



# International Comparative Law

One-Day Course of  
The Hague Academy of International Law

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## 3. Conflict Rules for Torts

Professor Dr Matthias Lehmann, D.E.A., LL.M., J.S.D.  
University of Vienna / Radboud University Nijmegen

# Overview

## **Part I: Classic Method**

1. Lex loci delicti
2. Place of Tortious Behaviour vs. Place of Injury

## **Part II: US Approaches**

1. Governmental Interest Analysis
2. Better Law
3. Flexible Approach

## **Part III: Commonalities**

1. Conduct Regulating vs. Loss Distributing Rules
2. Common Domicile Exception
3. Choice of Applicable Law

## **Part IV: Rules for Particular Torts**

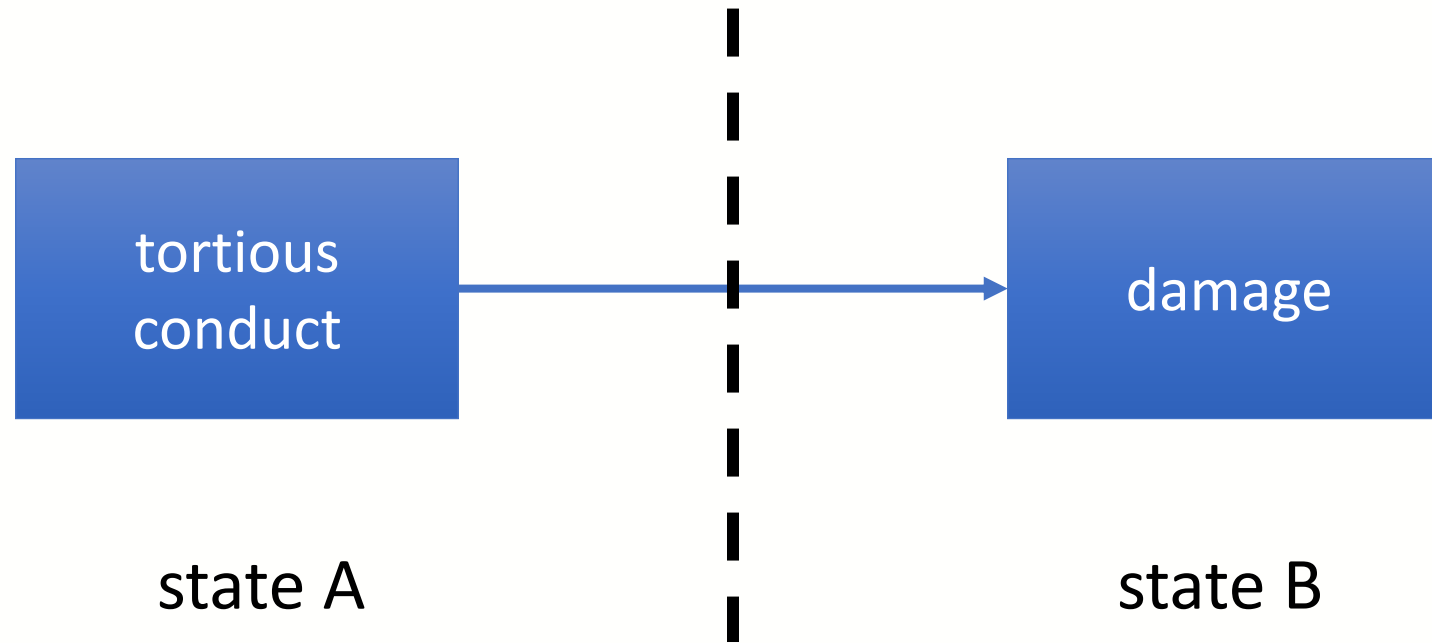
# Part I: Classic Method

## Lex loci delicti

- *lex loci delicti* = application of the law in force at the place of the tort
- is the classic principle
- still prevails today  
e.g. Art 17 Japanese Act, Art 133(2) Swiss PILA, Art 1219(1) Russian Civil Code, Art 4(1) Rome II, Art 44 phrase 1 Chinese Law

# Place of Tortious Behaviour vs. Place of Injury

- even if you apply the *lex loci delicti*, the question remains: where is the *locus delicti*?



