The New European Private International Law of Product Liability – Steering Through Troubled Waters

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Contents

* Literature cited in *abbreviated form*: *Carine Brière*, Le règlement (CE) n 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II): J. Dr. Int. (Clunet) 2008, 31; *Thomas Kadner Graziano*, The Law Applicable to Product Liability, The present state of the law in Europe and current proposals for reform: Int. Comp. L. Q. 54 (2005) 475 (cited: Product Liability); *Hamburg Group for Private International Law*, Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations: RabelsZ 67 (2003) 1; *Jan von Hein*, Die Kodifikation des europäischen IPR der außervertraglichen Schuldverhältnisse vor dem Abschluss?: VersR 2007, 440 (cited: Kodifikation); *id.*, Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung: ZEuP 2009, 1 (cited: Rom II); *Gerhard Hohloch*, The Rome II Regulation, An Overview – Place of Injury, Habitual Residence, Closer Connection and Substantive Scope, The Basic Principles: Yb. PIL 9 (2007) 1; *Peter Huber/Ivo Bach*, Die Rom II-VO: IPRax 2005, 73; *Peter Huber/Martin Illmer*, International Product Liability, A Commentary on Article 5 of the Rome II Regulation: Yb. PIL 9 (2007) 31; *Stefan Leible/Matthias Lehmann*, Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II"): RIW 2007, 721; *Michael Sonnentag*, Zur Europäisierung des internationalen außervertraglichen Schuldrechts durch die geplante Rom II-Verordnung: ZvglRWiss. 105 (2006) 256; *Andreas Spickhoff*, Die Produkthaftung im Europäischen Kollisions- und Zivilverfahrensrecht, in: Die richtige Ordnung, FS Kropholler (2008) 671; *Peter Stone*, The Rome II Regulation on Choice of Law in Tort: Ankara L. Rev. 4 (2007) 95 (cited: Rome II); *Gerhard Wagner*, Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäische Deliktsgerichtsstand: IPRax 2006, 372 (cited: Internationales Deliktsrecht); *id.*, Die neue Rom II-Verordnung: IPRax 2008, 1 (cited: Rom II); *Manfred Wandt*, Internationale Produkthaftung (1995).

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A. Introduction

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[1] marks a cornerstone in the process of harmonising the private international law of the Member States.[2] In application as of 11 January 2009, it will be accompanied by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),[3] applying as of 17 December 2009, which will replace the Rome Convention of 1980.[4]

During the legislative process of Rome II, proposals for the conflict of laws rule on product liability ranged from modelling it on the complex rule of the Hague Convention on the law applicable to products liability of 1973 to not providing for a special provision at all. The rule in Art. 5 is a compro-

[1] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. EU 2007 L 199/40.

[2] The Regulation does not apply in Denmark since it is not taking part in Title IV of the EC Treaty according to Protocol (No. 5) on the position of Denmark (1997), O.J. EC 2006 C 321E/201.

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. EU 2008 L 177/6. While Denmark is not taking part in Rome I either (see previous note), the United Kingdom is participating in Rome I according to a Formal Notification to the Commission of 24 July 2008 (JUSTCIV 162, 12143/08), welcomed by the Commission in its Opinion of 7 November 2008 (COM(2008) 730 final) and approved by Commission Decision of 22 December 2008 (2009/26/EC), O.J. EU 2009 L 10/22, so that recital 45 is already obsolete (initially, the United Kingdom did not opt in under Protocol (No. 4) on the position of the United Kingdom and Ireland (1997), O.J. EC 2006 C 321E/198).

[4] Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), O.J. EC L 266/1.

mise based on the Common Position adopted by the Council on 25 September 2006.[5]

After a brief overview of the legislative history (II.) I will provide a detailed analysis of the rule in Art. 5 (III.) before discussing the relationship with other European regulations and international conventions (IV.) and concluding with a Résumé (V.).

B. Legislative History

I. Early Attempts

1. A Private Effort

The earliest move towards a uniform conflict of laws rule on tort and delict for the European countries was made in the late 1940's by the German attorney Ernst Frankenstein while in exile in England during World War II. It was an entirely private effort which Frankenstein published in 1950 as a "Projet d'un Code Européen de droit international privé". The Code was concerned with the entire conflict of laws including issues of jurisdiction and international insolvency. The European countries did, however, not take up Frankenstein's proposal. It neither received much attention at the time nor influenced later efforts towards a harmonisation.

2. On the Agenda of the Hague Conference

It was not until the 1960's that the Hague Conference on Private International Law put a convention for the law applicable to tort and delict on its agenda. The result of this initiative was not a comprehensive convention dealing with all types of tort and delict. Rather, separate conventions dealing with specific aspects of tort and delict were agreed to be appropriate. The initiative led to two conventions: the Convention of 4 May 1971 on the law applicable to traffic accidents and the Convention of 2 October 1973 on the law applicable to products liability. Neither convention proved very successful in terms of ratification and acceptance: The Convention on traffic accidents was ratified by and is in force in twelve Member States of the European Union; the Convention on product liability was ratified by and is in force in only six Member States.[6]

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[5] Common Position (EC) No 22/2006 adopted by the Council on 25 September 2006 with a view to adopting Regulation (EC) No …/… of the European Parliament and of the Council of … on the law applicable to non-contractual obligations (Rome II), O.J. EC C 289E/68.

[6] In total, the Convention on traffic accidents is currently signed by 16, ratified by 19 and

3. Early Attempts by the European Economic Community

The European Economic Community's first attempt to unify, *inter alia*, the conflict rules on delict and tort was initiated by the Benelux Member States in 1968. The European Commission set up a Working Group to consider possibilities of unifying the private international law of the then six Member States. The Group completed a draft EEC Convention on the law applicable to contractual and non-contractual obligations in June 1972.[7] While continuing work on a preliminary version of the Convention, the Group decided in 1978 to focus solely on the law applicable to contractual obligations. The result was the Rome Convention on the law applicable to contractual obligations of 1980.[8]

II. The Hague Convention on the Law Applicable to Products Liability

Art. 4 to 7 of the Hague Convention on the law applicable to products liability of 1973 provide for a rather complex system for determining the law applicable to contractual and non-contractual liability for defective products.[9] The system consists of cumulative connecting factors, two of which have to be present in one state for that state's internal law to apply. The connecting factors are the place of injury, the place of the habitual residence of the person directly suffering damage, the principal place of business of the person claimed to be liable, and the place where the product was acquired by the person directly suffering damage. In the first instance, the law of the place of injury applies if any of the other three criteria is also present in that state (Art. 4). If this is not the case, the law of the habitual residence of the person directly suffering the damage applies if any of the remaining two criteria is also present in that state (Art. 5). Failing even that, the law of the principal place of business of the person claimed to be liable applies. This three-step rule is supplemented by a defence available to the person claimed to be liable under Art. 7: If he or she could not have foreseen the marketing of the product causing the damage in the relevant state, the law of that state does not apply.

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in force in 19 states; the Convention on products liability is currently signed by 14, ratified by 11 and in force in 11 states.

[7] See for the text: Am.J.Comp.L. 21 (1973) 587 with a short introduction by *Kurt H. Nadelmann*, The EEC Draft of a Convention on the law applicable to contractual and non-contractual obligations: Am.J.Comp.L. 21 (1973) 584; for background and details see also *Patrick Ross Williams*, The EEC Convention on the law applicable to contractual obligations: Int. Comp. L.Q. 35 (1986) 1.

[8] O.J. EC 1980 L 266/1.

[9] *Carine Brière* 46 argues that this is an advantage of the Hague Convention over the Rome II Regulation.

As mentioned above, the Convention was not a success and is of very little relevance to international product liability as between the Member States of the European Union and the rest of the world. It is widely regarded as being unnecessarily complex, unsatisfactory and as a consequence unattractive.[10] Nevertheless, it was the first attempt to harmonise the conflict rules in the field of product liability and played a role in the legislative process leading to Art. 5 of the Rome II Regulation.[11]

III. The Legislative Process of the Regulation's Rule on Product Liability

The Regulation's rule on product liability finally adopted in Art. 5 is *lex specialis* to the *lex generalis* on delict and tort in Art. 4. The legislative process leading to this rule was very controversial.

1. Back again on the Agenda of the European Community

The project of unifying the private international law of tort and delict was taken up by the European Community once again in the late 1990's. The crucial impetus was the Treaty of Amsterdam, signed on 2 October 1997.[12] In Title IV, it empowered the European Community pursuant to Art. 65 lit. b EC to legislate, amongst other areas, in the field of private international law by way of Regulation to promote uniformity of the rules throughout the Member States. Anticipating this forthcoming change, the unification of the law applicable to non-contractual obligations was back on the agenda of the European Community in 1996 and a first draft Convention was prepared under the auspices of the Austrian Council Presidency in late 1998.

At the same time, the Groupe Européen de droit international privé (GEDIP) submitted a proposal for a European Convention on the law applicable to non-contractual obligations to the European Commission.[13] The pro-

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[10] See e.g. *Thomas Kadner Graziano*, General Principles of Private International Law of Tort in Europe, in: Japanese and European Private International Law in Comparative Perspective, ed. by *Jürgen Basedow/Harald Baum/Yuko Nishitani* (2008) 243 (245); *Jan Kropholler*, Internationales Privatrecht[6] (2006) § 53 V. 3.; *Gerhard Kegel/Klaus Schurig*, Internationales Privatrecht[9] (2004) § 18 IV. 3; *Werner Lorenz*, Der Haager Konventionsentwurf über das auf die Produktenhaftpflicht anwendbare Recht: RabelsZ 37 (1973) 317 (328 et seq.); *Ulrich Drobnig*, Produktehaftung, in: Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse, ed. by *Ernst von Caemmerer* (1983) 298 (311 et seq.).

[11] On the relationship between the Hague Convention and the Rome II Regulation see below at D. IV.

[12] O.J. EC 1997 C 340/173.

[13] The proposal is accessible at <http://www.gedip-egpil.eu/documents/gedip-documents-8pe.html>.

posal did not contain a specific rule or presumption regarding the law applicable to product liability despite employing presumptions for other specific areas of tort and delict such as privacy and personality rights, defamation, unfair competition, restrictive trade practices, and environmental damage.

2. The First Draft of the Commission

After the Treaty of Amsterdam entered into force on 1 May 1999, the Commission took the initiative. It presented the first draft of a Regulation on the law applicable to non-contractual obligations in May 2002.[14] The draft contained a special rule concerning product liability in its Art. 5. This rule provided for a combination of cumulative and alternative connecting factors determining the applicable law which bore a considerable degree of similarity to Art. 5 and 6 of the Hague Convention of 1973. The law of the habitual residence or main establishment of the person sustaining the damage applied if (1) either that state was also the place of the main establishment of the person claimed to be liable or (2) the product was also acquired in that state. Failing that, the law of the country where the damage occurred applied.

About eighty interested entities, scholars and lobby groups filed submissions with the Commission during the consultation period.[15] Most of them were in favour of a separate rule dealing with product liability cases. In its summary of the consultation process, the Commission highlighted three issues that were repeatedly raised in the contributions: the high number of settlements between the involved insurers, the necessity or desirability of an escape or residuary clause[16] (often claiming the desirability of an annex connection linking the law applicable to claims in tort/delict to the law applicable to an existing contract[17]), and the general question whether the European Union should adopt the same rules as those of the Hague Convention.[18]

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[14] The first draft is accessible at <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_hearing_rome2_en.htm>.

[15] Most of them are accessible at <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm>.

[16] See e.g. *Hamburg Group for Private International Law* 18 et seq.; Response of the Government of the United Kingdom, Annex, para. 11 and 12; Réponse de Professor C. Nourissat 16.

[17] See in particular *Hamburg Group for Private International Law* 18 et seq.; Position Paper by the Bar Council of England and Wales at para. 17 et seq.

[18] In favour of that e.g. the *Deutscher Rat für Internationales Privatrecht* in its comments (Stellungnahme der 2. Kommission) 21 et seq.

3. The Initial Proposal by the Commission

The Commission presented an initial proposal on 22 July 2003.[19] It was supplemented by an Explanatory Memorandum. The rule on product liability in Art. 4 differed substantially from the one in the first draft.

