Climate Change Litigation

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the cross-border nature of the case.[119] Note, however, that despite their duty to apply conflict rules *ex officio*, courts sometimes tend to overlook the private international law dimension of cases. For example, in the case of the Peruvian farmer who claimed compensation from *RWE* because of the potential damage to his land in Peru as the result of the melting of a glacier, the LG Essen has applied German property law without giving any consideration to the fact that the affected immovable was situated in Latin America and that, because of the cross-border element, Art. 44 EGBGB and the rules of the Rome II Regulation should have been applied.[120]

2. EU: Liability in tort (delict) according to the Rome II Regulation

a) Applicability. The 2007 EU Regulation on the Law Applicable to Non-Contractual Obligations (Rome II) unifies the conflict rules among the Member States of the EU, except for Denmark. Like all other regulations in the area of conflict of laws, it is of "universal application" (Art. 3 Rome II), meaning that the courts of the Member States will apply its rules to every cross-border case, regardless of whether there is any possible connection of the facts with third states[121] or whether the law of a third state might apply. Note, however, that the question whether conflict rules are to be applied *ex officio* or only upon request by the parties is not answered unanimously among the Member States (*supra*, 1.). Although one may argue that the status quo is incompatible with the spirit of the European unification of Private International Law (PIL), these differences persist in practice. **41**

According to Art. 31 Rome II, the Regulation shall only "apply to events giving rise to damage which occur after its entry into force", which was on 11 January 2009.[122] The time at which proceedings are initiated is immaterial. In climate change litigation, the "event giving rise to damage", meaning the event for which the tortfeasor is alleged to be responsible, will be the greenhouse gas emissions. For the most part, they will have occurred before the entry into force of the Rome II Regulation,[123] meaning that the autonomous PIL of the Member States will apply with respect to that period of time. German courts, for example, would have to judge the applicable law according to Art. 40 EGBGB; however, the outcome would not be different from an application of Art. 7 Rome II (see below): both rules effectively enable the victim to choose between the law of the state where the damage is located and the law of the state where the event giving rise to the damage occurred. **42**

Article 2 (2) Rome II emphasises that the Regulation also applies to non-contractual obligations that are "likely to arise". Pursuant to Art. 2 (3) Rome II, it applies to "an event giving rise to damage" as well, and the notion of "damage" includes damage that is *likely* to occur. It is therefore undisputable that the Regulation also covers claims for injunctive relief or compensation for protective measures against future damage. **43**

b) Freedom of choice of law, Article 14 Rome II. Article 14 Rome II Regulation grants parties the freedom to choose the applicable law either ex post (Art. 14 (1) (a)) or, if "all the parties are pursuing a commercial activity, also by an agreement freely **44**

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[119] Cf in greater detail Kieninger, in: Leible (ed.), *General Principles of European Private International Law*, 2016, p. 357; Hartley, 45 *ICLQ* (1996), 271; Esplugues/Iglesias/Palao (eds.), *Application of Foreign Law*, 2011; Cheshire/North/Fawcett, *Private International Law*, p. 803.

[120] Cf LG Essen, 15.12.2016, ZUR 2017, 370; neither does the court mention a choice of law pursuant to Art. 14 Rome II Reg.

[121] Cheshire/North/Fawcett, *Private International Law*, pp. 801 et seq.; Halfmeier, in: Calliess (ed.), *Rome Regulations*, 2nd ed., 2015, Article 3 Rome II, mn. 11 et seq.

[122] ECJ Case C-412/10 *Deo Antoine Homawoo v GMF Assurances SA* [2011] ECR I-11603, mn. 30.

[123] For example, in the case pending before the OLG Hamm (*supra* fn. 5), it is claimed that RWE is responsible for greenhouse gas emissions that span 100 years.

negotiated before the event giving rise to the damage occurred" (Art. 14 (1) (b). Unlike the rules on other special torts (see Art. 8 (3) and 6 (4)), Art. 7 on environmental damage (*infra*, c)) does not exclude freedom of choice of law, but for practical reasons, it seems only relevant where parties want to choose the law of the forum state after the proceedings have been instituted.

