

Symeonides on Rome II: a Missed Opportunity (and other works on tort conflicts)

Symeon C. Symeonides (Dean, College of Law – Willamette University) has posted **Rome II and Tort Conflicts: A Missed Opportunity** (forthcoming on the *American Journal of Comparative Law*, Vol. 56, 2008) on SSRN. Here is the abstract:

This article reviews the European Union's new Regulation on tort conflicts ("Rome II"), which unifies and "federalizes" the member states' laws on this subject. The review accepts the drafters' pragmatic premise that a rule-system built around the lex loci delicti as the basic rule, rather than American-style "approaches," was the only politically viable vehicle for unification. Within this framework, the review examines whether Rome II provides sufficient and flexible enough exceptions as to make the lex loci rule less arbitrary and the whole system more workable.

The author's answer is negative. For example, the common-domicile exception is too broad in some respects and too narrow in other respects. Likewise, the "manifestly closer connection" escape is phrased in exclusively geographical terms unrelated to any overarching principle and is worded in an all-or-nothing way that precludes issue-by-issue deployment and prevents it from being useful in all but the easiest of cases. The review concludes that, although attaining a proper equilibrium between legal certainty and flexibility is always difficult, Rome II errs too much on the side of certainty, which ultimately may prove elusive.

On the whole, Rome II is a missed opportunity to take advantage of the rich codification experience and sophistication of modern European conflicts law. Nevertheless, Rome II represents a major political accomplishment in unifying and equalizing the member states' laws on this difficult subject. If this first step is followed by subsequent improvements, Europe would have achieved in a relatively short time much more than American conflicts law could ever hope for.

An interesting comparison can be made with two previous works by Prof. Symeonides, commenting the Rome II Commission's Proposal and the EP Rapporteur's Draft: **Tort Conflicts and Rome II: a View from Across** (published in the *Festschrift für Erik Jayme*) and **Tort Conflicts and Rome II: Impromptu Notes on the Rapporteur's Draft**. Both are available for download on Diana Wallis' website (Rome II seminars' page), together with other works by prominent scholars.

Prof. Symeonides has posted a number of interesting articles on tort conflicts on SSRN (see the complete list of his available works on the *author page*), among which: The Quest for the Optimum in Resolving Product-Liability Conflicts; Territoriality and Personality in Tort Conflicts; Resolving Punitive-Damages Conflicts.

(Many thanks to Prof. Lawrence B. Solum - Legal Theory Blog - for pointing out Prof. Symeonides' latest article on Rome II)