Following most of the comments and proposals submitted in reaction to the first draft, the Commission incorporated by reference Art. 3(2) – the common habitual residence rule – and Art. 3(3) – the escape clause – into the rule on product liability. In substance, this survived the legislative process and is now part of the rule in Art. 5 of the Regulation.[20]

The combination of cumulative and alternative connecting factors was abandoned and replaced by a system of just two elements: the habitual residence of the injured person as the connecting factor and consent to marketing of the product in that country as a defence for the person claimed to be liable: if he could show that the product was marketed without his consent in the country of the habitual residence of the injured person, the applicable law was that of his (the liable person's) habitual residence. A requirement of marketing was not laid down explicitly but is implied by the defence of lack of consent to the marketing in the respective country: lack of consent to marketing requires actual marketing. The prevailing view amongst scholars went further than that. They favoured a pure marketing element, some even suggested the place of marketing should be the only or at least the decisive connecting factor.[21]

These amendments substantially changed the structure of the rule for determining the applicable law: in case of a common habitual residence, the law of this country applied. In the absence of a common habitual residence, the law of the habitual residence of the injured person applied, unless the person claimed to be liable could show that marketing in the respective country took place without his consent. If so, the law of his habitual residence applied instead. However, none of those laws applied if there was a manifestly closer connection to another country, in which case the law of that country applied.

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[19] COM(2003) 427 final, accessible at <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0427en01.pdf>.

[20] The escape clause is now incorporated by repeating it in Art. 5(2) instead of a mere reference to Art. 4(3).

[21] See in particular *Hamburg Group for Private International Law* 15 et seq.; *Kadner Graziano*, Product Liability 481 et seq.; *Wagner*, Rom II 6; *Alberto Saravalle*, The Law Applicable to Product Liability, Hopping off the Endless Merry-Go-Round, in: The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe, ed. by *Alberto Malatesta* (2006) 107 (123); *Sonnentag* 282 et seq.; *Wandt* para. 1059 et seq.

4. The Position of the European Parliament

Since Rome II had to be adopted under the codecision procedure according to Art. 61 lit. c, 65, 67 and 251 EC, it was now the European Parliament's turn. Its position of 6 June 2005[22] after the first reading was based on the Report by the Committee on Legal Affairs.[23] This Report suggested deletion of the special rule on product liability, arguing that cases of international product liability could be resolved by applying the general rule on tort and delict. In turn, the escape clause in the general rule was extended by several criteria which presumably were thought to be capable of handling, *inter alia*, cases of product liability. Those included rather vague aspects of certainty, predictability, uniformity of results, protection of legitimate interests, and the policies underlying the law applicable but for the escape clause. This move by the European Parliament represented a completely different approach to rules of private international law, following the US model. Whereas the European tradition of conflict rules is characterised by specific hard-and-fast rules with escape clauses reserved for exceptional cases, the US approach after the Second Restatement of the Conflict of Laws of 1971[24] is characterised by guiding factors striving for a more flexible solution of the individual case.[25] Against this background it did not come as a surprise that the shift by the European Parliament was strongly criticised. It was understood as an attempt to alter the systematic approach to conflict rules in tort law by importing the US conflicts revolution into the European system of private international law despite the legal uncertainty and manifold problems it had produced.[26]

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[22] P6_TA(2005)0284.

[23] COM(2003)0427 – C5–0038/2003–2003/0168(COD); Diana Wallis was the rapporteur of the European Parliament responsible for the Report.

[24] *American Law Institute*, Restatement of the Law Second, Conflict of Laws (St. Paul, Minn. 1971); see for a short overview *David F. Cavers*, Am.J.Int. L. 66 (1972) 437.

[25] See for an overview *Mathias Reimann*, Conflict of Laws in Western Europe, A Guide through the jungle (1995) 12 et seq. and 102 et seq.; *Jan Kropholler/Jan von Hein*, From Approach to Rule-Orientation in American Tort Law?, in: Law and Justice in a Multistate World, Essays in honor of Arthur T. von Mehren (2002) 317.

[26] *Von Hein*, Kodifikation 441; *id*., Rom II 18; *id*., Something Old and Something Borrowed, but Nothing New?, Rome II and the European Choice-of-Law Evolution: Tul.L.Rev. 82 (2008) 1663 (1685 et seq.); *Wagner*, Internationales Deliktsrecht 386; *Willibald Posch*, The 'Draft Regulation Rome II' in 2004, Its past and future perspectives: Yb. PIL 6 (2004) 129 (146 et seq.); in contrast arguing for a more flexible approach *Symeon C. Symeonides*; Tort Conflicts and Rome II, A View from Across, in: FS Jayme I (2004) 935 et seq.; *Russel J. Weintraub*, Rome II and the Tension between Predictability and Flexibility, in: Balancing of Interests, Liber Amicorum Peter Hay zum 70. Geburtstag (2005) 451 et seq.; for general critique on Diana Wallis' approach see *Stefan Leible*, Der Beitrag der Rom II-Verordnung zu einer Kodifikation der allgemeinen Grundsätze des Europäischen Kollisionsrechts, in: Europäisches Gemeinschaftsrecht und IPR, ed. by *Gerte Reichelt* (Wien 2007) 31 (42: "… erscheint die Vorstellung, die Rechtsprechung werde es schon richten, nachgerade naiv …"); *Drobnig* (supra

5. The Amended Proposal by the Commission

In its amended proposal the Commission restated the special rule set out in its initial proposal with minor clarifications.[27] It stressed the need for certainty and predictability by the conflicts rule itself, particularly in light of the frequent involvement of insurers in product liability cases aiming for settlements.[28]

6. The Common Position of the European Council

The Council rejected the European Parliament's approach to product liability and other special fields of tort and delict based on an escape clause with presumptions for a manifestly closer connection.[29] At the same time it did not simply follow the Commission's amended proposal. Although it returned to a system of *lex specialis* and *lex generalis* as proposed by the Commission, the Council amended the content of the special rule by introducing a cascade system with three connecting factors supplemented by a foreseeability defence in Art. 5(1). The common habitual residence rule – by reference to Art. 4(2) – and the escape clause – by restating Art. 4(3) – were kept.

7. The Final Stretch

The Commission regretted the increased complexity of the rule laid down in the Common Position and stressed that it preferred its own simpler draft which, it argued, struck an equally fair balance.[30] The European Parliament accepted the rule on product liability. In the parliamentary debate the issue was not even raised.[31] The position adopted in the second reading contains no amendments to the rule.[32] In the subsequent conciliation process, which

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n. 10) 323; according to *Kadner Graziano*, General Principles (supra n. 10) 255 et seq. the introduction of special rules concerned with complex torts is a general principle of the European private international law rules in tort.

[27] COM(2006) 83 final, accessible at <http://ec.europa.eu/justice_home/doc_centre/civil/doc/com_2006_83_en.pdf>.

[28] Explanatory Memorandum, p. 5, accessible at <http://ec.europa.eu/justice_home/doc_centre/civil/doc/com_2006_83_en.pdf>.

[29] Statement of the Council's Reasons, O.J. EU 2006 C 289E/79.

[30] COM(2006) 566 final, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0566:FIN:EN:PDF>.

[31] The parliamentary debate is accessible at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20070118&secondRef=ITEM-004&language=EN&ring=A6-2006-0481>.

[32] P6_TC2-COD(2003)0168, accessible at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007–0006&language=EN&ring=A6-2006-0481#BKMD-10>.

focussed on other highly controversial aspects of Rome II, the rule was not further addressed. Hence, the rule was finally adopted by the Parliament and the Council on 11 July 2007 as drafted by the Council in the Common Position.

C. The Rule in Art. 5 Rome II

I. The Reasons for a Uniform Conflict Rule

There are mainly three reasons for a uniform conflict rule on product liability, whether it be a separate rule or part of the general rule on tort and delict. They relate to the level of harmonisation of the substantive law, the differences in the conflict rules of the Member States and the variety of fora available under the Brussels I Regulation.[33]

The level of harmonisation of the substantive law of product liability amongst the Member States is still low[34] despite the Product Liability Directive of 1985.[35] First, the Directive was only concerned with strict liability. With regard to fault-based liability under the general law of tort, delict or contract there are considerable differences between the laws of the Member States, particularly in relation to heads of liability, causation, presumptions, assessment of damages and prescription. Secondly, even in the field of strict liability, the Directive does not amount to a full harmonisation since it contains optional rules, particularly with regard to the liability for development risks pursuant to its Art. 7 lit. e, and since it does not harmonise the crucial issue of assessment of damages.

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[33] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. 2001 L 12/1 as lastly amended by Council Regulation (EC) No. 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania, O.J. L 363/1.

[34] With regard to the substantive law of non-Member States there is no harmonisation at all.

[35] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Members States concerning liability for defective products, O.J. L 210/29 as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 141/20.

The conflict rules on product liability – if there are separate rules at all[36] – are internationally very different, even amongst the Member States of the European Union.[37]

These differences in the substantive and private international law of product liability coincide with a range of available fora. Under the Brussels I Regulation the plaintiff in a product liability case has a choice between the defendant's domicile (Art. 2), the place where the event giving rise to the damage occurred and the place where the damage occurred (Art. 5 Nr. 3 as interpreted by the European Court of Justice[38]).

This status quo highly encourages forum shopping and frustrates the predictability of the applicable law and the outcome of disputes considerably. It is exactly those phenomena, the Rome II Regulation addresses. The basic rationale of the Regulation as expressed in its recital 6 is therefore particularly relevant with regard to international product liability.

II. The Roots of the Uniform Conflict Rule

The rule in Art. 5 takes on ideas, principles and concepts of existing rules on international product liability, but it is novel and unprecedented in its final composition. Considering the different conflict rules on product liability amongst the Member States, this is not surprising. There was no consensus to build upon. There was no model that had proven significantly better than the others. Nevertheless, it is remarkable that the Council in its Common Position did not opt for one of the already existing rules, but strived instead for a new, possibly better solution.

III. The Objectives of the Uniform Conflict Rule

Apart from the general aim of the Rome II Regulation stated in recital 6, which is particularly relevant with regard to product liability,[39] the more

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[36] Amongst the Member States of the European Union Italy (Art. 63 Private International Law Act), Lithuania (Art. 1.43(5) of the Civil Code) and Estonia (§ 166 4th alt. of the Law of 1994 on the principles of the Civil Code) have a codified separate rule on product liability in their national laws; Belgium, France, Luxembourg, the Netherlands, Slovenia and Spain have a separate rule by way of application of the Hague Convention.

[37] For further details see *Kadner Graziano* 478 et seq.

[38] See from the long line of case law in particular ECJ 30. 11. 1976, Case 21/76 *(Mines de Potasse d'Alsace)*, [1976] ECR 1735 (1746 et seq.); 11. 1. 1990, Case C-220/88 *(Hessische Landesbank)*, [1990] ECR I-49 (78); 7. 3. 1995, Case C-68/93 *(Shevill)*, [1995] ECR I-415 (460); 1. 10. 2002, Case C-167/00 *(Verein für Konsumenteninformation)*, [2002] ECR I-8111 (8141); 10. 6. 2004, Case C-168/02 *(Kronhofer)*, [2004] ECR I-6009 (6029).

[39] See above C. I.

specific objectives of the special rule are now contained in recital 20 of the Regulation. It restates with slight amendments the objectives as initially articulated by the Commission in recital 10 of its proposal and in its Explanatory Memorandum.[40]

The primary objective is to spread the risks inherent in a modern high-technology society fairly. As addressed in several statements of the Commission, Parliament and the Council, this means striking a fair balance between the interests of the person sustaining the damage on the one hand and the person potentially incurring liability on the other hand. The other objectives mentioned in recital 20 are linked to the European Union's more general policies and objectives: protecting consumers' health on a high level, stimulating invention, facilitating international trade and securing undistorted competition.

IV. The Material and Personal Scope of the Rule

1. Material Scope

a) Strict and Fault-Based Liability

The special rule in Art. 5 covers all forms of liability arising from damage caused by a product regardless of whether liability is of a strict or fault-based nature.[41]

b) Non-Contractual versus Contractual Liability

Liability for damage caused by a product may be non-contractual liability in tort or delict or liability under an existing contract. The applicable law determined by Art. 5 Rome II covers only claims in tort or delict whereas the applicable law determined by Art. 3, 4 and 5 of the Rome Convention which will soon be replaced[42] by Art. 3, 4 and 6 Rome I covers claims in contract.

On this basis one has to distinguish the following relationships:

As between the parties to a contract, e.g. the buyer and the selling manufacturer, the law determined by Art. 3, 4 and 5 of the Rome Convention/ Art. 3, 4 and 6 of Rome I applies to the contractual claim for breach of contract by delivering a defective product causing damage. Under Art. 5(2)

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[40] COM(2003) 427 final, p. 13 et seq.

[41] COM(2003) 427 final at p. 15; see also *Huber/Illmer* 37 *Palandt (-Thorn)*, Bürgerliches Gesetzbuch[68] (2009) Anh. zu EGBGB 38–42 (IPR) Rom II 5 para. 3; *Ansgar Staudinger*, Rechtsvereinheitlichung innerhalb Europas: Rom I und Rom II: AnwBl. 2008, 8 (14).

