Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law

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I. INTRODUCTION

In 1980, the European Union adopted the Convention on the Law Applicable to Contractual Obligations, commonly called the “Rome Convention.” In order to advance unification and harmonization of choice of law in the European community and to eliminate the inconveniences arising from the diversity of the rules of conflict, the Rome Convention, effective April 1, 1991, established the uniform rules concerning choice of law in contracts among EU member states. Some twenty-seven years later, the European Parliament and the Council of European Union stepped further and promulgated a sister regulation on July 11, 2007, namely the Regulation on the Law Applicable to Non-Contractual Obligations. To differentiate it from the Rome Convention, the Regulation is labeled as Rome II, and the Rome Convention is now referred to as Rome I.

Like Rome I, Rome II is purposed to enhance the “compatibility of the rules applicable in the member states concerning the conflict of law[s].” But Rome II has a stated focus on the “harmonisation of

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2 See Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 0001-0050. The Rome Convention was opened for signature in Rome on June 19, 1980, for the then nine Member States and entered into force on April 1, 1991. When the Convention was signed by Austria, Finland, and Sweden, a consolidated version was drawn up and published in the Official Journal in 1998. A further consolidated version was published in the Official Journal in 2005 following the accession of ten new Member States to the Convention.
5 Rome II, supra note 3, at para. 2.
conflict-of-law rules" with respect to non-contractual obligations.\(^6\) Aimed at helping attain legal certainty regarding the applicable law in non-contractual obligations,\(^7\) Rome II sets forth the choice-of-law rules that are required to be uniformly applied in the whole European Community "irrespective of the nature of the court or tribunal seised."\(^8\)

Under Article 1 of Rome II, the material scope of the Regulation is defined to cover "non-contractual obligations in civil and commercial matters" in "situations involving a conflict of laws," excluding in particular "revenue, customs or administrative matters" or "the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)."\(^9\) For purposes of Rome II, a conflict-of-laws situation means the situation in which civil and commercial matters involve cross-border, non-contractual obligations subject to the laws of two or more States (Countries),\(^10\) primarily among the EU member States.

In the civil law system, "obligation" is originated from the term "obligatio" ("obligationes"), a Roman law concept that might still be alien to many common law lawyers. Pursuant to Institutes of Justinian, the obligatio was characterized as "a bond of law by which we are under a necessity of releasing (solvendae) something according to the laws of our state."\(^11\) Roman jurist Gaius divided obligationes into three major categories as to their origin, including obligationes ex contractu (obligations arising out of contracts), ex delicto (obligations incurred in torts), and ex variis causarum figuris (obligations by other causes or an unclassifiable miscellaneous group).\(^12\) The ex variis causarum figuris category was understood to contain the subcategories obligationes quasi ex contractu (quasi-contractual obligations) and quasi ex delicto (quasi-delictual obligations).\(^13\)

Thus, in the law of countries with a civil law tradition, obligations are generally classified into contractual obligations and non-

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\(^{6}\) Id. at para. 4.

\(^{7}\) Id. at para. 6.

\(^{8}\) Id. at para. 8.

\(^{9}\) Id. at art. 1.


\(^{11}\) THOMAS COLLETT SANDERS, THE INSTITUTES OF JUSTINIAN 319 (7th ed. 1917); see also A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 817–21 (William Smith et al. eds., 1875).


\(^{13}\) A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES, supra note 11, at 818.
contractual obligations. The former deal with consensual obligations while the latter cover non-consensual obligations.\textsuperscript{14} Non-contractual obligations are further classified into obligations that arise out of a tort, and other obligations—or non-tort obligations. The non-tort obligations refer to, in particular, unjust enrichment and \textit{negotiorum gestio} (agency without due authority).\textsuperscript{15} In addition, there also developed a doctrine of \textit{culpa in contrahendo} (faulty in contract negotiating) under which a liability arising out of unsuccessful contract negotiations may be imposed.\textsuperscript{16}

In common law countries, the United States for example, a quite popular term used to describe non-contractual obligations other than torts is “quasi-contract,” which is construed to cover unjust enrichment and \textit{negotiorum gestio}.\textsuperscript{17} Although it is claimed that the concept of quasi-contract originated in Roman law,\textsuperscript{18} the concept is generally disregarded in civil law countries because the term is deemed dangerous and confusing.\textsuperscript{19} The major concern is that the term “quasi-contract” may create an assumption that unjust enrichment and \textit{negotiorum gestio} are “akin to contract.”\textsuperscript{20} Thus, in civil law countries, both unjust enrichment and \textit{negotiorum gestio} are regarded as obligations.

\textsuperscript{14}Radin, supra note 12, at 243–44.

\textsuperscript{15}See Report on Rome II, supra note 4, at art. 2. In addition, the \textit{negotiorum gestio} refers to the situation in which a gestor acts on behalf of a principal for the benefit of that principal but without the consent of that principal, and the action is later ratified by the principal. Negotiorum Gestio, Wiktionary, http://en.wiktionary.org/wiki/negotiorum_gestio (last visited June 5, 2009). The gestor is only entitled to reimbursement of expenses and not to remuneration. \textit{Id.} The underlying principle being that \textit{negotiorum gestio} arises from an act of generosity and friendship and is not aimed at allowing the gestor to make a profit out of his administration. \textit{Id.}

\textsuperscript{16}First introduced in 1861 by German scholar Von Jhering, the doctrine of \textit{culpa in contrahendo} advocated that “damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection,” meaning that contracting parties are under a duty to deal in good faith with each other during the negotiation stage, or else face liability. See Friedrich Kessler & Edith Fine, Culpa in Contrahendo, \textit{Bargaining in Good Faith, and Freedom of Contract: A Comparative Study}, 77 \textit{Harv. L. Rev.} 401, 401–02 (1964). This doctrine does not seem to have its place in the common law, but a similar counterpart, in the United States for example, is perhaps the concept of precontractual liability that is aimed at protecting the rights of parties if their negotiations fail. See Allan Farnsworth, \textit{Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations}, 87 \textit{COLUM. L. REV.} 217, 285 (1987).

\textsuperscript{17}See ALLAN FARNSWORTH, \textit{Contracts} 101 (3d ed. 1998).

\textsuperscript{18}See Radin, supra note 12, at 242.


\textsuperscript{20}Id.
sui generis (its own kind), distinguished from both contracts and torts. 21

Against that background, Rome II defines the non-contractual obligations as those that arise out of "tort/delict, unjust enrichment, negotiorum gestio, or culpa in contrahendo." 22 The coverage of Rome II not only includes the non-contractual obligations that are incurred, but it also embraces the "non-contractual obligations that are likely to arise," 23 meaning that in conflicts involving non-contractual obligations, the law applicable is to be the law of the country in which the damages arise or are likely to arise. 24 However, Rome II does not apply to the non-contractual obligations that involve family relations, matrimonial property, negotiable instruments, corporations, trusts, nuclear damage, or rights relating to personality. 25 These are the legal areas in which either exists wide disagreement as to the applicable rules or special attention is needed due to their unique distinction.

The most innovative part of Rome II is its introduction of the principle of party autonomy into the choice of law for non-contractual obligations, allowing the parties freedom of choice of law to determine their obligations beyond contracts. 26 This is innovative because party autonomy is a product of freedom of contract and applies to the consensual obligations with regard to choice of law, and such autonomy never had anything to do with torts or other non-consensual obligations. In this context, Rome II, at least in part, is hailed to have exemplified a European revolution in the conflict of laws. 27

Rome II also reverses its member state's common practice, which uses the principle of the lex loci delicti commissi (law of the place where the tortious conduct is committed or simply the law of the place of conduct) as the basic solution for non-contractual obligations, and it adopts the principle of the lex loci damni (law of place of damage). 28 The reason is that the practical application of the principle of the lex loci delicti commissi—where the component factors of the case involve

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21 Id.
22 Rome II, supra note 3, at art. 2(1).
23 Id. at art. 2(2).
25 Rome II, supra note 3, at art. 1.
26 Id. at art. 14.
28 Rome II, supra note 3, at para. 16.
several countries—varies, which engenders uncertainty as to the applicable law.\textsuperscript{29} It is then believed that "[a] connection with the country where the direct damage occurred . . . strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage."\textsuperscript{30}

Simply put, under Rome II, except for special types of cases, a non-contractual obligation related to two or more countries shall, by default, be governed by the law that is agreed to by the parties.\textsuperscript{31} Absent the parties' choice, as a general rule, "the law applicable to a non-contractual obligation arising out of a tort/or delict shall be the law of the country in which the damage occurs,"\textsuperscript{32} unless the parties involved have a common residence in another country at the time the damage occurs,\textsuperscript{33} or the tort/or delict is manifestly more closely connected with another country.\textsuperscript{34}

The special types of cases prescribed in Rome II, where application of the party autonomy principle is excluded, concern the non-contractual obligations arising from such cases as product liability,\textsuperscript{35} unfair competition and acts restricting free competition,\textsuperscript{36} environmental damage,\textsuperscript{37} infringement of intellectual property rights,\textsuperscript{38} and industrial action.\textsuperscript{39} The non-contractual obligations in those cases, though broadly tortious in nature, are governed by particular choice-of-law rules explicitly provided in Rome II because they are characterized into special categories. In addition, Rome II has separate provisions that are applied respectively to other non-contractual obligations other than torts, including unjust enrichment,\textsuperscript{40} negotiorum gestio,\textsuperscript{41} and culpa in contrahendo.\textsuperscript{42}

It is important to note that Rome II requires a universal application, which means that "any law specified by Rome II" shall be ap-

\textsuperscript{29} Id. at para. 15.
\textsuperscript{30} Id. at para. 16.
\textsuperscript{31} Id. at art. 14.
\textsuperscript{32} Id. at art. 4(1).
\textsuperscript{33} Id. at art. 4(2).
\textsuperscript{34} Id. at art. 5.
\textsuperscript{35} Id. at art. 6.
\textsuperscript{36} Id. at art. 7.
\textsuperscript{37} Id. at art. 8.
\textsuperscript{38} Id. at art. 9.
\textsuperscript{39} Id. at art. 10.
\textsuperscript{40} Rome II, supra note 3, at art. 4(2).
\textsuperscript{41} Id. at art. 11.
\textsuperscript{42} Id. at art. 12.
plied "whether or not it is the law of a member state." Thus, in its application, Rome II "will preempt the national choice-of-law rules of the European Union's member states," except for Denmark, in relation to non-contractual obligations. To a certain extent, adoption of Rome II demonstrates that choice of law in the European Union is being instrumentalized, making the private international law of European countries "a European private international law."

This Article provides an analytical review of Rome II, but the focus is on the application of the doctrine of party autonomy to the choice of law applicable to non-contractual obligations. Part II examines conventional approaches in the choice of law governing non-contractual obligations. It argues that in past decades, choice of law in tort cases has experienced more dramatic change than any other area in the conflict-of-law arena, but the transition from the single and territorially-based "place of wrong" rule to the multiple, as well as flexible, approaches posed great challenges to the certainty and predictability that the modern conflict of law is driven to achieve.

Part III discusses Rome II and its infusion of the party autonomy principle into non-contractual obligations. It analyzes both ex ante agreement and ex post agreement upon the choice of law applicable to non-contractual obligations and the issues related to their application. It also examines certain limitations imposed by Rome II on the parties' freedom of choice. For example, one such limitation concerns both the "domestic case" and the "intra-community case." The Article further analyzes the issues Rome II has to overcome and argues that it might not be wise to exclude indiscriminately the choice of law by party agreement from substantive areas such as infringement of intellectual property rights and unfair competition.

Part IV explores the likely impacts Rome II will have on choice-of-law analysis and the challenges it poses to American choice of law. By comparing the American choice-of-law revolution with the development of choice of law in the European Union, it explains the different direction each has respectively headed. It intends to emphasize that Rome II represents a growing trend in the choice-of-law development in the European Union: the unification of choice-of-law rules and the maintenance of certainty and predictability. The argument is that the American conflict-of-law revolution brought the choice of law in the United States from rules to approaches, making American choice of law too pragmatic to be measurable.

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43 Id. at art. 3(1).
44 See Symeonides, supra note 10, at 175.
45 Meeusen, supra note 27, at 287.
In conclusion, this Article stresses that the application of the party autonomy doctrine in the determination of choice of law in non-contractual obligations crosses over the traditional line between consensual choice of law by the parties and non-consensual obligations. This Article argues that by allowing the parties to choose the law they wish to govern their non-contractual obligations, Rome II represents a historical change in modern choice-of-law doctrine, and the change offers a great opportunity to rethink American choice of law. The hope is that American choice of law would be repositioned to be compatible with the international trend and common practice.

II. CHOICE OF LAW IN NON-CONTRACTUAL OBLIGATIONS AND EVOLVING APPROACHES

Non-contractual obligations may arise from either torts or other non-consensual conduct. Because non-contractual obligations lack a consensual basis, the obligations may arise only by operation of law. Thus, unlike contractual obligations created by the agreement of parties to the contract, non-contractual obligations greatly depend on the specific rules of the place to which they are related. In other words, the issue of territoriality, in terms of application of law, traditionally is deemed a more important factor in determining a non-contractual obligation than in ascertaining a contractual obligation.

