Remedies and the Rome II Regulation

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This paper has two aims. Its first aim is to provide an answer to how courts applying the Rome II Regulation will deal with issues relating to remedies. Its second aim, in seeking to provide an answer to the Commission’s report on the issue, is to refute the suggestion made by the European Parliament, and some continental authors, that remedies may require a separate choice of law rule.

A. Introduction

English common law has traditionally reserved at least some aspects of the law of remedies to the category of procedure.\(^1\) Thus, the debate over damages and the conflict of laws has usually concerned the extent to which procedure should encroach upon foreign laws of damages.\(^2\) Substantive issues included heads of damage,\(^3\) remoteness\(^4\) and contributory negligence.\(^5\) Procedural issues included the quantification of damage,\(^6\) which has been held to include certain

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\(^1\) Originally, all aspects of the ‘remedy’ were a matter for the lex fori. However, in Chaplin v Boys [1971] AC 356, the House of Lords adopted a distinction between the assessment or quantification of damage and heads of damage. The latter was substantive, and therefore governed by the lex causae, whereas the former was procedural and governed by the lex fori.


\(^3\) Chaplin v Boys [1971] AC 356 (House of Lords); Harding v Wealands [2006] UKHL 32, [2006] 3 WLR 83 (House of Lords).


\(^5\) Dawson v Broughton (2007) 151 SJLB 1167 (County Court (Manchester)).

\(^6\) Chaplin v Boys, supra, fn. 3.
caps on damages.\(^7\) In addition, the type of remedy awarded has been said to be procedural.\(^8\)

One of the effects of European harmonisation has been to change this rather parochial attitude to remedies in the conflict of laws. The Rome Convention started the process by subjecting, with certain caveats, the consequences of breach, including the assessment of damages, to the applicable law.\(^9\) The Rome II Regulation has continued the process, with seemingly broader provisions. The first part of this paper will discuss the exact position of remedies under the Rome II Regulation.

The second part of this paper considers potential reforms, especially whether there ought to be a choice of law for remedies, a suggestion that has gained some ground amongst French academics recently.\(^10\) The time is certainly ripe for such a discussion as the Commission has agreed to prepare reports into various contentious areas, including the approach of the Rome II Regulation to traffic accidents. This is intended to include its approach to damages and, in particular, the European Parliament’s proposal to subject damages in road traffic accidents to the law of the place of the victim’s habitual residence.

B. Current Law

1. The Starting Point

The Rome II Regulation starts from the position that remedies are governed by the law applicable to the non-contractual obligation.\(^11\) This is subject to two caveats. The first caveat is explicitly outlined in article 15(d): the granting of the remedy must be ‘within the limits of powers conferred on the court by its procedural law’. The second caveat, which is implicit, and derived from article 1(3), is that questions of fact which arise in the course of determining the remedy will be governed by the \textit{lex fori}. It could be argued that on top of these two caveats, there exists a further caveat where the damage arises in a road traffic accident, due to recital (33). However, it will be argued that the recital does not actually provide any new rule but is merely an affirmation of

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\(^7\) Harding \textit{v} Wealands, supra, \textit{fn. 3}.

\(^8\) Baschet \textit{v} London Illustrated Standard [1900] 1 Ch. 73.

\(^9\) Article 10(1)(c). The provisions have been preserved in the Rome I Regulation, article 12(1)(c).


\(^11\) See articles 15(c) and (d).