

The Application of Multiple Laws under the Rome II Regulation

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1 Introduction

The function of the Rome II Regulation (2007)¹ ('Rome II') is described, unexceptionally, as the determination of the applicable 'law'. But the reference to 'law' in the singular masks a more complex picture. Most obviously, the law of the forum also has a role to play, in issues of procedural law² and through mandatory rules and public policy.³ The role of the law of the forum here can be described as a 'supplementary law', operating in addition to the substantive applicable law. Sometimes, however, more than one law is applicable to the substance of a claim. This paper analyses and evaluates the attitude within Rome II towards the application of multiple laws to non-contractual obligations, focusing on the general choice of law rules for torts and delicts.⁴

Private international law rules always involve a variety of competing policy considerations, including certainty, flexibility, and party autonomy. The following analysis shows that the tension between these policy objectives also underlies the question of the extent to which choice of law rules for non-contractual obligations should permit the application of multiple applicable laws.

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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").

² Reflected in Article 1(3) of Rome II; although note the expansive definition of issues governed by the substantive applicable law under Article 15.

³ Provided for under Articles 16 and 26 of Rome II, respectively.

⁴ The term 'tort' will be used in this paper for the sake of brevity.

2 The mosaic principle

One clear way in which Rome II provides for the application of multiple applicable laws is through the mosaic principle. This principle emerges as a response to one of the basic problems in designing a general choice of law rule in tort, dealt with in Article 4 of Rome II. The law of the place of the tort, the *lex loci delicti*, has a presumptive claim to govern the dispute. This raises the difficulty, however, of how to localise a tort which is made up of elements which occur in different places. Most commonly this will be where the place of the wrongful act is different from the place where the damage is suffered. This issue could be left to the courts to decide on a case by case basis, but this might lead to greater uncertainty and unpredictability in the application of the rule.⁵ The basic approach of Rome II is to select the law of the place of the damage as the primary rule under Article 4(1) (sometimes referred to as a *lex damni* rule), subject of course to the exceptions in Article 4(2) (for common habitual residence⁶) and Article 4(3) (where the tort/delict is ‘manifestly more closely connected’ with another country). This approach evidently deals well with torts which are the product of actions which take place in multiple states, leading to a single place of damage. The rule achieves certainty by defining the place of the tort as the place of damage, not the place of action or the place where the indirect consequences of the harm are felt.

It is, however, unclear from the text of Article 4 how this approach is intended to deal with torts which consist of a single action which causes damage in more than one country. The Explanatory Report accompanying the 2003 Commission proposal for Rome II clarifies that what is intended is that the laws of *each* of the places where damage is suffered should be applied ‘on a distributive basis’ – this is what is known as the ‘mosaic principle’, or in German law as the *Mosaikbetrachtung*.⁷ The effect of this principle is that Rome II in these

⁵ Arguably evidenced by the litigation concerning the Private International Law (Miscellaneous Provisions) Act 1995, s.11(2)(c); see eg *Morin v Bonham’s and Brooks* [2003] EWCA Civ 1802.

⁶ As defined in Article 23.

⁷ Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”) 22.7.2003 COM(2003) 427 final, 2003/0168 (COD), at p.11; see Carruthers, JM and Crawford, EB, ‘Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part II’ (2005) 9 *Edinburgh Law Review* 238 at p.249ff; Morse, CGJ, ‘Choice of Law in Tort: A Comparative Survey’ (1984) 32 *American Journal of Comparative Law* 51 at p.59.

circumstances provides for multiple applicable laws. Where harm occurs in multiple countries, the laws of each of those countries is applied separately to determine the damages which are awarded in respect of that harm – potentially multiplying not only the applicable laws, but also the expense and uncertainty of proving them.

An alternative approach might have been to suggest that where damage is caused in multiple countries by a single act, the law of the place of the action would provide the simplest and most convenient solution. This approach is particularly advocated in the context of defamation, which is excluded from the scope of application of Rome II⁸, on the grounds that otherwise a defamatory publication in a widely available format, for example, a publication on the internet, could give rise to the application of as many laws as there are legal systems in the world. It has not, however, been adopted in the common law world even in this context.⁹ It is clear that this approach is not adopted in Rome II – although it is subject to the flexible exception under Article 4(3), there is no provision for departing from the *lex damni* rule and its mosaic effects as a primary rule.

What is not clear from Rome II is whether an action in one place which causes damage in more than one country is still a single tort (with more than one applicable laws), or a collection of individual torts (each with a different applicable law) – both ways in which multiple applicable laws can govern a claim. This uncertainty is related to the pervasive problem within tort law about whether the focus is on conduct (suggesting a single tort) or loss redistribution (suggesting separate torts for each loss).¹⁰ An additional dimension to this problem, which is also unclear, is whether it makes a difference if the damage (in more than one country) is all suffered by one party, or by multiple parties.

⁸ Article 1(1)(g).

⁹ A defamatory tort is viewed as governed by each of the laws of the places where the material was read: see eg *Dow Jones v Gutnick* [2002] HCA 56. For the purposes of the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, OJ L 12, 16.1.2001), a defamation which causes damage in multiple jurisdictions is considered to constitute a series of torts taking place in all those different jurisdictions: see eg *Shevill v Presse Alliance* [1995] ECR I-415 (Case C-68/93); see similarly under English law *Berezovsky v Michaels* [2000] UKHL 25. Note, by contrast, the Uniform Single Publication Act widely applicable in the United States; see Wood, LA, 'Cyber-Defamation and the Single Publication Rule' (2001) 81 Boston University Law Review 895; Prosser, WL, 'Interstate Publication' (1953) 51 Michigan Law Review 959.

¹⁰ See eg Symeonides, S, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 American Journal of Comparative Law 173 at p.188.

