WHERE DOES ECONOMIC LOSS OCCUR?

MATTHIAS LEHMANN*

A. THE PROBLEM

1. The Role of the Place of Damage in Private International Law

The financial crisis has triggered many court proceedings all over the world with investors trying to recuperate their losses. Often they allege torts committed by financial intermediaries from other countries. Then crucial issues of international jurisdiction and choice of law arise, the solution of which depends in whole or in part on the question of where the loss has occurred.

This is particularly true in the European Union, where a tort claim may be brought under Article 5(3) of the Brussels I Regulation\(^1\) at the place “where the harmful event occurred”. The European Court of Justice (ECJ) has famously interpreted this provision as giving the plaintiff an option to sue at the place of the event giving rise to the damage or the place where the damage occurred.\(^2\) The place of damage may thus play an important role in the determination of a court’s jurisdiction.

The location of damage is even more relevant with regard to choice of law. Under Article 4(1) of the Rome II Regulation,\(^3\) the law which applies to a tort is that of the country “in which the damage occurs”. Remarkably, the European legislator has added that this law governs “irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occur”.\(^4\) Especially in financial cases, it is not easy to distinguish the latter two countries from the one in which the direct damage takes place.

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* Prof Dr Matthias Lehmann, DEA (Paris II), LLM, JSD (Columbia), is Director of the Institute of Economic Law and holds the Chair for German and European Private Law, Commercial and Business Law, Private International and Comparative Law at the Law School of the University of Halle, Germany. The author wishes to thank Pamela Kirschbach, Alexander Grimm, maître en droit, and ass jur Johannes Rehahn for reviewing the manuscript.

4 Art 4(1) Rome II Regulation in fine.
It is important to note that the two issues of jurisdiction and choice of law are not independent, but interconnected. The Rome II Regulation requires courts to interpret its provisions consistently with those of the Brussels I Regulation. Therefore, any solution found under the jurisdictional regime is relevant for choice-of-law purposes as well.

Locating economic loss is thus crucial in the European Union, but not only there. Many other private international law rules – eg those of China, Japan, Russia or Switzerland, also give a significant role to the place of damage. The analysis that follows might therefore be valuable for these and other countries with similar rules. Conversely, the experience of such countries will also be taken into account.

This article does not concern itself with the circumstances in which the place of damage does not play any role. Under the Brussels I Regime, this is for instance the case where the plaintiff has decided to sue at the domicile of the defendant or at the place where the event giving rise to the damage occurred. Under the Rome II Regulation, the place of the damage does not apply if the parties have their habitual residence in the same country or the case has a manifestly closer connection to another country. Such a connection might arise out of a concurrent contract, which is often construed to exist in financial cases. Also, many cases involving economic loss fall in the category of culpa in contrahendo, for which the Rome II Regulation provides a special conflicts rule that points in the first place to the law of the contract and, only if that law cannot be determined, to the country in which the damage occurred. Moreover, there are specific conflicts rules for certain torts that do not refer to the place of the loss and the possibility that the parties might enter into a choice-of-law agreement. These situations will not be considered here.

5 Preamble 7 Rome II Regulation.
7 See for China Art 44, sentence 1 of the Law of the Application of Law for Foreign-Related Civil Relations; for Japan Art 17, sentence 1 of the Act on the General Rules of Application of Laws; for Russia Art 1219(1)2 of the Civil code; for Switzerland Art 133(2)2 of the Act on Private International Law.
8 See the case law from Switzerland, infra C.2.
9 The first option is opened by Art 2(1) Brussels I Regulation. For the second option, see the case-law of the ECJ, infra n 2 and accompanying text.
10 See Art 4(2), (3) Rome II Regulation.
11 This is particularly true in Germany, where courts imply a contract as soon as a bank advises a person recognising the importance of the advice for the latter. See eg, J Sied, in H Schimanisky, H-J Bunte and H-J Lovovski (eds), Bankrechts-Handbuch (Beck, 3rd edn, 2007), § 43 no 7.
12 See Art 12 Rome II Regulation.
13 See eg Arts 6, 8 and 9 of the Rome II Regulation.
14 Art 14(1) Rome II Regulation.
2. Economic Loss: Case Illustrations

In order to better grasp the nature of the problem, it may prove helpful to look at some practical cases in which the question of locating economic loss might arise.

(a) Misleading Information

In a first series of cases, a financial intermediary, eg a bank, gives information to a foreign investor, typically through some medium such as a letter, email or telephone. The information could be that a customer is creditworthy or solvent, or that he had sufficient funds in his account. One may also think about more widely distributed information, such as false or misleading ratings. Based on that information, the investor makes an investment with a third party. When the information turns out to be false, he sues the intermediary, eg for fraudulent or negligent misrepresentation. In order to determine its jurisdiction and the applicable law, the court must find out where the damage occurred.

(b) False Prospectuses and Financial Statements

Another category is composed of those cases in which a company issues a prospectus or publishes financial statements containing false or misleading information. An investor who has acquired shares in that company in the secondary market might bring a claim against the issuer. Since the parties have never had any direct contact, this claim is in many legal systems considered to be a tort claim.

The following is noteworthy here. Currently, there is a discussion whether the law applicable to prospectus liability should be determined independently of the country in which the loss occurred. Since the Rome II Regulation does not provide a clear answer, this question is still open for discussion. See the cases decided by the English Court of Appeal and the German Reichsgericht, infra nn 63 and 65. See the Domraysa case decided by the English High Court, infra n 70.

15 See the cases decided by the English Court of Appeal and the German Reichsgericht, infra nn 63 and 65.
16 See the Domraysa case decided by the English High Court, infra n 70.
18 If the contract is concluded with the same party that has given the advice, the case falls under the category of culpa in contrahendo, which will in general be governed by the law of the ensuing contract, see supra text accompanying n 12.
not contain an express rule to this effect, to adopt it would either require an amendment of its text or a very brave interpretation by the ECJ. As both have not yet occurred, the place where the damage was sustained is still of primordial interest in the cases mentioned.

(c) Bad Asset Management

Other practical examples of economic loss are cases in which a person has received funds from his client and was asked to invest these. A problem that may arise subsequently is that the manager may embezzle the money or commit another tort, such as churning. Whatever the misbehaviour, the court must decide where the damage occurred for the jurisdictional analysis as well as for choice-of-law purposes.

