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From Rule-Orientation to "Approach" in German Conflicts Law

The Effect of the 1986 and 1999 Codifications

INTRODUCTION

German choice-of-law rules, not unlike those of most of Continental Europe, traditionally have had a territorial orientation. They were "jurisdiction selecting" rules.[1] American law, in contrast, moved away from jurisdiction-selective, fixed rules. Instead, "approaches" to choice of law seek to identify the "most significantly related" law (so the *Restatement (Second) Conflict of Laws* in its secs. 145 (torts) and 188 (contracts)), the "better rule of law," or the law of the most "interested" legal system.[2] The American development – from "rule" to "approach" – has been much decried in Europe over the years.[3] Reasons included, foremost, the uncertainty that the American method entails – with resulting lack of "decisional harmony"[4] from case to case and legal system to legal system – and the fear that the approach-methodology could be *issue*, rather than *case* oriented and thus lead to *dépeçage*, the application of different laws to the several issues of a case. *Dépeçage* is, of course, what has happened wholesale in the United States when the rules of the *First Restatement* were abandoned. The *Second Restatement*, in its tort and contract provisions, in fact directs the determination of the law most significantly related to "the particular issue." The other approaches are likewise issue-oriented.[5] An interstate or international case may thus be "taken apart" and different laws applied to its different aspects.

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1. See Hay, "Flexibility versus Predictability and Uniformity in Choice of Law," Hague Academy, 226 *Recueil des Cours* 281, 339 (1991-I).

2. Hay, id., at 350 et seq.; Eugene Scoles, Peter Hay, Patrick Borchers & Symeon C. Symeonides, *Conflict of Laws* § 2.9 et seq. (3d ed. 2000); Friedrich K. Juenger, *Choice of Law and Multistate Justice* 88 et seq. (1993).

3. Gerhard Kegel, *Internationales Privatrecht* 112-14 (7th ed. 1995) [hereinafter Kegel, *IPR*]; Kegel, "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers," 27 *Am. J. Comp. L.* 615 (1979); Audit, "A Continental Lawyer Looks at Contemporary Choice-of-Law Principles," 27 *Am. J. Comp. L.* 589 (1979).

4. Jan Kropholler, *Internationales Privatrecht* § 6 (3d ed. 1997).

5. Hay, supra n. 1, at 350 et seq.

To be sure, characterization – using the "applicable" foreign law, if this be the case, only to the "substantive" issues of a case, but applying local law (the *lex fori*, forum law) to all procedural matters – already produces *dépeçage*. This will be the case in any legal system. However, the American "approach"-model to choice-of-law allows, even calls for *dépeçage* with respective to *substantive* matters.

European conflicts law of course also needs to deal with the characterization problem, at times arriving at different results from those obtaining in the United States.[6] Beyond that, as noted, it has been a rule-based system and, within the framework of those rules, Europeans traditionally have not favored the splitting-up of cases into issues, *dépeçage*.[7]

Except for family and succession law issues, for which the 1986 revision of the German conflicts statute[8] regrettably still adheres to a person's nationality/citizenship as the principal connecting factor,[9] German conflicts law increasingly has adopted flexible rules. They are at once reminiscent of their U.S. precursors and, reflecting the experience with the latter, may improve upon them.

The following comments briefly recall the 1986 statute as it relates to the codification of choice of law in contract. They then turn to consider the 1999 statute which codified conflicts rules with respect to torts, unjust enrichment, "agency without mandate," and property.[10] An appendix contains the provisions in English translation. The statute still lacks provisions on choice of law in corporate matters. In addition, the government's official comments accompanying

6. Time limitations, for instance, are generally characterized as substantive in European legal systems, including in Germany. Kropholler, supra n. 4, at 283. In the United States, time limitations have generally been regarded as procedural, leading to the application of forum law, except when the forum, by statute, "borrows" the foreign shorter limitations to prevent forum shopping. More recently, time limitations have also been subject to interest-balancing tests. See Gantes v. Kason Corp., 145 N.J. 478, 679 A.2d 106 (1996); Braune v. Abbott Laboratories, 895 F.Supp. 530, 565-66 (E.D. N.Y. 1995).

7. As in many legal systems, the applicable law may differ with respect to matrimonial property and succession issues upon the death of an intestate spouse. For an example, see Peter Hay, *Internationales Privatrecht* 307-09 (PdW Series 1999).

8. German conflicts law is codified in the Introductory Law to the Civil Code (hereinafter EGBGB). A 1986 statute amended it and brought major reforms, the 1999 statute added further provisions.

9. Over 7,319,000 foreigners lived in Germany in 1998, or almost 9 % of the total population. Statistisches Bundesamt Deutschland, Bevölkerung (1999). It makes little sense to determine capacity to marry (Art. 13 EGBGB) or intestate succession (Art. 25 EGBGB) on the basis of the nationality, especially when the court or agency is to make this determination *ex officio* (see § 293 German Code of Civil Procedure).

10. Germany, *Bundesgesetzblatt* 1999, I, 1026. For summaries and comment, see Staudinger, "Gesetz zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen vom 21.5.1999," 1999 *Der Betrieb* 1589; Wagner, "Der Regierungsentwurf eines Gesetzes zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen," 1998 *IPRax* 429ff.; Busse, "Die geplante Kodifikation des internationalen Bereicherungsrechts in Deutschland," 1999 *RIW* 16ff.

the draft bill's submission to the parliament repeatedly state that certain details are not addressed because they are sufficiently established in the case law.[11]

CONTRACTS

The 1986 German Conflicts Statute incorporates the Rome Convention on the Law Applicable to Contractual Obligations.[12] Both permit the parties to stipulate the applicable law. In fact, they may provide that the law selected shall apply only to a part of the contract.[13] The remainder of the contract will then be governed by the law identified by the default rule (below). *Dépeçage* will have occurred. The parties cannot refer to something that is not the law of a state, such as the *lex mercatoria* or the UNIDROIT Principles.[14] They remain free, of course, to write such matters into their contract expressly. Except for this limitation, party autonomy in Convention states is far-reaching. There is no general requirement, for instance, that the law selected have a relationship to the subject matter of the contract.[15]

The default rule (i.e., in the absence of a party stipulation) calls for the application of the "most closely connected law."[16] This may at first seem as vague and unhelpful to courts as the *Second Restatement's* reference to the law of the state of the "most significant relationship." The *Restatement* makes things more difficult still: the most significant relationship is to be determined on the basis of the "general principles" of § 6. They list a number of policy goals, in no order of priority. Unguided, let alone directed, courts can achieve whatever

11. See, e.g., *Bundestagsdrucksache* 14/343, at 10 (1999) (no provision necessary for infringement of patents and trademarks in view of the generally accepted reference to the law of the state protected).

