 284–85 (N.Y. 1963) (same).

The common-residence rule is most questionable when the rights of third parties are affected. For example, a husband, resident in state X, is driving in state Y with his wife as a passenger. He injures his wife when he collides with an automobile driven by a Y resident. The wife sues, not her husband, but the Y resident, to recover for her injuries. The Y resident contends that the husband's fault also caused the wife's injuries and seeks to implead the husband for contribution. Under the law of the marital residence, however, the husband is immune from tort liability to his wife. Under similar circumstances the Supreme Court of Wisconsin applied the law of the state where the collision occurred and overturned its previously adopted common-domicile exception to the place-of-wrong rule.<sup>45</sup>

Article 4(2)'s common-residence exception would be more consistent with a consequences-based approach if after the words "same country" it added "or different countries with laws that would reach the same result." One of the more sensible comments in the Second Restatement of Conflict of Laws is comment i in § 145: "When certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state."<sup>46</sup>

The common-residence exception is consistent with a consequences-based analysis if (1) only the injured person and the party claimed to be liable are involved, and (2) the place of injury imposes less liability or less compensation than the parties' residence. A different conclusion results when the place of injury imposes liability that the common residence does not, particularly when the tortfeasor's conduct is intentional. The place of injury has a policy of deterring conduct that it regards as undesirable. That policy will be thwarted if the tortfeasor is subjected to no or lesser liability under the law of the common residence.<sup>47</sup> Article 7, covering "environmental damage," recognizes this policy of deterrence by allowing the person seeking compensation for damage to choose between the law of the place of injury or "the law of the country in which the event giving rise to the damage occurred."<sup>48</sup> "Whereas" number 25, preceding the text of the regulation, explains:

[The policy] which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.<sup>49</sup>

Article 14(1)(b) gives the parties to a "freely negotiated" commercial agreement the ability to choose the law applicable to their non-contractual obligations.<sup>50</sup> This is likely to induce better drafting of choice-of-law provisions. The consensus of U.S. courts is that parties may agree on the law applicable to torts if—and that is a big "if"—they do so with

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45. *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 472–73 (Wis. 1968) (involving child-parent immunity from suit).

46. RESTATEMENT (SECOND), *supra* note 37, § 145 cmt. i. *See also id.* § 186 cmt. c (making same statement with regard to "contacts involving a contract").

47. *See Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1546 (11th Cir. 1983) ("The State of Florida would have a strong governmental interest in insuring that infringements of existing rights of publicity do not occur within its borders."); *Kammerer v. Western Gear Corp.*, 635 P.2d 708, 712 (Wash. 1981) ("Where the most significant relationships were in California and where the conduct and acts as to the fraud and misrepresentation were accomplished in California that state has a specific interest to be furthered.").

48. Rome II, *supra* note 1, art. 7.

49. *Id.* preliminary recital 25.

50. *Id.* art. 14(1)(b).

reasonable clarity.<sup>51</sup> Many cases have litigated the issue of whether the parties' choice-of-law agreement includes tort issues<sup>52</sup> or rules characterized as "procedural" by most U.S. courts, such as statutes of limitations and burden of proof.<sup>53</sup> The following choice-of-law provision would annually eliminate thousands of lawyers' billable hours in the U.S.:

The parties select the law of X, excluding the conflict-of-laws rules of X, to govern: (1) the construction and validity of this contract; (2) any action arising from or in any way related to this contract no matter what the theory of the action, whether tort, contract, or any other; (3) any issue, such as statutes of limitations, burden of proof, attorneys' fees, and prejudgment interest,<sup>54</sup> that will affect the result in a manner that will induce forum shopping, unless the law of X on that issue will be unusually difficult for a court in another jurisdiction to apply; (4) the scope of this choice-of-law agreement;<sup>55</sup> (5) the construction of the choice-of-forum agreement in [designate paragraph number in the contract].<sup>56</sup>

If the law of X invalidates any term of this contract, the parties stipulate that the choice of X law is a mistake as to that term and should be disregarded. Instead the law applicable to that term is the local law of the state that, with respect to that term, has the most significant relationship to the transaction and the parties. As to all other matters stated above, the law of X shall apply.<sup>57</sup>

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51. See *Kuehn v. Children's Hosp.*, 119 F.3d 1296, 1301–02 (7th Cir. 1997).

52. See *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 611 (6th Cir. 2001) (holding that choice-of-law clause that does not mention torts does include "promissory fraud," i.e., making promises with no intention to keep them); *Rayle Tech, Inc. v. Dekalb Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir. 1998) (stating that clause did not cover torts, but if it did, Georgia conflicts rules would not enforce it); *Northwest Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392–95 (8th Cir. 1997) (construing clause to cover torts arising from failure to perform contract and enforcing it); *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (construing clause as not covering fraud claim); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1155 (Cal. 1992) (construing clause to cover tort claim and enforcing it; Justice Panelli differed on construction but indicated he would enforce the clause if it covered torts, *id.* at 1156–57, as did Justice Kennard, *id.* at 1157–58); *Barrow v. ATCO Mfg. Co.*, 524 N.E.2d 1313, 1315 (Ind. Ct. App. 1988) (holding that the law chosen applies although plaintiff sues in "tort" for misrepresentation).