Not surprisingly, therefore, in the choice-of-law context, non-contractual obligations are influenced strongly by territorial imperatives that such obligations be governed by the law of the place that is either the location of the occurrence of the underlying event or is re-

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46 See supra notes 14–16 and accompanying text.
47 Torts, for example, are defined as "the breach of duties fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them." W. Page Keeton et al., Prosser and Keeton on Torts 4 (W. Page Keeton ed., 5th ed. 1984).
48 See id. at 3 (stating that "there is no such thing as a law of Tort, but only a law of particular unconnected torts—that is, a set of pigeon-holes, each bearing a name, into which the act or omission of the defendant must be fitted before the law will take cognizance of it and afford a remedy").
lated to the event.\textsuperscript{50} This notion can be further illustrated by the fact that as early as the sixteenth century, when the conflict of law was still in its initial stage of development,\textsuperscript{51} contractual obligations were allowed to depart from the traditional doctrine of \textit{lex loci contractus}—that the contract was to be governed by the law chosen by the parties under the doctrine of party autonomy,\textsuperscript{52} while the law applicable to non-contractual obligations remained purely territorial.\textsuperscript{53}

In the past decades, however, choice of law in non-contractual obligations has witnessed sweeping changes, particularly in the torts context.\textsuperscript{54} As a result, territoriality still plays a role in shaping the choice-of-law rules for non-contractual obligations, but the dominance of territorially-based, traditional rules has become less and less of a phenomenon.\textsuperscript{55} With regard to torts, the expanding range of tort problems seriously challenged the single-factor, territorial, choice-of-law rule\textsuperscript{56} and, in the meantime, these problems generated a strong need for flexibility in determining the governing law for a particular tort.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{50} See Goodrich, \textit{supra} note 49, at 19 ("The right to sue for the tort, the liability of the perpetrator, and the defenses that he may plead are, with few exceptions, governed by the law of the place.") (quoting Dorr Cattle Co. v. Des Moines Nat'l Bank, 98 N.W. 918, 922 (Iowa 1904)); see also Russell J. Weintraub, \textit{Commentary on the Conflict of Laws} 373 (5th ed. 2006) ("A territorial rule is one that selects a state's law without regard to the law's content but based on some contact that state has with the parties or the transaction.").
\item \textsuperscript{51} "The development of the principles of conflict of laws began in the Italian universities in the 1200's and 1300's during the revival of the study of Roman law." Willis L. M. Reese & Maurice Rosenberg, \textit{Cases and Materials on Conflict of Laws} 4 (Elliot E. Cheatham et al. eds., 8th ed. 1984).
\item \textsuperscript{53} See Roger C. Cramton et al., \textit{Conflict of Laws: Cases, Comments, and Questions} 15 (4th ed. 1987) ("The traditional approach to choice of law determines the applicable law by locating territorially the relevant event or thing. In many cases it is a simple matter to localize the transaction in space, and thus to find the governing law.").
\item \textsuperscript{54} See Weintraub, \textit{supra} note 50, at 371.
\item \textsuperscript{56} See Weintraub, \textit{supra} note 50, at 371-72.
\item \textsuperscript{57} A British scholar once suggested the adoption of a "proper law" doctrine, such as that which was used in contracts, to govern torts because scholars doubted that "courts w[ould] achieve socially desirable results if they appl[ied] the same conflicts rule"—the place of wrong—"to liability for automobile negligence, radio defamation, escaping animals, the seduction of women, economic conspiracies, and conversion." J. H. C. Morris, \textit{The Proper Law of a Tort}, 64 Harv. L. Rev. 881, 884 (1951). That scholar believed that "[a] proper law approach, intelligently applied, would furnish a much-needed flexibility." \textit{Id.}
\end{itemize}
As far as other non-contractual obligations are concerned, although their pertinent resources are considered less abundant than other legal institutions,\(^{58}\) it is discernable that a change has been taking place in the choice of law from so-called “rigid connecting facts” rules such as \textit{lex loci}\(^{59}\) to a more relation-based approach, such as \textit{lex causae conditionis} (the law governing the underlying relationship)\(^{60}\) or “proper law.”\(^{61}\) But it is still the case that the choice-of-law rules in non-contractual obligations other than torts are far from well established.\(^{62}\) Compared with torts, “classification and definition of other non-contractual obligations may be more complex and difficult.”\(^{63}\)

A. \textit{Traditional Choice-of-Law Approach in Torts: Lex Loci Delicti}

Choice of law analysis is believed to have originated in twelfth-century, northern Italy in which there existed city-states that were independent entities, each having its own judiciary and local law.\(^{64}\) When trade between them increased and conflicts between their local laws arose with some frequency, the need for choice-of-law rules became imminent.\(^{65}\) To deal with city states’ conflicting statutes,\(^{66}\) Italian legal scholars, reputed as “statutists,”\(^{67}\) created an Italian school and developed a choice-of-law theory called “statute theory” to deal with conflicts between the statutes of cities.\(^{68}\) Bartolus de Saxoferrato, was claimed to have had “virtually the last new word” in choice of law.\(^{69}\) As the first man to deal with the choice-of-law subject in principle,\(^{70}\) he represented the idea that choice-of-law problems can be

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\(^{58}\) See Zweigert & Müller-Gindullis, \textit{supra} note 19, § 30-1, at 3.

\(^{59}\) \textit{Id.} § 30-20, at 11.

\(^{60}\) \textit{Id.; see also} Peter Hay, \textit{Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement 2d}, 26 \textit{AM. J. COMP. L.} 1, 2 (1978).


\(^{62}\) \textit{See Report on Rome II, supra} note 4, at 8.

\(^{63}\) \textit{Id.} at 9.

\(^{64}\) \textit{See} GENE R. SHREVE, \textit{A CONFLICT-OF-LAWS ANTHOLOGY} 7-8 (1997) (citing FRIEDRICH JUENGER, \textit{CHOICE OF LAW AND MULTISTATE JUSTICE} 11 (1993)).

\(^{65}\) \textit{See} REESE & ROSENBERG, \textit{supra} note 51.


\(^{67}\) CRAMTON \textit{ET AL.}, \textit{supra} note 53, at 1.

\(^{68}\) REESE & ROSENBERG, \textit{supra} note 51, at 4.


resolved by "the ordinary processes of construction and interpretation," of law.\textsuperscript{71}

The most distinctive feature of the statute theory was its classification of the law into three categories for determining the applicable law in transactions involving more than one city state: "real," "personal," and "mixed" statutes.\textsuperscript{72} Under the statute theory, the "real" statutes applied within the territory of the city that created the law because they were territorial in nature, while the "personal" statutes followed the city's citizenry even when in another city state.\textsuperscript{73} The "mixed" statutes applied to all acts done in the city state of the enacting sovereign.\textsuperscript{74} Thus, except for personal statutes, which included laws that govern capacity, all laws were territorial and could only be effective within the boundary of the city state where the law was enacted.\textsuperscript{75}

In addition, the Italian school established a principle of \textit{locus regit actum} (the place determines the act) to govern the act or conduct. Although the principle itself, as expressed by Bartolus, was considered "a final point of a secular debate on foreign condition,"\textsuperscript{76} it in essence permitted "a party to employ the form of the law in force in the country in which he happens to act."\textsuperscript{77} In other words, in transactions, the \textit{lex loci actus} (the law of the place of the act) must be observed.\textsuperscript{78} Similarly, there developed a rule of \textit{lex loci delicti} (the law of the place where a wrong was committed), or \textit{lex loci} in short, to govern civil wrongs,\textsuperscript{79} a concept later developed in "tort law."\textsuperscript{80}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{71} Friedrich K. Juenger, \textit{American and European Conflicts Law}, 30 \textit{Am. J. Comp. L.} 117, 119 (1982) (quotations omitted).
\item \textsuperscript{72} NORTH, \textit{supra note} 70, at 20; \textit{see also} CRAMTON ET AL., \textit{supra note} 53, at 1.
\item \textsuperscript{73} \textit{See} DAVID F. CAVERS, \textit{THE CHOICE-OF-LAW PROCESS} 2 (1965).
\item \textsuperscript{74} NORTH, \textit{supra note} 70, at 21.
\item \textsuperscript{75} \textit{See} Fritz von Schiwind, \textit{Problems of Codification of Private International Law}, 17 \textit{Int'l. & Comp. L.Q.} 428, 430 (1968) ("In the mind of Bartolus and all the later scholars the problem of private international law was the territorial limitation of the application of the law."); \textit{see also} JUENGER, \textit{supra note} 64, at 14; Ernest G. Lorenzen, \textit{Huber's de Conflictu Legum}, 13 \textit{Ill. L. Rev.} 375, 378–79 (1919).
\item \textsuperscript{76} Renato Sansa & Ercole Sori, \textit{Governance of Diversity Between Social Dynamics and Conflicts in Multicultural Cities: A Selected Survey on Historical Bibliography} 4 (Fondazione Eni Enrico Mattei, Working Paper No. 73.05, 2005), \textit{available at} http://ssrn.com /abstract=728943.
\item \textsuperscript{77} O. Kahn-Freund, \textit{Locus Regit Actum}, 7 \textit{Mod. L. Rev.} 238, 241 (1944).
\item \textsuperscript{78} \textit{Id.} at 240.
\item \textsuperscript{79} \textit{See} BARTOLO OF SASSOFERRATO, \textit{BARTOLUS ON THE CONFLICT OF LAWS} 23–24, 56–57, 60 (Joseph Henry Beale trans., 1914) (stating that "[i]f a foreigner does a wrong," then that foreigner "should be punished by the law of the place where he offended . . . because statutes which have to do with the substance of the suit do not extend to those things which happened outside the territory"); \textit{see also} Kahn-Freund, \textit{supra note} 77, at 240.
\end{itemize}
\end{footnotesize}
Later, Dutch scholars reinforced the territorial principle of choice of law, though they seemed to reject the traditional idea of classifying laws as real and personal. Ulrich Huber, a renowned Dutch jurist, adopted the territorially-based, choice-of-law rules into his famous "three maxims," whereby a doctrine of "comity" was developed. Comity, as applied in choice of law, essentially provided a legitimate ground for recognition of foreign-created rights in each state, dismissing the idea that application of a foreign law was an obligation.

Huber was regarded as "the first writer who made it clear beyond [a] doubt" that to recognize foreign-created rights was merely a "concession which [a] state made" for "convenience and utility." Huber also further illustrated the principle of locus regit actum by pointing out that "all transactions and acts . . . rightly done according to the law of any particular place, are valid even where a different law prevails, and where, had they been so done, they would not have been valid." "On the other hand," according to Huber, "transactions and acts done in violation of the law of that place, since they are invalid from the beginning, cannot be valid anywhere."

However, classic territorialism met challenges in many European countries. In Germany for example, Friedrich Carl von Savigny,
whose writings on conflict of law remain influential today,\textsuperscript{87} “did not seek for solutions to choice-of-law problems in the classification of local statutes. Instead, he sought to find a proper seat for each legal relationship in its connection with a given state whose law would thereby be rendered applicable, whatever its terms.”\textsuperscript{88} Unlike the statutists, to identify proper “seat” for purposes of choice of law, Savigny focused on “connecting factors,” including “domicile, situs, place of transaction and place of litigation.”\textsuperscript{89} In addition, in developing his “seat” theory, Savigny turned his attention to the principle of \textit{lex fori} (the law of forum), making it “the fountainhead of all conflict of laws.”\textsuperscript{90}

Even in Italy, the home of the statute theory, an emphasis on nationality other than local statutes developed. Advocated by Pasquale Stanislao Mancini (1817–88), the personal law became an important principle with regard to choice of law. Mancini “urged that choice of law be based on the principle of nationality”\textsuperscript{91} and “attributed fundamental importance to the ties of allegiance that link individuals to their home countries.”\textsuperscript{92} According to Mancini, the personal law principle shall take priority over the territoriality principle in choice of law unless the matters involve “public policy, sovereignty, [or] rights in real estate.”\textsuperscript{93} It was his belief that “private law [was] primarily personal.”\textsuperscript{94}

Despite the differences, the \textit{lex loci delicti} remains the general rule in Europe when dealing with torts,\textsuperscript{95} even at the present time.\textsuperscript{96} The dominance of this classic doctrine, however, has been weakening

\textsuperscript{87} See JUENGER, \textit{supra} note 64, at 40 (“Outside the United States, Savigny's doctrine still dominates, despite the fact that several European scholars, sufficiently disenchanted with mechanical jurisprudence, have mounted an all-out attack on his conceptual edifice.”).

\textsuperscript{88} CAVERS, \textit{supra} note 73, at 5; \textit{see also} JUENGER, \textit{supra} note 64, at 34–40 (discussing Savigny's seat theory). Savigny's conflict treatise, originally published in 1849, was translated and republished in 1869. \textit{See} FRIEDRICH CARL VON SAVIGNY, \textit{PRIVATE INTERNATIONAL LAW: A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME} (William Guthrie trans., 1869).

\textsuperscript{89} JUENGER, \textit{supra} note 64, at 37.

\textsuperscript{90} Albert A. Ehrenzweig, \textit{Savigny and the Lex Fori, Story and Jurisdiction: A Reply to Professor Briggs}, 53 CAL. L. REV. 535, 536 (1965); \textit{see also} ALBERT A. EHRENZWEIG, \textit{CONFLICT OF LAWS} 322 (1962).

\textsuperscript{91} CAVERS, \textit{supra} note 73, at 5.

\textsuperscript{92} \textit{See} JUENGER, \textit{supra} note 64, at 41.

