Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 1. - Preliminary Considerations

Introduction

30-001

A contract may be connected with several territorial jurisdicions because the parties to it reside in different countries, or because the contract is made in one country but is to be performed in a different country or concerns subject-matter which is situated in a different country, or for other reasons. In such cases it may become necessary to determine which legal system is to govern the contract or a particular aspect of it, i.e. to determine what is the law applicable to the contract. [1]

Sources of the law

30-002

This chapter is concerned with the elucidation of the choice of law rules according to which the law applicable to a contract which is connected with more than one territorial jurisdiction is determined. [2] Originally, these rules were to be found in the common law as developed by the courts. According to these rules, a contract was governed by its "proper law". [3] These common law rules were first substantially reformulated as a result of the implementation in the United Kingdom of the Rome Convention on the Law Applicable to Contractual Obligations 1980 ("the Rome Convention") in the Contracts (Applicable Law) Act 1990. The rules of that Convention, as implemented in the Act of 1990, will apply to determine the law applicable to a contract which is entered into after April 1, 1991, [4] but before December 17, 2009. As from the latter date, the Rome Convention is replaced by Regulation (EC) 593/2008 of June 17, 2008 on the law applicable to contractual obligations (Rome I). [5] This Regulation (hereafter "the Rome I Regulation" or "the Regulation") arose out of a revision of the Rome Convention and will apply to determine the law applicable to contracts concluded after its date of application, December 17, 2009. [6]

"Brexit"

30-002A

As noted above, [7] the future legal relationship of the UK to the EU remains to be determined. In the absence of any arrangements which include the UK remaining bound by EU law, the impact on conflict of laws is potentially very significant. Key European private international law instruments, notably the Brussels I Regulation (recast) (which governs jurisdiction in European cases) and the Rome II Regulation (which governs choice of law in non-contractual cases) would cease to have effect. Most significantly for the purposes of this chapter, the Rome I Regulation, which applies to all contracts entered into on or after December 17, 2009, and whose rules form the main subject matter of this chapter, would no longer be directly effective EU law. One possibility is that the UK would return to the position under the Contracts (Applicable Law) Act 1990, which implemented the Rome Convention into English law. However, the status of those rules following the UK's exit from the EU

raises difficult issues of international law and UK statutory law. Alternatively, as choice of law rules are unilateral (not requiring reciprocity, unlike rules of jurisdiction) it would be possible for the UK to enact national legislation which substantially mirrors the Rome I Regulation. All of these issues remain to be determined and this text to Chapter 30, and particularly the discussion of conflict of laws, remains written on the premise that the status of EU law in UK law remains unchanged. [8]

Structure of this chapter

30-003

This Chapter gives a brief account of the common law principles, by way of background, in Section 2. [9] Section 3 [10] seeks to analyse the provisions of the Rome Convention, since these will form the basis of the law in respect of contracts concluded after April 1, 1991, but before December 17, 2009, the date on which the Rome I Regulation entered into force. Section 4 [11] provides a commentary on the Rome I Regulation, drawing attention to similarities and differences between the earlier Convention and the Regulation, as relevant. Section 5 [12] explores the scope of the applicable law and the relevance of other laws in the context of the incidents of the contract and the various issues which may arise in a contractual context. That section considers these matters from the perspective of the common law, the Rome Convention and the Rome I Regulation.

Terminology

30-004

The Rome Convention and the Rome I Regulation do not adopt the familiar terminology of the common law; in particular, they abandon the linguistic usage “proper law of a contract” and replace that usage with their own terminology. This terminology is variously, “applicable law”, “law applicable to the contract”, “governing law” or “law governing the contract”. This terminology is used interchangeably in sections 3, 4 and 5 of the Chapter. The phrase “proper law of a contract” is, however, retained for the purpose of the discussion of the common law in section 2.

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1. It will also be necessary to decide whether the court of the forum, i.e. the English court, has *jurisdiction* to entertain an action arising out of such a contract. On the issue of jurisdiction in such cases, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Chs 10-14; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Chs 10-14.

2. It is not concerned with the rules as to the jurisdiction of English courts: see preceding note. Nor is it concerned with the rules relating to the recognition of foreign judgments, as to which see Dicey, Morris and Collins, 15th edn (2012), Chs 14 and 15; Cheshire, North and Fawcett, Chs 15 and 16. The conflict of laws’ aspects of arbitration (as to which see Dicey, Morris and Collins 15th edn (2012), Ch.16; Cheshire and North, Ch.17) are similarly excluded. For the conflict of laws with regard to negotiable instruments see below, paras 30-037, 30-038, 30-155 and Vol.II, paras 34-192 et seq. Some contracts for the sale of goods made on or after August 18, 1972, which are connected with several territorial jurisdictions may be governed by the provisions of the Uniform Law on International Sales Act 1967 and will not necessitate examination of the rules of the conflict of laws: Sch.I art.2. See Vol.II, para.44-013. See also Hague Draft Principles on Choice of Law in International Contracts (Hague Conference on Private International Law (November, 2013)).

3. See below, paras 30-005 et seq.

4. The date on which the 1990 Act entered into force: see Rome Convention art.17; *Society of Lloyd’s v Fraser [1998] C.L.C. 1630, 1651*. Some contracts may, depending on the circumstances, straddle the relevant periods: see e.g. *BGC Capital Markets (Switzerland) LLC v Rees [2011] EWHC 2009 (QB)*.

5. Regulation (EC) 593/2008 of June 17, 2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L177/6.

6. Rome I Regulation arts 28, 29.

7. See above, paras 1-013A—1-013E.

8. For a discussion see A. Dickinson, “Back to the future: the UK’s EU exit and the conflict of laws” [2016] JPIL 195; P. Rogerson, “Litigation post-Brexit” [2017] N.L.J. 2016; J. Harris “How will Brexit impact on cross-border litigation?” [2016] S.J. 160; “Brexit & cross-border dispute resolution” [2016] N.L.J. 166; The General Council of the Bar, Brexit Working Group, Brexit Papers (December 2016); Commercial Bar Association (COMBAR) Brexit Report Conflict of Laws Sub-Group (January 5, 2017); The Law Society of England and Wales, Brexit and the Law (January 2017); Final Report of the House of Lords European Union Justice Sub-Committee “Implications of Brexit for the justice system” (March 14, 2017).

9. Below, paras 30-005 et seq.

10. Below, paras 30-017 et seq.

11. Below, paras 30-129 et seq. The reader considering either instrument is advised to consult the relevant passages relating to each one, in, respectively, sections 3 and 4.

12. Below, paras 30-304 et seq.

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Section 2. - Common Law: The Doctrine of the Proper Law of a Contract [13]

Statement of the doctrine

30-005

The modern approach to the problem of determining the proper law of a contract involved the need to examine three possible situations. [14] If the parties had made an express choice of law in the contract itself, then, subject to certain limitations, [15] the law that they had chosen would govern. If there was no express choice, the court had to examine all the facts surrounding the contract to determine whether there was an inferred or implied choice of law by the parties. In the absence of any choice, express or implied, the court ceased to look for the intention of the parties (since they were presumed to have no intention on the point) and proceeded, on objective grounds, to determine and apply "the system of law with which the transaction has the closest and most real connection". [16] It was, however, often difficult to distinguish between the second and third approaches, i.e. implied choice and no choice, and the same decision could well be justified on either approach. [17] What was clear was that there must be a proper law and that it was not possible to have a contract which was not governed by some system of private law. [18] Furthermore, there had to be a proper law from the time that the contract was made. [19] There could not be a proper law which "floats", i.e. is not identified when the contract was made but which was left to be determined later by the unilateral act of one of the parties. [20] In determining the governing law at the time the contract was made, conduct or events subsequent to that date could not be taken into account. [21] A contract could, however, validly provide for two proper laws, the second to be applied if the event on which the application of the first depends was negatived. [22] This would also support the view that the proper law could be changed by the parties during the currency of the contract. [23]

Express choice of law

30-006

Determination of the proper law of the contract would not normally involve any difficulty if the parties had stipulated expressly which legal system was to apply to their agreement. [24] Where it was concluded that the choice of law by the parties was meaningless, the express choice would be ignored and the proper law determined by reference to any implied choice or, failing that, the most closely connected system of law. [25] An issue might arise as to the validity of the term which purported to choose the proper law. There was little direct authority on this issue. There was support of the application of English law as the law of the forum to the question, [26] but the better view was to apply the law that would govern if the choice was valid. [27]

Limitations on power to choose: common law

30-007

The parties' power to choose the proper law was limited, first, by virtue of an obscure judicial formula which required that the choice must be "bona fide and legal". [28] The possible effect of this formula

(which has never been applied in England to strike down a choice of law) was:

> "… that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If, after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as a bona fide expression of their intentions." [29]

Secondly, it was said "that there must be no reason for avoiding [the choice] on the ground of public policy", [30] a limitation which was merely an example of the general principle that a foreign law would not be enforced if it offended English public policy. [31] Thirdly, it sometimes was suggested that some sort of connection might possibly have to exist between the transaction and the chosen system of law, other than the mere fact that that law was chosen. [32] The better view appeared to be that no such connection need exist, though the absence of such a connection might be evidence that the choice of law was not "bona fide and legal" as described above. [33]

Statutory limitations

30-008

The power to choose a proper law could be restricted by statute. Thus, for example, the Unfair Contract Terms Act 1977 makes provision to prevent the use of choice of law clauses to evade the controls on exemption clauses imposed by the Act. [34] The controls cannot be evaded by the choice of the law of a country outside the United Kingdom as the governing law, if the choice of law was imposed wholly or mainly to enable the party imposing it to evade the operation of the Act. [35] However, the controls in the 1977 Act do not apply where the law applicable to the contract is the law of a part of the United Kingdom only by reason of the choice of the parties, [36] nor do they apply to "international supply contracts". [37] Not all English statutes which express stringent social policy contain (as does the Unfair Contract Terms Act) any indication as to whether their provisions override a choice of a foreign law. Whether any particular statute, or provision thereof, has such an effect ultimately depends on the construction of the statute. [38]

Incorporation by reference [39]

30-009

There was a necessary distinction to be drawn between an express selection by the parties of the proper law to govern the whole contract and the incorporation into the contract of the provisions of some foreign legal system to govern some particular incident of the contract, such as the time at which property or risk should pass under a contract for the sale of goods. In these circumstances the provisions of the foreign law become terms of the contract and the reference to the foreign rules is a shorthand method of incorporating these rules into the contract rather than including a verbatim statement of the rules in the contract. [40] Nevertheless, the question whether a rule of foreign law has been effectively incorporated is a matter for the proper law of the contract. The importance of the distinction between selection of the proper law and incorporation of provisions of a foreign law into the contract by reference is seen most clearly where there is a change in the foreign law between the date of the contract and the time of the proceedings. The proper law selected is normally that of the country in question as existing from time to time with the changes that may befall it, [41] whilst if the provisions of a foreign law are incorporated they become terms of the contract as at the date of incorporation even though such foreign provisions may later be repealed or amended. [42]

Implied choice of law

30-010

Where there was no, or no valid, express choice of the proper law in the contract, the court might, nevertheless, be able to conclude that the parties had by implication (or by inference) come to an agreement [43] as to what should be the proper law. [44] Such an implication might be derived from a variety of factors surrounding the contract, the most usual being jurisdiction or arbitration clauses. If the parties agreed that the courts of a particular country should have jurisdiction over any claims made under the contract, that would give rise to a strong implication that the parties had chosen the law of that country as the proper law. [45] Similarly, if the contract contained a clause whereby the parties agreed that any disputes shall be submitted to arbitration in a particular country, there was a powerful, [46] though not conclusive, [47] implication that the parties had selected the law of the country of arbitration as the proper law. A variety of other factors could also, in appropriate cases, give rise to an implication that the parties had made a choice of the proper law.

Relevant factors

30-011

Such factors included the nature of the particular transaction, [48] the form of the documents made with respect to the transaction, [49] the style and terminology in which the contract was drafted, [50] the use of a particular language [51] (though this became a factor of minor importance [52]), the currency in which payment was to be made, [53] the use of a “follow London” clause, [54] the nature and location of the subject matter of the contract, [55] the residence [56] and, occasionally, the nationality [57] of the parties, a connection with a preceding transaction, [58] or, possibly, the fact that one of the parties was a government. [59] If one or more terms of the contract would be valid under one of two possible governing laws but invalid under the other, there was authority in favour of the view that the parties may be taken to have intended that their contract should be governed by the system of law by which it is valid. [60] However, it would seem that the fact that the contract is valid under one system of law was only evidence and not conclusive evidence as to the intention of the parties. [61]

No choice of the proper law

30-012

In cases where it was not possible to conclude that the parties had made an express or implied choice of the proper law, then it was necessary to abandon any reference to what the parties intended [62] and look for the law “with which the transaction has the closest and most real connection”, [63] on objective grounds. [64] In this regard, all the facts and circumstances of the contract should be examined. [65] Although the weight to be attached to relevant facts and circumstances would vary from case to case, the following may be mentioned as representative. The place where the contract was made, [66] the place where the contract had to be performed, [67] the nature of the legal personality of the parties, [68] the place of residence [69] or business [70] of the parties, the nature, subject-matter [71] and standard terms [72] of the contract, the situation of the funds which were available for the discharge [73] or security of the obligation, [74] the place where a bank had to perform its obligation under a letter of credit, [75] or whether the contract was closely linked with another contract containing a choice of law clause. [76]

Connection of the transaction with a system of law

30-013

The proper law was usually defined as “the system of law with which the transaction has the closest and most real connection”. [77] However, it was not wholly clear whether the connection was to be with a “system of law” or with a “country”. A number of earlier cases preferred the latter criterion [78] but the weight of authority supported a connection with a “system of law”. [79] The difference might be important when the geographical factors of the contract point to one country, whilst the legal factors point towards the legal system of another country as in the case of a contract to do building work in Scotland, the contractual documents for which were in English form. [80] It might be particularly relevant that one system of law under consideration had no provision dealing with the matter in issue. [81]

Indeed, one suggestion was that the two tests should be combined, [82] though this may well be difficult when they point to different solutions. [83]

Transaction not contract

30-014

It was suggested that the connection with the system of law, or country, should be that of the "transaction" contemplated by the contract. This meant the connection should be with what was to be done under the contract rather than just with the technical forms of the contract. [84]

Splitting of the contract [85]

30-015

Although almost all the incidents of a contract were governed by the proper law, [86] it had to be considered whether that proper law was to be the same for each incident and whether the obligations of both parties to the contract were to be governed by the same proper law, for it was suggested that:

> "The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that the law is to be the proper law of the contract as a whole." [87]

However the basic rule was that there will normally be no such "scission", for as Lord MacDermott said [88]:

> "It is doubtless true to say that the courts of this country will not split the contract in this sense readily or without good reason."

Nevertheless, there was some authority in the case of banking accounts of different aspects being governed by different laws [89]; and where a contract of reinsurance (governed by English law) was deemed to be "back to back" with the insurance contract (governed by Norwegian law), a clause in the former was construed as being intended by the parties to have the same effect as under Norwegian law. [90] The parties might, however, agree expressly that different contractual issues should be governed by different laws. [91] The different obligations of the two parties to a contract would be governed by the same proper law [92] unless they had made an agreement, express or implied, to the contrary. [93]

Renvoi

30-016

The doctrine of renvoi [94] had no place in the law of contract, at common law. [95] Thus the proper law of the contract meant the domestic rules of that law and not its rules of the conflict of laws.

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13. For more detailed accounts of the common law position, see the 26th edition of this work, Ch.30; Dicey & Morris on the Conflict of Laws, 11th edn (1987), Chs 32 and 33; Cheshire and North, *Private International Law*, 11th edn (1987), Ch.18.

14. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 51*. For a short historical account of the development leading to this view, see Dicey, Morris and Collins on the Conflict of

Laws, 15th edn (2012), paras 32-003—32-008. The detail may be traced through *Robinson v Bland (1760) 2 Burr. 1077*; *Lloyd v Guibert (1865) L.R. 1 Q.B. 115*: *P. & O. S.S. Co v Shand (1865) 3 Moo. P.C.(N.S.) 272*; *Chartered Mercantile Bank of India v Netherlands Co (1883) 10 Q.B.D. 521*; *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589*; *Re Missouri Steamship Co (1889) 42 Ch. D. 321*; *Hamlyn v Talisker Distillery [1894] A.C. 202*; *Spurrier v La Cloche [1902] A.C. 446*; *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co [1927] A.C. 604*; *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500*; *Mount Albert BC v Australasian, etc, Assurance Building Society Ltd [1938] A.C. 224*; *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277*; *Kahler v Midland Bank Ltd [1950] A.C. 24*; *Bonython v Commonwealth of Australia [1951] A.C. 201*; *The Assunzione [1954] P. 150*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323*; *Re United Railway of the Havana and Regla Warehouses Ltd [1960] Ch. 52* (affirmed sub nom. *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007*); *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA [1971] A.C. 572*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co*.

15. Below, paras 30-007—0-008.

16. e.g. *Bonython v Commonwealth of Australia [1951] A.C. 201, 219*; *The Assunzione [1954] P. 150*; *Re United Railways of the Havana and Regla Warehouses Ltd [1960] Ch. 52, 91-92, 115* (affirmed sub nom. *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007, 1068, 1081-1082)*; *Philipson-Stow v Inland Revenue Commissioners [1961] A.C. 727, 760*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50*. Early decisions tended to express this idea in the language of the presumed intention of the parties rather than as a purely objective test which applied because of an absence of intent as to the applicable law. See, e.g. *Lloyd v Guibert (1865) L.R. 1 Q.B. 115*; *Mount Albert BC v Australasian, etc, Assurance Building Society Ltd [1938] A.C. 224*; *Kahler v Midland Bank Ltd [1950] A.C. 24*; *The Assunzione*.

17. See the views of Lord Diplock and Lord Wilberforce in *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1894] A.C. 50*. The former (speaking for the majority) treated the case as one of implied choice, the latter as one of no choice. See also *Armadora Occidental SA v Horace Mann Insurance Co [1977] 1 W.L.R. 520* (implied choice), (affirmed 1098 (no choice)).

18. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1894] A.C. 50, 65*. The proper law, at common law, must be the law of a country: *Musawi v R E International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 382*.

19. *Armar Shipping Co Ltd v Caisse Algérienne [1981] 1 W.L.R. 207*; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep. 446, 456*; *The Blue Wave [1982] 1 Lloyd's Rep. 380, 385*; *Cantieri Navali Riuniti SpA v NV Omne Justitia [1985] 2 Lloyd's Rep. 428, 435*; *The Frank Pais [1986] 1 Lloyd's Rep. 428, 435*; *Star Shipping A.S. v China National Foreign Trade Transportation Corp [1993] 2 Lloyd's Rep. 445*. See also *XL Insurance v Owens Corning [2000] 2 Lloyd's Rep. 500*.

20. *Armar Shipping Co Ltd v Caisse Algérienne [1981] 1 W.L.R. 207, 215-216*; *Astro Venturoso Compania Naviera v Hellenic Shipyards SA [1983] 1 Lloyd's Rep. 12, 15*; *E.I. du Pont de Nemours v Agnew [1987] 2 Lloyd's Rep. 585, 592*; *Star Shipping A.S. v China National Foreign Trade Transportation Corp [1993] 2 Lloyd's Rep. 445* (but there was no objection to an arbitration subject to a "floating" curial law). In *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328 (Comm), [2013] 2 Lloyd's Rep. 121* the objection was said to be limited to a floating non-law or absence of law.

21. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603, 611, 614-615*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572, 593, 595-596, 603*; *Armar Shipping Co Ltd v Caisse Algérienne [1981] 1 W.L.R. 207*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 69*. Such subsequent conduct may be relevant in determining whether the parties have entered a

new collateral contract (*James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd 603, 614-615*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA 602-608*) or as evidence of estoppel (*James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd 611, 614-615*). As to the position under the Rome Convention and the Rome I Regulation, see below, paras 30-053, 30-173. Effect would be given, however, to later changes in a foreign applicable law.

22. *Astro Venturoso Compania Naviera v Hellenic Shipyards SA [1983] 2 Lloyd's Rep. 12*.

23. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603, 614*; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep. 446, 453*; *E.I. du Pont de Nemours v Agnew [1987] 2 Lloyd's Rep. 585, 592*; *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728, 747*. cf. *Armar Shipping Co Ltd v Caisse Algérienne [1981] 1 W.L.R. 207, 216*; *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328 (Comm), [2013] 2 Lloyd's Rep. 121*. As to the position under the Rome Convention and the Rome I Regulation, see below, paras 30-057, 30-175.

24. See, e.g. *Mackender v Feldia AG [1967] 2 Q.B. 590*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572*.

25. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1969] 1 W.L.R. 1338* (reversed on a different view of the facts *[1971] A.C. 572*). Mere difficulty in ascertaining the chosen law would not render the choice ineffective: see, e.g. *The Blue Wave [1982] 1 Lloyd's Rep. 151*; *Star Shipping SA v China National Foreign Trade Transportation Corp [1993] 2 Lloyd's Rep. 445*.

