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Examining the Role of Article 7 Rome II Regulation: Exploring the Principle of Ubiquity in Environmental Protection and Climate Litigation

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Abstract

This master thesis explores the significance of Article 7 Rome II in the context of climate change litigation. As one of the key norms in questions of private international law, Article 7 Rome II applies to non-contractual obligations arising from environmental damage and its consequences. There has been criticism that the provision is overly broad, given the inclusion of the principle of ubiquity and the resulting claimant's right to choose the applicable law, potentially leading to the application of various liability regimes. On this basis, the work examines the legal possibilities for restricting its scope of application or legal consequences. The analysis includes the interpretations of the norm in the landmark cases *Lliuya v RWE* and *Milieudefensie et al v Royal Dutch Shell*. Additionally, in the face of the proposed restrictions, it considers the impact of socially relevant factors such as political interests and human rights implications. The findings suggest that most restrictions lack a solid legal basis. The only viable approach is to take foreign permits into account that meet a strict standard of appropriateness under Article 17 Rome II.

LIST OF ABBREVATIONS

BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf	confer
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ed	Editor
edn	Edition
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the German Civil Code)
ELD	Environmental Liability Directive
ff	and following
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
n	footnote
para	Paragraph
PIL	Private International Law
RDS	Royal Dutch Shell
RWE	Rheinisch-Westfälisches Elektrizitätswerk AG
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Table of contents

A. INTRODUCTION

The remarks by the United Nations Secretary-General António Guterres on climate change in September 2018, in which he stated, "The world is counting on all of us to rise to the challenge before it's too late," [1] remain relevant and urgent in the context of the ongoing climate crisis. In all areas of life, including politics, the private sphere and the workplace, the effects of climate change are pervasive, impacting individuals and communities, sometimes right at their doorstep. News reports detailing extreme weather events have become commonplace, integrated into the fabric of our social lives and the political discourse. Indeed, the issue of climate change has emerged as a topic of significant importance, requiring attention for years to come.

Efforts at the national and international levels have been made within the executive and legislative branches to address the challenges posed by climate change to mitigate its impacts. International agreements such as the Paris Agreement[2] adopted under the United Nations Framework Convention on Climate Change and the work of organizations like the Intergovernmental Panel on Climate Change[3] underscore the commitment to tackle this pressing issue. Hence, it was only a matter of time before the judiciary would be confronted with such cases. In recent years, courts have dealt with a significant influx of cases related to climate change and its consequences. In response to this growing phenomenon, the term Climate Change Litigation has emerged to describe this new area of legal practice.

This thesis seeks to narrow its focus specifically on climate change litigation through the lens of private international law. The introduction provides a definition of the term climate change litigation and outlines the role of private international law in this context.

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[1] António Guterres, 'Secretary-General's Remarks on Climate Change [as delivered]' (New York, 10 September 2018) https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered accessed 31 July 2024

[2] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 54113

[3] Intergovernmental Panel on Climate Change 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report* (2023) <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> accessed 31 July 2024

The main section encompasses an analyze of the background, objectives, and the application area of Article 7 Rome II. It examines the principle of ubiquity and in particular how the lex loci damni and lex loci actus are localized. It further addresses criticisms when applying Article 7 Rome II and explores potential solutions for limiting its influence. Then, the thesis reviews landmark cases, including *Lliuya v. RWE AG* and *Milieudefensie v. Royal Dutch Shell*, to illustrate the practical implications and interpretations of Article 7 Rome II. Finally, it considers the political, financial, and human rights dimensions of restricting Article 7 Rome II.

I. Overview of Climate Change Litigation

Climate change litigation is a relatively new phenomenon that has been part of the legal debate for the past two decades.[4] Action by international and national decision-makers to combat the effects of climate change remains inadequate in the face of the growing risks of climate-related disasters and the current failure of states to meet their responsibilities under the Paris Agreement.[5] Consequently, there is an increasing demand for legal mechanisms to hold governments and corporations accountable.[6] These lawsuits are being used strategically to attract public attention on the one hand, and on the other to prevent states and companies from continuing to allow or practice excessive greenhouse gas emissions.[7] As a result, this emerging field produces a growing number of court cases and increasing legal grounds for claims.[8] In order to ensure consistent usage throughout this thesis, the term will be defined due to an

[4] Ivano Alogna, Christine Bakker, Jean-Pierre Gauci (eds), Climate Change Litigation: Global Perspectives (Brill 2021) 3.

[5] United Nations Environment Programme, Global Climate Litigation Report: 2023 Status Review (2023) https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 accessed 31 July 2024.

[6] Mehrdad Payandeh, 'The Role of Courts in Climate Protection and the Separation of Powers' in Wolfgang Kahl, Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (C.H. Beck 2021) 66.

[7] Christina Voigt, 'Introduction: Climate Change as a Challenge for Global Governance, Courts and Human Rights' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (C.H. Beck 2021) 3.

[8] Ibid (n 5) X.

ongoing debate among scholars[9] and varying definitions and interpretations in different languages.[10]

Given the focus of the thesis on international law and its application in various cases, it is necessary to establish a clear definition independent of national legal perspectives. Understanding this definition helps in recognizing how litigation can contend for better environmental protection and contribute to strategic efforts aimed at enhancing climate protection. The term climate change litigation originated in the United States and only later became part of the European legal discourse.[11] It is therefore important to recognize that the definition of the term should reflect its original linguistic context. The multitude of different jurisdictions, levels as well as the diversity of legal areas and legal bases, render the formulation of a uniform definition a challenging task. The literature contains a variety of opinions on this matter.[12]

When examining the term climate change litigation, two prominent definitional approaches stand out: one that is broad and another that is more narrowly defined.[13]

The expansive approach includes all cases that come before judicial or administrative bodies related to climate change issues.[14] This definition is comprehensive, encompassing cases where climate change is either explicitly mentioned in the proceedings or decisions, or where it serves as an underlying motivation, even if not directly referenced.[15] It also covers cases where climate change is a secondary concern rather than the primary focus.[16]

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[9] Ibid (n 4) 15.

[10] Wissenschaftliche Dienste des Deutschen Bundestages, Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland (Aktenzeichen: WD 7 - 3000 - 116/16, 3 August 2016) 4.

[11] Christoph Althammer, 'Zivilprozessualer Rechtsschutz gegen grenzüberschreitende Umweltemissionen – von Rudolf von Jhering zur Climate Change Litigation' in *Festschrift für Peter Gottwald zum 70. Geburtstag* (C.H. Beck 2014) 9.

[12] cf Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483, 486.

[13] Ivano Alogna, Christine Bakker, Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (Brill 2021) 15.

[14] Joana Setzer, Catherine Higham, Andrew Jackson, and Javier Solana, Climate Change Litigation and Central Banks (December 2021) 21 Legal Working Paper Series, 5 <https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp21~f7a250787a.en.pdf> accessed 31 July 2024.

[15] Ivano Alogna, Christine Bakker, Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (Brill 2021) 16.

[16] ibid.

In contrast, the Sabin Center for Climate Change Law[17] opts for a more restrictive definition. Their research is focused on climate policy and litigation, and they have established a definition for their global climate change lawsuits database. According to the Sabin Center's criteria, climate change litigation is confined to cases that are adjudicated by courts or quasi-judicial bodies and that address substantive legal issues concerning climate change.[18] To fit this narrower definition, a case must meet two essential conditions: it must be heard by a judicial or quasi-judicial authority, and it must involve substantive legal matters related to climate change.[19] Cases that merely have incidental effects on climate change or address climate law issues in a secondary manner do not fall within this definition unless they directly engage with substantive climate-related legal questions.[20]

This thesis adopts the narrower definition as outlined by the Sabin Center to maintain precision and ensure that the focus remains on cases that directly address substantive climatic impacts. By aligning with this definition, the thesis avoids potential ambiguity and centers on litigation that relates to substantive climate change issues.

II. Significance of Privat International Law in Climate Change Litigation

Climate change litigation has historically been characterized by a predominance of public law cases, wherein individuals, groups of activists, and non-governmental organizations strive to hold governments and their bodies accountable for combating climate change and its effects.[21] It's often focused on challenging explicit governmental policies or failures to meet climate commitments. However, there is a noticeable shift in this landscape. Increasingly, private law

[17] The Sabin Center for Climate Change Law at Columbia Law School works on advancing legal strategies for climate change and educating future legal professionals. See The Sabin Center for Climate Change Law https://climate.law.columbia.edu.

[18] Global Climate Litigation Report (n 5) 10.

[19] ibid.

[20] ibid (n 14).

disputes against corporate actors - especially Carbon Majors[22] - are taking center stage, attracting more publicity.[23] In these horizontal cases claimants employ private legal instruments, including tort liability, to impose liability on culpable parties for environmental harm resulting from actions causing environmental degradation. These parties may include, for example, automotive manufacturers, airline corporations, fossil fuel energy producers, and even individuals.[24]

Moreover, if the cases fulfill the cross-border criteria, the questions regarding private international law arise. The cross-border dimension of these cases typically stem from the fact that the tortfeasor and the victim are domiciled in different countries, or alternatively, that the corporate structure of the case affects several locations and thus several legal systems.[25] Determining the appropriate forum and applicable legal system can lead to jurisdictional conflicts and clashes between different legal systems. A solution should be found here by means of international civil procedure and private international law that defines which forum and which national law is ultimately applicable to the case. This thesis will focus on the question of applicable law - therefore, issues in determining the forum may be disregarded. But to achieve the required coherence the interpretation of the norms determining the jurisdiction can still be utilized.[26]

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[21] Marc-Philippe Weller, Mai-Lan Tran, 'Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?' (2021) 3 ZEuP 573, 574.

[22] "Carbon Majors" refers to the largest companies responsible for 63% of global industrial CO2 and methane emissions resulting from fossil fuel combustion. These entities are typically fossil fuel producers, including major oil, gas, and coal companies. See Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2013) Climatic Change 229, 234.

[23] Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023) 2.

[24] Eva-Maria Kieninger, 'Conflicts of Jurisdiction and the Applicable Law in Domestic Courts' Proceedings' in Wolfgang Kahl and Marc-Philippe Weller (eds), Climate Change Litigation: A Handbook (C.H. Beck 2021) 121 para 2.

[25] ibid 138 para 40.

[26] See recital 7 Rome II.

In cases where several state laws are in conflict, private international law sets out conflict-of-law rules that determine which national substantive law applies. International private law and its rules therefore do not decide the case themselves, but merely refer to a legal system.[27] In doing so, international private law applies its principles to determine which applicable law is most appropriate for this case. Within the EU, the resolution of such conflicts is facilitated by the EU conflict of laws, which is governed by two key regulations: Rome I[28] and Rome II. In the context of climate change litigation, where contractual agreements rarely exist, Rome II typically comes into play.

The traditional perspective of Private International Law, which solely has the purpose to refer to one legal system that is applicable to the case has transformed. Nowadays, especially within the Rome Regulations through particular norms there is a margin of appreciation which allows to decide more flexible and thinking in terms of the result.[29] This point will be addressed further in the following paragraph.

B. ANALYSIS OF ARTICLE 7 ROME II

The analysis is structured into four key sections. First, the background, objectives, and scope of Article 7 Rome II, particularly concerning environmental and individual damages, are explored (I. and II.). Next, the principle of ubiquity is examined, including the localization of the reference points (III.). This is followed by an analysis of the criticisms, challenges, and potential limitations associated with Article 7 Rome II (IV.).

[27] Abbo Junker, *Internationales Privatrecht* (5th edn, Beck 2022) 3ff.

[28] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6.

I. Background and Objectives

The Rome II Regulation, adopted in 2007, is the first to standardize the rules on the law applicable to non-contractual obligations at a European level.[30] Notably, it predates the Rome I Regulation, which regulates the applicability of the law to contractual obligations and was adopted in 2008. Since 1967, efforts have been made to harmonize conflict of laws in cross-border cases within the European Union (at that time, the European Community).[31] In 1997, with the Treaty of Amsterdam[32], a title of competence had been included in ex-Article 65(1)(b) TEC, but it was not until 2002 that the Commission published a preliminary draft[33] for the law applicable to non-contractual obligations.[34] This draft contained an article addressing cross-border cases involving environmental violations, yet it lacked the provision for the claimant to choose their preferred law-option.[35]

Article 8 of the preliminary draft read as follows: "The law applicable to a non-contractual obligation arising from a violation of the environment shall be the law of the country in whose territory the damage occurs or threatens to occur." The rule seemed to only reproduce the general lex loci damni principle of Article 3 of the preliminary draft but was still necessary because it did not include its exceptions.[36] The Hamburg Group for Private International Law criticized the wording for being too industry-friendly, arguing that it could allow businesses to

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[29] Sophie Zeidler, *Klimahaftungsklagen. Die Internationale Haftung für die Folgen des Klimawandels* (Dunker & Humblot 2022) 238; Gerhard Wagner, 'Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäische Deliktsgerichtsstand' (2006) IPRax 372, 374.

[30] Andreas Spickhoff 'Art. 1 Rome II' in *BeckOK BGB* (70th edn. 2024) para 1.

[31] Jessica Schmidt 'Art. 1 Rom II-VO' in BeckOGK (2024) para 2.

[32] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/1.

[33] The draft is available within the article: Hamburg Group for Private International Law, 'Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations' (2003) 67 RabelsZ, 1.

[34] Jessica Schmidt, 'Art. 1 Rom II-VO' in BeckOGK (2024) para 3.

[35] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 3.

[36] Hamburg Group for Private International Law: Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (2003) 67 RabelsZ, 26.

take advantage of less stringent environmental laws in their home countries.[37] They suggested a new wording that focused on refining the text without altering the substance of the clause. It was only when the Permanent Bureau of the Hague Conference proposed to base the article about environmental violations on the principle of favorability that the principle of ubiquity was invented.[38] After considering different opinions, the Commission presented the official draft regulation in 2003 and included the option for the damaged party to choose the applicable law.[39]

Subsequently, the European Economic Committee criticized this decision, implying that Article 7 Rome II was politically motivated and extended beyond the primary goal of conflict of laws.[40] They argued that it could impose a stricter liability system, posing a threat to potential environmental polluters.[41] In their conclusion, the committee questioned whether granting the injured party the right to choose the applicable law under Article 7 Rome II was appropriate. Some even characterized this choice as a matter of who—the damaged or the damaging party—garnered the most sympathy.[42]

The Commission itself stated that the reason behind granting the right of choice to the victim was the lack of harmonization in substantive environmental law.[43] Without this provision,

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[37] ibid.