# Place of Tortious Behaviour vs. Place of Injury

- where is the *locus delicti*?
- is decided differently:
  - (1) place of behaviour** or place of damage if damage in other country was foreseeable  
e.g. Art 133(2) Swiss PILA, Art 1219 Russian Civil Code, Art 17 Japanese Act
  - (2) place of damage**  
EU: Art 4(1) Rome II

# Place of Tortious Behaviour vs. Place of Injury

## Art 133(2) Swiss PILA

*When the tortfeasor and the injured party do not have an habitual residence in the same state, [tort] claims are governed by the law of the state **in which the tort was committed**. However, **if the result occurred in another state, the law of such state applies if the tortfeasor should have foreseen that the result would occur there.***

# Place of Tortious Behaviour vs. Place of Injury

## Art 17 Japanese Act

*The formation and effect of claims arising from a tort shall be governed by the **law of the place where the results of the infringing act are produced**. However, if it was not foreseeable under normal circumstances that the results would be produced at that place, the law of the place where the infringing act occurred shall apply.*



# Place of Tortious Behaviour vs. Place of Injury

## Art 4 Rome II

*(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the **law of the country in which the damage occurs** irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*

# Place of Tortious Behaviour vs. Place of Injury

- Illustration

*C, a security software producer based in Austin (Texas), provides an update to its security software on the internet. This causes a computer crash around the world. It is unclear whether C could have foreseen the crash. Which law applies to A's liability?*

- From EU point of view

- law of all affected countries applies

- From Swiss point of view:

- cannot be proven that damage in other countries was foreseeable – Swiss law applies

- From Japanese point of view:

- law of all affected countries applies as it cannot be proven that damage in other countries was unforeseeable

# Part II: US Approaches

# Governmental Interest Analysis

- some US states do not follow *lex loci delicti* rule
- impact of American 'conflicts revolution'
- governmental interest analysis

## Governmental Interest Analysis

Babcock v. Jackson, 12 N.Y.2d 473 (N.Y. 1963)

### Facts:

- two NY residents drive together to Ontario (Canada)
- driver Mr Jackson causes an accident in which Ms Babcock is hurt
- back in NY, Ms Babcock sues Mr Jackson
- Ontario has a guest statute according to which a driver is not liable towards passenger (to avoid insurance fraud)

**Issue:** Which law applies?

# Governmental Interest Analysis

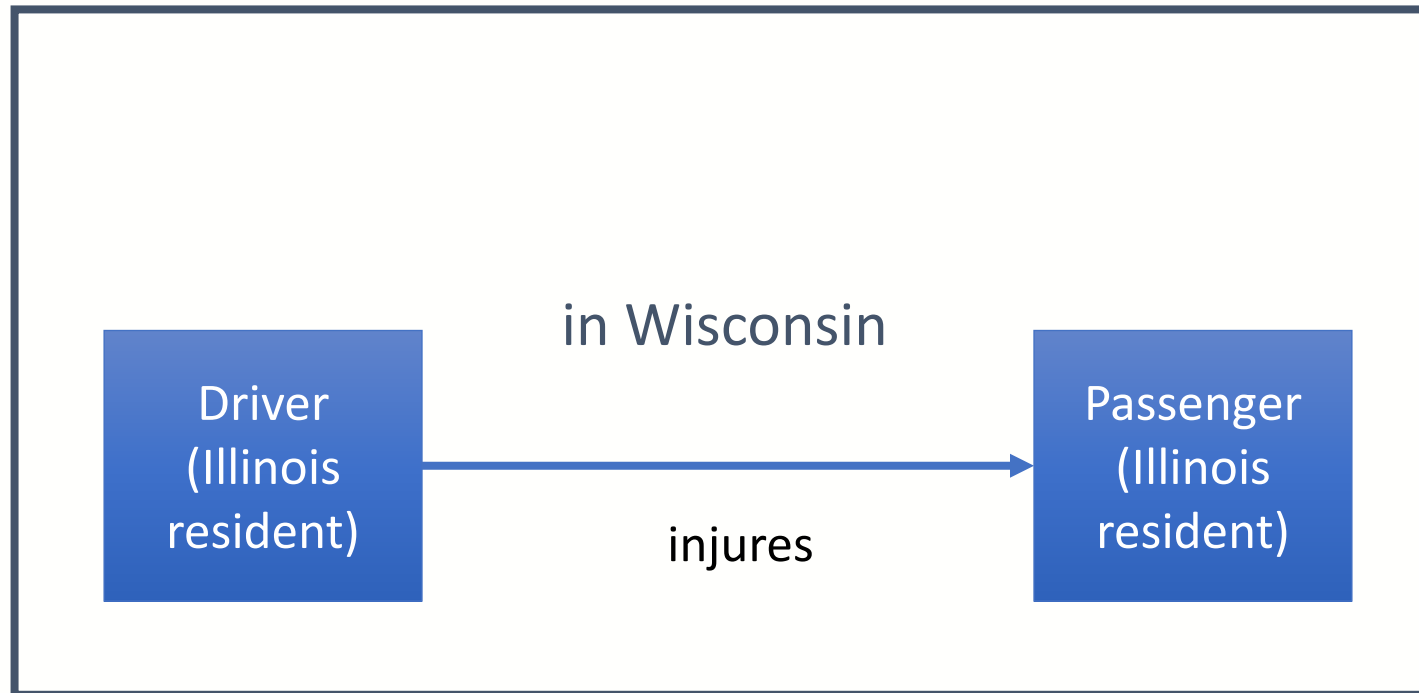
**Holding:** NY law applies

**Reasoning:**

- vested rights theory (which was prevalent in US until this case) is **mechanical and sterile**
- fails to take account of underlying **policy considerations**
- ignores the **interests** which jurisdictions other than that where the tort occurred may have in the resolution of particular issues
- “the concern of New York is unquestionably the **greater** and more direct and ... the interest of Ontario is at best minimal”