12. German, English, and French versions in *Bundesgesetzblatt* 1986, II, 809 and 1995, II, 307.

13. Art. 27(1)3 EGBGB = 3(1)3 Rome Convention.

14. See Juenger, "Private International Law and the German Legislature," in Kübler, Scherer & Treek (eds.), *The International Lawyer - Freundesgabe für Döser* 623, 629 (1999).

15. Kegel, *IPR*, supra n. 3, at 483; Kropholler, supra n. 4, at 273. Exceptions: 27(3) EGBGB = 3(3) Rome Convention; 34 EGBGB = 7 Rome Convention; compare in contrast *Restatement (Second) of Conflict of Laws* § 187, comment *f* and UCC 1-105(1) ("reasonable relationship"): Scoles, Hay, Borchers & Symeonides, supra n. 2, at § 18.8 et seq.

16. The concept is not new. Westlake referred to "the most real connection" as early as 1880 (*A Treatise on Private International Law* § 201, at 237 (2d ed. 1888)); Nadelmann has shown other early European antecedents: "Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws," 28 *Am. J. Comp. L.* 61 (1980). The concept now appears in the Austrian (§ 1), Greek (Art. 25), Romanian (Arts. 77-78), Swiss (Art. 117), Venezuelan (Art. 30) codifications, among others. It is also contained in § 145, para. 2, of China's General Principles of Civil Law (1986). See Riering (ed.) *IPR-Gesetze in Europa* (1997) and Kropholler, Krüger, Riering, Samtleben & Siehr (eds.), *Außereuropäische IPR-Gesetze* (1999).

result is desired.[17] The Convention, in contrast, provides that the closest connection exists to the law of the residence of the person rendering the "characteristic performance."[18] This, and other presumptions for the determination of the closest connection give the latter both some limits and also meaning. The presumptions may not always work. Exceptionally, therefore, the result reached on the basis of the preceding analysis may require correction: the otherwise applicable law perhaps should be displaced by an even "more closely" connected law.[19] Contrary to criticism by some,[20] the combination of principle-presumption-back-to-principle seems better designed to achieve predictable results than does the reference to unprioritized policies. This may explain in part why this approach has proved increasingly attractive to many states.[21] In response to a European Union directive, the German (and other EU states') default rule for insurance contracts, other than for re-insurance, now also calls for the application of the most closely connected law.[22] In American law, *stare decisis* ameliorates the lack of predictability over time. In a civil law system, more certain guidelines are needed from the beginning.[23] In 1999, further codification of German conflicts law has brought more flexibility also to torts and to additional areas. These changes, ironically, came at time when England and Canada decided to adhere to a more traditional *lex loci delicti commissi*-rule in tort, dropping only the double-actionability requirement of prior law.[24]

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17. Hay, supra n. 1, at 373.

18. Art. 28(2)1 EGBGB = 4(2)1 Rome Convention.

19. Art. 28 (5) EGBGB = 4(5) Rome Convention.

20. See Juenger, supra n. 14, at 630. The criticism is justified that the direction, in the new (1997) § 1051 (2) of the German Code of Civil Procedure, that arbitrators apply the most closely connected law in the absence of party stipulation is not desirable. Id., at 634. This provision unnecessarily looks to results in arbitration that will track national conflicts rules for contract (Art. 28) and tort (Arts. 40-41, discussed infra).

21. See supra n. 16. The Romanian provision, for instance, adopted in 1992, tracks the Rome Convention on the Law Applicable to Contractual Obligations.

22. Art. 11(1), Introductory Law to the Law Concerning Insurance Contracts, *Bundesgesetzblatt* 1990, I, 1249. As in Art. 28 EGBGB, the general contracts conflicts provision, an independent part of the insurance contract may, by way of exception, be severed and be subjected to a different law that is more closely related to it. Paragraph 2 contains a presumption in favor of the situs of the covered risk.

23. For this reason, the criticism is not well taken that the drafters of the Rome Convention (source of the German contracts conflicts provision) "were not particularly enamored with judicial discretion." Juenger, supra n. 14, at 630. More serious may be the substantive criticism (id., at 630-31) that the reference to the domicile or establishment of the provider of the "characteristic performance" unduly favors "a certain class of enterprises, namely those that supply goods and services internationally." The criticism overlooks, however, the extensive recourse to arbitration (but see supra n. 20) and the use of choice-of-law clauses, especially also of floating choice-of-law and choice-of-court clauses. These are specifically intended to avoid imbalance. See Rasmussen-Bonne, *Alternative Rechts- und Forumswahlklauseln* (1999).

24. For England, see Private International Law (Miscellaneous Provisions) Act 1995 c. 42, Part III, secs. 9-15. For Canada, see Tolofson v. Jensen, [1994] 3 S.C.R.

TORTS

German conflicts law was a fragment until 1999. The original conflicts statute did not cover torts, its most serious gap. The 1999 amendment dealing with torts, unjust enrichment, property and aspects of agency now expands the statutory scheme dealing with choice of law.