[38] ibid (n 35).

[39] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 2003/0168 (COD).

[40] Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)' (COM (2003) 427 final, 2003/0168 (COD)) (2004) OJ C241/1 para 5.5.

[41] ibid.

[42] Gerhard Kegel, Klaus Schurig, Internationales Privatrecht (9th edn. C.H.Beck 2004) 72; See also Angelika Fuchs 'Art. 7 Rome II' in Peter Huber (ed) *Rome II Regulation Pocket Commentary* (sellier 2011) para 13; Ulrich Hönle, *Die deliktische Grundanknüpfung im IPR und IZVR: Auswirkungen der Kollisionsrechtsvereinheitlichung auf europäischer Ebene* (1st edn, Lang 2011) 57.

[43] Abbo Junker, 'Art. 7 Rom II-VO' in Münchener Kommentar zum BGB (8th edn, C.H. Beck 2021) para 2.

businesses could exploit the disparities in environmental protection between states.[44] Article 7 Rome II aims to deter businesses from establishing themselves in states with low protective standards while allowing victims in states with lower protection levels to benefit from higher standards in neighboring states.[45] Therefore, the Commission's decision intended not only to enhance the rights of the victims but also to raise the level of environmental protection, aligning with the general objective of high environmental protection in Article 191 TFEU[46]. This was especially relevant because polluters derived economic benefit from their harmful actions.[47] The economic profit was generated at the expense of the environment, for which no compensation was initially due. Moreover, environmental substantive rules, being a significant cost factor, heavily influenced companies' decisions regarding their locations.[48] Article 7 Rome II sought to mitigate the risk of regulatory arbitrage in this regard.[49] Considering these factors, Article 7 Rome II reflected a shift from the classic, neutral conflict of laws perspective to a more value-oriented decision-making process aiming at achieving desired outcomes.[50] Ultimately, the final version of Article 7 Rome II prioritized victim and environmental protection over industry interests.

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[44] Leopold König, Sebastian Tetzlaff, '"Forum Shopping" unter Art. 7 Rom II-VO – Neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei "Klimaklagen"' (2022) RIW 25, 28.

[45] cf Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 19.

[46] See recital 25 Rome II.

[47] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 19.

[48] Abbo Junker, 'Art. 7 Rom II-VO' in *Münchener Kommentar zum BGB* (8th edn, C.H. Beck 2021) para 2.

[49] Peter Mankowski P, 'Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie' (2010) 5 IPRax 389; Liesbeth FH Enneking 'Judicial Remedies: The Issue of Applicable Law' in Juan José Álvarez Rubio and Katerina Yiannibas (eds) *Human Rights in Business - Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 53.

[50] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 5; Zeidler (n 29) 238; Enneking (n 49).

II. Scope of Application

When determining the scope of application, it is essential to consider it through the lens of European law, specifically in relation to other Private International Law Regulations such as Brussels Ia and Rome I, rather than applying the standards of any particular national legal system.[51] In the absence of a definitive ruling from the European Court of Justice on Article 7 of the Rome II Regulation[52], the scope of application is determined through an analysis of relevant literature.

1. Environmental Damage

The ambiguous legal term "environmental damage" necessitates further definitional clarification. The interpretation of this term is the subject of ongoing academic debate, and even the interpretation provided in recital 24 is considered contentious.[53] According to the latter environmental damage “should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms”. It remains unclear when exactly an adverse change of a natural resource occurs. The distinction between the terms "Schädigung" in Article 7 Rome II and "Schaden" in Recital 24 of the German version is considered insignificant because, despite the linguistic difference, both terms ultimately refer to damage within the context of environmental law. [54] The apparent differentiation between active ("Schädigung") and passive ("Schaden") actions does not

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[51] Jessica Schmidt, ‘Art. 1 Rom II-VO‘ in BeckOGK (2024) para 3.

[52] Peter Gailhofer, David Krebs and others (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* (1st edn, Springer 2023) 199 para 49.

[53] André Duczek, Rom II-VO und Umweltschädigung ein Überblick (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht, 6; Markus Buschbaum, Privatrechtsgestaltende Anspruchspräklusion im internationalen Privatrecht (Kovač 2008) 69.

[54] Leopold König and Sebastian Tetzlaff, ‘“Forum Shopping” unter Art. 7 Rom II-VO – Neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei “Klimaklagen”‘ (2022) RIW 25, 28; See also Thomas von Plehwe, ‘Art. 7 Rom II-VO‘ Rainer Hüßtege R and Heinz-Peter Mansel (eds) *Bürgerliches Gesetzbuch: BGB, Band 6: Rom-Verordnungen - EuGüVO - EuPartVO - HUP - EuErbVO* (3rd edn. Nomos 2019) para 7.

substantially affect the legal interpretation or application.[55] As a result, this distinction does not contribute to a clearer understanding of the text. Given that the English, Italian, and French versions of Rome II use consistent terminology, this discussion becomes irrelevant in the broader context of interpreting the regulation. [56] Due to the similarity of the definition to the one in the Environmental Liability Directive[57], this could be helpful for further interpretation.[58]

a) Impact of the EU Environmental Liability Directive

For a more comprehensive understanding of environmental damage, the definition in Article 2 ELD can be consulted.[59] This article specifies a list of protected interests. According to Article 1 ELD the directive aims to establish a unified framework for environmental liability and thus prevent environmental harm. Although both the ELD and Article 7 Rome II are based on the polluter pays principle[60] it must be noted that the ELD is substantive law, whereas Article 7 Rome II — despite its shift from a traditional, rigid private international law norm to a more

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[55] ibid.

[56] Michael Bogdan 'The Treatment of Environmental Damage in Regulation Rome II' in William Binchy and John Ahern (eds) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations A New International Litigation Regime* (Martinus Nijhoff 2009) 219, 223; Abbo Junker, 'Art. 7 Rom II-VO' in *Münchener Kommentar zum BGB* (8th edn, C.H. Beck 2021) para 10; Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 10.

[57] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, OJ 2004 L 143/56.

[58] Michael Bogdan and Michael Hellner 'Art. 7 Rom II-VO' Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law: Rome II* (Otto Schmidt 2019) para 6.

[59] Article 2 (1) Directive 2004/35/EC, "environmental damage" means: (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species; (b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive No. 2000/60/ EC, of the waters concerned, with the exception of adverse effects where Art. 4 (7) of that Directive applies; (c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. Article 2 (2) Directive 2004/35/EC defines "damage" as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

[60] Article 1 ELD; Recital 25 Rome II.

flexible one — remains a conflict of law rule. Article 2(1)(a) ELD states that environmental damage covered by an official permit fall outside the scope of application. Transferring this would mean that all cases where private actors operated under official authorization would not fall under Article 7 Rome II, leading to non-application in numerous cases.[61] Such an outcome would not only contradict the purpose of private international law but also prove impractical. Another reason against the direct transfer of the definitions is that the original draft of the Commission[62] contained a reference to the ELD, which was then removed in the final version. Opinions within the literature regarding this decision are polarized. Some scholars propose restricted application[63], while another group contends that full application is reasonable[64]. Essentially, the deletion of the reference to the ELD should not be misunderstood as a complete exclusion of its significance for interpretation.[65] Instead, the definition should be adapted in a way that takes account of the conflict-of-law nature of the provision. Therefore, a mediating approach should be preferred. This perspective generally adopts the definition while recognizing that Article 7 Rome II does not exclude environmentally damaging acts performed with permission. Moreover, it extends beyond the scope of Article 2 ELD by including changes to the air or atmosphere within the definition applicable to Article 7 Rome II.[66]

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[61] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 14.

[62] Commission, 'Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II")' COM (2006) 83 final, 2003/0168 (COD) 10.

[63] Stefanie Matthes, 'Umwelthaftung unter der Rom II-VO' (2011) 8 Zeitschrift für Gemeinschaftsprivatrecht (GPR) 146, 146; Hannah Güntner 'Das nach der Rom II-VO anwendbare Recht auf Klimaklagen, insbesondere die Auswirkungen ausländischer Genehmigungen im Deliktsstatut' (2023) 01 BLJ 16, 16.

[64] Abbo Junker, 'Art. 7 Rom II-VO' in *Münchener Kommentar zum BGB* (8th edn, C.H. Beck 2021) para 10; Angelika Fuchs 'Art. 7 Rome II' in Peter Huber (ed) *Rome II Regulation Pocket Commentary* (sellier 2011) para 19.

[65] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 13.

[66] Christian von Bar and Peter Mankowski (eds) Internationales Privatrecht Band 2: Besonderer Teil (2nd edn, C.H. Beck 2019) 363.

b) Climate Change as Environmental Damage

The question of whether climate change itself constitutes "environmental damage" under Article 7 of the Rome II is controversial. The human-made emissions that cause climate change primarily alter the atmospheric composition, increasing greenhouse gases and contributing to global warming.[67] While emissions may not directly cause immediate harm to water, land, or protected species, their role in altering the atmospheric balance may qualify as an indirect form of environmental damage.

According to Article 2 ELD "environmental damage" includes significant adverse effects on protected species, natural habitats, water, or land. Although the ELD does not explicitly mention the air as a natural resource, it is implicitly included within the broader concept of environmental damage under Article 7 Rome II. Should one reject this due to scientific distinctions, the air could nonetheless be included as its own ‘natural resource’ under recital 24 Rome II, as this list is non-exhaustive.[68] Notably, the ELD recognizes that damage can occur both directly and indirectly.

Critics argue that emissions alone do not constitute direct ecological harm but rather initiate a chain of events that may eventually lead to environmental damage. This perspective relies on a strict interpretation of the term "damage," suggesting that it should apply only to immediate harm to natural resources.[69] However, this narrow interpretation has been contested.

A broader interpretation suggests that altering the atmosphere's composition through CO2 emissions does indeed constitute environmental damage.[70] This is because the atmospheric changes caused by emissions trigger a series of unstoppable environmental impacts, including global warming. These impacts, in turn, cause significant harm to natural resources such as

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[67] Zeidler (n 29) 261.

[68] ibid 258.

[69] Matthias Lehmann and Florian Eichel ‘Globaler Klimawandel und Internationales Privatrecht‘ (2019) 83 RabelsZ 77, 94.

[70] Gerhard Wagner, 'Die neue Rom-II-Verordnung' (2008) IPRax 1, 9; Abbo Junker, ‘Art. 7 Rom II-VO’ in *Münchener Kommentar zum BGB* (8th edn, C.H. Beck 2021) para 12.

water, land, and ecosystems. Immediate occurrence of damage is not a prerequisite within the norm; the harm is inherently present in the emission and thereby qualifying it as environmental damage.[71]

Also, the purpose of Article 7 Rome II is to ensure high environmental protection standards and provide victims with the flexibility to choose the applicable law in cross-border cases. This goal supports a broad interpretation of "environmental damage," extending it to complex causal chains like those involved in climate change.

Furthermore, in the landmark case of Milieudefensie v. Royal Dutch Shell, the Hague District Court acknowledged that climate change resulting from CO2 emissions falls within the scope of environmental damage under Article 7 Rome II.[72] Although the court did not provide a detailed analysis, its decision aligns with the aims of Article 7.

In conclusion, it is consistent to include climate change itself, caused by human-made emissions, under the concept of environmental damage. This approach aligns with the regulation's objective of upholding high environmental protection standards, is consistent with case law, and recognizes the unstoppable causal chains set in motion by such emissions.

c) Interim Conclusion

In summary, when defining environmental damage, Recital 24 Rome II must be considered in conjunction with Article 2 ELD. It is essential to account for the conflict-of-law nature of Article 7 Rome II, distinguishing it from the substantive law outlined in the ELD. Given the definition, the regulation's purpose, and relevant case law, it can be concluded that the alteration of the atmosphere caused by human-made emissions does indeed constitute environmental damage under Article 7 Rome II.

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[71] Marc-Philippe Weller, Jan-Marcus Nasse, Laura Nasse ‚Climate change litigation in Germany' in Wolfgang Kahl and Marc-Philippe Weller (eds) *Climate Change Litigation: A Handbook* (C.H. Beck 2021) 394.

[72] *Milieudefensie et al v Royal Dutch Shell,* Rechtbank Den Haag (2021) para 4.3.2.

2. Individual Damage

In the second alternative, Article 7 Rome II mentions the individual – either personal or property - damage arise "as a result" of environmental damage, indicating that an independent occurrence of harm must be present.[73] This is particularly relevant in the context of determining the place of damage since the focus is on the location where the personal or property damage occurred. The question of whether the personal or property damage stems from environmental harm, as stipulated by the regulation, raises two issues. Firstly, whether prior ecological damage is necessary, and secondly, how the causal relationship between this damage, if required, and the individual harm should be constituted.

a) Ecological Harm

The wording of Article 7(2) of Rome II raises the question of whether ecological harm must be present for the provision to apply. Specifically, it is unclear whether an actual impairment of the function or substance of a natural resource is required, or if merely an impact on it suffices. The text of the Article suggests the former[74], as it states that individual damage must result from environmental damage, and the title "Environmental Damage" implies that the provision applies only when such damage has already occurred. Also, according to this view, a privileged status such as that of the claimant under the ubiquity principle would no longer be justified under a broader interpretation.[75]

On the other hand, climate change and its worldwide impacts inherently constitute ecological damage[76], making further examination - apart from the examination of the causal connection -

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[73] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 16.

[74] André Duczek, *Rom II-VO und Umweltschädigung ein Überblick* (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht, 8ff.

[75] ibid (n 73) para 18.