45 **c) Special rule on environmental harm, Article 7 Rome II.** Where liability for environmental harm is at stake, Art. 7 takes precedence over the general rule in Art. 4. Article 7 refers to Art. 4 (1) with modifications, but the rule on closer connection in Art. 4 (2) and the escape rule in Art. 4 (3) remain inapplicable.[124]

46 **aa) Applicability.** Article 7 Rome II refers to "a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage". With a literal reading of the provision, one could argue that the rule only covers factual scenarios where the tortious act has a direct negative impact on the environment. If that were the case, Art. 7 would not cover typical climate change-related events, since the damage to persons or property through storms, floods, heatwaves, etc. is not the result of "environmental damage" in a strict sense because the accumulation of carbon dioxide and other greenhouse gases in the atmosphere and the consequential global warming is not *per se* damage to the atmosphere. Rather, it is the consequences of global warming that have a negative impact on the environment. However, according to the predominant opinion, Art. 7 Rome II nevertheless applies to climate change cases because it is held to be sufficient if the damage to persons or property is caused by an influence on or change in the environment.[125] In other words, it suffices if there is some causal link between the change in the environment (to which the defendant has contributed) and the damage to persons or property.[126]

Article 7 includes torts such as nuisance, despite the fact that in some jurisdictions (e.g. under German law) a property law remedy might also exist (*infra*, 3).[127]

47 **bb) Place of damage rule.** Article 7 principally refers to Art. 4 (1) Rome II Regulation and therefore leads to the application of the law at the place where the primary damage or injury that was directly or indirectly caused by the tortfeasor through an impact on the environment occurred. The location of further (mostly pecuniary) damage resulting from the injury of the victim's health or property is irrelevant.[128] For climate change cases, this means that the applicable law is that of the place where the damage to lives, health or property arising from the environmental impact of global warming has occurred or is likely to occur. Article 7 Rome II clearly only refers to Art. 4 (1), not to Art. 4 (2) or (3) Rome II Regulation. The application of Art. 7 and its *lex loci damni* rule is therefore strict and cannot be avoided, unless the victim chooses to use the law of the place where the damaging event occurred, see *infra*, cc). As a result, greenhouse gas-emitting corporations must potentially face liability under the law of all states where global warming is already damaging or threatening to damage lives, health and property.

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[124] Von Hein, in: Calliess (ed.), *Rome Regulations*, Article 7 Rome II, mn. 9; von Plehwe, in: Hüßtege/Mansel (eds.), *Nomos Kommentar-BGB*, 3rd ed., 2019, Art. 7 Rom II, mn. 17.

[125] Lehmann/Eichel, *RabelsZ* 2019, 77 (94); Junker, in: *MünchKomm*, 7th ed., 2018, Art. 7 Rom II-VO, mn. 12 with further references; G. Wagner, *IPRax* 2008, 1 (9); Wurmnest, in: Herberger/Martinek/Rüßmann (eds.), *jurisPK-BGB*, 8th ed., 2017, Art. 7 Rom II-VO mn. 37; Huber, in: *BeckOGK*, 1.10.2019, Art. 7 Rom II-VO, mn. 33; Plender/Wilderspin, *The European Private International Law of Obligations*, 4th ed., 2014, mn. 21–020.

[126] Lehmann/Eichel, *RabelsZ* 2019, 77 (95) with further references.

[127] Plender/Wilderspin, *The European Private International Law of Obligations*, mn. 21–006 referring to ECJ Case C-343/04 *Land Oberösterreich v ČEZ a.s.* [2006] ECR I-4586.

[128] Von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 17.