(d) Breach of Statutory Duties

Another line of cases concerns a person's behaviour that is contrary to the law and negatively affects others. An intermediary may, for instance, have violated a regulatory conduct-of-business rule. Another example is money laundering by a bank. National laws often set out a specific ground of action allowing plaintiffs to bring claims for a violation of the law in these cases. Again, in order to decide on the jurisdictional point and on the applicable law, the court must first determine the place of the damage.

(e) Inducing an Unfavourable Contract

There is finally a voluminous category of cases in which a party has been induced into a contract with a third party that is very unfavourable to her. This may be, for example, an ordinary sale, an option contract or a subscription of warrants. Provided that the innocent party cannot set aside or

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[23] See the case decided by the Swiss Federal Court, infra n 87.


[25] If the agreement was made with the party itself that induced the contract, than the case falls under the category of culpa in contrahendo, which follows specific choice-of-law rules, see supra n 12. One practical application seems to be the case Raiffeisen Zentralbank AG v Alexander Tranos [2001] ILPr 9, [15], which today would have been decided under Art 12 Rome II Regulation, see J Fawcett, and JM Carruthers, Cheshire, North & Fawcett Private International Law (Oxford University Press, 14th edn, 2008), 797, n 259.


[27] See eg the case underlying the decision of the ECJ in Kronhofer, supra n 76.

otherwise cancel the contract, her liabilities are now higher without her assets being increased to the same extent. She has thus incurred a loss. The question is: where did the loss take place?

3. Locating Economic Loss

Although these cases seem disparate, they all feature the same problem: in all of them, no physical object or asset has been damaged. Rather, a monetary or “financial” loss has occurred. If no specific part of the victim’s property has been damaged, often the term “pure economic loss” is used.

In private international law, economic loss creates problems because it is notoriously hard to locate. The reason is its non-material nature. Mostly, it can only mathematically or statistically be proven. Say an asset manager sells valuable bonds from an investor’s account and buys junk bonds, or a person acquires shares of a company relying on false information in the prospectus. The damage incurred by the investor is an incorporeal one.

Finding the geographical location of economic loss seems as impossible as nailing jelly to the wall. Yet legal texts require us to determine the place where damage occurs in order to determine jurisdiction and applicable law. The question is thus open: what shall we do in private international law about economic loss?

B. THE ANATOMY OF ECONOMIC LOSS

1. The Concept of “Patrimonial Loss”

In continental Europe, the term economic loss is often replaced with “patrimonial loss”. This expression conveys the idea that economic loss would have an object: the victim’s “patrimony”. The notion is commonly understood to mean the sum of all rights and obligations of a person. Some authors there-
fore say that financial loss would occur where the patrimony of the victim is located.\footnote{This opinion is especially widespread in Germany. See eg A Lüderitz, in HT Soergel, \textit{Kommentar zum BGB} (W Kohlhammer, 12th edn, 1996), Art 38, no 11; K Thorn, in O Palandt, \textit{BGB} (Beck, 70th edn, 2011), Art 4, Rom II-VO, no 9; G Wagner, in \textit{Anwaltkommentar BGB} (Deutscher Anwaltverlag, 2005), Art 40, EGBGB, no 21.}

In reality, this means falling into a linguistic trap. Patrimony is an ontological category that exists only in the lawyer’s mind. Obviously, there is no physical place in which a fictitious “sum of rights and obligations” can be found.

One could of course adopt a more factual notion of patrimony and define it as the totality of a person’s assets.\footnote{See GL Gretton, “Trusts without Equity” (2000) \textit{49 International and Comparative Law Quarterly} 599, 608.} But even in that case, problems remain. First, these assets will often be quite heterogeneous, like real estate, money or securities. More importantly, they may be dispersed over a number of different countries. Patrimony in this sense can therefore often not be attributed to a single country either.

\section*{2. Dismembering Financial Transactions}

Although it is difficult to locate economic loss, it is not entirely impossible. If one looks through the microscope of financial law, one may sometimes be able to identify a particular asset or a particular sum of money that has been lost. Take the example of the bad asset manager.\footnote{See supra A.3.} Since he sold valuable bonds and replaced them with junk bonds, one could take the place of the bonds that were lost as the place of the damage. Similarly, in the cases of prospectus liability,\footnote{See supra A.2(b).} one could think about the location of the money that has been invested. Instead of referring to the general place of patrimony, one could thus dissect the transaction to see which particular asset is affected.

Such a “financial lawyer’s approach” has one definite advantage: it is undoubtedly correct from a legal perspective. As every lawyer is aware, shares, bonds and money do not exist in reality, but only by virtue of the law. Their location thus has to be determined using legal methods. The greatest expertise in that area certainly lies with financial lawyers. It would appear foolish to determine the competent court and the applicable law in disregard of the teachings of banking and financial law by using some other, supposedly “natural” method. Such a method risks inherent contradictions in the legal system.

However, the financial lawyer’s approach also has several disadvantages.

First, it may not always be possible to discern a particular asset that has been damaged. An example is provided by the case of the unfavourable contract.\footnote{See supra A.2(e).} One simply cannot say which of the victim’s assets has been lost or diminished
by the obligation arising out of the unfavourable transaction. Rather, it is his whole “patrimony” that has been damaged.

Second, even if one were to dissect the financial transaction to identify the asset that was negatively affected, it is still necessary to locate this particular asset. And this, after all, is not as easy an exercise as it seems. The last statement will be explained now.

3. Finding the Place of Financial Instruments (Shares, Bonds and Derivatives)

Financial instruments are products sold on the financial market. The notion of “financial instrument” is preferred by the European Union over the commonly used word “securities”, because it is broader and also includes derivatives, such as options or futures.

Financial instruments are constructs of law and thus do not have a physical reality. Some authors have mistaken the share certificate for the share, but the certificate is only evidence of the share, not the share itself. In many countries, financial instruments exist in dematerialised form only. There is no longer a need for documents to prove the proprietary interest in them, nor to validly transfer them. Other countries still cling to the concept of shares being physically evidenced through paper, but replace the individual documents with so-called jumbo certificates that collectively represent all the instruments resulting from one issue. The rights of the investors are administered by financial intermediaries, which hold the jumbo certificates for their benefit – hence the expression “indirect holding system”.