This issue is not just of semantic or academic interest, because it affects the possibility of applying Article 4(3) of Rome II, which might be relied on to remedy the multiplication of both laws and costs caused by the mosaic principle. If the correct interpretation is that damage in multiple countries means that there is a single tort with multiple applicable laws, the court may be inclined to find that the tort is more closely connected with the single law of the place of action than with the multiple laws of the places of damage. If, on the other hand, the action must be viewed as constituting multiple torts – which is probably the better view, certainly if there is more than one claimant involved – the application of Article 4(3), like the applicable law itself, is subject to a mosaic effect, and must be applied separately to each tort. The court is less likely to find for any individual tort, with a single place of damage, that Article 4(3) is engaged.¹¹ This problem is exacerbated by the fact that it seems that Article 4(3) only permits consideration of objective connecting factors – it does not seem to permit changing the applicable law on convenience or appropriateness grounds.¹² A more flexible rule might permit reconsideration of the applicable law because the tort is part of a group or series of torts which could more conveniently be governed by a single applicable law.

3 Dépeçage

The possibility of having multiple applicable laws may also arise because different laws govern different elements or issues in a tort claim. This conceptual splitting of the applicable law is known as *dépeçage*, or issue by issue analysis. It is important to distinguish *dépeçage* from the problem of characterisation – the task of working out which choice of law rule or rules apply to a claim or an issue, particularly if it may be brought in the form of more than one cause of action.¹³ It is equally important to distinguish *dépeçage*

¹¹ Symeonides, S, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173 at p.200.

¹² Carruthers, JM and Crawford, EB, 'Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part II' (2005) 9 *Edinburgh Law Review* 238 at p.252. By way of comparison, arguably s.12 of the Private International Law (Miscellaneous Provisions) Act 1995 would allow the court to determine that a single law should apply to a series of related torts, on 'appropriateness' grounds. This is, however, not entirely clear, because it is also unclear whether in situations of damage in a number of places, s.11 of the Private International Law (Miscellaneous Provisions) Act 1995 provides for multiple torts, each with a single applicable law, or multiple applicable laws for a single tort.

¹³ See eg Forsyth, C, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) 114 *LQR* 141.

from the problem of the ‘incidental question’ in choice of law – the determination of what choice of law rule to apply to a subsidiary question which arises within a choice of law problem.¹⁴ Although the term *dépeçage* is sometimes used in a wider sense which embraces these issues and also the role of supplementary laws (such as the procedural function of the law of the forum), for the purpose of this paper it is to be understood as concerned with the possibility that multiple laws may be applicable to different substantive issues or aspects of a single action, such as the standard of liability and the availability of damages for a tort.

Dépeçage is a perennial problem in private international law, particularly in the context of choice of law in tort. This section examines the approach adopted in Rome II and then evaluates that position through a broader comparative and theoretical framework.

3.1 Rome II position and history

Issue by issue analysis is clearly excluded under Article 4 of Rome II – there is no provision for *dépeçage*. While the focus in this paper is on the general rule under Article 4, it is worth noting that *dépeçage* is equally not provided for when it might arise under specialised rules, for example, the rules dealing with product liability (Article 5(2)) and unjust enrichment (Article 10(4)).

The Commission Proposal for Rome II did not provide for issue by issue analysis.¹⁵ However, the European Parliament First Reading Report in response suggested, among its many proposed amendments, the addition of a new Article 4(4), providing that:

In resolving the question of the applicable law, the court seised shall, where necessary, subject each specific issue of the dispute to separate analysis.¹⁶

¹⁴ See eg Lipstein, K, ‘Recognition of Divorces, Capacity to Marry, Preliminary Questions and Depeçage’ (1986) 35 *International and Comparative Law Quarterly* 178; Gottlieb, AE, ‘The Incidental Question Revisited – Theory and Practice in the Conflict of Laws’ (1977) 26 *ICLQ* 734.

¹⁵ Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”) 22.7.2003 COM(2003) 427 final, 2003/0168 (COD).

¹⁶ European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”) (COM(2003)0427 – C5-0338/2003 – 2003/0168(COD)), P6_TA(2005)0284, Art.4(4). It is unclear why this proposal was only made

This proposal came from the Report by the European Parliament's Committee on Legal Affairs, where it was accompanied by the following explanation:

The rapporteur considers that, in so far as it is provided that each specific issue of an international dispute requires separate analysis, courts can avoid all potentially applicable *statuta odiosa*, by applying, where necessary, *dépeçage* (see Friedrich K. Juenger, *The Problem with Private International Law*, Rome 1999, Centro di studi e ricerca di diritto comparato e straniero). This ... enables the court seized to decline to apply a provision or provisions of foreign law whose consequences would be repugnant.¹⁷

The concluding Explanatory Statement to the Report of the Committee on Legal Affairs further argued that:

Moreover, in disputes which take place in a Community of States without borders, all having different legal systems but sharing a common heritage of human rights provisions and Community law, justice will often be served by applying *dépeçage*. It is for this reason, that [the amendment] provides that the court seized must, where necessary, subject each issue of the dispute to separate analysis. This may prove necessary, *inter alia*, in order to avoid having to apply *statuta odiosa* of non-Community countries. What is essential is that courts are provided with a clear instrument which allows them the necessary flexibility in order to do justice to the parties in individual cases.¹⁸

This idea, that the courts could avoid unattractive foreign laws through the device of *dépeçage*, raises important and controversial issues about the intended function and purpose of issue by issue analysis. The suggestion here that *dépeçage* 'enables the court seized to decline to apply a provision or provisions of foreign law whose consequences

in respect of the rule in Article 4, and not, for example, in respect of the special rules on product liability or unjust enrichment.

¹⁷ European Parliament Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (COM(2003)0427 – C5 0338/2003 – 2003/0168(COD)) A6-0211/2005 (27.6.2005), Amendment 26, p.19.