cc) Option. According to Art. 7 Rome II, the claimant has the right "to choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred". This one-sided option is justified by the fact that the Regulation is intended to offer victims of cross-border damage to the environment a high and equal level of protection. If the place of damage rule were to be strictly followed, victims on different sides of a border between Member States could get different levels of compensation and protection, depending on the law at the place of the damage. Such inequality is to be avoided.[129] With respect to greenhouse gas emissions, the relevant "event giving rise to the damage" is located where the emissions occur, not the place where the emitting corporation's decisions are made.[130] **48**

dd) Scope of the applicable law. Article 15 Rome II Regulation contains a non-exclusive list of matters which are governed by the applicable law as defined by Art. 4 et seq. This includes in particular "(a) the basis and extent of liability, including the determination of persons who may be held liable"; "(c) the existence, the nature and the assessment of damage or the remedy claimed;" "(d) […] the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;" and "(h) […] rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation." The CJEU has held that rules on prescription cannot be regarded as mandatory provisions within the meaning of Art. 16 Rome II Regulation.[131] **49**

d) Article 17 Rome II Regulation. aa) Local data rule. Article 17 states that "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." The rule enables the court to take into account so-called "local data" when assessing the standard against which the acts of the tortfeasor are to be measured. The classic cases at which Art. 17 Rome II is directed are road accidents; see Rome II Regulation Recital 34. If the applicable law is determined by the common habitual residence pursuant to Art. 4 (2) Rome II, then it differs from the place where the harmful event occurred as well as from the location where the damage was sustained. In this instance, it goes without saying that the safety rules of the state where the tortfeasor acted (e.g. on maximum speed, etc.) must be taken into account when assessing liability. In contrast, it is questionable whether and to what extent Art. 17 should be applied to cross-border torts like environmental liability, where the harmful event and the damage are typically located in different states. According to the predominant view, Art. 17 may still be applied, but with caution and restrictions.[132] Moreover, local data may be taken into consideration within the framework of the *lex loci damni*, but Art. 17 does not enable the court to *replace* the applicable law.[133] Rather, courts have to weigh the pros and cons when deciding whether and to what extent local rules at the place of the damaging event should be considered.[134] **50**

[129] Cf Cheshire/North/Fawcett, *Private International Law*, p. 830.

[130] Lehmann/Eichel, *RabelsZ* 2019, 77 (96); Huber, in: *BeckOGK*, Art. 7 Rom II-VO, mn. 38.

[131] ECJ Case C 149/18 *Agostinho da Silva Martins/Dekra Claims Services Portugal SA* [2019] ECLI:EU:C:2019:84.

[132] Junker, in: *MünchKomm*, Art. 17 Rom II, mn. 9; von Hein, in: Calliess (ed.), *Rome Regulations*, Article 17 Rome II, mn. 8.

[133] Cheshire/North/Fawcett, *Private International Law*, p. 831 and p. 871; Dicey/Morris/Collins, *The Conflict of Laws Vol.* II, mn. 35–071; Plender/Wilderspin, *The European Private International Law of Obligations*, mn. 18–121.

[134] Bittmann, in: Weller (ed.), *Europäisches Kollisionsrecht*, 2016, p. 213, mn. 369.

51 It has been suggested that Art. 17 Rome II Regulation should be used in climate change cases to the widest possible extent because the applicability of the *lex loci damni* was "unrelated" and "unforeseeable" for the emitters.[135] The authors voice the concern that states (which may be non-EU Member States because of the universal application of the Rome II Regulation) may introduce new substantive rules, lowering the threshold with respect to the causal link between greenhouse gas emissions and the resulting natural events that cause damage to persons or property.[136] They fear that such rules would be applicable against EU-based corporations on the basis of Art. 7 Rome II Regulation and therefore propose to counter this result through a far-reaching application of Art. 17. The authors suggest that the limits set for greenhouse gas emissions in the statutory rules in force at the location of the emitting facility or in the licences granted by domestic public authorities should be regarded as local data and should therefore restrict the application of tort law at the location of the damage.[137]

52 However, such a general application of the standards at the place where the emitter is located through Art. 17 would effectively displace any stricter liability rules of the *lex loci damni*, which is contrary to what the rule intends. It would lead to a race to laxity[138] and therefore contravene the intention of the European legislator, who, in Recital 25 of the Rome II Regulation, stresses the need for a high level of protection against environmental damage (citing Art. 174 EC Treaty (now Art. 191 TFEU)) and the need to discriminate in favour of the person sustaining the damage.[139] Moreover, it cannot be said that the location of the damage was unforeseeable. The greenhouse effect, its relation to carbon dioxide emissions and its potential to negatively impact the natural environment is well documented and has been known for decades.[140] The fact that no one can predict exactly where and what kind of damage will occur through storms, floods, droughts and heatwaves is inherent in the kind of change to the atmosphere brought about by greenhouse gas emissions and can therefore not exempt the emitters from liability.