Evidently, these modern developments pose a huge problem for conflict of laws. There is no longer a physical document to which one could refer in order to locate financial instruments. Shares, obligations and derivatives are not tangible. That is why a geographical criterion for determining their location is lacking. One therefore has to resort to other methods. One could refer to the place where the instruments are registered.

40 See Annex I, s C to MiFID, ibid.
41 See M Ooi, Shares and Other Securities in the Conflict of Laws (Oxford University Press, 2003), [3.06]. Regarding the nature of the share, see also R Pennington, Company Law (Butterworths, 8th edn, 2001), 398.
42 For an overview of French, Italian, Spanish, UK, US and Swiss law, see M Lehmann, Finanzinstrumente (Mohr, 2010), 61–89.
43 This is true, for instance, for Germany; see Lehmann, ibid, at 29–37.
44 Cf Ooi, supra n 411, [3.19], 49.
45 See Lehmann, supra n 42, 490–91; Ooi, supra n 411, [5.52], 83.
systems with several levels of intermediaries and hence several registers, this might prove to be difficult. The Hague Convention on Securities held with an Intermediary,\textsuperscript{47} which has yet to enter into force,\textsuperscript{48} therefore adopts another approach. Its main rule is that the parties may determine the applicable law by agreement.\textsuperscript{49} The Convention purposefully avoids any attempt to “localise” the security, as its drafters were convinced that this would encounter insurmountable obstacles.\textsuperscript{50}

We are thus stuck with a conundrum: financial instruments held with an intermediary are not located in a country by the rules of private international law. Rather, the law applicable to them can be chosen by the parties. One could of course try to use that law as the “place” of the damage. But this would amount to heresy from the orthodox view of conflict of laws: the law chosen by the parties to the account agreement cannot, without further explanation, be equated with the country in which the damage occurred. If one were to try to overcome that dilemma and ask the legal system applicable to the financial instruments about their location, one may get stuck with another problem: That system must not necessarily provide a geographic location, but may instead confine itself to giving the rules applicable to it without indicating its \textit{situs}. We are thus back to square one.

\textbf{4. Where Is Book Money?}

Similar quandaries will be encountered when we try to locate money. Investments are rarely made with physical money, ie with notes or coins. In the great majority of cases, payment is made through banks. What is transferred is so-called “book money”, ie money in intangible form.\textsuperscript{51} Determining its location can be a challenge as much as it is to find the place of dematerialised financial instruments.

One must start from the realisation that book money is a creature of law.\textsuperscript{52} Hence it is necessary first to determine the applicable law before one can find

\textsuperscript{47} Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, done at The Hague on 5 July 2006.
\textsuperscript{48} To date, only Mauritius and Switzerland have signed and ratified this convention, while the US merely signed it. See www.hcch.net/index_en.php?act=conventions.status&cid=72, accessed 23 November 2011.
\textsuperscript{49} See Convention supra n 47, Art 4(1).
\textsuperscript{51} See eg R Goode, \textit{Commercial Law} (LexisNexis, 4th edn, 2009), 488–89.
\textsuperscript{52} See also C Kleiner, “Money in Private International Law: What Are the Problems? What Are the Solutions?” (2009) \textit{11 Yearbook of Private International Law} 563, 580 (noting that “the balance of an account is abstract by nature”).
out the proper location. That presupposes “characterisation” of the issue, which is not an easy task, as the true nature of money, in particular of book money, is subject to an old academic quarrel between economists and lawyers.

In legal circles, book money is generally considered to be a claim of the customer against the bank. This money claim arises out of the account agreement between the bank and its customer. The law applicable to the account to which the money is credited thus steers the law applicable to the money claim itself. Under the general principles of conflicts relating to contractual obligations, it is obvious that the parties have the right to choose the law to which they want to submit the account. In the absence of such a choice, the account agreement must be submitted to the bank’s place of central administration. In the likely case that the account is held with a branch, its location will inform the governing law. This is not only true in the EU, but in the US as well.

Determining the law applicable to book money thus seems fairly easy. Two problems, however, complicate things. First, it is unclear whether the fact that an account is governed by the law of a certain country means that the account and the loss incurred in relation to it are “located” there. Is, for instance, England to be considered the place of a damage that is done to an account maintained at the Polish branch of an English bank, merely because the parties have agreed that the account shall be governed by English law? Secondly, often the investor does not transfer the money from one account directly to that of the tortfeasor, but sends it through a number of different accounts held by the investor. In these circumstances, finding “the” location of the damage becomes an impossible exercise.

In sum, the financial lawyer’s approach might help in some cases. However, in a large number of situations, it will be unsuitable to pinpoint a specific location of the damage.

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55 See Procter, *ibid*, [1.03], 7; Goode, *supra* n 51, 487; HJ Hahn, *Währungsrecht* (Beck, 1990), § 2, no 30 et seq.
56 See Art 3(1)1 of the Rome I Regulation (Regulation 593/2008 EU [2008] OJ L177/1).
57 See Art 4(1)(b) in conjunction with 19(1) sub-para 1 Rome I Regulation.
58 Cf Art 19(2) Rome I Regulation.
59 See Art 5–116(b) of the Uniform Commercial Code (UCC). On that provision, see Sommers, *supra* n 53, 68.
60 See the parallel problem for financial instruments, *supra* B.3.
61 See eg *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm), [47]; Swiss Federal Court, *infra* n 85, sub 3b.
Given that the financial lawyer’s approach proves to be elusive in many cases, it seems advisable to turn back to the rough and somewhat simplifying methods of private international law. Fortunately, the problem of locating economic loss is not at all new there. For decades, courts and writers have struggled to solve it. We have to leave out here, of course, those decisions that have focused solely on the place in which the alleged tortfeasor has acted. Rather, we must focus on the decisions that might provide valuable insight to our question: where does economic loss occur?