[76] ibid (n 71).

unnecessary. For example, in the Milieudefensie v. Royal Dutch Shell, the court concluded that damage had already occurred and that any additional CO2 emissions would just worsen the existing damage.[77] Given the clear global impacts of climate change a requirement proof of additional environmental damage is redundant and would complicate the process. In most cases, the requirement of environmental damage is likely to be met.[78] In the rare instances where this is not the case, it should be sufficient that the damage occurs along an "environmental pathway", through an impact on an environmental medium.[79] This approach aligns with the objective of the article, which aim to enhance environmental protection.[80]

b) Establishing Causation

The requirement of a causal link is one of the biggest hurdles in climate change litigation. Due to the large number of polluters and the complexity of the climatic processes and their effects, it is incredibly difficult to draw precise causal processes.[81] Regarding the relationship between environmental damage and the individual damage in Article 7 Rome II, it is rightly assumed that a loose causal relationship is sufficient.[82] The damage should simply stem from the environmental damage, aiming to exclude other damages lying outside of this causal chain.[83]
Under this understanding, the causal link within the context of Article 7 Rome II is not considered a significant obstacle. However, courts face complicated evidentiary issues when it

[77] ibid (n 72).

[78] ibid (n 67) 271.

[79] Gerhard Wagner, 'Die neue Rom-II-Verordnung' (2008) IPRax 1, 9; Leopold König and Sebastian Tetzlaff, '"Forum Shopping" unter Art. 7 Rom II-VO – Neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei "Klimaklagen"' (2022) RIW 25, 29.

[80] Ibid (n 78).

[81] Stephanie Nitsch 'Liability for climate change damages under the German Environmental Liability Act' in Wolfgang Kahl and Marc-Philippe Weller (eds) *Climate Change Litigation: A Handbook* (C.H. Beck 2021) 442 para 47.

[82] Eva-Maria Kieninger 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' (2022) 1 IPRax 1, 6; ibid (n 67) 272.

[83] Matthias Lehmann, Florian Eichel 'Globaler Klimawandel und Internationales Privatrecht' (2019) 83 RabelsZ 77, 95.

comes to proving causality.[84] It is extremely challenging in climate change cases to determine whether an individual's damage directly results from the emissions of a specific tortfeasor. This difficulty has led to discussions about addressing the problem of causality within the framework of conflict of laws. But the determination of a causal link between the defendant's actions and the claimant's damage should be governed by substantive law and decided by national courts. [85] Engaging in this discussion would overlook the conflict-of-law nature of the norm. Affirming or denying causality under Article 7 of Rome II could impact the outcome of the proceedings heavily. It could lead to the non-application of the norm and therefore withdraw the victim their right to choose the substantive law.

In conclusion, an extensive debate on causality is not appropriate as it would contradict the objective of achieving a high level of environmental protection. A straightforward, loose causal link is deemed adequate to exclude cases that should fall within the scope of Article 4 of the Rome II Regulation. [86]

3. Interim Conclusion

In the second alternative of Article 7 Rome II, where individual damages are claimed, it is not necessary to establish prior ecological damage as a prerequisite. An impact on the environment that leads to individual harm is sufficient. Additionally, the requirement for a causal link is relatively loose; it is enough for the individual damage to result from the environmental impact, without needing to prove a direct or immediate connection.

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[84] See *Lluiya v RWE* (2016) ZUR 2017, 370 para 41ff.

[85] ibid (n 67) 272.

[86] ibid (n 83); ibid (n 67) 272.

III. Principle of Ubiquity

The following section will examine the principle of ubiquity and the specific impacts of the choice it encompasses. Furthermore, it will explore the criticism and challenges the principle faces and whether it should be restricted accordingly. Finally, potential limitations will be examined and tested for their suitability.

1. Overview of the Principle

In accordance with the classical understanding, which predates the establishment of Rome II[87], the principle of ubiquity states that the place of success and the place of action are of equal importance and that both are taken into account in the determination of the place of the offence.[88] Article 7 Rome II implements the principle by given the claimant the right to choose between legal systems of different locations. Accordingly, in a case of a non-contractual obligation due to environmental damage or resulting individual damage, the law of the place where the damage occurred (*Lex loci damni*) applies by default under Article 7 (1) Rome II in conjunction with Article 4 of Rome II. However, the claimant can opt to base the claim on the law of the place where the event giving rise to the damage occurred (*Lex loci actus*). The decision of the claimant to select the Lex loci actus can be influenced by several factors, including the existence of legal precedents in this field, the level of environmental standards or stricter liability rules.[89]

This principle of favorability in Article 7 Rome II, unique in the Rome II Regulation, accepts a certain degree of legal uncertainty to uphold the objective of high environmental protection

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[87] Michel Walter ‚§ 64 Anwendbares Recht' in Ulrich Loewenheim (ed) *Handbuch des Urheberrechts* (3rd edn, C.H. Beck 2021) para 159.

[88] André Duczek, *Rom II-VO und Umweltschädigung ein Überblick* (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht 19.

[89] Liesbeth FH Enneking 'Judicial Remedies: The Issue of Applicable Law' in Juan José Álvarez Rubio and Katerina Yiannibas (eds) *Human Rights in Business - Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 54.

outlined Article 191 TFEU. At the same time, it aims to protect the plaintiff from an unforeseeable coincidence in legal system under conflict of laws when the two locations are not linked.[90] For large companies, it is not uncommon to face litigation in the jurisdictions where they operate, particularly when their activities give rise to legal claims in those regions.

2. Localization of the Reference Points

According to the principle of ubiquity, two locations are of significance in determining the applicable law: firstly, the place of the damage, as also mentioned in Article 4 Rome II and alternatively, the place of choice, the place where the event giving rise to the damage occurred. In the following section, it will be defined how these two locations are localized. The determination of locations is particularly challenging in climate change cases, which involve numerous places of effect and action. In accordance with the concordance principle set forth in recital 7 Rome II, there is a preference for consistency with the interpretation of Brussels Ia. Consequently, the interpretation of Brussels Ia can serve as a reference point for interpreting Rome II. [91]

a) Lex Loci Damni

The primary rule of the Rome II Regulation, as stated in Article 4 Rome II, refers to the law of the country where the damage occurs. This rule prioritizes the location where the harm has directly manifested and aims to ensure that the legal system most closely connected to the damage is applied.

Article 7 Rome II strengthens the approach by allowing the application of the law of the place where the damage occurs by default, unless the claimant exercises their right to choose and

[90] Leopold König and Sebastian Tetzlaff, '"Forum Shopping" unter Art. 7 Rom II-VO – Neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei "Klimaklagen"' (2022) RIW 25, 35.

[91] Zeidler (n 29) 274 ff.

opts for the lex loci actus. The exceptions set forth in Articles 4(2) and 4(3) Rome II, which permit consideration of a closer connection to another country, are not applicable in this context due to the unambiguous language of Article 7 Rome II.[92] This adherence to the clear legislative wording supports the objective of high environmental protection within the EU. Denying claimants access to the stricter liability regimes of certain jurisdictions would undermine this objective.[93]

As recital 16 Rome II clarifies, the lex loci damni describes the law of the place where the direct damage occurred. The regulation explicitly distinguishes between two types of protected interests: environmental damage and individual damage. This distinction necessitates careful consideration when determining the place of damage occurrence. [94]

Regarding environmental damage, the relevant location is where the adverse change occurred, i.e. where flooding has taken place due to altered greenhouse gas composition.[95] Focusing solely on the primary legal interest, like the atmosphere, is ineffective because it does not allow for clear location determination, given the global distribution of atmospheric composition.[96] Splitting climatic processes into individual parts complicates identifying the place of impact and makes standard application impractical. But in cases where environmental damage spans multiple jurisdictions, each jurisdiction applies its laws to the respective part of the damage in a "mosaic-like" manner.[97] Nevertheless, the determination of the location of damage in cases of pure environmental harm is likely to have only theoretical significance without practical implications.[98] The absence of a legal basis for claiming pure environmental damage

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[92] Angelika Fuchs ‘Art. 7 Rome II‘ in Peter Huber (ed) *Rome II Regulation Pocket Commentary* (sellier 2011) para 25.

[93] Zeidler (n 29) 273.

[94] Thomas Kadner-Graziano T, 'Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung' (2009) 73(1) RabelsZ 1, 54.

[95] Zeidler (n 29) 201.

[96] ibid.

[97] Stefan Huber, ‘Art. 7 Rom II-VO’ in BeckOGK (2022) para 31; See below, Section B. IV. 2. b) aa) for a detailed discussion of the mosaic principle.

[98] Zeidler (n 29) 204.

in private law represents a significant obstacle. In the majority of legal systems, the plaintiff will lack the legal standing to assert such an infringement.[99] Consequently, the examination of the location of damage in the context of individual harm is more pertinent to the real world.

In cases of claims for compensation for individual personal injury or property damage, the place of the individual – not the environmental - damage serves as the reference point for determining the applicable law.[100] It may be argued here that indirect damage is merely consequential damage, which therefore should be disregarded as indirect.[101] However, this can be countered by the fact that the individual damage is mentioned separately as a connecting factor and thus establishes the applicable law. This ensures that individuals seeking redress for personal or property damage are governed by the laws of the place where they suffered harm. Hence, individuals can interact with the legal system with which they are most familiar, rather than being forced to navigate the tortfeasor's legal system. Thus, no deviation from the fundamental focus on direct damage is observed here. Rather, a new type of damage is incorporated into the article to preempt potential criticism. Generally, whether the place of the damage was foreseeable on the side of the tortfeasor is not a requirement under Rome II.[102]

b) Lex Loci Actus

The injured party can choose the lex loci actus, which refers to the law of the place where the event giving rise to the damage occurred, the location where the harmful act was conducted.[103] It is not specified which harmful act in the causal chain is meant, so this determination is particularly challenging for so-called distance delicts, where these locations are in different

[99] Graziano (n 94) 54 ff.

[100] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 33; Marc-Philippe Weller, Jan-Marcus Nasse, Laura Nasse ‚Climate change litigation in Germany' in Wolfgang Kahl and Marc-Philippe Weller (eds) *Climate Change Litigation: A Handbook* (C.H. Beck 2021) para 54.

[101] cf recital 16 Rome II.

[102] ibid (n 92) para 6.

[103] Gailhofer (n 52) 197 para 46; Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 36.

states.[104] In climate change litigation, particularly those concerning emissions-related damages, identifying the loci actus is disputed. Some argue that the loci actus should be located where the emissions occur.[105] This perspective emphasizes the direct source of the harmful emissions and the immediate impact on the environment.

Another view suggests that the relevant legal system should be that of the state where the corporate decisions leading to emissions are made.[106] This argument posits that decisions made at a company's headquarters can initiate a chain of events resulting in environmental damage.[107] Supporters of this view argue that corporate decisions, particularly those made in jurisdictions with higher regulatory standards, should not be circumvented by focusing solely on the subsidiary's location with lower regulatory requirements.[108] Also, harmful conduct is generally understood as active behavior, suggesting deliberate actions. In contrast, the emission of CO2, which is typically caused by machines and other equipment, has a more passive connotation. The active elements of this process, including the decisions and actions taken to initiate and manage these emissions, should also be considered within the context of the "event giving rise to the damage". This approach ensures that the higher standards governing corporate conduct are maintained and not undermined by jurisdictional arbitrage.

The complexity of this issue is highlighted in the ruling against Royal Dutch Shell, where the Rechtbank Den Haag noted that the CJEU had not provided an opinion on cases concerning the "event giving rise to the damage."[109] Among other things, the parties were arguing about the interpretation of Article 7 Rome II. While the claimants consider RDS's policy to be partly responsible for the CO2 emissions and therefore constitute an event giving rise to the damage, Shell is convinced that the corporate decision are only a preparatory act and therefore fall out-

[104] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 34.

[105] Kieninger (n 24) para 48; Lehmann and Eichel (n 83) 96.

[106] Gailhofer (n 52) 198 para 48.

[107] ibid; König and Tetzlaff (n 90) 39.

[108] Gailhofer (n 52) 198 para 48.

side the scope of Article 7 Rome II.[110] However, the court decided that RDS's view is too narrow and that, although the article refers to one "event", several different events may have led to the damage. Accordingly, the corporate policy is also an independent cause that led to the damage.[111] The decision is difficult insofar as the place of action cannot be precisely determined due to the interaction of multiple locations. This impairs the legal certainty and predictability required in the recitals.[112]

Regarding the treatment of different stages of an action or multiple equivalent actions spanning several countries, the policy objectives of Article 7 and the need for legal certainty argue against solely considering the primary location of the action. Instead, it seems appropriate within the framework of Article 7 Rome II to allow the injured party to choose among all the locations where actions occurred.[113]

c) Interim Conclusion

The determination of lex loci actus is primarily relevant in cases involving individual damage, as environmental harm alone does not hold practical significance in private law disputes due to the lack of legal standing for private individuals in such cases. Therefore, the applicable law should be based on the location where the individual damage occurred. In contrast, lex loci actus is more complex to localize and requires a comprehensive assessment of all circumstances in each case, including potentially corporate policy decisions. Overall, it is most convincing to grant the injured party the choice of which location to prioritize for determining the applicable law.

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[109] *Milieudefensie et al v Royal Dutch Shell,* Rechtbank Den Haag (2021) para 4.3.4.

[110] *Milieudefensie et al v Royal Dutch Shell,* Rechtbank Den Haag (2021) para 4.3.6.

[111] ibid.

[112] König and Tetzlaff (n 90) 38; Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 38.

[113] Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 38; but see König and Tetzlaff (n 90) 38 ff.

IV. Criticisms and Potential Limitations

The following section deals with the question of whether Article 7 Rome II represents a balanced solution between environmental protection, the improvement of the position of the injured party and the protection of the confidence of the injuring party. First, the criticism of Article 7 Rome II is presented, and then possible restriction possibilities are examined.