\textsuperscript{93} \textit{See id.}

\textsuperscript{94} \textit{See id.}

\textsuperscript{95} Kuratowski, \textit{supra} note 80, at 174.

since as early as the late nineteenth century as a result of the advocacy for its displacement and the application of other rules in certain tort cases.\textsuperscript{97} In England, for example, the 1870 case Phillips v. Eyre set a common law rule that required an action brought on a foreign tort to be actionable under both the \textit{lex fori} and the \textit{lex loci}.\textsuperscript{98} This double actionability rule was further elaborated in the 1971 House of Lords decision in Boys v. Chaplin.\textsuperscript{99}

Thus, for centuries, although the place of wrong was an important factor in England for torts committed abroad, "an act [was] not actionable in England if it [was] justifiable by the law of the place where it ha[d] been committed[,] [and] . . . the wrong must [have been] of such a character that it would have been actionable if [it was] committed in England."\textsuperscript{100} In 1995, the Private International Law (Miscellaneous Provisions) Act was enacted, and a statutory rule of modified \textit{lex loci} was adopted to replace the double actionability rule—although the double actionability is still required in defamation cases.\textsuperscript{101} Under the modified \textit{lex loci}, the law other than the law of the place of wrong is applied in cases of personal injury and damage to property, as well as other cases involving the most significant elements.\textsuperscript{102}

\textsuperscript{97} See id.

\textsuperscript{98} Phillips v. Eyre, 6 L.R.Q.B. 1 (1870); Albert A. Ehrenzweig, \textit{The Not So "Proper" Law of A Tort: Pandora's Box}, 17 INT'L & COMP. L.Q., 1, 2–5 (1968).


\textsuperscript{100} Kuratowski, \textit{supra} note 80, at 177.


\textsuperscript{102} Section 11 of the 1995 Private International Law (Miscellaneous Provisions) Act provides:

1. The general rule is that the applicable law is the law of the country in which the events constituting the tort or \textit{delict} in question occur.

2. Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
   a. for the cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained injury; 
   b. for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and 
   c. in any other case, the law of the country in which the most significant element or elements of those events occurred.

3. In this section "personal injury" includes disease or any impairment of physical or mental condition.
The *lex loci* would also be set aside where the parties have the same "personal law," or more precisely, the parties have the same nationality or are domiciled in the same country.\(^{103}\) In Switzerland, the general rule in a tort action is that the law of the place where the tort was committed governs, but if the parties are both habitually resident in the same law district, that law will apply.\(^{104}\) Similar rules can be found in other European countries such as Germany,\(^{105}\) Portugal,\(^{106}\) Hungary,\(^{107}\) and Poland.\(^{108}\)

In the United States, the choice of law in torts has its origin in the territoriality principle, and Huber's doctrine is regarded as having greater influence upon the development of American conflict of laws than any other work.\(^{109}\) Joseph Story, "the first great American conflicts scholar,"\(^{110}\) in his famous *Commentaries on the Conflict of Laws*,\(^{111}\) laid out three axioms as the basis of American conflict of laws.\(^{112}\) Story's work, however, was considered, if not exaggerated, as "in reality nothing but a 'paraphrase' of Huber."\(^{113}\)

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\(^{103}\) See C.G.J. Morse, *Choice of Law in Tort: A Comparative Survey*, 32 AM. J. COMP. L. 51, 59 (1984) ("The more recent continental codes often allow for displacement of the *lex loci* in favor of the common 'personal law' of the parties.").


\(^{105}\) See Morse, *supra* note 103, at 59.

\(^{106}\) See *id.* at 66.

\(^{107}\) See *id.* at 85–86.

\(^{108}\) See *id.* at 89.

\(^{109}\) Lorenzen, *supra* note 75, at 375.

\(^{109}\) SHREVE, *supra* note 64, at 25.

\(^{110}\) JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (1834).

\(^{111}\) Story's axioms are described as follows:

The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural born subjects or aliens; and also all contracts made and acts done within it.

Another maxim, or proposition, is, that no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories.

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According to Story, "comity of nations" was "the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Like Huber, Story put great emphasis on the place where an event occurred, and he believed that "the law of the place where an event took place [should] govern its legal consequences." This territorial approach not only laid the foundation for American conflict of laws, but it also influenced American choice-of-law thinking for centuries.

Further developed from the territoriality principle was the theory of vested rights. Advocated by the influential British conflict-of-law scholar A.V. Dicey, the vested rights theory focuses on the extraterritorial enforcement of rights rather than comity. Although Dicey "rejected the doctrine of comity," he was regarded as having apparently "imbibed from Huber through Holland's jurisprudence." The "vested rights" theory was then transplanted into American conflict of laws by Joseph Beale, the Reporter of the 1934 Restatement of Conflict of Laws ("1934 Restatement"). Beale made "vested

From these two maxims or propositions there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.

Id. at 19, 21–25.

Lorenzen, supra note 75, at 375; see also Juenger, supra note 71, at 117–19 ("Europeans and Americans alike owe a debt to the labors of the glossators and commentators who in this very spot invented our science . . . . Samuel Livermore, the first American to write a conflicts treatise, borrowed from the statutists. Story professed to follow Huber’s teachings.").

STORY, supra note 111, at 37.

CRAMTON ET AL., supra note 53, at 14.

See Juenger, supra note 71, at 117 ("What Story planted in America's fertile federalist soil quickly took root and has since yielded an indigenous crop of conflicts law and literature."); see also BRILMAYER, supra note 69, at 15 ("Joseph Story's Commentaries on the Conflict of Laws of 1834 . . . founded conflict of laws on the idea of comity of nations.").

See Hessel E. Yntema, The Historical Bases of Private International Law, 2 AM. J. COMP. L. 297, 307 (1953) ("[T]he importance of Story's great work in the formation of legal thinking until but recently can scarcely be overestimated.").

Id. at 308 ("The excision of comity from Huber's doctrine . . . left the conception of vested rights.").

See ALBERT VENN DICEY, A DIGEST OF THE LAw OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 22–33 (Stevens & Sons, Ltd. 1927) (1896).

Yntema, supra note 117, at 308.

Id.
rights” both “the theoretical basis of his own work” and the premise on which the 1934 Restatement rested.

Essentially, “vested rights” theory is the legal obligation to recognize rights acquired under foreign law. According to Professor Beale, “[a] right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus, an act valid where done cannot be called in question anywhere.” On this basis, Professor Beale advanced the notion that “legally enforceable rights and liabilities vest[] in the parties at the time and place, and in accordance with the law of the place where the cause of action arose.”

Realizing that each state has legislative authority to determine the legal effect of acts or events taking place within its territory, the 1934 Restatement enshrined the lex loci doctrine, escalating “the place of wrong” to the level of a general rule in determining the applicable law for torts. Under the 1934 Restatement, “the law of the place of wrong determines whether a person has sustained a legal injury.” As a matter of fact, the lex loci doctrine was accepted by U.S. courts long before the 1934 Restatement, and the application of this doctrine first appeared in 1880 in Dennick v. Central Railroad Co., and was again upheld in the 1892 classic case Alabama Great Southern Railroad Co. v. Carroll. Not until the 1934 Restatement, however, did this doctrine become “a black-letter rule” in the American conflict-of-laws system.

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123 See SHREVE, supra note 64, at 25; see also Hanotiau, supra note 96, at 73.
124 See BRILMAYER, supra note 69, at 20.
127 See RESTATEMENT OF CONFLICT OF LAWS § 377 cmt. a (1934).
129 RESTATEMENT OF CONFLICT OF LAWS § 378 (1934). In addition, the law of the place of wrong also determined “whether liability is absolute or based only on negligence or international harm, . . . the effect of contributory negligence, . . . the fellow-servant rule, . . . vicarious liability, . . . survival of a tort action, . . . the right of action for death, . . . the distribution of wrongful-death damages, . . . the measure of damages for tort, . . . and the right for exemplary damages.” CRAMTON ET AL., supra note 53, at 14 (citing RESTATEMENT OF CONFLICT OF LAWS §§ 379, 385–87, 390–91, 393, 412, 421 (1934)).
130 Dennick v. Cent. Railroad Co., 103 U.S. 11, 18 (1880) (dictum); see also Hanotiau, supra note 96, at 73 & n.3.
132 Hanotiau, supra note 96, at 73.
In the United States, judicial practice and the 1934 Restatement developed the prevailing principle that "[t]he right to sue for the tort, the liability of the perpetrator, and the defenses that he may plead are, with few exceptions, governed by the law of the place."\(^{133}\) And for a considerable period of time, "the place of wrong" became the choice-of-law rule that "United States courts [had] most widely accepted and universally applied."\(^ {134}\) Further, given its axiomatic status in the conflict-of-laws doctrine in the United States and many civil law countries, the *lex loci delicti* (law of the place of wrong) was regarded as "one of the few rules of conflict of laws which are uniform throughout the world."\(^{135}\)

**B. American Conflict-of-Laws Revolution: A Departure from the Tradition**

Among the legal areas of conflict of laws, torts is regarded as "the most fertile field in the United States for choice-of-law decisions."\(^ {136}\) Partly for this reason, the traditional approach of *lex loci delicti*, though widely accepted in American courts, was not widely accepted by legal scholars. On the contrary, criticism against the approach never stopped, and conflict of laws scholars constantly "questioned both the theoretical underpinnings of the *lex loci* approach and the reliability of its operation."\(^ {137}\) Even before the 1934 Restatement was adopted, the major opponents—including Ernest Lorenzen in 1921,\(^ {138}\) Walter Cook in 1924,\(^ {139}\) and David Cavers in 1933\(^ {140}\)—furiously attacked the vested rights theory and the traditional approach underlying the 1934 Restatement.\(^ {141}\)

As observed, the academic attack on the traditional approach had two prongs. Under the first prong, academics argued that "the

\(^{133}\) See Goodrich, *supra* note 49, at 19 (quoting Dorr Cattle Co. v. Des Moines Nat'l Bank, 98 N.W. 918, 922 (Iowa 1904)).


\(^{137}\) SHREVE, *supra* note 64, at 25.


\(^{141}\) See BRILMAYER, *supra* note 69, at 22 ("[B]y undermining the foundations, these critics sought to collapse the entire edifice.").
traditional approach was 'inaccurate and misleading.'\textsuperscript{142} The traditional approach, they argued, intended to "lump[] all 'tort' cases together under the 'place of wrong' rule."\textsuperscript{143} But the term "place of wrong" itself is subject to question. One commentator interpreted it to mean the place where the alleged tort was committed,\textsuperscript{144} while another said it referred to the place of impact or the place of harm.\textsuperscript{145} Under the 1934 Restatement, the place of wrong was further defined to be the place "where the last event necessary to make an actor liable for an alleged tort takes place."\textsuperscript{146} It is highly questionable, however, why "the last event [was] more significant than the first, when each is equally essential to the cause of action,"\textsuperscript{147} and whether the last event denotes the place of the act or the place of harm.\textsuperscript{148} In addition, it was regarded impossible to localize intangible injuries.

The second prong criticized the traditional approach for being "insensitive to the goal of 'socially useful decisions.'"\textsuperscript{150} At the heart of the criticism was the notion that the traditional approach did not reflect "the substantive policies underlying the legal rules vying for application."\textsuperscript{151} In other words, it was doubted "that courts [would] achieve socially desirable results if they appl[ied] the same conflicts rule to tort liability" arising from different causes of action.\textsuperscript{152} Critics believed the traditional approach failed to realize that "our choice is really being guided by considerations of social and economic policy or ethics" and did not "take into consideration all the relevant facts of life required for a wise decision."\textsuperscript{153} It was further pointed out that choice-of-law problems "need to be broken down into smaller groups and dealt with so as to meet the needs of society."\textsuperscript{154}

The effort to attack the traditional approach and the 1934 Restatement was later joined by other scholars, including Professor

\textsuperscript{142} SHREVE, \textit{supra} note 64, at 55.
\textsuperscript{143} CRAMTON ET AL., \textit{supra} note 53, at 17.
\textsuperscript{144} Rheinstein, \textit{supra} note 135, at 4.
\textsuperscript{145} See Weintraub, \textit{supra} note 134, at 215 & n.2.
\textsuperscript{146} CRAMTON ET AL., \textit{supra} note 53, at 15 (quoting \textit{RESTATMENT OF CONFLICT OF LAWS} § 377 (1934)).
\textsuperscript{147} Id.
\textsuperscript{148} See id.
\textsuperscript{150} SHREVE, \textit{supra} note 64, at 55.
\textsuperscript{151} BRILMAYER, \textit{supra} note 69, at 33.
\textsuperscript{152} Morris, \textit{supra} note 57, at 884.
\textsuperscript{153} Cook, \textit{supra} note 139, at 487.
\textsuperscript{154} Morris, \textit{supra} note 57, at 882 n.9 (quoting WALTER WHEELER COOK, \textit{LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS} 431 (1942)).
Brainerd Currie, who went much further than other scholars when he declared that “[w]e would be better off without choice-of-law rules.” While criticizing the 1934 Restatement, scholars called for conflicts reform, which ultimately turned into a conflict-of-laws revolution. The revolution that took place in the 1960s resulted in remarkable changes in the American choice-of-law system and eventually led to an end to the dominance of traditional choice-of-law rules. The very purpose of the revolution was to seek the replacement of traditional choice-of-law rules, which were regarded as rigid and arbitrary, with rules that were not only flexible but also policy and interest oriented.

A highly notable feature of the American conflict-of-laws revolution was the departure from the traditional choice-of-law rules. Many of the departing initiatives actually started with tort cases. Doctrinally, the revolution experienced a blossom period in which a number of new choice-of-law theories sprouted, and each of them had an ambition to try to lay a new foundation or find a new direction.