1. The Place where Information Was Received

Many of the decisions dealing with misleading information have turned to the place where this information was received. The leading case in English law is *Diamond v Bank of London & Montreal Ltd*. A London commodity broker had started negotiations with a US company for the sale of 1 million tons of sugar. A bank from Nassau assured him over the telephone and by telex as to the availability of the sugar and the bona fides and creditworthiness of the envisaged trading partner. When it turned out that the sugar was not available, the commodity broker sued the bank in London. In order to decide whether leave for service of the writ outside England was to be granted, the Court of Appeal had to determine whether the action was founded on a tort “committed within the jurisdiction”. It held that the substance of the tort took place in England since the misstatements were received there.

A similar reasoning was adopted by the German Reichsgericht in a decision dating back to 1888. A party from Zurich sued a bank from Lyon, which had assured the plaintiff by mail about the creditworthiness of a not so creditworthy client. The German judges decided that the tort was committed in Zurich where the incriminating letter had been received.

The problem with both decisions is that their rationale seems to be centred on the tortious behaviour, not on the place of damage. It would certainly not be accurate to say that the investor has sustained “damage” just by receiving false information. The receipt of information in and of itself is not damage. Something more has to happen.
In this context, it is worth noting that Lord Denning mentioned that in his opinion the tort is committed “where the representation is received and acted upon”.68 This adds to the mere receipt of information the behaviour of the investor. It therefore comes closer to the actual suffering of the damage. Indeed, Rix J in Domicrest took exactly this view under Article 5(3) of the predecessor of the Brussels I Regulation, the Brussels Convention,69 by saying that the place where the damage occurs is likely to be where the misstatement is “heard and relied on”.70 But in his judgment, he applied this rule in a curious way. The case was about a British company that had relied upon the assurances of a Swiss bank according to which payment for delivery of goods to a customer would be made and the bank would guarantee such payment. Upon this information, the British company made a decision to release the goods. Rix J opined that the place of the damage was not England, where the false information had been received by the company and where it had acted upon it by making arrangements for the release, but rather Switzerland and Italy, where the goods eventually were released without prior payment.71 In reality, and contrary to the assurances of Rix J, that means that the country in which the information is received and acted upon is no longer decisive. Rather, it is the place where the actual asset has left the victim’s control. Although this reasoning is convincing, it can hardly be squared with the Diamond decision.

2. Victim’s Domicile or Habitual Residence

The particular aspect in Domicrest was that the victim had lost a physical asset. Often, however, economic loss can only be proven mathematically or statistically. In these cases, one could think about locating the damage at the investor’s domicile. After all, it is there that the financial interests of the victim are located and where he takes most decisions related to it. It is also there that the consequences of financial torts, such as fraud, will effectively be felt.

However, the ECJ has constantly held that the domicile of the victim is not to be taken into account when locating economic loss. It did so in a trilogy of cases. In the first of them, Dumez,72 two French banks were suing several German banks in relation to the latter’s cancellation of loans for a property-development project in Germany. The plaintiffs argued that the cancellation had caused the insolvency of their German subsidiaries and that they had consequently suffered a loss in their home country, France, because their interests as shareholders were adversely affected there. The ECJ disagreed and held that

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68 Diamond, supra n 63, 346 (per Lord Denning) (emphasis added).
70 Domicrest Ltd v Swiss Bank Corp [1999] QB 548, 568.
71 Domicrest, ibid.
the harm alleged was “merely the indirect consequence of the financial losses initially suffered by their subsidiaries” and that it would therefore not qualify as the “harmful event” under Article 5(3) of the Brussels Convention.73

The ECJ made its position even clearer in *Marinari*.74 An Italian citizen had tried to lodge promissory notes of dubious origin with the Manchester branch of Lloyds. The employees of the bank called the police, which arrested him and sequestered the notes. Back in Italy, Marinari sued Lloyds there. The Corte di cassazione referred a preliminary question to the ECJ, which took the view that Article 5(3) of the Brussels Convention could not be interpreted as giving the Italian court jurisdiction over the English bank. The justices in Luxembourg stressed that the term “place where the harmful event occurred” could not be construed so extensively as to encompass “any place where the adverse consequences can be felt of an event that has already caused damage actually arising elsewhere”.75

These cases were merely harbingers for the ECJ’s decision in *Kronhofer*,76 which can be considered to be the “leading case” on the location of economic loss. The facts were as follows: Directors and investment consultants of a German company persuaded an Austrian client named Kronhofer over the telephone to invest in highly speculative call options at the London Stock Exchange. Kronhofer transferred the necessary funds to an investment account in Germany. Later he brought a claim against the German directors and investment consultants in Austria. The Austrian Supreme Court, the Oberster Gerichtshof (OGH), submitted to the ECJ the question whether the courts of the domicile of Kronhofer would have jurisdiction to hear the claim. It was already clear from the text of Article 5(3) of the Brussels Convention that the domicile of the victim as such could not be the relevant place at which the damage occurred. However, the argument in *Kronhofer* was made in a more sophisticated form. The main point asked by the OGH was whether the damage occurred, in cases like the one submitted, at the place “where the victim’s assets are concentrated”.77 Obviously, this would in the majority of cases lead to the victim’s domicile, as his assets are usually concentrated there. This opinion is in agreement with a view in the literature according to which the domicile is the “centre of patrimony” of the victim and should therefore be considered as the place of financial loss incurred by him.78 In its reference to the ECJ for a preliminary ruling, the OGH specifically pointed out that this was indeed a case which simultaneously affected the whole of the investor’s

73 *Ibid* at [13]–[14].
75 *Ibid* at [14].
76 Case C-168/02 *Kronhofer* [2004] ECR I-6009.
77 See the opinion of Advocate General Léger, [2004] ECR I-6009, [2].
assets. It took the view that the place where the harmful event occurred was in Germany, and Germany only. The ECJ did not criticise that view. On the contrary, it supported it by saying that in determining the place of loss, the fact that the ultimate adverse consequences of the damaging behaviour were felt in Austria, where the plaintiff lived and where his assets were concentrated, could not be taken into account. The court gave two reasons for this. First, to hold otherwise would run counter to the objectives of the Convention, which aims at enabling the claimant to easily identify the court in which he may sue and the defendant to reasonably foresee in which court he may be sued. Second, to take into account the location of the plaintiff’s assets would give jurisdiction to the courts of the plaintiff’s home, a solution that is generally not favoured by the Convention. As is well known, there is a strong horror fori actoris built into the European jurisdictional regime: the ECJ has repeatedly stressed that the Brussels Convention does not favour to give jurisdiction of the courts at the plaintiff’s domicile. It is thus understandable that the Luxembourg judges refused to locate the damage at the place where the victim’s assets are concentrated.