[42] Denmark does not take part in Rome I so that the Rome Convention remains in force.

Rome II the same law will usually apply to a concurrent non-contractual claim based on tort or delict.[43]

Subsequent purchasers or unrelated third parties sustaining damage caused by the product usually have no contractual relationship with the person claimed to be liable, in particular the manufacturer of the defective product. Therefore most laws provide for a direct claim of the person sustaining the damage against the person claimed to be liable. In the Member States of the European Union this is, above all, a strict liability claim based on the national provisions[44] implementing the Product Liability Directive.[45] The law determined by Art. 5 Rome II covers these claims since they are clearly claims in tort and delict.[46] Besides the strict liability claim based on the Directive, there lies a fault-based direct claim under the general law of tort or delict under the laws of most Member States such as Germany,[47] England,[48] France,[49] the Netherlands[50] and Italy.[51] The law determined by Art. 5 Rome II covers this claim as well.[52] In the context of sale of goods, French law chooses a different solution with the *action directe*.[53] It is a direct, though derivative contractual claim of any subsequent buyer of a product against the manufacturer and original seller despite the lack of privity of contract be-

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[43] *Spickhoff* 679 points out quite rightly that this annex connection regarding the applicable law is not reflected in the jurisdictional rules of Brussels I: the victim may not bring the delictual claim in the court that has jurisdiction merely based on Art. 5 No. 1 Brussels I; see in this regard also *Jan Kropholler*, Europäisches Zivilprozessrecht[8] (2005) Art. 5 EuGVO para. 79 (criticising this lack of an annex jurisdiction in that regard), *Rauscher (-Leible)*, Europäisches Zivilprozeßrecht[2] (2006) Art. 5 Brüssel I-VO para. 59.

[44] See e.g. in Germany the provisions of the Produkthaftungsgesetz, in France Art. 1386–1 to 1386–18 Code Civil, in England Part I of the Consumer Protection Act 1987.

[45] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Members States concerning liability for defective products, O.J. L 210/29 as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 141/20 (which explicitly amends Art. 2 of the 1985 Directive).

[46] If the claim lies between buyer and seller, pursuant to Art. 5(2) Rome II the law applicable to the claim in contract applies also to the claim in tort and delict, since the pre-existing contractual relationship constitutes a manifestly closer connection.

[47] The so called *Produzentenhaftung* under § 823 BGB (German *Bürgerliches Gesetzbuch* [Civil Code]).

[48] In English law liability for harm caused by products arises in particular under the tort of negligence following the famous decision of the House of Lords in *Donoghue* v. *Stevenson*, [1932] A.C. 562.

[49] Art. 1383 et seq. Code Civil.

[50] Art. 6:162 Burgerlijk Wetboek.

[51] Art. 2049, 2050 Codice Civile.

[52] Again, Art. 5(2) Rome II may apply as between buyer and seller.

[53] For further details on the *action directe* see *Frédéric Leclerc*, Les chaînes de contrats en droit international privé: Clunet 1995, 272 et seq.

tween them.[54] According to the principle of *non cumul* in French law, the contractual claim bars any claim in tort or delict.[55] Despite its contractual nature in French law, when autonomously qualified for the purposes of European private international law, it is a claim arising from a non-contractual obligation as between the subsequent purchaser and the manufacturer since the obligation is not freely assumed by the manufacturer towards a subsequent purchaser. The European Court of Justice took this view with regard to Art. 5 No. 1 vis-à-vis Art. 5 No. 3 Brussels I[56] and the same should apply in respect of Rome I vis-à-vis Rome II. Therefore, the *action directe* is a non-contractual claim which is available if Art. 5 Rome II designates the application of French law.[57]

c) Definition of Product

While the term "product" is not defined in the Regulation, the Commission, in its Explanatory Memorandum,[58] refers to the definition of product in Art. 2 of the Product Liability Directive. Accordingly, as under Art. 2 in connection with Art. 1 of the Directive, this covers only liability for *defective* products[59] whereas the law applicable to liability for damage caused by non-defective products is determined by the general rule in Art. 4. In the subsequent legislative process the definition was not discussed.[60] There seems to be a consensus that the reference to the Product Liability Directive is a satisfactory solution. Since the definition covers all movables even if incorporated into another movable or immovable including electricity, it is very broad and therefore capable of dealing with the vast majority of product liability cases. In the very few remaining cases one can easily apply the gen-

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[54] See in particular Cass., Ass. plèn. 7. 2. 1986, J.C.P. 1986, jurispr., No. 20616; Civ. (1) 21. 1. 2003, Bull. Civ. I No. 18; see furthermore *Simon Whittaker*, Liability for Products (2005) 27 et seq. and 95 et seq.; *Robert Freitag*, Der Einfluß des Europäischen Gemeinschaftsrechts auf das internationale Produkthaftungsrecht (2000) 23 et seq.

[55] An exception to this principle exists pursuant to Art. 1386–1 Code Civil with regard to the rights based on the Product Liability Directive.

[56] E.C.J. 17. 6. 1992, Case C-26/91 *(Handte)*, E.C.R. 1992, I-3967; 27. 10. 1998, Case 51/97 *(Réunion européenne)*, E.C.R. 1998, I-6511; concurring *Kropholler*, Europäisches Zivilprozessrecht (supra n. 43) Art. 5 EuGVO para. 16.

[57] *Spickhoff* 679.

[58] COM(2003) 427 final at p. 13.

[59] *Adam Rushworth/Andrew Scott*, Rome II: Choice of Law for Non-Contractual Obligations: Lloyd's Marit. Com. L.Q. 2008, 274 (283); *Phaedon John Kozyris*, Rome II: Tort Conflicts on the Right Track!, A Postscript to Symeon Symeonides' "Missed Opportunity": Am. J.Comp.L. 56 (2008) 471 (487); *von Hein*, Rom II 26.

[60] *Peter Stone*, Der Vorschlag für die Rom II-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht: European Legal Forum (EuLF) (German issue) 2004, 213 (225) (cited: Vorschlag Rom II-VO); *id.*, Rome II 118 and *Leible/Lehmann* 727; *Spickhoff* 678; *von Hein*, Rom II 26 all approve the Commission's reference.

eral rule on tort and delict in Art. 4 and, if necessary, reach a satisfactory solution by turning to the escape clause of Art. 4(3).

2. Personal Scope

a) Person Sustaining the Damage

The rule in Art. 5 is not restricted to consumers. It applies to any person sustaining a damage caused by a product. Hence, when interpreting Art. 5, one must not simply and solely rely on the protection of consumers' health[61] or, more generally, on the protection of consumers in order to justify certain aspects of the rule.[62]

b) Person Claimed to be Liable

The person claimed to be liable is not only the manufacturer of the final product. In its Explanatory Memorandum the Commission refers to the various persons – producer, quasi-producer (by attaching his name, trademark or other distinguishing feature), importer, supplier – potentially liable under Art. 3 of the Product Liability Directive.[63] However, this neither implies that the rule is limited to those persons nor that it encompasses those persons in any given case. One has to differentiate: when determining the applicable law pursuant to Art. 5, the person *claimed* to be liable is *any* person.[64] Whether this person is *actually* liable, is a matter of the applicable law.[65]

V. The System for Determining the Applicable Law

The law applicable to international product liability cases is not exclusively determined by the rule in Art. 5 of the Regulation, although this provision is the *lex specialis* in relation to the *lex generalis* in Art. 4. Rather, the *lex specialis* is intertwined with other rules of the Regulation and, in effect, is only replacing Art. 4(1): under Art. 14, a choice of law takes precedence

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[61] See the Commission in the Explanatory Memorandum, COM(2003) 427 final at p. 15, and recital 20 of the Regulation itself.

[62] *Von Hein*, Kodifikation 447.

[63] COM(2003) 427 final at p. 15; concurring *Brière* 47; *Stone*, Rome II 120 also approves the view taken by the Commission, but takes it even further by reference to Art. 3 of the 1973 Hague Convention covering designers, repairers, warehousemen, agents of those who are liable.

[64] Unclear in that respect: *Stone*, Vorschlag Rom II-VO (supra n. 60) 225.

[65] *Huber/Illmer* 38.

over any of the objective connections of Art. 5 just as it does over the objective connections of Art. 4. The common habitual residence rule and the escape clause apply equally in cases of product liability as in all other cases of tort and delict: Art. 4(2) is incorporated by reference, Art. 4(3) is restated in Art. 5(2). Hence, the unique part of the *lex specialis* in Art. 5 is the cascade system of connecting factors supplemented by a foreseeability defence. Accordingly, these two elements are highlighted in recital 20 of the Regulation as forming the core of the rule on product liability.

The law applicable to cases of product liability may be illustrated by projecting the system created by the interaction of Art. 4, 5 and 14:

1. Choice of law (Art. 14), or, failing that,
2. Common habitual residence (Art. 5(1)1 in combination with Art. 4(2)), or, failing that,
3. Habitual residence of the person sustaining damage if the product was marketed in that country (Art. 5(1)1 lit. a) and if this marketing was reasonably foreseeable for the producer (Art. 5(1)2) or, failing that,
4. Place of acquisition of the product if the product was marketed in that country (Art. 5(1)1 lit. b) and if this marketing was reasonably foreseeable for the producer (Art. 5(1)2) or, failing that,
5. Place of occurrence of damage if the product was marketed in that country (Art. 5(1)1 lit. c) and if this marketing was reasonably foreseeable for the producer (Art. 5(1)2), with connections 2 to 5 being subject to a
6. Manifestly closer connection to another country (Art. 5(2) – repeating Art. 4(3)).

Although Art. 5 is in substance merely replacing Art. 4(1), it was better to put the special rule on product liability into a separate provision of the Regulation. There are further special rules in Art. 6 to 9 of the Regulation. Each of those makes reference to the general rule in Art. 4 to a different extent and in a different respect. A choice of law under Art. 14 does not prevail in all of those special fields. Incorporating all these aspects into Art. 4 would have resulted in an unnecessarily complex rule.

VI. The Cascade System of Art. 5(1)1

The cascade system of Art. 5(1)1 has three levels. Each of those levels consists of two cumulative elements. One is common to all three levels: marketing of the product in the relevant country. The connecting factor varies as between the levels: habitual residence of the person sustaining the damage, place of the acquisition of the product and lastly, place where the damage occurred.

1. The Connecting Factors

a) Habitual Residence

The habitual residence is a connecting factor used in various fields of private international law. The Rome II Regulation clarifies the term in its Art. 23 only in relation to companies, other bodies, corporate or unincorporated, and natural persons acting in the course of their business activity.[66] This is due to the fact that those entities as well as natural persons in their capacity as business players do not have a habitual residence in the natural sense of the word as it is commonly understood.[67] In contrast, the notion of habitual residence is well developed with regard to natural persons in their capacity as private individuals.[68] It is a flexible concept resting on numerous criteria which may differ depending on the circumstances of each case.[69] As such it is by its very nature averse to a set definition.[70] When determining the habitual residence of a natural person in its capacity as a private individual under the Rome II Regulation, it seems appropriate to apply the concept by way of a comparative approach taking account of the need to apply the Regulation uniformly in the Member States.[71] Since the concept

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[66] Compare in this respect the similar approach in Art. 60 of the Brussels I Regulation (No. 44/2001) with regard to the domicile of companies and other legal persons.

[67] The concept being linked to a natural person in its individual capacity and within its social sphere, see *Kegel/Schurig* (supra n. 10) § 13 III. 3. a; *Dicey/Morris/Collins*, The Conflict of Laws[14] I (2006) para. 6-116 et seq.

[68] Traditionally, civil law jurisdictions relied on the concept of nationality, whereas common law jurisdictions rather relied on the concept of domicile. For an increasing use of the concept of habitual residence see e.g. Art. 4(2) of the Rome Convention; Art. 14(2) No. 2, 15, 40(2), 41(2) of the German EGBGB; see for further details on German law *Kegel/Schurig* (supra n. 10) § 13 III. 3.; *Gerhard Kegel*, Was ist gewöhnlicher Aufenthalt?, in: Recht im Wandel seines sozialen und technologischen Umfeldes, FS Rehbinder (2002) 699; *Hohloch* 4; section 46 of the English Family Law Act 1986, section 1 of the English Wills Act 1963; see for further details on English law *Dicey/Morris/Collins* (previous note) para. 6–125 et seq., and *Pippa Rogerson*, Habitual Residence, The New Domicile?: Int. Comp. L.Q. 49 (2000) 86; for an American perspective see *David F. Cavers*, "Habitual Residence", A useful concept?: Am. U.L.Rev. 21 (1972) 475, for a detailed comparative analysis see *Dietmar Baetge*, Der gewöhnliche Aufenthalt im Internationalen Privatrecht (1994).