26. *Mackender v Feldia AG [1967] 2 Q.B. 590, 598, 603, 605*; *Chevron International Oil Co Ltd v A/S Sea Team [1983] 2 Lloyd's Rep. 356, 358-458*.

27. See *Compagnia Naviera Micro SA v Shipley International Inc [1982] 2 Lloyd's Rep. 351*. This is the position under the Rome Convention arts 3(4) and 8 and the Rome I Regulation arts 3(5) and 10: see below, paras 30-058, 30-183.

28. *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 290*.

29. Cheshire and North, *Private International Law*, 11th edn (1987), p.454; see also, Dicey & Morris on the Conflict of Laws, 11th edn (1987), pp.1175-1176. And see *Boissevain v Weil [1949] 1 K.B. 482, 490 (affirmed on other grounds [1950] A.C. 327)*; *English v Donnelly (1958) S.C. 494*; *Kay's Leasing Corp Pty Ltd v Fletcher (1964) 116 C.L.R. 124, 143-144*; *Golden Acres Ltd v Queensland Estates Ltd [1969] St. R. Qd. 378* (affirmed on different grounds sub nom. *Freehold Land Investments Ltd v Queensland Estates Ltd (1970) 123 C.L.R. 418*); *Nike Information Systems Ltd v Avac Systems Ltd (1979) 105 D.L.R. (3d) 455*; *Greenshields Inc v Johnston (1981) 119 D.L.R. (3d) 714* (appeal dismissed *(1981) 131 D.L.R. (3d) 234*); *Bank of Montreal v Snoxell (1982) 143 D.L.R. (3d) 349*.

30. *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 290*.

31. See generally Dicey, Morris and Collins, 15th edn (2012), paras 5-002—5-009, 32-181 et seq.; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), pp.139-150, 741-743.

32. *Boissevain v Weil [1949] 1 K.B. 482, 490 (affirmed on other grounds [1950] A.C. 327)*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 341*; *The Fehmarn [1958] 1 W.L.R. 159*. See also *The Hollandia [1983] 1 A.C. 565, 576*.

33. *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 290*; *British Controlled Oilfields v Stagg [1921] W.N. 31*. There will often be good commercial grounds for choosing a geographically unconnected system, as, e.g. where the parties select a particular system of law because it is neutral: cf. *Steel Authority of India Ltd v Hind Metals Inc [1984] 1 Lloyd's Rep. 405, 409*; *Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 90*.

34. See *Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep.*

629 at [436]-[448]. For detailed discussion, see Dicey, Morris and Collins, 14th edn, (2006), paras 33-033—33-035, 33-126—33-128.

35. Unfair Contract Terms Act 1977 s.27(2).

36. s.27(1). See *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L. 318*. And see below, para.30-067. Note a similar provision in the (Australian) Insurance Contracts Act 1984 s.8, as to which see *Akai Pty Ltd v The People's Insurance Co Ltd (1996) 188 C.L.R. 418* cf. *Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 90*. See also Late Payment of Commercial Debts (Interest) Act 1998 s.12, below, paras 30-342 et seq.

37. Unfair Contract Terms Act 1977 s.26. On the meaning of "international supply contract", see *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 All E.R. (Comm) 519*; *Amiri Flight Authority v BAE Systems Plc [2002] EWHC 2481 (Comm), [2003] 1 All E.R. (Comm) 1*; *Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm)*. See below, paras 30-065, 30-067.

38. See, e.g. *The Hollandia [1983] A.C. 565* (no freedom to avoid operation of Carriage of Goods by Sea Act 1971 by choice of law clause); *English v Donnelly (1958) S.C. 494* (Scottish hire-purchase legislation mandatory in effect); *Chiron Corp v Organon Teknika (No.2) [1993] F.S.R. 567* (Patents Act 1977 s.44 applied to contract governed by foreign law); *DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74* (Insurance Companies Act 1982 applied to reinsurance contracts whatever their proper law). See generally, Dicey, Morris and Collins, 14th edn, (2006), paras 32-132—32-137. As to the application of the Consumer Credit Act 1974 and orders made thereunder, see *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316*; Dicey, Morris and Collins, 14th edn, (2006), paras 33-036—33-041.

39. Dicey, Morris and Collins, 15th edn (2012), paras 30-056—30-058.

40. *Ex p. Dever re Suse and Sibeth (1887) 18 Q.B.D. 660*; *Dobell & Co v Steamship Rossmore Co [1895] 2 Q.B. 408*; *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277*; *Ocean S.S. Co Ltd v Queensland State Wheat Board [1941] 1 Q.B. 402*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 69-70*; *D R Insurance Co v Central Insurance Co [1996] 1 Lloyd's Rep. 74, 81*; *The Stolt Sydness [1996] 1 Lloyd's Rep. 273*; *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784*; *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195* at [31]-[35] (both cases on the Rome Convention).

41. *Re Chesterman's Trusts [1923] 2 Ch. 466*; *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500*; *Kahler v Midland Bank Ltd [1950] A.C. 24*; *Zivnostenska Banka v Frankman [1950] A.C. 57*; *Jabbour v Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323*; *Rossano v Manufacturers' Life Insurance Co [1963] 2 Q.B. 352, 362*.

42. *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 286*.

43. There must be actual agreement on the point: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603*.

44. *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 529-531*; *Re United Railways of the Havana and Regla Warehouses [1960] Ch. 52* (affirmed sub nom. *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007*); *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50*.

45. *Hamlyn & Co v Talisker Distillery [1894] A.C. 202*; *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co [1927] A.C. 604, 608*; *Evans Marshall & Co Ltd v Bertola SA [1973] 1 W.L.R. 349, 364*; *The Komninos S [1991] 1 Lloyd's Rep. 370*. The effect of such a clause cannot be by-passed by attempting to formulate a claim in tort rather than in contract: *The Sindh [1975] 1 Lloyd's Rep. 372*.

46. *Hamlyn & Co v Talisker Distillery [1894] A.C. 202*; *Spurrier v La Cloche [1902] A.C. 446*; *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co [1927] A.C. 604, 608*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572*; *The SLS Everest [1981] 2 Lloyd's Rep. 389*; *Compania Naviera Micro SA v Shipley International Inc [1982] 2 Lloyd's Rep. 351*; *Astro Venturoso Compania Naviera v Hellenic Shipyards SA [1983] 1 Lloyd's Rep. 12*; *Steel Authority of India Ltd v Hind Metals Inc [1984] 1 Lloyd's Rep. 405*. cf. *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500* (insurance policy governed by New York law as a result of express choice, arbitration clause governed by English law since the parties had stipulated for arbitration in London under the Arbitration Act 1996). However, it is possible for different laws to apply to the underlying contract and to the different aspects of the arbitration agreement: *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep. 671*; *Arsanovia Ltd v Cruz City Mauritius Holdings [2012] EWHC 3702 (Comm), [2013] 2 All E.R. Comm 1*.

47. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572* (disapproving *Tzortzis v Monark Link A/B [1968] 1 W.L.R. 406* where the implication to be derived from an arbitration clause was treated as virtually conclusive); *The Elli 2 [1985] 2 Lloyd's Rep. 107, 117*; *Star Shipping AS v China National Trade Transportation Corp [1993] 2 Lloyd's Rep. 445*; *C v D [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239*. Where a clause provided for arbitration in a country other than that which was held to be that of the proper law, the curial law of the arbitration proceedings is that of the arbitration forum: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*. See also *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*. There was no reason why the curial law of an arbitration has to be fixed at the time of the arbitration agreement: *Star Shipping AS v China National Foreign Trade Transportation Corp*. On conflict of laws' aspects of arbitration see Dicey, Morris and Collins, 15th edn (2012), Ch.16.

48. *Trade Indemnity Plc v Forsakringsaktiebolaget Njord [1995] 1 All E.R. 796* (strong presumption that reinsurance contract written on London market is written on the basis of an implied or imputed English proper law); *DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74* (when parties enter a particular market in order to transact business they can usually be taken to intend that their relationship will be governed by the system of law in force in that market unless they provide some clear indication to the contrary); *Tiernan v Magen Insurance Co Ltd [2000] I.L.Pr. 517* (a case on the Rome Convention); *Ace Insurance SA-NV v Zurich Insurance Co of Europe [2000] 2 Lloyd's Rep. 423, affirmed [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep. 618*; *Chase v Ram Technical Services Ltd [2000] 2 Lloyd's Rep. 418*. cf. *Commercial Union Assurance Co Plc v N R G Victory Reinsurance Ltd [1998] 1 Lloyd's Rep. 80, 84-85 affirmed [1998] 2 All E.R. 434* (New York arbitration clause and service of suit clause indicated contrary intention); *King v Brandywine Reinsurance Co [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep. 655*.

49. *Chamberlain v Napier (1880) 15 Ch. D. 614*; *Re Missouri Steamship Co (1889) 42 Ch. D. 321*; *Rossano v Manufacturers' Life Insurance Co [1963] 2 Q.B. 352*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; cf. *NV Handel My. J. Smits Import-Export v English Exporters (London) Ltd [1955] 2 Lloyd's Rep. 69, 72 (affirmed [1955] 2 Lloyd's Rep. 317)*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572, 583*.

50. *Chatenay v Brazilian Submarine Telegraph Co Ltd [1891] 1 Q.B. 79, 82*; *Rossano v Manufacturers' Life Insurance Co [1963] 2 Q.B. 352*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603, 608, 611-612*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50*.

51. *Chatenay v Brazilian Submarine Telegraph Co Ltd [1891] 1 Q.B. 79*; *St Pierre v South American Stores (Gath and Chaves) Ltd [1937] 2 All E.R. 349*.

52. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572, 583, 594*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176, 1183-1184, 1186*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 47, 50*.

53. *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 553*; *The*

Assunzione [1954] P. 150; *Rossano v Manufacturers' Life Insurance Co [1963] 2 Q.B. 352*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 47, 50*; cf. *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176, 1183, 1186*.

54. *Armadora Occidental SA v Horace Mann Insurance Co [1977] 1 W.L.R. 1098*. cf. *King v Brandywine Reinsurance Co [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep. 655*.

55. *Lloyd v Guibert (1865) L.R. 1 Q.B. 115, 122-123*; *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 1 Ch. 354, 383*.

56. *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589*; *Keiner v Keiner [1952] 1 All E.R. 643*.

57. *Re Missouri Steamship Co (1889) 42 Ch. D. 321, 328-329*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176, 1183*.

58. e.g. *The Adriatic [1931] P. 241, 247*; *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 554, 558*; *The Freights Queen [1977] 1 Lloyd's Rep. 140*; *The Broken Hill Pty Co Ltd v Theodore Xenakis [1982] 2 Lloyd's Rep. 304*; *The Elli 2 [1985] 1 Lloyd's Rep. 107*; *Turkiye Is Bankasi A.S. v Bank of China [1993] 1 Lloyd's Rep. 132*; *Wahda Bank v Arab Bank Plc [1996] 1 Lloyd's Rep. 470*; cf. *The Metamorphosis [1953] 1 W.L.R. 543*; *Forsikringsaktieselskapet Vesta v Butcher [1989] A.C. 852*; *Attock Cement Co Ltd v Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147*; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] 2 All E.R. (Comm) 54* (a case on the Rome Convention). See also *Groupama Navigation et Transports v Catatumbo C.A. Seguros [2000] 2 All E.R. (Comm) 193*; *Lexington Insurance Co v AGF Insurance Ltd [2009] UKHL 40, [2010] 1 A.C. 180*.

59. *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 554, 557*.

60. *P. & O. Steam Navigation Co v Shand (1865) 3 Moo. P.C.(N.S.) 272*; *Re Missouri S.S. Co (1889) 42 Ch. D. 321, 341*; *South African Breweries Ltd v King [1899] 2 Ch. 173, 180-181*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 44, 48*; *S.C.F. Finance Co Ltd v Masri [1986] 1 Lloyd's Rep. 293, 304*.

61. *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 2 Ch. 502, 513* (not of "much weight"); *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176, 1184* (a "pointer", the importance of which "must not be exaggerated"); *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 50–51*; contrast *Monterosso Shipping Co Ltd v International Transport Workers Federation [1982] I.C.R. 675, 683–685* ("irrelevant").

62. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50*. Rejection of any reference to the parties' intentions meant that the fact that the contract would be valid under one system of law but not another was definitely irrelevant: *Monterosso Shipping Co Ltd v International Transport Workers Federation [1982] I.C.R. 675, 683-685*. Opinions may differ as to whether a case presented an example of "implied" choice or "no" choice: compare the contrasting views of Lord Diplock, speaking for the majority in *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 62-65*, and Lord Wilberforce, 69; see also *DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74*; *Zebrarise Ltd v De Nieffe [2004] EWHC 1842 (Comm), [2005] 1 Lloyd's Rep. 154*.

63. *Bonython v Commonwealth of Australia [1951] A.C. 201, 219*; *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007, 1068, 1081-1082*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34*; *Offshore International SA v Banco Central SA [1977] 1 W.L.R. 399*; *Power Curber International Ltd v National Bank of Kuwait [1981] 1 W.L.R. 1233*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 61*; *Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm), [2007] 1 W.L.R. 470*.

64. Where there was no choice of law by the parties, some older authorities purported to search for the "presumed intention" of the parties: see, e.g. *Lloyd v Guibert (1865) L.R. 1 Q.B. 115,*

120-123; *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500*; *Mount Albert BC v Australasian Temperance and General Mutual Life Assurance Society [1938] A.C. 224*. In carrying out this exercise there was a tendency to resort to rebuttable presumptions, in favour, depending on the circumstances of the case, of, e.g. the law of the place of contracting (*Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589*), the law of the place of performance (*Re Missouri S.S. Co (1889) 42 Ch. D. 321*; *Benaim & Co v Debono [1924] A.C. 514*), the law of the flag (*Lloyd v Guibert*; *The Assunzione [1954] P. 150*) or the lex situs of an immovable (*British South Africa Co v De Beers Consolidated Mines [1910] 2 Ch. 502*). See also *Merck KGaA v Merck Sharp & Dohne Corp [2014] EWHC 3867 (Ch)*.The use of presumptions was rejected in *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 44, 47, 50*. cf. the position under the Rome Convention and the Rome I Regulation, below, paras 30-071 et seq., 30-185 et seq.

65. e.g. *The Assunzione [1954] P. 150*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34*.

66. *P. & O. Steam Navigation Co v Shand (1865) 3 Moo. P.C.(N.S.) 272*; *Lloyd v Guibert (1865) L.R. 1 Q.B. 115, 122*; *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589, 596-597, 600*; *Re Missouri S.S. Co (1889) 42 Ch. D. 321, 326, 338*; *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 1 Ch. 354, 381*; *Kahler v Midland Bank Ltd [1950] A.C. 24*; *Zivnostenska Banka v Frankman [1950] A.C. 57*; *Cantieri Navali Riuniti SpA v NV Omne Justitia [1985] 2 Lloyd's Rep. 428, 433-435*; cf. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 62*.

67. e.g. *Lloyd v Guibert (1865) L.R. 1 Q.B. 115, 122*: *Re Missouri S.S. Co (1889) 42 Ch. D. 321* at 341; *Chatenay v Brazilian Submarine Telegraph Co [1891] 1 Q.B. 79, 83*; *Hamlyn & Co v Talisker Distillery [1894] A.C. 202*; *Ralli Bros v Compania Naviera Sota y Aznar [1920] 1 K.B. 614, 630, 631 (affirmed [1920] 2 K.B. 287)*; *Benaim & Co v Debono [1924] A.C. 514, 520*; *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd [1934] A.C. 122, 145, 151*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; cf. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 62-63*.

68. *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 531, 557, 574*; *National Bank of Australia Ltd v Scottish Union and National Insurance Co [1952] A.C. 493*; *The Assunzione [1954] P. 150*.

69. *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589, 600, 602*.

70. *Re Anglo-Austrian Bank [1920] 1 Ch. 69*.

71. e.g. whether it was a contract relating to land (*British South Africa Co v De Beers Consolidated Mines Ltd [1910] 1 Ch. 354, 383*) or a contract relating to a marriage settlement (*Re Fitzgerald [1904] 1 Ch. 573, 587*) or a contract of affreightment (*Re Missouri S.S. Co (1889) 42 Ch. D. 321, 327*); and see *Re United Railways of the Havana and Regla Warehouses Ltd [1960] Ch. 52, 91*.

72. *Gill and Duffus Landauer Ltd v London Export Corp [1982] 2 Lloyd's Rep. 627, 629*.

73. *Spurrier v La Cloche [1902] A.C. 446, 450*.

74. *Bonython v Commonwealth of Australia [1951] A.C. 201, 221* (loan secured on public revenue of self-governing colony).

75. *Offshore International SA v Banco Central SA [1977] 1 W.L.R. 399*; *Power Curber International Ltd v National Bank of Kuwait [1981] 1 W.L.R. 1233*; *Turkiye Is Bankasi AS v Bank of China [1993] 1 Lloyd's Rep. 132*; *Minories Finance Ltd v Afribank Nigeria Ltd [1995] 1 Lloyd's Rep. 134*; *Bank of Credit and Commerce Hong Kong Ltd v Sonali Bank [1995] 1 Lloyd's Rep. 227*; *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902, 1910*; *Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm), [2007] 1 W.L.R. 470*. See also *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87* (a case on the Rome Convention). cf. *Attock Cement Co Ltd v Romanian Bank for Foreign Trade [1989] 1 W.L.R. 1147*; *Wahda*

Bank v Arab Bank Plc [1996] 1 Lloyd's Rep. 470.

76. *The Njegos [1936] P. 90*; *The Broken Hill Proprietary Co v Xenakis [1982] 2 Lloyd's Rep. 304*; *Forsikringsaktieselskapet Vesta v Butcher [1988] 3 W.L.R. 565 (affirmed on different grounds [1989] A.C. 852)*; *Mitsubishi Corp v Alafouzos [1988] 1 Lloyd's Rep. 191*. cf. *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] 2 All E.R. (Comm) 54* (a case on the Rome Convention).

77. *Bonython v Commonwealth of Australia [1951] A.C. 201*, at 219.

78. *Boissevain v Weil [1949] 1 K.B. 482, 490*; *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007, 1068*; *Philipson-Stow v IRC [1961] A.C. 727, 760*.

79. *Bonython v Commonwealth of Australia [1951] A.C. 201, 219*; *Rossano v Manufacturers' Life Insurance Co [1963] 2 Q.B. 352, 361, 368-369*; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 44, 46*; *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 60, 71*.

80. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*.

81. *Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co [1987] 1 Lloyd's Rep. 315, 320*.

82. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583, 603-604, 605-606, 614-616*; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572, 583*; *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 50*; *Monterosso Shipping Co Ltd v International Transport Workers Federation [1982] I.C.R. 675*.

83. e.g. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583* .

84. *Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 Q.B. 34, 46*; *Merck KGaA v Merck Sharp & Dohne Corp [2014] EWHC 3867 (Ch) [74]*.

85. See McLachlan (1990) 61 B.Y.I.L. 311.

86. See below, paras 30-305 et seq.

87. *Re United Railways of the Havana and Regla Warehouses [1960] Ch. 52, 92*; and see *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 340*.

88. *Kahler v Midland Bank Ltd [1950] A.C. 24, 42*. See also *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557*.

89. *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728*; *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co [1988] 2 Lloyd's Rep. 494*; and see *Chamberlain v Napier (1880) 15 Ch. D. 614*; *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 1 Ch. 354, 383*; Lord MacDermott, dissenting, in *Kahler v Midland Bank Ltd [1950] A.C. 24, 42*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 340*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176, 1180-1181*; *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557*.

90. *Forsikringsaktieselskapet Vesta v Butcher [1988] 3 W.L.R. 565 (affirmed on different grounds [1989] A.C. 852)*. cf. *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] 2 All E.R. (Comm) 54*; *Lexington Insurance Co v AGF Insurance Ltd [2009] UKHL 40, [2010] 1 A.C. 180*.

91. *Hamlyn & Co v Talisker Distillery [1894] A.C. 202*; though see *Armar Shipping Co Ltd v Caisse Algérienne d'Assurance [1981] 1 W.L.R. 207, 216*; *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*. Under the Uniform Laws on International Sales Act 1967, the parties are permitted to choose the uniform law to govern those aspects of their contract covered by that

Act: Sch.1 arts 2 and 4. However, other aspects of their contract of sale of goods will be governed by the normal choice of law rules of the conflict of laws.

92. *Zivnostenska Banka v Frankman [1950] A.C. 57, 83*.

93. *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 340*.