53 **bb) Article 17 and the possible impact of permits or authorisations in accordance with public law.** Another practically important question relates to the possible impact of permits granted by state authorities pursuant to the law of the location of the emitter. Do such permits preclude or limit tortious liability according to the law of the state where the damage occurs or is likely to occur? *Plender* and *Wilderspin* state that "while the question

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[135] Cf Lehmann/Eichel, *RabelsZ* 2019, 77 (97 et seq.). The unforeseeable nature of the liability is stressed by Lehmann/Eichel, *RabelsZ* 2019, 77 (100). On the other hand, the authors emphasize at p. 101 that the emitters should be allowed to rely on authorisations issued by their home states because in those proceedings, the public authorities will have weighed the advantages of the activities of the emitters for the public welfare against the effects of global warming. The authors therefore admit themselves that the effects of global warming were known. Cf also p. 103 where the authors stress that – of course – the negative impact of the emissions on the climate were foreseeable, even when the permits were granted to the fossil energy companies. The fact that the legal analysis by *Lehmann* and *Eichel* is primarily results-driven is further evidenced by the text at p. 101: in their view, it is immaterial whether the protection of the emitters against liability in accordance with the *lex loci damni* is achieved through Art. 17, Art. 16 (mandatory provision) or the ordre public (Art. 26).

[136] Lehmann/Eichel, *RabelsZ* 2019, 77 (96 et seq.).

[137] Lehmann/Eichel, *RabelsZ* 2019, 77 (97), who, however, only cite Lehmann himself (*Nomos Kommentar-BGB*, Art. 17 Rom II, mn. 41) in support of this view.

[138] Von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 23.

[139] Dicey/Morris/Collins, *The Conflict of Laws Vol.* II, 15th ed., 2012, mn. 35–069; von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 23.

[140] Cf Pöttker, *Klimahaftungsrecht*, p. 131 et seq. with numerous references. Knowledge of the risks of anthropogenic greenhouse gas emissions can be traced back to 1965, when President Lyndon B. Johnson's Science Advisory Committee Panel on Environmental Pollution reported that by the year 2000, emissions "would modify the heat balance of the atmosphere to such an extent that marked changes in climate could occur."

does not admit of a straightforward answer, it is nevertheless clear, that this should not automatically be a good defence".[141] Older jurisprudence of German courts suggests that the effects of permits granted by public authorities remain limited to the territory of the issuing state in accordance with the principle of territoriality of public law.[142] Courts in the Netherlands and Austria have taken a more liberal view and have accorded extra-territorial effect to such authorisations if (a) they were granted in accordance with existing public international law, (b) the standards for granting the authorisation in the issuing state equated to those of the state where the damage occurred, and (c) those who were affected by the permitted emissions in the state where the damage occurred were party to the proceedings and were able to voice their concerns.[143] Although the Rome II Regulation has not explicitly embraced this approach, its adoption has been suggested pursuant to Art. 17 Rome II so that foreign authorisations may be recognised under Art. 17 where the three criteria are met.[144] The opinion that seems to be predominant holds that only those administrative decisions which prohibit or prescribe a certain conduct can qualify as local data, but that Art. 17 Rome II Regulation should not be extended to permissive authorisations which emitters can but do not need to use. This is because the ratio of Art. 17 Rome II is restricted to the avoidance of a conflict of obligations.[145] However, others would extend Art. 17 Rome II Regulation to permissive authorisations, although only within the limits of the applicable law. Therefore, it would not be possible to attribute to it a more far-reaching effect than it could have under the *lex loci damni*.[146] According to *von Plehwe*, licences which do not originate from authorities of the *forum* state can only be taken into account as local data according to Art. 17 Rome II (i) if they are functionally equivalent and (ii) if the law of the state where the damage occurs grants those licences such extraterritorial effect. There can be no "recognition" of licences which were not granted by the forum state.[147]