Of those new theories, Currie’s government interest analysis, announced in 1958, was seemingly the most aggressive and controversial because it essentially regarded conflict of laws as a conflict of interest between the states involved. Currie’s theory defined “[t]he central problem of conflict of laws” as “determining which interest shall yield” when “two or more states are in conflict.” Perhaps because of its “revolutionary” character, Currie’s interest-analysis doctrine was once hailed as “the first real alternative” to the traditional
As such, some believe that after Currie the "dark science called the conflict of laws can never be the same again."\(^{164}\)

In practice, the U.S. courts' adherence to the traditional approach was interrupted in 1963 when the New York Court Appeals, in the landmark case Babcock v. Jackson, abandoned the principle of \textit{lex loci delicti} in torts cases.\(^{165}\) The decision, which was significantly influenced by the government interest analysis approach, was considered a watershed because "it [came] at a time when the courts [were] becoming increasingly dissatisfied with some basic choice-of-law rules and [were] seeking alternative solutions."\(^{166}\) As part of the American conflict-of-laws revolution, Babcock spearheaded the U.S. courts' search for new choice-of-law rules for torts and had "a profound effect upon future developments in many other areas of choice of law."\(^{167}\) Since then, the departure from the traditional approach has swept the U.S. courts. As of today, forty-two of fifty-two U.S. jurisdictions have repudiated the \textit{lex loci} rule as the single rule in resolving tort conflicts.

The major movement of the American conflict-of-laws revolution ended in 1971 when the Restatement (Second) of the Conflict of Laws ("Second Restatement"), after more than seventeen years of drafting, was adopted.\(^{168}\) "[A]s a negotiated settlement of conflicting judicial and academic approaches,"\(^{169}\) the Second Restatement based the choice of law on factor analysis of contacts or relationships and introduced the doctrine of "the most significant relationship."\(^{170}\) Under the Second Restatement, determination of applicable law "involves a two-step process of identifying the relevant 'contacts' with the respective states and then evaluating their significance" with respect to the particular issue in order to find "the state with the most significant re-

\(^{163}\) See Brilmayer, \textit{supra} note 69, at 43.
\(^{164}\) See Kay, \textit{supra} note 122, at 21.
\(^{167}\) Id.
\(^{168}\) See Symeonides, \textit{supra} note 55, at 1746.
\(^{169}\) \textit{Restatement (Second) of Conflict of Laws} (1971).
\(^{171}\) See \textit{Restatement (Second) of Conflict of Laws} \S 6 cmt. c (1971).
For the choice-of-law purpose, the Second Restatement not only specifies the detailed prescriptive rules for each area of law, but also provides a set of general principles to help identify the significance of relationships.

The change as a result of the revolution was dramatic in many ways. The most striking changes were that U.S. courts split in the "approaches" on which they relied to handle conflicts cases, and the "issue-by-issue" analysis, rather than a uniform rule, became a common mechanism. A survey of U.S. jurisdictions in 2000 revealed that, in torts cases, twenty-two jurisdictions adopted the Second Restatement's approach, ten stayed with the traditional rule, five employed the doctrine of "better law," three applied the analysis of "government interest," three took the "lex fori" (the law of forum) approach, and six used a combined method.

Elsewhere, as will be discussed in Part IV, the American conflict-of-laws revolution has astonished as well as "puzzled" conflict-of-laws scholars in many countries. Nevertheless, the revolution, to a certain extent, was deemed as having "an incontestable influence on the development of private international law in Europe" and the rest of the world. For tort conflicts in particular, there are several conceptual aspects emerging from the revolution that are worthy of note.

The first aspect is the concept of false conflict, introduced by Currie. In addressing his interest analysis doctrine, Currie divided conflict into "true conflict" and "false conflict" by classifying the states as interested or disinterested. According to Currie, the conflict-of-

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172 See Cramton et al., supra note 53, at 302.
173 See Leflar, supra note 128, at 271–74.
174 See Willis L.M. Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58, 58 (1973) ("Amidst the chaos and tumult of choice of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved."); see also Symeonides, supra note 55, at 1746.
176 See Vitta, supra note 66, at 2.
177 See T. Hanotiau, supra note 96, at 84.
178 See Huang Jin, Private International Law 122 (1999) (stating that the determination of applicable law under the principle of the most significant relationship has become an international trend).
179 "[T]he idea of false conflicts" was deemed "an old concept which Currie simply clothed in new terminology," but Currie "was the first to analyze systematically the disposition of what he called 'false problems.'" Peter Kay Westen, False Conflicts, 55 Cal. L. Rev. 74, 75–76 (1967).
180 See Kay, supra note 122, at 60.
laws system was essentially a conflict of state interests or policies, and "[t]he basic problem in conflict of laws was to reconcile or resolve the conflicting interests of different states." Thus, if one state had an interest and the other state had none in a particular case, a conflict between the laws of those two states was a false one because the conflicting interests of the respective states were not involved. In a false-conflict case, under Currie's approach, the court should apply the law of the only interested state.

The false-conflict analysis was intended to focus on the content of the competing laws, and as such the concept was regarded as a distinctive contribution Currie made to the conflict-of-laws field. It has been believed that "no one proposes today that the decisional process in choice of law cases should fail to include an inquiry into

By definition, an interested state must be a state has a domestic policy which will be advanced by its application in the case. A disinterested state may either be one of the states whose law is invoked by a party, but which, after analysis, turn out not to be interested; or it may be a third state whose law is not invoked by any party but in which the suit is brought.

Id. CURRIE, supra note 155, at 107-08, 178-79 ("Each state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case."); Currie, supra note 165, at 1242.

When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

Id. CURRIE, supra note 155, at 163.

See id. at 184; see also BRILMAYER, supra note 69, at 47.

[Currie's] method sorted cases into three different types. First, it was possible that both states had "interests" in the sense that their policies would be furthered by application of their law: These were called "true conflicts." Second, it was possible that one state might have an interest while the other did not: These were called "false conflicts." Third, it was possible that neither state might have an interest: These were the "un-provided-for cases."

Id. CURRIE, supra note 155, at 184; see also Albert A. Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847, 851 (1967) ("Other [courts] have undertaken to avoid the battleground of choice of law altogether by engaging in such legerdemain as the new construct of 'false conflicts,'" which "in theory permits courts without making such a choice, 'simply' to apply the law of the state which is presumably exclusively interested in the application of its law.").

See KAY, supra note 122, at 169.
the content of the competing laws." In addition, the false-conflict concept was considered "useful in eliminating as forceful precedent those choice-of-law cases which are found to have involved no real conflict," and it also posed "a challenge to counsel and courts alike to abandon the talismans of the past by confronting the task of accommodating legitimate state interests."

The second aspect concerns the distinction between conduct regulation and loss distribution. Since Babcock v. Jackson, the New York Court of Appeals has adopted a legal-content-categorization approach in tort conflict cases, and it has divided the torts rules into the rule of conduct regulation and rule of loss distribution. The motivation was to help determine the applicable law through an inquiry into the objective of the laws of the states involved. Thus, for purposes of resolving tort conflicts, the conduct regulation rules refer to those that "have the prophylactic effect of governing conduct to prevent injuries from occurring," while the loss distribution rules "are those that prohibit, assign, or limit liability after the tort occurs." In practice, the distinction seems to be straightforward: when the conflicting rules involve the appropriate standards of conduct or rules of the road, the law of the place of torts has a predominant concern. "Conversely, when the . . . conflicting rules relate to allocating losses that result [in] admittedly tortious conduct, . . . the locus jurisdiction has at best a minimal interest in determining the right of recovery . . . ." Although the line between the two categories does not seem bright all the time, most courts in the United States have adopted this distinction one way or the other.

186 Id. at 179.
187 Westen, supra note 179, at 122.
188 Id.
189 The court in Babcock held that "[w]here the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the alleged wrongful conduct occurred will usually have a predominant, if not an exclusive, concern." Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963). According to the court: [the issue in this case] is not whether the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong concededly committed.

190 See Symeonides, supra note 55, at 1753–54.
193 Symeonides, supra note 55, at 1754.
The third aspect deals with the common-domicile consideration. Domicile is regarded as the chosen point of entry in the conflict-of-laws analysis. It serves as a jurisdiction base on the one hand, and it constitutes an important factor for choice of law on the other. In *Babcock*, the New York Court of Appeals made the common domicile of the plaintiff and the defendant a decisive consideration in the determination of the applicable law to the tort conflict. This consideration was reinforced in *Neumeier v. Kuehner* and became the widely cited "Neumeier rule No. 1" under which the law of common domicile determines the standard of care in guest-passenger tort conflicts.

Under the choice-of-law theories developed in the revolution, it is assumed that state policies are often triggered by domicile, and this assumption makes domicile a key concept to the choice-of-law process. As one commentator observed, the revolution had produced nothing more than an exception from the prevailing rule of *lex loci delicti* in tort cases where the parties had a common domicile in a state other than the place of injury. A further development in this context is to have the common domicile consideration extended to the cases where the parties are domiciled in different states that have the same laws.

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194 REESE & ROSENBERG, supra note 51, at 7.
As to [the issue of choice of law for damages], it is New York, the place where the parties resided, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law.

*Id.*

197 Neumeier v. Kuehner, 286 N.E.2d 454, 457 (N.Y. 1972) ("When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest."); see also Reese, supra note 136, at 137 ("To date, [the Neumeier] rules have not been widely adopted by the courts of other states. They are, nevertheless, believed to be of considerable significance.").

198 See BRILMAIER & GOLDSMITH, supra note 195, at 303.
199 See id.

201 In Louisiana, it is provided that "[p]ersons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state." LA. CIV. CODE ANN. art. 3544(1) (2008).
The fourth notable aspect is the balance of relationships. As discussed, the central theme of the Second Restatement is its "most significant relationship" approach. To speak loosely, the choice of law contemplated by the Second Restatement is virtually a process of balancing relationships in order to identify the most significant one. To reach that goal, the Second Restatement offers a formulation to determine which state has the most significant relationship with respect to the particular issue. In tort conflicts, the formulation contains the general policy-based considerations under section 6 and detailed contact assessment under section 145. More specifically, section 6 functions as a benchmark to evaluate the significance of a relationship with respect to the particular issue to the potentially interested

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202 See Weintraub, supra note 157, at 382; see also Hanotiau, supra note 96, at 82-83.
203 Leflar, supra note 128, at 268-74; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971). Section 6 sets forth the choice-of-law principles as follows:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include
   a. the needs of the interstate and international systems,
   b. the relevant policies of the forum,
   c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   d. the protection of justified expectations,
   e. the basic policies underlying the particular field of law,
   f. certainty, predictability, and uniformity of result, and
   g. ease in the determination and application of the law to be applied.

Id. § 6. Section 145 sets forth the rules for torts.

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, which respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
2. Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
   a. the place where the injury occurred,
   b. the place where the conduct causing the injury occurred,
   c. the domicile, residence, nationality, place of incorporation and place of business of the parties, and
   d. the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145.
state, the occurrence, and the parties. Section 145 states a principle explicitly applicable to all torts and all issues in torts as well.

Generally, the Second Restatement approach is issue-by-issue oriented. In contrast to the 1934 Restatement, the Second Restatement puts in place a more general and flexible choice-of-law methodology that focuses on multiple fact contacts. In addition, the Second Restatement is considered as a "reconciliation" of a variety of theories and, for that reason, courts often refer to the Second Restatement rules in their decisions. Moreover, given its emphasis on the actual connection between the applicable law and the transactions or parties at issue, the relationship theory, though not free of controversy, has become a popular choice-of-law approach and "the dominant methodology within the modern camp."

C. Choice of Law Governing Other Non-Contractual Obligations

For other non-contractual obligations, there is no general consensus with regard to the choice of law, and in certain cases it is doubtful that a choice-of-law rule ever exists, though the matters in

204 See id. § 6.
205 Id. § 145 cmts. a, b. In addition, there are also certain special provisions in the Second Restatement to deal with particular tort issues such as personal injuries and injuries to tangible things, as well as wrongful death. Id. §§ 146, 147, 175.
207 See Finch, supra note 170, at 659; see also BRILMAYER & GOLDSMITH, supra note 195, at 264 ("Because of the Second Restatement's eclecticism, courts have done many different things under its banner.").
208 Leflar, supra note 128, at 277.
209 Hanotiau, supra note 96, at 84.
210 See Leflar, supra note 128, at 269 ("In short, although the place of the injury may be the point at which to begin a search for the most significant relationship, the Second Restatement is misleading to the extent that it may be read to imply that the locus of wrong is where such a relationship will ordinarily be found.").
211 SHREVE, supra note 64, at 153.
213 See Bennett, supra note 61, at 137 ("It seems that where there is no general action enrichment claims are dispersed ... throughout the legal system which, in turn, appears to inhibit the formation of a general category for the rules of unjust enrichment."). For example, in the People's Republic of China, there are no choice-of-law rules for non-contractual obligations, although both unjust enrichment and negotiorum gestio are provided in the 1986 General Principles of Civil Law of China as the legal causes for obligations. See, e.g., General Principles of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 92, in LEGISLATIVE AFFAIRS OFFICE, STATE COUNCIL, LAWS AND REGULATIONS 18 (2001) (P.R.C.) (providing that "if profits are acquired unjustly and without a lawful basis, resulting in another person's loss, the unjust profits shall be returned to the
those areas are not as complicated as in torts. One reason is that "almost every legal system in the world has its own definition" and terminology of other non-contractual obligations, particularly when the concept of quasi-contract is involved.\textsuperscript{214} Also, courts found it difficult to treat the non-contractual obligations systematically because the meanings attached to them are many, due to the fact that in most legal systems such obligations may stretch over a number of legal institutions of various kinds that differ from country to country.\textsuperscript{215}

Another reason for the lack of consensus is the underdevelopment of the literature in those areas. With respect to unjust enrichment, for example, although it was deemed as a "common denominator" of quasi-contract\textsuperscript{216}—or in many jurisdictions it was even thought of as synonymous of quasi-contract\textsuperscript{217}—the literature is sparse.\textsuperscript{218} Similarly, the doctrine of culpa in contrahendo, or pre-contractual liability, remains an area where there is substantial uncertainty regarding when such liability will be imposed by the law.\textsuperscript{219} Some still seem to believe that no liability attaches for representation made during preliminary negotiations of a contract unless there is a "preliminary agreement" between the parties.\textsuperscript{220}

The third reason for the lack of consensus is associated with the lack of rules for maintainable remedies. Professor T.W. Bennett observed that enrichment remedies are considerably "volatile and difficult to contain."\textsuperscript{221} It is in part because "[t]he rules of enrichment are often of a second order," which means that they normally are sought "to correct or undo the consequences" caused by the first order rules, such as creation or failure of a contract.\textsuperscript{222} For instance, restitution is a remedy for unjust enrichment because it has long been held

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person who suffered the loss."); General Principles of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 93, in \textsc{Legislative Affairs Office, State Council, Laws and Regulations 18} (2001) (P.R.C.) ("If a person acts to manage or provides services in order to protect another person's interests when he is not legally or contractually obligated to do so, he shall be entitled to claim from the beneficiary the expenses necessary for such assistance.").