94. Dicey, Morris and Collins, 15th edn (2012), Ch.4; Cheshire, North and Fawcett, Ch.5.

95. *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 61-62*; *E.I. du Pont de Nemours v Agnew [1987] 2 Lloyd's Rep. 582, 592*. See also *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3) [1995] 1 W.L.R. 987, 1008* (Millett J.) affirmed on other grounds, *[1996] 1 W.L.R. 387*, see especially Staughton L.J., at 405; *Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326*; *Dornoch Ltd v Westminster International BV [2009] EWHC 889 (Admlty), [2009] 2 Lloyd's Rep. 191*; cf. *Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep. 284, 296-297*. And see below, paras 30-027, 30-145.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(a) - In General

History and purpose [97]

30-017

In 1980 the then Member States of the European Community concluded a Convention on the Law Applicable to Contractual Obligations. This Convention (which is known as the Rome Convention) was ratified by the United Kingdom in 1991 and was implemented in United Kingdom law in the Contracts (Applicable Law) Act 1990. [98] The provisions of the 1990 Act which give the force of law in the United Kingdom to the Rome Convention, [99] entered into force on April 1, 1991. [100] Consequently the rules of the Convention will apply to contracts falling within its scope which are entered into after that date [101] but before December 17, 2009, the date on which the Rome I Regulation entered into force. [102] Schedule 3 to the Act sets out the text of the Brussels Protocol which enables questions concerning the interpretation of the Rome Convention to be referred to the Court of Justice of the European Union (hereafter the "European Court"). [103] Although the United Kingdom ratified the Brussels Protocol on implementing the Convention, [104] delay in ratification by Belgium [105] meant that it did not enter into force internationally until August 1, 2004 and was eventually implemented in United Kingdom law on March 1, 2005. [106]

Interpretation: the European Court

30-018

As a consequence of the Treaty of Lisbon, any national court may make a reference to the European Court. [107] Because of the delay in the ratification of the Rome Convention, referred to above, there have been few decisions by the European Court on the interpretation of the Convention. [108]

Interpretation: methodology

30-019

It is now standard practice in the European Court [109] and the English courts [110] to give autonomous or uniform interpretations to legal concepts referred to in the Convention. Courts may also have regard, in ascertaining the meaning or effect of any provision of the Convention, to the Report on the Convention by Professors Giuliano and Lagarde ("Giuliano-Lagarde Report"). [111] And art.18 of the Convention itself provides that in the interpretation and application of the uniform rules of the Convention, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application. [112]

General scope of the Convention

30-020

A number of general questions arise as to the scope of the Convention (as opposed to the specific questions which are included in or excluded from the Convention by the text of the instrument itself [113]).

"Laws of different countries"

30-021

First, art.1(1) provides that the rules contained in the Rome Convention "shall apply to contractual obligations in any situation involving a choice between the laws of different countries". According to the Giuliano-Lagarde Report, such situations are those:

> "… which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc.), thereby giving the legal systems of several countries claims to apply." [114]

The situation contemplated thus seems to be the presence in a transaction of a foreign element of legal relevance according to customary notions of private international law. Such a relevant foreign element would appear to be present even if the only such element is the fact that a contract otherwise domestic in nature contains a choice of a foreign governing law. [115]

Law specified need not be of a contracting state

30-022

Secondly, art.2 of the Convention provides that any law specified by the Convention shall be applied whether or not it is the law of a contracting state. Taken with art.1(1), the effect of this is that it is not necessary that the countries whose laws are implicated in the problem be states which are parties to the Convention or Member States of the EU and that the rules of the Convention must be applied even if they point to a governing law which is neither the law of a contracting state nor the law of a Member State of the EU. The Convention will thus apply if the choice is between the law of England and the law of Brazil, or between the law of Brazil and the law of India, [116] as it will if the choice is between the law of the Netherlands and the law of Italy. Further, the application of the Convention, in a case where the forum is in the United Kingdom, does not depend on the situation having a factual link with another contracting state or with another Member State of the EU. The rules of the Convention will thus apply to all cases [117] brought in United Kingdom courts to which those rules, according to their terms, apply. [118]

Countries with more than one legal system

30-023

Thirdly, although art.1(1) refers to situations involving a choice between the law of different *countries*, the rules of the Convention are intended, also, to apply to situations involving a choice between two or more *legal systems* which may not necessarily be the same thing. [119] Article 19(1) of the Convention provides that where a state comprises territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be treated as a country for the purposes of identifying the applicable law. [120] Hence the rules of the Convention will apply to

determine, for example, whether a contract is governed by the law of New York [121] or the law of California, whether a contract is governed by the law of California or the law of British Columbia, whether a contract is governed by the law of England or the law of Luxembourg, or whether a contract is governed by the law of Germany or the law of France.

Different parts of the United Kingdom

30-024

Fourthly, the Convention rules will apply in the case of conflicts between the laws of the different parts of the United Kingdom. For although art.19(2) does not require states within which different territorial units have their own rules of law in respect of contractual obligations to apply the Convention to conflicts between the laws of such units, the United Kingdom decided to apply those rules to intra-United Kingdom conflicts. [122] Accordingly, the rules of the Convention will apply to situations involving a choice between the laws of England and Wales, Scotland and Northern Ireland, [123] as the case may be, as well as to situations involving a choice between the laws of England and Germany. [124]

Mandatory

30-025

Lastly, it has been suggested that the parties to a contract may be able to exclude the application of the uniform rules contained in the Rome Convention by indicating a choice, in the contract, of "English law excluding the Act of 1990" (i.e. the Contracts (Applicable Law) Act 1990) or of English law as it was on the day before the 1990 Act entered into force. [125] This view cannot be accepted, [126] principally because the 1990 Act provides, in unambiguous terms, that the Convention shall have "the force of law" in the United Kingdom [127] and because it is stated in the Convention itself that the Convention:

> "… *shall* apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State." [128]

The words of the Act denote the mandatory character of the rules, as a matter of English law, [129] while the words of the Convention clearly indicate a treaty obligation on the United Kingdom to implement the provisions of the Convention, which obligation has, of course, been discharged in the 1990 Act.

Relationship with other Conventions and EU law

30-026

Article 21 of the Rome Convention stipulates that the Convention is not "to prejudice the application of international conventions to which a contracting state is, or becomes, a party". [130] Accordingly, existing and future conventions entered into by contracting states will apply in those states despite the existence of the Rome Convention. [131] Further, art.20 seeks to avoid conflicts between the Rome Convention regime and choice of law provisions contained in acts of the institutions of the European Communities or in national law harmonised in accordance with such acts by providing that the latter provisions shall take precedence over the rules contained in the Convention. [132]

No renvoi

30-027

Reflecting the common law, [133] art.15 of the Rome Convention excludes the doctrine of renvoi in

providing that application of the law of any country specified by the Convention means "the application of the rules of law in force in that country other than its rules of private international law". [134]

Incorporation by reference

30-028

At common law, the parties were free to incorporate into the contract provisions of foreign law as part of the terms and conditions of the contract. [135] The Rome Convention does not appear to restrict their power to continue with such a device. [136] The principle of incorporation by reference only applies, however where the parties have sufficiently indicated the provisions of foreign law or international convention which are apt to be incorporated as terms of the contract. A broad reference to principles of Sharia law is insufficient to incorporate such principles. [137]

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96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh, *Autonomy in International Contracts* (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

97. Dicey, Morris and Collins, paras 32-009 et seq.; North, *Contract Conflicts*, pp.4-9 reprinted in Essays in Private International Law (1993), p.23; Report on the Convention by Professors Giuliano and Lagarde [1980] O.J. C282/1, 4-8 (hereafter Giuliano-Lagarde Report), as to which see below, para.30-019.

98. Contracts (Applicable Law) Act 1990 s.2(1). The English text of the Convention is set out in Sch.1 to the Act "for ease of reference": s.2(4). Each language text is, however, equally authentic: Rome Convention art.33. For the French, German, Italian and Dutch texts, see Kaye at pp.478-505. The Rome Convention was seen as a way of buttressing the work done, originally, in the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968, designed to establish uniform rules for the international jurisdiction of courts amongst the Member States: [1978] O.J. L304/77, replaced as from March 1, 2002 for all Member States except Denmark, by Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1 (the Brussels I Regulation) and see SI 2001/3929. The latter Regulation applies to Denmark by virtue of a parallel agreement, [2006] O.J. L120/22, with effect from July 1, 2007: SI 2007/1655. Regulation 44/2001 is amended by Commission Regulation (EC) 280/2009 of April 6, 2009, amending Annexes I, II, III and IV: [2009] O.J. L93/13. Regulation 44/2001 has itself been replaced by Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L351/1 (the Brussels I Regulation recast) which applies from January 10, 2015. On links between the Brussels I, Rome I and Rome II Regulations, see Crawford and Carruthers (2014) 63 I.C.L.Q. 1.

99. Note the power to make reservations to arts 7(1) and 10(1)(e) in art.22 of the Convention. The UK has exercised this power so that arts 7(1) and 10(1)(e) do not have the force of law in the United Kingdom: Contracts (Applicable Law) Act 1990 s.2(2). See below, paras 30-032, 30-062.

100. SI 1991/707.

101. Rome Convention art.17, which provides that the Convention shall apply in a contracting state to contracts made after the date on which it has entered into force with respect to that State. Accordingly, contracts entered into *on or before* April 1, 1991, which will be rare, given the passage of time, will be governed by common law choice of law rules (as to which see above, paras 30-005 et seq.).

102. Rome I Regulation arts 28, 29.

103. See below, para.30-018. Sch.2 to the Act contains the text of the Luxembourg Convention providing for accession to the Rome Convention by Greece. Sch.3A to the Act contains the text of the Funchal Convention providing for the accession to the Rome Convention by Spain and Portugal (see SI 1994/1900) which entered into force for the United Kingdom on December 1, 1997. Sch.3B to the Act contains the text of the 1996 Convention providing for the accession to the Rome Convention of Austria, Finland and Sweden (see SI 2000/1825), which came into force on January 1, 2001. A consolidated version of the text of the Rome Convention can be found in [1998] O.J. C27/34.

104. See above, para.30-017.

105. Belgium finally ratified the Protocol on May 5, 2004.

106. SI 2004/3488. A Convention was signed on April 14, 2005 providing for the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic to the Rome Convention and the Brussels Protocol, but this is not yet in force. For the Recommendation for a Council Decision concerning the accession of Bulgaria and Romania, see COM(2007) 217 final. A consolidated version of the Convention and the Protocol is printed in [2005] O.J. C334/11.

107. See art.267 TFEU. Under art.68 of the EC Treaty which has lapsed, a reference could only be made to the European Court by a national court against whose decisions no judicial remedy was available.

108. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*; *Koelzsch v État du Grand-Duché du Luxembourg (C-29/10) [2012] Q.B. 210*; *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr. 16*; *Schlecker v Meilitta (C-64/12) (September 12, 2013)* ; *ERGO Insurance SE v If P&C Insurance AS (Joined cases C-359/14 and C-475/14)*.

109. See preceding note.

110. See for e.g. *Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380*; *Credit Lyonnais v New Hampshire Insurance Co Ltd [1997] 2 Lloyd's Rep. 1*; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 825*; *Bergmann v Kenburn Waste Management Ltd [2002] EWCA Civ 98, [2002] 2 F.S.R. 45*; *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 359*. See also the 30th edition of this work, para.30-020.

111. [1980] O.J. C282/1: Contracts (Applicable Law) Act 1990 s.3(3)(a). The European Court has referred to the Report: see cases in n.111, above. the Report is without prejudice to any other material the court is permitted to look at.

112. Relevant decisions of the European Court are binding on United Kingdom courts and judicial notice must be taken of any decision of, or expression of opinion by the European Court as to the meaning or effect of the Rome Convention in relation to any question that is referred to it: Contracts (Applicable Law) Act 1990 s.3(2).

113. See below, paras 30-029 et seq.

114. Giuliano-Lagarde Report, p.10. The applicable law, as determined by the rules in the Convention, must be the law of a country: see *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784*; *Halpern v Halpern (Nos 1 and*

2) [2007] EWCA Civ 291, [2008] Q.B. 195; *Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326*; *Dubai Islamic Bank PJSC v Energy Holdings BSC [2013] EWHC 3186 (Comm)* at [11]. See below paras 30-047, 30-070.

115. The relationship between this requirement and art.3(3) is discussed by the Court of Appeal in *Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA [2016] EWCA Civ 1267*.

116. e.g. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 412*; *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380* (law of England and law of Japan); *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] 2 All E.R. (Comm) 54* (law of England and law of Taiwan); *Tiernan v Magen Insurance Co Ltd [2000] I.L.Pr. 517* (law of England and law of Israel); *Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 641* (law of England and law of Japan); *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019, [2002] C.L.C. 533* (law of England and law of Egypt).

117. Including cases where it is necessary to determine whether a contract is "governed by English law" for the purposes of CPR PD 6B, para.3.1(6) which enables permission to be given for service of a claim form out of the jurisdiction: see *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; *Egon Oldendorff v Libera Corp [1995] 2 Lloyd's Rep. 64*; *Burrows v Jamaica Private Power Co Ltd [2002] 2 All E.R. (Comm) 374*; Dicey, Morris and Collins para.30-027. According to CPR r.6.37(3), the court will not give permission for such service "unless satisfied that England and Wales is the proper place in which to bring the claim".

118. Giuliano-Lagarde Report, p.13. For criticism of this result by Lords Wilberforce and Goff, see Hansard, HL Vol.515, cols 1476-1482, Vol.517, cols 1537-1541.

119. cf. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*.

120. See also Giuliano-Lagarde Report, p.10.

121. See *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557* (law of England or law of New York); *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024* (law of England or law of Texas).

122. Contracts (Applicable Law) Act 1990 s.2(3).

123. For an example, see *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059* (law of England or law of Scotland). In such cases it is probable that a UK appellate court could make a reference to the European Court under the Brussels Protocol: see Dicey, Morris and Collins, paras 32-029—32-030. cf. *Kleinwort Benson Ltd v City of Glasgow District Council (C-346/93) [1995] E.C.R. I-615 [1996] Q.B. 57*.

124. The German Länder would not have to be treated as separate legal systems under art.19(1) because German contract law is federal in nature: see Dicey, Morris and Collins para.32-029.

125. F.A. Mann (1991) 107 L.Q.R. 353, a view perhaps not unconnected with the learned author's general hostility to the Convention.

126. See *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195* at [21]-[24]; Dicey, Morris and Collins, para.32-044; Hogan (1992) 108 L.Q.R. 12; North (1992) 3 King's Coll. L.J. 29, 38-40, reprinted in Essays in Private International Law (1993), pp.171, 85-187.

127. Contracts (Applicable Law) Act 1990 s.2(1) (subject only to s.2(2) and (3)).

128. Rome Convention art.17 (emphasis supplied).

129. Compare the same treatment of identical wording in the Carriage of Goods by Sea Act 1971, implementing the Hague-Visby Rules, in *The Hollandia [1982] Q.B. 872 CA (affirmed [1983] A.C. 565)*. See also s.5 of and Sch.4 to the 1990 Act which amend legislation referring to the

"proper law of a contract" so as to replace that terminology with words which reflect the Convention usage.

130. See Kaye, pp.367-370. See also arts 23, 24 and 25 of the Rome Convention.

131. The principal conventions envisaged in this provision would seem to be those concerning matters of private international law: see art.24 of the Rome Convention. See, e.g. the Hague Convention on the Law Applicable to International Sale of Goods of June 15, 1955 to which Denmark, France, Italy and Sweden but not the UK, are parties. Belgium has denounced this Convention. Article 21 is, however, broad enough to enable a State party to the Vienna Convention on the International Sale of Goods 1980 to continue to apply that Convention. A UK court *may* be required to apply the Vienna Convention if the law applicable to the contract pursuant to the Rome Convention is that of a country which is a party to the Vienna Convention and which would regard the latter Convention as applicable, but such a conclusion is controversial. It may equally be the case that, because of art.21, international conventions are only properly applicable as between contracting states which are parties thereto, with the consequence that since the UK is not a party to the Vienna Convention, it will be the contract law of the country (excluding the Vienna Convention) which will be applicable: this problem is distinct from that of renvoi, as to which, see above, para.30-016 and below, para.30-028. The power of the parties to a contract of sale to choose the Uniform Law on International Sales to govern the contract would not seem to be prejudiced by the Rome Convention since that power is conferred by statute (Uniform Law on International Sales Act 1967) and ULIS is not the law of a "country" for the purposes of the Rome Convention.

132. cf. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. This proposal was withdrawn on December 16, 2014: COM (2014) 910 final.

133. Above, para.30-016.

134. Since the exclusion of renvoi prevents application of rules of private international law, it has no bearing on the issue concerning the application of the Vienna Convention discussed in n.132, above, since that Convention establishes rules of substantive law rather than rules of private international law.

135. Above, para.30-009.

136. *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784*; *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195* at [31]-[38]; Dicey, Morris and Collins, para.32-088.

137. *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19*; see also *Halpern v Halpern [2007] EWCA Civ 291* at [31]-[38]. See also *Investment Dar Co KSCC v Blom Development Bank Sal [2009] EWHC 3545 (Ch)*. See *Dubai Islamic Bank PJSC v Energy Holdings BSC [2013] EWHC 3186 (Comm)*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(b) - Exclusions [138]

Introduction

30-029

The specific scope of the provisions of the Rome Convention is set out in art.1. The general purport of art.1(1) has already been referred to but it is necessary to examine one additional question in relation to that provision, namely the meaning of "contractual obligations". For if an obligation is not a "contractual obligation" for the purposes of that provision, then the Convention does not apply even if the situation involves "a choice between the laws of different countries". Secondly, art.1(2) excludes certain types of contract and certain issues which are capable of arising in a contractual context from the scope of the Convention. The following paragraphs deal with these two questions.

Meaning of "contractual obligations"

30-030

At a very general level, it can be said that since the Rome Convention is only concerned with contractual obligations: property rights and intellectual property are not covered by its provisions. [139] This observation, however, does not carry the matter much further and the Giuliano-Lagarde Report provides no additional guidance. Initially, however, it would seem to be generally accepted that an autonomous or Convention interpretation should be given to the expression "contractual obligations" [140] and that, thus, the expression should not necessarily be limited to obligations which the law of the English forum would regard as contractual. [141] Additionally, it may be said that the Rome Convention does not apply to tortious obligations. This outcome is inevitable under the Rome II Regulation on the law applicable to non-contractual obligations [142] since the term "non-contractual obligation" for the purpose of that Regulation must be understood as an autonomous concept, independent of meanings it may have in national law [143] and because it is necessary to demarcate the respective scope of the Rome II Regulation and the Rome Convention, the meaning of "contractual obligation" in the latter instrument will similarly be interpreted in an autonomous fashion.

Concurrent liability

30-031

A rather different problem is presented when the forum (as is sometimes the case in English law, with employment contracts [144]) allows alternative claims in contract and tort. In such a case an English court has held [145] that there is nothing in the Rome Convention which precludes, say, an employee from framing his claim in tort if the tort choice of law rule is more advantageous to him than the rules of the Rome Convention. [146] In relation to the Rome II Regulation, which applies only to events giving rise to damage occurring after January 11, 2009, [147] it is highly unlikely that the claimant will have the

option of framing a claim which is contractual as a claim in tort since the term “noncontractual obligation” in that Regulation must be understood as an autonomous concept independent of meanings it may have in national law so that the meanings of “contractual obligation” and “non-contractual obligation” are likely to be held to be mutually exclusive. [148]

Restitution

30-032

Finally, it would seem to be the case, in the United Kingdom at any rate, that the Rome Convention will not be applied to claims which are classified, according to English notions, as sounding in restitution (or quasi-contract [149]). This much is suggested by the power to make a reservation to art.10(1)(e) of the Convention, which refers the “consequences of nullity” of the contract to the law applicable to the contract, [150] which power was exercised by the United Kingdom [151] because such a question is not a matter of contract but one of restitution in United Kingdom legal systems. [152] Consistently with this, a majority of the House of Lords has held that a claim for money paid under a void contract was not a matter “relating to a contract” for the purposes of art.5(1) of the modified version of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 [153] which is applicable as between the component parts of the United Kingdom. [154]

Effect of Rome II Regulation

30-033

Under the Rome II Regulation it would seem that the consequences of nullity of a contract may be regarded as falling within art.10 of that Regulation which provides choice of law rules for determining the law applicable to non-contractual obligations arising out of unjust enrichment. The principal rule is that where such an obligation concerns a relationship between the parties, such as one arising out of a contract or a tort that is closely connected with the unjust enrichment, then the obligation shall be governed by the law that governs that relationship. [155] This will normally mean that the law applicable to the contract will be the applicable law in cases where the relationship between the parties arises out of a contract. It would also seem, however, that when the Rome I Regulation takes effect the issue will be submitted to the law applicable to the contract since art.12(1)(e) of the latter Regulation reproduces art.10(1)(e) of the Rome Convention and there is no power to make a reservation to any provision of a Regulation. [156]

Specifically excluded matters

30-034

Article 1(2) provides that the rules of the Rome Convention shall not apply to certain specified matters. These are discussed in the following paragraphs.