[69] The major regimes of private international law using the habitual residence as a connecting factor do not define it by statute but leave its determination to a case-by-case exercise by the courts; but compare the Domicile and Habitual Residence Act 1983 of Manitoba.

[70] Concurring *Hohloch* 11.

[71] A similar problem occurs with regard to the Rome Convention which in a similar way provides in Art. 18 for a uniform interpretation and application of the Convention in all member states; this comes close to an understanding based on a comparison of the concepts under the various national laws; see in this regard also the Resolution (72) 1 of the Committee of Ministers of the Council of Europe of 18 January 1972 on the standardisation of the legal concepts of "domicile" and "residence", accessible at <http://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=642794&SecMode=1&Admin=0&Usage=4&InstranetImage=48966>.

of habitual residence emerges in most European systems of private international law and since it is already used in several Hague Conventions,[72] the courts of the Member States are in a position to pursue this flexible approach[73] until the European Court of Justice may provide guidelines.

The connecting factor of the habitual residence is qualified by a time factor: Decisive is the habitual residence at the time when the damage occurred. As in the general rule of Art. 4 ("law of the country in which the damage occurs") this does not relate to the *indirect* damage such as the financial loss ultimately incurred but to the *direct* damage to legally protected interests in, for example, one's physical integrity or property.[74]

b) Place of Acquisition

The place of acquisition is a straightforward connecting factor that is easy to determine. For the connection to apply it does not matter, in principle, whether the product was purchased directly from the person claimed to be liable or from a person who acquired the product as first purchaser elsewhere. In the case of second purchasers the circumstances may, however, call for an application of the escape clause of Art. 5(2). In the case of innocent bystanders the circumstances regularly call for an application of the escape clause.[75] The law of the place of acquisition will usually apply only in relation to the victim that acquired the product, not to bystanders.[76]

c) Place Where Damage Occurred

The place where the damage occurred is the last fall-back position of the cascade. It differs from the general rule in tort and delict in Art. 4(1) in so far as it is qualified by the marketing requirement.

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[72] E.g. the Hague Convention on the law applicable to traffic accidents (May 4, 1971); Hague Convention on the law applicable to maintenance obligations (October 2nd, 1973); Hague Convention on the law applicable to products liability (October 2nd, 1973); Hague Convention on the law applicable to agency (March 14, 1978); note that the term is not defined in any of the Hague Conventions.

[73] *Hohloch* 11 et seq. denies the need for an autonomous interpretation (apart from the constellations dealt with by Art. 23) but then seems to present such an autonomous interpretation by referring to habitual residence as the factual center of life activities.

[74] See the Explanatory Memorandum by the Commission, COM(2003) 427 final at p. 11; concurring *Hohloch* 7 et seq.; *Wagner*, Internationales Deliktsrecht 376; *id.*, Rom II 7; *von Hein*, Kodifikation 443; *id.*, Rom II 16; *Huber/Bach* 76; *Helmut Ofner*, Die Rom II-Verordnung, Neues Internationales Privatrecht für außervertragliche Schuldverhältnisse in der Europäischen Union: ZRvgl. 49 (2008) 13 (16); *Helmut Heiss/Leander Loacker*, Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II: JBl. 2007, 613 (624); *Spickhoff* 681; *Leible/Lehmann* 724.

[75] For a more detailed discussion of the problem see C. IX. 2.

[76] *Stone*, Rome II 122, again see in more detail C. IX. 2.

2. The Cumulative Element: Marketing of the Product

a) Introduction

The common, cumulative element throughout all levels of the cascade is the requirement that the product was marketed in the country of the respective connecting factor. It corresponds with the foreseeability defence in Art. 5(1)2. Both the marketing requirement and the foreseeability defence aim to strike a fair balance between the interests of the person sustaining the damage and the person potentially liable. Whereas the varying connecting factors operate rather in favour of the person sustaining the damage, the marketing requirement and the foreseeability defence take account of the interests of the person claimed to be liable.

b) The Marketing Requirement's Function

The key to understanding the marketing requirement's function is a systematic comparison of the initial proposal by the Commission[77] with the rule finally adopted in Art. 5 Rome II. While the rule in the Commission's proposal and the rule in Art. 5 Rome II seem very different at first sight, they show considerable similarity in substance and structure when taking a closer look:[78]

There is a connecting factor: In the initial proposal only one – with the habitual residence of the injured person; in Art. 5(1)1 Rome II there are three, contained in the varying factors of lit. a to c, with the habitual residence of the injured person still being the highest ranking connecting factor on the first level of the cascade.

There is a cumulative element: The requirement that the product was marketed in the country of the connecting factor – in the initial proposal it

[77] The rule on product liability in the Commission's initial proposal read as follows: "Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident." (The changes in the amended proposal were negligible with regard to the issues discussed here.)

[78] Similar *Peter Hay*, Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation: EuLF 2007, I-137 (145); *Stone*, Rome II 118 disagrees on that point (departs very substantially); unclear *Marc Fallon*, The Law Applicable to Specific Torts in Europe, in: Japanese and European Private International Law in Comparative Perspective (supra n. 10) 264 et seq.: he observes a fundamental difference while a few paragraphs later he points out that the first level of the cascade is not so far from a simple rule (like the one in the Commission's proposal).

is implied,[79] in Art. 5(1)1 Rome II it is explicitly mentioned and repeated throughout lit. a to c.

There is a defence concerned with predictability, protecting the interests of the person potentially liable: In the initial proposal it is the requirement of consent to marketing in the country of the connecting factor. In Art. 5(1)2 Rome II it is the requirement of foreseeability of marketing in the country of the respective connecting factor.

The three minor differences – one single connecting factor being replaced by three structured as a cascade in descending order, the marketing requirement being mentioned explicitly and the defence being changed from lack of consent to lack of foreseeability – affect neither structure nor system of the rule: The change from one to three connecting factors merely leads to a more differentiated rule. The marketing requirement is still implied by the foreseeability defence in Art. 5(1)2: To ask the question whether marketing in the country of the respective varying factor of lit. a to c was reasonably foreseeable requires that the product was actually marketed in this country. The amendments to the defence simply broaden its scope slightly since the notion of foreseeability is potentially wider and more flexible than that of lack of consent.

The comparison indicates that the marketing requirement in lit. a to c is not the decisive element of the three levels of the cascade for determining the applicable law. Rather, the three varying connecting factors lead the way to the applicable law whereas the marketing requirement serves merely as a tool for structuring the three connecting factors as a cascade.[80] Without the conditional marketing requirement the three connecting factors could only be structured as cumulative or alternative. While cascade connections are close to alternative connections, they differ in one crucial aspect: In case of purely alternative connecting factors there is a choice which factor to invoke in order to determine the applicable law whereas cascade connections prescribe a clear descending order of the connecting factors.

c) Definition and Scope of Marketing of the Product

The systematic considerations underlying the marketing requirement's function provide the basis for defining its elements and scope.

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[79] The wording of the Commission's proposal is clear in that respect ("…, unless the person claimed to be liable can show that the product was marketed in that country without his consent, …"); see above B. III. 3.

[80] *Von Hein*, Rom II 26 takes the opposite view: He regards marketing of the product as the decisive connecting factor whereas the three varying elements are only supplementary connecting factors; similar *Spickhoff* 686 (although he accepts that the marketing requirement is satisfied by a marketing of products of the same type which clearly diminishes the weight of the marketing element in Art. 5(1)1).

(1) Inferences from the Product Liability Directive? – Since Art. 5(1) itself does not define what constitutes marketing of the product, one might be inclined to refer, as with regard to other aspects of Art. 5, to the Product Liability Directive.

The Product Liability Directive, however, does not provide useful guidance in that respect. The wording is not conclusive. It differs in the English language version – in Art. 6(1) lit. c, 6(2) and Art. 7 lit. f of the Directive *putting the product into circulation*, but *marketing of the product* in Art. 5(1)1 Rome II – while other language versions, e.g. the German language versions – use the concurrent terms of "in den Verkehr bringen".[81] Furthermore *putting into circulation* affects the liability under substantive law whereas *marketing of the product* determines the applicable substantive law. Hence, the terms are used in a different context and serve different purposes in the Directive and in the Rome II Regulation. *Putting into circulation* in Art. 6 and 7 of the Directive aims at establishing the relevant point in time for assessing whether the product is defective and whether the producer could have discovered and avoided the defect. After that point in time the producer lacks control over the product so that responsibility for defects has to be limited. *Marketing* and its foreseeability in Art. 5 Rome II determine the applicable law, taking account of the predictability concerns of the person potentially liable. He shall not be subject to the laws of those countries where he did not intend to offer the product for purchase. Hence, *putting into circulation* refers to a point in time whereas *marketing of the product* refers to the countries where the product is offered to end users. Owing to these differences, it is not appropriate to transfer the meaning of *putting into circulation* in the Product Liability Directive to the *marketing element* of Art. 5 Rome II.

(2) A fresh definition. – (a) Marketing. – Marketing may range from initial distribution of the product by the manufacturer at one end of the spectrum to making the product available, i.e. distribution to end users at the other end.

For several reasons it is not convincing to regard marketing as the initial distribution. First, the marketing element is not related to the manufacturer of the product but is purely product-related. The product may have been marketed *by anyone* in the respective country.[82] Otherwise there would be no scope of application for the foreseeability defence. If the person claimed to be liable marketed the product in the respective country of the connecting factor of lit. a to c, he could not claim that this marketing was not reasonably foreseeable for him. In contrast, he might claim that marketing was not reasonably foreseeable for him if the product was marketed by someone

[81] The German language version of both Rome II and of the Product Liability Directive refer to the same term of "in den Verkehr bringen".

[82] Concurring *Leible/Lehmann* 728; according to *Fallon* (supra n. 78) 266 this matter is not settled by Art. 5.

else. Secondly, initial distribution is a time factor rather than an indication of a specific country whose law should apply to a product liability claim. The place of initial distribution may be random. Often it is even the place of the habitual residence of the manufacturer which is reserved as a connecting factor for the case that marketing was not reasonably foreseeable in the countries indicated by Art. 5(1)1 lit. a to c.

Given these shortcomings, marketing is better understood as occurring in every country where the product is distributed, i.e. offered for supply to end users via sale, hire or otherwise.[83] The definition is not restricted to distribution in the physical presence of seller and buyer. It applies equally in the case of sale and supply of the product via the Internet by online distribution which may be run by the manufacturer himself or other persons in the distribution chain such as importers or retailers: Marketing takes place in every country where a potential buyer will be supplied with the product. Restrictions of distribution to specific countries by the person claimed to be liable[84] become relevant when considering the foreseeability defence.[85] Finally, this definition of marketing could even handle product liability claims of bystanders[86] although it is commonly agreed that, with regard to bystanders, the cascade of Art. 5(1)1 is usually superseded by a manifestly closer connection under the escape clause of Art. 5(2) to the country where the damage occurred regardless of marketing in that country.[87] The cascade is rather designed with a focus on the claim of a purchaser of the product towards the manufacturer, importer or any supplier other than the seller. However, depending on the circumstances Art. 5(1)1 lit. a may even serve the legitimate

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[83] Concurring *Stone*, Rome II 122; in contrast, *von Hein*, Rom II 26 takes a more restrictive approach (actual supply to the end user) corresponding to his view that the marketing element in Art. 5(1)1 requires a marketing of the individual product causing the harm while the marketing is not satisfied by marketing of products of the same type.

[84] Such restrictions in relation to the countries where the product will be supplied are common in online distribution; usually they are stated directly in connection with an offered product such as: "This product will only be supplied to Germany and Austria."

[85] See C. VII. 2. b) and c) for details.

[86] Bystanders are third parties having no pre-existing relationship to the product causing the damage. They did not acquire it. They did not use it. They have no other connection with it. The damage strikes them unexpectedly.

[87] See *Huber/Bach* 77; *Spickhoff* 689; *Leible/Lehmann* 728; *Sonnentag* 283; *Wandt* para. 1099 et seq.; *Bettina Heiderhoff*, Eine europäische Kollisionsnorm für die Produkthaftung, Gedanken zur Rom II-Verordnung: Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2005, 92 (94); *Heiss/Loacker* (supra n. 74) 628 take the view that the Regulation does not provide for a specific connection as regards bystanders (and they do not even discuss an application of Art. 5(2)); similar already with regard to German law (by arguing for the application of the general rule on tort and delict) *Hans Stoll*, Anknüpfungsgrundsätze bei der Haftung für Straßenverkehrsunfälle und der Produktenhaftung nach der neueren Entwicklung des internationalen Deliktsrechts, in: Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts, FS Kegel (1977) 113 (131); opposing a different rule regarding purchasers/user as opposed to bystanders *Drobnig* (supra n. 10) 318 et seq.

interests of a bystander such that there is no need to resort to the escape clause of Art. 5(2).