The traditional reference was to the "place of the tort," both for the exercise of judicial jurisdiction and for choice of law. The debate about whether that place is where the defendant acted or where the injury[25] occurred received an early answer that differed from that given in the American classic, *Alabama Great Southern Railroad Co. v. Carroll*[26]: The "place of the tort" is in both places.[27] With respect to judicial jurisdiction,[28] the rule affords the plaintiff some needed choice in the absence of such general bases of jurisdiction – available in U.S. law – as transient service or jurisdiction based on doing business.

The (judge-made) choice-of-law rule was the same as for judicial jurisdiction: either place is the place of the tort. As between the two, the law that is the more favorable to the injured plaintiff applies and is to be determined *ex officio*.

Two statutory rules modified the general rule. A 1942 Decree Law, an early precursor of *Babcock,*[29] provided that German law applies to torts between Germans abroad.[30] Originally designed to apply to German military personnel in World War II, the rule was first extended judicially to apply generally when the parties shared the same nationality, more recently common residence would also bring it into operation.[31] The other exception provided – chauvinistically –

1022; Tetley, "Current Developments in Canadian Private International Law," 78 *Can. B. Rev.* 152, 195 (1999).

25. The "place of injury" is where the legally protected right was violated, not where the consequences of the violation manifest themselves. See Kegel, *IPR*, supra n. 3, at 540. Legally protected rights under substantive law (Art. 823 I Civil Code, BGB) are: life, body, health, liberty, ownership, or "another right." Property rights, including commercial and industrial property rights, and the right to privacy are such "other rights," among others. See Brox, *Besonderes Schuldrecht* 342-49 (24th ed. 1999).

26. 97 Ala. 126, 11 So. 803 (1892).

27. RGZ 23, 305 (306) (1888).

28. § 32 German Code of Civil Procedure: RGZ 72, 41 (42f.) (1910); BGHZ 40, 391 (394) (1963). With respect to defendants with habitual residence in the European Union, see Art. 5 No. 3, Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters. See Court of Justice of the EC, Case 21/76, [1976] ECR 1735.

29. Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

30. Germany, *Reichsgesetzblatt* 1942, I, 706.

31. See infra n. 38.

that German law limits a German's liability for torts committed abroad, even for claims otherwise governed by foreign law.[32]

The combination of statutory rules of different origin and purpose and of a considerable body of judge-made law was unsatisfactory. Legislative drafts lingered for years. They finally produced the 1999 statute. It considerably "softens"[33] choice of law in torts and in the other areas it addresses, but it also presents difficulties of its own.

The basic provision is simple enough. In the absence of a choice by the parties (see below),[34] the law of the place of tort – now defined as *the place of acting* – applies (Art. 40(1)). The alternative reference of prior case law to the place of the injury has not been displaced, but it has been limited in two respects. First, the search for the law more favorable to the claimant is no longer the court's task. It is for the claimant to ask for the application of the alternative law. This is an obvious improvement. It eases the judicial task, especially if, as under prior law, an ex officio examination might be required on additional appellate levels.[35] Second, the references contained in Art. 40 are displaced – and with it the claimant's ability to chose the more favorable law – when the case presents a "substantially closer connection" to another law (Art. 41). This provision is new and deserves separate discussion below.[36]

Additional limitations on the claimant's choice existed in prior law. One of them was the war-time Decree Law of 1942,[37] calling for the application of the law of the common nationality, later broadened to take account of common habitual residence as well. The 1942 Decree Law has now been codified as Art. 40(2). The uncertainty in the case law whether common habitual residence would displace the *lex loci delicti* the same as common nationality – for instance, if residents with common residence had an accident in the state of nationality of one or both of them[38] – has been resolved. Art. 40(2) refers, without qualification, to the common habitual residence of the parties. If they are legal persons, the location of the central administration takes the place of the common habitual residence. The German focus on the corporate *seat*,[39] rather than on the law of incorporation as in U.S.

32. Art. 38 EGBGB (former version, now repealed). For the replacement provisions, Art. 40(3) EGBGB, Nos. 1 and 2, see text at n. 51 infra.

33. On the "gradual softening of concepts" in the history of conflicts theory, see Kahn-Freund, "General Problems of Private International Law," Hague Academy, 143 *Recueil des Cours* 139, 406-09 (1974-III).

34. See text at n. 72 infra.

35. See Germany, *Bundestagsdrucksache*, supra n. 11, at 11.

36. See text at n. 60 infra.

37. Supra n. 30.

38. Compare BGH 1977 *JZ* 99 (common habitual residence does not displace nationality) with BGHZ 119, 137 (1992) (nationality no longer a criterion unless it coincides with the parties' center of life). See also Hay, supra n. 7, at 236.

39. Hay, supra n. 7, at 330-36; Kegel, *IPR*, supra n. 23, at 408-16.

conflicts law,[40] thus reappears in torts conflicts law. The reference to the corporate seat for choice of law for non-corporate issues first appeared in the contracts conflicts provision,[41] to which the tort provision is a deliberate parallel.[42] Indeed, if the main goal is the identification of the most closely connected law – as Art. 41 ultimately teaches for tort,[43] and as Art. 28(5) had done for contract[44] before it – the reference to the center of a corporation's activities makes sense. Whether a general reference to the law of the corporate seat is appropriate – especially for the recognition of corporate personality and for questions of a corporation's internal affairs – may be a different question. It continues to be the source of controversy in Europe where a number of countries, in addition to Germany, adhere to the seat theory, while others, also members of the European Union, do not.[45]

Assuming that the application of Art. 40(1), leads to a legal system that makes high awards for pain and suffering and also permits punitive damages, neither of which accords with German standards: will that law be applied? From the German perspective,[46] the answer is clearly "no" for punitive damages and may now be "no" for high awards for pain and suffering as well.

Art. 6 of the German Conflicts Statute, in force in this or another form since codification and of course of ancient pedigree,[47] proscribes the use, even if otherwise applicable by German conflicts rules, of a law that would produce a *result* "obviously" incompatible with "essential basic principles of German law." An identically worded provision is the basis for a public-policy review in the context of judgment-recognition.[48] The wording of both provisions is intended to assure that use of the *ordre public*-exception will be restrained, that – indeed – it

40. See Restatement (Second) of Conflict of Laws § 297 (1971) (existence of corporation); see also id. §§ 302(2) (powers and liabilities), 303 (shareholders), 304 (participation in management). See also CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987).