1. Criticisms and Challenges

Even before the formal adoption of Rome II, the principle of equivalence for environmental protection faced significant criticism. Critics argued that there was no need for a specific conflict rule tailored to environmental protection, as general conflict rules were deemed sufficient.[114] Others advocated for the ubiquity principle to be extended to other types of damage, such as product liability, to enhance overall protection.[115] Proponents of special rules for environmental protection countered these criticisms by emphasizing that the environment, as a vulnerable and defenseless entity, requires specialized legal safeguards.[116] Subsequently, further points of criticism have arisen in the concrete application of Article 7 of Rome II, in particular in connection with climate change litigation, which need to be analyzed.

a) Law Shopping

One major criticism center on the concept of "law shopping,"[117] which arises from the broad application of Article 7 Rome II.[118] This provision allows claimants to choose the legal sys-

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[114] European Parliament proposed to remove the norm, see Diana Wallis ‚Entwurf einer legislativen Entschliessung des europäischen Parlaments zu dem Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über das auf außervertragliche Schuldverhältnisse anzuwendende Recht' KOM(2003) < https://www.europarl.europa.eu/doceo/document/A-6-2005-0211_DE.html> accessed 17 September 2024.

[115] Steffen Pabst ‚Artikel 7 Rom II' in Thomas Rauscher (ed) Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III (5th edn. Ottoschmidt 2023) para 34.

[116] Zeidler (n 29) 282.

[117] The terms law and forum shopping are sometimes used interchangeably. See Zeidler (n 29) 240.

[118] cf König and Tetzlaff (n 90) 33.

tem most advantageous to them, leading to procedural inequality. Critics argue that this creates an unjustified advantage for the injured party, who can select a jurisdiction with more favorable laws.[119] The concern is that claimants could exploit jurisdictions with stringent environmental laws and lenient causal link requirements to hold companies liable, even if these companies have minimal or no connection to those legal systems.[120] Furthermore, it is noted that the applied polluter pays principle merely stipulates that the polluter should bear the costs for the damages caused, but it does not grant the injured party the right to choose the applicable law, which would allow them to seek maximum compensation.[121] Thus, they demand a restriction of the norm in favor of predictability and determinability.[122]

b) Economic Challenges for Companies

One point of criticism, which is a consequence of the previous one, relates to the organizational and economic burden placed on companies by the possible application of several, strict national environmental laws. The emissions affect the composition of the atmosphere, leading to climate change with all its adverse environmental consequences and damages. These do not only occur in the country where the emissions were released but are inherently transboundary. So-called distance torts present legal difficulties. In the case of individual damage, the lex loci damni is the place of the applicable law where the personal injury or damage to property occurred. The fact that climate change is causing damage worldwide that can be traced back to emissions leads - applying Article 7 Rome II - to a wide range of legal systems.[123] Therefore

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[119] Angelika Fuchs 'Art. 7 Rome II' in Peter Huber (ed) *Rome II Regulation Pocket Commentary* (sellier 2011) para 9; Gerhard Wagner, 'Internationales Deliktsrecht, die Arbeiten an der Rom II-Verordnung und der Europäische Deliktsgerichtsstand' (2006) IPRax 372, 380.

[120] Matthias Lehmann, Florian Eichel 'Globaler Klimawandel und Internationales Privatrecht' (2019) 83 RabelsZ 77, 96.

[121] Fuchs (n 119) para 9.

[122] König and Tetzlaff (n 90) 33; Recital 14 also mentions the requirements of legal certainty and the need to do justice in individual cases.

[123] ibid (n 120).

it is argued that it is unreasonable to expect companies to comply with all substantive environmental regulations across different jurisdictions worldwide.

c) Lack of Incentives to Strengthen Environmental Protection

Critics also argue that the broad application of the ubiquity principle in Article 7 Rome II reduces the pressure for national legislators to strengthen environmental protections. Since claimants can seek compensation under the any stricter liability regime of other jurisdictions, domestic lawmakers might feel less compelled to create robust environmental laws.[124] This could lead to a scenario where legislators rely on foreign legal systems to address environmental issues, potentially resulting in weaker national environmental standards. Additionally, this dynamic might incentivize companies to relocate their headquarters to jurisdictions with more lenient regulations, thereby avoiding stricter liability under the lex loci actus.[125] Such a situation could diminish the overall effectiveness of environmental protection efforts.

d) Interim Conclusion

In summary, these criticisms highlight significant concerns with the application of Article 7 Rome II in climate change litigation. The broad choice of law, economic burdens on companies, and reduced incentives for strengthening environmental protection all point to potential flaws in the current framework. A possible solution could lie in the harmonization of global environmental laws and the establishment of uniform liability standards for companies.[126] Such harmonization would render the complex conflict-of-laws regulations unnecessary, as legal outcomes would no longer hinge on differing national systems but rather on consistent,

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[124] Stefan Leible and Andreas Engel 'Der Vorschlag der EG-Kommission für eine Rom II-Verordnung: Auf dem Weg zu einheitlichen Anknüpfungsregeln für außervertragliche Schuldverhältnisse in Europa' (2004) EuZW 7, 13; André Duczek, *Rom II-VO und Umweltschädigung ein Überblick* (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht, 20.

[125] See André Duczek, *Rom II-VO und Umweltschädigung ein Überblick* (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht 21.

universally applied standards. It will be interesting to see whether this criticism can be countered, as we will probably have to wait a long time for such harmonization. Whether these criticisms can be effectively addressed will be explored in the context of approaches to limitation in the subsequent analysis.

2. Approaches to Limitations

The European legislator cannot regulate every possible case, which is why courts are essentially obligated to interpret the law. When interpreting EU legal acts, courts in member states have the right, Article 267(2) TFEU or even the obligation, Article 267(3) TFEU to refer questions to the CJEU. In the literature, various approaches are discussed that aim to restrict the scope of norms to address and counter criticism effectively. The following will demonstrate possibilities for restriction that claim to provide a fair balance between environmental protection and legal certainty for emitters, who are potentially defendants. Each of the individual possibilities for restricting Article 7 Rome II is outlined and then evaluated as to whether this is compatible with the dogmatics of the article.

a) Adjusting the Scope of Application

In the following, teleological approaches to limit the scope of the Article 7 Rome II are examined.

aa) Commercial Activities

An option to narrow the scope of Article 7 Rome II could be to reduce its application to commercial activities, thereby excluding private activities from its scope.[127] Such a restriction

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[126] Fuchs (n 119) para. 10.

[127] Helmut Heiss H and Leander D Loacker 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 10 Juristische Blätter 613, 632.

would ensure that at least individuals who engage in private environmentally damaging activities are not faced with a large number of possibly applicable legal systems. While the articles wording does not give a hint to support this interpretation, the underlying rationale may be open to such restriction.

Referring to the Commission's draft regulation, Heiss and Loacker argue that the less favourable treatment of polluters is justified because they derive an economic advantage from their polluting activity.[128] In other words, it is the polluter who ultimately generates a financial return from their damaging behavior and is therefore treated more severely.[129] Zeidler rightly states that Heiss and Loacker fail to recognize that economic benefit is not equivalent to commercial activity, as economic benefits could arise from private activities, such as private energy-generating plants.[130]

Moreover, the recitals of the regulation indicate that the rationale for the more rigorous treatment is to achieve a high level of environmental protection, particularly through the implementation of the polluter-pays principle.[131] According to Article 16 Rio Declaration on Environment and Development, the polluter pays principle states that the polluter should bear the costs of the pollution. Notably, this principle is not limited to professional or commercial activities.

The nature of the damage, whether private or commercial, should not affect the injured party's ability to exercise this right, as this would be unfair for the injured party. Further, it is difficult to distinguish whether an activity is private or commercial in nature, as the definitions of these terms vary across legal systems. Introducing such an unwritten limitation within the EU

[128] ibid.

[129] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 19.

[130] Zeidler (n 29) 260.

[131] See recital 25 Rome II.

conflict of laws system could lead to disputes over definitions, potentially creating a regulatory gap in cases of environmental damage caused by private activities.

While the primary motivation is the significant CO2 emissions from commercial activities, it is certainly not the only concern.[132] This is further supported by the fact that the reference to the Environmental Liability Directive, which requires a professional activity (cf. Art. 2 para. 1 lit. a) "Operator" in conjunction with Art. 2 para. 6 ELD), was ultimately removed from the final draft. The significantly narrower scope of application of the directive, which is regulating substantive law, therefore cannot simply be transferred.[133]

In scenarios where two parties reside along a border and one engages in private environmentally harmful activities—such as dumping toxic waste into a river, thereby polluting the water on the neighboring side—the right to choose would also be excluded. This could jeopardize environmental protection by preventing the applicability of the stricter liability system.

In the final version of the Commission's draft only states that the scope includes environmental damage that results from human activity[134], without specifying whether it pertains to private or commercial contexts. For these reasons, narrowing the scope of application to only professional or commercial activities should be dismissed.[135]

bb) Materiality Threshold

The introduction of a materiality threshold would mean that Article 7 Rome II would only apply when a specific, predetermined threshold is exceeded. Such a threshold could, for instance, limit the article's applicability to "Carbon Majors" —companies responsible for par-

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[132] André Duczek, *Rom II-VO und Umweltschädigung ein Überblick* (2009) 91 Beiträge zum Transnationalen Wirtschaftsrecht 9.

[133] ibid.

[134] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 19.

[135] See Zeidler (n 29) 260; Duczek (n 133) 10; Matthes GPR (n 63) 147; Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para. 14.

ticularly large emissions worldwide and therefore significantly contributing to climate change. It is worth considering whether a materiality threshold could be a reasonable approach to protect smaller-scale environmental polluters from being subject to various legal regimes.

However, the text of the norm does not support such a limitation. While one might attempt to read a materiality threshold into the definition of environmental damage by referencing Article 2(1)(a) ELD[136], it's important to note that any mention of the ELD was deliberately removed from the final draft of Rome II.[137] Excluding environmental damage below a certain qualitative or quantitative threshold from the general rule would be unreasonable, especially when a separate article was created specifically for environmental harm.

Moreover, the purpose of the regulation argues against such a threshold. Since environmental protection is a high priority, even minor environmental deteriorations should be enough to trigger the application of Article 7 Rome II. Introducing a materiality threshold could lead to smaller, yet still harmful, environmental impacts being overlooked, which would contradict the goal of comprehensive environmental protection.

Practical challenges would also arise. Determining whether a natural resource has been adversely affected and whether this has caused damage can only be accurately assessed on-site in the specific state.[138] A materiality test at the level of conflict of laws would complicate this assessment significantly. Therefore, questions of materiality should be left to substantive law and excluded from conflict-of-law considerations.[139]

Furthermore, determining the specific level of the materiality threshold would be problematic. The classification of entities as "Carbon Majors" or not could fluctuate due to constant changes in emission levels. As a result, the application of the law would depend on external factors not enshrined in legislation, which would negatively impact legal certainty and transparency.

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[136] See “significant adverse effects” in Article 2 (1)(a) ELD.

[137] cf Duczek (n 133) 8.

[138] cf Stefanie Matthes, 'Umwelthaftung unter der Rom II-VO' (2011) 8 GPR 146, 147.

[139] Zeidler (n 29) 260.

Using a dynamic and ever-changing threshold as a standard could lead to legal uncertainty and complicate the enforceability of regulations.

Given these arguments, the introduction of a materiality threshold should be rejected.[140]

cc) Exclusion of Non-EU Environmental Interests

Enneking raises the question of whether Article 7 Rome II is applicable to cases where local conduct causes transboundary damage in distant or non-EU countries.[141]

The question arises from the nature of the EU as a supranational organization whose primary responsibility is to safeguard the interests of its Member States. Consequently, non-EU environmental interests are not initially considered. Even the final Commission proposal makes reference to neighboring countries[142], thereby giving the impression of supporting this restrictive approach. This would entail that the injured party from a country that is geographically distant from the location of the event giving rise to the damage, or even outside of the EU, would be unable to exercise their right to choose under the principle of ubiquity.

Considering that Article 191 (1) TFEU states that the EU is obliged to encourage the tackling of global environmental issues implying that an only regional approach is insufficient and a more comprehensive – and global - solution is necessary. Such a proposed restriction would not only lead to discrimination against the victim but would also fail to achieve the goal of deterring polluters worldwide. Providing the injured party with the option of choosing a legal system with a more robust protection is an effective means of safeguarding the environment.

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[140] cf Duczek (n 133) 8.; Matthes (n 140) 146 ff; Stefan Huber, 'Art. 7 Rom II-VO' in BeckOGK (2022) para 14; Michael Bogdan and Michael Hellner 'Art. 7 Rom II-VO' Ulrich Magnus and Peter Mankowski (eds) European Commentaries on Private International Law: Rome II (Otto Schmidt 2019) para 7; For a different view, see Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law: Rome II* (Otto Schmidt 2019) para 7 "It seems to be implied in the concept of environmental damage that it has to be of a certain significance […]".

[141] Liesbeth FH Enneking 'Judicial Remedies: The Issue of Applicable Law' in Juan José Álvarez Rubio and Katerina Yiannibas (eds) *Human Rights in Business - Removal of Barriers to Access to Justice in the European Union* (Routledge 2017) 38, 54.

Also, the territorial scope of application is universal and does not depend on the claimant in accordance with Article 3 Rome II.[143]

Taking into account the global dimension of environmental issues, such an approach would not only go against the EU's own strategic interests but also conflict with the articles and regulation's broader goal of improving environmental protection worldwide, based on universally accepted environmental principles like the polluter pays principle.[144]

b) Modifying Connecting Factors

Another possibility to counteract the criticism would be to modify the connecting factors for the places that then determine the applicable law.

aa) Application of the Mosaic principle

To introduce a limitation on the application of Article 7 Rome II, the so-called mosaic principle[145] could be considered. This principle was developed by ECJ in the Shevill case, which dealt with cross-border defamation through press publications.[146] According to the mosaic principle, a legal claim can only address the damage sustained within the forum state and cannot encompass worldwide damage.[147]

The mosaic principle aims to balance the interests of plaintiffs and defendants by ensuring that the plaintiff cannot exploit multiple jurisdictions to seek the most advantageous outcome. The ECJ introduced this limitation in response to the principle of ubiquity, which had previ-

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[142] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 19.