(b) Product or also product of the same type? – All three levels of the cascade in Art. 5(1)1 lit. a to c refer by their wording only to the *product*, not to *products of the same type*.

The term *product* as such relates only to the individual product that caused the damage to the injured person. The wording is rather clear in that regard. The use of the terms *product, or product of the same type* in Art. 5(1)2 also seems to bar another understanding: If the Council used the terms *product* and *product of the same type* in the same section as regards foreseeability, the term *product* does not encompass *products of the same type*.[88]

Despite this literal interpretation of the term *product* as such, most commentators consider a relaxation of the marketing requirement: It is equally satisfied if *products of the same type* rather than the individual *product* were marketed in the respective country.[89] They argue mainly that it has to be inferred from Art. 5(1)2 that the marketing requirement relates to products of the same type since marketing and foreseeability have to refer to the same thing. Although this argument is intuitively appealing, one may doubt whether an entirely congruent structure of marketing and foreseeability is systematically necessary and presupposed by the interaction of the marketing requirement with the foreseeability defence. It is not inconceivable that the foreseeability defence raises the bar higher than the marketing requirement: once the individual product was marketed in the respective country, the person claimed to be liable has to prove that even a marketing of products of the same type was not reasonably foreseeable since the defence would otherwise be all too easy to establish.

The real argument seems to be another one. If marketing in Art. 5(1)1 lit. a to c required marketing of the individual product in the respective country of the connecting factor, the three descending connections of the cascade would effectively be replaced by one connection. Marketing of the individual product that caused the damage would regularly point at one single country – the country where the product was acquired. This would turn lit. b into the decisive connecting factor whereas lit. a and c would play no further role:[90] If the product was acquired in the country of the injured

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[88] *Von Hein*, Rom II 27 stresses this argument based on the wording.

[89] *Leible/Lehmann* 728 (extending it comprehensively to products of the same type); *Wagner*, Rom II 7 (a differentiated solution: product of the same type insofar covered as it bears the same safety features as the specific product causing the damage); *Palandt (-Thorn)* (supra n. 41) para. 11; *Spickhoff* 685; *Hay* (supra n. 78) 145; *Francisco J. Garcimartín Alférez*, The Rome II Regulation: On the way towards a European Private International Law Code: EuLF 2007, I-77 (85).

[90] *Von Hein*, Rom II 27 et seq. admits that but argues that the place of marketing/acquisi-

person's habitual residence, lit. a and lit. b would point to the same country. If the product was acquired in the country where the damage occurs, lit. c and lit. b would point to the same country. If the product was acquired in another country, lit. a and lit. c would regularly not apply but lit. b instead. In effect, lit. b would cover all possible scenarios; the country of marketing would eventually determine the applicable law.[91] This would not only undermine the cascade system. In fact, it would reverse the function of the marketing requirement vis-à-vis the connecting factors of lit. a to c.[92]

If the marketing requirement is satisfied by the distribution of products of the same type, the definition of this term becomes the crucial issue. What kind and degree of deviation constitutes a product of a *different* type as opposed to a product of the *same* type?

The identity of the safety features has been suggested as the distinguishing criterion.[93] In other words, same type refers to same safety features. Different safety features result in a different type of product. One may extend this criterion to all product-related features relevant to incurring liability for damage caused by the product. This may cover, e.g., the general design (in so far as it may cause or prevent damage by the product), the instructions for use of the product (regularly containing safety advice and warnings) and general quality aspects of the product (again in so far as they correlate with damage caused by the product).

The wording, "product of the same type" in the English language version, "gleichartiges Produkt" in the German language version and "produit du même type" in the French language version, is consistent with such an interpretation. It suggests that the term refers to products with features that are identical to the product that caused the damage. Identity may, however, not only encompass safety-related characteristics, but any features of the product such as outer appearance, colour, function, purpose, general design, quality and the like.

A purposive analysis reduces the relevant features to those that are safety-related. The overriding objective of the marketing element in Art. 5(1) is predictability of the applicable law for the person potentially liable.[94] This

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tion of the individual product is the most appropriate connection in product liability so that one should take the chance to interpret Art. 5(1)1 this way.

[91] *Huber/Illmer* 42; *Spickhoff* 685 seems to deny this consequence: While he takes the view that marketing of the product in Art. 5(1)1 lit. a to c is met by marketing of products of the same type which inevitably reduces the weight of the marketing element, he nevertheless accuses the drafters of the rule in Art. 5 of favouring the manufacturer by implementing the marketing requirement (and the unforeseeability defence) as the decisive connecting factor.

[92] See C. VI. 2. b).

[93] *Wagner*, Rom II 7 draws such a distinction without going into further detail; concurring *Palandt (-Thorn)* (supra n. 41) para. 11.

[94] See the Commission itself COM(2003) 427 final at p. 14; *Karl F. Kreuzer*, Die Vergemeinschaftung des Kollisionsrechts für außervertragliche Schuldverhältnisse, in: Europäisches

predictability relates primarily to the safety standard and the duty of care set by the laws of the countries in which the product has been marketed. It is these two aspects of the applicable law that determine liability in the first place, not the colour or function of the product. Linking the requirement of identity to the safety features of the product suffices to ensure that the person potentially liable is not subject to a standard of product liability which he did not have to take into account regarding the product that caused the damage. The person potentially liable is put into a position where he can adapt those features of the product that bear relevance for product liability to the standard required by the laws which may potentially apply. This enables him to diversify his product range. He may offer the same model – e.g. the baby buggy "baby boomer" or the BMW 3 series – with different safety-related product features in different countries without running the risk of being subjected to a product liability standard he could not envisage. Otherwise the person potentially liable would, in order to be on the safe side, have to meet the highest product-related standard of the countries where the product model or product family is marketed. Product diversification within the range of a specific model of a product would become substantially more difficult if not impossible.

(c) The price-risk relationship. – Predictability is the overriding objective of the marketing element of Art. 5(1), not only in relation to the safety features of the product but also in relation to the price-risk interrelation. The person potentially liable may want to reflect the different regimes of product liability in the countries where the product is marketed in country-specific prices so that the purchaser pays part of the price for his remedies vis-à-vis the manufacturer and/or retailer for damage caused by the product.[95] This price diversity may be desirable even if products marketed in different countries bear the same safety-related features. The product liability laws may differ with regard to aspects other than the safety features of the product such as the heads of liability, the extent of fault-based as opposed to strict liability, presumptions of law and the quantum of damages in particular.[96] If marketing was not limited to the individual product causing the damage, a purchaser acquiring the product in country A for a price of X while habitually residing in country B where the product is marketed for the much high-

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Kollisionsrecht, ed. by *Gerte Reichelt/Walter H. Rechberger* (2004) 13 (35); *Wagner*, Internationales Deliktsrecht 374 (predictability as the overriding objective even of the general rule on tort and delict).

[95] *Wandt* para. 1063; *Sonnentag* 282; *Kadner Graziano*, Product Liability 481; *von Hein*, Kodifikation 447; *Huber/Bach* 77; even Wagner concedes that, see *Wagner*, Internationales Deliktsrecht 382.

[96] Pursuant to Art. 15 lit. (a), (b), (c) and Art. 22 these aspects are all governed by the applicable law as determined by Art. 5.

er price of Y, would get the benefit of the product liability law of country B, while having paid only for the much lower standard of product liability in country A.[97] He would get a benefit he has not paid for while the person claimed to be liable would be deprived of the ability to effectively adapt his pricing policy to the liability risk.

Against the background of this price-risk relationship, one could argue that marketing of the individual product that caused the damage is required. Since the country where the individual product is marketed usually coincides with the country of acquisition of this product, the law of the country of acquisition pursuant to Art. 5(1)1 lit. b would regularly apply to product liability claims.[98]

While this may be a preferable solution and even though it may find support in the wording of the marketing requirement, it is irreconcilable with the systematic structure and purpose of the cascade of Art. 5(1)1 and the foreseeability defense of Art. 5(1)2 as discussed above. Apart from systematic inconsistency it is questionable whether the manufacturer or importer does in fact diversify its pricing policy according to the potentially applicable product liability laws. Their aim will be rather to avoid liability by adjusting the safety features of the product to the respective product liability standard instead of taking the risk of liability while increasing prices. It is therefore suggested that the product liability risk plays a rather minor role in the calculation of the price of a product. Furthermore, under Art. 5 Rome II the marketing requirement is not tied to the manufacturer: Any person may have marketed the product in the respective country; in fact, in the majority of cases it will not be the manufacturer himself. He can keep control of the countries of marketing only by restrictions on distribution which may, however, not bind subsequent traders in the distribution chain, take no effect vis-à-vis the injured person and are subject to competition law. Against this background it is nearly impossible for the person potentially liable to effectively diversify prices so as to reflect varying product liability risks and quantum of damages issues. If restrictions on distribution are valid and take effect against the injured person, they may be accommodated under the foreseeability defence,[99] so that there is no need to provide a solution for those cases under the cascade already.

(d) Conclusion. – *Marketing of the product* in Art. 5(1)1 is distribution – not necessarily by the person claimed to be liable – of the product that caused the damage or any product of the same type, i.e. with identical safety-related

[97] Or vice versa (paid high price for low standard), see *Wagner*, Internationales Deliktsrecht 382; *von Hein*, Kodifikation 447; *id.*, Rom II 28; *Kadner Graziano*, Product Liability 481 et seq.

[98] This view is taken by *von Hein*, Rom II 27 et seq.

[99] See for further details C. VII. 2. b) and c).

features, to the end user. This understanding is consistent with the system and purpose of the marketing requirement of Art. 5(1)1. It does not afford too much weight to the marketing requirement – as it is not the decisive criterion of the cascade connections – while at the same time establishing the marketing requirement as a first filter of the laws potentially applicable.

The limited relevance of the marketing requirement in Art. 5(1)1 resulting from this interpretation does not unfairly prejudice the interests of the manufacturer.[100] He is sufficiently protected by the foreseeability defence in Art. 5(1)2 which would in fact lose much of its relevance if one adopted a narrow understanding of the marketing element in Art. 5(1)1. It is interesting to note that the protection of the manufacturer (or more generally the person claimed to be liable) in the Commission's proposal was only via a defence concerned with marketing – lack of consent to marketing which transformed into foreseeability of marketing in the final version of Art. 5.

d) Lack of Marketing

The cascade in Art. 5(1) does not provide for the law applicable if the product is not marketed in any of the countries indicated by the varying connecting factors of lit. a to c. Art. 5(1)2 applies directly only to those cases where the product is marketed in the respective country but where this occurrence is not reasonably foreseeable for the person claimed to be liable. Art. 5(2) does not apply since there is no law indicated by Art. 5(1) which is a precondition for the application of the escape clause.

At first sight one might be inclined to resort to the general rule on delict and tort in Art. 4.[101] On further consideration, this is however not convincing. One has to distinguish between the rule's scope of application on the one hand and the connecting factors of Art. 5 on the other hand. The relationship of *lex generalis* and *lex specialis* exists in relation to the scope of application, not with regard to the connecting factors determining the applicable law. Once a non-contractual obligation such as the one arising out of damage caused by a product is within the scope of application of the special rule, one must not revert to the general rule. Furthermore, applying Art. 4(1) would undermine the special rule in Art. 5(1) lit. c: In case of liability for damage caused by a product, the law of the country where the damage occurred must not be applied if the product was not marketed in that country.

The solution is to be found within the system of Art. 5 by an analogous application of Art. 5(1)2. If the law of the habitual residence of the person

[100] So goes the argument of *von Hein*, Rom II 27 et seq.

[101] *Spickhoff* 686 et seq. proposes this solution which is based on his general view that Art. 5 is unfairly weighted to the advantage of the person claimed to be liable.

claimed to be liable applies whenever that person could not reasonably have foreseen marketing in the relevant country identified by lit. a to c, this must hold true, *a fortiori*, in a case where the product was not even marketed in the relevant country at all.[102]

In the upcoming review process pursuant to Art. 30(1) one may clarify Art. 5(1)2 accordingly. In order to keep a coherent structure of Art. 5 one should render Art. 5(2) into a third subsection 5(3) and turn Art. 5(1)2 into a new second subsection 5(2). The new Art. 5(2) (which is the former Art. 5(1)2) could read as follows:

(2) The law applicable shall be the law of the country in which the person claimed to be liable is habitually resident

(a) if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under Article 5(1) lit. (a), (b) or (c); or

(b) if the product was not marketed in the country of habitual residence of the person sustaining the damage, in the country in which the product was acquired or in the country in which the damage occurred.