41. Art. 28(2) EGBGB = 4(2) Rome Convention.

42. *Bundestagsdrucksache*, supra n. 11, at 12 (1999).

43. See text at n. 60 infra.

44. See OLG Hamm, 1993 *IPRspr.* 20; OLG Düsseldorf, 1996 *RIW* 958. See also Reithmann & Martiny, *Internationales Vertragsrecht* 152-61 (5th ed. 1996).

45. See the decision of the European Court of Justice in Centros Ltd. v. Erhvervs og Selskabsstyrelsen, Case C-212/97, [1999] ECR I, 1459. For comment, see Behrens, "Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH," 1999 *IPRax* 323.

46. See the decision of the German Supreme Court of 1992 in BGHZ 118, 312; Hay, "The Recognition and Enforcement of American Money-Judgments in Germany," 40 *Am. J. Comp. L.* 1001 (1992). See also the decision of the German Constitutional Court, assuming (dictum) that American awards of punitive damages would not be recognized in Germany: 1995 *NJW* 649.

47. See Juenger, supra n. 2, at 79-81.

48. § 328 I No. 4 German Code of Civil Procedure. See also Hay, "On Comity, Reciprocity, and Public Policy in U.S. and German Judgments Recognition Practice," *Festschrift für Kurt Siehr* __ (2000).

will be the exceptional case in which the exception will bar resort to foreign law or deny recognition to a foreign judgment.[49]

In one case, prior law contained a lower threshold than the one demanded by the overarching provision of Art. 6 EGBGB. The former Art. 38 EGBGB shielded Germans, when sued in Germany, from higher liability under foreign law for torts committed abroad, than what German law would provide. The issue of damages, otherwise considered "substantive" in German conflicts law,[50] was split off. German defendants were protected through *dépeçage*. The German measure of damages was substituted for that of the applicable foreign law. A violation of German public policy within the strict limits of Art. 6 was not required. Higher liability alone was enough to make the foreign measure unacceptable.

Art. 40(3), Nos. 1-2 of the new German Conflicts Statute now codify exceptions to the basic rules of Art. 40 (1) and (2).[51] They mirror, in more refined form, the policies that underlay the case law. Art. 41 (providing for an overarching exception) is discussed separately below.

Claims based on foreign law may not be entertained to the extent that "they obviously serve purposes other than the provision of appropriate compensation" (Art. 40(3), No. 2). What is meant are punitive damages. The case law rejecting punitive damages in choice of law and in judgment recognition on the basis of the respective *ordre public*-exceptions has now been codified. The provision is a specialized *ordre public*-exception,[52] a reference to Art. 6 becomes unnecessary, the judicial task will be easier. The built-in limitations ("obviously," "appropriate") are again designed to keep the exception narrow. Their application may require difficult interpretation. Punitive damages, pure and simple, surely are covered. But when does a damage claim, permitted under foreign law but not labeled "punitive damages," exceed what is needed for "appropriate compensation," so that it thereby "obviously" serves other than compensatory purposes, i.e., becomes punitive in nature?

No. 1 of Art. 40(3) excludes damage claims that go "substantially beyond that which is required for appropriate compensation." The official comment considers the provision to cover principally claims for

49. See Kropholler, supra n. 4, at 224-32; Staudinger, von Hoffmann & Blumenwitz, *BGB*, Art. 6 EGBGB Nos. 8-9 (13th ed. 1996).

50. *Münchener Kommentar*-Kreuzer, Art. 38 EGBGB No. 289 (3d ed. 1998).

51. Art. 40(3) No. 3 further provides that foreign law shall not be applied when this would be incompatible with liability standards contained in an international agreement to which Germany is a party. The provision parallels Art. 3(2), providing generally for the priority of international agreements "to the extent that they have become directly applicable domestic law" (author's translation). The present provision is intended to assure priority for agreements dealing with marine, nuclear, air transport liability, and the like. *Bundestagsdrucksache*, supra n. 11, at 13.

52. *Bundestagsdrucksache*, supra n. 11, at 12.

multiple damages and excessive claims for pain and suffering.[53] But the overlap between Nos. 1 and 2 is obvious. Punitive damages as well as multiple damages—for instance, treble damages for antitrust violations—do not compensate. Multiple damages are punitive damages set by statute. They fall under No. 2. A case involving them, however, could just as easily be decided the same way under No. 1: multiple damages are not required for appropriate *compensation*. The only further question under No. 1 would be whether they go "substantially" beyond what *appropriate* compensation requires. This will probably always be the case when multiple or punitive damages are involved. No. 2 of Art. 40(3) thus serves only one purpose: it eliminates the need for individualized determinations when the claim pursues a remedy which the foreign law identifies upfront as noncompensatory in nature. In all other cases, No. 1 will apply. It requires difficult, individualized evaluation and the provision offers only guidelines ("substantially," "appropriate").

The official comment notes that the purpose of the guidelines is the same as that of Art. 6 (the general *ordre public*-exception): to tolerate differences in standards and to guard only, and exceptionally, against excesses.[54] The analogy does not fit fully. Art. 6 (and its companion provision in the procedure code, dealing with judgment recognition[55]) achieve this purpose by requiring a showing that the foreign law (or judgment) would violate German law or would conflict with basic values of the German legal system. Punitive damages may do that because, in the German view, they impermissibly combine civil law damages and criminal law sanctions. A sum of money for pain and suffering awarded in a civil proceeding does not. It may be excessive, grossly inappropriate: but that is in the eye of the beholder. Thus, application of Art. 40(3), No. 1 does not require the same articulation of what makes the foreign law offensive as does Art. 6. The court can set the threshold lower for Art. 40(3), No. 1 than the statute sets it in Art. 6 for choice of law generally and in § 328 ZPO for judgment recognition.