The most far-reaching view in favour of emitters is again taken by *Lehmann* and *Eichel*. In climate change litigation cases, the authors propose that authorisations pursuant to the law at the location of the emitter should be granted full cross-border effectiveness in all states where damage occurs, irrespective of whether the cross-border effects and possible damage were taken into account when granting the permission or whether the persons affected had the chance to be heard in the proceedings which led to the authorisation.[148] The main argument is the unforeseeable nature of potentially global damage, which in their view distinguishes climate change liability cases from other environmental harm liability cases.[149] **54**

Comment: The extreme opinion voiced by *Lehmann* and *Eichel* seems to be motivated by the wish to protect fossil energy companies and other greenhouse gas producers from seemingly "unforeseeable" potential liability, although it is well docu- **55**

[141] Plender/Wilderspin, *The European Private International Law of Obligations*, mn. 21–028 with further references.

[142] Cf BGH 10.3.1978, DVBl. 1979, 226, 227; cf also Unberath/Cziupka/Pabst, in: Rauscher, *EuZPR – EuIPR Kommentar Vol.* III, 4. ed. 2016, Art. 7 Rom II VO, mn. 46.

[143] Rechtbank Rotterdam 16.12.1983, Ned Jur 1084, No. 341, para 8.7.; OGH 20.12.1988, JBl. 1989, 239; cf also von Hein, in: Calliess (ed.), *Rome Regulations*, Article 7 Rome II, mn. 34.

[144] Unberath/Cziupka/Pabst, in: Rauscher, *EuZPR – EuIPR Kommentar Vol.* III, Art. 7 Rom II VO, mns. 46–48.

[145] Mankowski, *IPRax* 2010, 389 (390 et seq.); Matthes, *GPR* 2011, 146 (150 et seq.); Siems, *RIW*, 2004, 662; v. Bar/Mankowski, *Internationales Privatrecht* II, § 2 mn. 423 et seq.; in the same sense Hohloch, in: *Erman BGB*, Art. 7 Rom II VO, mn. 17 (licenses are not a subject-matter of Art. 17).

[146] Maultzsch, in: *BeckOGK*, Rom II-VO Art. 17, mn. 25 et seq.

[147] Von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 23.

[148] Lehmann/Eichel, *RabelsZ* 2019, 77 (98 et seq.).

[149] Lehmann/Eichel, *RabelsZ* 2019, 77 (100).

mented that the effects of carbon dioxide emissions and the resulting possibilities and dangers of climate change have been known at least since the 1970s, even if the extent of the possible consequences were not yet known at that time.[150] Leaving policy-driven interpretations aside and returning to the relevant statutory rules and the considerations given by the European legislator, it must be noted that Art. 17 Rome II Regulation only allows local rules at the state where the tortfeasor acted to be taken into account "where appropriate".[151] Moreover, Art. 17 is meant to apply to local legal prohibitions; it is not designed to grant extraterritorial application to local authorisations of damage.[152] If one were to nevertheless subscribe to the idea that even permissive licences may be taken into account as local data,[153] this must be done with caution and restriction.[154] It must be considered whether and to what extent the global effects of greenhouse gas emissions (especially in the more vulnerable parts of the world) have been taken into account in the proceedings leading up to the authorisation. Furthermore, the effects of such authorisations on civil liability will always have to be assessed by the *lex loci damni*.[155] In sum, Art. 17 cannot be used to reverse the decision made by the European legislator in favour of a high level of protection in cases of environmental harm.[156]

56 **e) No analogous application of Article 5 (1) (ii) in cases of environmental liability.** In order to protect emitters from accountability in accordance with the *lex loci damni* even further, *Lehmann* and *Eichel* propose to apply Art. 5 (1) (ii) Rome II Regulation by way of analogy.[157] In their view, this rule shall come into play where (a) no public permit authorising the emissions has been granted, (b) the permission is void, (c) the permitted limits have been negligently exceeded or (d) a court finds that it would be inadequate to apply the law at the location of the emitter in accordance with Art. 17. In all these cases, the suggestion is to protect the emitters against liability through an analogous application of Art. 5 (1) (ii) if they could not reasonably foresee the exact damage that may have been caused or will be caused by global warming. The authors want to unrestrictedly apply the *lex loci damni* only where the alleged tortfeasor has obtained the permission fraudulently or has willingly and knowingly exceeded its limits.[158] After having thus effectively denied the law at the location of the damage any say in the standard of care that should be exercised by emitters of greenhouse gases, the authors "comfort" the reader by stating that conscious environmental sinners can still be judged pursuant to the law at the place of the damage.[159] In their summary, they stress that according to the analogous application of Art. 5 (1) (ii), the law at the location where the acts giving rise to the damage took place (i.e. the law at the emitters' location) should govern liability for climate change "exclusively".[160]