[143] ibid (n 143).

[144] Peter Gailhofer, David Krebs and others (eds) *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* (1st edn, Springer 2023) 200 para 51; Enneking (n 143) 54.

[145] Peter Mankowski 'Article 5 Brussels I' in Ulrich Magnus and Peter Mankowski (eds) *Brussels I Regulation* (sellier 2009) para 207 ff.

[146] *Fiona Shevill v. Presse Alliance SA* (Case C-68/93) [1995] para 33.

[147] ibid.

ously given plaintiffs an overly favorable position by allowing them to sue in any jurisdiction where the harm was felt, no matter how minimal.[148] Thus, this approach is specifically designed to prevent forum shopping—where plaintiffs choose the most favorable jurisdiction—rather than law shopping, which concerns the selection of the most favorable legal system. Nevertheless, the principle could also be transferable to the problem of law shopping.

Applying the mosaic principle to the Article 7 Rome II cases that is dealing with distant torts seems reasonable because these cases involve cross-border harm, much like the defamation cases that inspired the principle. Additionally, the mosaic principle is already applied in unfair competition cases under Article 6 Rome II. In such cases, the effects of unfair behavior, when affecting multiple markets, are judged separately according to the respective competition laws of those markets.[149] This parallel suggests that the principle could also be relevant to climate liability, where the harm caused by emissions affects multiple jurisdictions.

However, before adopting the mosaic principle in climate liability cases, it must first be examined whether climate damage also falls into a so-called multistate category, which is characterized by the fact that a single wrongful act injures a person in more than one state.[150] Some scholars, like Zeidler, argue that climate damage does not fit this category[151], while others, like Lehmann and Eichel, acknowledge the multistate nature of climate torts but doubt the effectiveness of the mosaic principle in these cases.[152] The key difference between transboundary climate cases and traditional multistate torts lies in the nature of the harm. The latter deals with multiple damage locations for a single victim, whereas climate cases involve nu-

[148] Peter Mankowski 'Article 5 Brussels I' in Ulrich Magnus and Peter Mankowski (eds) *Brussels I Regulation* (sellier 2009) para 207 ff.

[149] Graziano (n 94) 56.

[150] ibid 37.

[151] Zeidler (n 29) 299.

[152] Lehmann and Eichel (n 120) 97; Andreas Spickhoff 'Art. 1 Rome II' in *BeckOK BGB* (70th edn. 2024) para 4.

merous victims across various jurisdictions.[153] Therefore, according to the principles set by the ECJ, these cases are classified as distance torts rather than multi-state torts.[154]

Nonetheless, Zeidler rightly notes that there can be a few cases where an injured party owns property in different states, all of which are affected by the defendant's climate-damaging actions.[155] In such instances, the mosaic principle could be applied, meaning that the court in each state would only be responsible for the damage that occurred within its territory.[156] This interpretation could potentially be extended to the determination of applicable law in these cases.

However, the application of the mosaic principle in climate liability cases is not a comprehensive solution. The scenario where an injured party owns property in multiple states is relatively rare. More importantly, the principle does not address situations where the spread of damage is driven by the defendant's actions—such as the emission of pollutants—rather than by the claimant's property locations.[157] Therefore, while the mosaic principle may offer some guidance in very few cases, it is not fully equipped to handle the complexities of law shopping in climate liability cases, where the harm is inherently transboundary.

bb) Transfer of the Foreseeability Requirement

The transfer of the foreseeability requirement from product liability in Article 5(1)(ii) Rome II has been discussed in the literature. According to this, the law of the country where the person whose liability is being asserted has their habitual residence is applicable if they could not reasonably foresee the product or a similar product being placed on the market in the country whose law would apply according to general rules. In the context of the environmental PIL

[153] Weller and Tran (n 21) 594.

[154] Weller and Tran (n 21) 594; Weller and Nasse and Nasse (n 100) 389ff.

[155] Zeidler (n 29) 210.

[156] Ulrich Hönle, *Die deliktische Grundanknüpfung im IPR und IZVR: Auswirkungen der Kollisionsrechtsvereinheitlichung auf europäischer Ebene* (1st edn, Lang 2011) 59.

norm, this means that in instances of cross-border emissions, the emitter should not be held liable under the lex loci damni if it was not reasonably foreseeable that the emissions would reach that location and cause damage.[158]

The methodological derivation for this approach often differs. Either foreseeability is demanded on the basis of an analogous application of the requirement from Article 5 (1) (ii) Rome II[159], which, from a strict point of view, presupposes an unintended regulatory gap and comparable interests.[160] Others speak of a teleological reduction of the link to the place of damage.[161]

The restriction methods of teleological reduction and analogy both assume that the telos of the norm necessitates a correction.[162] Teleological reduction covers cases where the literal wording of the norm applies to the situation, but applying the norm would contradict its intended purpose.[163] Consequently, a legal gap is presumed in these instances. Considering the purpose of the norm, an exception must be made to fill this gap.[164] The norm can thus be reduced so that it aligns with its intended purpose.

In contrast, a legal analogy applies to situations where the case in question is not covered by the literal wording of the law but should be included based on the law's intent. The unregulated case is so similar to the regulated one that they must be treated the same.[165] For an analogy to be assumed, certain requirements must be met. These include the existence of an unintentional gap in the legislation and a comparable interest situation.[166]

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[157] cf Eva-Maria Kieninger 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' (2022) 1 IPRax 1, 4.

[158] Kieninger (n 24) para 57.

[159] Lehmann and Eichel (n 120) 105 ff.

[160] Kieninger (n 24) para 57.

[161] Weller and Nasse and Nasse (n 100) para 56.

[162] Möllers, Juristische Methodenlehre (253) Rn. 94; cf. Groh in Weber Rechtswörterbuch - Auslegung (Interpretation)

[163] Möllers, Juristische Methodenlehre (260) Rn. 123

[164] ibid

[165] ibid 253 para. 92

[166] ibid 253 para. 94

As previously examined, the wording of the norm includes claims related to emissions reductions and those based on tort or property law concerning environmental damage caused by emissions. Therefore, the plaintiff would have a right of choice between the Lex loci damni and lex loxi actus. But it is argued that this does not align with the purpose of the norm.[167] Therefore, the place of the damage should only be applicable if it is foreseeable, which serves as a gap filler. Thus, this approach could be seen as a restriction through teleological reduction.

Nevertheless, when viewed through the lens of Article 5 Rome II and its foreseeability criterion, the norm, despite not aligning with the wording, it should be applicable because of its purpose. From this perspective, the requested restriction would be an analogy. Consequently, both views are reasonable. In conclusion, the legal distinction is not a significant factor in determining whether the restriction should be applied. To ensure that the requirements of an analogy are not circumvented, it is essential to examine whether the requirements are met.

(a) Regulatory Gap

An analogy first requires the presence of an unintended regulatory gap. As explained above, it is argued that the possibility of environmental polluters liable under potentially every legal system worldwide represents an unreasonable risk. According to these arguments, the regulatory gap arises from the fact that the legislature did not anticipate climate change litigation when enacting the legislation.[168]

The existence of a regulatory gap is with regard to Article 17 Rome II is as some argue that this provision already fully addresses the criterion of foreseeability. This article stipulates that liability at certain locations can be influenced by considering the safety and conduct rules

[167] cf Lehmann and Eichel (n 120) 106.

[168] Lehmann and Eichel (n 120) 107.

applicable at the place of the event giving rise to the liability.[169] It serves to prevent the application of supposedly unforeseeable legal systems. Wagner explicitly states that Article 17 Rome II serves the purpose of the foreseeability requirement outside of product liability cases.[170] However, Lehmann and Eichel argue that, given the history of the article, a separate foreseeability requirement in addition to Article 17 Rome II would be beneficial.[171] Further, the restriction possibility through Article 17 Rome II will be examined separately.

Apart from the question if Article 17 Rome II does preclude this restriction, the argument for an unintended regulatory gap is unconvincing anyways. It is assumed that the legislature only considered environmental liability cases in the classic neighboring context.[172] However, by the time of the Rome II Regulation's entry into force in 2009, it was already widely known—even beyond specialized fields—that emissions were causing worldwide damage.[173] Additionally, the first climate change lawsuits had already been filed at that time.[174]

The introduction of a foreseeability reservation in Article 7 Rome II would have been obvious for the legislature, provided it had aligned with their intentions. It seems implausible that the European legislator envisioned environmental liability claims solely in a neighboring context and completely overlooked their broader cross-border impact.[175] It should also be noted that the European legislator has also dispensed with the requirement of foreseeability for all other distance offenses and that even this requirement plays a rather subordinate role in product

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[169] Zeidler (n 29) 301

[170] Gerhard Wagner, 'Die neue Rom-II-Verordnung' (2008) IPRax 1, 5.

[171] Lehmann and Eichel (n 120) 107.

[172] Lehmann and Eichel (n 120) 106.

[173] i.e. Kyoto Protocol, which entered into force in 2005 and obliges states to reduce their emissions; Eva-Maria Kieninger 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' (2022) 1 IPRax 1, 7.

[174] The case *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007), involving several states, focused on the EPA's refusal to regulate greenhouse gas emissions, and resulted in a 2007 US Supreme Court ruling that granted standing to the plaintiffs due to the anticipated impacts of global warming, recognized greenhouse gases as pollutants, and required the EPA to re-evaluate its decision, ultimately leading to the regulation of vehicle CO2 emissions by 2010."

[175] Zeidler (n 29) 301; for a different view see Lehmann and Eichel (n 120) 107.

liability due to the globalized product chains.[176] This rather outdated requirement should therefore not be relevantly awarded to other articles.

Therefore, the notion that the legislature made a mistake, resulting in an unintended regulatory gap due to recent developments, can be rejected.[177]

(b) Common Interests

Even if an alternative line of argument was considered and the existence of an unintentional regulatory gap is affirmed, the requirement of comparability of the interests involved must though be denied based on compelling arguments.

Article 5 (1) (ii) Rome II regulates the case where it is not foreseeable for the producer which country their product will be marketed in. The regulation allows the producer to account for certain liability risks that may arise from the possible inadvertent resale of their product in other countries. Recital 20 Rome II clarifies that this reservation is a consideration rooted the aim to fairly distribute risks in a modern, highly technological society with rapid developments. Conversely, Recital 25 justifies providing the person who sustains the damage through environmental damage with a better standing effectively favoring them.[178] This demonstrates that the two cases are not subject to a comparable set of interests and that the law assigns in the latter enhanced protection to one party.[179]

Also, one could argue that the foreseeability requirement is a reservation rooted in conflict of laws[180] through judicial precedent and named in Recital 16 Rome II. However, it can be encountered that even in international tort law, it is held that a tortfeasor acting from a distance

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[176] Graziano (n 94) 43.

[177] Kieninger (n 24) para 57.

[178] cf ibid.

[179] cf Eva-Maria Kieninger 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' (2022) 1 IPRax 1, 7.

[180] Andreas Vogeler*, Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse* (Mohr Siebeck 2013) 148.

must assume the so-called risk of law application.[181] It would be unfair to impose a legal system unfamiliar to the victim in the case of a tort committed from a distance.

Lehmann and Eichel concede that emitters must anticipate potential damages caused by climate change but emphasize that the situation is comparable in that these damages, like those faced by producers, cannot be localized.[182] It is only fair that the rules of the market in which the producers sell their products apply to them and not the rules of any other market, as compensation payments in the area of product liability - particularly in the common law and civil law systems - are very different.

Also, the transfer of damage to another state is solely the responsibility of the emitter's actions, as their emissions inherently cross borders without any additional intervention. In contrast, producers rely on the actions of third parties—such as distributors or retailers—to move their products into another state. This reliance on an intermediary step justifies the necessity of the foreseeability requirement. It highlights that while emitters and producers may appear to have similar interests, their situations are fundamentally different. Emitters directly cause cross-border effects, whereas producers' cross-border impact depends on the actions of others, thereby making foreseeability an important factor when evaluating their liability.

Indeed, emitters must be aware of the inherent cross-border nature of emissions, making limitation to a specific area impossible.[183] Therefore, the circumstances of emitters differ fundamentally from those of producers, making any direct comparison inappropriate.[184]

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[181] Jan von Hein, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht* (Mohr Siebeck 1999) 209.

[182] Lehmann and Eichel (n 120) 107.

[183] cf Kieninger (n 24) para 57; Weller and Nasse and Nasse (n 100) para 57.

(c) Interim Conclusion

Neither an unintended gap in the regulation nor a comparable interest situation can be determined. Even if the analogy and, consequently, the requirement of foreseeability were to be applied, an emitter could never reasonably rely on it, given that it is foreseeable that emissions are distributed in any location globally. In conclusion, the requirement of foreseeability from product liability under Article 5(1)(ii) Rome II cannot be transferred to transboundary climate litigation cases under Article 7 Rome II.

cc) Interim Conclusion

As a result, there is no reasonable approach to restrict the connecting factors of Article 7 Rome II.

c) Substantive considerations under Article 17 Rome II

Beyond methods of legal interpretation like teleological reduction and analogy, which demand substantial justification, the criticisms and challenges mentioned above can also be addressed within the framework of Rome II itself, particularly through Article 17. This article serves as a gateway for incorporating substantive considerations. Importantly, this approach does not involve correcting or limiting the law but rather focuses on how a specific substantive law is applied in individual cases.[185]

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[184] Abbo Junker, 'Art. 7 Rom II-VO' in Münchener Kommentar zum BGB (8th edn, C.H. Beck 2021) para. 21; Andreas Spickhoff 'Art. 1 Rome II' in *BeckOK BGB* (70th edn. 2024) para 4; Weller and Nasse and Nasse (n 100) para 54; Graziano (n 94) 45 ff.