Capacity of natural persons

30-035

The Convention is not to apply to “questions involving the status or legal capacity of natural persons” subject to the operation of a special rule relating to the contractual capacity of such persons. [157] This special rule, contained in art.11, is discussed later in this chapter. [158] The question of the law which determines the capacity of a natural person to enter into a contract will thus, in general, be governed by common law rules. [159] Essentially, this question was excluded because of disagreement between common law and civil law negotiators as to the proper classification of it. A common lawyer usually regards the matter as a contractual issue, whereas the civil lawyer regards it as an issue of status. [160]

Wills, succession, etc

30-036

Article 1(2)(b) excludes from the ambit of the Convention contractual obligations relating to wills and succession; rights in property arising out of a matrimonial relationship; rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate. The purpose of this is to exclude all matters of family law. [161] In relation to maintenance obligations, the exclusion extends only to contracts which are made by parties under a legal maintenance obligation, in performance of that obligation. [162] All other contractual obligations, even if they provide for maintenance of a member of the family to whom there are no legal maintenance obligations, would fall within the scope of the Convention. [163] The contractual effects of gifts apparently fall within the Convention, even when made within the family, unless they are covered by family law. [164] Contractual effects of gifts would also be excluded if they arise out of the law relating to succession or that relating to matrimonial property rights. [165] Although not specifically mentioned, matters relating to the custody of children are excluded since they fall within the realm of personal status and capacity. [166]

Bills of exchange, cheques and promissory notes

30-037

The rules of the Convention do not apply to bills of exchange, cheques and promissory notes. [167] To have included such obligations would have required "rather complicated special rules" [168] which would have been inappropriate in a Convention purporting to deal with contractual obligations in general. Further, many Member States (but not the United Kingdom) are parties to the Geneva Conventions which govern most of these areas. [169] And, in any event, such obligations are regarded as noncontractual in some Member States. [170] Bills, cheques and promissory notes will thus, in England, be dealt with under the relevant statutory and common law rules. [171]

Other negotiable instruments

30-038

The exclusion goes further than the obligations just mentioned for, in addition, "other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character" [172] are also excised from the ambit of the uniform rules. [173] Whether a document is to be classified as a negotiable instrument is not, however, a matter for the Convention but one for the law of the forum, including its rules of private international law. [174] But the exclusion only extends to those obligations which arise out of the negotiable character of documents so characterised: it would not, apparently, extend, e.g. to contracts pursuant to which such instruments are issued, or contracts for the purchase and sale of such instruments. [175]

Arbitration agreements and agreements on the choice of court

30-039

Of considerable practical significance is the exclusion from the scope of the Convention of arbitration agreements and agreements on the choice of court. [176] The exclusion was also a matter of some controversy within the group which negotiated the Convention. [177] As far as arbitration agreements are concerned, the arguments for exclusion were the need to avoid an increase in the number of international conventions in this area, [178] that the concept of closest connection [179] was difficult to apply to arbitration agreements, that the procedural and contractual aspects of such agreements were difficult to separate and that since the Convention permitted "severability", [180] the

arbitration clause could be treated as a distinct entity, apart from the contract, without any difficulty. [181] The result of the exclusion is that not only the procedural aspects but also the formation, validity and effect [182] of an arbitration agreement will have, seemingly, to be determined by common law rules, which is at best inconvenient, whereas the law applicable to the remaining part of the contract will be determined by the rules of the Convention. [183]

Choice of court agreements were excluded because the prevailing view in the negotiating group was that the matter lay within the realm of procedure, that rules of jurisdiction were a matter of public policy, that a court must determine the validity of such an agreement according to its own law rather than the law chosen, [184] that Convention rules would be frustrated if disputes were brought before courts of non-contracting states, [185] and, finally, that in relation to cases within the Community, most important matters (validity of the clause and form) are governed by art.17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. [186] The result is that this question will again be governed by common law rules. [187]

Questions governed by the law of companies, etc

30-040

Questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body will not fall within the ambit of the Rome Convention. [188] The intention behind the provision is the exclusion of matters of contract which arise in the context of company law, [189] particularly in view of the work being done in the European Community on the harmonisation of company law. [190] Thus, for example, the question of the law applicable to the contractual capacity of a company will be governed by common law rules [191] and not by the Convention. On the other hand, an agreement by promoters to create a company is thought to fall within the scope of the Convention. [192]

Power of agent to bind principal, etc

30-041

Further excluded is the question of whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party. [193] The exclusion only affects the question of whether the principal is bound with regard to third parties by the acts of the agent (or organ of a company etc, as the case may be). [194] It is justified because the Convention permits parties a wide freedom to choose the applicable law of a contract, [195] a freedom which it was not thought appropriate to recognise in this context. [196] This matter will, therefore, continue to be governed by common law rules. [197] But the rules of the Convention will apply to determine the law which governs the contract (if any) between principal and agent, [198] and also, it would seem, the law which governs the contract (if any) which the agent concludes with a third party. [199] Further excluded by art.1(2)(f) is the effect of ultra vires acts by an organ of a company or firm, [200] but the fact that this is said to be excluded under this provision rather than that dealing with company law (art.1(2)(e)) [201] would appear to be of no practical significance. [202]

Trusts

30-042

Article 1(2)(g) excludes the constitution of trusts and the relationship between settlors, trustees and beneficiaries. Trusts in this context, are to be understood in the meaning which they bear in common law countries. [203] This readily explains their exclusion since, in the common law sense, a trust is not a contract. [204] In the civil law systems, however, institutions similar to the trust may fall within the Convention because they are normally contractual in origin. [205] According to the Giuliano-Lagarde

Report, it will, nevertheless, be open to the judge to treat these civil law institutions in the same way as the institutions of the common law countries when the former exhibit the same characteristics as the latter. [206]

Evidence and procedure

30-043

Article 1(2)(h) of the Convention excludes "evidence and procedure, without prejudice to Article 14", from the scope of the Convention. Article 14 (concerned with the law applicable to presumptions, burden of proof and mode of proof) is discussed below, paras 30-353—30-355. The Giuliano-Lagarde Report expresses the view that the exclusion of evidence and procedure "seems to require no comment". [207] Presumably it will be for national law to classify an issue as belonging to one or other of these categories. [208] But it must be borne in mind that a matter classified as evidential or procedural will be governed by the law of the forum. The possibility of disparate approaches to classification amongst the contracting states may thus constitute an obstacle to the uniformity of choice of law rules which the Convention seeks to achieve. [209]

Insurance

30-044

Article 1(3) of the Rome Convention provides that its rules:

> "… do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law." [210]

The effect of this provision is as follows. Where the risk covered by the insurance contract is situated outside the territories of the Member States of the European Communities, the rules of the Rome Convention will apply. [211] Additionally, those rules will also apply to determine the law applicable to a contract of reinsurance since such contracts are specifically exempted from the exclusionary rule of art.1(3), even if the contract of reinsurance covers a risk which is situated in a Member State. [212] Where, however, the risk covered by a contract of insurance is situated in the territories of the Member States of the EU or, as from December 1, 2001, in an EEA Member State, the choice of law rules to determine the applicable law are to be found in special legal regimes for, respectively, nonlife and life insurance, which regimes are based on Community Directives [213] which have been implemented in United Kingdom law. [214] The detail and complexity of these legal regimes precludes discussion here and the reader is referred to the appropriate source. [215]

Identification of situs

30-045

One issue which may, however, be appropriately dealt with here is as to the rules which are to be used for identifying the situs of a risk. The second sentence of art.1(3) requires the court to apply its "internal law" [216] to determine whether a risk is situated in the territories of Member States of the EU, which territories must now be taken to refer to the territories of the Member States of the European Economic Area. [217] Since, traditionally, the situs of a risk had played no role in United Kingdom insurance law, difficulties could have arisen in its identification. These difficulties are resolved by the existence of rules for this purpose in the Directives which are incorporated into United Kingdom law by the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, [218] and by an amendment to the Contracts (Applicable Law) Act 1990 which provides that these rules constitute the relevant internal law in art.1(3) of the Rome Convention. [219]

96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh, *Autonomy in International Contracts* (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

138. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 32-031—32-042; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.18; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.98-106, 111-142.

139. Giuliano-Lagarde Report, p.10. Thus, e.g. although the contractual aspects of a sale of goods will be governed by the Rome Convention, the proprietary aspects will not, and thus will be governed by the rules as to proprietary rights developed in the common law. See also *Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep. 284*; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 825*.

140. *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68*; *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*; see also *Atlantic Telecom GmbH, Noter (2004) S.L.T. 1031*. See Dicey, Morris and Collins para.32-023; Kaye pp.97-98.

141. *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68*. cf. *Re Bonacina [1912] 2 Ch. 394*.

142. Regulation 864/2007.

143. Recital 11 to the Rome II Regulation. See Rome I art.1(2)(f) (Rome I does not apply to obligations arising prior to the conclusion of a contract). And see Rome II art.12 (culpa in contrahendo), below, para.30-148. On Rome II, see Dickinson, The Rome II Regulation (2008); and for clarification of the Rome II Regulation and its relationship with earlier English choice of law rules, see SI 2008/2986; for Scotland, see SSI 2008/404. In *Verein für Konsumenteninformation v Amazon EU Sarl (C-191/15)* the CJEU held that a claim for an injunction against the use of unfair means in consumer cases came within the Rome II Regulation whereas the assessment of a particular term of a contract came under the Rome I Regulation.

144. As to which see below, paras 30-107 et seq.

145. *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*; *Booth v Phillips [2004] EWHC 1437 (Comm), [2004] 1 W.L.R. 3292*. See Dicey, Morris and Collins, paras 33-084—33-085, 35-066; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.20. See also *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059*. cf. *Kalfelis v Schroder (189/87) [1988] E.C.R. 5565* holding such a claim to be contractual for the purposes of art.5(1) of the Brussels Convention.

146. cf. *Matthews v Kuwait Bechtel Corp [1959] 2 Q.B. 57*; *Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R. 1136 (affirmed 1151)*; *Johnson v Coventry Churchill International Ltd [1992] 3 All E.R.*

14 (where the claim was made in tort only, the contract not being pleaded); *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316*. See also *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916*. There is nothing in Pt III of the Private International Law (Miscellaneous Provisions) Act 1995, in the rare occasions where it will apply, which contains choice of law rules in tort in English law, which precludes an employee from relying on an alternative claim in contract if it is more advantageous to do so: see Dicey, Morris and Collins para.32-024.

147. *Homawoo v GMF Assurances SA (C-412/10) [2012] I.L.Pr. 2*.

148. See Recital 11 and previous paragraph. And see *Kalfelis v Schroeder (C-187/87) [1988] E.C.R. 5565*. cf. *Trafigura Beheer BV v Kookmin Bank Co [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep. 455*.

149. See Cheshire, North and Fawcett, pp.678, 818–226. cf. Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.19.

150. Rome Convention art.22(1). Even Member States who do not make a reservation will, presumably, not apply the Convention to all aspects of restitution or quasi-contract but only to this aspect since they regard it as contractual.

151. Contracts (Applicable Law) Act 1990 s.2(2).

152. Hansard, HL Vol.513, cols 1258–1259. And see below, para.30-327.

153. Civil Jurisdiction and Judgments Act 1982 Sch.4.

154. cf. *Kleinwort Benson Ltd v Glasgow City Council [1999] 1 A.C. 153*, reversing a majority decision of the Court of Appeal to the opposite effect: *[1996] Q.B. 678*. The European Court of Justice had earlier declined jurisdiction to interpret this version of the Brussels Convention: see *Kleinwort Benson Ltd v Glasgow City Council (C-346/93) [1995] E.C.R. I–5615, [1996] Q.B. 547* . See also *Raiffeisen Zentralbank Osterreich AG v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408*. cf. *Caterpillar Financial Services Corp v SNC Passion [2004] EWHC 569 (Comm), [2004] 2 Lloyd's Rep. 99* at [16].

155. Rome II Regulation art.10(1). Article 10(2) and (3) provide default rules for cases where the applicable law cannot be determined on the basis of art.10(1) and 10(4) provides that where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in art.10(1), (2), or (3), the law of that other country shall apply. See Dicey, Morris and Collins on the Conflict of Laws, Fourth Supplement to the Fourteenth Edition, paras 34–014, 34–044.

156. See below, para.30-062.

157. Rome Convention art.1(2)(a). See *Gorjat v Gorjat [2010] EWHC 1537 (Ch)*.

158. Below, para.30-325.

159. Below, para.30-324.

160. North, *Contract Conflicts* (1982), p.10, reprinted in Essays in Private International Law (1993), p.23; Bogdan, *The Enforcement of International Contracts in the European Union* (2004), pp.211–223.

161. Giuliano-Lagarde Report, p.10.

162. Giuliano-Lagarde Report, p.10.

163. Giuliano-Lagarde Report, p.10. See *Waldwiese Stiftung v Lewis [2004] EWHC 2589 (Ch)*.

164. Giuliano-Lagarde Report, p.10. See *Gorjat v Gorjat [2010] EWHC 1537 (Ch)* at [10]–[11]; and

see Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession; Proposal for Council Regulations on matrimonial property regimes and registered partnerships: COM(2011) 126 final; COM(2011) 127 final. See Dicey, Morris and Collins, para.32–033. Following the failure to reach a political agreement on these proposals, on March 2, 2016, the European Commission adopted a proposal for a Council decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships (COM(2016) 108 final). The Commission also published proposals for two new Regulations, a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2016) 106 final) and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (COM(2016) 107 final). Council Regulation 2016/1103 of 24 June 2016 ([2016] O.J. L183/1) will apply in Member States which participate in advanced cooperation from January 29, 2019 in the context of matrimonial property and the property consequences of registered partnerships.

165. Giuliano-Lagarde Report, pp.10–11. See *Tod v Barton [2002] EWHC 264 (Ch), [2002] W.T.L.R. 469*; *Halpern v Halpern [2007] EWCA Civ 291, [2008] Q.B. 195* at [23] (compromise of arbitration dealing with a dispute as to whether assets outside an estate should be brought into account in order that one party should gain a fair share could not be termed a contract relating to wills and succession).

166. Giuliano-Lagarde Report, p.11. See *Karafarin Bank v Mansoury-Dara [2009] EWHC 3265 (Comm), [2010] 1 Lloyd's Rep. 236*; Boonk [2011] L.M.C.L.Q. 227.

167. Rome Convention art.1(2)(c).

168. Giuliano-Lagarde Report, p.11.

169. Giuliano-Lagarde Report, p.11.

170. Giuliano-Lagarde Report, p.11.

171. See *Zebrarise Ltd v De Nieffe [2004] EWHC 1842 (Comm), [2005] 1 Lloyd's Rep. 154*; *Karafarin Bank v Mansoury-Dara*, above; Vol.II, paras 34-192 et seq.

172. art.1(2)(c).

173. For discussion, see Dicey, Morris and Collins, paras 33–323—33–332; Schultsz, *Contract Conflicts* (1982), pp.188–191; Kaye, pp.117–118.

174. Giuliano-Lagarde Report, p.11. cf. Schultsz, *Contract Conflicts*.

175. Giuliano-Lagarde Report, p.11.

176. Rome Convention art.1(2)(d). See *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701* at [44]. And see *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195*. For discussion, see Dicey, Morris and Collins, paras 32–035—32–037; Kaye, pp.118–121; Morse, *The Enforcement of International Contracts in the European Union* (2004), pp.191–209. An arbitration or choice of court agreement may nonetheless be relevant in determining whether the parties have made a choice of law: see below, paras 30-050 et seq.

177. Giuliano-Lagarde Report, pp.11–12. The UK argued strenuously for the inclusion of both matters.

178. In fact only the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards touches upon the law applicable to an arbitration agreement (Arbitration Act 1996

s.103(2)(b)), and that only in the context of the recognition and enforcement of foreign awards.

179. See below, para.30-070.

180. See below, para.30-055.

181. Giuliano-Lagarde Report, pp.11–12. As to "severability" of an arbitration clause, see *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*; *Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40*.

182. Giuliano-Lagarde Report, p.12; and see *XL Insurance Ltd v Owens Corning [2002] 2 Lloyd's Rep. 500*.

183. In practice it may be that the law applicable to the contractual aspects of the arbitration agreement will normally be the same as that which governs the contract of which it forms part: Dicey, Morris and Collins, para.32–037. In *BCY v BCZ [2016] SGHC 249* the High Court of Singapore applied such a presumption.

184. This is not the case in English law, in which the validity of such an agreement depends on the applicable law: see Dicey, Morris and Collins, para.12–090. cf. *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557*; *XL Insurance Ltd v Owens Corning [2002] 2 Lloyd's Rep. 500*.

185. It is difficult not to regard this reason as incomprehensible, since, presumably, non-contracting states would not apply the Convention in any event.

186. Giuliano-Lagarde Report, p.11. Apparently, according to the view there expressed: "[O]utstanding points, notably those relating to consent, do not arise in practice, having regard to the fact that Art.17 provides that these agreements shall be in writing". But see Dicey, Morris and Collins, paras 12–097—12–099, 16–017—16–027, 32–035—32–037.

187. *Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 90, 98*.

188. Rome Convention art.1(2)(e); *Debt Collect London Ltd v SK Slavia Praha-Fotbal AS [2010] EWHC 57 (QB)* at [14]; *Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm)*. See Dicey, Morris and Collins, paras 30–025—30–028; Benedetelli, *The Enforcement of International Contracts in the European Union* (2004), pp.225–254.

189. Giuliano-Lagarde Report, p.12.

190. On this work, see Dine, *EC Company Law* (1991); Andenas and Kenyon-Slade, *EC Financial Market Regulation and Company Law* (1993); Werlauff, *EC Company Law* (1993).

191. *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*; *Continental Enterprises Ltd v Shandong Zucheng Foreign Trade Group Co [2005] EWHC 92 (Comm)*; *Atlantic Telecom GmbH, Noter (2004) S.L.T. 1031*; *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2011] 1 All E.R. 190*; *Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm)*. See also *Standard Chartered Bank v Ceylon Petroleum Corp [2011] EWHC 1785 (Comm)*. The exclusion of legal capacity concerns limitations on companies or firms, for example, in respect of acquisition of immovable property, but does not concern "ultra vires act by organs of the company or firm" (Giuliano-Lagarde Report, pp.12–13) which are excluded under Rome Convention art.1(2)(f): see below, para.30-326.

192. Giuliano-Lagarde Report, p.12.

193. Rome Convention art.1(2)(f).

194. Giuliano-Lagarde Report, p.13.

195. See below, paras 30-046 et seq.

196. Giuliano-Lagarde Report, p.13.

197. As to which, see Dicey, Morris and Collins, para.33R–428 et seq. See *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd [2010] EWHC 294 (Comm), [2010] 2 Lloyd's Rep. 236*; *Standard Chartered Bank v Ceylon Investment Corp*, above.

198. Giuliano-Lagarde Report, p.13. For discussion, see Dicey, Morris and Collins, paras 33–405—33–425. Application of the common law rules on this matter may be affected by the Directive on Self-employed Commercial Agents [1986] O.J. L382/17 implemented in England and Wales and Scotland by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053), as amended by SI 1993/3173 and SI 1998/2868 and in Northern Ireland by the Commercial Agents (Council Directive) Regulations (Northern Ireland) 1993 (SI 1993/483). The Regulations govern the relations between commercial agents and their principals and apply in respect of the activities of commercial agents in Great Britain (reg.1(2)). It is specifically provided that regs 3–22, which deal with the mutual rights and obligations of agent and principal, remuneration of the agent, the conclusion and termination of the agency contract and miscellaneous matters such as service of notices, do not apply where the parties have agreed that the agency contract is to be governed by the law of another Member State (reg.1(3)(a)). Conversely, regs 3–22 will apply where the law of another Member State, corresponding to the Regulations, enables the parties to agree that the agency contract is to be governed by the law of a different Member State and the parties have agreed that it is to be governed by English law (reg.1(3)(b)). For consideration of some of the conflict of laws problems which arise in the context of the Directive and the Regulations, see *Case 381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc [2000] E.C.R. I–9305*, discussed by Verhagen (2002) 51 I.C.L.Q. 135; *Accentuate Ltd v ASIGRA Inc [2009] EWHC 2655 (QB), [2009] 2 Lloyd's Rep. 599*; *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161*; *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch)*. For further discussion, see Vol.II, para.31-017; Bowstead and Reynolds on Agency, 18th edn (2006), Ch.11; Dicey, Morris and Collins, paras 33–416—33–425; below, para. 30-064. On the interpretation of the compensation provisions of the Regulations, see *Lonsdale v Howard & Hallam Ltd [2007] UKHL 32, [2007] 1 W.L.R. 2055*, Vol.II, para.31-149.

199. Giuliano-Lagarde Report, p.13. This conclusion is not free from difficulty: Dicey, Morris and Collins, para.33–443. See also *Presentaciones Musicales SA v Secunda [1994] Ch. 271*.

200. Giuliano-Lagarde Report, p.13 *Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm)*.

201. Above, para.30-040.

202. Dicey, Morris and Collins, para.33–430. See *Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm)* at [62].

203. Giuliano-Lagarde Report, p.13.

204. For choice of law rules in trusts, see Dicey, Morris and Collins at Ch.29. See *Tod v Barton [2002] EWHC 264 (Ch), [2002] W.T.L.R. 469*; *Chellaram v Chellaram (No.2) [2002] EWHC 632 (Ch), [2002] 3 All E.R. 17*.

205. Giuliano-Lagarde Report, p.13.

206. Giuliano-Lagarde Report, p.13.

207. Giuliano-Lagarde Report, p.13. See *Wall v Mutuelle de Poities Assurances [2014] EWCA Civ 138, [2014] 1 W.L.R. 4263*.