¹⁸ *Ibid*, p.38.

would be repugnant’ seems misplaced. Dépeçage has been adopted in some European states, but not as a device through which courts can avoid unattractive applicable laws. Under the traditional approach to conflict of laws, still dominant outside the United States, the choice of law process is generally supposed to be blind to substantive outcomes and the content of the different applicable laws, except when it comes to public policy (where the term *statuta odiosa* is more commonly used¹⁹). The argument suggested in the European Parliament’s proposal here, and elsewhere in its proposals in respect of Article 4, reflected a modern United States approach to choice of law rules: that they should permit outcome-selection, aimed at substantive or material justice, not merely conflicts justice, the selection of the most appropriate applicable law.²⁰ This is indeed the foundation of the United States conflict of laws revolution – the claim that judges in practice have used the complexity of traditional conflicts rules as ‘escape devices’ to choose their preferred outcome, and that choice of law rules should be more open textured to accommodate this process.²¹

The European Parliament’s proposed amendment here implicitly suggested that the courts should be permitted to choose between applicable laws based on their content. This is not, however, a proposition which is generally accepted in European states. This issue should not be confused with the question of whether conflicts rules themselves can be designed to achieve substantive objectives – this is obviously the case with at least some of the specialised rules in Rome II.²² It is an entirely different proposition, however, to give a court the discretionary power to choose between applicable laws based on their content.

The proposal was rejected by the Commission in its response to the European Parliament, no doubt because dépeçage was viewed as inconsistent with the Regulation objectives of certainty and predictability, although the specific question of dépeçage was not directly addressed. The point was not pursued further by the European Parliament in its Second Reading report or in later stages of the negotiations concerning Rome II.

¹⁹ The term derives from the medieval statisticians: see eg Mills, A, ‘The Private History of International Law’ (2006) 55 *International and Comparative Law Quarterly* 1 at pp.12-13.

²⁰ Symeonides, S, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 *American Journal of Comparative Law* 173 at p.181ff; Symeonides, S, ‘American Conflicts Law at the Dawn of the 21st Century’ (2000) 37 *Willamette Law Review* 1.

²¹ See generally Symeonides, S, ‘The American Choice of Law Revolution: Past, Present and Future’ (2006); Cavers, DF, ‘A Critique of the Choice of Law Problem’ (1933) 47 *Harvard Law Review* 173.

²² Note eg the rule on environmental damage in Article 7 of Rome II, which is clearly designed to favour the enforcement of environmental laws.

3.2 Comparative analysis

While Rome II may have excluded the possible application of multiple applicable laws through *dépeçage*, the fact that it was proposed invites further consideration and comparative analysis. A preliminary observation is that *dépeçage* as a phenomenon is of relatively recent origin in the history of choice of law in tort. The best explanation for this, and perhaps the most important basic observation concerning this approach, is that *dépeçage* cannot actually work as a device to evade rigid choice of law rules. If the choice of law rule is fixed, for example, a *lex loci delicti* rule with no flexible exception, as is now the case in Australia²³, it does not matter if a court undertakes issue by issue analysis. Applying the fixed rule to the tort as a whole is functionally identical to applying the fixed rule to each issue arising under the tort. *Dépeçage* can thus only arise as a live issue where more open textured choice of law rules are adopted, or where different choice of law rules apply to different issues or aspects of a dispute.²⁴ It is logically connected with the development of more flexible choice of law rules, not because it is a device to introduce flexibility, but because it works to multiply already existing flexibility in the choice of law process. Where *dépeçage* has arisen, as the following analysis will show, it seems to be a consistent point of policy uncertainty.

3.2.1 The common law

Historically, under the common law the choice of law rule in tort was the double-actionability rule established in the case of *Phillips v Eyre* (1870)²⁵, still applicable to claims in defamation which are excluded from the scope of both Rome II²⁶ and the Private International Law (Miscellaneous Provisions) Act 1995.²⁷ This provides, in effect, for the concurrent application of the law of the place of the tort (the *lex loci delicti*) and the law of the forum, requiring liability under both laws. While this rule is more complicated than a *lex loci delicti* rule, on a strict application it equally leaves no room for considerations of

²³ See section 3.2.3 below.

²⁴ This second possibility is discouraged by the broad definition in Article 15 of what is covered by the applicable law under Rome II.

²⁵ (1870) LR 6 QB 1.

²⁶ Article 1(1)(g).

²⁷ Section 13.

dépeçage. Double-actionability is functionally equivalent whether it is applied to the tort as a whole, or to each issue separately.

It was only with the introduction of a flexible exception to the double-actionability rule, recognised in the case of *Boys v Chaplin* (1969)²⁸, that dépeçage became meaningful as an issue under the common law. This case established that, in exceptional circumstances, the court can apply the law of the forum or the *lex loci delicti* exclusively.²⁹ This development raised the issue of whether the exception requires the application of the single law to the tort as a whole, or whether it can be used to require the application of that law to only one or more issues arising under the tort.

The leading judgment of Lord Wilberforce in *Boys v Chaplin* (1969) endorsed the operation of dépeçage in this context, finding that:

The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.³⁰

It is striking that the judgment exhibits the broader influence of United States interest analysis style approaches to choice of law³¹, and more particularly the influence of a 1968 proposed official draft of the American Law Institute's *Second Restatement of Conflict of Laws* (1969).³² Dépeçage was subsequently adopted by the strongly influential text of Dicey and Morris (9th edn, 1973)³³, as part of its description of the choice of law rule in tort, in which the flexible exception to the double-actionability rule was stated to involve

²⁸ [1969] 2 All ER 1085.

²⁹ In *Boys v Chaplin* (1969) only the law of the forum was applied. It was confirmed that the *lex loci delicti* could be applied exclusively in *Red Sea Insurance Co v Bouygues SA* (1995) 1 AC 190. It remains unclear under the common law whether the flexible exception can operate in favour of the law of a third state.

³⁰ [1969] 2 All ER 1085 at 1104; see also Lord Hodson at p.1094, referring to 'the specific issue raised in the litigation'.