VII. The Foreseeability Defence

1. Overview

Once the applicable law has been determined pursuant to Art. 5(1)1 lit. a to c, the person claimed to be liable may raise a defence: If he could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is indicated by lit. a to c, then the law of his habitual residence applies.[103] A similar defence is contained in Art. 7 of the 1973 Hague Convention.

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[102] Proposing the same solution *Wagner*, Rom II 7; *Luís de Lima Pinheiro*, Choice of law on non-contractual obligations between communitarization and globalization, A first assessment of the EC Regulation Rome II: Riv. dir. int. priv. proc. 44 (2008) 5 (23); *Huber/Illmer* 43; *Leible/Lehmann* 728; *Palandt (-Thorn)* (supra n. 41) para. 11; *von Hein*, Kodifikation 447 (regarding the Common Position which does not differ in that respect); *id*., Rom II 28; *Garcimartín Alférez* (supra n. 89) 85; *Martina Benecke*, Auf dem Weg zu "Rom II", Der Vorschlag für eine Verordnung zur Angleichung des IPR der außervertraglichen Schuldverhältnisse: RIW 2003, 829 (834) (as regards the Commission Proposal which equally does not differ in that respect), *Spickhoff* 686 et seq. explicitly rejects this solution but is prepared to take the rationale of Art. 5(1)2 via the escape clause of Art. 4(3) into account.

[103] The application of the law of the habitual residence of the person claimed to be liable was criticised during the legislative process by many commentators, see e.g. *Huber/Bach* 77; *von Hein*, Die Kodifikation des europäischen Internationalen Deliktsrechts: ZvglRWiss. 102 (2003) 528 (554); *Kadner Graziano* Product Liability 485; concurring, however, *Wagner*, Internationales Deliktsrecht 377 and *id*., Rom II 7.

The foreseeability defence is the decisive mechanism for protecting the legitimate interests of the person claimed to be liable since the marketing requirement of Art. 5(1)1 provides only a very broad, first filter of the laws potentially invoked by the cascade connections of lit. a to c. It appears to be a necessary corrective to the strictly product-related marketing requirement of Art. 5(1)1 lit. a to c.

Requiring that marketing was not reasonably foreseeable even with regard to *products of the same type* raises the bar for successfully invoking the defence. This seems appropriate since the defence would otherwise be all too easy to establish such that the cascade, which provides the primary connections, would be substantially undermined. Furthermore, the limitation of the defence correlates with the extension of the marketing requirement of Art. 5(1)1 lit. a to c to products of the same type as explained above.[104]

2. Foreseeability

a) The Setting

The essential prerequisite of the defence is that marketing in the respective country indicated by Art. 5(1)1 lit. a to c was not reasonably foreseeable for the person claimed to be liable. Since the marketing requirement in Art. 5(1)1 is a very permeable filter, foreseeability becomes the focal point for the person claimed to be liable. Under what circumstances is marketing in a specific country not reasonably foreseeable for him? Are there ways to create a situation where distribution in specific countries is generally not reasonably foreseeable for the person claimed to be liable so that he can avoid the application of the laws of these countries outright? What are the tactical implications for distribution and the contractual arrangements with distributors?

It has been argued – though with regard to the consent element in the Commission's initial proposal which was transformed into the foreseeability defence in the Regulation – that in the era of globalised trade and commerce a manufacturer of a product is deemed to have consented to marketing in countries beyond those initially contemplated as target markets and perhaps even around the globe,[105] i.e., that marketing is reasonably foreseeable in many more than the targeted countries or even worldwide. Generally presuming foreseeability to such an extent is not convincing. It would undermine the defence substantially and turn it in effect into an irrebuttable pre-

[104] Though it is only a welcome, not a necessary correlation; see above C. VI. 2. c) (2) (b).

[105] *Kadner Graziano*, Product Liability 485; similar *Lorenz* (supra n. 10) 348.

sumption of forseeability. The factual basis for such a presumption is also doubtful – even in a globalised world.[106]

Foreseeability of marketing depends predominantly on the precautionary measures taken by the person claimed to be liable. Hence, by way of the right precautions he may establish prima facie that marketing was not reasonably foreseeable with regard to certain countries.

b) Precautionary Measures

There are two different types of precautionary measures: absolute and relative ones.

The absolute precautionary measures are physically tied to the product, e.g. by stating on the product itself or on its packaging the countries where it is for sale or alternatively the countries where it is not for sale. This refers to statements like "Not for sale in the US or Canada". They will usually suffice to establish that marketing of the product was not reasonably foreseeable in the respective countries. Since foreseeability extends to products of the same type, the same precautionary measures have to be taken with regard to them. This imposes a heavy burden upon the person potentially liable and creates a considerable degree of uncertainty for him. He has to assess and anticipate what amounts to a product of the same type and he has to organise production and distribution accordingly. Overall, product-related precautions will be rather rare and limited to extreme cases with an increased risk of incurring liability, significant differences in national product liability laws and potentially high damage awards.

The relative precautionary measures are contractual provisions in distribution agreements or contracts for sale restricting further distribution to specific countries. The weakness of contractual safeguards is obvious: They are only binding on the other party to the contract. The manufacturer or importer may remedy this disadvantage to a certain degree by inserting additional provisions obliging the contractual partner to impose the same restrictions on subsequent distributors or retailers but he cannot directly bind those subsequent traders. Nevertheless, for the purposes of the defence, a contractual restriction will usually suffice to establish that marketing in the contractually excluded countries was not *reasonably* foreseeable. Just as foreseeability is qualified by reasonableness, the same has to apply to the precautionary measures. The person claimed to be liable has to take only those measures which he can be reasonably expected to take which are those he can reasonably expect to effectively exclude marketing in the respective countries. Contractual restrictions with a duty to impose the same restric-

[106] See *Huber/Bach* 77.

tions on subsequent traders usually meet this reasonableness test. It is only in exceptional circumstances that they do not.

c) Individual Circumstances

Apart from and in addition to the precautionary measures the individual circumstances of each case are of course relevant when determining foreseeability. These circumstances are manifold. The person claimed to be liable may have some special knowledge. He may be aware of distribution in breach of contractual restrictions by certain distributors or retailers. It may be an objective aspect such as sale and supply into a free trade area, for example the EU, EFTA, NAFTA or Mercosur. Since barriers to cross-border trade are low as between the member states of such an area, the manufacturer or importer may have to anticipate that the product will circulate amongst those member states and consider product related precautionary measures as described above. Further, it may be that the product is only suitable for use in specific countries on objective grounds such as technical features like power connection or voltage range. These may differ although not resulting in different types of product since they are not safety related. Another example is the language of the instructions or the inscription of the buttons on the product, say a digital camera, though there is a tendency to simplify product information and inscriptions by pictorial symbols which are "multilingual".

d) Conclusion

Whether marketing of the product or products of the same type in a specific country is reasonably foreseeable for the person claimed to be liable depends primarily on the precautionary measures he has taken to prevent marketing in the respective country. These precautionary measures may be restrictions of marketing tied to the product itself or restrictions in the distribution or sale contracts. Contractual restrictions are regularly sufficient to establish that marketing was not reasonably foreseeable. The objective suitability of the product for use in a specific country and the knowledge of the person claimed to be liable of distribution in the relevant country despite contractual restrictions are important circumstances that have to be taken into account.

VIII. The Common Habitual Residence Connection

As provided in Art. 5(1)1, the common habitual residence connection of Art. 4(2) prevails over the connecting factors of the cascade system and ap-

plies regardless of any of the considerations under the cascade. Marketing in the country of common habitual residence is not required and the person claimed to be liable cannot invoke the foreseeability defence. This approach is not self-evident. One could have chosen not to incorporate Art. 4(2) into Art. 5 at all or to qualify it as in the cascade connections by a marketing element. Depending on the importance attached to predictability for the person potentially liable, one may well consider whether such qualifications would have been appropriate.

IX. The Escape Clause of Art. 5(2)

1. General Remarks

Art. 5(2) provides for an escape clause of a type common to most conflict rules which employ a rather rigid system of defined connecting factors.[107] A manifestly closer connection to a country other than the one indicated by the special connections supersedes the latter so that the law of that other country applies. It does, however, not prevail over a choice of law pursuant to Art. 14.

One may question the drafter's approach to restate the escape clause in Art. 5(2) instead of incorporating it by reference as in the case of the common habitual residence connection.[108] While the Commission's proposal incorporated both by reference, the Council opted for restating the escape clause. In its Statement of Reasons it did not address the amendment. Since the Parliament had indicated in its first reading that it attached great importance to a flexible rule in the field of product liability by dealing with it under an extended escape clause, the Council may have tried to reconcile this intention with the position of the Commission. By restating the escape clause it raised the awareness of a flexible approach to product liability cases while in substance returning to a special rule with straight forward connecting factors as proposed by the Commission. Ultimately however, it is rather an aesthetic issue which has no impact on the substance of the provision.[109]

The classic case of a pre-existing contractual relationship between the person claimed to be liable and the injured person is specifically mentioned in the escape clause as constituting a manifestly closer connection. This is

[107] See e.g. section 12 of Part III of the English Private International Law (Miscellaneous Provisions) Act 1995, Art. 41 of the German EGBGB; see also in different areas e.g. Art. 4(5) of the Rome Convention on the law applicable to contractual obligations.

[108] See *von Hein*, Kodifikation 447; *Wagner*, Rom II 7.

[109] *Wagner*, Rom II 7 leaves it at that.

most welcome since it is sensible to provide that the same law shall govern liability in both tort/delict as well as contract.[110]

2. Presumptions for Specific Groups or Types of Persons

With regard to Art. 5(2), one may consider whether there are pre-defined, separable groups of persons in relation to whom a manifestly closer connection under Art. 5(2) should be presumed since it appears generally inappropriate to apply the cascade connections of Art. 5(1).

Overall, such an approach is not convincing. First, the Regulation has chosen a uniform rule that applies to any person sustaining a damage. A standardised application of the escape clause to certain groups of persons would undermine this choice. Secondly, as an exception to the general rule, the escape clause should be applied cautiously, i.e. only in a limited number of exceptional cases.[111] Thirdly, establishing presumptions for the application of the escape clause contradicts its character as a flexible rule. Fourthly, it is difficult if not impossible to pre-define groups of persons in relation to whom a presumption could apply.[112] If there is any such group, it is that of bystanders. In relation to them the law of the country where the damage occurred is commonly regarded as the most appropriate one.[113] But taking that as a general presumption for the closest connection under Art. 5(2) does not add predictability or legal certainty to the bystander problem. The bystander does not consider suffering any damage at all. And the person potentially liable cannot envisage the country where the damage may occur to the bystander. Hence, though the law of the country where the damage occurred will usually apply in case of bystanders through invocation of the escape clause of Art. 5(2), there is no general presumption to that extent.

For these reasons it is neither justified nor helpful to develop presumptions under Art. 5(2) with regard to pre-defined groups of persons sustaining damage. Rather, the escape clause has to be applied afresh to each individual case.

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[110] To the same extent the *Hamburg Group for Private International Law* 18.

[111] *Leible/Lehmann* 726; *Spickhoff* 688.

[112] See *Wandt* para. 365 et seq. analysing the different attempts to distinguish between different groups.

[113] *Hamburg Group for Private International Law* 18; *von Hein*, Rome II 29; *Leible/Lehmann* 728 (although they note that this requires an extensive interpretation of the escape clause); *Huber/Bach* 77; *Spickhoff* 689; *Sonnentag* 283; *Palandt (-Thorn)* (supra n. 41) para. 11.

X. Burden of Proof and Pleading Foreign Law

1. Burden of Proof

a) The Objective Connections of Art. 5(1)1

With regard to the burden of proof concerning the objective connections of Art. 5(1)1 it is unclear what happens if the person sustaining the damage as claimant pleads and proves the facts of one specific connection on a lower level of the cascade, e.g. the place of acquisition pursuant to Art. 5(1)1 lit. b, but the facts underlying a prevailing level of the cascade, e.g. Art. 5(1)1 lit. a, might also be present. Does the person claimed to be liable have, as the respondent, the burden to *plead and prove* the facts underlying the prior level of the cascade? Or does he simply have to *plead* the prior level whereas it is then for the person sustaining the damage to disprove the facts underlying it, e.g. his habitual residence in the respective country of marketing of the product?