208. See Cheshire and North, p.550 (stressing that English courts should not necessarily adopt the classifications applied in the common law in the context of the Convention).

209. It can be suggested that the principles of uniform interpretation (art.18, above, para.30-019) may be applied to avoid the danger of different states making different classifications. And see below, Section 5.

210. Contrast the approach taken in the Rome I Regulation which provides, in art.7, choice of law rules for determining the law applicable to contracts of insurance, subject to the exclusion of a limited category of insurance contracts in art.1(2)(k): see below, paras 30-252 et seq.

211. See *Crédit Lyonnais v New Hampshire Insurance Co [1997] 2 Lloyd's Rep. 1*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370*. For the application of the rules of the Rome Convention in this situation, see Dicey, Morris and Collins, r.214, paras 33–137 et seq.

212. Rome Convention art.1(4). For application of the Convention rules to reinsurance, see Dicey, Morris and Collins, r.217, paras 33–210 et seq. The special choice of law rules for insurance contracts contained in the Rome I Regulation do not apply to contracts of reinsurance: see art.7(1), below, para.30-254.

213. Second Council Directive on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of the freedom to provide services: [1988] O.J. L127/1, amending the First Council Directive [1973] O.J. L228/3 (the Second Non-Life Insurance Directive); Third Council Directive on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance [1992] O.J. L228/1, amending the First Council Directive and the Second Non-Life Insurance Directive (the Third Non-Life Directive); Second Council Directive on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services [1990] O.J. L330/50, amending the First Council Directive [1979] O.J. L63/1 (the Second Life Insurance Directive); Third Council Directive on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance [1992] O.J. L360/1, amending the First Council Directive and the Second Life Directive (the Third Life Directive). The choice of law rules are to be found respectively in art.7 of the Second Non-Life Insurance Directive, as amended by art.24 of the Third Non-Life Directive, and art.4 of the Second Life Insurance Directive. The Directives concerned with life insurance have been "recast" and amended in Directive 2002/83 [2002] O.J. L345/1. See SI 2004/3379. The choice of law rules contained in art.32 of this Directive are the same as those which are already applicable. All of these earlier Directives will be repealed by Directive 2009/138/EC of the European Parliament and of the Council of November 25, 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast). The Solvency II Directive came into force on January 1, 2016. The UK has implemented the Directive through the Solvency 2 Regulations 2015 (SI 2015/575) making only minor changes to the pre-existing statutory instruments.

214. The choice of law rules contained in the directives are, with effect from December 1, 2001, implemented in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 (SI 2001/2635), as amended by SI 2001/3452. The Regulations apply to determine the law applicable to a contract of Insurance covering a risk situated in an EEA Member State: see in addition to the Regulations EEA Agreement (Agreement on the European Economic Area signed at Oporto on May 2, 1992 as adjusted by the Protocol signed at Brussels on March 17, 1993); European Economic Area Act 1993. The Directives were originally implemented in regulations amending the Insurance Companies Act 1982 which was repealed by the Financial Services and Markets Act 2000.

215. Dicey, Morris and Collins, r.215, paras 33–159 et seq., r.216, paras 33–190 et seq.

216. This excludes rules of private international law: Giuliano-Lagarde Report, p.13.

217. See above, n.215.

218. SI 2001/2635, as amended by SI 2001/3542: above, n.215.

219. Contracts (Applicable Law) Act 1990 s.2(1)(a), as substituted by SI 2001/3649 art.320. According to the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 (hereafter "the Regulations") where the contract relates to buildings or their contents (in so far as the contents are covered by the same policy) the risk covered by the contract is situated in the EEA state in which the property is situated: reg.2(2)(a). If the contract relates to vehicles of any type, the relevant EEA state is that of the registration of the vehicle: reg.2(2)(b). Where the contract covers travel or holiday risks and has a duration of four months or less, the relevant EEA state is that in which the policyholder entered into the contract: reg.2(2)(c). In any other case, if the policyholder is an individual, the EEA state where the risk covered by the contract is situated is that in which the policyholder resides on the date the contract is entered into (reg.2(2)(d)(i)) and the state in which an individual resides for these purposes is to be treated as being the country in which he has his habitual residence (reg.2(3)(a)). If the policyholder is not an individual the relevant EEA state is that in which the establishment (defined in reg.2(1)) of the policyholder too which the contract relates is situated on the date the contract is entered into: reg.2(2)(d)(ii). The scope of the choice of law rules for life insurance is defined by reference to these last two grounds. If the policyholder is an individual, the choice of law rules contained in the Regulations will apply if that individual is habitually resident in an EEA state: regs 2(1) and 2(2)(a). If the policyholder is, for example, a company insuring the lives of an employee or employees, the choice of law rules contained in the Regulations will apply if the establishment at which the employee is, or employees are, employed is situated in an EEA state: reg.2(1). For discussion, see Dicey, Morris and Collins, paras 33–144—33–146.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(c) - Choice of Law by the Parties [220]

The general principle

30-046

The opening sentence of art.3(1) of the Rome Convention provides that a "contract shall be governed by the law chosen by the parties". The clear intent of this provision is to legitimise, for the purposes of the Convention, the principle of party autonomy. [221] Its effect is that the law chosen by the parties will govern the contract except to the extent that the power to choose is limited or restricted by other provisions of the Convention. [222]

Choice must be of law of a country

30-047

By way of introduction, it would first seem that parties may only choose a law of a country to govern the contract. This appears to follow from the terms of art.1(1) of the Convention. [223] Thus a choice of the principles of Sharia law will not be the choice of the law of a country. [224] Similarly, if the parties stipulate that the contract shall be governed by "general principles of law", or by "its own terms" or by the "lex mercatoria", such clauses will not amount to a choice of law. [225] In such cases, the applicable law will have to be determined as if the parties had made no choice of law, i.e. according to art.4 of the Convention [226]: and it will then be for the applicable law, as so identified, to determine whether a clause of this kind is effective. [227]

Law neither pleaded nor proved

30-048

Secondly, the question arises as to whether a court faced with a contract containing a choice of law is required to apply that law if that law is neither pleaded nor proved by either party. The use of the word "shall" in the first sentence of art.3(1) appears to carry a mandatory connotation. However, the English rule that foreign law must be pleaded and proved, failing which English law will be applied, [228] is a rule of evidence [229] or procedure [230] and, as has been pointed out above, [231] such matters are excluded from the scope of the Convention by art.1(2)(h). It is suggested that the practice of the common law remains unchanged and that the court is not bound to apply a foreign applicable law which is neither pleaded nor proved by the parties. [232] However, this conclusion cannot be free from doubt in the light of the potential lack of harmony which it might introduce into the application of the Convention amongst the contracting states. [233]

Meaning of a "choice" of law: express

30-049

The second sentence of art.3(1) requires that the "choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case". The first aspect of this formula recognises the efficacy of typical contractual terms such as the contact is to be "governed by" [234] or "construed in accordance with" [235] or "subject to" [236] a particular country's law, as apt to make a choice of law. [237] It appears, also, that an express oral agreement as to the applicable law will satisfy art.3(1). [238]

"Implied choice"

30-050

More difficulty surrounds the second aspect of the formula. [239] The common law recognised that parties could impliedly choose the law to govern a contract and that an intention on their part to do so could be inferred from the terms and nature of the contract and from the general circumstances of the case. [240] However, art.3(1) requires that the parties choice be "demonstrated" and further that such demonstration be "with reasonable certainty", which might connote a stricter evidential standard than that involved in drawing an "inference" as to the parties' intentions at common law, [241] particularly when, according to the Giuliano-Lagarde Report, this aspect of the formula is supposed to reveal, in its application, that the parties have made a "real choice of law". [242] Having said that, it is necessary to bear in mind the need for uniform interpretation of the Convention. [243] This means that it is appropriate to adopt a purposive approach to interpretation which does not involve construing the Convention in a narrow, literal fashion. [244] Overall however, the examples given in the Giuliano-Lagarde Report of circumstances which may suffice to demonstrate a choice of law with reasonable certainty, tend to indicate that the relevant factors are broadly similar to those which were capable of indicating an implied choice of law at common law.

> "For example, the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance. [245] In other cases a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties. [246] In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case. [247] Similarly, references in the contract to specific Articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French law, although there is no expressly stated choice of law. [248] Other matters that may impel the court to the conclusion that a real choice of law has been made might include an express choice of law in related transactions between the same parties, [249] or the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place." [250]

30-051

In the case of arbitration clauses it appears that the application of art.3(1) involves a shift of emphasis [251] from the approach which was found in the common law. [252] This results from the fact that, as stated in the extract from the Giuliano-Lagarde Report set out above, the circumstances surrounding the arbitration clause must indicate that it is the intention of the parties that the arbitrator should apply the law of the country in which the arbitration takes place, which is not quite the same test as was adopted in the common law. [253] In practice, however, it is unlikely that any material difference will emerge between the two approaches. [254]

Other relevant factors

30-052

The extract from the Giuliano-Lagarde Report set out above [255] is expressly stated to provide examples of what might be taken to be indications as to the intent of the parties to choose a particular law as the governing law. There may, however, be other terms of the contract or other circumstances in the particular case which will point to the fact that the parties have made a "real choice of law". [256] Thus, for example, where a company based in a particular country concludes, in that country, through a broker based in the same country, a worldwide insurance policy on behalf of its subsidiaries with an insurer based in the same country, and the policy contains a term which imposes a one year period in which suit had to be brought unless such a limit was invalid by the law of the country in which the policy was issued in which case suit had to be commenced within the shortest limit of time permitted under the law of the latter country, the conclusion may well be drawn that the parties intended to make a real choice of the law of that country and that the term and the other circumstances demonstrated with reasonable certainty an intention to make such a choice. [257]

Subsequent conduct

30-053

At common law, it was not possible to take into account the conduct of the parties subsequent to the making of the contract in determining their intentions in relation to an implied choice of law. [258] The position under the Rome Convention is not clear. The Giuliano-Lagarde Report recognises that a choice of law may be deduced "in the light of all the facts". [259] It further concludes that where there is no choice of law, so that it is necessary to discover the law of the country with which the contract is most closely connected pursuant to art.4 of the Convention, [260] "it is also possible to take account of factors which supervened after the conclusion of the contract". [261] The better view, it is suggested, is that subsequent conduct may be taken into account in this context also to the extent that it points to the intentions of the parties at the time the contract was made. [262]

"Implied" choice or "no" choice

30-054

One difficulty in the common law, which remains under the Convention, is that of distinguishing between a case of "implied" choice of law and a case of "no" choice of law. [263] In the latter case, art.4 will be used to determine the applicable law. [264] But opinions may legitimately differ on whether a particular case constitutes one in which a choice of law has been demonstrated with reasonable certainty or whether it is, in fact, one in which no choice of law has been made. [265] The obvious solution to this potential uncertainty is to include an express choice of law in the contract.

Partial choice of law

30-055

The first sentence of art.3(1) permits the parties to "select the law applicable to the whole or part only of the contract". The provision introduces into the Convention the notion of the splitting [266] of the contract, or severability [267] thereof, often described in the jargon of the conflict of laws as dépeçage, [268] whereby different aspects (or parts) of a contract may be governed by different laws. This notion was also recognised in the common law. [269] Its inclusion in the Convention was not, however, uncontroversial, [270] though ultimately it was accepted that permitting parties, in this way, to choose different laws to govern different parts of the contract or to make a choice of law in relation to one part and no choice in relation to another part or parts of the contract [271] could be justified as the logical conclusion of the principle of party autonomy in choice of law. [272]

30-056

The Giuliano-Lagarde Report provides some guidance as to how it is thought the provision is likely to operate. First, it appears that the contract must consist of several parts "which are separable and independent of each other from the legal and economic point of view". [273] Secondly, when the contract can be split in this sense:

> "… the choice must be logically consistent, i.e. it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions. For example, an 'index-linking clause' may be subject to a different law; on the other hand it is unlikely that repudiation of the contract for non-performance would be subjected to two different laws, one for the vendor and the other for the purchaser." [274]

If the chosen laws cannot be reconciled as a matter of logic, then neither choice of law is effective so that the law applicable to the contract will have to be determined according to art.4 of the Convention, as if the parties had made no choice of law at all. [275] Finally, where parties make a choice of law in relation to one part of the contract but no such choice in relation to the other part or parts, the law applicable to the latter part or parts will also have to be determined according to art.4 of the Convention. [276]

Changing the applicable law

30-057

At common law, it was uncertain whether the parties were free to change the law governing their contract and, if so, what law governed the question of whether they were able to make such a change. [277] Support, however, existed for the power to change, [278] such power to change being governed by English law as the law of the forum. [279] Article 3(2) of the Rome Convention provides a specific choice of law rule to deal with the question:

> "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties."

In this formulation, it is necessary to emphasise the proviso as to formal validity of the contract [280] and the need to protect the rights of third parties who may be adversely affected by a change in the applicable law. [281] Subject to these points, however, the provision gives the parties to the contract maximum freedom as to the time when the ultimate choice of law is to be made since it confers on the parties such a wide freedom to change the applicable law. [282] This freedom extends to changing the applicable law when that law was chosen by the parties and to cases where the governing law which is changed was initially applicable by virtue of art.4 of the Convention. [283] The choice of law which purports to vary or change the original governing law will, however, need to comply with the requirements of art.3(1) of the Convention. [284] The principle of the common law which requires that a contract have a governing law from its inception [285] is equally a principle of the Rome Convention which is unaffected by art.3(2). It would seem, however, that where the contract provides for two governing laws, the second to be applied if the event on which the application of the first depends is negatived, [286] then the applicable law can be said to be changed from the first to the second law, pursuant to art.3(2), when the relevant event comes about. [287]

Validity of choice of law

30-058

Article 3(4) refers the "existence and validity of the consent of the parties as to the choice of the applicable law" to the law which the parties purported to choose, i.e. the law which would be the chosen law if the choice of law were valid. [288] This so-called "bootstrap" rule would seem to enable one party to choose the law to govern consent to a choice of law. However, it does not provide an answer in cases where there are conflicting standard forms of contract each referring to different applicable laws (or where one standard form contains a choice of law and the other does not). In such cases, it has been suggested that resort should be had to the law which would govern the contract if no choice of law had been made, [289] i.e. art.4 of the Convention. In any event, art.4 will determine the governing law if, according to the "bootstrap" rule, there is no valid choice of law in the contract itself. [290]

Limitations upon the choice

30-059

In general, the provisions of the Rome Convention will, in practice, give the parties a comparatively wide freedom to choose the applicable law. [291] There are, however, some provisions which place specific limits upon this freedom. The tendency of these provisions, however, is to limit rather than invalidate in toto the choice of law. [292] These specific limitations are discussed in the following paragraphs.

Mandatory rules

30-060

The Convention refers to the concept of "mandatory rule" in various provisions which will be discussed in this chapter. [293] At this juncture, in connection with the power of the parties to choose the governing law, it is necessary to refer to art.3(3) which provides as follows:

> "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'." [294]

The purpose of this provision would seem, essentially, to be somewhat narrow. It is designed to prevent the evasion of mandatory rules, as defined in the Article, in relation to a contract which, but for a choice of foreign law, would be a purely domestic contract, by the simple device of including in the contract such a choice of foreign law. [295] Such a narrow situation does not appear to have arisen in any reported case at common law, [296] but the narrowness of art.3(3) is explicable by reference to the desire of the United Kingdom negotiators of the Convention to preserve the possibility of the parties choosing a foreign law although there was no other foreign element in the situation. [297] Such a possibility should only, thus, be restricted by the mandatory rules of the only other country which would otherwise be relevant to the situation. [298]

Connection with one country only

30-061

For art.3(3) to operate it is first necessary that all the elements (other than the choice of law and jurisdiction where present) relevant to the situation (not the contract) at the time of the choice are

connected with *one* country only. Accordingly, the provision will not apply where, although at first sight the contract appears to be connected to one country only, there are other elements relevant to the "situation" (which goes beyond the contract itself) which are connected with another country or other countries. Having said that, it is not easy to determine in the abstract whether an element is "relevant" to the "situation". Such a conclusion may be reached if a seller manufactures goods in one country which are then sold in another country under a contract entirely connected with the latter country apart from the choice of the law of yet a different country. It is by no means certain that this is a situation which would not call art.3(3) into play, though it is suggested that art.3(3) should not apply here. [299] Conversely, it is likely that art.3(3) will apply if, say, an English buyer enters into a contract with an English seller through the seller's website on the internet and the only foreign element (apart from a choice of foreign law) is the fact that the website is hosted by a third party in a foreign country, since the physical location of the server would not seem to be an element relevant to the situation. [300] Secondly, the time at which it must be ascertained whether the relevant elements are connected with one country only is the time at which the choice of law is made so that connections with other countries which materialise after that time must seemingly be ignored. Thirdly, although art.3(3) speaks literally of a choice of foreign law, it may apply, nonetheless, if parties to a contract have chosen English law if all the other elements relevant to the situation at the time of the choice are connected with a foreign country. Thus if all the other elements relevant to the situation are connected with Germany but the contract contains a choice of English law then the English court would have to apply German mandatory rules. [301] Likewise, if all the other elements relevant to the situation were connected with England, but the contract contains a choice of German law, the English court will have to apply any relevant English mandatory rules.

"Mandatory rules"

30-062

The core difficulty with art.3(3) is, however, the concept of "mandatory rules". By way of purported definition, the provision describes them as rules "which cannot be derogated from by contract, hereinafter called 'mandatory rules'". This wording might be thought to suggest that the concept of mandatory rules bears this meaning wherever these rules are referred to in other provisions of the Convention. Reference to such rules appears in art.5 (dealing with "certain consumer contracts"), [302] art.6 (dealing with "individual employment contracts"), [303] art.7(1) (which is of broader application) and art.7(2) (which concerns mandatory rules of the law of the forum [304]). Article 7(1) does not have the force of law in the United Kingdom [305] which renders unnecessary a detailed examination of its terms. However, comparison of arts 3(3) and 7(1) indicates that the Convention contemplates two kinds of mandatory rule. [306] Article 7(1) gives the courts of a country which implements the provision a discretion, when applying under the Convention the law of one country, to give effect to:

> "… the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract."

It appears from this formulation that to be applied under art.7(1), a rule must not only be mandatory in the sense of art.3(3) but must also bear an additional quality, namely that it must also be a rule which must be applied whatever the law applicable to the contract. Accordingly, art.3(3) is concerned with securing the application of mandatory rules of a domestic nature, i.e. rules which cannot be derogated from in a purely domestic transaction, even by a choice of foreign law, but which can be derogated from in a contract which bears an international character. [307] On the other hand, art.7(1) entails the possibility, for courts of states which implement the provision, to apply mandatory rules of a higher order, namely rules which apply whatever law is applicable to the contract even when the contract is of an international character. [308]

Rules not applicable if foreign law chosen

30-063

When art.3(3) applies, its effect is that the choice of foreign law "shall not … prejudice" application of relevant mandatory rules. On one view, this wording might suggest that a rule is mandatory for this purpose even if, according to the law of the country of which it forms part, it is possible to contract out of it by a choice of foreign law. It is submitted, however, that art.3(3) does not have this effect. If the country of whose law the rule forms part would not apply the rule in the circumstances of the case then the rule is inapplicable in the context of art.3(3). [309]

When is a rule mandatory?

30-064

Where an English court is faced with a problem involving art.3(3) and the possibility arises that foreign mandatory rules may apply, then whether a rule is mandatory for this purpose will depend on the view of it in the law of the country of which it forms part. Where it is alleged that an English mandatory rule is applicable, it will first be necessary to decide whether the particular rule in question does possess a mandatory character. A statute may give an express indication of whether, and to what extent, its provisions are mandatory, [310] but this is not always the case. [311] Further, it may be particularly difficult to determine whether any particular common law rule is mandatory. All that can be said with any degree of certainty is that, in the absence of any express indication, whether any given rule is mandatory will depend on the proper construction of the rule. [312]

Mandatory rules of English law

30-065

As far as English law is concerned, it is suggested that most rules possessing a mandatory character will be contained in legislation and these will also be rules which apply whatever the law applicable to the contract. [313] Accordingly, although art.3(3) is designed to secure application of "domestic" mandatory rules, and, a fortiori, internationally mandatory rules, there are unlikely to be many rules of domestic English contract law which will be treated as mandatory for the purposes of art.3(3). Thus, for example, it would be doubtful whether the requirement of consideration would be treated as mandatory, [314] though it is possible that the English rule against contractual penalties bears that character. [315] In contrast, statutory rules designed to give effect to important social policies, for example rules concerning consumer or employee protection, are more likely to be regarded as being of a mandatory nature. [316]

Chosen law governs other issues

30-066

Lastly, it must be emphasised that the application of art.3(3) does not strike down the choice of law in toto. The provision merely restricts application of the chosen law to the extent that the chosen law conflicts with relevant mandatory rules. To the extent that these mandatory rules are not prejudiced, the chosen law will continue to govern issues not covered by mandatory rules. [317]

Mandatory rules of the law of the forum

30-067

Article 7(2) of the Rome Convention provides that:

> "… nothing in this Convention shall restrict the application of the rules of the law of the

> forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract." [318]

As far as English courts are concerned, the provision will enable them to give effect to English rules of this nature so as to override the choice of law by the parties. [319] Rules envisaged as applicable through the principle are, notably, rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage. [320] To qualify for application, the relevant mandatory rules must be rules which cannot be derogated from even in an international transaction governed by a foreign law, as opposed to mandatory rules which are the subject-matter of art.3(3) where what are relevant are rules which are mandatory in a domestic context but which can, nevertheless, be avoided or restricted in application, by a choice of foreign law. [321] Whether any particular rule bears this overriding [322] character will, in the absence of any express indication in the rule itself, [323] depend on the proper construction of the relevant rule. [324]

Public policy [325]

30-068

Article 16 of the Rome Convention contains a general reservation to the application of a foreign law on the basis of public policy (*ordre public*):

> "The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum."