The EU is not alone in its aversion to the domicile of the victim. The Swiss Federal Court (Bundesgericht) took a similar view in an action brought by German investors against the directors of a Liechtenstein company. It held that the investors’ domicile would be irrelevant for the purposes of determining the applicable law, since they had wilfully separated the funds from their other patrimony and sent them to Liechtenstein. The ratio decidendi was, however, a little ambiguous since the justices in Lausanne stressed that the plaintiffs had not proven the origin of the funds. It is not clear what result they would have reached if the plaintiffs had shown that they sent the money from their accounts in Germany.

The place of the victim’s domicile as the place of economic loss was rejected again in a later case by the Swiss Federal Court. Money had been stolen from X, an Arab bank, by an employee co-operating with a dubious African “investor”. It had been channelled through various Swiss banks and transferred to an

79 Supra n 76, at [17].
80 Ibid.
81 Ibid at [21].
82 Ibid at [20].
83 Ibid.
84 See ECJ, Marinari, supra n 74, [13] and Kronhofer, supra n 76, [20]. However, a forum actoris has recently been adopted by the ECJ in relation to the place where the damage occurred under Art 5(3) Brussels I Regulation in relation to torts on the internet affecting the personality rights of the victim in Joined Cases C-509/09 and C-161/10 eDate Advertising GmbH v X and Martinez v MGN Ltd, judgment of the Grand Chamber of 25 October 2011, esp at [48]–[50].
85 Swiss Federal Court, decision of 2 November 1998, BGE 125 III 103.
86 Swiss Federal Court, ibid, sub 3b.
87 Swiss Federal Court, decision of 18 April 2007, BGE 133 III 323.
account with Z in Switzerland, from which the “investor” deducted the money for his own purposes. X sued Z in the Swiss courts for money laundering to its detriment. The Swiss Federal Court reiterated that the place of economic loss was not necessarily the domicile of the victim. In cases in which the funds in question could be distinguished from the rest of the patrimony, the country in which the financial interest was affected would have to be taken into consideration.88 This country was identified as being Switzerland.

Regardless of some ambiguities, it is therefore fair to say that there is now a pan-European agreement that the domicile of the plaintiff is normally not to be considered the place where economic loss is suffered.

3. Conclusion: Two Places to Be Avoided

From the case-law outlined above, certain lessons can be drawn. There are two kinds of places that can be excluded as the location of economic loss.

First, it is clear that where financial information is received is not necessarily where the loss occurs.89 The receipt of wrong information in and of itself is not damage. Even if the party trusted in the information and has acted upon it, the place of such action is not to be mistaken as the place of damage. Rather, as the Domicrest decision has made clear, the loss occurs where the victim loses the control of a physical object as a consequence of his releasing it.90 In the case of non-tangible assets, the place of loss is more difficult to identify. However, it should equally be clear that the loss is not sustained where the victim disposes of the assets, but rather where they were located when he lost them.

Second, one can glean from the case-law that the place of the victim’s domicile is not necessarily the place in which damage occurs.91 Thus, the ECJ has repeatedly held that one must disregard the place where only indirect consequences are felt, or where the victim’s assets are concentrated.92 Even if the tort affected the whole of the victim’s assets rather than any particular right or object, the justices in Luxembourg reject locating the damage at the place where the plaintiff lives.93

Reference to the domicile of the plaintiff is not excluded under all circumstances. The German Bundesgerichtshof recently had to decide three cases in which German investors were lured into speculative investments abroad and transferred the money from a bank account at their habitual residence.94 The federal judges ruled that the loss occurred at the place of the victim’s bank

88 Swiss Federal Court, ibid, sub 2.3.
89 See supra C.1.
90 See supra n 70 and accompanying text.
91 See supra C.2.
92 See the cases supra C.2.
93 See Kronhofer, supra n 76 and accompanying text.
94 German Federal Court, two decisions of 15 July 2010, Zeitschrift für Wirtschaftsrecht (ZIP) 2010, 1996 and 2004; decision of 12 October 2010, ZIP 2011, 475. On these cases, see
account in Germany, even if this place happened to coincide with the investor’s domicile. These decisions can be explained because the ECJ’s Kronhofer judgment excluded localising the damage at the domicile of the victim “by reason only” of the fact that he has suffered damage there which resulted from the loss of assets in another Contracting State. The ECJ thus did not preclude reference to the victim’s domicile if the direct and immediate loss occurred there. In cases like those decided by the Bundesgerichtshof, the domicile is not relevant as such, but only because it coincides with some other event that occurred at the same place.

With the latter exception in mind, it is safe to draw the following conclusion: the search for the applicable law in economic loss cases has to avoid the place where information is received and the place of the victim’s domicile like Scylla and Charybdis. That becomes easily understandable if one looks at the particular language of Article 4(1) of the Rome II Regulation. The place of information receipt can be easily identified as an example of a country “in which the event giving rise to the damage occurred”. The place of the victim’s domicile, on the other hand, can be paralleled to the country “in which the indirect consequences of that event occur”. Both countries should not be considered as the countries in which the damage occurs, as Article 4(1) of the Rome II Regulation expressly states. We have thus identified the two countries that should be disregarded in the context of economic loss. Now we need to find out the country where the direct and immediate damage occurs.

D. A DIFFERENTIATED APPROACH TO ECONOMIC LOSS LOCALISATION

1. Methodological Observation

From the above, it has become apparent that localising economic loss is not an easy exercise. It is not possible to use the methods of geography. We cannot just point to some place on earth and identify it as the location of damage.

The insight is hardly novel. As long ago as the first half of the 20th century, the US “legal realist” movement argued that the lex loci delicti rule could not be applied mechanically, but is subject to policy- and result-oriented considerations. For very much the same reason, the rule came under heavy attack


95 See Kronhofer, supra n 76, [21].
during the judicial conflict-of-laws “revolution” in the 1960s. The observations in this article largely confirm US doubts against the mechanical application of the *lex loci* rule. As has been shown, there is no “natural” place where economic loss occurs.