53. See *Woodling v. Garrett Corp.*, 813 F.2d 543, 551–52 (2d Cir. 1987) (holding that the law designated applies to the "substantive" issues of rescission and parol evidence rule, but not to the "procedural" issue of burden of proof); *Fed. Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 142–43 (10th Cir. 1985) (holding that absent an express statement of contrary intention, a choice-of-law clause does not apply to statutes of limitation); *Juran v. Bron*, No. Civ.A.16464, 2000 WL 1521478, at \*11 (Del Ch. Oct. 6, 2000) (holding that choice-of-law clause does not, without express reference, include statutes of limitations); *Nez v. Forney*, 783 P.2d 471, 473 (N.M. 1989) (holding that choice-of-law clause does not, without express reference, include statutes of limitations). *But see* *Hughes Elec. Corp. v. Citibank Delaware*, 15 Cal. Rptr.3d 244, 259–60 (Cal. Ct. App. 2004) (holding that choice-of-law clause's reference to "laws" of New York includes both the New York statute of limitations and borrowing statute, which would borrow the California limitations and bar the action); *Hambrecht & Quist Venture Partners v. American Med. Int'l, Inc.*, 46 Cal. Rptr.2d 33, 38 (Cal. Ct. App. 1995) (stating that because California no longer adheres to the traditional characterization of statutes of limitations as procedural, a choice-of-law clause referring to "laws" includes statutes of limitations).

54. See *Schwan's Sales Enters. v. SIG Pack, Inc.*, 476 F.3d 594, 596–97 (8th Cir. 2007) (holding that choice-of-law clause selecting Wisconsin law did not include prejudgment interest).

55. See *id.* at 597 (stating that forum law, not the law chosen in a choice-of-law provision, determines the effect of the provision).

56. See *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006) (holding that when contract contains both choice-of-law and choice-of-forum clauses, the forum clause is construed under the chosen law).

57. Cf. RESTATEMENT (SECOND), *supra* note 37, § 187 cmt. e ("If the parties have chosen a law that would

As indicated above,<sup>58</sup> most U.S. courts have characterized statutes of limitation and burden of proof as “procedural” for conflicts purposes with the result that forum law applies to those issues although the law of another jurisdiction applies to all “substantive” issues. For choice-of-law purposes, any rule that would affect the outcome in a manner that induces forum shopping should be characterized as “substantive.” Possible exceptions are foreign rules, such as those governing pre-trial discovery,<sup>59</sup> that, if applied, would require substantial and repeated efforts by forum lawyers and judges. Rome II wisely includes within the scope of its rules time limits for bringing suit and burden of proof.<sup>60</sup>

Heads of damages—elements of harm such as pain and suffering that are compensable—are treated as substantive and subjected to choice-of-law analysis.<sup>61</sup> Most courts also treat statutory limits on damages as substantive.<sup>62</sup> In 2006, the House of Lords disagreed and applied New South Wales law but not New South Wales statutory ceilings on damages.<sup>63</sup> Aside from statutory limits on damages and perhaps a court opinion that imposes a specific ceiling on a head of damages,<sup>64</sup> courts treat quantification of damages as procedural and apply forum standards to determine proper compensation for such nonpecuniary elements of harm as pain and suffering. One of the leading English treatises on conflict of laws reflects the traditional view: “A distinction must be drawn between remoteness and heads of damages, which are questions of substance governed by the *lex causae*, and the measure or quantification of damages, which is a question of procedure governed by the *lex fori*.”<sup>65</sup>

It makes no sense to treat quantification of damages as procedural. Nothing is more likely to induce forum shopping than a venue that considers its high levels of compensation as manna for the injured and aggrieved of the world.<sup>66</sup> Does Rome II correct this

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invalidate the contract, it can be assumed that they did so by mistake. If, however, the chosen law is that of the state of the otherwise applicable law under the rule of § 188 [most significant relationship], this law will be applied even when it invalidates the contract. Such application will be by reason of the rule of § 188, and not by reason of the fact that this was the law chosen by the parties.”)

58. See *supra* note 53.

59. The extensive scope of pre-trial discovery is one of the reasons that U.S. courts are magnet forums for the aggrieved and injured of the world. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (listing U.S.-style pretrial discovery as one of the reasons that U.S. forums are attractive to litigants). It is not necessary to bring suit in the U.S. to use U.S. discovery. 28 U.S.C. § 1782(a) (2000) permits federal district court judges to order persons present in the district to give testimony or produce documents “for use in a proceeding in a foreign or international tribunal.”