In combination, the exceptions of Nos. 1 and 2 of Art. 40(3) exclude multiple and punitive damages and measure other damage awards for their appropriateness. Local law is no longer expressly the ceiling, as it had been in favor of German defendants in prior law (Art. 38, old version). There may indeed be tolerance for differences in legal systems. In its 1992 judgment-recognition decision, the German Supreme Court disagreed with the Court of Appeals which had considered an American award for pain and suffering to be excessive. By living and acting in the United States, the defendant could not com-

53. Id.
54. Id.
55. § 328(1), No. 4 German Code of Civil Procedure.

plain to be judged by the standards of his community.[56] That case had required a finding on the basis of the *ordre public*-exception. Will a German judge hearing a tort case under applicable American law likewise apply the standard of the American community, especially when the case has more contact with Germany and when it is litigated there for the first time?[57] Will not the standard used to measure appropriateness – under the lower threshold of Art. 40(3) – necessarily be bound up with local values?

Except for clearly compensatory damages at or below German levels, the nature and size of the remedy no longer automatically follow the applicable law. There may be review. This may result in *dépeçage*. And that will then mean application of German law to the damage issue.[58]

The basic provision of Art. 40(1) (*lex loci delicti*, in its two possible forms) is thus limited by the exception in favor of the law of the common habitual residence as well as by the possible *dépeçage* of the damage issue.[59] Art. 41 presents another possibility for the displacement of the basic reference.[60]

Article 41 parallels Art. 28(5) in contract choice of law. It envisions the application of the law having a "substantially closer connection" than the law to which the basic provision (Art. 40(1) and (2)[61]) refers. Its second paragraph gives examples ("in particular"), of which No. 1 is of special importance for tort cases. The "legal or factual rela-

56. BGHZ 118, 312.

57. In other decisions as well, the German Supreme Court made reference to the extent of the contacts of the case to the German forum ("*Inlandsbezug*"): see, e.g., BGHZ 120, 29 at 34.

58. In contract conflicts, the statute also begins by providing for an applicable law for "the contract," not—as in *Restatement (Second) of Conflict of Laws* § 188 (1971)—for a "particular issue." Nevertheless, Art. 28(1) EGBGB envisions *dépeçage* in exceptional cases: "If a part of the contract can be severed from the rest of the contract and if this part has a closer connection to another state, the law of that other state may be applied to it by way of exception" (author's translation). The difference between *dépeçage* in contracts and the possible *dépeçage* in tort damages, discussed in the text, is of course this: rejecting foreign damage law in tort leads to forum law, making a separate choice of law for a severable part of the contract may lead to a different foreign law or to the lex fori. The latter *dépeçage* thus is forum-neutral.

59. Art. 40 also clarifies prior law with respect to the question what law determines whether the claimant has a direct action against the insurer. The prevailing view in literature and case law had referred to the law applicable to the tort. Staudinger/von Hoffmann, supra n. 49, Art. 38 EGBGB, No. 265; Hay, supra n. 7, at 227-28; OLG Köln, 1995 *RIW* 858, 859. Another view favored the law applicable to the insurance contract. OLG Celle, 1973 *Versicherungsrecht* 657, 659. Art. 40(4) EGBGB now provides for direct action if either law so permits.

60. Art. 41 applies also to the provisions dealing with unjust enrichment (Art. 38) and *negotiorum gestio* (conducting someone's business on his or her behalf, but without his or her request, Art. 39), both discussed infra.

61. Art. 41 naturally does not displace Art. 40(3). It also does not displace Art. 40(4), 2d alternative. The insurance contract is subject to its own "closest connection"-test: see supra n. 22. In limiting its own application to the provisions preceding it, Art. 41 therefore also does not displace the parties' possible choice of the applicable law (Art. 42). See text at n. 72 infra.

tionship" mentioned there may be one in contract, for instance. Still unclear in prior law,[62] the law applicable to the contract will then also govern the tort arising from that relationship.[63]

Beyond serving as a corrective for the law otherwise applicable according to Art. 40(1) and (2), Art. 41 may frequently be even the basic choice-of-law rule. This follows from the fact that the legislator deliberately refrained from adopting a number of concrete rules for special cases, leaving their solution to existing case law, as supplemented or corrected by Art. 41: examples are invasion of privacy, industrial and commercial property rights, product liability, unfair competition, and state liability.[64] This gives the provision wide scope and provides for considerable flexibility. Indeed, at times the quest for flexibility goes too far. Thus, the official comments accompanying the draft bill suggest that "social contact" might constitute a "special . . . factual relationship" for purposes of Art. 41(2), No. 1.[65] Such an expansive view of the function of Art. 41 threatens to make Art. 40 a non-rule.

UNJUST ENRICHMENT

Claims for unjust enrichment also present difficult choice-of-law questions because the enrichment may result from tort, an invalid contract, a contract rescission, or in other ways.[66] Art. 38 therefore differentiates according to types of enrichment claims. The easiest of these are claims arising from the rendition of a performance. Art. 32(1), No. 5, in contracts choice of law, already extends the contracts rules to the "consequences of the invalidity of the contract." Art. 38(1) generalizes this rule and refers to the law applicable to the relationship, with respect to which performance was rendered.

62. The literature favored the notion of having tort choice of law be "accessory" to the parties' contractual relationship, while the case law, in the main, treated the relationships separately. *Münchener Kommentar*-Kreuzer, Art. 38 EGBGB No. 62, nn. 207-08 (3d ed. 1998).

63. The law applicable to a family-law relationship may also be appropriate for a tort arising from the family context. See BGHZ 119, 137 at 144; Hay, supra n. 7, at 222-24.

64. *Bundestagsdrucksache*, supra n. 11, at 10. Emissions, in contrast, are now governed by Art. 44. It contains a crossreference to Art. 40(1)(place of the tort) but is itself subject to a "substantially-closer-relationship exception" (in Art. 46).