This does not mean, however, that we could simply throw the *lex loci delicti* rule completely overboard. Two considerations speak against this. First, both the Brussels I Regulation and the Rome II Regulation clearly ask us to determine the country in which the damage occurred. There is thus from a legalistic point of view no way to eschew the discussion of the place of loss simply by claiming that this place would be “non-existent”. Second, from a policy perspective, the EU may not have been ill-advised in referring to the “country in which the damage occurs”. Even such an abstract concept may be preferable to having no rule at all. The US conflicts revolution had the effect of creating nearly complete chaos as to the applicable law. For all their disadvantages, mechanical and sterile rules like the place of the damage at least ease the determination of the applicable law and favour predictability and efficiency of the case administration.

Thus, rather than rejecting the rule of Article 4(1) of the Rome II Regulation, we must apply it in a meaningful way to economic loss. We cannot find the place of this kind of loss by using a natural science-approach, as the wording of the *lex loci damni* rule seems to insinuate. Rather, we must have recourse to typical legal methods, such as rules and presumptions. What has also become clear is that there can be no one-size fits-all legal definition which would locate the place of damage. The matter is much more complex. Each case has to be looked at individually in order to find the relevant contact. Therefore, a differentiated approach is necessary. The rough and broad provision of Article 4(1) Rome II Regulation must be supplemented by more refined and precise rules that allow its application to pure economic loss.

To this effect, we must differentiate between certain fact patterns. These fact patterns can be identified through relevant criteria which will play a role in determining the country of damage. The criteria must be convincing from the point of view of choice of law and jurisdiction.

To get a clearer picture of how the criteria might look, it is necessary to bear in mind the objectives being pursued when we try to locate economic loss. They are conveniently summarised in the preamble to the Rome II Regulation. First, the rules should be highly predictable and thus reinforce legal certainty rather than sowing confusion about the competent court and the applicable

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90 A distinction between certain “types of torts” has been proposed by Hein, *supra* n 96, 22–23. See also Engert and Groh, *supra* n 94, 463.
law. Second, they should do justice in the individual case by providing a reasonable balance between the interests of the defendant and those of the claimant. Legal certainty and justice to the individual parties are thus the criteria that must guide the search for the place of economic loss.

One could also think about other objectives, such as economic efficiency or the attainment of certain policy goals, such as the protection of particular groups like consumers, workers or insurance takers. These factors play a role in the specific jurisdictional and conflicts rules of the Brussels I and Rome II Regulations. However, the location of the loss is a criterion which seems to leave little room for efficiency or policy considerations. What is certain, though, is that the predictability of the competent court and the applicable law as well as respect for the interests of the claimant and the defendant are the minimal standards that have to be met by any localisation of economic loss. Hence they provide the yardstick for the following analysis.

2. Loss of a Distinguishable and Locatable Asset

In the case where a particular asset has been lost, such as a physical object, a number of financial instruments or a certain amount of money, its location can be considered the place where the damage occurred. This presumption conforms with the expectations of both parties, and leads thus to a predictable outcome. In addition, it matches the ECJ’s case-law, according to which one must apply the law of the country in which the direct damage has taken place.

To be able to follow this presumption, two conditions must be met. First, the assets must be distinguishable from the rest of the victim’s patrimony. It is not enough, for instance, that he lost €100,000; the money must be precisely distinguishable from his other money in order to locate it. That is for instance the case when it has been withdrawn from a certain account.

Second, it must be possible to locate the asset. This will be easy if physical objects have been lost; more difficult is the location of intangible assets. In the case of financial instruments, there seems to be no better solution than to refer to the office of the intermediary with which they are registered. This location is relied upon by a number of specific EU conflict rules. It also applies as a “fall-back rule” under the Hague Securities Convention in the absence of

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101 See recital 14 Rome II Regulation. See also recital 11 Brussels I Regulation. The goal of predictability has also been stressed by the ECJ in Kronhofer, supra n 766, no 20.
102 See recitals 14 and 16 Rome II Regulation.
103 See eg Arts 15–21 Brussels I Regulation; Arts 6–9 Rome II Regulation.
104 See supra C.1.
105 See eg Domicrest, supra n 70.
106 See supra B.3 and B.4.
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a choice by the parties. The law chosen for the account agreement, which dominates under the Convention, cannot be taken into account, as it is not foreseeable by third parties. If there is – as often – a whole chain of different intermediaries that have registered the financial instruments, one should refer to the place of the one who managed the account from which the shares were transferred or stolen. That place comes as close as possible to the physical location of the loss.

In the case where money is lost from a bank account, it is safe to identify the place of the damage as being at the location of the bank where the lost money was credited. The law chosen for the bank account is irrelevant since such an agreement is not foreseeable for third parties. If the bank has a branch that maintains the account, its location is decisive. This presumption governs, for instance, where money was stolen or embezzled directly from the bank account of the victim. It also applies where a person is induced by fraud to send her money to a foreign account. Otherwise, a fraudster could try to manipulate the place of damage by luring the victim into a country whose law provides a lower level of protection. Thus, the German Bundesgerichtshof was right to hold in the three cases in which investors had been fraudulently induced to send money abroad that the damage had occurred in Germany, from where the money was sent. As the court noted, the transfer was the consequence of a tort that had occurred before the victims made the transfer. In this case, the loss is incurred at the place of the victim’s bank account.

3. Importance of Wilful Acts by the Victim

It is different if the victim has wilfully transferred the money to another account and the tort occurs only after the transfer. For instance, she instructs an asset manager in relation to the investment of a certain amount of money, and the manager later invests the money badly or embezzles it. In these cases, it is reasonable to refer to the place of the account to which the money was sent as the place of damage. For this place is the most foreseeable and predictable for the parties; it is the one that they have agreed upon as the destination of the money. Both parties must have considered the possibility that the law of this place will govern any potential loss.