\textsuperscript{214} Zweigert \& Müller-Gindullis, supra note 19, at 3.
\textsuperscript{215} See id.
\textsuperscript{216} Id.
\textsuperscript{217} Bennett, supra note 61, at 138.
\textsuperscript{218} Id.
\textsuperscript{219} Bennett, supra note 61, at 137.
\textsuperscript{220} Id. at 662–63.
\textsuperscript{221} Id. at 167.
that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." But "to state a general conflicts rule for the law of restitution" has seemingly been deemed impossible on the ground that legal remedies such as restitution "are merely the remedial devices by which a result conceived of as right and just is made to square with principle and with the symmetry of the legal system."  

Despite the difficulties, the attempt to search for choice-of-law rules for non-contractual obligations other than torts was never abandoned. Countries, through legislation, scholarly writing, or practice of courts, have more or less adopted certain rules to deal with choice of law in non-contractual obligations, though those rules are far from uniform and are unsatisfactory. The most commonly noted rules include *lex loci condictionis*, *lex causae condictionis*, and "relationship."

Like the *lex loci delicti* in tort, the *lex loci condictionis* is regarded as an orthodox method for determining the law applicable to non-contractual obligations. Countries that adopted this method took the position that the claims arising from non-contractual obligations are in a category of their own, and a choice-of-law rule attaching to this category is based on geographic connecting factors that would help locate the occurrence of a non-contractual obligation. The factor, as such, is the place where the legal event occurred that gave rise to the claim, and therefore the *lex loci* is regarded as the "most closely connected with the situation."

The *lex causae condictionis* is a modern rule that bases the choice of law for non-contractual obligations on the cause of action in the underlying transaction. As applied to the non-contractual obligations, the *lex causae condictionis* refers to "the law governing the underlying legal relationship or factual situation which gave rise to the claim."

In English Conflict of Laws, the rule of *lex causae condictionis*
was transformed into the doctrine of "proper law," referring to "the law with which the claim has the closet and most substantial connection."\(^{250}\)

Thus if a non-contractual obligation claim arose from a performance or transaction, it would be governed by the law applicable to the legal relationship on which the performance or transaction was based.\(^{251}\) This approach is also taken by Rome II with regard to the determination of law applicable to unjust enrichment, *negotiorum gestio*, as well as *culpa in contrahendo*. Under Article 10(1) of Rome II, for example, "if a non-contractual obligation arising out of unjust enrichment... concerns a relationship existing between the parties, such as one arising out of a contract or a tort/deict that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship."\(^{252}\)

Compared with the *lex loci condictionis*, the *lex causae condictionis* is more flexible in terms of connecting factors on which the choice of law is determined because the *lex causae* differs from case-to-case and, therefore, "must be ascertained independently for each [type] of case[]."\(^{253}\) In this context, the rule of the *lex loci condictionis* was opposed by those who believed that the acceptance of this rule would mean to destroy the uniformity in the solution to all cases of non-contractual obligations.\(^{254}\)

The relationship rule in many cases is basically a replica of the most-significant-relationship test advanced by the Second Restate-

\(^{250}\) *Id.* (quotations omitted).

\(^{251}\) Bennett, *supra* note 61, at 160.

\(^{252}\) Rome II, *supra* note 3, at art. 10. A similar rule is provided in Articles 11 and 12. Article 11 deals with *negotiorum gestio* and Article 12 governs *culpa in contrahendo*. According to Article 11(1):

[i]f 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/deict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

*Id.* at art. 11. Under Article 12:

[t]he 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.

*Id.* at art. 12.


\(^{254}\) Morris, *supra* note 57, at 884–85.
ment. On its face, this rule appears similar to the *lex causae condictionis* because both are concerned with relationships or connections. But a closer look reveals the difference between the two. The *lex causae condictionis* assumes that the underlying legal relationship or situation has the closest connection with the non-contractual obligation claim, while the most significant relationship requires an analysis or balance of the relationships involved and the analysis is also intertwined with policy considerations.

The relationship rule, as stated in section 221 of the Second Restatement, focuses on the law of the state that has the most significant relationship to the occurrence and parties involved in the action for restitution (a term used to implicate non-contractual obligations such as unjust enrichment). Thus, in general, the law governing restitution cases is the law of "the place where a relationship between the parties was centered, provided that the receipt of the enrichment was substantially related to the relationship." In addition, other relevant places would also need to be considered according to their relative importance in light of the principles set forth in section 6.

III. ROME II AND THE APPLICATION OF PARTY AUTONOMY IN NON-CONTRACTUAL OBLIGATIONS

At present, the choice of law in non-contractual obligations varies from country to country. Thus, concerned about the legal uncertainty, increase of costs, and the forum shopping that such variety may produce, Rome II intends to establish uniform rules among the European community to determine the law applicable to the "issues in cases with an international dimension where the claim is brought to enforce a non-contractual obligation." To that end, two major steps are taken under Rome II. The first is the adoption of a general

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236 Hay, *supra* note 60, at 12 ("The Restatement rule, however, is more complex than it first appears.").
237 *RESTATEMENT (SECOND) OF CONTRACTS* § 221 (1971).
238 *Id.* § 221 (2) (a).
239 Other places include:
   (b) the place where the benefit or enrichment was received, (c) the place where the act conferring the benefit or enrichment was done, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, [and] (e) the place where a physical thing, such as land or a chattel, which was substantially related to the enrichment, was situated at the time of the enrichment.

HeinOnline -- 39 Seton Hall L. Rev. 890 2009
rule that is applied to torts/delicts as well as the rules for other non-contractual obligations.\textsuperscript{241} The general rule serves as a default rule in dealing with choice-of-law issues in tort/delicts and applies at all times unless "otherwise provided for" in Rome II.\textsuperscript{242}

The second major step is the incorporation of the concept of freedom of contract into the choice of law for non-contractual obligations—the legal area where the will of the parties does not normally count in the determination of applicable law. More specifically, Rome II not only recognizes the principle of party autonomy, but also makes it a rule of freedom-of-choice for the parties to decide which law they would prefer to apply to the non-consensual obligations that occur or arise between them. Since Rome II does not separate torts/delicts from other non-contractual obligations with regard to the choice of law by the parties, the principle of party autonomy, which is provided in Article 14 of Rome II, equally applies to all non-contractual obligations.\textsuperscript{243}

\begin{itemize}
\item \textsuperscript{241} Rome II, supra note 3, at arts. 4, 10, 11, 12. Under the heading of "General Rule," article 4 provides:
\begin{enumerate}
\item 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.
\item 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.
\item 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 the preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.
\end{enumerate}
\textit{Id.} at art. 4.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id. at art. 14. Article 14 provides:
\begin{enumerate}
\item The parties may agree to submit non-contractual obligations to the law of their choice:
\begin{enumerate}
\item by an agreement entered into after the event giving rise to the damage occurred; or
\item where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred
\end{enumerate}
\end{enumerate}
\end{itemize}
Consequently, under Rome II, the choice of law for non-contractual obligations shall first be determined by the parties because “predominance is given to the principle of party autonomy,” and the other rules will be applied only if there is lack of choice by the parties. In a tort case, for example, in the order of hierarchy, the governing law will be (a) the law chosen by the parties, (b) the law of the country with which the tort/delict is manifestly more closely connected, (c) the law of the common habitual residence of the parties at the time the damage occurs, and then (d) the law of the place where the damage occurs. For purposes of the application of Rome II, the lack of choice of law by the parties means that the parties do not have a choice, the choice made is deemed invalid, or the choice is preempted by the so-called “mandatory rules.”

A. Principle of Party Autonomy Under Article 14 of Rome II

The focus of Article 14 of Rome II is freedom of choice by the parties. The clear intention of Article 14 is to grant the parties as much freedom as possible in their determination of applicable law to the non-contractual obligations that arise between them. In accor-

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

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 the Community law, where appropriate as implemented in the Member States of the forum, which cannot be derogated from by agreement.

Id.


245 Id. II, supra note 3, at art. 14.

246 Id. at art. 4(3).

247 Id. at art. 4(2).

248 Id. at art. 4(1).

249 See infra notes 266–67 and accompanying text.


251 See id.
dance with Article 14(1), "[t]he parties may agree to submit non-contractual obligations to the law of their choice." With respect to the choice, Article 14 further sets out several rules that prescribe the extent to which the choice is made by the parties.

The first rule is the rule of timing for making the choice of law. Under Article 14(1), the parties may choose a governing law "by an agreement entered into after the event giving rise to the damage occurred" or "by an agreement freely negotiated before the event giving rise to the damage occurred." The former is called "post-event-agreement," "post factum agreement," or "ex post agreement"; and the latter is called the "pre-event-agreement" or "ex ante agreement." In the ex ante agreement, for the parties' choice of law to be effective, Article 14(1) requires that "all the parties are pursuing a commercial activity" and the agreement is "freely negotiated."

The second rule is the rule of formality. Article 14 seems to be flexible as to formality, which allows the choice to be made either expressly or tacitly. But the tacit choice must be one "demonstrated with reasonable certainty by the circumstances of the case." In either situation, however, the choice "shall not prejudice the rights of third parties." Given the importance of the choice of law, an agreement in this regard would normally be made in writing.

The third rule is the non-prejudice rule. This rule applies to two fact patterns. One fact pattern is "[w]here 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 other fact pattern is "[w]here 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" and the law other than that of a Member State is chosen by the parties.

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252 Id. at art. 14(1)(a).
253 Id.
254 Id.
255 Tacit choice is also called inferred choice, which means that "[w]here there is no express choice of the proper law, it is open to the court to determine whether there is an implied or inferred choice of law in the parties' [agreement]." NORTH, supra note 70, at 203.
256 Rome II, supra note 3, at art. 14(1).
257 Id.
258 Id. at art. 14(2).
259 Id. at art. 14(3).
The first fact pattern is also categorized as the "domestic case" pattern because all relevant elements are located in a country. In the first fact pattern, "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." That is to say that the choice of a foreign law by the parties may not "displace the mandatory provisions of the law" of the place of damage that would apply without such a choice.

The second fact pattern involves "intra-community" cases in which the actual location of all relevant elements is in "one or more of the Member States." In this situation, the choice of law by the parties "shall not prejudice the application of provisions of [European] Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement." Simply put, in intra-community cases, the mandatory provisions of Community law override the parties' choice.

Between the lines of Article 14, there is another rule: the rule of choice regardless of actual connection. Under Article 14, the parties, when making a choice of law, are not required to choose the law that has a certain connection with the parties, event, or transaction at issue. Therefore, as long as the non-prejudice rule is not violated, through agreement, the parties may choose whatever law they wish to govern their non-contractual obligations.

B. Application of Article 14 and Limitations on Party Autonomy

Under Article 14, the parties are given ample freedom to choose the law applicable to the non-contractual obligations between them. The underlying presumption of Article 14 seems to be that the choice of law, if agreed to by the parties, is valid and shall be respected. From this perspective, it is fair to say that in Rome II, the principle of party autonomy becomes a primary choice-of-law rule for non-contractual obligations. However, it does not mean that party autonomy, as applied to non-contractual obligations under Rome II, is unlimited. On the contrary, under the provisions of Rome II, several re-

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261 Rome II, supra note 3, at art. 14(2).
262 de Boer, supra note 260
263 Id.
264 Id.
265 Rome II, supra note 3, at art. 14(3).
266 Id.
restrictions are imposed upon the autonomy of the parties in their choice of governing law.

One such restriction is the mandatory rule exception. In the context of conflicts of law, the mandatory rule is the rule that cannot be derogated from by the parties, or in other words, the rule that must be applied or must not be violated.\textsuperscript{266} In its application, the mandatory rule may refer to either the mandatory provisions of forum or the mandatory regulations of relevant countries. Under Rome II, in addition to the non-prejudice clauses of Article 14(2) and (3), which concern the mandatory provisions of the place of damage occurrence or the mandatory provisions of Community law as applied in a member state, the mandatory provisions of the forum law must also be observed.

Article 16 of Rome II explicitly provides that "[n]othing 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."\textsuperscript{267} Therefore, if there is a conflict between the law chosen by the parties and the mandatory provisions of the forum law, the parties' choice will be ignored and the mandatory provisions of the law of the forum will instead be applied.