[185] cf Jan von Hein 'Art. 7 Rome II' Gralf-Peter Calliess and Moritz Renner (eds) *Rome Regulations Commentary* (3rd edn. Wolters Kluwer 2020) para 33.

aa) Objective

A reasonable balance between the right of choice of the claimant and the interest of the plaintiff in legal certainty could be achieved through the utilization of Article 17 Rome II. The norm stipulates that, when evaluating the conduct of a person claimed to be liable, the rules of safety and conduct that were in effect at the location where the event giving rise to the damage occurred, should be taken into account, if appropriate. Thus, it is not a conflict-of-laws provision in the strict sense, but rather the incorporation of relevant safety and conduct rules within the context of the applicable lex causae, resulting in a substantive modification of the applicable law.[186]

The rationale behind the norm is that the claimant, in principle, acts in accordance with the norms and standards of this location, regardless of the law that governs the civil consequences of those actions.[187] Therefore, they are bound to adhere rules of the lex loci actus. In the event that the case is governed by another law with its own substantive law and different safety and conduct rules, Article 17 Rome II provides a potential avenue for relief through the consideration of rules of the lex loci actus.[188] However, considering foreign law is not the same as applying it directly. The court will apply the law determined by the conflict-of-laws rule but must regard another law as a factual point of reference.[189] This standard gives the court the possibility of exercising a certain discretion to observe the permit but at the same time does not create an obligation so that the principle of ubiquity in Article 7 Rome II is not fully underpinned.[190]

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[186] Felix Maultzsch 'Art. 7 Rom II-VO' in BeckOGK (2022) para 1.

[187] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 25.

[188] Abbo Junker, 'Art. 7 Rom II-VO' in Münchener Kommentar zum BGB (8th edn, C.H. Beck 2021) para 1.

[189] ibid (n 189).

bb) Relevant Constellation

Applied to cases of climate change litigation, it may be relevant in cases where the polluter has obtained a permit for its environmentally harmful activity in its state. Herby, distance torts pose particular challenges.[191] A distinction must be made between the following constellations in which the problem of recognizing permits can arise.

In the first constellation, the forum state applies foreign law concerning the location of the damage. There is broad consensus that a domestic permit must be considered, based on principles such as the unity of the legal system and the separation of powers.[192]

The second constellation arises when the forum state applies foreign lex loci actus and must take into account a foreign permit. There is widespread agreement that foreign permits should be considered when applying the law of the place where the tort was committed, supported by the preclusive effect of permits in private law[193] and the need for consistency within the applicable legal system. Furter, an unwritten requirement for applying Article 17 Rome II is that lex loci actus whose safety and conduct rules are to be considered differs from the lex causae.[194] Thus Article 17 Rome II only applies to so-called non-statutory safety and conduct rules.[195] Despite different interpretations and not least because the decision will hardly be recognizable in the issuing state without taking the permit into account, the common conclusion is that foreign permits must be recognized when applying the foreign lex loci actus is applied.[196]

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[190] ibid (n 188).

[191] Abbo Junker, 'Art. 7 Rom II-VO' in Münchener Kommentar zum BGB (8th edn, C.H. Beck 2021) para 9.

[192] ibid; Jan von Hein 'Art. 7 Rome II' in Gralf-Peter Calliess and Moritz Renner (eds) *Rome Regulations Commentary* (3rd edn. Wolters Kluwer 2020) para 26; Zeidler (n 29) 310.

[193] Graziano (n 94) 49.

[194] Felix Maultzsch 'Art. 7 Rom II-VO' in BeckOGK (2022) para 9.

[195] ibid.

[196] Peter Mankowski P, 'Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie' (2010) 5 IPRax 389.

The third and the most debated constellation over considering foreign permits arises when the forum state, which is also the place where the damage occurred, applies its own law to environmental damage under Article 7 Rome.[197] The question thus arises as to whether the state is obliged to recognize a foreign permit on the basis of Article 17 Rome II and thus include it in the applicable substantive law considerations. Here it is first necessary to examine whether Article 17 Rome II covers permit for emitting plants at all.

cc) Scope of Article 17 Rome II

The question arises as to whether authorizations held by polluting industries should be recognized in such a way as to lighten their liability for environmental damage. This would counteract the criticism that the tortfeasor would be confronted with different environmental standards worldwide as this which would require adaptation. In this context, it is important to distinguish between two types of authorizations: plant permits and emission certificates. Both are state-issued authorizations that permit certain activities and have a private law preclusive effect. Since the European Union operates the EU Emissions Trading System, the debate on recognizing emission allowances would be limited to non-EU countries and the potential for considering such allowances under Article 17 of the Rome II.[198]

Considering the wording of Article 17 Rome II, it is specified that safety and conduct rules of must be taken into account, which does not automatically speak in favor of including permits for plants or emissions. These permits indeed often involve regulations that govern the safe operation of a business. But some critics argue that permits are concrete and not abstract nature, which is why they reject its application.[199] This perspective cannot be agreed with, as the

[197] Zeidler (n 29) 312.

[198] See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

[199] David-Christoph Bittmann in Matthias Weller (ed) *Europäisches Kollisionsrecht* (Nomos 2016) para 309.

individual regulatory approvals merely concretize abstract regulations and tailor them to the specific case.[200]

One might contend that the core area was historically established for the purpose of addressing road traffic offenses[201] and that the inclusion of various permits represents a circumvention of the original intention. Similarly, it is claimed that the initial constellation differs too much from the existing constellation, as the traffic regulations are rules that are enforced by sanctions, while the authorizations and permits are optional privileges that the non-utilization of which would generally not trigger any sanctions.[202] Nevertheless, even those who argue that public-law authorizations typically do not fall within the scope of application consider a complete disregard of these permit to be unjust as this would completely disregard the interests of the tortfeasor.[203] Therefore, these voices would also establish criteria according to which this permit can still be considered, so this view would also pursue the following debate on the criteria.

The purpose of the article is to ensure that substantive legal factors from one jurisdiction can influence the liability outcomes in another, thereby avoiding unfairness. This is further supported by the broader interpretation of Article 17 Rome II beyond road traffic safety rules.[204] In conclusion permits should be viewed as safety and conduct rules within the meaning of Article 17 Rome II, as they help define the conduct expected within a given regulatory framework.[205]

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[200] Felix Maultzsch 'Art. 7 Rom II-VO' in BeckOGK (2022) para 23.

[201] See recital 34 Rome II; Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM (2003) 427 final, 25.

[202] Mankowski (n 198) 390; Matthes (n 140) 151.

[203] ibid.

[204] See also "for example" in recital 34 Rome II.

[205] Felix Maultzsch 'Art. 7 Rom II-VO' in BeckOGK (2022) para 2.

dd) Obligation to Recognize within the EU

In principle, a permit issued in the state of issuance is trusted to remain valid. In many states, such a permit has a private law constitutive effect and protects the permit holder from private claims.[206] Within the EU, the principles of legitimate expectations and mutual recognition apply, which could potentially lead to a general obligation to recognize permits from other states. Mutual recognition is generally referred to in international legal relations, whenever the sovereign decisions of another state are accepted and not challenged within the legal system of the recognizing state.[207] This applies, for example, to judicial decisions or the recognition of foreign administrative acts. Since this principle is generally applied in the area of the free movement of goods, complete transferability is not reasonable. Such an obligation would also render Article 17 Rome II ineffective in the context of EU member states.

In the Temelín II case the CJEU ruled that EU Member States must recognize permits from other Member States to prevent discrimination based on nationality, according to Article 18 TFEU. [208] However, the case refers to nuclear law and cannot be applied due to the exclusion of this area under Article 1 (2)(f) Rome II.[209] Further, the prohibition of discrimination specifically addresses discrimination based on nationality. In this case, it is not apparent that the refusal of recognition is based on nationality. Therefore, this approach is not helpful and does not establish an obligation of recognition. Consequently, an alternative solution must be found that balances the interests.

[206] Zeidler (n 29) 308.

[207] Stefan Ulrich Pieper 'Prinzip der gegenseitigen Anerkennung‘ in *Handlexikon der Europäischen Union* (6th edn. Nomos 2022).

[208] Land Oberösterreich v ČEZ Temelin II (2006) Sammlung der Rechtsprechung 2006 I-04557.

ee) Appropriateness Test

According to Article 17 Rome the safety and conduct rules should only be taken into account so far as is appropriate. The following criteria have been developed in the literature to guide judicial discretion in deciding in whether to take into account foreign permits.

(1) Traditional Criteria

The three traditional criteria will be outlined[210], followed by a discussion of a newer additional criterion. Firstly, it must be ensured that any approval aligns with international law and treaties and the ordre public of the forum state.[211] While there is broad consensus on the importance of this criterion[212], it is often underestimated how conflicts can arise. Permits and certificates that authorize emissions inherently contribute to global CO2 levels, which can directly conflict with international environmental agreements, like the Paris Agreement. In such cases, the approval may be deemed incompatible with these international obligations, potentially leading to its disqualification under this criterion.

In situations where emissions-intensive facilities are located near national borders, the principle of due regard becomes particularly significant.[213] This principle requires states to consider the interests and rights of other states when undertaking actions that may have cross-border environmental impacts. The due regard principle ensures that neighboring states are not unduly harmed by activities such as emissions that could exacerbate global warming or degrade

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[209] Zeidler (n 29) 313; For a different opinion see Michael Bogdan and Michael Hellner 'Art. 7 Rom II-VO' Ulrich Magnus and Peter Mankowski (eds) European Com-mentaries on Private International Law: Rome II (Otto Schmidt 2019) para 24.

[210] cf Steffen Pabst ‚Article 7 Rom II' in Thomas Rauscher (ed) *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III* (5th edn. Ottoschmidt 2023) para 46 ff.

[211] Jan von Hein 'Art. 7 Rome II' in Gralf-Peter Calliess and Moritz Renner (eds) *Rome Regulations Commentary* (3rd edn. Wolters Kluwer 2020) para 34; Mankowski (n 198) 391; Matthes (n 140) 146; Fuchs (n 119) para 40; Zeidler (n 29) 316.

[212] ibid.

[213] Mankowski (n 198) 390.

environmental conditions across borders.[214] Therefore, in such cross-border cases, compliance with international law isn't just a formality—it is essential to prevent disputes and ensure that environmental harm is minimized in line with global standards.

Secondly, the permit should have equal or comparable regulatory content that aligns with the applicable legal framework.[215] This involves assessing whether the conditions under which the permit was issued initially correspond with the requirements of the lex causae. Each case must be evaluated individually to determine if the regulations governing the permit are consistent with the provisions of the applicable legal system.

Finally, it must be ensured that the parties concerned have had the opportunity to participate.[216] Traditionally, this requirement has been associated with more localized issues, such as disputes between neighboring properties.[217] However, in the context of emissions and environmental harm, the scope of affected parties is much broader, often involving numerous individuals across the globe.[218] Requiring the participation of all potentially affected parties in such cases is impractical due to the sheer number of victims and would be administratively unmanageable. Given these challenges, the idea emerged to at least allow representatives from vulnerable states—those most affected by emissions and environmental damage—to participate in the approval processes.[219] This would provide a platform for those states to voice concerns and potentially mitigate the negative impacts of decisions that authorize activities harmful to the environment. However, implementing such a system would be a very com-

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[214] 'Transboundary Impacts' in Lavanya Rajamani and Jacqueline Peel (ed) The Oxford Handbook of International Environmental Law (2nd edn. Oxford Handbooks 2021)

[215] Fuchs (n 119) para 40; Jan von Hein 'Art. 7 Rome II' in Gralf-Peter Calliess and Moritz Renner (eds) *Rome Regulations Commentary* (3rd edn. Wolters Kluwer 2020) para 34.

[216] Jan von Hein 'Art. 7 Rome II' in Gralf-Peter Calliess and Moritz Renner (eds) *Rome Regulations Commentary* (3rd edn. Wolters Kluwer 2020) para 34.

[216] Christian von Bar and Peter Mankowski (eds) Internationales Privatrecht Band 2: Besonderer Teil (2nd edn, C.H. Beck 2019) 345.

[217] Zeidler (n 29) 317.

[218] ibid.

[219] Weller and Tran (n 21) 597.

plex bureaucratic undertaking. Additionally, it would primarily serve future processes, meaning it might not address current or past emissions-related harms. Therefore, such a requirement is unlikely to be implemented in time to offer meaningful protection. As a result, an alternative criterion must be identified to ensure that the interests of affected parties are adequately considered, even without their direct participation in the approval process.

(2) New Criterion

Moreover, it is proposed that in climate liability cases, particularly those based on emission activities, a new additional criterion regarding environmental protection should be applied. This necessitates a comprehensive consideration of the environmental impact of the emissions in question, alongside an assessment of the economic and social benefits that may arise therefrom.[220] In the opinion of Kieninger, particular consideration should be given to the relationship between the global benefits and the global damages, with a view to establishing a fair balance between the two.[221] This would shift the focus from a national environmental protection perspective to an international one, which seems much more appropriate for cross-border emissions and the resulting damage. By requiring courts to weigh the global consequences of emissions, such a criterion would recognize the international scope of environmental damage. This would prevent states from focusing solely on national economic benefits while ignoring the broader environmental costs.

However, one of the main concerns is the legal complexity and uncertainty it would introduce. Courts would have to assess whether such a balancing of interests had taken place. The lack of clear guidelines could lead to unpredictable legal outcomes worldwide.

On the contrary this requirement would align national and EU legal systems more closely with international treaties, such as the Paris Agreement, which seeks to limit global tempera-

[220] cf Kieninger (n 24) para 55.

[221] Eva-Maria Kieninger 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' (2022) 1 IPRax 1, 9.

ture rise. From a fairness perspective, an international approach to emissions regulation is essential to protect vulnerable regions that disproportionately suffer from climate change, such as small island nations or areas with fragile ecosystems. This criterion promotes foresight and emphasizes that states must not only consider their own interests when making decisions on emissions, but also take into account the impact on the global community. It is therefore reasonable to consider this criterion in preference to the second criterion, which requires participation in the case of foreign permit, as it offers a more comprehensive and practical approach.