60. Rome II, *supra* note 1, arts. 22, 15(h).

61. See *Slater v. Mexican Nat’l R.R.*, 194 U.S. 120, 126 (1904) (“[W]e may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught.”).

62. See, e.g., *Marmon v. Mustang Aviation*, 430 S.W.2d 182, 194 (Tex. 1968) (applying Colorado statutory limit on wrongful death recovery); *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 C.L.R. 503, paras. 199–200 (Austl.) (applying limit in New South Wales workers’ compensation law to action brought in Australian Capital Territory).

63. *Harding v. Wealands*, [2006] UKHL 32, [2007] 2 A.C. 1 (appeal taken from Eng.) (U.K.). See Russell J. Weintraub, *Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse*, 42 TEX. INT’L L.J. 311, 315 (2007).

64. See *Cunningham v. Quaker Oats Co.*, 107 F.R.D. 66, 73 (W.D.N.Y. 1985) (treating as substantive a statement of the Supreme Court of Canada that Canadian law places an upper limit on nonpecuniary loss); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1150–52 (N.D. Tex. 1980) (stating that under Canadian law, \$100,000 should be the upper limit for nonpecuniary losses, except in extraordinary circumstances).

65. 1 ALBERT VENN DICEY & J.H.C. MORRIS, *THE CONFLICT OF LAWS* 192 (Lawrence Collins et al. eds., 14th ed. 2006).

66. See *Piper Aircraft*, 454 U.S. at 252 n.18 (listing “jury trials” with their attendant generous verdicts as a

aberration? A prior draft of the regulation included quantification of damages within its scope only “in so far as prescribed by law.”<sup>67</sup> This appears to mean that if the jurisdiction selected by the regulation’s rules has a statutory limit on recovery, that limit applies. On March 14, 2005, I spoke at a conference in Brussels devoted to the discussion of that Rome II draft. I urged revision of the scope provision to include all aspects of quantifying damages.<sup>68</sup> The scope provision now includes “the existence, the nature and the assessment of damage or the remedy claimed.”<sup>69</sup> This language may be broad enough to incorporate my suggestion, but Professor Hay does not think so.<sup>70</sup>

A series of statements by the European Parliament and the Council of the European Union precede the articles of Rome II. “Whereas” number 33 is relevant to quantification of damages:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.<sup>71</sup>

Insofar as this statement refers to the pecuniary costs of medical care, applying the law of “the country in which the damage occurs,” as directed by article 4(1), will not prejudice an injured claimant. Suppose that he or she resides elsewhere where medical costs are higher and receives post-injury treatment there. The law of the country where the damage occurred, assuming it has no statutory ceilings on reimbursing medical expenses, should include those actual costs in assessing compensation for the injury.

The problem occurs with nonpecuniary damages such as pain and suffering or loss of enjoyment of life. If the injured person’s habitual residence generously compensates these elements of damage but the place of injury does not, the plaintiff should recover under the law of his or her residence if it is fair to impose that law on the defendant. It is fair if the defendant and plaintiff share the same habitual residence. Article 4(2) permits this recovery. It is also fair if the defendant does not share the plaintiff’s residence but resides, not where the injury occurred, but in a country that affords the same generous compensation as the country in which the plaintiff resides. As Chief Justice Roger Traynor of the Supreme Court of California stated, “A defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would have had they been injured at home.”<sup>72</sup>

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reason why “American courts . . . are extremely attractive to foreign plaintiffs”).

67. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”)*, art. 11(e), COM (2003) 427 final (July 22, 2003).

68. See Russell J. Weintraub, *Rome II and the Tension between Predictability and Flexibility*, 41 *Rivista di Diritto Internazionale Privato e Processuale* 561, 564-65 (2005) (publishing my statement at the conference).

69. Rome II, *supra* note 1, art. 15(c).

70. See Peter Hay, *Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community’s “Rome II” Regulation*, EUR. LEGAL F. I-137, I-148 (4-2007) (“The unfortunate terminology in Art. 15(c) (‘assessment’) does not change what seems to have been the common understanding of all parties (Council, Parliament, and the Commission): That the *lex fori* applies.”). Professor Hay agrees with me that “[t]his would be an unfortunate result.” *Id.*

71. Rome II, *supra* note 1, preliminary recital 33.

72. *Reich v. Purcell*, 432 P.2d at 731.

Another situation in which it is fair to impose the law of plaintiff's residence on a defendant who does not share plaintiff's residence is when plaintiff is a passenger in an automobile driven by defendant who picked up plaintiff at plaintiff's residence and then drove across the border to the country where the injury occurred.<sup>73</sup> Article 4 would not permit application of the law of plaintiff's residence in these two circumstances unless the cryptic language of article 4(3), "manifestly more closely connected," can be stretched to encompass them.