[150] Pöttker, *Klimahaftungsrecht*, p. 131 with further references.
[151] Cf also Plender/Wilderspin, *The European Private International Law of Obligations*, mn. 21–028.
[152] Von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 23 at the end (with further references).
[153] Maultzsch, in: *BeckOGK*, Rom II-VO Art. 17, mn. 25 et seq.
[154] Maultzsch, in: *BeckOGK*, Rom II-VO Art. 17, mn. 27.
[155] Von Plehwe, in: *Nomos Kommentar-BGB*, Art. 7 Rom II, mn. 24; Maultzsch, in: *BeckOGK*, Rom II-VO Art. 17, mn. 25 et seq.
[156] Yet the exclusive decisiveness of the carbon dioxide limits set by the state where the emitter is located at the expense of the applicability of the *lex loci damni* under Art. 7 is exactly the result that *Lehmann* and *Eichel* propose; cf *RabelsZ* 2019, 77 (105).
[157] Lehmann/Eichel, *RabelsZ* 2019, 77 (105–107).
[158] Lehmann/Eichel, *RabelsZ* 2019, 77 (105–107).
[159] Lehmann/Eichel, *RabelsZ* 2019, 77 (107).
[160] Lehmann/Eichel, *RabelsZ* 2019, 77 (107).

Comment: This suggestion does not find any support in the wording of the Regulation, nor is it shared by other commentators.[161] The general prerequisites for an analogy are (i) an unintended regulatory gap and (ii) comparable interests. There is no evidence that the European legislator unintentionally omitted a rule analogous to Art. 5 (1) (ii) in Art. 7 and the interests are not comparable. In contrast, Recital 20, directed at Art. 5 Rome II Regulation, highlights at the outset that "the conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society". One element of such fair risk distribution is the rule on foreseeability in Art. 5 (1) (ii). On environmental liability, on the other hand, Recital 25 stresses that, "regarding environmental damage, Article 174 of the Treaty […] provides that there should be a high level of protection[,] […] fully justif[ying] the use of the principle of discriminating in favour of the person sustaining the damage". Moreover, there is no parallelism regarding the interests involved. Technological innovation is, as a matter of principle, in the interest of public welfare. It seems therefore just and equitable to protect producers from unforeseeable liability risks and to allow them to control their risks through selected marketing. Greenhouse gas emitters, on the other hand, do not run a special risk created by technological innovation. Their liability risks are created by the unforeseeable nature of the concrete damage that is, however, inherent in the kind of impact the emissions have on the atmosphere. Furthermore, even if one favoured an analogy, Art. 5 (1) (b) merely states that the law at the producer's location prevails if he or she could not have foreseen that the product was marketed in the state where the victim was resident, purchased the goods or suffered the injury. Translated to the issue of liability for cross-border emissions, this would mean that the emitter could not be held liable according to the standards of the *lex loci damni* if he or she could not have foreseen that the emission could reach the state where the damage occurred. However, it is clear that emitters of greenhouse gases must know that the emissions are transported into the atmosphere worldwide. Therefore, even if one would subscribe to the idea of an analogy (which is not done here), the result that *Lehmann* and *Eichel* want to achieve – i.e. that emitters could only be held liable according to the *lex loci damni* if they could reasonably foresee the specific damage in that jurisdiction[162] – is not attainable via an application of Art. 5 (1) (ii). **57**