(3) Legal Effect

With the aforementioned criteria on the hand, the court is a position to determine whether the foreign permit should be taken into consideration. In instances where the defendant adheres to a foreign permit that did not evaluate environmental impacts during its approval process, the court may then choose to disregard the permit. Nevertheless, if a foreign permit fulfils all the criteria, it would be appropriate for it to be applied in accordance with Article 17 II Rome II. This leads to the question of the extent to which the permit is applicable and whether it excludes claims directly. In other words, it is necessary to determine whether its preclusive effect from the original private law is directly transferable.

If the effects of foreign permits were generally extended, it would undermine the victim's option provided under Article 7 of the Rome II. By taking a foreign permit into account under Article 17, the law of the place where the harm occurred could effectively be applied in a way that overrides place where the damage is assessed.[222] This could mean that the interests of the defendant might be limited if the foreign permit has a lesser impact at the place of harm compared to the permit originally issued in the issuing state.[223] However, this limitation is accept-

[222] Zeidler (n 29) 319.

[223] ibid.

ed because the defendant can anticipate the application of the law at the place of harm, which is predictable for them. On the other hand, it is unjustifiable to disadvantage the victim, as they can only rely on the legal consequences of a permit under domestic law.[224]

Since Article 17 of the Rome II Regulation neither establishes substantive law nor imposes an obligation to recognize foreign permits, it cannot mandate their full recognition. Therefore, the court can only determine whether the permit should be considered at all. The way it should be considered remains at the discretion of the judge in the forum state.

ff) Interim Conclusion

The criteria mentioned serve to evaluate the appropriateness of taking the permit into account. The newly added criterion is of particular relevance here, as it prescribes a comprehensive view of the global impact of emissions. However, the question of the extent to which this permit is then recognized and has a preclusive effect even if the criteria are affirmed remains reserved for substantive law.

3. Interim Conclusion

A variety of methods are employed to approach the expressed criticism and the calls for restrictions, with the objective of exonerating the tortfeasor. However, the majority of these approaches lack persuasive legal justification. The only approach that appears to be justifiable is the latter, which attempts to allow a foreign permit for emissions or plants to be taken into account via Article 17 Rome II. Nevertheless, caution is required here, as simple recognition would completely undermine Article 7 of Rome II and its right of choice.

[224] Philipp Rüppell, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen* (Mohr Siebeck 2012) 245.

V. Interim Conclusion

In conclusion, Article 7 Rome II is driven by the principle of environmental protection. It applies to cases of climate change litigation without any restrictions on its scope. The principle of ubiquity was introduced to enable claimants to achieve a higher level of environmental protection. Although this principle presents challenges in pinpointing connection points, it overall favors the claimant, allowing them to exercise their choice effectively. Criticisms and calls for limiting the principle of ubiquity cannot be justified by its purpose but rather reflect political interests.

C. CASE LAW ANALYSIS

The following section presents two cases in which the injured parties exercised their right to choose the applicable law under Article 7 Rome II and selected the law most favorable to them. The objective of this section is to illustrate the courts' interpretation of the principle of favorability under Article 7 Rome II and its impact on questions of climate protection in private law. Furthermore, this section will examine whether there are indications in the national case law, given the absence of a ruling from the CJEU, of potential limitations to Article 7 Rome II or if the national courts broadly interpret the scope and the claimant's choice under the principle of ubiquity.

I. Lliuya v. RWE AG

One of the most prominent and sensational climate change cases in recent history with a cross-border dimension is the case of Lliuya v. RWE AG. This case is notable for the considerable distance between the alleged place of conduct and the place of damage. The particular explosiveness of the case lies in the fact that it is about striving to obliged a company to reduce emissions, but that a private claimant is demanding the removal of the impairment under national property law. The analysis begins with the presentation of the facts, is followed by an

examination of the conflict-of-laws component, and finally, concludes with an evaluation of the prospective implications of the case for future legal proceedings.

1. Case Overview

The case of Lliuya v. RWE AG is a protracted legal dispute of private law nature, which garnered worldwide attention.[225] It revolves around the question whether companies should be proportionately liable for damage caused by their emissions contributing to climate change. The litigation began in November 2015 before the Regional Court of Essen, where the plaintiff demanded compensation for the impairment of his property due to global climate change, under § 1004 BGB.

The plaintiff argues that the water level of the Palcacocha glacial lake above the city of Huaraz, where he resides, is rising due to anthropogenic climate change. The rapid melting of the glaciers and the risk of ice blocks falling into the glacial lake could cause strong waves.[226] Such a flood wave would lead to severe flooding in the urban area of Huaraz. Local authorities have already been regularly warning about possible flooding.

Further the plaintiff states that RWE bears significant responsibility for this situation, as the company is responsible for 0.47 percent of global greenhouse gas emissions. The emissions released by the coal-fired power plants of RWE's subsidiaries are attributed to RWE. Evidence shows that these emissions are increasing greenhouse gas concentrations, causing global warming and melting glaciers. The plaintiff's main claim includes the demand that the de-

[225] Agence France-Presse, 'German Court to Hear Peruvian Farmer's Climate Case Against RWE' The Guardian (30 November 2017) <https://www.theguardian.com/environment/2017/nov/30/german-court-to-hear-peruvian-farmers-climate-case-against-rwe> accessed 2 September 2024.

[226] For the scientific background see Christian Huggel, Mark Carey, Adam Emmer, Holger Frey and others, 'Anthropogenic Climate Change and Glacier Lake Outburst Flood Risk: Local and Global Drivers and Responsibilities for the Case of Lake Palcacocha, Peru' (2020) 20 Natural Hazards and Earth System Sciences 2175 <https://doi.org/10.5194/nhess-20-2175-2020> accessed 10 September 2024.

fendant RWE Group bear the costs for suitable measures to protect its property from inundations.

After the Regional Court of Essen dismissed the case in 2016 due to the lack of a causal relationship[227], the plaintiff appealed to the Higher Regional Court of Hamm in November 2017. The court recognized the case as admissible and ordered evidence to be obtained.[228] Following numerous delays in 2022, the judges, accompanied by a team of experts, conducted an on-site visit to assess the situation.

2. Conflict of Laws

In the case of Lliuya vs. RWE, the question arises as to why German law is applicable. The case involves a Peruvian citizen seeking to protect his property from the consequences of climate change caused by worldwide occurring emissions. His property is located in Peru, so in terms of conflict of laws, the *lex rei sitae* (the law of the place where the property is located) could be considered the most reasonable point of reference, which would imply the application of Peruvian law.[229] However, the lawsuit is directed against a German company based in Essen, Germany, and has been filed with the Essen District Court. The question of which legal system applies is being examined on the basis of German conflict-of-law principles. To ensure compliance with European conflict-of-law rules, Article 43 EGBGB subjects these claims to the Rome II Regulation. In practice, whether these claims fall under tort law or property law is arguably irrelevant.[230]

In the statement of claim, the plaintiff invokes Article 7 Rome II and explains that in the case of a typical distance offense, the place of action and the place of success do not fall on the

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[227] *Lliuya v RWE* in Zeitschrift für Umweltrecht (2017) 370, 372.

[228] Pressemitteilung, 'Rechtsstreit Lliuya v RWE - Beweisaufnahme angeordnet' (30 November 2017) Oberlandesgericht Hamm.

[229] See Article 43(1) EGBGB

[230] Jens Prütting and Anton Zimmermann 'Art. 44 EGBGB' in BeckOGK (2024) para 3.

same location. Environmental damage is caused by the emissions from RWE, which lead to changes in the atmosphere and thus to the melting of the glacier.[231] Also according to the plaintiff no single event giving rise to damage occurred, but that the entire incident constitutes a process of events giving rise to damage in the sense of a continuous offense. [232]

In this case, it is noteworthy that the District Court in Essen applied German property law without further explanation, so it seemed they complete overlooked the cross-border situation here.[233] This suggests that the Higher Regional Court in Hamm is also inclined to apply German law. An indication of this is the order for the taking of evidence from November 2017.

It is extremely surprising that the other party does not comment on the applicable law here. It can only be surmised that they see their greater chances in denying the causal connection as already confirmed in the judgement of the Essen Regional Court.

II. Dutch Precedent in Climate Change Litigation

The following sections will commence with an examination of the *Urgenda* case, which established the foundation for the subsequent Royal Dutch Shell case. Thereafter, the judgment of the Dutch environmental organization *Milieudefensi v RDS* will be analyzed. This will be followed by an examination of the conflict of laws issue, concluding with implications for potential future cases.

1. Context and Landmark Case: Urgenda v State of the Netherlands

In the groundbreaking *Urgenda* ruling[234] of June 2015, the District Court of Hague ruled in favor of the Dutch environmental foundation *Urgenda* against the Dutch state, setting a precedent for environmental claims. The Dutch state has been obliged to take additional measures

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[231] *Lliuya v RWE* ‚Klage' Rechtsanwälte Günther (23 November 2015) 23 ff.

[232] Iibid.

[233] Kieninger (n 24) 139.

[234] *Urgenda Foundation v. State of the Netherlands,* Rechtbank Den Haag (2015).

to address climate change, with a particular focus on reducing greenhouse gas emissions by 25% by late 2020 relative to 1990. In 2018, the initial ruling was upheld on appeal[235], and in 2019, the Dutch Supreme Court (Hoge Raad) also confirmed[236] the judgment. This ruling is particularly important for the state and its residents, as the Netherlands, within Europe, will be most affected by the consequences of climate change due to the high risk of flooding and the ever-rising sea levels. [237] Additionally, Urgenda invoked Articles 2 and 8 of the European Convention on Human Rights. The District Court of Hague determined that these articles are not directly applicable to Urgenda, as it is not a direct or indirect victim under Article 34 ECHR.[238] However, the fundamental rights to life and respect to private and family life, as interpreted by the European Court of Human Rights serve as sources for interpreting private law. Specifically, these rights inform the duty of care obligations under Dutch private law.[239]

2. Milieudefensie v Royal Dutch Shell

a) Facts and Ruling

The Urgenda judgment addressed the state obligation to protect the public from climate-related harms, whereas the judgment against RDS, which was inspired by the mentioned judgment, is of a private-law nature. The question to be addressed is the extent to which the standards set forth in the initial judgment can be applied to the second.

In 2019, various environmental organizations and individual plaintiffs filed a lawsuit at the District Court of The Hague, arguing that Shell's corporate policies and CO2 emissions were contributing significantly to climate change, thereby violating its duty of care. This legal ar-

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[235] *Urgenda Foundation v. State of the Netherlands,* Rechtbank Den Haag (2018).

[236] *Urgenda Foundation v. State of the Netherlands,* Rechtbank Den Haag (2019).

[237] Johannes Saurer and Kai Purnhagen 'Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation „Urgenda“ gegen die Niederlande und seine Bedeutung für Deutschland' (2016) ZUR 16, 17.

[238] *Urgenda Foundation v. State of the Netherlands,* Rechtbank Den Haag (2015) para 4.35 ff.

gument was primarily based on Book 6, Section 162 of the Dutch Civil Code and its unwritten duty of care obligation.[240]

Additionally, they contended that Shell was violation human rights obligations. Here, the arguments from the Urgenda case were expanded. The duty of care was argued to apply not only to the state but also to large private entities. The court explicitly referenced the Urgenda ruling, asserting that Articles 2 and 8 of the European Convention on Human Rights and Articles 6 and 17 of the International Covenant on Civil and Political Rights are not directly applicable in the same way as they are in the relationship between the state and its citizens. However, due to their outstanding importance for society, these articles serve as interpretative benchmarks for concretizing the duty of care.[241] The court emphasized that these human rights entail a protective duty to protect the citizens from the impacts of climate change due to human-made CO2 emissions.

Consequently, in June 2021, the Hague District Court ordered RDS to reduce its overall CO2 emissions by at least 45% by the end of 2030.[242]

b) Conflict of Laws

Besides the largely positive feedback from environmental organizations worldwide, the court has also faced criticism on the procedural level for its interpretation of Article 7 Rome II.[243]

Milieudefensie invokes the right of choice of Article 7 Rome II, asserting the legal subjection of the Netherlands.[244] The claimant hereby argues that the event giving rise to the damage is in this case where the corporate policy of RDS in decided on by company's board the in the

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[239] *Urgenda Foundation v. State of the Netherlands,* Rechtbank Den Haag (2015) para 4.46.

[240] *Milieudefensie et al v Royal Dutch Shell,* Rechtbank Den Haag (2021) para 3.2.

[241] ibid.

[242] *Milieudefensie et al v Royal Dutch Shell,* Rechtbank Den Haag (2021) para 5 ff.

[243] König and Tetzlaff (n 90).

[244] *Milieudefensie et al v Royal Dutch Shell*, Summons (04 May 2019) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190405_8918_summons.pdf> para 96 ff.

Netherlands.[245] Moreover, they contend that the general rule of Article 4 Rome II connecting factor, namely the occurrence of the damage, is also situated in the Netherlands. The effects of climate change, increasingly observable in the Netherlands – especially in the Wadden region - due to emissions, are clearly noticeable. Consequently, according to the argumentation of the claimants - even if the principle of favorability of Article 7 Rome II is not applied the jurisdiction determination- the applicable law would still be the Netherlands.

RDS contests the applicability of only Dutch law, arguing that the adoption of policy does not itself give rise to the damage; rather, it is the execution of the policy that could cause harm. [246] In their statement of defense, they assert that preparatory acts do not constitute an event giving rise to damage and refer to the CJEU's interpretation of Brussels I, suggesting that these related regulations should be considered when interpreting for coherence.[247]

RDS asserts that the event causing the damage occurs where the emissions are produced, meaning the damage originates in multiple jurisdictions. [248] They argue that the law of each country where emissions occur should apply to the emissions within that country. Even Shell has acknowledged that its emissions are generated worldwide, supporting the claim that the applicable law should be determined by the location of the emissions, not the location of policy adoption.[249] Consequently, this perspective implies that a multitude of legal systems, rather than just Dutch law, govern the emissions and their damages.