108 See Hague Convention, supra n 47, Art 5(1).
109 See supra n 49 and accompanying text.
110 See supra B.4.
111 The same view is adopted by Dickinson, supra n 29, [4.67], 329. See also the three decisions by the German Federal Court, supra n 94.
112 On this danger, see Dickinson, supra 29, [4.66], 327.
113 See German Federal Court, supra n 94.
114 See supra D.2.
115 See supra A.2(c).
116 See also Engert and Groh, supra n 94, 463.
The ECJ has reached the same outcome in Kronhofer, where it rejected to place the loss in Austria, the country in which the investor’s assets were concentrated, and seemed to be inclined to give jurisdiction to the courts of Germany, the country to which the Austrian investor had wilfully transferred his money.\(^{117}\) The ECJ did not, however, specifically emphasise the wilful transfer in its decision. The Swiss Federal Court, in its parallel decision, was more explicit. It noted that “the defendants themselves have separated the funds in question from their patrimony”.\(^{118}\) It is precisely this argument which justifies applying the law of the account of destination.

The reference to the place of the account to which money has been sent is convincing only under the condition that the transfer was made intentionally and consciously. This is the case if the victim was clear about where the money goes and what will be done there with it. The victim’s decision is not made freely if it is tainted by fraud, for instance if the other party concealed that the money was sent to his personal account or that he intended to embezzle it. In cases such as these, the act of sending the money to another account loses its significance and should be disregarded. This category comes close to stealing or robbery and thus to the type of cases that have been discussed first; the law to be applied then is that of the place of the victim’s bank account.\(^{119}\)

### 4. Fortuitous Circumstances Excluded

In many cases funds are channelled through a number of different accounts before they are finally invested, or end up in the hands of criminals, or disappear altogether. In these cases, it will run counter to the reasonable expectations of the parties to tie the damage to the location of an account through which the money merely passes, even if the account is the last that can be determined. Sometimes, the channelling might have purely technical reasons, such as clearing and settlement of debts in US dollars which usually takes place in New York.\(^{120}\) Sometimes, it might just be used by the tortfeasor to disguise the path the funds took. Such fortuitous circumstances do not lead to a significant connection. They should therefore not influence the applicable law.

The situation is different where the presumed tortfeasor is the bank that has itself channelled the money. In such circumstances, the channelling is not a “fortuitous circumstance”, but the very tort that is alleged. The bank can expect that its liability will be governed by its own rules on money laundering, and the client must foresee as well that a bank can only be liable under the law of its home state, even if he does not know which bank will “launder” the

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\(^{117}\) See ECJ, \textit{supra} n 76, [6].
\(^{118}\) Swiss Federal Court, decision of 2 November 1998, \textit{supra} n 85, sub 3b.
\(^{119}\) See \textit{supra} D.2.
\(^{120}\) See Sommers, \textit{supra} n 53, 48–49.
money. Thus, the Swiss Federal Court correctly held in the money laundering case\textsuperscript{121} that Swiss law applies.

5. “Mosaic View”

One of the primary concerns in locating damage in any transnational context is to avoid that a plurality of different laws will govern the same set of facts. Such a simultaneous application of different laws, in German called Mosaikbetrachtung, has the disadvantage of being complicated and inefficient.\textsuperscript{122} These dangers are particularly real with regard to financial transactions involving different countries.

The presumptions that have been set out so far reduce the scope of the mosaic view to a considerable extent. In particular, the rule on wilful transfer\textsuperscript{123} very often favours the application of a single law, because it designates a single place of loss even if the money is sent from different accounts.\textsuperscript{124} The rule according to which fortuitous circumstances like the channelling of money are to be excluded\textsuperscript{125} might in certain situations have a similar effect.

However, there will remain cases in which the loss cannot be attributed to only one country. A possible example is the embezzlement of funds from accounts located in different states. Under these circumstances, the mosaic view cannot be excluded. But there are also good arguments to be made for it here because if the embezzlement is committed in different countries, it will often be carried out by separate acts and different means, so it makes sense to distinguish between the different losses.

6. The Unfavourable Contract

The presumptions outlined above do not cover the situation in which the victim has been induced by fraud to enter into an unfavourable contract, without having paid any money yet.\textsuperscript{126} In this instance, neither a distinguishable and locatable asset has been lost, nor has the victim made some wilful transfer or is the mosaic view of any help. The rules that have been considered so far do not work.

There is genuine dispute about how this category of cases should be treated. Basically, two approaches can be distinguished. The first is to locate the damage

\textsuperscript{121} See supra n 87 and accompanying text.
\textsuperscript{123} See supra D.3.
\textsuperscript{124} Such was the case, eg, in Swiss Federal Court, supra n 85.
\textsuperscript{125} See supra D.4.
\textsuperscript{126} See supra A.2(e).
at the place where the unfavourable contract has been entered into.\textsuperscript{127} In case that the contract is entered into with a third party, the place of conclusion of this contract is determinative.\textsuperscript{128} The second is to look for the place of the assets of the party that has been pushed into an unwanted contractual relation.\textsuperscript{129}

Which solution is better? As has been stressed above,\textsuperscript{130} there is no right or wrong answer in locating economic loss, just arguments pro and con a certain position.

What can be said against the reference to the place of the contract is that this place is notoriously hard to locate, especially, but not only, in the case of contracts closed over the internet. For these reasons, the \textit{locus contractus} has been rejected as a connecting factor in the context of choice of law for contractual obligations.\textsuperscript{131} It is hard to understand why it should now resuscitate from its grave and become determinative for the location of the loss in torts. Moreover, there are profound difficulties in seeing any actual damage incurring at this place: Neither has the party paid anything, nor must it necessarily fulfill the contract there. The place of contracting might be totally fortuitous and have nothing to do with the tortious relationship. This is true even if one were to substitute the “legal” locus of contracting – wherever this place might be – by the more factual place where “the victim (or his representative) took the final step necessary to create a legally binding obligation”.\textsuperscript{132} Although it may be easier to identify the latter place than the former, it does not necessarily bear any relationship to the damage. It suffices to imagine the case in which the CEO of a British company is invited by a Swiss co-contractor to a Frankfurt airport hotel to sign a multi-million investment deal in Dubai: certainly it would be far-fetched to argue that the loss had occurred in Germany just because the damaged party has undertaken the final step necessary to create a legally binding obligation there. Furthermore, the place of contracting is open

\textsuperscript{127} This solution seems to be prevalent in England. See Dickinson, \textit{supra} n 29, [4.67], 329. The place of the transaction was clearly retained by the English High Court in \textit{London Helicopters Ltd v Heliportugal LDA-INAC}, \textit{supra} n 26, [27]. See also the same court in \textit{Raiffeisen Zentralbank Österreich AG v Alexander Transus}, \textit{supra} n 25, [15], although Longmore J referred to the place of the transaction as opposed to the place where the misrepresentations were received, not as opposed to the place of the patrimony of the victim.