65. Id. at 13.

66. See Hay, "Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement Second," 26 *Am. J. Comp. L.* 1 (1977); Bennett, "Choice of Law Rules in Claims of Unjust Enrichment," 39 *Int'l & Comp.L.Q.* 136 (1990); W. Lorenz, "Der Bereicherungsausgleich im deutschen internationalen Privatrecht und in rechtsvergleichender Sicht," *Festschrift für Zweigert* 199 (1981); Plaßmeier, *Ungerechtfertigte Bereicherung im Internationalen Privatrecht und aus rechtsvergleichender Sicht* (1996).

Paragraph 2 addresses claims arising from interference with a legally protected right. Contrary to part of the literature,[67] it adopts a tort-orientation and refers to the law where the interference occurred. The advantage is that characterization of a claim as one for tort damages or for unjust enrichment becomes unnecessary. The formulation leaves open where the place of enrichment (tort) is – place of acting or place where the protected right was violated or infringed. In that respect, it provides more flexibility than does the tort provision of Art. 40(1), while both also remain subject to the closest-relationship exception of Art. 41, discussed earlier.[68]

The law of the place where the enrichment occurred is to apply to all remaining cases, for instance when someone is enriched unknowingly. Art. 41 once again provides the potential for correction.

Agency Without Mandate

The concept of "agency without mandate" (*"Geschäftsführung ohne Auftrag"*) has no exact counterpart in American law. *Negotiorum gestio*, of Roman law origin,[69] covers a number of instances in which one person (or institution) performs the obligation of another or performs a task for the other without having received a mandate or request to do so. The "agency" may be the result of a statutory obligation, such as when a public agency pays support to an obligee and seeks reimbursement from the obligor.[70] Art. 39(1) now specifically addresses statutory claims for performance of the obligation of another (the law of the state where performance was rendered) and the payment of the debt of another (law applicable to the debt). Once again, the overarching exception of Article 41 in favor of a more closely connected law applies. It is interesting to note that, for Arts. 38(2) and (3) as well as for Art. 39, the "special relationship" that may lead to a different law under Art. 41(2) may be found in the parties' common habitual residence (Art. 41(2), No. 2), even though the first paragraph of Art. 41 displaces that relationship for tort choice of law.[71]

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67. See Palandt/Heldrich, *BGB*, Intro. Note to Art. 38 EGBGB, No. 3 (58th ed. 1999) (situs or place where the shift of assets occurred).

68. Art. 41 is not needed as a corrective to Art. 38(1), inasmuch as the focus is already on the underlying performance. See Art. 41(2), No. 2.

69. See Seiler, *Der Tatbestand der negotiorum gestio im römischen Recht* (1968); Dawson, "Negotiorum gestio — The Altruistic Intermeddler," 74 *Harv. L. Rev.* 817 (1961).

70. The particular example is covered by a different (special) provision of the statute: Art. 18(6), No. 3 refers the reimbursement claim to the law applicable to the support obligation.

71. This is inartful drafting. The official comment accompanying the bill states: "In view of Art. 40(2), provision for the application of the law of the parties' common state of habitual residence is made only for unjust enrichment and for agency without mandate." *Bundestagsdrucksache*, supra n. 11, at 14 (author's translation). This overlooks that Art. 41(1) may displace Art. 40(2), as already noted.

CHOICE OF LAW BY THE PARTIES (PARTY AUTONOMY)

All claims arising from "non-contractual obligations"—tort, unjust enrichment, and agency without mandate—are subject to the law chosen by the parties (Art. 42).[72] Their choice has priority over the default rules discussed above but, for obvious reasons protective of a weaker party,[73] may be made only after the event giving rise to the claim has occurred and does not affect rights of third parties.

The parties will make their choice by agreement. As a result, the general rules relating to choice-of-law agreements apply (Art. 27):[74] the choice may be express or implied[75] and may be limited to part of the claim. The parties are essentially free as to the law they may choose, except as limited by Art. 42 itself and by Art. 27(3): if – except for the agreement – the facts of the case are related only to one state, the parties' agreement cannot displace the mandatory rules of that state. The law chosen is only the substantive law of that state and does not include its conflicts law: there is no *renvoi* (Art. 4(2)).

PROPERTY AND THE MORE CLOSELY CONNECTED LAW

Property is governed by the law of the situs (Art. 43(1)). The property provisions thus deal with problems arising from a change in the applicable law (*"Statutenwechsel"*) which, in turn will usually be the result of a change of situs. The combination of paragraphs 1 and 2 produces the rule that the law of each situs applies for the time the property was or is situated in it and that, for purposes of acquisition of ownership rights, legally relevant events of a prior situs are considered by the present one (Art. 43(3)).

No special rule was adopted for things while in transit (*res in transitu*). While other modern codifications do contain special rules, the drafters thought that Art. 43(3) would cover most cases or that, if necessary, "the courts could . . . develop principles on the basis of Art. 46"[76] (see below).

The provision on party autonomy (Art. 42, discussed above) does not apply to property law, the law governing emissions, or to rights in aircraft, vessels or rail vehicles. This is so because, in the view of the German Supreme Court, party autonomy might import concepts of

72. For party autonomy with respect to property law claims, see text following n. 76.

73. *Bundestagsdrucksache*, supra n. 11, at 14.

74. See Staudinger, supra n. 10, at 1590.

75. "[T]he choice . . . must appear with sufficient certainty from [the provisions of the contract] or the circumstances of the case." Art. 27(1), 2d sentence (author's translation).

76. *Bundestagsdrucksache*, supra n. 11, at 14.

property interests unknown to German law: the closed system (the "*numerus clausus*") of rights in property would be breached.[77]

However, this argument against party autonomy no longer has the force it once did. Art. 46 now provides, in language identical with Art. 41(1), for the displacement of the law applicable on the basis of Arts. 43-45 by a substantially more closely connected law. Such a law obviously may also provide for interests in property other than those known in German law. The answer in such cases ("*Transpositionslehre*") is to find a functional equivalent in German law and to treat the foreign property right accordingly.[78] Assuming that party stipulations as to the (desired) applicable law carry weight in the determination that another law is more closely connected than situs law,[79] the detour over Art. 46 may make the stipulation indirectly effective.