³¹ [1969] 2 All ER 1085 at 1102ff.

³² [1969] 2 All ER 1085 at 1103; see also Lord Hodson at p.1094.

³³ Morris, JHC (ed), 'Dicey and Morris on the Conflict of Laws' (9th edn, 1973), Rule 178(2) (Rule 235 in the current 14th edition, now applicable only to defamation claims), which is expressly stated to be modelled on section 145 of the American Law Institute's *Second Restatement of Conflict of Laws* (1969).

issue by issue analysis. This interpretation was endorsed and confirmed by the Privy Council in the later case of *Red Sea Insurance Co v Bouygues SA* (1995), which in fact felt it necessary to confirm that the exception could be applied to the case as a whole, rather than just to an isolated issue.³⁴

3.2.2 United Kingdom statutory reform

Despite the increase in its flexibility, a growing sense of dissatisfaction with the double-actionability rule led to proposals for statutory reform of choice of law in tort which culminated in the Private International Law (Miscellaneous Provisions) Act 1995.³⁵ The basic approach of the Act is to adopt a *lex loci delicti* rule (in section 11), subject to a flexible exception (in section 12) where it is ‘substantially more appropriate’ to apply a different law. The development of this new rule again invited the question of whether the flexible exception ought to permit *dépeçage*, like the exception under common law. The law reform report which led to the adoption of the Act expressly and deliberately did not provide for *dépeçage*.³⁶ But it was, nevertheless, adopted by Parliament when the bill was passed, largely based on the observation that issue by issue analysis had been embraced under the common law and endorsed by Dicey and Morris.³⁷ It is, however, far from obvious why this consideration should have been decisive, given that the rule in the 1995 Act is so different from the common law double-actionability rule.

In any case, *dépeçage* is expressly built in to the exception in section 12 of the 1995 Act, which provides that it may operate to displace ‘the applicable law for determining the issues arising in the case, or any of those issues’. The availability of issue by issue analysis does not appear to have been crucial to the determination of the cases which have arisen so far concerning the application of section 12.

³⁴ [1995] 1 AC 190; see also *Johnson v Coventry Churchill International* [1992] 3 All ER 14.

³⁵ See Law Commission Working Paper No.87, ‘Private International Law: Choice of Law in Tort and Delict’ (1984); Law Commission Report No.193, ‘Private International Law: Choice of Law in Tort and Delict’ (1990).

³⁶ Law Commission Report No.193, ‘Private International Law: Choice of Law in Tort and Delict’ (1990), paragraph 3.52.

³⁷ See Special Public Bill Committee Report (1994-95), *Private International Law (Miscellaneous Provisions) Bill*, House of Lords Paper 36 (Amendments 26-27).

3.2.3 Australian and Canadian developments

Statutory codification of Australia's choice of law rules was also proposed in the early 1990s, and a Draft Uniform Choice of Law Bill of 1992 was produced by the Australian Law Reform Commission.³⁸ This proposal included choice of law rules for tort which were roughly equivalent to those adopted under the United Kingdom 1995 Act – a *lex loci delicti* rule modified by a flexible exception (in section 6(8)), which expressly authorised dépeçage. These proposals were not adopted, however, and the reform of Australian choice of law in tort has been instead conducted by the courts. It was already noted above that the present choice of law rule in tort in Australia is a strict *lex loci delicti* rule, as established by the High Court of Australia in *Regie Nationale des Usines Renault SA v Zhang* (2002).³⁹ As previously discussed, this rule, which applies both to choice of law questions between the various Australian states⁴⁰ and to international torts, leaves no scope for consideration of issue by issue analysis – it renders dépeçage redundant. The wisdom of such a strict approach may be doubted, based on the rather unsatisfactory sophistry it prompted from the High Court in *Neilson v Overseas Projects Corporation of Victoria* (2005)⁴¹ in order to evade the application of the *lex loci delicti*.

For torts which raise a choice of law question involving the laws of the different provinces of Canada, the Canadian Supreme Court has similarly adopted a strict *lex loci delicti* rule, in the case of *Tolofson v Jensen* (1994).⁴² However, unlike Australia, the Canadian Supreme Court made a distinction between domestic and international cases. For international cases, an exception to the *lex loci delicti* rule is available where it is necessary to achieve justice between the parties. This raises the question of whether the exception must be applied to the applicable law as a whole, or whether it may be subject to issue by issue analysis. The question does not appear to have arisen yet in the case law, but there is no indication from *Tolofsen v Jensen* (1994), or from the cases in which the flexible

³⁸ Australian Law Reform Commission, 'Choice of Law', Report No.58 (1992).

³⁹ (2002) 210 CLR 491.

⁴⁰ Adopted first in *Pfeiffer v Rogerson* (2000) 203 CLR 503.

⁴¹ [2005] HCA 54; noted in Mills, A, 'Renvoi and the Proof of Foreign Law in Australia' (2006) 65 Cambridge Law Journal 37.

⁴² [1994] 3 SCR 1022.

exception has subsequently been applied, such as *Hanlan v Sernesky* (1998)⁴³, that dépeçage is permitted under the Canadian choice of law rule for international torts.

3.2.4 United States

The introduction of dépeçage into United Kingdom law may thus be attributed, at least to some extent, to the influence of interest analysis and other United States approaches on Lord Wilberforce in *Boys v Chaplin* (1969). Dépeçage was widely adopted and advocated by adherents of interest analysis style approaches and other critics of the traditional *lex loci delicti* rule which was reflected in the American Law Institute's *First Restatement of Conflict of Laws* (1934).⁴⁴ It has been viewed as an inevitable consequence of interest analysis, or as 'the price that any issue-oriented approach inevitably exacts'.⁴⁵

This is true if interest analysis is taken, as it frequently is, to require an examination of the policy or interest behind any potentially applicable statute, from whatever legal system, to see whether it is engaged by the facts of the dispute. This 'statute-centred' approach to interest analysis, adopted by some scholars in the United States, invites the application of different statutes or even different parts of statutes to the issues of the dispute, depending on whether their policies are affected by the particular issue.⁴⁶ It is not, however, true that interest analysis is so closely connected to dépeçage if it is taken to mean merely the process of identifying the state most interested in the dispute. This 'state-centred' approach to interest analysis has no necessary implications for whether or not dépeçage is adopted. It

⁴³ (1998) 38 OR 3d 479.