Applying the rationale of the cascade it must be for the person sustaining the damage to disprove the facts of a prior level of the cascade before he may successfully invoke a lower level by pleading and proving its underlying facts, once the person claimed to be liable pleaded the facts establishing a prior level of the cascade. Hence the burden of proof (and disproof) regarding the facts establishing the connections of Art. 5(1)1 lit. a to c including the prevailing common habitual residence connection of Art. 4(2) lies in any event with the person sustaining the damage being bound by the descending order of the cascade.[114] This accords with the general rule under most national procedural laws that the claimant has to prove the facts which are beneficial to him (and disprove the detrimental ones).[115] Of course, a concurrent choice of law pursuant to Art. 14(1) lit. a prevails over the objective connections. If the person sustaining the damage pleads and proves a lower level of the cascade and the person claimed to be liable does not object to that, this amounts to an *ex post* choice of law under Art. 14(1) lit. a. To this extent the connections of Art. 5(1)1 as well as their descending order are at the disposal of the parties when acting jointly.

b) The Foreseeability Defence of Art. 5(1)2

The burden of proof for the facts establishing that marketing was not reasonably foreseeable in the respective country designated by the objective connections of Art. 5(1)1 lies with the person claimed to be liable. Since the

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[114] Concurring with the result *Spickhoff* 682.

[115] Whether this is reversed in case of an action for negative declaratory relief is a matter of national procedural law.

foreseeability defence of Art. 5(1)2 is solely designed to protect the person claimed to be liable against the application of a law he neither envisioned nor was required to envision, he may of course abstain from invoking it. There is no injustice done to the person sustaining the damage since the connecting factors of Art. 5(1)1 lit. a to c are designed in his favour. The language of the Commission's initial proposal in its Art. 4 (Art. 6 of the amended proposal) was in that respect clearer than the current language of Art. 5 of the Regulation. It stated "… unless the person claimed to be liable can show …" as opposed to the current version, "… if he or she could not reasonably foresee …"

c) The Escape Clause of Art. 5(2)

The burden of proof regarding the escape clause of Art. 5(2) is clearly on the person claiming a manifestly closer connection to another country than the one designated by the objective connections of Art. 5(1).

2. Excursus: Pleading and Proof of Foreign Law

Whether foreign law as designated by the respective connection is applied once its underlying facts are proven depends on the approach in determining the applicability of foreign law which is currently still governed by the procedural law of the respective *lex fori*.[116] One approach treats foreign law as a matter of law so that its application and content are determined by the judge *ex officio*.[117] Another approach regards foreign law as a matter of fact so that the judge will not apply it unless its application and content are pleaded and also proven by the parties.[118] If none of the parties pleads foreign law, the court will not apply any conflict rule in order to determine the *lex causae* but simply apply the *lex fori*. Whether both approaches may co-exist under a uniform European private international law is questionable. The underlying basic rationale of the Rome Regulations with uniform conflict rules coupled with an extended realm of the *lex causae* on the one hand and the prin-

[116] Art. 1(3) of the Regulation supports that view.

[117] As it is the case in most Member States, e.g. Austria, Estonia, Germany, Greece, Italy, the Netherlands, Poland, Portugal, Spain; for the position under German law pursuant to section 293 of the Code of Civil Procedure (*Zivilprozessordnung*) see BGH 13.12. 2005, NJW 2006, 762 (764); *Zöller (-Geimer)*, Zivilprozessordnung[27] (2009) § 293 para. 14; *Baumbach/Lauterbach*, Zivilprozessordnung[67] (2009) § 293 para. 2.

[118] As it is the case, e.g. under English law, see *Fremoult* v. *Dedire* (1718), 1 P. Wms. 429; *Nelson* v. *Bridport* (1845), 8 Beav 527; *Dynamit AG* v. *Rio Tinto Co.*, [1918] A.C. 260, 295; *Ottoman Bank of Nicosia* v. *Chakarian (No. 2)*, [1938] A.C. 260; *Bumper Development Corp.* v. *Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362, 1369; *Glencore International AG* v. *Metro Trading International Inc.* [2001], 1 Lloyd's Rep. 284; *Concord Trust* v. *Law Debenture Trust Corp. Plc*, [2005] UKHL 27.

ciple of *effet utile* on the other hand strongly militate in favour of a uniform approach of applying foreign law under the conflict rules of the Rome Regulations *ex officio*,[119] at least with regard to those conflict rules which may not be derogated from by a choice of law.[120] The European Commission is aware of the differences regarding the treatment of foreign law in the international procedural laws of the Member States. In a Statement annexed to the Regulation it has announced that it will publish a horizontal study on the issue within four years after the entry into force of the Regulation and that it is prepared to take the appropriate measures having regard to the Hague Programme.[121]

D. Interaction with Other Regulations and International Conventions

The rule on product liability in Art. 5 is interrelated with several other European regulations and international conventions regarding applicable law and jurisdiction. It forms part of the wider system of private international law and jurisdiction. The interesting question is whether it fits into the pre-existing system.

I. Interaction with the Rome Convention and Rome I

The interaction with the Rome Convention and the Rome I Regulation is concerned with a synchronisation of the law applicable to product liability pursuant to Art. 5 Rome II with the law applicable to contractual rights in

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[119] *Clemens Trautmann*, Ausländisches Recht vor deutschen und englischen Gerichten: ZEuP 2006, 283 (296); *Kreuzer* (supra n. 94) 8 et seq. (according to him not applying foreign law *ex officio* would constitute a "Geburtsfehler" of European private international law); see also the recommendations by the *Institut de Droit international*, published inter alia in: RabelsZ 54 (1990) 161 (167); the European Parliament had proposed inserting rules to that extent into the Rome II Regulation, see Art. 13 of the Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to noncontractual obligations ("Rome II") that where, however, rejected in the subsequent legislative process by the Council; for a different English view (though concerned with the Rome Convention) see *Dicey/Morris/Collins* (supra n. 67) para. 9–011; *Trevor C. Hartley*, Pleading and Proof of Foreign Law, The Major European Systems Compared: Int. Comp. L. Q. 45 (1996) 271 et seq.

[120] *Rainer Hausmann*, Pleading and Proof of Foreign Law, A Comparative Analysis: EuLF 2008, 1 (7) favours this differentiating approach; foreign law would apply *ex officio* only with regard to Art. 6 (consumer contracts) and Art. 8 (individual employment contracts) Rome I and Art. 6 (unfair competition and acts restricting free competition) and Art. 8 (intellectual property rights) Rome II.

[121] Regulation (EC) No. 864/2007 (supra n. 1) at 49.

case of damage caused by a product. Such a synchronisation is generally desirable since it avoids contradictions which may result from the complex interface of the two regimes, this interface differing substantially as between the national laws. The difficulty with regard to this goal lies in the different structure of the two legal regimes. Art. 5 Rome II applies to consumers as well as non-consumers whereas the Rome Convention and the Rome I Regulation distinguish between consumer and non-consumer contracts, generally providing for different laws to apply. Against this background, synchronisation can only be achieved by tying the law applicable to non-contractual product liability to the law applicable to the contractual claim. Consequently, the escape clause of Art. 5(2) Rome II provides for an annex connection by regarding the contract as a pre-existing relationship between the parties giving rise to a manifestly closer connection superseding the connections of Art. 5(1) Rome II. One should note that in Business-to-Business (B2B) relationships a choice of law is standard with regard both to contract[122] and tortuous liability,[123] so that synchronisation may be easily achieved by party autonomy, subject only to overriding mandatory rules.[124]

II. Interaction with the Jurisdictional Rules under Brussels I

Another issue of great importance is the interaction of the jurisdictional rules of the Brussels I Regulation with the applicable law pursuant to Art. 5 of the Rome II Regulation.[125] It is commonly accepted that the application of the *lex fori* minimises the risk of a wrong decision (based on a false application of the foreign law), reduces the costs of litigation and speeds up the trial.[126]

1. Art. 5 No. 3 Brussels I vis-à-vis Art. 5 Rome II

Under the Brussels I Regulation there are several jurisdictional rules potentially covering a product liability claim. By far the most relevant is the special forum for claims in tort and delict pursuant to Art. 5 No. 3. According to a line of judgments by the European Court of Justice, the relevant

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[122] Pursuant to Art. 3 of the Rome I Regulation.

[123] Pursuant to Art. 14(1) lit. b of the Rome II Regulation a choice of law between parties pursuing a commercial activity is possible even before the event giving rise to the damage).

[124] See Art. 9 Rome I and Art. 14(2), 14(3) and Art. 16 Rome II.

[125] Although the territorial scope of the jurisdictional scheme of Brussels I is limited to the Member States whereas Rome II, pursuant to its Art. 3, applies with regard to any law whether or not it is the law of a Member State.

[126] *Wagner*, Internationales Deliktsrecht 375; *Kegel/Schurig* (supra n. 10) § 15 II.; *Adrian Briggs*, The Conflict of Laws[2] (2008) 4.

place where the harmful event occurred refers to the place where the damage occurred as well as to the place where the event giving rise to the damage occurred. The plaintiff has the choice between the two alternatives.[127] The question arises to what extent the available fora match with the laws applicable under Art. 5 of the Rome II Regulation.

a) The Cascade Connections of Art. 5(1)1

There is no systematic synchronisation of the laws applicable to a product liability claim pursuant to Art. 5(1)1 lit. a and b Rome II with one of the fora available under Art. 5 No. 3 Brussels I. Neither the habitual residence nor the place of acquisition is systematically linked to any of the relevant places under Art. 5 No. 3 Brussels I, in particular in the light of the cumulative marketing requirement.[128] A coincidence of the forum and the applicable law depends very much on the circumstances of the individual case. A regular coincidence exists only with regard to the country where the damage occurred pursuant to Art. 5(1)1 lit. c Rome II.

In order to achieve a systematic synchronisation of Art. 5(1)1 lit. a to c Rome II with Art. 5 No. 3 Brussels I, one should consider a systematic link between the two provisions.

If one accepted the place of marketing of the product as a place – not necessarily the only one – where the event giving rise to the damage occurred,[129] the law applicable pursuant to Art. 5(1)1 lit. b Rome II would always match with one of the fora under Art. 5 No. 3 Brussels I.[130] If the European Court of Justice is prepared to accept such an understanding of Art. 5 No. 3, a narrow understanding of the marketing element in Art. 5(1)1 Rome II (marketing of the individual product), which establishes Art. 5(1)1 lit. b Rome II as the only relevant connection of the cascade, would achieve a better synchronisation with Art. 5 No. 3 Brussels I.[131] The argument that the place where the event giving rise to the damage occurred covers even the places of marketing of products of the same type might remedy that aspect and align Art. 5 No. 3 Brussels I even with a wide understanding of the marketing

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[127] See in particular ECJ 30. 11. 1976, 1746 et seq.; 11. 1. 1990, I-78; 7. 3. 1995, I-460; 1. 10. 2002, I-8141; 10. 6. 2004, I-6029 (all supra n. 38).

[128] *Von Hein*, Kodifikation 448.

[129] In favour of such an understanding of Art. 5 No. 3 Brussels I *Rauscher (-Leible)* (supra n. 43) Art. 5 EuGVVO para. 88; *von Hein*, Kodifikation 448; *Laurenz Uhl*, Internationale Zuständigkeit gemäß Art. 5 Nr. 3 des Brüsseler und Lugano-Übereinkommens (2000) 183; the issue was not yet decided by the European Court of Justice; *Drobnig* (supra n. 10) 328 (with regard to the identical provision in Art. 5(3) of the Brussels Convention).

[130] *Spickhoff* 678 points out rightly that marketing under Art. 5 No. 3 Brussels I should not be confined to marketing by the manufacturer but extend to marketing by other persons in light of Art. 5 Rome II.

[131] To that extent *von Hein*, Rom II 27.

element of Art. 5(1)1 Rome II (marketing of products or products of the same type). It is, however, not convincing to take such an approach with regard to Art. 5 No. 3 Brussels I. "Doing business" does not result in jurisdiction in the respective country.[132] Furthermore there are no additional criteria or filters which ultimately reduce the number of jurisdictions as the varying connecting factors and the foreseeability defence accomplish with regard to the applicable laws under Art. 5(1)1 Rome II. Rather, one would open up a large number of jurisdictions, potentially all 27 if products of the same type are distributed Community-wide.

One should note that in B2B relationships synchronisation will usually be achieved by party autonomy since business partners will regularly align jurisdiction with the choice of law by way of a jurisdiction agreement pursuant to Art. 23 Brussels I and a concurrent choice of law under Art. 14(1) lit. b Rome II subject to overriding mandatory provisions pursuant to Art. 14(2), (3) and 16 Rome II – the application of these provisions will, however, be rather rare in B2B relationships.

b) The Other Connections of Art. 5

There will be no coincidence in relation to the common habitual residence pursuant to Art. 5(1)1 in connection with Art. 4(2) Rome II. With regard to Art. 5(2) Rome II, coincidence is a matter of chance.