This provision, although of general application, may also be resorted to deny effect to a choice of law by the parties to the contract. [326] The expression "manifestly" is designed to indicate that there must be special grounds, of an exceptional nature, for the exclusion to apply. [327] It is also important to stress that the concept of public policy is not to be applied to a foreign law in the abstract. It may only be resorted to when a provision of foreign law, if applied to an actual case, would offend English public policy. [328] The terms of art.16 clearly warn against an ubiquitous application of the doctrine. [329]

"Community public policy"

30-069

According to the Giuliano-Lagarde Report public policy, for the purposes of art.16 of the Rome Convention, includes "Community public policy" and the concept of the public policy of the English forum must be understood as embracing this European dimension. [330] The European Court of Justice has held, in the context of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 [331] that fundamental principles of human rights, as contained in the European Convention on Human Rights, may inform the content of Community public policy, [332] a view which has been accepted in England. [333] The European Court has also indicated that it is for national courts to define the content of public policy, though the European Court may itself review the limits within which national courts may have recourse to that concept. [334]

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96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh,

Autonomy in International Contracts (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

220. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 30–062—30–103; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), pp.690–707; Fentiman, *International Commercial Litigation* 2nd edn (2015), pp.196 et seq.

221. Giuliano-Lagarde Report, pp.15–16. For the background, see Dicey, Morris and Collins, paras 32–062—32–064.

222. See below, paras 30-059 et seq.

223. "Convention shall apply … in any situation involving a choice between the *laws of different countries*" [emphasis added]; *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19, [2004] 1 W.L.R. 1784*; *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195*; *Musawi v RE International (UK) Ltd [2007] EWHC 2981 (Ch), [2008] 1 Lloyd's Rep. 326*.

224. *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] EWCA Civ 19*; *Musawi v RE International (UK) Ltd [2007] EWHC 2881 (Ch)*. See also *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 241 (Jewish law)*. cf. *Investment Dar Co KSCC v Blom Developments Bank Sal [2009] EWHC 3545 (Ch)*. *Dubai Islamic Bank PJSC v Energy Holdings BSC [2013] EWHC 3186 (Comm)*.

225. Dicey, Morris and Collins, para.32–081; Cheshire, North and Fawcett, pp.698–700.

226. Below, paras 30-070 et seq.

227. See below, para.30-048.

228. Dicey, Morris and Collins, Ch.9; Fentiman, *International Commercial Litigation* 2nd edn (2015), Ch.20; Fentiman, *Foreign Law in English Courts* (1998); Hartley (1996) 45 I.C.L.Q. 271; Fentiman (1992) 108 L.Q.R. 142.

229. Fentiman (1992) 108 L.Q.R. 142.

230. Giuliano-Lagarde Report, p.18.

231. Above, para.30-043.

232. Dicey, Morris and Collins, paras 9–011, 32–060, 32–065; Cheshire, North and Fawcett, p.694.

233. See Fentiman, *Foreign Law in English Courts* (1998), pp.87–96; Fentiman (1992) 108 L.Q.R. 142.

234. See, e.g. *Vita Food Products Inc v Unus Shipping Co Ltd [1939] A.C. 277*.

235. See, e.g. *The Torni [1932] P.78*.

236. Dicey, Morris and Collins, para.32–078.

237. cf. above, para.30-006.

238. *Oakley v Ultra Vehicle Design Ltd [2005] EWHC 872 (Ch), [2005] I.L.Pr. 747*. General words of incorporation may also be sufficient to incorporate a proper law clause: *Caresse Navigation Ltd*

v Office National De L'Electricite [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337.

239. Dicey, Morris and Collins, paras 32–091—32–099; Cheshire, North and Fawcett, pp.701–707; Kaye, pp.150–154; Morse (1982) 2 Ybk. Eur.L. 107, 117.

240. Above, paras 30-010 et seq.

241. See Morse (1982) 2 Ybk. Eur. L. 107, 177. See above, paras 30-010 et seq.

242. Giuliano-Lagarde Report, p.17. See *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380*; *Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 641*; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 1162, [2002] C.L.C. 533*; *Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All E.R. (Comm) 873*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370*; *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange [2010] EWHC 2279 (Comm), [2010] 2 C.L.C. 349*; *FR Lurssen Werft GmbH & Co KG v Halle [2010] EWCA Civ 587, [2011] 1 Lloyd's Rep. 265*; *Gard Marine & Energy Ltd v Tunnicliffe [2010] EWCA Civ 1052, [2011] I.L.Pr. 10*; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep. 664*; *Faraday Reinsurance Co Ltd v Howden North America Inc [2011] EWHC 2837 (Comm), affirmed [2012] EWCA Civ 980, [2012] 2 C.L.C*. See also *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd [2004] EWHC 1704 (Comm), [2004] I.L.Pr. 793*; *Sapporo Breweries Ltd v Lupofresh Ltd [2012] EWHC 2013 (QB), affirmed [2012] EWCA Civ 948, [2013] 2 Lloyd's Rep. 444*; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365, [2013] 1 Lloyd's Rep. 98*; *Caresse Navigation Ltd v Office National De L'Electricite [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337*.

243. Rome Convention art.18; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 825*; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 1162*; *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024*.

244. *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380*; *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68*; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 1162*; *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024*; Dicey, Morris and Collins, para.32–080.

245. See *Tiernan v Magen Insurance Co Ltd [2000] I.L.Pr. 517* in which it was said that where a reinsurance contract was placed on the Lloyd's market in the usual way, the contract was on a Lloyd's form and contained London market clauses, such factors were sufficient to demonstrate with reasonable certainty a choice of English law for the purposes of art.3 of the Rome Convention. See also *Ace Insurance SA-NV v Zurich Insurance Co [2000] 2 Lloyd's Rep. 423, affirmed [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep. 618*; *Evialis SA v S.I.A.T. [2003] EWHC 863 (Comm), [2003] 2 Lloyd's Rep. 377*; *Tonicstar Ltd v American Home Insurance Co [2004] EWHC 1234 (Comm), [2005] Lloyd's Rep. I.R. 32*; *Tryg Baltica International (UK) Ltd v Boston Compania De Seguros SA [2004] EWHC 1186 (Comm), [2005] Lloyd's Rep. I.R. 40*. cf. *Travelers Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd [2006] EWHC 2716 (Comm), [2007] Lloyd's Rep. I.R. 619*; *Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475*. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50, 62*, where the use of a Lloyd's policy of marine insurance and the absence of any indigenous code of marine insurance law in Kuwait, the other possible applicable law, was held, at common law, to point to an intention to choose English law. cf. *DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74*.

246. See *Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 641*; cf. *Burrows v Jamaica Private Power Co Ltd [2002] 1 All E.R. (Comm) 374*.

247. *Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All E.R. (Comm) 873*. cf. *Burrows v Jamaica Private Power Co Ltd [2002] 1 All E.R. (Comm) 374*; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019,*

[2002] C.L.C. 533 (deletion of English jurisdiction and choice of law clause from draft contract indicates that parties had made no choice as to the governing law). In *The Komninos S. [1991] 1 Lloyd's Rep. 371*, the jurisdiction clause referred to "British" courts. This was construed as choice of English courts and English law ("[w]hatever the constitutional niceties, it seems to me altogether far-fetched, in truth a lawyer's point, to suppose that the parties can have intended to embrace the Courts of British dependencies overseas" and "scarcely less far-fetched to suppose that the parties can have meant or intended to embrace" the courts of Scotland or Northern Ireland: 374, per Bingham L.J.).

248. cf. *The Stensby (1948) 64 T.L.R. 89*; *Keiner v Keiner [1952] 1 All E.R. 643*.

249. See *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019*. Contrast *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [1999] 2 All E.R. (Comm) 54* (fact that insurance policy was expressly governed by the law of Taiwan did not demonstrate with reasonable certainty an intention to choose Taiwanese law as the law applicable to an associated reinsurance policy which was made in England between English underwriters and brokers and thus was governed by English law). See too *Emeraldian Ltd Partnership v Wellmix Shipping Ltd [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993*; *FR Lurssen Werft GmbH v Halle [2010] EWCA Civ 587, [2011] 1 Lloyd's Rep. 265*; *Gard Marine & Energy Ltd v Tunnicliffe [2010] EWCA Civ 1052, [2011] I.L.Pr. 10*; *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange [2010] EWHC 2279 (Comm), [2010] 1 C.L.C. 349*; *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2011] EWHC 56 (Comm), [2011] 1 C.L.C. 125*; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep. 664*; *Faraday Reinsurance Co Ltd v Howden North American Inc [2011] EWHC 2837 (Comm), [2012] EWCA Civ 980, [2012] 2 C.L.C. 956*; *Aquavita International SA v Ashapura Minecham Ltd [2014] EWHC 2806 (Comm)*. And see *Raiffeisen Zentralbank Osterreich AG v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408*; *European Bank of Reconstruction & Development v Tekoglu [2004] EWHC 846 (Comm)*. cf. *Re United Rys of the Havana and Regla Warehouses [1960] Ch. 52, 94 (affirmed [1961] A.C. 1007)*. See also *Wahda Bank v Arab Bank Plc [1996] 1 Lloyd's Rep. 470*; cf. *Minories Finance Ltd v Afribank Nigeria Ltd [1995] 1 Lloyd's Rep. 134*; *Bank of Credit and Commerce Hong Kong Ltd v Sonali Bank [1995] 1 Lloyd's Rep. 277*; *Batstone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902, 1910*. And see *Alliance Bank JSC v Aquanta Co [2012] EWCA Civ 1588, [2013] 1 Lloyd's Rep. 175*.

250. Giuliano-Lagarde Report, p.17. cf. *Star Shipping SA v China National Foreign Trade Transportation Corp [1993] 2 Lloyd's Rep. 445*, and see Dicey, Morris and Collins, paras 32–096—32–098. The Report makes no reference to the relevance of an inference in favorem negotii.

251. Dicey, Morris and Collins, paras 32–096—32–097 referred to with approval in *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 381*. And see *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*. See also Morse, *The Enforcement of International Contracts in the European Union* (2004), pp.191, 204–206.

252. *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 381, 389–390*.

253. Common law decisions did not always stress this additional factor, though there are dicta which refer to it: see, e.g. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] A.C. 572, 579, 600, 605, 609*.

254. *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 381, 390*. In this case the parties had agreed to English arbitration by arbitrators conversant with shipping matters in respect of disputes arising out of a well-known English form of charterparty containing standard clauses and terminology with well-known meanings in English law. Although the parties were, respectively, German and Japanese, it was held that all of these factors pointed to an intention to choose English law for the purposes of art.3(1) of the Convention. The parties had chosen England as the place of arbitration because it was "neutral". Equally, they must have intended a "neutral" law to apply. The inference to be drawn, in favour of English law, will of course be stronger if the arbitration clause provides for arbitration in England before arbitrators of the London Maritime Arbitrators' Association, or before London brokers, or a London association or

exchange. And see *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*. cf. *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*; *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638, [2013] 1 W.L.R. 102*; *Navig8 Pte v Al-Riyadh Co for Vegetable Oil Industry [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep. 104*; *Caresse Navigation Ltd v Office National De L'Electricite [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337*.

255. Above, para.30-050.

256. Giuliano-Lagarde Report, p.17. The test is objective and it is not enough that the parties, if they had made a choice of law, would have chosen English law: *Lupofresh Ltd v Sapporo Breweries Ltd [2013] EWCA Civ 948, [2013] 2 Lloyd's Rep. 444*; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365, [2013] 1 Lloyd's Rep. 98*.

257. *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ. 206, [2003] I.L.Pr. 370*. See also *Travelers Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd [2006] EWHC 2716 (Comm), [2007] Lloyd's Rep. I.R. 619*; *Gard Marine & Energy Ltd v Tunnicliffe [2010] EWCA Civ 1052, [2011] I.L.Pr. 10*; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep. 664*; *Faraday Reinsurance Co Ltd v Howden North America Inc [2011] EWHC 2837 (Comm) [2012] EWCA Civ 980, [2012] 2 C.L.C. 956*.

258. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583*.

259. Giuliano-Lagarde Report, p.17.

260. Below, paras 30-070 et seq.

261. Giuliano-Lagarde Report, p.20.

262. Approved *Lupofresh Ltd v Sapporo Breweries Ltd [2013] EWCA Civ 948, [2013] 2 Lloyd's Rep. 444* cf. *FR Lurssen Werft GmbH & Co KG v Halle [2010] EWCA Civ 587, [2011] 1 Lloyd's Rep. 265*. See Dicey, Morris and Collins, para.32–091. This conclusion is supported by the fact that the common law approach is not accepted in other countries: see F.A. Mann (1973) 89 L.Q.R. 464. See also *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380, 382*. See too *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*; *British Arab Commercial Bank v Bank of Communications [2011] EWHC 281 (Comm)*; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365, [2013] 1 Lloyd's Rep. 98*.

263. See *Tiernan v Magen Insurance Co Ltd [2000] I.L.Pr. 517*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370*; *Tryg Baltica International (UK) Ltd v Boston Compania De Seguros SA [2004] EWHC 1186 (Comm), [2005] Lloyd's Rep. I.R. 40*; *Cadre SA V Astra Asigurari [2005] EWHC 2504 (Comm)*; *Travelers Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd [2006] EWHC 2716 (Comm), [2007] Lloyd's Rep. I.R. 619*; *Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475*. For the difficulty in the common law compare the views of Lords Diplock and Wilberforce in *Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] A.C. 50*.

264. Giuliano-Lagarde Report, p.17.

265. And compare the use of "reasonable certainty" in the English text with the phrase "de façon certaine" in the French text.

266. cf. *Kahler v Midland Bank [1950] A.C. 24, 42*, per Lord MacDermott.

267. Giuliano-Lagarde Report, p.17. See also *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*.

268. Giuliano-Lagarde Report, p.17. See generally, Dicey, Morris and Collins, paras 32–047—32–053; Cheshire, North and Fawcett, pp.690–692.

269. Above, para.30-015.

270. Giuliano-Lagarde Report, p.17.

271. Giuliano-Lagarde Report, pp.17, 20.

272. Giuliano-Lagarde Report, p.17. Contrast *CGU International Insurance Plc v Szabo [2002] 1 All E.R. (Comm) 83* (no logical or commercially sensible basis on which words of an insurance policy defining the insured can be "severed" so as to be interpreted by different laws and given possibly different meanings); *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370* at [20] ("neither the parties nor the Rome Convention could sensibly be taken to have intended to scissor up" a composite but single and probably multipartite insurance policy and to subject different aspects of it to different governing laws); *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd [2004] EWHC 1704 (Comm), [2004] I.L.Pr. 793*; *CGU International Insurance Plc v Astrazeneca Insurance Co Ltd [2005] EWHC 2755 (Comm), [2006] 1 C.L.C. 162*. For a sceptical view of dépecage, see the majority view of the Court of Appeal in *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557* and contrast the dissenting judgment of Waller L.J. cf. *XL Insurance v Owens Corning [2000] 2 Lloyd's Rep. 500*.

273. Giuliano-Lagarde Report, p.17.

274. Giuliano-Lagarde Report, p.17.

275. Giuliano-Lagarde Report, p.17.

276. Giuliano-Lagarde Report, p.17 and p.20.

277. Above, para.30-006.

278. Above, para.30-005.

279. See Dicey, Morris and Collins, paras 32–084—32–085.

280. See below, paras 30-313 et seq.

281. "The preservation of third-party rights appears to be entirely justified. In certain legal systems, a third-party may have acquired rights in consequence of a contract concluded between two other persons. These rights cannot be affected by a subsequent change in the choice of the applicable law": Giuliano-Lagarde Report, p.18.

282. Giuliano-Lagarde Report, p.18. See *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328 (Comm), [2013] 2 Lloyd's Rep. 121*.

283. Giuliano-Lagarde Report, p.18.

284. Giuliano-Lagarde Report, p.18. See *Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 81*. The power to change the governing law, pursuant to Rome Convention art.3(2), would seem to be distinct from any power to change which may exist, as a matter of procedure, in national law. An example in English law would be a case where parties do not rely on an applicable foreign law in their statements of case, in which case English law will apply: see Giuliano-Lagarde Report, p.18.

285. Above, para.30-005.

286. Above, para.30-005.

287. Dicey, Morris and Collins, paras 32–304 et seq.

288. Rome Convention arts 3(4), 8(1). See *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's*

Rep. 64; *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380*; *Kingspan Environmental Ltd v Borealis A/S [2012] EWHC 1147 (Comm)*, at [559]–[568]. cf. *Lupofresh Ltd v Sapporo Breweries Ltd [2013] EWCA Civ 948, [2013] 2 Lloyd's Rep. 444* at [29]. On alleged excess of authority see *Habas Sinai v VSC Steel Co Ltd [2013] EWHC 4701 (Comm), [2014] 1 Lloyd's Rep. 479*.

289. Dicey, Morris and Collins, para.32–103. For further consideration of the problems generated by conflicting standard terms, see *Ferguson Shipbuilders Ltd v Voith Hydro GmbH (2000) S.L.T. 229*; *SSL International Plc v TTL LIG Ltd [2011] EWHC 1695 (Ch), affirmed [2011] EWCA 1170*. Danneman, *Lex Mercatoria: Essays in Honour of Francis Reynolds* (2000), p.199.

290. Below, paras 30-070 et seq.

291. For discussion of the more stringent rules in relation to "certain consumer contracts" and "individual employment contracts", see below, paras 30-091 et seq.

292. A choice of law which is meaningless (cf. *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1970] A.C. 572*) must be regarded as invalid (or ineffective at any rate) under the Convention.

293. See Rome Convention art.5 (below, paras 30-091 et seq.); art.6 (below, paras 30-107 et seq.); art.7(1) (below, para.30-062); art.7(2) (below, para.30-065). For the position under the Rome I Regulation, see below, paras 30-179 et seq.

294. See Dicey, Morris and Collins, paras 32–070—32–073, 32–132—32–134; Cheshire, North and Fawcett, pp.695–697; Kaye, pp.159–168; Philip, *Contract Conflicts* (1982), p.81, at pp.95–97; Morse (1982) 2 Ybk. Eur. L. 107, 122–124.

295. ⚠See Giuliano-Lagarde Report, p.18. There is no need to show evasiveness or bad faith: *Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm) at [373], affirmed [2016] EWCA Civ 1267*.

296. Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp.377–378.

297. Giuliano-Lagarde Report, p.18.

298. ⚠Giuliano-Lagarde Report, p.18. The application of Rome Convention art.3(3) was considered but rejected in *Caterpillar Financial Services Corp v SNC Passion [2004] EWHC 569 (Comm), [2004] 2 Lloyd's Rep. 99*; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993*. See also *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd [2007] EWHC 1713, [2008] 1 Lloyd's Rep. 93* at [43]–[44]. In *Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm)* the judge confirmed that the test was "deliberately general" (at [390]) and that it was enough that the case involved "international elements" (at [411]). This decision was affirmed by the Court of Appeal *[2016] EWCA Civ 1267*. The starting point must be that art.3(3) was an exception to party autonomy and so should be construed narrowly. The only question was whether the situation is "purely domestic". The *Banco Santander Totta* case was followed in *Dexia Crediop SpA v Comune di Prato [2017] EWCA Civ 428*.

299. Lasok and Stone at pp.377–378; Dicey, Morris and Collins, para.32–071.

300. cf. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market ("Directive on electronic commerce") [2000] O.J. L178/1, Recital 19, not reproduced in the United Kingdom implementing legislation, the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013). See *Menashe Business Mercantile Ltd v William Hill Organisation Ltd [2002] EWCA Civ 1702, [2003] 1 W.L.R. 1462*.

301. See *Caterpillar Financial Services Corp v SNC Passion [2004] EWHC 569 (Comm), [2004] 2 Lloyd's Rep. 99*; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993*. Presumably, the English court would not apply these rules unless

they were pleaded and proved.

302. Below, paras 30-092 et seq.

303. Below, paras 30-107 et seq.

304. Below, para.30-065.

305. Contracts (Applicable Law) Act 1990 s.2(2). Article 22 of the Convention permits contracting states to make a reservation to the application of this provision, which power the UK exercised on signing the Convention. See *Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 90, 100*; cf. art.9 of the Rome I Regulation, below, paras 30-179 et seq.