⁴⁴ Section 377; see further Ena, M, 'Choice of Law and Predictability of Decisions in Products Liability Cases' (2007) 34 Fordham Urban Law Journal 1417 at p.1420ff; Stevenson, CG, 'Depeçage: Embracing Complexity to Solve Choice-of-Law Issues' (2003) 37 Indiana Law Review 303; Reese, WLM, 'Dépeçage: A Common Phenomenon in Choice of Law' (1973) 73 Columbia Law Review 58; Wilde, CL, 'Depeçage in the Choice of Tort Law' (1968) 41 Southern California Law Review 329.

⁴⁵ Juenger, FK, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American Journal of Comparative Law 1 at p.41ff.

⁴⁶ Juenger, FK, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American Journal of Comparative Law 1 at pp.10-11, 41-42; McDougall, LL, 'Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence' (1979) 26 UCLA Law Review 439. Numerous authors have pointed out the similarity of this approach to that of the medieval statisticians, with their classification of laws as personal or territorial: see eg Mills, A, 'The Private History of International Law' (2006) 55 International and Comparative Law Quarterly 1 at pp.11-12. One of the pioneers of this approach was Brainerd Currie, but note that he himself had reservations concerning dépeçage, favouring the application of the law of the forum in any case of 'true conflict': note Currie's comment in Cavers, DF, 'The Choice of Law Process' (1965) at pp.38-39 that 'It is one thing to fall between two stools; it is quite another to put together half a donkey and half a camel, and then ride to victory on the synthetic hybrid'.

is perfectly possible to have an interest analysis approach which looks to the state with the greatest interest in the dispute as a whole, refusing to analyse different issues separately. It is also perfectly possible to have *dépeçage* without interest analysis, as part of a choice of law rule based purely or primarily on objective connecting factors – as was adopted in the Private International Law (Miscellaneous Provisions) Act 1995, and reflected in the common law under *Red Sea Insurance Co v Bouygues SA* (1995).⁴⁷

It remains true, however, that there is a broader congruence between interest analysis and *dépeçage*, and an association between these ideas and approaches. It might be argued that this comes simply from an underlying objective of interest analysis scholars and the United States conflict of laws revolution – the introduction of greater flexibility into choice of law rules. This also, perhaps, explains its influence beyond strict adherents of interest analysis, such as its adoption in the context of choice of law in tort in the American Law Institute's *Second Restatement on Conflict of Laws* (1969).⁴⁸ While it might be thought that more open textured choice of law rules would have less need for *dépeçage*, the fact that it multiplies the effect of existing flexibility may, without further consideration of its policy effects, make it attractive to advocates of the extreme flexibility which is characteristic of much modern United States choice of law.

3.3 Evaluation

The analysis above reveals consistent uncertainty about the desirability of the adoption of *dépeçage* in choice of law rules, and does not provide a clear answer to the question of whether *dépeçage* should or should not have been adopted as part of Rome II. While there is of course room for different views on this question, this section will suggest that the exclusion of *dépeçage* from Rome II was the preferable approach.

The exclusion of issue by issue analysis from Rome II has been strongly criticised in a recent article by Professor Symeon Symeonides⁴⁹, who regrets particularly the absence of the additional flexibility it would have given to the choice of law rules. It is certainly true

⁴⁷ [1995] 1 AC 190.

⁴⁸ Section 145.

⁴⁹ Symeonides, S, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 American Journal of Comparative Law 173 at p.184ff.

that one can make an argument, as Professor Symeonides does, that the choice of law rules in Rome II are insufficiently flexible. He demonstrates that the basic rules in Article 4(1) and Article 4(2) will arguably give inappropriate results in some circumstances. It is also evident that Article 4(3) will only apply very exceptionally, because Article 4(1) and Article 4(2) are both based on objective connecting factors, and Article 4(3) only allows a departure from these rules based on consideration of objective connections. It will rarely be clear that another country is manifestly more closely connected than the country of common habitual residence or the place of the damage, especially because Article 4(1) implicitly appears to disapprove of using other connecting factors such as the place of action or the place of the indirect consequences of the tort. As previously noted, Article 4(3) does not allow considerations of appropriateness, like section 12 of the United Kingdom 1995 Act, nor does it permit considerations of justice, like the flexible exception to the common law double-actionability rule developed in *Boys v Chaplin* (1969).⁵⁰ Thus, the exception established in Article 4(3) is relatively narrow and inflexible. It can, therefore, fairly be argued that issue by issue analysis would beneficially increase this flexibility, because it would be more likely that a single issue might be manifestly more closely connected with another country than the tort as a whole.⁵¹ Such flexibility could, however, equally be achieved by making the rule in Article 4(3) more open to considerations of justice and appropriateness.

An additional argument made in favour of *dépeçage* in choice of law in tort more specifically considers its particular characteristics and effects. This argument draws on a distinction sometimes developed in United States scholarship, which purports to distinguish between different types of torts, or between different issues in a single tort claim.⁵² Some torts or issues are said to be concerned with conduct regulation, with issues of deterrence, which suggests a focus on the standard of liability. Other torts or issues are said to be concerned with the loss distributing effects of a tort, with the issue of reparations, which suggests a focus on damages. It is sometimes argued that *dépeçage* is a

⁵⁰ [1969] 2 All ER 1085; see also *Red Sea Insurance Co v Bouygues SA* (1995) 1 AC 190; *Johnson v Coventry Churchill International* [1992] 3 All ER 14.