Another restriction is the public policy exclusion. Public policy is a safeguard device to protect the social and public interests of the forum when a foreign law is to be applied. In conflicts-of-law literature, the public policy exclusion is also called an "escape device."\textsuperscript{268} The basic notion is that if a foreign law is repugnant to the distinctive policy of the forum's law, such foreign law shall not be applied because the application of a foreign law must always remain subject to a "stringent domestic policy."\textsuperscript{269} On this ground, it has been a well-established principle in conflicts-of-law analysis that a foreign law must be excluded if its application is incompatible with the public policy of the forum.\textsuperscript{270}

In accordance with Article 26 of Rome II, "[t]he application of a provision of the law of any country specified [under Rome II] may be refused only if such application is manifestly incompatible with the

\begin{footnotesize}
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\item \textsuperscript{266} DAVID MCCLEAN, MORRIS: THE CONFLICT OF LAW 346–47 (5th ed. 2000).
\item \textsuperscript{267} Rome II, supra note 3, at art. 16.
\item \textsuperscript{268} ANDREAS LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE AND INTERNATIONAL PERSPECTIVES 41 (2d ed. 2002).
\item \textsuperscript{269} NORTH, supra note 70, at 145.
\item \textsuperscript{270} See Morris Levin, Party Autonomy: Choice of Law Clauses in Commercial Contracts, 46 GEO. L.J. 260, 264 (1958).
\end{itemize}
\end{footnotesize}
public policy . . . of the forum.” As a matter of fact, Article 26 serves a two-fold purpose. On the one hand, it states a rule of public policy that may be employed to exclude the application of a foreign law that otherwise would be applied. On the other hand, Article 26 stresses the principle of party autonomy where the applicable law is chosen by the parties because it sets at least two conditions under which the application of a foreign law may be excluded: (a) “only if” the application is found incompatible with the public policy of the forum and (b) “only if” the incompatibility is manifest. Obviously, the key word here is “manifest.”

Another restriction is the confinement of the law chosen by the parties to the substantive law of the country specified. Article 24 of Rome II provides with particularity that the application of the law of any country under Rome II shall mean the application of the rules of law in force in that country other than its rules of private international law. Here, the rules of private international law explicitly refer only to the choice-of-law rules, despite the fact that in some countries the rules of private international law are meant to include both choice-of-law rules and certain substantive law rules.

The very purpose of Article 24 is to avoid the issue of renvoi. In conflicts of laws, renvoi (meaning “sending back”) refers to a situation where the forum, when applying a foreign law to a case, takes the foreign law as a whole, including the choice-of-law rules prevailing in that foreign country, and points the applicable law pointed to either the law of forum (remission) or the law of third country (transmission). The direct effect of renvoi is the application of the law pointed back by the choice-of-law rules rather than the law originally intended. By limiting the applicable law to the substantive law only, or excluding choice-of-law rules in the law to be applied, Rome II eliminates renvoi entirely.

272 Id.
273 Id. at art. 24.
274 In China, for example, the private international law rules are defined to consist of conflict-of-laws rules (namely the choice-of-law rules) and substantive law rules that are directly applied to foreign (international) civil cases. Han Depei, Private International Law, in TEXTBOOK SERIES FOR 21ST CENTURY 90–92 (2000); see also Mo Zhang, Choice of Law in Contracts: A Chinese Approach, 26 NW. J. INT’L L. & BUS. 289, 311–12 (2006).
An additional restriction is the exclusion of the choice of law by the parties in particular cases. Such cases, as provided in Rome II, include unfair competition and restrictive trade practice, and the infringement of intellectual property rights. Under Articles 6 and 8 of Rome II, with regard to non-contractual obligations arising from an infringement of intellectual property rights, an act of unfair competition or an act restricting free competition, the applicable law as specified may not be derogated by an agreement of the parties.\(^\text{276}\) Thus, in those two cases, the parties may not make a choice of applicable law.

\(^{276}\) Rome II, supra note 3. Article 6 of Rome II provides:

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, 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. 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.

   a. When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damages 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 among 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.

Id. at art. 6. Article 8 of Rome II provides:

1. The law applicable to a non-contractual obligations 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.
C. Issues Facing Article 14

Generally speaking, to the extent that the parties choose the applicable law, Rome II follows the footprints of Rome I where the contractual parties enjoy maximum freedom in choice of law.\textsuperscript{277} A very interesting point in this respect is that Article 14 of Rome II is identical to Article 3 of Rome I, in that they are all under the same title of "Freedom of choice." Also, Article 14, "the main provision on party autonomy in Rome II[,] . . . has not given rise to much debate," and in its final version "all elements of the Commission's original proposal . . . remained basically intact."\textsuperscript{278} This phenomenon demonstrates the general enthusiasm and keenness toward the principle of party autonomy in the European Community.

However, although nobody at this point seems to oppose or challenge the application of the doctrine of party autonomy in non-contractual obligations, and torts in particular, there are several issues that indeed require further discussion or clarification regarding the provisions of Rome II. Those issues are important because they are closely related to the effective application and implementation of Rome II. The first issue is the ex ante agreement. There is a lingering doubt about how it may work because in torts, for example, "[t]he parties do not (and should not) contemplate a future tort[,] they do not know who will injure whom, or what will be the nature or severity of the injury."\textsuperscript{279} Hence, it seems hard to understand how in torts a choice-of-law agreement could be made by the parties in advance.

But in many cases there is a pre-existing relationship between the parties, and the tortious act committed afterwards is related to such relationship. "[M]ost choice-of-law agreements covering an anticipated tort are made in connection with a contractual relationship" already existing "between the parties."\textsuperscript{280} Thus, it would seem perfectly natural that when a host-driver has a guest-passenger in a car owned and operated by the host, the two reach an agreement as to the law governing the liability of the host in case of an accident that causes injury to the guest-passenger. Further, one should anticipate that a bus company will include a choice-of-law clause on its ticket issued to each passenger that specifies the law applicable not only to

\textsuperscript{277} See Rome Convention, supra note 1, at art. 3.
\textsuperscript{278} de Boer, supra note 260, at 22.
\textsuperscript{279} Symeonides, supra note 10, at 215.
\textsuperscript{280} de Boer, supra note 260, at 27.
the resulting contractual relationship but also to any potential tort liability.

Obviously, then, it is possible for the parties to contemplate a future tort. In 1991, for example, the Supreme Court of the United States made a historical review of the choice-of-forum clause in *Carnival Cruise Lines, Inc. v. Shute*. The underlying cause of action in *Carnival Cruise* was a tort, as the case primarily involved Mrs. Shute's injury as a result of her slipping on the wet deck, even though the case was made on a contract claim pursuant to the provisions printed on the back of the ticket. *Carnival Cruise* nicely exemplified how a choice-of-law clause could be made by the parties with regard to a tort before the occurrence of the event that gave rise to the tort claim.

What might be problematic, however, is the case where "the parties have entered into an ex ante agreement on the law applicable to a future tort while they are not bound by a pre-existing relationship.

The second issue involves the protection of weaker parties or consumers. In the ex ante agreement situation, there is a concern about abuse of the choice-of-law agreement, especially when the agreement made is adhesive either because the parties do not have equal bargaining power or because a party lacks an opportunity to bargain. Probably in response to this concern and also with the notion that "[p]rotection should be given to weaker parties," Article 14(1) (b) of Rome II, as discussed, imposes two requirements on an ex ante agreement: "all parties are pursuing a commercial activity" and a "freely negotiated" contract. The former limits the pre-event choice of law to commercial parties and the latter stresses the way such a choice is to be made.

The "commercial parties" requirement seems to presume that when pursuing a commercial activity, the parties are on an equal footing of bargaining. If that is the case, the term "commercial activity" is somewhat obscure and would need to be further defined. On the one hand, it could be narrowly interpreted to refer to the business activity of professional parties or merchants, while on the other hand, the term could also be broadly construed as to include everyone in-
volved in commercial transactions. More specifically, it is questiona-
ble whether a contract between a merchant and a consumer for the
sale of goods would fall within the definition of "commercial activity."
And even if, as it has been pointed out, the term was "uniformly un-
derstood throughout the" community, "it would still include within
its scope" the commercial "relationships that are one-sided."289

The requirement of "free negotiation," though self-evident on its
face, may serve as double insurance when the parties pursuing a
commercial activity have uneven bargaining power. It provides the
party in a weaker position with a legal basis to challenge the validity
of the pre-event agreement if it is believed that the agreement is not a
product of free negotiation. But, the "free negotiation" requirement
provided in Article 14(1)(b) appears to be somewhat misleading be-
cause when reading Article 14(1)(a) and (b) together, one might feel
confused as to whether the ex post agreement under Article 14(1)(a)
must also be "freely negotiated."290

The third issue concerns the reasonable connection pertaining
to the law chosen. As noted, Article 14 of Rome II does not require
any connection between the law chosen and the parties, the transac-
tion, or the event giving rise to the damage. A question may arise as
to "why the parties should be allowed to choose the law of a country
that is not in any way connected with the non-contractual obligation
at issue."291 It is claimed that this "freedom of choice can only be un-
derstood if it is viewed as a transposition of the parties' power to dis-
pose of their rights under substantive law to the level of conflicts
law."292 To say it differently, the power of the parties as to the choice
of law totally depends on the substantive law of the particular sove-
reignty.

The fact is that, unlike in the United States, it has now become a
common practice in the European Community and elsewhere in the
world that connection is not a required component in a choice of law
by the parties in contracts.293 This practice was already adopted and

289 Symeonides, supra note 55, at 1772. This would include the relationships such
as those arising from franchise, licensing, or insurance contracts.
290 Article 14(1)(a) only provides that "[t]he parties may agree to submit non-
contractual obligations to the law of their choice" by the use of "an agreement en-
tered into after the event giving rise to the damage occurred." Rome II, supra note 3,
at art. 14(1)(a).
291 de Boer, supra note 260, at 22.
292 Id.
293 PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 57 (1999) ("Today, it is
no longer seriously argued that the State whose law or courts are chosen should have
formed as a basic rule in both Rome I and the 1985 Convention on
the Law Applicable to Contracts for the International Sale of
Goods. Although a clear rationale was not given, the primary
assumption is that as long as the parties agree, the choice is reasonable
and proper. Rome II simply follows this trend and makes the
choice of law by the parties a top priority in non-contractual obliga-
tions for the determination of applicable law.

However, in terms of connection under Rome II, the unfettered
choice of law by the parties is subject to the non-prejudice rule.
Thus, as noted, when making a choice, the parties may not displace
the mandatory rules (or non-derogatory rules) of the Community in
the "intra-community" cases or the mandatory rules of the country in
which "all elements relevant to the situation at the time when the
event giving rise to the damage occurs are located" (the "domestic
case"). Then a question that will necessarily be raised is whether the
mandatory rules as such may be ignored if not "all elements" or only
some elements as defined are located in that country or in one or
more of the member states.

The fourth issue is the protection of the third-party interest.
Pursuant to Rome II, the choice-of-law agreement as entered between
the primary parties may not prejudice the rights of third parties.
There is a similar provision in Rome I that applies to a change in the
law chosen by the parties. But first, it is unclear whether the parties
are allowed under Rome II to change the applicable law previously
chosen. It seems more likely that the rights of a third party may be

\[\text{a factual connection with the transaction or the parties. The selection of a forum or law as a 'neutral' is commonplace.}\]

294 See Hague Conference on Private International Law Draft Convention on the
U.N.T.S. 3.

295 For example, under the subjective proper-law doctrine, the proper law that go-
vern a contract is the law by which the parties intended, or may be fairly presumed
to have intended, the contract to be governed. NORTH, supra note 70, at 201-07.
Such a choice is considered as a completely free choice, including the choice of a law
wholly unconnected with the contract. Id.

296 Rome II, supra note 3, at art. 14(2).

297 Id. at art. 14(1).

298 Under Article 3(2) of the Rome Convention,
[t]he parties may at any time agree to subject the contract to a law oth-
er than that which previously governed it, whether as a result of an ear-
lier choice under this Article or of other provisions of this Convention.
Any variation by the parties of the law to be applied made after the
conclusion of the contract shall not . . . adversely affect the rights of
third parties.

Rome Convention, supra note 1.
affected when there is a change of applicable law because a different law may result in differences in the rights and obligations of the parties. Second, it is also questionable as to whether the third party classification should be limited to the party in good faith or a bona fide third party.

The last issue concerns the rationale for excluding the choice of law by the parties in particular cases. Again, under Rome II, a choice-of-law agreement may not affect the law applicable to non-contractual obligations arising from either the infringement of intellectual property rights or unfair competition and restrictive trade practice.\(^9\)

With respect to infringement of intellectual property rights, the exclusion of the parties' choice of law under Rome II is based on the territorial nature of intellectual property rights, which assumedly does not support application of any foreign law.\(^9\) On that ground, Rome II adopts the doctrine of the *lex loci protectionis*\(^6\) and sets applicable law as the law of the country for which protection is claimed under Article 8.\(^9\)

It is true that intellectual property rights are territorially protected. It is, however, equally true that the international convention renders it possible to grant multi-national protection to particular intellectual property rights. For example, the 1883 Paris Convention for the Protection of Industrial Property provides a protection of the right of priority for patent or trademark registration in all member countries\(^9\) and guarantees a national treatment to all such applicants.\(^9\)

\(^9\) Rome II, *supra* note 3, at arts. 6, 8.
\(^9\) de Boer, *supra* note 26, at 25.
\(^9\) Pursuant to Article 4(A)(1) of the Paris Convention:

> [a]ny person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.


\(^9\) *Id.* at art. 2(1). Article 2(1) provides that,

> [n]ationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their
Therefore, it might not be wise to make a lump-sum exclusion of the choice of law by the parties, particularly when there is more than one country in which the claim for protection may be made. In addition, as some have argued, there are issues related to an infringement, such as capacity of the infringer, scope of liability, and method of remedy that may not necessarily be subject only to the lex loci protectionis doctrine.

With regard to unfair competition and restrictive trade practices, the choice-of-law exclusion is based on the notion that "the conflict-of-law rules should protect competitors, consumers, and the general public, and ensure that the market economy functions properly." It is further believed that "[t]he 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." Hence, under Article 6 of Rome II, in those cases, "the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected" (for unfair competition), or "the law of the country where the market is, or is likely to be, affected" (for restrictive trade practice) shall be applied.