306. Dicey, Morris and Collins, paras 32–132—32–143; Cheshire, North and Fawcett, pp.695–697, 726–738; Kaye at pp.160–163, 167–168, 239–267; Philip, *Contract Conflicts* (1982), Ch.5; Jackson, *Contract Conflicts* (1982), Ch.4; Diamond (1986) 216 Recueil des Cours IV 233, 288–298; North (1990) 220 Recueil des Cours I 3, 191–194; Morse (1982) 2 Ybk. Eur. L. 107, 121–124, 142–147.

307. This view is supported by reference to the French text of the Convention. Mandatory rules in art.3(3) are described in that text as "*dispositions imperatives*". Article 7 is, however, headed by the words "Lois de Police". The change in terminology reflects a distinction drawn in some Continental legal systems between the former class of laws from which derogation may be permitted in international contracts, and the latter class from which no derogation is permitted even in such contracts. In *Banco Santander Totta SA v Cia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm)* the judge said that in his view it was sufficient to take a rule outside the scope of art.3(3) if the rule could be disapplied by agreement between the parties whether ex ante or ex post (at [506]). Although the Court of Appeal upheld the decision of the judge that art.3(3) did not apply, so that any comments on this point were obiter, the majority disagreed and would have held that an ex post agreement not to rely on a provision did not mean that it was derogable and so outside art.3(3): *[2016] EWCA Civ 1267* (at [73]).

308. For the historical origins of this provision, see F.A. Mann, *Harmonisation of Private International Law by the EEC* (1978), pp.31–32; Dicey, Morris and Collins, para.32–141. cf. the definition in art.9(1) of the Rome I Regulation, below, paras 30-179. And see *Arblade (C-396/96)* and *Leloup (C-376/96) [1999] E.C.R. I–8453*.

309. Dicey, Morris and Collins, para.32–073; Morse (1982) 2 Ybk. Eur. L. 107, 123; cf. Cheshire, North and Fawcett, p.729.

310. See, e.g. Unfair Contract Terms Act 1977 s.27(2), above, para.30-008; see *Deutsche Bank Suisse SA v Khan [2013] EWHC 482 (Comm)*. See now *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161* (mandatory provisions in art.7(2) should be given a narrow meaning, having regard to art.9(1) and 9(2) of the Rome I Regulation); Unfair Terms in Consumer Contracts Regulations 1999 (above, para.30-008). Regulation 9 provides that the Regulations apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territories of the Member States (see below, para.38-322). Similarly, s.74 of the Consumer Rights Act 2015 provides that where a consumer contract has a close connection with the UK, a choice of law of a country or territory other than an EEA State as the contract's applicable law does not affect the application of Pt 2 of the Act's provisions governing unfair contact terms in consumer contracts (see para.38-386 below). A similar provision is found in s.32 of the 2015 Act rendering the terms of Ch.2 mandatory in similar circumstances (see para.38-494 below). A virtually identical formula is found in the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334, as amended by SI 2005/689) reg.25(5). These Regulations implement Directive 97/7 on the protection of consumers in respect of distance contracts [1997] O.J. L144/19. The same kind of provision is contained in Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 art.7(2). Article 7(2) is not reproduced in the United Kingdom implementing legislation contained in the Sale and Supply of Goods to Consumers Regulations 2002 (SI

2002/3045). For the difficulties created by this omission, see below, para.30-102. For similar anti-avoidance formulae, see Directive 2002/65 concerning the distance marketing of consumer financial services [2002] O.J. L271/16 art.12(2), implemented in Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.16(3). For discussion, see Benjamin's Sale of Goods, 9th edn (2014), paras 26-101—26-128. See also Knofel (1998) 47 I.C.L.Q. 439. cf. Late Payment of Commercial Debts (Interest) Act 1998 s.12(2). Like the Directive which they implement (Council Directive on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17) the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053, as amended by SI 1993/3173 and SI 1998/2868) contain no anti-avoidance provision. In *Ingmar GB Ltd v Eaton Leonard Technologies Inc (C-381/98) [2002] E.C.R. I–9305* the European Court of Justice held that arts 17 and 18 of the Directive (implemented in regs 17 and 18 of the Regulations), which guarantee certain rights to commercial agents after the termination of the agency contract, must be applied, as mandatory rules, where the commercial agent carries out his activities in a Member State even though the principal is established in a non-Member State and a clause in the contract stipulates that the contract is to be governed by the law of that non-Member State. See Dicey, Morris and Collins, paras 33-416 et seq.; Verhagen [2002] 51 I.C.L.Q. 135; Vol.II, para.31-108; *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch)*.

311. See, e.g. Consumer Credit Act 1974 s.75(1), considered in *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316*.

312. cf. *The Hollandia [1983] 1 A.C. 565*; *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48*; *Trafigura Beheer BV v Mediterranean Shipping Co SA [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep. 622*.

313. See *Primetrade AG v Ythan Ltd [2005] EWHC 2399 (Comm), [2006] 1 All E.R. 367* at [14]–[15] (Carriage of Goods by Sea Act 1992 is not mandatory and only applies if the law applicable to the contract is English law); Cheshire, North and Fawcett, pp.728–738.

314. cf. *Re Bonacina [1912] 2 Ch. 394*.

315. cf. *Godard v Gray (1870) L.R. 6 Q.B. 139*. See Dicey, Morris and Collins, para.32-134.

316. See below, paras 30-092 et seq., 30-107 et seq.

317. cf. *The Hollandia [1983] 1 A.C. 565*.

318. See Dicey, Morris and Collins, paras 32-135—32-137; Cheshire, North and Fawcett, pp.728–738. See also *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161*.

319. Some such rules may completely override the choice of law by the parties: see, e.g. Employment Rights Act 1996 s.204(1), below, paras 30-113 et seq. Others may only restrict the power of the parties to avoid the relevant rules by a mere choice of law where English law would be applicable if there were no such choice: see, e.g. Unfair Contract Terms Act 1977 s.27(2), above, para.30-008. Contrast Unfair Contract Terms Act 1977 s.27(1), which provides that the controls on exemption clauses contained in the Act do not apply where the law applicable to the contract is the law of any part of the United Kingdom only by choice of the parties and apart from that choice would be the law of some country outside the United Kingdom; see *Deutsche Bank Suisse SA v Khan [2013] EWHC 482 (Comm)*. If a contract (other than one excluded from the 1977 Act by s.26, as to which see *Ocean Chemical Transport Inc v Exnor Craggs [2001] 1 All E.R. (Comm) 519*; *Amiri Flight Authority v B.A.E. Systems Plc [2002] EWHC 2481 (Comm), [2003] 1 All E.R. (Comm) 1*; *Balmoral Group Ltd v Borealis (UK) Ltd [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629*; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2009] EWCA Civ 290, [2009] 1 Lloyd's Rep. 702* contains a choice of English law, but the contract would be governed by a foreign law were the rules contained in art.4 of the Convention (below, paras 30-070 et seq.) to be applied, the controls contained in the Act will not form part of the applicable law: *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L. 318*. And see Late Payment of Commercial Debts (Interest) Act 1998 s.12(1), discussed below, paras 30-342 et seq.

320. Giuliano-Lagarde Report, p.38. For a discussion of potentially mandatory rules contained in European Union legislation, see Knofel (1998) 47 I.C.L.Q. 439; Fallon and Francq, *Private Law in the International Arena: Liber Amicorum Kurt Siehr* (2000), p.155.

321. See above, paras 30-063 et seq. cf. Rome Convention art.7(1), which does not have the force of law in the UK: above, para.30-062.

322. See Dicey, Morris and Collins, paras 1-053—1-061.

323. Employment Rights Act 1996 s.204(1); Unfair Contract Terms Act 1977 s.27(2); Unfair Terms in Consumer Contracts Regulations 1994 reg.7; Consumer Protection (Distance Selling) Regulations 2000 reg.25(5). cf. Sale and Supply of Goods to Consumers Regulations 2002.

324. See *Ingmar GB Ltd v Eaton Leonard Technologies Inc (C-381/98) [2000] E.C.R. I–9305*; *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch)*; *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316*; *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*. cf. *Boissevain v Weil [1949] 1 K.B. 482*; *Corocraft Ltd v Pan American Airways Inc [1969] 1 Q.B. 616*; *The Hollandia [1982] Q.B. 872 (affirmed [1983] 1 A.C. 565)*; *English v Donnelly (1958) S.C. 494*, not followed in *Hong Kong Shanghai (Shipping) Ltd v The Cavalry [1987] H.K.L.R. 287*; *Chiron Corp v Organon Teknika (No.2) [1993] F.S.R. 567*; *Kaye's Leasing Corp Pty Ltd v Fletcher (1964) 116 C.L.R. 124*; *Att-Gen's Reference No.1 of 1987 (1987) 47 SAS.R. 152*; *DR Insurance Co v Central National Insurance Co [1996] 1 Lloyd's Rep. 74*. See also *Akai Pty Ltd v The People's Insurance Co Ltd (1996) 188 C.L.R. 418*; cf. *Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep. 80*. And see *Duncan v Motherwell Bridge and Engineering Co Ltd (1952) S.C. 131*, below, para.30-102.

325. Dicey, Morris and Collins, paras 32-230—32-241; Cheshire, North and Fawcett, pp.741–743; Kaye, pp.345–350.

326. See *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*.

327. *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*; Giuliano-Lagarde Report, p.38.

328. Giuliano-Lagarde Report, p.38.

329. Giuliano-Lagarde Report, p.38. See also *Re COLT Telecom Group Plc [2002] EWHC 2815 (Ch), [2003] B.P.I.R. 324*; *Tekron Resources Ltd v Guinea Investment Co Ltd [2003] EWHC 2577 (Comm), [2004] 2 Lloyd's Rep. 26*.

330. Giuliano-Lagarde Report, p.38. See generally, Peruzzetto, *The Enforcement of International Contracts in the European Union* (2004), pp.343–361; Meidanis (2005) E.L.Rev. 95.

331. Brussels Convention art.27(1). See Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters art.34(1) and Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) art.45(1)(a).

332. *Krombach v Bamberski (C-7/98) [2000] E.C.R. I–1935, [2001] Q.B. 709*; *Regie National des Usines Renault SA v Maxicar SpA (C-38/98) [2000] E.C.R. I–2973*. See also *Eurofood IFSC Ltd (C-341/04) [2006] E.C.R. I–3813, [2006] Ch. 508*; *Gambazzi v Daimlerchrysler Canada Inc (C-394/07) [2010] Q.B. 388*.

333. *Maronier v Larmer [2002] EWCA Civ 774, [2003] Q.B. 620*. cf. *Oppenheimer v Cattermole [1976] A.C. 249*; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883* at [15]–[29], [111]–[118], [135]–[149].

334. *Krombach v Bamberski (C-7/98) [2000] E.C.R. I–1935*; *Regie National des Usines Renault SA v Maxicar SpA (C-36/98) [2000] E.C.R. I–2973*. See also *Eurofood IFSC Ltd (C-341/04) [2006] E.C.R. I–3813*; *Gambazzi v Daimlerchrysler Canada Inc (C-394/07) [2010] Q.B. 388*.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(d) - Applicable Law in the Absence of Choice by the Parties [335]

General principle

30-070

Article 4(1) of the Rome Convention provides as follows:

> "To the extent that the law applicable to the contract has not been chosen in accordance with Art.3, the contract shall be governed by the law of the country with which it is most closely connected." [336]

This proposition has a familiar ring to a common lawyer, since it reflects the general principle of the common law which was developed to deal with cases where the parties had made no choice of law in the contract itself. [337] The first general point to note is that art.4 envisages the possibility of a contract being governed in part by a law chosen by the parties and as to another part, by the law applicable through art.4, since art.4 operates to "the extent that" the parties have made no choice of law in the contract itself. [338] This concept of dépeçage [339] is extended in the second sentence of art.4(1) where it is stated that a "severable part of the contract" which has a closer connection with another country may, "by way of exception", be governed by the law of that country though the remaining part or parts of the contract will be governed by the law of the country with which it is, or they are, most closely connected. The Giuliano-Lagarde Report emphasises that the words "by way of exception" are to be interpreted in the sense that the courts must have regard to severability as seldom as possible. [340] Further, in *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08)* [341] the European Court held that the rule providing for severance was exceptional in nature and could only be allowed where there were a number of parts of the contract which could be regarded as independent of each other, so that it was necessary to determine whether the object of a particular part was independent in relation to the rest of the contract. Accordingly, it is likely that the second sentence of art.4(1) will be of limited importance in practice. The second general point to note is the opinion expressed in the Giuliano-Lagarde Report that in order to determine the law of the country with which the contract is most closely connected, it is possible to take account of factors which appear after the conclusion of the contract. [342] The third general point to emphasise is that the law applicable under art.4 of the Convention must be the law of a country and cannot, say, be a non-national body of rules or a system of religious law. [343]

Presumptions

30-071

Article 4 departs from the common law in establishing in art.4(2)–(4) a series of presumptions which are to be used to identify the law of the country with which the contract is most closely connected. [344] Specific presumptions are established for certain contracts regarding immovables [345] and contracts for

the carriage of goods. [346] Article 4(2) establishes a controversial general presumption which will be applicable in cases involving most other types of contract. [347] However, these presumptions, where applicable, are to be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country than it is with the country whose law is indicated by application of the presumption, in which case the law applicable to the contract will be the law of the former country. [348] These various elements of art.4 are discussed in the following paragraphs.

The general presumption

30-072

Article 4(2) provides as follows:

> "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."

It can be seen that application of this rule involves, first, the identification of the "characteristic performance" of the contract in question. The law applicable to the contract will then, presumptively, be the law of the habitual residence or central administration (as the case may be) of the party who is to effect that characteristic performance. Secondly, however, if the contract is entered into in the course of the "characteristic performer's" trade or profession, then the applicable law will, presumptively, be the law of the characteristic performer's principal place of business. But where, thirdly, under the terms of the contract performance is to be effected through a place of business other than the characteristic performer's principal place of business, the applicable law will be, presumptively, the law of the country in which that other place of business is situated.

Characteristic performance [349]

30-073

The central concept of art.4(2) is that of the "characteristic performance" of a contract. The expression is not defined in the Convention itself and is a novel one for contracting states, [350] owing its origin to Swiss law. [351] Elucidation of the concept involves identifying specific contracts and then identifying in relation to each such contract the performance which characterises or typifies the relevant contract, in reality identifying the obligation which is peculiar to the contract under consideration. [352] The concept has been much criticised, [353] but is greeted with effusion in the Giuliano-Lagarde Report:

> "… this performance refers to the function which the legal relationship involved fulfils in the economic and social life of any country. The concept of characteristic performance essentially links the contract to the social and economic environment of which it forms part." [354]

Performance for which payment due "characteristic"

30-074

According to the Giuliano-Lagarde Report, which purports to provide guidance to the application of the doctrine, identifying characteristic performance causes no difficulty in the case of unilateral contracts. [355] Since in such contracts only one party agrees to confer a benefit on another, the characteristic performance will be that of the party agreeing to confer the benefit. [356] More controversy surrounds the analysis of reciprocal or bilateral contracts in which each party has to perform obligations. The Report points out that the performance of:

> "… one of the parties in a modern economy usually takes the form of the payment of money. This is not, of course, the characteristic performance of the contract. It is the performance for which payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security etc, which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction." [357]

This passage suggests that characteristic performance is a somewhat abstract notion: it is not the payment of money but performance for which such payment is due.

"Characteristic" performance not determinable

30-075

It does not follow from this that every contract not specifically dealt with in art.4(3) and (4) must have a characteristic performance. This is recognised in art.4(5) which provides that art.4(2) shall not apply if the characteristic performance cannot be determined. [358] One obvious example is that of a contract of barter or exchange. [359] It has been held that the characteristic performance of an agreement between two companies regulating the use of their respective trademarks cannot be determined. [360] And the same conclusion has been reached in the case of a contract for the warranty of authority. [361] It has also been suggested that certain kinds of joint venture agreements, [362] certain types of distributorship agreements, [363] and contracts between publisher and author [364] may similarly not have a particular performance which can be said to characterise them. Further, on occasion, the particular circumstances involved in a transaction may be such that it is not possible to determine the characteristic performance of the contract which is at the root of it. [365] In such cases the most closely connected law will have to be determined without the aid of any presumption. [366]

Specific applications

30-076

English courts have had some opportunities to consider the meaning of characteristic performance in the context of particular types of contracts. Drawing on the decisions and the passage from the Giuliano-Lagarde Report quoted above, the following conclusions may be reached. In a contract of sale, the characteristic performance is that of the seller [367]; in a contract which is in part for the sale of goods and in part for the supply of services, the characteristic performance is that of the seller/supplier [368]; in a contract for the supply of services, the characteristic performance is that of the supplier [369]; in a contract of hire, the characteristic performance will be that of the party who makes the item available for hire [370]; in a contract of insurance, [371] the characteristic performance is that of the insurer since he provides the service (cover) for which the insured pays his premium [372]; in a contract of reinsurance, the characteristic performance is that of the reinsurer [373]; in a contract between an insurance broker and an insurance company seeking reinsurance, the characteristic performance is that of the broker [374]; in a "bank to bank" contract under which one bank undertakes to make payment due under a separate agreement to another bank and to warrant that there has been no default under the loan agreement, the characteristic performance is that of the bank which makes the payment and provides the warranty [375]; in a contract between banker and customer, the characteristic performance is that of the bank [376]; in a letter of credit transaction, [377] separation of the various contracts involved reveals that the characteristic performance in the contract between the

issuing bank and the buyer is that of the bank, [378] the characteristic performance in the contract between the issuing bank and the confirming bank is that of the confirming bank, [379] the characteristic performance in the contract between the confirming bank and the beneficiary is that of the confirming bank, [380] while the characteristic performance in the contract between the issuing bank and the beneficiary is that of the issuing bank [381]; in a contract of loan, the characteristic performance is that of the lender (since he provides the "service" for which repayment is due) [382]; in a contract between lawyer and client, the characteristic performance is that of the lawyer [383]; in a contract between principal and agent, the characteristic performance is that of the agent [384]; in a distributorship contract intended to be fulfilled by individual contracts of sale and purchase, the characteristic performance is that of the vendor [385]; in a contract of guarantee, the characteristic performance is that of the guarantor [386]; in a contract of pledge, the characteristic performance is that of the pledgor (since he provides the relevant security) [387]; in a contract for storage (a bailment), the characteristic performance is that of the bailee [388]; in construction contracts, the characteristic performance is that of the builder [389]; in wagering contracts, the characteristic performance is that of the party who offers the facility for the placing of the wager [390]; in a contract whereby a person undertakes not to make or allow to be made any communication to any individual or company in the United Kingdom, the characteristic performance is that of the party who gives the undertaking [391]; in a contract of gift, the characteristic performance is that of the donor [392]; in a contract to provide an indemnity, the characteristic performance is that of the party who is to provide the indemnity [393]; in a compromise agreement, the characteristic performance is that of the party required to transfer assets [394]; in a contract whereby a bank grants an option to purchase promissory notes, the characteristic performance is that of the bank which is under an obligation to deliver the notes upon exercise of the option. [395]

Applicable law

30-077

Despite the central importance of characteristic performance, it is not the *place* of such performance which supplies the applicable law. Rather it is either the law of the country where the characteristic performer is habitually resident or, where the performer is a body corporate or unincorporate, its central administration. If the contract is, however, entered into in the course of the characteristic performer's trade or profession, then a different set of connecting factors becomes relevant: in such circumstances, the applicable law will be the law of the country where the characteristic performer's principal place of business is situated or where under the terms of the contract the (characteristic) performance is to be effected through a place of business other than the principal place of business, the applicable law will be that of the country in which that other place of business is situated. [396] These various connecting factors are not defined in the Convention. It is likely, however, that they will receive an autonomous interpretation so as to achieve uniformity in the application of art.4(2). [397] The meaning given to analogous expressions in English case law, discussed below, is, thus, not conclusive as to their meaning under the Convention. [398] The relevant time for identifying each of the relevant connecting factors is the time at which the contract is concluded.