⁵¹ See eg Carruthers, JM and Crawford, EB, 'Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part II' (2005) 9 *Edinburgh Law Review* 238 at p.253.

⁵² Famously adopted, under the influence of interest analysis approaches, in *Babcock v Jackson* (1963) 191 NE2d 279 (NY) at 284.

useful component of choice of law analysis in tort because it allows a court to separate out these issues and determine the appropriate applicable law for each of them separately.

It must be questioned, however, whether this distinction is really useful. The amount of damages awarded for a tort must, to some extent, be conduct regulating. Equally, the standard of liability for a tort claim determines the question of whether there is any loss distribution, and if so how much. This is, arguably, the problem which lies at the heart of issue by issue analysis. Dépeçage may be viewed as an expression of doubt about the effectiveness of choosing any single applicable law in the complex world of multi-state torts with elements and effects felt in various countries. But it is vulnerable to the criticism that it is not possible (or at least not possible often enough to justify the adoption of the rule⁵³) to distinguish and analyse issues separately as part of a choice of law process, that this would constitute what is known in law and economics terminology as an ‘isolation fallacy’.⁵⁴ To the extent that dépeçage is adopted, it may be argued that it creates an artificial fragmentation (a ‘dismemberment’, as dépeçage might literally be translated) of policy interests – a Frankenstein’s monster combining reanimated parts taken from diverse national tort laws.⁵⁵ Although there is no doubt that in some circumstances this may be done without producing results deserving of such caricature, it remains questionable

⁵³ Note, however, the argument that the applicable law for certain issues should be identified separately in the context of the validity of marriage, in Reed, A, ‘Essential Validity of Marriage: The Application of Interest Analysis and Depeçage to Anglo-American Choice of Law Rules’ (2000) *New York Law School Journal of International and Comparative Law* 387 at p.412ff; see also the arguments in favour of dépeçage in Reese, WLM, ‘Dépeçage: A Common Phenomenon in Choice of Law’ (1973) *73 Columbia Law Review* 58; Stevenson, CG, ‘Depeçage: Embracing Complexity to Solve Choice-of-Law Issues’ (2003) *37 Indiana Law Review* 303 at p.327ff.

⁵⁴ Allen, WH and O’Hara, EA, ‘Second Generation Law and Economics of Conflict of Laws: Baxter’s Comparative Impairment and Beyond’ (1999) *51 Stanford Law Review* 1011 at pp.1034-7; Allen, WH and O’Hara, EA, ‘From Politics to Efficiency in Choice of Law’ (2000) *67 University of Chicago Law Review* 1151 at p.1192-3; see also Ena, M, ‘Choice of Law and Predictability of Decisions in Products Liability Cases’ (2007) *34 Fordham Urban Law Journal* 1417 at p.1451-2 (arguing for the exclusion of dépeçage from any future Third Restatement on Conflict of Laws, in the context of product liability); Stevenson, CG, ‘Depeçage: Embracing Complexity to Solve Choice-of-Law Issues’ (2003) *37 Indiana Law Review* 303 at p.320ff; Wilde, CL, ‘Depeçage in the Choice of Tort Law’ (1968) *41 Southern California Law Review* 329 at p.358ff.

⁵⁵ Weintraub expressly argues that the court should craft its own law from the available raw materials of the laws of the interested states: Weintraub, RJ, ‘Beyond Dépeçage: A ‘New Rule’ Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code’ (1974) *25 Case Western Reserve Law Review* 16.

whether European national courts would be acting appropriately in exercising this degree of discretion and ‘result-selectiveness’.⁵⁶

Instead, there is a strong argument that a single law should govern all aspects of a tort, including standards of behaviour or liability and issues of damages. This is because a system of tort law contains a balance between these different considerations – a tort with a very low threshold for liability will correspondingly provide for equally low damages; breach of a tort with a very high threshold is likely to command higher damages. Issue by issue analysis necessarily involves taking these decisions out of context, and in doing so it risks establishing hybrid torts with one of two faults – a low threshold of liability but with high damages, giving a windfall to the claimant, or a high threshold of liability and low damages, giving a windfall to the defendant. In either case, the unbalanced result reached is not provided for in any legal system. This argument follows from the simple observation that the different aspects of a tort are not independent but are related to each other, forming part of a single coherent system of regulation, ‘a cohesive whole that cannot be easily cannibalized’.⁵⁷

This does, to some extent, beg the question of whether ‘coherence’ in regulation is something which should be valued in conflict of laws. It has arguably been rejected by some United States scholars, perhaps because it appears to constitute a deference to states which is out of step with the policy focus of the United States conflict of laws revolution.⁵⁸ But coherence is not desirable merely out of deference to states, but because it is far more likely to achieve a fair and balanced result for the parties, a balance, for example, between standards of liability and damages.

⁵⁶ See eg Wilde, CL, ‘Depeçage in the Choice of Tort Law’ (1968) 41 Southern California Law Review 329 at pp.330, 356ff.

⁵⁷ Kozyris, PJ, ‘Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ ‘Missed Opportunity’ (2008) 56 American Journal of Comparative Law 471 at p.477.

⁵⁸ Thus, ‘That different states have real interests in applying their law to different issues in a case justifies combining laws to reach a result that would not be possible if one state’s laws were applied in its entirety’: Sedler, RA, ‘The Governmental Interest Analysis Approach to Choice of Law: An Analysis and a Reformulation’ (1977) 25 UCLA Law Review 181 at p.243. See further Stevenson, CG, ‘Depeçage: Embracing Complexity to Solve Choice-of-Law Issues’ (2003) 37 Indiana Law Review 303; Juenger, FK, ‘Conflict of Laws: A Critique of Interest Analysis’ (1984) 32 American Journal of Comparative Law 1 at p.42; McDougall, LL, ‘Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence’ (1979) 26 UCLA Law Review 439 at p.456; Reese, WLM, ‘Dépeçage: A Common Phenomenon in Choice of Law’ (1973) 73 Columbia Law Review 58 at pp.65ff, 74.