Article 4(3) would better comply with the law-and-economics commentators' desire for predictability and with a consequences-based approach if it based the exception to place of injury on the fact that another country would experience the effects of the choice of law. This can be empirically verified. The language of Article 7(1) of the Rome Convention on the Law Applicable to Contractual Obligations<sup>74</sup> suggests the following formulation:

When, in the light of the nature and purpose of the laws applicable to the tort/delict in the countries that have contacts with the parties and the occurrence and the consequences of the application or nonapplication of those laws, it is clear that the law of a country other than that indicated in paragraphs 1 or 2 should apply, the law of that other country shall apply.

If the plaintiff's residence is not the place of injury, it may be unfair to impose the law of that residence on the defendant. The most common situation in which it is unfair is when the plaintiff is injured by a defendant resident in the place of injury who has had no previous contact with the plaintiff. The level of recovery available at defendant's residence is likely to determine the amount of liability insurance that defendant purchases. Defendant's liability should not vary with the residence of the plaintiff.

## VI. CONCLUSION

Rome II provides reasonably foreseeable answers to choice-of-law issues. The various exceptions to the regulation's rules create the major predictability problems: (1) the cryptic "more closely connected" exception that appears in the general rule of article 4 and in several other articles, (2) the "public policy" exception of article 26, and (3) the "mandatory provisions" exception of article 16. The uncertainty caused by these exceptions can be alleviated by (1) replacing the "more closely connected" language with a reference to the country that will experience the consequences if its law is not applied; (2) providing that if a court refuses on "public policy" grounds to apply the law that Rome II selects, the court is not to seize this excuse to apply its own law, but is to dismiss without affecting the plaintiff's ability to sue elsewhere; and (3) giving some guidance as to what can qualify as internationally "mandatory" forum law.

The common residence exception to application of the law of the place of damage is partially, but insufficiently, consequences oriented. Rome II gets high marks for including

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73. See *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972) (applying law of the residence of the deceased guest passenger when planned round trip from guest's residence resulted in fatal injury in another state).

74. "Rome" Convention on the Law Applicable to Contractual Obligations, art. 7(1), Jan. 26, 1998, 1998 O.J. (C 27) 34 ("When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.").

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time limitations and burden of proof within the scope of its rules. If it is to achieve its main purpose of making the result independent of the forum, Rome II should clearly indicate that quantification of damages is also within its scope.

## VII. APPENDIX

**Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199, 31/07/2007 p. 40**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee.<sup>1</sup>

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007.<sup>2</sup>

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.<sup>3</sup> The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme<sup>4</sup> adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free

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1. OJ C 241, 28.9.2004, p. 1.

2. Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

3. OJ C 12, 15.1.2001, p. 1.

4. OJ C 53, 3.3.2005, p. 1.

movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>5</sup> (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

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5. OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the

principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term ‘intellectual property rights’ should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State’s internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

(30) *Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term ‘rules of safety and conduct’ should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).<sup>6</sup>

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Chapter I: SCOPE

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6. OJ L 178, 17.7.2000, p. 1.

#### Article 1: Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

#### Article 2: Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

#### Article 3: Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

#### Chapter II: TORTS/DELICTS

#### Article 4: General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### Article 5: Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### Article 6: Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is

based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

#### Article 7: Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

#### Article 8: Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

#### Article 9: Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

### Chapter III: UNJUST ENRICHMENT, *NEGOTIORUM GESTIO* AND *CULPA IN CONTRAHENDO*

#### Article 10: Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11: *Negotiorum gestio*

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12: *Culpa in contrahendo*

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Article 13: Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

Chapter IV: FREEDOM OF CHOICE

Article 14: Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

Or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

#### Chapter V: COMMON RULES

##### Article 15: Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

##### Article 16: Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

##### Article 17: Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

##### Article 18: Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

##### Article 19: Subrogation

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in

discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 20: Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

Article 21: 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.

Article 22: Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter VI: OTHER PROVISIONS

Article 23: Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

Article 24: Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 25: States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 26: Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 27: Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Article 28: Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Chapter VII: FINAL PROVISIONS

Article 29: List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the Official Journal of the European Union within six months of receipt:

- (i) a list of the conventions referred to in paragraph 1;
- (ii) the denunciations referred to in paragraph 1.

Article 30: Review clause

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.<sup>7</sup>

Article 31: Application in time

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7. OJ L 281, 23.11.1995, p. 31.

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32: Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

For the European Parliament

The President

H.-G. POTTERING

For the Council

The President

M. LOBO ANTUNES

Commission Statement on the review clause (Article 30)

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

Commission Statement on road accidents

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

Commission Statement on the treatment of foreign law

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.