f) Internationally mandatory rules and ordre public. The choice-of-law rules of the Rome II Regulation can theoretically be supplanted by the internationally mandatory rules of the forum state (Art. 16 Rome II Regulation) and its ordre public (Art. 26 Rome II Regulation). However, this author is not aware of any present internationally mandatory rule that cuts off or limits liability for cross-border harm through climate change. Presently, it is hard to predict whether any potential forum state (which, after what has been said on jurisdiction, will most likely be the corporate home of a large greenhouse gas emitter) will in the future pass internationally mandatory legislation to shield its corporations from climate change liability. Given the strong public opinion in favour of greenhouse gas reduction and international obligations to cut emissions, it seems hardly conceivable that such legislation will get passed, at least in Western democracies. Instead, as far as corporate social responsibility is concerned, the trend is towards internationally mandatory rules establishing (and not limiting) the liability of corporations for human rights violations and environmental harm.[163] As for the **58**

[161] This is even admitted by the authors themselves, Lehmann/Eichel, *RabelsZ* 2019, 77 (106).
[162] Lehmann/Eichel, *RabelsZ* 2019, 77 (107).
[163] Cf *Mansel*, ZGR 2018, 439 (444 et seq.); Weller/Pato, *ULR* 2018, 397 (412 et seq.); on French legislation: Nasse, *ZEuP* 2019, 773; for possible future regulations on a European level, cf the "Study on Due

reservation of ordre public, even *Lehmann* and *Eichel* will not bring it into play (from the perspective of German law), even though they otherwise try to shield possible defendants from the applicability of foreign law that could take a stricter view on liability for climate change-related events with every conceivable argument.[164]

3. Autonomous PIL: Property law

59 In some jurisdictions, for example in Germany, damage to land or injuries resulting from activities carried out on immovable property may also give rise to remedies in property law (in Germany § 1004 BGB, § 906 (2) sent. 2 BGB). As a matter of principle, these remedies do not require negligence and are therefore particularly attractive for claimants. However, in order to avoid any divergence from EU conflict rules, the German PIL (Art. 44 EGBGB) submits these remedies to the rules contained in the Rome II Regulation so that there is no need to resort to the *lex rei sitae*.

4. US conflict of laws

60 As a matter of principle, US courts apply conflict-of-laws rules only if the parties plead foreign law; the latter is treated as fact, not as law.[165] Choice of law rules are state law and are the same for both interstate and international conflicts. Despite the richness of case law in the US on the law applicable to tort generally[166] and the great number of climate change cases filed in the US, it is hard to give an estimate as to which law US courts would apply, not least because choice of law questions do not seem to figure prominently in climate change cases.[167]

For tort, the traditional rule is the *lex loci delicti* or "last event" rule under which the applicable law is determined by the place where the injury was suffered.[168] However, due to the so-called "conflicts revolution", strict rules have partly given way to "approaches".[169] The 2nd Restatement reflects this development in § 145, according to which "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties, is centred." For personal injury, § 146 of the 2nd Restatement gives preference to the "local law of the state where the injury occurred […] unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 […]."

Diligence Requirements Through the Supply chain, Final Report", prepared for the European Commission, available at https://www.business-humanrights.org/sites/default/files/documents/DS0120017ENN.en_.pdf.

[164] Lehmann/Eichel, *RabelsZ* 2019, 77 (107 et seq.).

[165] Cf Hay/Borchers/Symeonides/Whytock, *Conflict of Laws*, § 12.15.

[166] Cf the summary by Hay/Borchers/Symeonides/Whytock, *Conflict of Laws*, § 17, pp. 711–997.

[167] E.g. the complaint in the lawsuit currently brought by Rhode Island against about 60 fossil fuel companies, including some foreign-based ones such as British Petroleum and Royal Dutch Shell, is a 150-page document that only briefly mentions jurisdiction, and does not mention choice of law. The most recent annual survey of choice-of-law cases in the American courts by *Symeonides*, "Choice of Law in the American Courts in 2019 – Thirty-Third Annual Survey", *American Journal of Comparative Law* 2020, (in print), does not mention any instance of climate change-related litigation.

[168] Hay/Borchers/Symeonides/Whytock, *Conflict of Laws*, § 17.2.

[169] For an overview of which states still follow the traditional rule, which adhere to the 2nd Restatement and which have adopted a combined approach, cf *Symeonides* (fn. 167) Table sub III. A.