It is sometimes suggested that *dépeçage* can assist with the choice of law process in a different way. The loss suffered by an individual who is physically harmed as the result of a tort will depend, to some extent, on the medical costs in the country in which they are treated, which may be different from the country in which the wrongful acts occur or the direct damage is suffered. Thus, it is argued, *dépeçage* might provide a useful device to ensure that appropriate compensation is received, by allowing for the application of a different applicable law to the question of damages. This, however, seems an unsatisfactory mechanism to achieve such a result. It would be better if the substantive law of damages as part of the applicable law were sophisticated and flexible enough to take into consideration the actual medical expenses incurred or to be incurred by the injured party. This solution is, in fact, suggested in respect of traffic accidents in Recital 33 of Rome II, which provides that:

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

Despite its form, it is somewhat unclear whether Recital 33 is a purely descriptive assertion that the courts of all Member States already act according to the principle it describes, or whether it is intended to instruct and influence them to adopt such an approach. In any case, of course, there can be no guarantee that every legal system in the world would provide for such a rule. Perhaps the better solution here lies in the emergence of a 'mandatory rule' of European law, or a rule of European public policy, that damages must be genuinely compensatory for the loss suffered by the injured party, including reasonable medical expenses incurred in a country with which they have a legitimate connection.

4 Party autonomy

One of the policies evidently adopted by Rome II is that effect, in limited and defined circumstances, should be given to party autonomy. This is provided for in both Article 14, dealing with choice of law agreements affecting torts, and Article 4(3), which specifically envisages that ‘a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question’. The primary objective of these rules is, of course, to meet the expectations of the parties. They can, however, have an incidental effect on the application of multiple laws to a claim. The principal effect will be to ensure that a single law applies to multiple causes of action, reducing the significance of the framing or characterisation of the claim under forum law. Where, for example, a claim could be brought in contract or in tort, giving effect to a choice of law agreement is likely to have the effect of ensuring that the one law governs both types of claim. Giving effect to party autonomy may, however, in some circumstances also have an effect on the application of multiple laws to a claim in tort.

4.1 Choice of law agreements encompassing torts

Although the text of Article 14(1) does not directly address the question of the application of multiple laws, it may nevertheless arguably give rise to this phenomenon in two situations.⁵⁹ First, the parties may choose a law in a contract, but expressly provide that the law only governs some issues of the tort, for example, the calculation of damages. Presumably, in these circumstances, Article 4 would have to be relied on to determine the law governing other issues. Article 4(3) could in some circumstances lead again to the application of the law of the contract between the parties, although given the narrowness and relative inflexibility of the exception this could not be expected in all circumstances, and might in any case appear to go against the intentions of the parties. Second, the parties could enter into a choice of law agreement which adopted their own issue by issue analysis, specifying that multiple laws are to be applied – for example, that one law was to be applied to questions of the standard of liability, and another law was to be applied to questions of damages. Although Article 14 requires that a choice of law agreement entered

⁵⁹ See Symeonides, S, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 *American Journal of Comparative Law* 173 at p.186.

into prior to a tort be ‘freely negotiated’ between parties ‘pursuing a commercial activity’, there could be situations where a commercial party with greater bargaining power would recognise the benefit of binding their counterpart to a hybrid tort law, with a low threshold of liability from one law and high damages from another. In some circumstances giving effect to party autonomy may thus have the effect of introducing *dépeçage* into the choice of law analysis. While Article 14 does not directly contemplate such a possibility, there equally does not appear to be any limitation on the ability of the parties to create such an effect – thus, the policy of giving effect to party autonomy appears to take priority over the exclusion of *dépeçage* and the risk of fragmentation of the applicable law.

4.2 Multiple applicable laws in underlying contracts

As noted above, Article 4(3) of Rome II may operate in narrow circumstances to ensure that the same law governs both contractual and tort claims, where there is an underlying contract. It must be presumed, although it is not clear from the text of Article 4(3), that what is proposed is that the tort is governed by the law applicable to the contract.⁶⁰ But this may give rise to problems if the contract is itself governed by more than one applicable law.⁶¹ Both the Rome Convention⁶² and the Rome I Regulation⁶³ permit the parties to choose, expressly or impliedly, a law which governs only part of their contract, potentially giving rise to a contract governed by more than one applicable law. The Rome Convention also overtly permits the application of different laws to different parts of a contract in the absence of party choice, if ‘a severable part of the contract’ may be identified.⁶⁴ While such a rule is not expressly provided for under the Rome I Regulation, there is at least an argument that the courts may still give effect to it by severing a contract prior to the application of the choice of law process. It is thus evidently possible that there may be multiple laws applicable to a single or set of contracts applying between the parties. It is

⁶⁰ Symeonides, S, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 *American Journal of Comparative Law* 173 at p.203.

⁶¹ On the application of *dépeçage* in contract, see the anonymous editorial note, ‘Article 7(1) of the European Contracts Convention: Codifying the Practice of Applying Foreign Mandatory Rules’ (2001) 114 *Harvard Law Review* 2462 at p.2466ff; McLachlan, C, ‘Splitting the Proper Law in Private International Law’ (1990) 61 *British Yearbook of International Law* 311.

⁶² Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (consolidated at OJ C 027, 26.1.1998), Article 3(1).

⁶³ 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) (OJ L 177), Article 3(1).

⁶⁴ Article 4(1).

unclear how Article 4(3) could apply in these circumstances, if the contracts concerned different issues or elements of a tort. If more than one law governed the contractual relationship between the parties, giving effect to party autonomy might again seem to necessitate the application of *dépeçage*. On balance it seems unlikely that Article 4(3), which is intended to operate exceptionally, would have effect in this situation.