What may become troublesome is the nature of the interests to be protected. Some suggest that Article 6 of Rome II seems to focus on public interest rather than private interest in order to justify the ban on choice-of-law agreements. But because not all interests involved are "collective," some are wondering "why the parties should not be allowed to" choose applicable law by agreement when "an act of unfair competition exclusively affects the interests of an individual competitor."

For example, a problem may arise when a claim of unfair competition results from the dispute over a contract or a pre-contract dealing (e.g., non-disclosure obligation) where the parties are free to choose the applicable law. In this case, it is certainly "in the interest rights, provided that the conditions and formalities imposed upon nationals are complied with.

Id. Also, if the infringement is committed on the Internet, it is hard to identify any particular country in which the protection should be claimed.

See de Boer, supra note 260, at 26.

Rome II, supra note 3, at para. 21.

Id.

Rome II, supra note 3, at art. 6(1).

Id. at art. 6(3).

de Boer, supra note 260, at 24–25.

Id. at 25 n.22.
of parties to be able to choose” the law governing both their contractual and their related non-contractual obligations.\textsuperscript{313} Similarly, it is highly questionable why the exclusion for restrictive trade practice leaves no room for the parties to make a choice-of-law decision, especially when such practice only affects particular parties rather than the market as a whole.

IV. THE IMPACT OF ROME II AND CHALLENGES TO AMERICAN CHOICE OF LAW

With respect to choice of law, Rome II is unprecedented in that it removes the traditional barrier between consensual obligations and non-consensual obligations pertaining to the application of the principle of party autonomy. Further, Rome II creates a great platform for scholars to address the issues associated with this development. Thus, if Rome I could be considered to have enhanced the notion that party autonomy is one of the leading principles of contemporary choice of law, Rome II may serve as a perfect example of the modern development of the party autonomy doctrine as well as the expansion of its application in choice of law.

Truly, Rome II is not the first to apply party autonomy to non-contractual obligations. In Switzerland, for instance, under Article 132 of the 1987 Swiss Federal Code on Private International Law (CPIL), as amended in 2007, the parties in a tort case may agree anytime after the event causing damage has occurred that the law of the forum shall be applied.\textsuperscript{314} Apparently, while permitting the parties to choose a governing law in torts, the CPIL limits the choice to the one that is made after-event only and it also prohibits the parties from choosing any law other than the law of the forum.\textsuperscript{315} Similarly, in Germany, the Introductory Law to the German Code of Civil Procedure was amended in 1999 to allow the parties to agree on the applicable law to a non-contractual obligation, but once again, the choice may be made only after such non-contractual obligation has arisen.\textsuperscript{316}

\textsuperscript{313} van Eechoud, supra note 244, at 12.
\textsuperscript{315} See id. In China, scholars have suggested adopting a rule allowing parties to select the governing law in tort, but the selection is limited to the law of the forum. Chinese Association of Private International Law: Model Law of Private International Law of the People’s Republic of China art. 116 (2000).
\textsuperscript{316} Wendy Kennett, Current Developments, Private International Law, 48 Int’l & Comp. L.Q. 497, 505–06 (2000); see also Kurt Siehr, Private International Law, in Introduction to German Law 346 (Mathias Reimann & Joachim Zekoll eds., 2005).
The significance of Rome II is obvious. It makes the principle of party autonomy a general rule of choice of law in non-contractual obligations, and it applies this rule to almost all of the countries of the European Community as a whole. It also eliminates the restrictions imposed by particular countries, such as Switzerland and Germany, on party choice by agreement concerning the governing law for non-contractual obligations. In this regard, although it may not be accurate to use the term "breakthrough" to credit Rome II, the impacts of Rome II on choice of law will certainly be historic and long-lasting.

A. Implication and Impacts of Rome II

A highly notable development in Europe in the past decades is the "intense europeanization," both in terms of creation and completion of an internal market, and in the sense of legal integration and instrumentalization. Suffice it to say that Rome II is a dramatic step in this development. With a stated purpose 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, Rome II is designed to provide reasonably clear choice-of-law rules and to unify the member states' laws on this subject.

The legal endeavor of Rome II, to bring the non-contractual obligations to the realm of party autonomy, is remarkable. It explicitly implicates that, like contractual obligations, the non-contractual obligations could also be dealt with in the way the parties wish, through a legal system to which they choose to be subject. Despite the view that the Rome II approach may to a certain extent ultimately prove to be elusive, and notwithstanding the fact that the practicability of Rome II with respect to the party autonomy doctrine needs to be tested in its future application, the advancement made by Rome II, to say the least, represents the modern trend of the development of choice of law. To be more specific, there are several fronts from which the impacts of Rome II are readily discernable.

First of all, Rome II underscores the function of party autonomy to help improve legal certainty and predictability. In the choice-of-law field, there is hardly anything to which a consensus can be established. But there seems to have developed an agreement that the certainty and predictability are the very basic values of choice of law, and indeed, these values constituted the principal underpinnings and

517 Meeusen, supra note 27, at 287.
518 Symeonides, supra note 10, at 174.
519 Report on Rome II, supra note 4, at paras. 1–9.
520 Symeonides, supra note 10, at 173.
justification of classic choice-of-law rules.\textsuperscript{321} But to achieve and maintain these values was rarely easy\textsuperscript{322} due to the considerable difficulty in attaining "a proper equilibrium between legal certainty and flexibility."\textsuperscript{323}

A major cause for the difficulty is the chronic struggle between application of the hard-and-fast rules and pursuance of elastic methods. In the context of conflicts of laws, the hard-and-fast rules are the ones that are pre-defined, fixed, and readily applicable, while elastic methods focus on flexible approaches in application and, in many cases, provide flexibility at the expense of certainty.\textsuperscript{324} For the choice-of-law rules themselves, they might be applied differently depending on whether the rules are directly concerned with a choice of law or whether the rules contain only the legislative directive pertaining to their application.\textsuperscript{325} In the former situation, the rules are clear as to which law is going to apply in a particular case,\textsuperscript{326} and in the latter circumstance, it would be up to the courts to further decide what the legislative directive actually means, given the specific facts of the case.

It has commonly been observed that every legal system has wrestled with a contradiction between two requirements of justice: "the law must be certain and predicable, on one hand, and it must be flexible and adaptable to circumstances, on the other."\textsuperscript{327} But the conflict-of-laws system has proved to be particularly susceptible to this contradiction because, at least in part, the conflict of laws deals with

\textsuperscript{322} Hanotiau, supra note 96, at 97 ("In the United States, the values of simplicity, certainty and predictability which were central to the First Restatement have given way to . . . the furtherance of the policies of the states concerned. . . . In Europe the traditional values of certainty and predictability are still considered essential.").
\textsuperscript{323} Symeonides, supra note 10, at 175.
\textsuperscript{324} Symeonides, supra note 161, at 405.
\textsuperscript{326} According to Professor Reese, examples concerned with choice of law are "statutes that select the state whose law should be applied to determine such matter as the validity of a contract, rights and liabilities in tort, succession on death and the transfer of interests in land." Id. at 399.
\textsuperscript{327} A typical example is the connection rule which provides that the applicable law should be the law bearing reasonable connection with the parties, transactions, or the matters involved because what constitutes "reasonable connection" and whether such a connection exists in an individual case are left to the judgment of the courts. Id.
\textsuperscript{328} René David, English Law and French Law 24 (1980).
the issues involving different legal systems. Perhaps for the same reason, legal certainty and predictability seem more desirable in the conflict-of-laws area than in any other legal area.

Rome II clearly conveys that to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. It is believed that a choice-of-law agreement by the parties helps provide a fair measurement of legal certainty and predictability. Normally, this belief is well received in the area of contracts, but Rome II adventures to prove that the belief may also be established and justified in the field of non-contractual obligations.

Secondly, as noted, Rome II crosses over the traditional boundary between the consensual and non-consensual obligations with regard to the will of the parties in determining the applicable law. As a powerful choice-of-law doctrine, party autonomy is deeply rooted in the concept of freedom of contract that is underscored by the philosophy of laissez-faire. The underlying notion is that to grant the parties the power to determine the governing law will help them forecast with accuracy their rights and obligations that will be affected by the legal system to which they choose to be subject.

Under the traditional view, the will of the parties may be relevant only with respect to contracts or consensual obligations because such a will is deemed sovereign in the territory of contracts. Thus, the non-contractual obligations, especially the obligations arising from torts, are something alien to the will of the parties. In the United States, for example, torts—personal injury in particular—are considered an area in which there is little predictability of result because in part "the propriety of an actor's conduct is frequently measured against that of the mythical reasonable man," and "predictability of

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329 See Symeonides, supra note 161, at 413 (comparing the diverse experiences of the European and American conflict of laws systems).
330 Report on Rome II, supra note 4, at para. 27.
333 See CASTEL, supra note 331, at 174.
335 Reese, supra note 136, at 135.
result and uniformity of decision are not, therefore, values of particular significance.

Under Rome II, however, the will of the parties becomes not only relevant but also decisive in determining the law to govern the obligations arising from torts, whereby a possible result could be predicted beforehand. The effects of the application of party autonomy in the area of non-contractual obligations appear to be self-explanatory; on the one hand, it reforms the choice of law to the extent that the contractual and non-contractual obligations could be dealt with in the same way, and on the other hand, it implicates that in choice of law, the difference between consensual and non-consensual obligations is not as significant as it was when party choice by agreement is involved.

Third, Rome II further consolidates the rule-based choice-of-law mechanism. In the conflict-of-laws arena, associated with the debate about certainty and flexibility, there has been a long battle between rules and approaches. In this context, the rule is a "formula which once applied will lead the court to a conclusion," while an approach is a "system which does no more than state what factor or factors should be considered in arriving at a conclusion." Thus, in contrast to the approach which, though flexible, is mostly factor-oriented in nature, the rule is more precise, direct, and instructive to apply. It is true that questions will inevitably arise as to how a particular rule should be defined and interpreted in order to apply it wisely and correctly, but the rule-based choice of law is indisputably believed to be essential to help achieve certainty and predictability.

As intended, Rome II has a stated purpose to provide uniform rules in the Community to "determine which national law should apply to issues in cases with an international dimension where the claim is brought to enforce a non-contractual obligation." Hence, in the sense that it lays down choice-of-law rules by which all member states are bound, Rome II, like Rome I, becomes part of European private international law. At any rate, Rome II contains the choice-of-law rules that determine which country’s law the forum court will apply.

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336 Id.
339 Id.
340 See Hanotiau, supra note 96, at 97.
to non-contractual obligations, without referring to any judicial analysis of interest or policies of a particular country.\textsuperscript{342}

In addition, it is worth noting that to make party autonomy a choice-of-law rule for non-contractual obligations, Rome II, to a certain extent, may help alleviate the concern that the rules “often do not offer enough flexibility and therefore could lead to unsatisfactory result[s].”\textsuperscript{343} Since party autonomy put the choice of law in the hands of the parties, the issue of flexibility might not appear to be as significant as in the case where the choice of law is to be determined by the courts. From a more practical standpoint, the party choice by agreement will greatly enable the parties to know the possible legal consequences of their activities in a certain and predictable way.

Fourth, Rome II enhances the notion of free choice by the parties in the selection of governing law. The tenet of the party autonomy doctrine is free choice because on the conflicts level, party autonomy “mirrors” the substantive principle of freedom of contract.\textsuperscript{344} Bearing the goal of respecting the principle of party autonomy in mind, Rome II grants the parties a high degree of freedom in determining applicable law by agreement, which makes it possible for the parties to choose the law of a country they like, regardless of connections with the non-contractual obligation at issue.

Some critics may question why Rome II is so generous with respect to party choice.\textsuperscript{345} One possible answer is that the choice-of-law rules are primarily concerned with the reconciliation of private interest and expectation,\textsuperscript{346} and such reconciliation can be best served by party autonomy. Without a doubt, Rome II needs to be further refined and improved both in substance and in structure. But its rationale supporting party autonomy in non-contractual obligations clearly rests with its efforts to help create a genuine European area of freedom and justice.\textsuperscript{347} Thus, whatever criticism there may be, it has been believed that Rome II would be “incomplete without a provision on party autonomy.”\textsuperscript{348}

\textsuperscript{342} See id. Also, it has been recognized as a common notion that “the positivistic, interest-oriented approaches that have become popular in the United States have not become widely accepted in the rest of the world.” Borchers, supra note 334, at 443.

\textsuperscript{343} Hanotiau, supra note 96, at 97.

\textsuperscript{344} See Juenger letter, supra note 334, at 447.

\textsuperscript{345} See de Boer, supra note 260, at 22.


\textsuperscript{347} See Report on Rome II, supra note 4, at para. 7.

\textsuperscript{348} See de Boer, supra note 260, at 29.
B. Challenges to American Choice of Law

The enactment of Rome II in Europe provides a great opportunity for American scholars and courts to rethink American choice of law. On the one hand, in the United States, choice of law in non-contractual obligations remains unsettled, especially in torts where theories are many but none of them are uniformly applicable. In fact, to speak metaphorically: "[T]he tale of American choice of law principles has become the story of a thousand and one inconsistent tort cases." Further, if not worse, after decades of experimentation in conflict of laws, Americans "are left with dominant greys and innumerable shades: a bewildering chiaroscuro effect that confuses academicians, practitioners, and judges."

On the other hand, American choice of law, in general, has a notoriously domestic focus because "[m]ost conflicts problems that arise in American practice are interstate rather than international." This unavoidably created a gap of contextual difference between the United States and the rest of the world in confronting conflicts matters. For example, conflict of laws is basically an "interstate" law in the United States, but it is an international private law (or private international law) elsewhere in the world.