2. Art. 2 Brussels I vis-à-vis Art. 5 Rome II

The forum of Art. 2 Brussels I, which is available in any case, points to the habitual residence of the person claimed to be liable. Under Rome II, this law will apply only in the rather rare cases of Art. 5(1)2 so that coincidence is seldom.

3. Art. 16 Brussels I vis-à-vis Art. 5 Rome II

Pursuant to its unequivocal wording the forum of Art. 16 Brussels I applies solely to contractual claims so that it is not available for claims of product liability arising in tort or delict.

4. Art. 23, 24 Brussels I vis-à-vis Art. 5 Rome II

In B2B relationships, synchronisation may be achieved *ex ante* by a combined jurisdiction and choice of law clause (e.g. in a contract containing a

[132] See *von Hein*, Rom II 27; *Burkhard Hess*, Aktuelle Brennpunkte des transatlantischen Justizkonflikts: AG 2005, 897 (899 et seq.).

jurisdiction agreement combined with a choice of law for contractual and non-contractual claims)[133] or *ex post* by a jurisdiction agreement pursuant to Art. 23 Brussels I or a submission to the jurisdiction pursuant to Art. 24 Brussels I combined with a choice of law after the event giving rise to the damage according to Art. 14(1) lit. a Rome II.

In B2C or employer/employee relationships, synchronisation may hardly be achieved *ex ante* since both Art. 23(5) in connection with Art. 13(1), 17(1) and 21(1) Brussels I and Art. 14 (1) lit. a Rome II provide only for an *ex post* choice of forum and applicable law. The additional restrictions of Art. 23(5) in connection with Art. 13, 17, 21 Brussels I and Art. 14(2), (3) and 16 Rome II are, however, not systematically aligned. As an alternative to an *ex post* jurisdiction agreement the consumer or employee may submit to the court's jurisdiction under Art. 24 Brussels I free from the restrictions of Art. 23 Brussels I. Since the restrictions of Art. 14(2), (3) and 16 Rome II still apply regarding the *ex post* choice of the applicable law under Art. 14(1) lit. a Rome II, synchronisation may, however, also not be achieved via this route.

5. Conclusion

Synchronisation of the connections of Art. 5(1)1 lit. a to c Rome II with the most important forum of Art. 5 No. 3 Brussels I is a matter of chance. In order to provide for a more reliable synchronisation one would have to establish a systematic link between the connections of Art. 5(1)1 lit. a to c Rome II and Art. 5 No. 3 Brussels I. As the law currently stands, such a link is difficult to establish. Complex cascade connections providing for several connecting factors are hardly reconcilable with a single connection in respect of jurisdiction.

III. The Relationship with the E-Commerce Directive

Under Art. 27 Rome II the conflict rules of the Rome II Regulation do not prejudice the application of provisions of conflict rules in other provisions of Community law governing particular matters (*lex specialis derogat legem generalem*). The provisions in Art. 3(1) and (2) of the E-Commerce Directive[134] are such prevailing conflict rules governing particular matters.[135] They establish the principle of origin for information society services

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[133] See above D. II. 1. a).

[134] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), O.J. L 178/1.

[135] The E-Commerce Directive is explicitly mentioned in recital 35 of the Rome II Regulation which is concerned with Art. 27 Rome II.

within the coordinated field of the Directive. In effect this amounts to a conflict rule covering the field of product liability[136] which prevails over the general conflict rules on product liability under the Rome II Regulation.[137]

The prevailing conflict rule providing for the law of the country of origin of the information society service is, however, qualified substantially in two respects.

First, applying Art. 3(4) lit. a (ii) fourth indent of the E-Commerce Directive, the law of the country of origin does not prevail in consumer contracts.[138] While the caveat of Art. 3(4) lit. a (ii) fourth indent is, strictly speaking, only concerned with derogations from the principle of origin by national law, this should also apply to provisions of a European Regulation replacing national law in a certain field.

Second, according to Art. 2 lit. h (ii) the coordinated field of the E-Commerce Directive constituting its material scope of application does not cover requirements applicable to goods as such. This accords with recital 21 of the Directive which excludes liability for goods from the coordinated field. Consequently, the law of the country of origin governs only products in the form of society information services sold and delivered via electronic means,[139] e.g. software sold directly by the manufacturer by download via the Internet but not the classic online sale of a product which is then delivered physically such as a hair dryer or an electronic screw driver.[140]

The effect of the prevailing provisions of Art. 3(1) and (2) E-Commerce Directive on the uniform conflict rule established by Art. 5 Rome II is

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[136] *Gerald Spindler*, E-Commerce in Europa, Die E-Commerce-Richtlinie in ihrer endgültigen Fassung: Multimedia und Recht (MMR) 2000, Beil. No 7/2000, p. 4 (19); *Bamberger/Roth (-Spickhoff)*, Kommentar zum Bürgerliches Gesetzbuch III[2] (2008) Rom II-VO Art. 42 Anh. EGBGB para. 145; *Peter Mankowski*, Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie: ZvglRWiss. 100 (2001) 137 (173 et seq.).

[137] *Spickhoff* 674, *Brière* 71; *Mankowski* (previous note) 177 et seq. discusses whether the *lex posterior* or the *lex specialis* rule should apply regarding the relationship of provisions of a Rome II Regulation (at the time there was only an initial proposal by the Commission) and provisions of the E-Commerce Directive; it seems settled under Art. 27 Rome II that the *lex specialis* rule applies.

[138] *Brigitta Lurger/Sonja Maria Vallant*, Grenzüberschreitender Wettbewerb im Internet: RIW 2002, 188 (190); *Spindler* 19; *Mankowski* 173 (both supra n. 136).

[139] According to Art. 2 lit. a of the E-Commerce Directive in connection with Art. 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC, this is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services; by *electronic means* means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

[140] Concurring *Lurger/Vallant* (supra n. 138) 190; *Spickhoff* 674; *Gerald Spindler*, Herkunftslandprinzip und Kollisionsrecht, Binnenmarktintegration ohne Harmonisierung: RabelsZ 66 (2002) 633 (692) (addressing several potentially relevant areas of services provided online).

therefore limited. On the one hand, the conflict rule providing for the law of the country of origin applies equally in all Member States since it originates in a European Directive. On the other hand, the material scope of the conflict rule is limited to a specific type of product sold in a specific way.

IV. The Relationship with the Hague Convention

1. Two Regimes

During the legislative process the alignment of the rule in Rome II with the regime of the 1973 Hague Convention was suggested repeatedly.[141] This could have been achieved either by way of adopting a rule identical to the one in Art. 4 to 7 of the Hague Convention or by the European Union or all its Member States signing the Convention. Neither happened. While the first draft of the Commission of May 2002 was very close to the Hague Convention's regime, the Commission's initial proposal and the rule finally adopted in Art. 5 Rome II deviate substantially from it. Art. 5 Rome II is less complex and the connecting factors as well as their composition differ.

Neither system prevails over the other. The Hague Convention does not contain a rule regarding the relationship with Community law instruments and pursuant to its Art. 28(1) the Rome II Regulation does not prejudice the application of the Hague Convention since the latter was not concluded exclusively between two or more Member States. As a consequence, there will be two regimes of conflict rules on product liability within the European Union.[142] The Hague Convention will apply in Finland, France, Luxembourg, the Netherlands, Slovenia, and Spain, whereas Art. 5 Rome II will apply in the remaining 21 Member States. This is a very unsatisfactory situation, to say the least.[143] It undermines the goal of the Regulation to establish a uniform system of private international law within the European Union in order to prevent forum shopping and increase the predictability of

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[141] E.g. Stellungnahme der 2. Kommission des *Deutschen Rates für Internationales Privatrecht* 20 et seq., accessible at <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/deutscher_rat_internat_privatrecht_de.pdf>.

[142] According to *Brière* 72 et seq. the Hague Convention does not address all issues relevant to a product liability claim and the gaps should be filled by applying Rome II to those aspects, e.g. a direct action under Art. 18 Rome II.

[143] Concurring *von Hein*, Die Kodifikation des europäischen Internationalen Deliktsrechts (supra n. 103) 554 et seq.; *Hans Stoll* in his submission to the Commission upon the initial draft ("untragbar"), accessible at <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/dr_hans_stoll_de.pdf>; with similar critique the Stellungnahme des Instituts für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg, p. 8 et seq., accessible at <http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/universitat_heidelberg_de.pdf>.

the applicable law so as to facilitate international trade and secure undistorted competition.

2. Possible Ways out of the Dilemma

The most obvious way out of the dilemma would be a renunciation of the Hague Convention by the Member States that have signed it. Pursuant to Art. 29 Rome II this would have to be notified to the Commission. However, since the signatory Member States indicated resistance to setting aside the Hague Convention already during the legislative process of Rome II, it is rather unlikely that they will now renounce the Convention.

As an alternative to a renunciation of the Hague Convention by several Member States, the signatory states and the European Union could agree on a joint review of the Hague Convention and Art. 5 of the Rome II Regulations in the course of the regular review of the Rome II Regulation according to its Art. 30(1). Such a joint review might provide a fresh impetus for reform, simplify the regime of the Hague Convention and possibly align it with Art. 5 Rome II which may also be slightly amended in the course of this review. For the Hague Convention this could result in its increased acceptance and ratification by countries outside the European Union. Whether the European Union should then even sign the Hague Convention[144] is another matter. It seems unnecessary and would rather complicate future reforms of Rome II.

While the two systems still co-exist, the parties may *de lege lata* avoid an application of the Hague Convention before the courts of the Member States which are parties to the Convention by derogating its application. In that case the Rome II Regulation applies since it will then not prejudice the application of the Hague Convention. The possibility of derogating the application of the Hague Convention has been accepted by French[145] and Austrian[146] courts.[147]

E. Résumé

The rule in Art. 5 of the Rome II Regulation is a complex rule. Its application is a journey through troubled waters with several shallows and obstacles to overcome. While the system for determining the law applicable

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[144] See *Martin Adensamer*, Der Verkehrsunfall im Licht der Rom II-Verordnung: Zeitschrift für Verkehrsrecht (ZVR) 2006, 523 (527) with regard to the Hague Convention on traffic accidents; *von Hein*, Kodifikation 452.

[145] Cass. 19. 4. 1988, Rev. crit. d.i.p. 78 (1989) 68 with an annotation by *Henri Batiffol*.

[146] OGH 30. 1. 2003, ZRvgl. 44 (2003) 148; 26. 1. 1995, ZRvgl. 36 (1995) 212.

[147] *Von Hein*, Rom II 32; *Ofner* (supra n. 74) 22.

to non-contractual product liability established by Art. 5 is still workable, one may doubt whether the degree of systematic complexity is justified by the results the rule produces in practice.[148] The first review under Art. 30(1) may clarify this.[149]

Despite a first impression to the contrary, the rule finally adopted in Art. 5 Rome II is close to the Commission's initial proposal, in effect only extending the connecting factors from one to three varying factors so as to form the cascade of Art. 5(1)1 lit. a to c. In interpreting the rule, the marketing element will be the main battle ground. The weight afforded to the varying connecting factors versus the marketing requirement, the preference either for the person claimed to be liable or conversely for the injured person as well as the synchronisation with the Brussels I Regulation all depend on the construction of the marketing element.

Synchronisation with the jurisdictional rules of Brussels I is not yet satisfactory. It is rarely achieved and, if so, rather by chance than by following a coordinated systematic approach. As regards the most important forum of Art. 5 No. 3 Brussels I, one has to ponder to what extent one can and is willing to adapt the understanding of Art. 5 No. 3 Brussels I or rather that of Art. 5 Rome II in order to align forum and applicable law. As the law currently stands, there are limits with regard to both provisions.

The major downside of the current regime in respect of the overarching goal of uniformity is the fragmented system of conflict rules as between the Member States resulting from the two parallel systems of Art. 5 Rome II and the 1973 Hague Convention. This status quo is unacceptable. It requires immediate action by the Member States in the short term while a long term solution may be achieved in the course of the review process of the Regulation. The situation with regard to the E-Commerce Directive is less problematic since one may distinguish between different kinds of products to which different regimes apply.

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[148] This is denied by *Wagner*, Rom II 7 and *Abbo Junker*, Die Rom II-Verordnung, Neues internationales Deliktsrecht auf europäischer Grundlage: NJW 2007, 3675 (3679), who both see no advantages in this complex system.

[149] So far, most commentators take a rather critical approach; see *Stone*, Rome II 118 ("maximum ambiguity"); *Spickhoff* 672 et seq. ("hochkomplexes System", "Verworrenheit"); *Junker* (supra n. 148) 3679 ("hochkomplexes System von Anküpfungskriterien, deren Zusammenspiel sich nur schwer erschließt"); *Wagner*, Rom II 7 ("Weniger wäre mehr gewesen").