5 Taking account of rules of safety and conduct

This paper has examined the possibility of multiple applicable laws under Rome II, and not the possible role of supplementary laws. As discussed in the introduction above, these typically involve the application of the law of the forum to questions of procedure, and consideration of the mandatory laws and public policy of the law of the forum. Rome II does, however, provide for one way in which foreign law may play a role which is not clearly either a ‘supplementary law’ or a ‘multiple applicable law’, under Article 17:

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

This provision was proposed by the European Commission, and adopted including amendments negotiated with the European Parliament. It is not unique to Rome II – similar provisions form part of various national private international law codifications.⁶⁵ There is, however, some uncertainty about the meaning and effect of this rule, and in particular whether it is intended to allow for the application of an additional foreign law to the particular issue of assessment of conduct of the defendant.

The better view is probably that this article merely affirms the particular role which foreign law may play, consistently with the approach taken under the common law, as part of the background factual matrix to a dispute – what has been described as the use of foreign law

⁶⁵ See Symeonides, S, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 *American Journal of Comparative Law* 173 at p.211; Symeonides, S, ‘Tort Conflicts and Rome II: A View From Across’, in Hansel, H-P et al (eds), *Festschrift für Erik Jayme* (2004), part 4.1.

as ‘datum’.⁶⁶ An obvious example is that when determining whether the driving of a defendant was negligent in France, even though English law may (for example, by virtue of Article 4(2)) be applicable to the substance of the tort, account must be taken of French road rules, including of course the obligation to drive on the right hand side of the road. Of course, such rules must also apply to the claimant’s conduct, if there are possible considerations of contributory negligence – presumably the narrow drafting of Article 17 is not intended to exclude this.⁶⁷ In any case, the better characterisation of this rule is that it does not provide for the application of multiple applicable laws to the substance of the dispute, but recognises the role that foreign law can play as part of the factual evidence for the claim. This only leaves uncertain why it was felt necessary to include this rule as part of a regulation on choice of law.

6 Conclusion

It is widely recognised that choice of law in tort involves balancing a variety of policy considerations, and these policy considerations are equally at stake in the determination of the extent to which Rome II should provide for multiple applicable laws.

Private international law rules need to possess a degree of certainty and predictability, policies which are particularly prominent in European Union conflicts instruments focused on the needs of the internal market, and have been supported in the United States by economic analysis of choice of law. These policies are behind the application of a fixed and predictable *lex loci delicti* rule in Article 4(1) of Rome II, and particularly the definition in advance of the place of the tort as the place of damage. They also suggest the application of a single predominant law to non-contractual obligations, minimising the expense and complication of establishing liability under and proving the content of multiple laws. However, by selecting a strict *lex damni* rule, Rome II provides for multiple

⁶⁶ Ehrenzweig, AA, ‘A Treatise on the Conflict of Laws’ (1962) p.362; see also Kay, HH, ‘Conflict of Laws: Foreign Law as Datum’ (1965) 53 California Law Review 47; but see Symeonides, S, ‘Tort Conflicts and Rome II: A View From Across’, in Hansel, H-P et al (eds), *Festschrift für Erik Jayme* (2004), part 4. This is not to suggest that it is always easy to draw the line between the use of foreign law as datum and its role in resolving substantive or incidental questions, described as an ‘elusive distinction’ in Fentiman, R, ‘Foreign Law in English Courts: Pleading, Proof and Choice of Law’ (1999) p.77.

⁶⁷ But see Symeonides, S, ‘Rome II and Tort Conflicts: A Missed Opportunity’ (2008) 56 American Journal of Comparative Law 173 at p.213.

applicable laws where damage is suffered in multiple countries, under the mosaic effect of Article 4(1). Certainty in the choice of law rule here is achieved at the cost and increased expense of potentially fragmenting a single tort into multiple actions, each governed by a different applicable law. It certainly could be argued that more flexibility in the rules, perhaps allowing for greater considerations of appropriateness under Article 4(3), would assist in reducing these effects.

At the same time, private international law rules need a degree of flexibility, to ensure that they are adaptable enough to the needs of each individual case – a policy behind the development of very flexible interest analysis approaches in the United States. The need to ensure that the most appropriate law is applied is usually met in Europe through open textured exceptions, a requirement to some extent reflected in Article 4(3) of Rome II, or devices which allow for the flexibility of applying supplementary laws. This might suggest that different laws would be appropriate for different issues or elements of a non-contractual obligation, giving rise to the application of multiple laws. Rome II, however, rejects any role for issue by issue analysis in the determination of the applicable law. There is room for debate over whether *dépeçage* might have introduced helpful flexibility into Article 4(3). But perhaps the added flexibility and other advantages of getting the most appropriate law for different elements of a tort are outweighed by the disadvantages of having multiple applicable laws. It may ultimately be illusory to think that multiple interests can or should be satisfied by the application of multiple laws – instead, this risks satisfying no-one, and applying a fragmented and incoherent law of nowhere. The rejection of *dépeçage* in Rome II must also, at least in part, be considered a rejection of the United States conflict of laws revolution, which, in its attention to the policy interests of each potentially applicable statute, embraces this type of fragmentation. While Rome II may legitimately be criticised for a lack of plasticity in its rules, there is a strong argument that *dépeçage* would not have been the right method to achieve greater flexibility.

A further fundamental policy issue is the desire to give effect to party autonomy, a policy reflected in the effect given in Rome II to choice of law agreements and underlying contracts between the parties. This policy will often ensure that one law governs both contractual and non-contractual claims between the parties, increasing certainty. In other circumstances, however, Rome II allows for the possibility that party autonomy can itself

work to introduce greater fragmentation into the applicable law, if that is what the parties choose.

Finding the right compromise between all these policy considerations is obviously an extremely difficult task. On the issue of multiple applicable laws, Rome II strikes an uneasy and somewhat equivocal balance which, while reasonable and workable, will inevitably have its critics.