To be sure, American conflicts law is derived from European law and, thus, is deemed as having shared "some basic characteristics with its European counterpart." But this tradition was substantially altered during the American conflict-of-law revolution, which not only swept away the choice-of-law rules previously established but also "tore down the entire structure of the conflict-of-law rules." What has been noticed mostly is that during and after the revolution, there developed a unique American attitude against mechanic choice-of-law rules. This attitude is deeply rooted in "the desire to make conflict law more responsive to the demand of substantive policies."

In the United States then—as to the choice of law in general—a marked outcome of the revolution was that all rules were denounced in favor of approaches, and the conflicts scholars were "quite pre-

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349 Reed, supra note 101, at 898.
350 Id. at 867.
352 Symeonides, supra note 55, at 1744.
354 Vitta, supra note 66, at 1.
355 See Symeonides, supra note 55, at 1746.
pared to live without a unified system.\textsuperscript{356} In tort conflicts, for instance, after Babcock v. Jackson,\textsuperscript{357} issue-by-issue analysis became a judicial fashion,\textsuperscript{358} and certainty, predictability, and uniformity of results appeared to be less important.\textsuperscript{359} Consequently, the lack of uniformity of choice-of-law methodologies led "to highly inconsistent and often unpredictable decisions."\textsuperscript{360} Even American judges sometimes felt uncomfortable with the unsettled and conflicting theories with regard to choice of law.\textsuperscript{361}

Ever since the conflict-of-laws revolution, American conflict-of-law doctrine has been confronted with various challenges and, to a great extent, those challenges were and still are closely entangled with the debates surrounding the choice-of-law analysis. From both academic and practical viewpoints, the conflict-of-laws revolution, though influential in certain ways to the development of conflict of laws at home and abroad, unfortunately left some sequelae that caused American choice of law to drift off the main course of private international law globally.

The first debate is "rule" or "approach." When the First Restatement was adopted in 1934,\textsuperscript{362} choice of law in the United States was settled on the principle of territoriality.\textsuperscript{363} In torts, almost all courts applied the law of the place of the wrong.\textsuperscript{364} This rule-based conflict-of-law infrastructure was destroyed later during the revolution because the rules were deemed rigid in their structure and were believed to "produce capricious results."\textsuperscript{365} Instead, a variety of choice-of-law approaches emerged and the case-by-case analysis became the center of play.

An instrumental product of the revolution was the replacement of the First Restatement with the Second Restatement.\textsuperscript{366} As many have pointed out, the provisions of the Second Restatement set out certain amorphous approaches and are "eclectic in nature" because


\textsuperscript{358} See Symeonides, supra note 55, at 1754.


\textsuperscript{360} Id.

\textsuperscript{361} Lowenfeld, supra note 356, at 107.

\textsuperscript{362} RESTATEMENT OF CONFLICT OF LAWS (1934).

\textsuperscript{363} Symeonides, supra note 55, at 1745.

\textsuperscript{364} Hanotiau, supra note 96, at 73.

\textsuperscript{365} See Vitta, supra note 66, at 1.

\textsuperscript{366} RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
they are based on a compromise among different theories and values.\textsuperscript{367} Therefore, in reality, no matter how hard the Second Restatement "attempts to make the 'most significant relationship' idea . . . concrete," it offers nothing more than a factor-based approach, and the factors listed are not only considered vague but they are also considered to resemble traditional choice-of-law connecting factors.\textsuperscript{368}

Admittedly, a very damaging side effect of the revolution is the "anti-rule syndrome" that spread over the American conflict-of-laws system.\textsuperscript{369} A visible symptom of the syndrome is the fear that rules will lead to inflexibility.\textsuperscript{370} On the flip side, there is always a voice advocating for a rule-based choice-of-law system. Even Professor Reese, the reporter of the Second Restatement, explicitly stated in early 1972 that "[w]e should press on, however, beyond these principles to the formulation of precise rules" and that "[a] choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results."\textsuperscript{371}

The debate on "rule" or "approach" in the United States, though decades long, does not seem to have an end in sight. On the contrary, the debate is likely to continue, especially along with the discussion about the possibility of a new conflict-of-laws restatement.\textsuperscript{372} But whatever developments may arise, the dilemma is clear: while it has been believed that "one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law,"\textsuperscript{373} there exists a strong appetite for flexible approaches.\textsuperscript{374}

The second debate, which is directly related to the first, involves the balance between "flexibility" and "certainty." In the course of the development of choice of law, the battle to strike a balance between legal certainty and flexibility never stopped. In past decades, the balance seemed to have tilted more toward flexibility.\textsuperscript{375} At the same time, however, there was an increasing effort attempting to maintain

\textsuperscript{368} Vitta, supra note 66, at 16–17.
\textsuperscript{369} Symeonides, supra note 161, at 423–24.
\textsuperscript{370} Id. at 422–23.
\textsuperscript{371} Reese, supra note 338, at 334.
\textsuperscript{372} Symeonides, supra note 161, at 424–25.
\textsuperscript{373} Willis L. M. Reese, General Course on Private International Law, in 150 RECUEIL DES COURS 180 (1976).
\textsuperscript{374} See Symeonides, supra note 161, at 420–23.
\textsuperscript{375} Id. at 406.
legal certainty as the basic conflict-of-law value. Such is especially true in Europe, where the trend leans towards greater flexibility by softening the conflict-of-law rules, and international treaties on choice of law have been concluded to promote certainty through harmonization.

In the United States, the movement towards flexibility unfortunately seemed to have gone too far "from the one extreme of . . . rigidity . . . to the other extreme of . . . total flexibility." As a result, the American conflict-of-laws system nearly has become a kingdom of anarchy, and the case-by-case analysis approach, one way or the other, "ha[s] created confusion, uncertainty, and attendant delay." Regrettably, from the viewpoint of foreign scholars, "the net effect of flexibility in [American] choice of law has been to apply forum law in favor of domiciliaries of the forum."

The Second Restatement undoubtedly declares as a choice-of-law principle that certainty and predictability, as well as uniformity of results, need to be considered as the factors relevant to the choice of applicable law. But those factors merely serve as "an indication of how the judge should approach the question, without definitely providing which is the applicable law." Thus, scholars have criticized the vague principles of the Second Restatement by claiming that they fail to provide adequate guidance to the courts. A further criticism is that "American choice of law provides for a system of ad hoc justice," primarily in the area of torts.

The third debate concerns the prominence of state interest or party interest. "Conflict of laws (or private international law,)") by definition, is the law that regulates civil and commercial matters involving foreign elements. As such, the law’s primary focus is on either

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376 See Vitta, supra note 66, at 15–16.
377 Id. at 16.
378 Symeonides, supra note 161, at 413.
379 See id.
380 See Reed, supra note 101, at 938–39.
381 Lowenfeld, supra note 356, at 102.
382 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 & cmt. c (1971).
383 Vitta, supra note 66, at 16.
384 Ena, supra note 359, at 1456.
385 Reese, supra note 136, at 146.
386 Wikipedia: The Free Encyclopedia, Conflict of Laws, http://en.wikipedia.org/wiki/Conflict_of_laws (last visited June 5, 2009) ("Conflict of laws (or private international law) is that branch of international law and . . . interstate law that regulates all lawsuits involving a 'foreign' law element where different judgments will result depending on which jurisdiction's laws are applied . . ."); see also REESE & ROSENBERG, supra note 51, at 3 ("Conflict of laws provides insights that may help to manage the
private interest or on party interest. The modern conflict-of-law rules are considered increasingly to comprise a tendency to take into consideration the interests of the parties in applying one or another law connected to the case to more realistically reflect the "social realities underlying legal developments." \(^{387}\)

Unfortunately, the American conflict-of-laws system since the revolution has experienced an astounding shift in favor of state interest, and many choice of law rules have been infused with a strong consideration of state policies and interest "over those of individuals and firms" \(^{388}\)—which, in many cases, made choice of law both immeasurably flexible and surprisingly unpredictable. Take the party autonomy doctrine for example: it has met resistance in its application in the United States due to unjustified concerns such as the legislative function of the parties, the principle of federalism, and constitutionality. \(^{389}\) All of those concerns clearly favored state or government interests.

Some advocates for party autonomy in the United States have argued that to be efficient the choice of law rules should be designed to promote individual rather than state, interests. \(^{390}\) It has been a belief that "[p]rotection of the natural expectation of the parties is a factor which, when considered with certain contacts, may lead to the formulation of still other rules of choice of law." \(^{391}\) But in fact, the parties' intention in quite a number of cases is not given "decisive ef-
fect" with respect to their choice of governing law, and the parties' choice often has to yield to the government's interest and policies.

Even at present, although the doctrine of party autonomy has been "so widely accepted by the countries of the world that it belongs to the common core of the legal system[,]" the acceptance of it in the United States is still limited to the circumstance in which it meets the requirement of "reasonable connection" or the need of state interest or policy. Therefore, it is not hard to understand why American choice of law theories, as developed in the revolution, are considered "unacceptable by a vast majority of European scholars.

The fourth debate relates to "interstate focus" or "international concern." It seems indisputable that in the United States the conflict-of-laws analysis has never really been considered in an international context. In a widely used conflict-of-law textbook, for example, conflict of laws even now is defined as encompassing "several related areas of law: choice of law, constitutional limitations on choice of law, jurisdiction of courts, recognition of sister-state judgment, and Erie problems." Obviously, the center of attention here is on the interstate conflicts. Furthermore, in American conflict-of-law literature, international conflicts are generally viewed as an exception to the interstate conflicts or as "an exotic sideshow."

Further evidence is that the concept of private international law is rarely used in law school classrooms in the United States, and the classic teaching of conflict of laws covers almost nothing international. In recent years, the federal government has been making efforts to promote general awareness of private international law by creating a private international law website at the State Department.

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392 In Haag, for instance, the court held that "even if the parties' intention and the place of the making of the contract are not given decisive effect, they are nevertheless to be given heavy weight," Haag v. Barnes, 175 N.E.2d 441, 444 (N.Y. 1961).

393 Opponents of party autonomy even suggested that the autonomy rule be abandoned, arguing that the autonomy "fail[ed] to serve any of the traditional value of conflicts of law." Richard J. Bauerfeld, Effectiveness of Choice-of-Law Clauses in Contract Conflict of Law: Party Autonomy or Objective Determination? 82 COLUM. L. REV. 1659, 1691 (1982).

394 Lando, supra note 332, § 24-3.

395 See Zhang, supra note 52, at 529–45.

396 Vitta, supra note 66, at 14.

397 BRILMAYER & GOLDSMITH, supra note 195, at xxvii.


399 See U.S. Department of State, Private International Law, http://www.state.gov/s/l/c3452.htm (last visited June 5, 2009) (stating that the site is "maintained by the Office of the Assistant Legal Advisor for Private International Law").
effort, however, does not look like it will be effective in sending a message that the law of conflicts and private international law are virtually the same body of law.

Certainly, American conflict of laws is rich in theory and in practice. But its domestic focus inevitably renders it characteristically parochial, both domestically and internationally. To date, facing rapid globalization, the mainstay of American conflicts law still does not appear to pay much attention to international concern, but rather still is surprisingly engrossed in "purely domestic issues." Thus, when looking at American conflicts law, one will always find that there is something missing in making conflict-of-law rules readily applicable to "foreign" civil or commercial cases, especially in the international setting.

V. CONCLUSION

The doctrine of party autonomy, since it was introduced in the sixteenth century, has evolved to become an international accepted conflict-of-laws principle. This principle now constitutes a fundamental choice-of-law rule and, further, it has also been accepted by the international community as a uniform choice-of-forum rule. Rome II is remarkable because it surmounts the traditional hurdle between consensual agreement in choice of law and non-consensual obligations by applying party autonomy extensively to the matters arising from non-contractual obligations. Rome II well represents a change or development in the modern choice of law, and the change is dramatic.

However, nothing in this Article suggests that Rome II is perfect. On the contrary, much work needs to be done to further clarify the provisions of Rome II both in theory and in practice, and quite a few debates surely are expected in relation to the application of party autonomy in non-contractual obligations. But Rome II, as an international regulation, opens the door for the consensus-based doctrine of

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400 Reimann, supra note 398, at 369.  
401 See id. at 369–70.  
403 In June 2005, the member states of the Hague Conference on Private International Law, including the United States, adopted the Convention on Choice of Court Agreements. See Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (2005). Under the Convention, the parties are permitted to enter into an "exclusive choice of court agreement," and such agreement, if it meets the requirements of the Convention, will be recognized and enforced in all member states. Id. at arts. 3, 8.
party autonomy to take effect in the territory of non-consensual obligations. More importantly, Rome II explicitly promotes the notion that the party autonomy doctrine helps to enhance legal certainty and predictability.

It is not an exaggeration to say that it is time for the United States to wake up. The truth is, the conflict-of-law revolution that many Americans are still proud of is already "a matter of the past," and "the twenty-first century expects more from" America. Actually, when talking about the defects in tort choice-of-law rules in 1982, Professor Reese had hoped that "at some future time the new theories w[ould] engulf the entire field of choice of law." In 1999, the hope of the reports of the Second Restatement was resuscitated by an initiative for a Third Conflicts Restatement.

The United States "can benefit from studying European [private, international law]"—and Rome II indeed offers a great chance. Given a pressing need to dispose of an anti-rule syndrome in the United States, it is necessary to reposition American choice of law in a way that it will absorb international trends and common practices. A revisiting of the party autonomy doctrine, with an aim to make it a basic choice-of-law rule that applies extensively not only to contractual obligations but also to non-contractual obligations, might be an ideal starting point. As many in the United States have concluded, "the expansion of party autonomy in choice of law both promotes individual welfare and pressures legislat[ors] to enact efficient laws."