RENVOI

German law generally considers conflicts law to be part of the "applicable (foreign law)." The court therefore follows the foreign conflicts law's reference, including back to its own (substantive) law: *renvoi* (Art. 4 EGBGB). The reference to foreign law does not include that law's conflicts law when the parties chose the foreign law (Art. 4(2)), when con-sidering the foreign conflicts law would be "incompatible with the purpose of the reference" to the foreign legal system (Art. 4(1)), nor, by way of general exception, when the issue is choice of law in contract (Art. 35 EGBGB).

The 1999 codification is silent on the scope of the reference to foreign law. The starting point must therefore be the general provisions of Art. 4, including its rule that foreign law chosen by the parties does not include its conflicts law. But foreign conflicts law is or should not be part of the reference in additional cases. Thus, Art. 39(2) (payment of the obligation of another) refers to the law applicable to that obligation. If the obligation arises from contract, Art. 35 will exclude renvoi. The same is true for unjust enrichment claims to the extent that they arise from a contractual relationship that has gone awry (Art. 38(1)).[80]

When the "performance" underlying the unjust enrichment claim does not arise from contract, any reference to foreign conflicts law should be the same as that appropriate for, or excluded by, the underlying relationship. Similarly, there must be parallelism in those cases

77. BGH NJW 1997, 461, 462; anno. Stoll, 1997 *IPRax* 411. See *Münchener Kommentar* — Quack, Vol 6, Einleitung at No. 29 (3d ed. 1997).

78. BGHZ 39, 173; BGH NJW 1991, 1415; Hay, supra n. 7, at 245-46.

79. See also Staudinger, supra n. 10, at 1594.

80. The result would accord with Art. 32(1), No. 5, which includes "the consequences of the invalidity of the contract" within the scope of the contract conflicts subchapter which, in turn, is subject to Art. 35 and its exclusion of foreign conflicts law (as noted in the text).

in which a tort claim is referred to the law of an underlying contractual relationship (as the law of the substantially closer relationship, Art. 41(2), No. 1).[81] Allowing a renvoi for the tort but not (because of Art. 35) for the contract claim is not expressly precluded by the statute. However, a reference to foreign conflicts law for the tort seems quite "incompatible" (Art. 4(1)) with the purpose of treating the claims together, indeed of making the tort claim "accessory" to the one in contract.

CONCLUSION

The incorporation of the Rome Convention's provision into the German conflicts statute in 1986 introduced the closest-connection-principle as the default rule for choice of law in contract (Art. 28 EGBGB). The statement of the principle is followed by presumptions. The initial principle is then restated (in Art. 28(5)) as a possible corrective. It applies to cases that turn out to be more closely connected with another state than the state identified by the presumptions. Article 28 thus combines rules derived from a principle with the possibility for individualization.

Each of the 1999 provisions dealing with non-contractual obligations deliberately[82] establishes connections[83] to Art. 28. Their structure is similar to, although not identical with Art. 28: the latter states the principle followed by presumptions; the 1999 provisions establish principles that assume the existence of a close relationship. Art. 28 contains the corrective (escape) clause in its paragraph(5); the new provisions state similar escape clauses in separate provisions (Art. 41 and 46). Art. 28(5) permits displacement of the presumptions when another state is "more closely related;" Arts. 41 and 46 require a "substantially closer relation."

The approach of the *Restatement Second* at first appears to be similar. The principle of the "most significant relationship" is stated in §§ 188 and 145 for contract and tort, respectively, in each case followed by provisions dealing with "particular contracts" (§§ 189 *et seq.*) and "particular torts" (§§ 146 *et seq.*). Each particular provision also calls for its displacement by a more significantly related law. Wherein, then, lies the difference between the *Restatement Second* and German law as it has now evolved?

In American law, so it seems, invocation of general principles or the statement of an approach predominates. This is obvious, of course, when governmental-interest analysis is the particular conflicts methodology employed. But even when the reference is to the *Restatement Second*, use of the general provisions (§§ 145, 188), to-

81. See supra, at n. 63.
82. Germany, *Bundestagsdrucksache*, supra n. 11, at 8.
83. Arts. 38(1), 39(2), 40(4), 41(2) No. 1.

gether with the principles of § 6, more often than not are the beginning and end of the analysis. The connecting factors of the particular provisions appear as factors in the general equation; they do not function as rules. The same could have been true in German law, if Art. 28(5), in combination with the overall principle of the closest connection (Art. 28(1)), had resulted in individualized decision-making at the expense of the presumptions in Art. 28(2)-(4). However, Art. 28(5) is intended as an exception.[84] For a number of cases, the presumptions of Art. 28(2)-(4) indeed do not fit or, at least, not well. For them, Art. 28(5) provides a mechanism for decision-making. However, for the most part, this decision-making has focused more upon case categories or particular problems of general importance than upon ad hoc dispute resolution.[85]

In the new provisions, the close connection which, in contract, the presumptions of Art. 28(2)-(4) seek to define, is built into the basic provision (e.g., Art. 40(1) and (2) for tort). Arts. 41 and 46 then serve here the function of Art. 28(5). However, Art. 41 could receive more extensive use. As mentioned earlier,[86] the new law does not particularize with respect to a number of particular torts, to property law problems, and to other matters. Instead, their solution is left to Art. 41. If it becomes the source of judicial solutions only to special categories of problems, its role and function will be different and more limited than that of, say, § 145 *Restatement Second*; if, in contrast, it is used to review all results reached by the particularized provisions, a far-reaching shift from rule-orientation to "approach" would occur. This seems unlikely to happen: over a decade's experience with Art. 28(5) has shown that courts use it with restraint. In addition, Arts. 41 and 46 set a higher standard for the displacement of the basic rule ("substantially closer relationship").