Finally, RDS also argues that if it is assumed that the law applicable is Dutch law, Article 17 Rome II must be included. It must be noted that at the time when RDS is to be held liable, it complied with the legal regulations and only acted after obtaining a permit.[250]

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[245] ibid para 101.

[246] *Milieudefensie et al v Royal Dutch Shell*, Statement of defence (13 November 201) < https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20191113_8918_reply.pdf> para 302 ff.

[247] ibid (n 247) para 305 ff.

[248] ibid (n 247) para 312 ff.

[249] ibid (n 247) para 312 ff.

[250] ibid (n 247) para 325 ff.

The court, however, finds that RDS's interpretation is too restrictive and does not adequately reflect the complexities of environmental damages and the protective intent behind Article 7 of the Rome II Regulation. Environmental damage often involves multiple contributing events across various jurisdictions, which demands a broader understanding of an "event giving rise to the damage." The court clarifies that the adoption of corporate policies by RDS is not merely a preparatory act but an independent cause of damage that contributes significantly to environmental harm affecting the Wadden region.

Furthermore, the court emphasizes that the overarching objective of Article 7 Rome II is to provide to resolve problems in establishing legal subjection and to raise environmental protection. This article, along with the the general rule in Article 4(1) Rome II, which states that the applicable law should be that of the country where the damage occurs, reinforces the applicability of Dutch legislation in this matter. By applying Dutch law, the court ensures that RDS cannot evade responsibility by fragmenting the legal accountability across different jurisdictions. This decision underscores the importance of the rationale behind Article 7 Rome II.

III. Interim Conclusion

The two landmark cases of climate change litigation are cross-border private law cases that fall outside of contractual obligations and therefore are subject to Rome II. Both courts acknowledge the applicability of Article 7 of Rome II and thus grant the plaintiffs their right of choice. Furthermore, both courts advocate for an unrestricted interpretation of Article 7 Rome II. The limitations suggested by voices from literature or the defense, such as those through Article 17 Rome II, do not find approval with the courts. The Dutch court even actively opposes these suggestions. Therefore, current case law provides no indication that Article 7 of the Rome II Regulation should be restricted in either its scope or its legal consequences. This approach ensures that plaintiffs can hold corporations accountable in the jurisdiction with the strictest provisions. By rejecting the proposed limitations or interpretations,

the courts reinforce the intent of Rome II to provide an effective legal framework for enhancing environmental protection. It remains to be seen whether the CJEU will adopt a similar interpretation.

D. CONFLICTING INTERESTS, RIGHTS AND GUARANTEES

The legal basis for the limitation of Article 7 Rome II in climate change disputes is closely intertwined with various aspects of social relevance. Specifically, the political dimension, environmental concerns, financial interests of states and companies, and human rights guarantees all play significant roles in the discussion. The following section examines opinions from different perspectives.

I. Political Dimensions

The debate over the justiciability of climate protection and the judiciary role in the climate change litigation is significantly influenced by political interests. Critics argue that judicial decisions in climate matters encroach on the competencies of the legislative and executive branches[251], suggesting that judges lack the authority to shape climate policy and calling for judicial restraint.[252] Conversely, others see it as a transformative force that fosters international judicial cooperation, or "cross-fertilization" between judges and through that holding governments and corporations accountable and reinforcing climate protection efforts.[253]

The political interests surrounding the proposed restrictions on Article 7 Rome II in climate change litigation further illustrate this complexity. Originally, the principle of ubiquity in Article 7 Rome II was designed to enhance environmental protection by allowing legal action in

[251] Wagner G, 'Klimaschutz durch Gerichte' (2021) 31 NJW 2261 para 39.

[252] ibid 2263 para 53.

[253] Christina Voigt, 'Introduction: Climate Change as a Challenge for Global Governance, Courts and Human Rights' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (C.H. Beck 2021) para 90.

jurisdictions with stricter environmental standards. However, proposed limitations reflect a shift away from this environmental focus toward other political priorities.

Economic considerations are a major factor in the discussion. Corporations and their advocates often push for narrowing the scope of Article 7 Rome II to limit exposure to rigorous environmental laws in foreign jurisdictions.[254] By constraining this principle, companies aim to reduce financial and operational risks associated with compliance costs and legal liabilities. This perspective aligns with the goal of mitigating business risks but conflicts with the broader objective of robust environmental protection.

Policymakers must balance the economic advantages of restricting Article 7 Rome II against the potential impact on global climate protection efforts. While limiting this principle may protect companies from financial repercussions related to adherence to compliance rules, it could also undermine international climate protection initiatives. It is important to note that the EU has already considered these interests, favoring a robust environmental protection approach over a purely conflict-of-law based norm and supporting privileged treatment for environmental damage claims.[255]

Some critics also argue that such limitations could distort competition if companies engaged in harmful environmental practices are burdened with costs while others are not. For instance, in the German legal framework, the principle of joint liability allows for proportional contributions to emission-related damages, preventing companies from being held accountable for global climate damages beyond their share.

Furthermore, if a company based in one country is required to pay compensation in another country with strict climate liability rules, the enforcement of such rulings remains a complex issue. International agreements and treaties must be considered when executing these judgments. Although the principle of ubiquity was initially intended to enhance environmental

[254] Lehmann and Eichel (n 120) 107.

[255] See recital 25 Rome II.

protection, the proposed restrictions reveal underlying economic motivations and political considerations that could undermine the effectiveness of international climate litigation.

II. Financial Interests

Climate change litigation, in particular the limitation of Article 7 Rome II, affects the financial interests of industry and states.

1. Industry

Lehmann and Eichel point out that one state could invent a ridged climate liability system with which companies that otherwise have no connection to this system are confronted.[256] Thus corporations and their lobbies may advocate for a narrower interpretation of Article 7 Rome II to limit their legal obligations to a single, familiar environmental regulatory framework. If the choice is exercise under the principle of ubiquity, it could lead to the application of foreign environmental laws from any jurisdiction, exposing companies to unknown legal standards. These strict liability regimes might impose considerable financial burdens through private compensation or removal claims. Companies could then face higher costs if held accountable under these strict environmental laws than those in their headquarter jurisdictions.

These fears, while significant, have not materialized in the cases observed. For example, companies operating internationally might fear facing this stringent liability regulation, which could require prevention operational adjustments. Such changes could impact their production rates and profitability. Therefore, companies often advocate a restrictive approach when it comes to the application of Article 7 Rome II to be only liable in their known legal system with the compliance norms they are familiar with.

2. States

States often have conflicting motivations when it comes to Article 7 Rome II. On one hand, restricting the Article 7 could decrease the financial pressures on companies, including those that are state-owned through the reduction of possible applicable environmental systems. Critical infrastructure or other companies that are economically important to the state are likely to be supported by the state if they have to pay high costs in private litigation before going bankrupt.

On the other hand, such restrictions could undermine broader environmental objectives. States are currently face and will even face higher substantial costs in the future associated with environmental damage. Investing in robust environmental protection measures can be more cost-effective in the long run compared to dealing with the aftermath of environmental harm. States that are particularly vulnerable to climate change impacts have a vested interest in maintaining high environmental protection standards, as proactive measures can prevent more expensive repairs and mitigate future risks.

3. Interim Conclusion

As a result, corporations and their lobby have an interest in limiting Article 7 Rome II to a modest number of jurisdictions, while states interests are complex, ranging from the risk of supporting economically important sectors when sued to managing potentially high costs of future environmental damage.

III. Environmental Consequences

In the context of climate change litigation, the protection of the environment is an inherent concern. Article 7 Rome II enshrined this interest by allowing plaintiffs to choose the applica-

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[256] Lehmann and Eichel (n 120) 97.

ble legal regime for cases involving environmental damage. This choice can have a major impact on the ability to hold corporations accountable for their environmental impacts.

The preamble to the Rome II explicitly refers to Article 191 TFEU, naming the EUs commitment to environmental protection. This inclusion shows the connection between Article 7 Rome II and the broader the environmental policy framework. By allowing plaintiffs to select either the Lex loci damni or the Lex actus, Article 7 Rome II Rome II ensures that cases can be pursued in jurisdictions where effective remedies and stringent environmental standards are available.

Proposals to restrict Article 7 Rome II could undermine its effectiveness and weaken environmental protection. If the applicability of Article 7 Rome II were limited, such that companies could only be sued under the legal system where the event giving rise to the damage i.e. place of the company policy decision, plaintiffs would face restriction in their choice. For instance, if the damage occurred in a country with lax environmental liability norms, claimants would be unable to invoke the stricter laws of the jurisdiction where the harmful activity originated. Companies could be incentivized to operate in jurisdictions with lower environmental standards, knowing that they would be subject to less stringent requirements. This potential "race to the bottom" could undermine global efforts to enforce high environmental standards.[257]

Narrowing the application of the norm could reduce the pressure on companies to adhere to high environmental standards, allowing them to exploit jurisdictions with weaker regulations. Such a limitation would contravene the main objective of Article 7 Rome II, which aims to facilitate comprehensive environmental accountability.

IV. Human Rights Guarantees

Climate change litigation is increasingly shaped by a human rights perspective. Traditionally, human rights obligations are understood as existing only between states and citizens, meaning they do not directly impose obligations on private individuals or corporations. However, these obligations may not be direct, but may have an indirect effect, often referred to as a "horizontal" effect.[258] This effect occurs when the principles embedded in the international human rights framework influence the legal obligations of private actors. It manifests itself through the interpretation of general legal principles and vague legal terms.

In the case of Milieudefensie v. Royal Dutch Shell, the court recognized the influence of human rights on the interpretation of private law by emphasizing the relevance of Articles 2 and 8 ECHR which protect the right to life and the right to respect for private and family life. This case highlighted the human rights considerations in private disputes. Additionally, the court's acknowledgment of the United Nations Guiding Principles on Business and Human Rights as soft law underscores the importance of aligning corporate conduct with human rights principles.

The restrictions proposed for Article 7 Rome II could have significant implications for human rights protections. If Article 7 Rome II were to be restricted, such limitations might impede the claimant’s ability to choose the most effective law. For example, if emissions originate from facilities located far from the place of impact and these locations are deemed unforeseeable, claimants might be prevented from selecting the law of the place where the harm occurred. This could hinder their ability to rely on domestic legal systems and the associated human rights obligations that indirectly influence civil law relations.

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[257] Philipp Rüppell, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen* (Mohr Siebeck 2012) 186.

[258] Marc-Philippe Weller, Mai-Lan Tran, 'Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?' (2021) 3 ZEuP 573, 576.

Similarly, if a plaintiff wishes to challenge environmental harm caused by a company based in a state that is a party to the ECHR, but their own country is not, they could be denied access to jurisdictions with more robust human rights protections. This situation highlights the critical role of Article 7 Rome II in ensuring that plaintiffs can access effective remedies. For citizens of vulnerable states, which are severely impacted by climate change[259] such limitations can pose significant barriers to seeking redress. These constraints might prevent plaintiffs from accessing more stringent legal regimes that offer better protection of human rights

Therefore, any restriction on the principle of ubiquity under Article 7 Rome II should be critically examined from a human rights perspective. Considering fundamental rights including the right to a healthy environment is increasingly important. Limiting the choice of law could obstruct plaintiffs' access to stronger legal protections, particularly in jurisdictions with inadequate climate protection standards in human rights interpretation. Such restrictions could undermine the right to a fair trial and hinder effective climate justice, making it essential to carefully evaluate the implications of any limitations on Article 7 Rome II.

E. CONCLUSION

Climate change remains inadequately addressed at national and international levels, resulting in a growing interest in climate change litigation. As the urgency of climatic issues increase, civil litigation emerges as a critical mechanism for holding responsible parties accountable and seeking damages. This approach is often seen as a quicker alternative for individuals and entities seeking redress compared to lengthy strategic processes against governmental actors.

Article 7 Rome II was originally designed to enhance environmental protection by allowing claimants to choose the legal system of a jurisdiction with stringent environmental standards.

[259] See Bundesministerium für wirtschaftliche Entwicklung und Zusammenarbeit ‚Klimaschutz in den kleinen Inselstaaten' (2023) <https://www.bmz.de/de/themen/klimawandel-und-entwicklung/ndc-partnerschaft/beispiel-pazifik-91346> accessed 15 September 2024.

However, this provision has faced mounting criticism from businesses and their advocates, who argue that its broad applicability introduces unpredictable risks and potential legal uncertainties. These concerns are leading to calls for restrictions on Article 7, aimed at mitigating what some perceive as excessive legal exposure for companies.

Despite these criticisms, limiting Article 7 Rome II appears to contradict the wording and the objective of the legislation. Any restrictive interpretation or teleological reduction of the article faces significant legal and methodological challenges. Such restrictions not only undermine the original legislative intent but also lack strong, consistent legal arguments to justify their implementation.

One viable option is to consider foreign permits according to Article 17 Rome II under very stringent conditions, particularly those requiring a global assessment of environmental impacts. This approach helps preserve the principle of favorability embedded in Article 7 Rome II and also ensuring that international environmental standards are upheld. This solution is fairer and more effective, especially taken into account smaller states that are disproportionately affected by climate change.

Examining recent case law, such as *Lliuya v. RWE AG* and *Milieudefensie v. Royal Dutch Shell*, reveals no indications that Article 7 Rome II is interpreted restrictively by courts. Even in the latter case, where the application of Article 7 Rome II was criticized, the court chose a broad interpretation and refrained from referring the issue to the ECJ for final resolution. This demonstrates a judicial preference for maintaining the article's expansive application.

Moreover, the societal implications of restricting Article 7 Rome II cannot be overlooked. Calls for limitations are often politically motivated, potentially leading to a reduction in environmental standards. Restricting Article 7 Rome II could enable companies to evade stringent regulations, thereby compromising global environmental protection efforts. Additionally, from a human rights perspective, limiting Article 7 Rome II could impede access to effective legal remedies and undermine the right to a healthy environment as protected by the ECHR.

In conclusion, the debate over Article 7 Rome II involves a complex interplay of legal, political, and socio-economic factors. Restricting the norm could undermine the effectiveness of climate change litigation and hinder the overarching aim of environmental safeguarding.

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