\textsuperscript{128} See Dickinson, \textit{supra} n 29, [4.67], 328-29.

\textsuperscript{129} This solution is favoured by German authors. See Mankowski, in Magnus and Mankowski, \textit{supra} n 122, no 238, 205; B Hoffmann, in \textit{Staudinger}, \textit{supra} n 54, Art 40 EGBGB, no 282; A Juncker, in \textit{Münchener Kommentar}, \textit{supra} n 54, Art 4 Rom II-VO, no 21; A Spickhoff, “Die Tatortregel im neuen Deliktskollisionsrecht” [2000] \textit{Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)} 1, 5.

\textsuperscript{130} See \textit{supra} D.1.

\textsuperscript{131} This point is conceded by Dickinson, \textit{supra} n 29, [4.67], 329.

\textsuperscript{132} In the latter sense (and partly correcting his earlier view) A Dickinson, \textit{The Rome II Regulation: The Law Applicable to Non-Contractual Obligations} [Updating Supplement] (Oxford University Press, 2010).
to manipulation by the tortfeasor.\textsuperscript{133} He might, for instance, induce the party to contract in a country whose law provides little or no liability for financial fraud. Finally, to consider the place of contracting as the location of loss seems to be in direct contradiction with the ECJ’s decision in \textit{Kronhofer};\textsuperscript{134} there, the funds of the investor were used to “subscribe for highly speculative call options on the London stock exchange”. Thus, the place of contracting was London.\textsuperscript{135} If one were to refer to the place of conclusion of the unfavourable contract, England and not Germany would have been the country where the damage occurred.\textsuperscript{136} However, the OGH in its reference assumed that it was Germany, and the ECJ did not criticise that view, though it could have done so.\textsuperscript{137}

On the other hand, the application of the law of the place of the victim’s assets is also not straightforward. First of all, it may be extremely hard to locate the assets, which may be dispersed over several countries.\textsuperscript{138} To solve this problem, it has been suggested to refer to the place where the majority of the victim’s assets are situated.\textsuperscript{139} However, it may be equally hard to identify the “majority” of the assets and their location. Furthermore, the place of the assets is difficult to predict from the tortfeasor’s perspective. Only rarely will he have an overview of the complete financial situation of the victim. In addition, this place may change over time, which will make its determination even more complicated. Finally, the place of the victim’s assets will often coincide with the victim’s domicile. Retaining it would therefore regularly give the latter the possibility to sue at his domicile, a solution that the ECJ and the Swiss Federal Court have rejected outright.\textsuperscript{140}

One must therefore retain, for the peculiar case of damage suffered through an unfavourable contract, a location different from the two described above. It is suggested here to apply the law of the place where the contractual obligation has to be performed by the victim. Several arguments can be made in favour of this solution. First, the place of performance can be predicted by the parties, since they usually know where they have to perform. Second, the most visible loss will be incurred at this place because payment will be made there, even if only in the future. Third, the place of contractual performance cannot change over time without the express agreement of both sides. Fourth, it is therefore not subject to manipulation by one party. Fifth, the place of damage will not

\textsuperscript{133} This point is as well conceded by Dickinson, supra n 29, [4.67], 329.
\textsuperscript{134} See supra n 76.
\textsuperscript{135} Remember that in cases in which the loss consists of a contract with a third party, the place where this contract was entered into shall govern under the theory discussed here, see supra n 127 and accompanying text.
\textsuperscript{136} This solution has indeed been suggested in the literature. See H. Muir Watt, commentary to the ECJ’s decision in \textit{Kronhofer} (2005) 94 Revue critique de droit international privé 330, 332.
\textsuperscript{137} See supra n 81 and accompanying text.
\textsuperscript{138} See supra B.1.
\textsuperscript{139} See Juncker supra n 129.
\textsuperscript{140} See supra C.2.
be different depending on whether the victim has already paid or not. Sixth, the place of performance also plays an important role in other contexts, eg in Article 9(3) of the Rome I Regulation or in Article 5(1) of the Brussels I Regulation. The courts are thus familiar with the problem of locating it.

It cannot be denied that the experience from the past with determining the place of performance of a contractual obligation was not always a happy one, as the extensive case-law of the ECJ on the issue demonstrates. But at least there is case-law. That means no new rules of private international law need to be invented, which would be the case if one were to look to the place of contracting or the place of the patrimony. The place of performance should be ascertained in accordance with the applicable law to the contract. This law can easily be determined using the Rome I Regulation. One should not refer to the particular rule under Article 5(1)(b) Brussels I Regulation, since this rule has the peculiar purpose of concentrating the contractual litigation in a single forum.

To sum up, the damage caused by an unfavourable contract is incurred at the place where the obligation has to be performed. This coincides with the rules relating to the place of loss in case of wilful acts by the victim. There is no change in the place of damage if payment under the contract is made later: the place of contractual performance remains the locus damni. The analysis would be different only if the influence of the tortfeasor on the victim’s will were so strong that it would be impossible to speak of a “wilful transfer”: in that case, the place of the lost asset is to be determined under the above-mentioned rule.

E. Summary

Economic loss cannot be located by a geographical one-size fits-all rule. Case-law suggests a more differentiated approach. One must first determine whether any distinguishable asset has been lost, such as certain financial instruments or a definite sum of money. If so, the place of the loss is the place of the intermediary with which the instruments were registered or that of the bank or branch where the account is held from which money is lost. If the victim wilfully transfers money to another account, the latter’s location will inform the place of the loss. Fortuitous connections, such as accounts through which the money has been channelled, have to be excluded. If financial instruments or money have been stolen in different countries, then the law of these countries

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141 See Mankowski, supra n 122, Art 5, nos 108–27, 142–51.
143 See supra D.2.
144 See supra D.1.
will have to be applied simultaneously adopting a mosaic view. Finally, there is a debate as to where the damage has been sustained if the loss consists of an obligation that has been incurred. The better arguments suggest that the damage occurs at the place where the obligation to pay money is to be performed under the contract.