Dépeçage is an important element of American conflicts law.[87] Except for characterization, partial choice of law by the parties, and the exceptional *dépeçage* in contract,[88] it was the exception in German law. Art. 40(3) introduces one more instance: review of damages. Despite this additional instance, the principal orientation remains the determination of a single applicable law to the substance of a case.[89]

84. See Soergel/von Hoffmann, *BGB*, Art. 28 EGBGB Nos. 18, 96 (12th ed. 1996).
85. Id. at Nos. 102-24.
86. Supra at n. 64.
87. Supra at nn. 4-5.
88. Supra at nn. 13 and 58.
89. See *Bundestagsdrucksache*, supra n. 11, at 22 (response of the Federal Government to the position paper issued by the upper house, *Bundesrat*, of Parliament). The *Bundesrat* had been concerned that, in mass torts, Art. 40(2), first sentence, might result in the application of different laws to the claims of victims of the same event. Id. at 20. In response, the Government pointed to Art. 41: This "escape provision provides the judge with the means to achieve [the] substantively often desirable

The 1986 and 1999 codifications of German Conflicts law have introduced welcome flexibility. Rule-orientation has become principled flexibility, wherein a rule remains the starting point of the analysis but allows of some adaptation in individual application. The extent to which the new flexibility still preserves a high degree of predictability[90] will depend on the courts' use of the freedom the escape clauses (particularly Art. 41) give them to displace the otherwise applicable law. Handled with the same principled restraint as with respect to Art. 28(5), the new Arts. 41 and 46 could prove to be salutary innovations.

There may also be further legislative action. Nationally, choice of law in corporate law remains to be codified.[91] The potential revision of the Rome Convention as well as possible European Community-level unification or approximation of torts conflicts law may both further affect German law. With the 1999 codification, the German legislator has provided a modern conflicts statute that may in turn influence European-level developments.

result . . . of the application of an uniform law to all claims arising from this event." (author's translation).

90. See supra n. 1.

91. *Bundestagsdrucksache*, supra n. 11, at 6.

APPENDIX

Introductory Law to the Civil Code

The 1999 Codification[1]

Section Five. Obligations

First Subsection. Contractual Obligations [unchanged]
Second Subsection. Non-Contractual Obligations [new]

Article 38
Unjust Enrichment

(1) Claims for unjust enrichment based on performance rendered are governed by the law applicable to the legal relationship with respect to which the performance was rendered.
(2) Claims for unjust enrichment resulting from the violation of a legally protected right or interest are governed by the law of the state where the violation occurred.
(3) In other cases, claims for unjust enrichment are governed by the law of the state where the enrichment occurred.

Article 39
Agency Without Mandate

(1) Statutory claims arising from the performance of the business of another are governed by the law of the state where the performance was rendered.
(2) Claims arising from the discharge of the obligation of another are governed by the law applicable to the obligation.

Article 40
Tort

(1) Claims arising from tort are governed by the law of the state in which the person liable to provide compensation acted. The injured person may demand, however, that the law of the state where the result took effect be applied instead. The right to make this election may be exercised only in the court of first instance and then only until the end of the first oral proceeding or the end of the written pretrial proceeding.[2]

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1. Germany, Bundesgesetzblatt 1999, I, 1026 (author's translation).
2. Author's annotation. German law provides for two alternative initial procedures: "The presiding judge either sets an early date for the oral proceeding (275) or orders a written pretrial proceeding (§ 276)." § 272(2) German Code of Civil Procedure (author's translation). In the case that a written pretrial proceeding has been ordered, the right of election under Art. 40(1) EGBGB thus ends when it concludes and does not extend until the end of the subsequent first oral stage.

(2) If the person liable to provide compensation and the injured person had their habitual residence in the same state at the time the act took place, the law of that state shall be applied. In the case of enterprises, associations, or legal persons the place of their principal administration, or, in the case of a branch of its location, shall be the equivalent of habitual residence.

(3) Claims that are governed by the law of another state may not be entertained to the extent that they

1. go substantially beyond that which is required for appropriate compensation for the injured person,

2. obviously serve purposes other than the provision of appropriate compensation for the injured person, or

3. conflict with provisions concerning liability contained in a treaty that is in force with respect to the Federal Republic of Germany.

(4) The injured person may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the tort or the law applicable to the insurance contract so provides.

Article 41
Substantially Closer Connection

(1) If there is a substantially closer connection to the law of a state other than the law that would be applicable under Articles 38 to 40, paragraph 2, the law of that state shall be applied.

(2) In particular, a substantially closer connection may be the result of

1. a special legal or factual relationship between the parties in connection with the obligation or,

2. in the cases under Art. 38, paragraphs 2 and 3 and Art. 39, the habitual residence of the parties in the same state at the time of the legally relevant occurrence; Article 40, paragraph 2, 2d sentence, applies accordingly.

Article 42
Party Autonomy

After the event giving rise to a non-contractual obligation has occurred, the parties may choose the law that shall apply to the obligation; rights of third parties remain unaffected.

Section Six. Property Law [New]

Article 43
Property

(1) Rights in property are governed by the law of the state where it is situated.
(2) If the situs of property changes, rights established in it cannot be asserted in contradiction to the law of the new situs state.
(3) If an interest in property brought into this state has not yet been perfected, events that occurred in another state are to be considered like local events for the determination of the perfection of such an interest in this state.

Article 44
Emissions

Article 40, paragraph 1, applies to claims arising from the adverse effects of emissions from real property.

Article 45
Means of Transportation

(1) Rights in aircraft, vessels, and rail vehicles are governed by the law of the state of origin. That state is

1. the state of registration of aircraft,
2. the state of registration of vessels, otherwise the state of the home port or home location,
3. the state granting the original license in the case of rail vehicles.

(2) The attachment of security interests as a matter of law in the above means of transportation is governed by the law applicable to the claim that is to be secured. Article 43, paragraph 1, applies to determine the priority as among several security interests.

Article 46
Substantially Closer Connection

If there is a substantially closer connection to law of a state other than the law that would be applicable under Articles 43 to 45, the law of that state shall be applied.