# Better Law

- example: Conklin v. Horner, 157 N.W.2d 579 (Wis. 1968)



- Illinois has “guest statute” excluding liability of driver to passengers
- Wisconsin does not

## Better Law

- Supreme Court of Wisconsin:
  - five Leflar considerations lead to **Wisconsin law**
  - **Wisconsin rule is better** because it deters other drivers from wrongful conduct



# Part III: Commonalities

# Conduct Regulating vs. Loss Distributing Rules

- even if loss distribution is decided by some other law, conduct must be regulated by the place where the tortfeasor acted
- is accepted in many laws  
e.g. Art 17 Rome II, Art 142 Swiss PILA, Babcock v. Jackson
- reason: legal certainty

# Conduct Regulating vs. Loss Distributing Rules

## Art 17 Rome II - Rules of safety and conduct

*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**.*

# Conduct Regulating vs. Loss Distributing Rules

Babcock v. Jackson, 12 N.Y.2d 473, 483 (1963)

*Where the defendant's exercise of due care in the operation of his automobile is in issue, the **jurisdiction in which the allegedly wrongful conduct occurred** will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.*

# Conduct Regulating vs. Loss Distributing Rules

- illustration:

*In the computer crash case above, A develops the update in conformity with US computer safety rules. These rules are however incompatible with the law of the EU. Which impact does this have on the solution of the case in an EU court?*

# Conduct Regulating vs. Loss Distributing Rules

- From EU point of view:
  - US rules of conduct and safety have to be taken into consideration “*in so far as is appropriate*” (see Art 17 Rome II)
  - but it can be argued that the taking into account of the US safety rules is not “appropriate”

## Common Domicile Exception

= where both plaintiff and defendant are resident in the same state, its law primes over that of the place of the tort

- now almost universally recognised

e.g. *Babcock v Jackson*, Art 133(1) Swiss Act, Art 1219(2) Russian Civil Code, Art 20 Jap. Act, Art 4(2) Rome II, Art 44 phrase 1 Chinese Law

# Common Domicile Exception

## Art 44 Chinese Law

*Tortious liability is governed by the lex loci delicti, but it is governed by the law of the common habitual residence if the parties have a place of common habitual residence.*



# Choice of Applicable Tort Law

- is allowed in many jurisdictions
- but typically only after the tort has arisen  
e.g. Art 14 Rome I, Art 44 Chinese Law
- sometimes limited to choice of *lex fori*  
Art 132 Swiss PILA

# Choice of Applicable Tort Law

## Art 44 Chinese Law

*... If the parties choose the applicable laws by agreement after any tort takes place, the agreement shall prevail.*

## Art 132 Swiss PILA

*The parties may, at any time after the damaging event, agree to apply the law of the forum.*

# Rules for Particular Torts

- for various types of torts, special conflicts rules have been developed:
  - 1. product liability**
    - **option for victim:** Art 45 Chinese Law, Art 1221 Russian Civil Code, Art 135 Swiss PILA
    - **place of delivery** to victim if foreseeable: Art 18 Japanese Act
    - **complex** solution: Hague Convention 1973, Art 5 Rome II

## Rules for Particular Torts

### 3. unfair **competition** and restraint of competition

place of **market**: Art 136 ff. Swiss PILA, Art 6 Rome II, Art 1222  
Russian Civil Code

### 4. **defamation**

- habitual **residence of victim**: Art 19 Japanese Act, Art 46  
Chinese Law
- **option** for victim: Art 139 Swiss PILA

# Summary

1. Most legal systems of the world use the *lex loci delicti* rule to identify the applicable law.
2. The countries following the *lex loci delicti* rule differ with regard to the focus on the **place of conduct** or the **place of damage**.
3. In the **US**, various **alternative approaches** are followed (e.g. governmental interest analysis and better law).
4. Many legal systems take account of the **conduct regulating rules** of the country in which the tortious conduct takes place.
5. An exception to the normal rules is almost universally recognised in case of the **common domicile** of the tortfeasor and the victim.
6. Rules for **special torts** increasingly displace the general connecting factors.