Habitual residence

30-078

English case law has not attributed a consistent meaning to this concept. [399] Outside the context of commercial law, it has been said that habitual residence refers to a person's abode in a particular country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being whether of short or long duration. [400] It seems possible that, on this basis, a person may have more than one habitual residence, [401] in which case, it has been suggested, the relevant habitual residence should be that of the place having the closest relationship to the contract and its performance, having regard to the circumstances known to, or contemplated by, the parties at any time before or at the conclusion of the contract. [402] It is conceivable, also, that a person may be without any habitual residence. [403] In such circumstances it would seem that the applicable law will have to be determined without reference to the presumption in art.4(2). It is, however, possible that if the matter should ever reach the European Court, that the concept of habitual residence will be given an autonomous meaning derived from relevant areas of Community law and, perhaps, corresponding

principles referred to in this paragraph. [404]

Central administration

30-079

Where the characteristic performer is a body corporate or unincorporate, the law of the country where that party's "central administration" is situated may apply. This expression is not defined in the Convention, but, presumably, it will be given an autonomous meaning. [405] The nearest analogy in English law is the concept of "central management and control", as used, for example, in the Civil Jurisdiction and Judgments Act 1982, [406] but that Act also fails to supply a definition. Case law suggests that the question is one of fact, to be answered by an examination of the course of business or trading, reference to the place where the principal office is, to the place (or places) where the directors and shareholders reside (or meet) and where control over major policy decisions and business operations is actually exercised. [407]

Principal place of business and place of business

30-080

In the more likely situation where a body corporate or unincorporate, as characteristic performer, enters into a contract in the course of its trade or profession, the law of the place of central administration will be substituted by either the law of that party's principal place of business at the time of conclusion of the contract, or if that party's performance is to be effected through a place of business other than the principal place of business, the law of the country in which that other place of business is situated. "Principal place of business" and "place of business" are not defined in the Convention. While it is likely that each expression will be given an autonomous meaning, an analogy suggested by English law is with cases dealing with whether a corporation is present in England for the purpose of being subject to the in personam jurisdiction of the English courts. [408] These cases established that a place of business constitutes a place that is fixed and definite [409] and that the activity carried on at that place (which must be the business activity [410] of the corporation) must be carried on for a sufficient period of time for it to be characterised as a business. [411] Whether a particular place of business will be regarded as the "principal" such place will be a question of fact and degree.

Immovables [412]

30-081

Article 4(3) of the Rome Convention establishes a special presumption with regard to certain contracts concerning immovable property in the following terms:

> "Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated."

It is important to delimit the scope of this provision. It is, first, confined to contracts which have as their subject matter rights in, or rights to use, immovable property. Thus, for example, it will not apply to contracts for the construction or repair of immovable property since "the main purpose of these contracts is the construction or repair rather than the immovable property itself". [413] A contract for the construction or repair of an immovable will thus be subject to the presumption in art.4(2). [414] Secondly, art.4(3) is concerned only with the contractual aspects of a transaction relating to immovables. The proprietary aspects will be subject to common law rules, since the Convention does not apply to proprietary matters. [415]

Severance

30-082

Since the presumption in favour of the lex situs applies "to the extent that" the contract has as its subject matter a right in or a right to use immovable property, a severable part of the contract which has that as its subject matter may be governed by art.4(3), whereas the remaining part or parts of the contract may be governed by art.4(2). In view, however, of the view expressed in the Giuliano-Lagarde Report that severance should be resorted to on only the rarest of occasions, [416] cases of this kind are likely to be rare and may, in any event where appropriate, be the kind of cases in which a court will conclude that the presumption is rebutted, pursuant to art.4(5).

Types of contracts for immovable

30-083

Article 4(3) clearly applies, inter alios, to contracts to sell land [417]; agreements to rent premises [418]; and some timeshare arrangements. [419] It also seems to apply to short term tenancies and holiday lettings of apartments. [420]

Contracts for the carriage of goods [421]

30-084

> "A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods." [422]

The effect of this provision is that a contract for the carriage of goods (by whatever mode of transport) will be presumed to be most closely connected with the country in which the principal place of business of the carrier, [423] at the time of the conclusion of the contract, is situated, if that country is also the country in which either the place of loading, [424] or the place of discharge, [425] or the principal place of business of the consignor [426] is situated. Since the provision explicitly excludes the application of art.4(2) to contracts for the carriage of goods, where there is no relevant grouping of the factors identified in art.4(4) the applicable law will have to be determined without the aid of any presumption. [427] A contract for the carriage of persons will, however, be subject to the presumption in art.4(2) [428] and, thus, it is conceivable that where there is a mixed contract for the carriage of goods and persons, the contract may have two different applicable laws. [429] If the contract is "severed", so that a part covers carriage of goods and a different part relates to different (independent) obligations, only the former part will be subject to art.4(4). [430]

"Other contracts" involving carriage of goods

30-085

! It is not clear, however, what is to be included in the expression "contract for the carriage of goods". While art.4(4) clearly states that a single voyage charter-party is to be treated as such a contract, less

clarity surrounds the “other contracts the main purpose of which is the carriage of goods”. It is likely (though the matter is controversial) that consecutive voyage charter-parties will fall within the provision, [431] as will contracts of carriage evidenced in a bill of lading, [432] though demise charters will not. [433] ❗ The principle seems to be that art.4(4) will apply to contracts the main purpose of which is the carriage of goods. Thus, where the owner of a ship’s obligations relate not merely to making available the means of transport, but also the carriage of goods proper, the contract in question falls within art.4(4), where its main purpose is the carriage of goods. [434]

International conventions

30-086

It is important to remember that many aspects of international transport are governed by international conventions, [435] which will take precedence over the provisions of the Rome Convention when they are applicable. [436]

Non-application of the presumptions

30-087

Article 4(5) of the Rome Convention provides that the presumption in art.4(2) shall not apply if the characteristic performance cannot be determined and that each of the three presumptions shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country than it is with the country indicated by the presumption.

Characteristic performance cannot be determined

30-088

Where it is concluded that the contract is one for which the characteristic performance cannot be determined, [437] then the law of the country with which the contract is most closely connected will have to be determined without resort to any presumption. In such circumstances, the court will have regard to all the facts and circumstances surrounding the contract and its making: relevant facts and circumstances will be those treated as relevant in cases decided at common law. [438]

Rebutting the presumptions [439]

30-089

❗ Each presumption set out in art.4 may be rebutted if it appears from the circumstances as a whole that the contract is more closely connected with another country than it is with the country whose law is indicated as applicable by virtue of the presumption. [440] The critical question, however, is as to the strength that will be attributed to the presumptions. The Giuliano-Lagarde Report states that paras (2)–(4) of art.4 are “only rebuttable presumptions” [441] and that art.4(5) “obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumption”, [442] this being “the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract”, [443] but such remarks are not particularly revealing as to the weight to be attributed to the presumptions. The relationship between para.(2) and para.(5) of art.4 has proved to be controversial and has given rise to difficulty. [444] Early decisions expressed different and polarised views. Thus in England it was said, obiter, that art.4(5) means that the presumption is “displaced if the court concludes that it is not appropriate in the circumstances of any given case. This, formally, makes the presumption very weak”. [445] Conversely, the Dutch Hoge Raad decided that art.4(5) of the Rome Convention should be applied restrictively. On this view, the presumption in art.4(2) is the “main rule” which rule should only be disregarded if, in the special circumstances of the case, the place of business of the party who is to effect the characteristic

performance “has no real significance as a connecting factor”. [446] Further examination in English decisions reveals, however, support for the following propositions. First, the presumption in art.4(2) must be given “due weight”. [447] Secondly:

> “… unless Art.4(2) is regarded as a rule of thumb which requires a preponderance of connecting factors to be established before the presumption can be disregarded, the intention of the Convention is likely to be subverted.” [448]

This is because the presumptions were introduced into the Convention with a view to injecting a degree of certainty into the search for the law of the country with which the contract is most closely connected, [449] and it also therefore follows that the presumptions are not limited in effect to cases where all the other factors in the case point to an equal balance between two or more countries. [450] Thirdly, it is thus possible to state that the court will apply the presumptively applicable law unless satisfied on a balance of probabilities that the contract, having regard to the circumstances as a whole, is clearly more closely connected with another country [451] and that the burden of proving this lies on the party who asserts it. [452] Relevant circumstances are likely to include those treated as pointing to a close connection in cases decided at common law [453] and, additionally, factors which supervene after the conclusion of the contract. [454] Fourthly, however, the application of art.4(5) will be very much conditioned by the circumstances of particular cases and general statements are of limited value. [455] There may, in some cases, be a tendency to regard the presumption as most easily rebutted in a case where the characteristic performance is to be effected in a country other than the country whose law is indicated by the presumption. [456] In *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08)*, [457] the European Court decided, in a somewhat literal and not entirely helpful interpretation, that “where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in art.4(2)–4(4) of the Convention it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected”. [458] In *Haeger & Schmidt GmbH v MMA IARD* [459] the CJEU provided further guidance and held that in order to decide whether to apply art.4(5) the national court must compare the connections existing between the contract and, on the one hand, the country in which the party who effects the characteristic performance has his or its habitual residence at the time of the conclusion of the contract, and, on the other hand, another country with which the contract is closely connected. The CJEU continued by stating that the court:

> “… must conduct an overall assessment of all the objective factors characterising the contractual relationship and determine which of these factors are, in its view, most significant … Significant connecting factors to be taken into account include the presence of a close connection between the contract in question with another contract or contracts which are, as the case may be, part of the same chain of contracts, and the place of delivery of the goods.” [460]

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30-090

The interpretation of the European Court, as described above, leaves much 30–090 scope to national courts in the interpretation of the relationship between art.4(2) and 4(5) of the Convention. Such, in some circumstances, may include a tendency to regard the presumption as most easily rebutted in a case where the characteristic performance is to be effected in a country other than the country whose law is indicated by the presumption, particularly in the context of a letter of credit transaction. [461] Here the operation of the presumption in art.4(2) will almost invariably mean that the contract between the issuing bank and the correspondent bank and that between the correspondent bank and the beneficiary will be governed by the law of the country in which the correspondent bank’s principal place of business, or place of business, as the case may be, is situated. [462] However, in relation to the contract between the issuing bank and the beneficiary, the operation of the presumption would lead to application of the law of the country in which the issuing bank’s principal place of business, or place of

business, as the case may be, is situated, which places will not coincide with those of the correspondent bank. [463] In such a case:

> "… application of Art.4(2) would lead to an irregular and subjective position where the governing law of a letter of credit would vary according to whether one was looking at the position of the confirming bank or the issuing bank. It is of great importance to both beneficiaries and banks concerned in the issue and operation of letters of credit that there should be clarity and simplicity in such matters," [464]

which clarity and simplicity could be achieved by invoking art.4(5) to secure application of the law of the country where the obligation to pay against presentation of conforming documents was to be performed. [465] This may not, of course, be an inevitable outcome in every type of case in view of the fact that the presumption focuses on the *place of business*, etc., of the characteristic performer rather than on *the place of* the characteristic performance. [466]

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96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh, *Autonomy in International Contracts* (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

335. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 32-108 et seq., 33-113 et seq., 33–150 et seq., 33–217 et seq., 33–229 et seq.; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), pp.707–722; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.171–202; Fentiman, *International Litigation* 2nd edn (2015), pp.207 et seq.; Hill (2004) 53 I.C.L.Q. 325; Atrill (2004) I.C.L.Q. 549. As to consumer contracts and employment contracts, see below, paras 30-092 et seq. As to the position under the Rome I Regulation, see below, paras 30-169 et seq.

336. For the meaning of "law of a country", see below.

337. See above, para.30-012.

338. Giuliano-Lagarde Report, p.20.

339. cf. above, para.30-015.

340. Giuliano-Lagarde Report, p.23. See also *Governor & Company of Bank of Scotland of the Mound v Butcher Unreported July 28, 1998 CA*; *Centrax Ltd v Citibank NA [1999] 1 All E.R. (Comm) 557*; *XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep. 500*; *CGU International Plc v Szabo [2002] 1 All E.R. (Comm) 83*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.LPr. 370*; *Travelers Casualty & Surety Co of Europe Ltd v Sun Life Assurance Co of Canada (UK) Ltd [2004] EWHC 1704 (Comm), [2004] I.L.Pr. 793*; *CGU International Insurance Plc v Astrazeneca Insurance Co Ltd [2005] EWHC 2755 (Comm), [2006] 1 C.L.C. 162*.

341. *[2010] Q.B. 411* at [41]–[48].

342. Giuliano-Lagarde Report, p.23. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

343. *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195*.

344. See generally on art.4 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. Presumptions, once fashionable in English law, were eventually abandoned: *Coast Lines Ltd v Hudig & Veder Chartering NV [1972] 2 Q.B. 34*.

345. Rome Convention art.4(3). See below, paras 30-081 et seq.

346. Rome Convention art.4(4). See below, paras 30-084 et seq.

347. See below, paras 30-072 et seq.

348. Rome Convention art.4(5). See below, paras 30-089 et seq.

349. See generally *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. Dicey, Morris and Collins, paras 32-113—32-117; Cheshire, North and Fawcett, pp.711–716; Kaye, pp.178–183; Schultsz, *Contract Conflicts* (1982), p.185; Hill (2004) 53 I.C.L.Q. 325; Atrill (2004) 53 I.C.L.Q. 349; Diamond (1986) 216 Recueil des Cours IV 233, 273–276; Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp.361–364; Morse (1982) 2 Ybk. Eur. L. 107, 126–131; Lipstein (1981) 3 Northwestern Journal Int'l. L. & Bus. 402; Jessurun d'Oliveira (1977) 25 Am. J. Comp. L. 303.

350. cf. Giuliano-Lagarde Report, p.20.

351. See Lipstein (1981) 3 Northwestern Journal Int'l L. & Bus. 402; Dicey, Morris and Collins, para.32-124.

352. Giuliano-Lagarde Report, p.20.

353. e.g. Lasok and Stone; Morse (1982) 2 Ybk. Eur. L. 107; Jessurun d'Oliveira (1977) 25 Am. J. Comp. L. 303.

354. Giuliano-Lagarde Report, p.20. See also *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [44] of the Opinion.

355. Giuliano-Lagarde Report, p.20. See Maher (2002) Jur. Rev. 317.

356. See *Waldweise Stiftung v Lewis [2004] EWHC 2589 (Ch)* (gift); *Ophthalmic Innovations International (United Kingdom) Ltd v Ophthalmic Innovations International Inc [2004] EWHC 2948 (Ch), [2005] I.L.Pr. 109* (indemnification agreement); *Ark Therapeutics Plc v True North Capital Ltd [2005] EWHC 1585 (Comm), [2006] 1 All E.R. (Comm) 138* (letter of intent). cf. *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195* (compromise agreement); *Standard Bank Plc v Agrinvest International Inc [2007] EWHC 2595 (Comm), [2008] 1 Lloyd's Rep. 532* (option agreement). See Maher (2002) Jur. Rev. 317; Kaye at p.181.

357. Giuliano-Lagarde Report, p.20. See also *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [45]–[46] of the Opinion.

358. See, further, below, paras 30-088 et seq.

359. See, e.g. Dicey, Morris and Collins, para.32–124.

360. *Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch), [2004] I.L.Pr. 597*.

361. *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265*.

362. Kaye, p.182.

363. See Collins, *Contract Conflicts* (1982), pp.206–210; Dicey, Morris and Collins, para.32–117. cf. *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2002] C.L.C. 352* (characteristic performance of a distributorship agreement intended to be fulfilled by individual contracts of sale and purchase is that of the vendor).

364. Kaye, p.182.

365. See *Governor and Company of the Bank of Scotland of the Mound v Butcher Unreported July 28, 1998 CA* (impossible to determine characteristic performance of a personal guarantee signed by two guarantors, one of whom was resident in Scotland and the other in England). Normally the characteristic performance of a guarantee will be that of the guarantor: see *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019, [2002] C.L.C. 533*; *Intercontainer Interfrigo SC (ICF) v Balkenende BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [68] of the Opinion.

366. See *Intercontainer Interfrigo SC (ICF) v Balkenende BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [68] of the Opinion.

367. See *W. H. Martin Ltd v Feldbinder Spezialefahrzeugwerke GmbH [1998] I.L.Pr. 794*; *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2002] C.L.C. 352*; *ISS Machinery Services Ltd v Aeolian Shipping SA [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 641*; *Iran Continental Shelf Oil Co v IRI International Oil Corp [2002] EWCA Civ 1024, [2004] 2 C.L.C. 696*; *Ferguson Shipbuilders Ltd v Voith Hydro GmbH (2000) S.L.T. 229*; *Societe Nouvelle des Papeteries de l'Aa SA v BV Machinefabriek BOA (1992) NJ 750* (Dutch Hoge Raad), discussed by Struycken [1996] LMCLQ 18; Dicey, Morris and Collins, para.32-116; Benjamin's Sale of Goods, 9th edn (2014), para.26-065. By analogy, the supplier of bunkers in the type of sui generis supply contract identified by the Supreme Court in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans) [2016] UKSC 23* (see para.44-174A) will also be the characteristic performer.

368. *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024*.

369. *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH [2001] 1 W.L.R. 1754* ; *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 WLR 3059*; *Pablo Star Ltd v Emirates Integrated Telecommunications Co PJSC [2009] EWCA Civ 1044*; *Chalbury McCouat International Ltd v PG Foils Ltd [2010] EWHC 2050 (TCC), [2010] 2 C.L.C. 181*; *SSL International Plc v TTK LIG Ltd [2011] EWHC 1695 (Ch) affirmed [2011] EWCA Civ 1170*. *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*.

370. Dicey, Morris and Collins, para.33-114.

371. But see above, para.30-044.

372. *Crédit Lyonnais v New Hampshire Insurance Co [1997] 2 Lloyd's Rep. 1*; *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370*; Giuliano-Lagarde Report, p.20; Dicey, Morris and Collins, para.33-150. An insurance contract may be a consumer contract: see below, paras 30-092 et seq.

373. *Tiernan v Magen Insurance Co Ltd; Tonicstar Ltd v American Home Insurance Co [2004] EWHC 1234 (Comm), [2005] Lloyd's Rep. I.R. 32*; *Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475*.

374. *HIB Ltd v Guardian Insurance Co Ltd [1997] 1 Lloyd's Rep. 412*.

375. *Raiffeisen Zentralbank Osterreich AG v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408*.

376. *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc [1998] 2 All E.R. 821*; Giuliano-Lagarde Report, p.20; Dicey, Morris and Collins, para.33-305, with a full discussion of contracts between banker and customer, paras 33-298 et seq. A contract between a bank and a customer may be a consumer contract.

377. See Morse [1994] L.M.C.L.Q. 560; Davenport and Smith [1994] 9 Butterworths Journal of International Banking and Financial Law 3.

378. This follows from the authority cited in n.377, above, since the provision of the credit is a service for the customer (buyer). See also *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87, 92*.

379. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*, treating the contract as one of agency in which the characteristic performance was the adding of the confirmation to the credit. The same result is likely to ensue if the correspondent bank does not add its confirmation to the credit, since the contract is one of agency and the characteristic performance in such a contract is that of the agent: *[1994] 2 Lloyd's Rep. 87, 93*; *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd [2005] EWCA Civ 235, [2007] 2 Lloyd's Rep. 72*; Giuliano-Lagarde Report, p.20. See also *Bank of Credit and Commerce Hong Kong Ltd v Sonali Bank [1995] 1 Lloyd's Rep. 223*; *Batstone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902, 1910*. cf. *European Asian Bank AG v Punjab and Sind Bank [1981] 2 Lloyd's Rep. 651*; *Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm), [2006] 2 Lloyd's Rep. 44*.

380. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd [2005] EWCA Civ 235, [2007] 2 Lloyd's Rep. 72*; *Trafigura Beheer BV v Kookmin Bank Co [2005] EWHC 2350 (Comm), [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep. 455*. This is because either the bank is providing a banking service (Giuliano-Lagarde Report, p.20) or because it is of the essence of a letter of credit that the confirming bank undertakes to pay the beneficiary (seller) on presentation of conforming documents (*[1994] 2 Lloyd's Rep. 87, 92*). See also *Bank of Credit and Commerce Hong Kong Ltd v Sonali Bank [1995] 1 Lloyd's Rep. 223*; *Batstone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902, 1910*.

381. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; *Trafigura Beheer BV v Kookmin Bank Co [2005] EWHC 2350 (Comm), [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep. 455*; *Sax v Tchernoy [2014] EWHC 795 (Comm)*. It is highly likely that the presumptively applicable law (that of the country in which the issuing bank's principal place of business is situated) will be displaced, pursuant to art.4(5), in favour of the law of the country where payment is to be made against presentation of documents, since this is the country where the obligations of the issuing bank towards the beneficiary under the credit are to be performed; see below, paras 30-089 et seq.

382. *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L. 318* (bank loan); *Atlantic Telecom GmbH, Noter (2004) S.L.T. 1031*; Kaye, p.182. This conclusion may be questionable: Morse (1982) 2 Ybk. Eur. L. 107, 128. A loan may be a consumer contract: see below, paras 30-092 et seq.

383. Dicey, Morris and Collins, para.32-117, citing a French decision reported in Clunet (1984) p.583. Such a contract may be a consumer contract: see below, paras 30-092 et seq.

384. *Albon v Naza Motor Trading Sdn Bhd [1007] EWHC 9 (Ch), [2007] 1 W.L.R. 2489*; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365*; Giuliano-Lagarde Report, p.209; Dicey, Morris and Collins, para.33-410. But cf. above, distributorship agreements. Such contracts may be consumer contracts: see below, paras 30-092 et seq.

385. *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2002] C.L.C. 352*.

386. *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019, [2002] C.L.C. 533*; *Commercial Marine Piling Ltd v Pierse Contracting Ltd [2009] EWHC 2241 (TCC), [2009] 2 Lloyd's Rep. 659*; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd [2010] EWHC 1411 (Comm), [2010] 1 C.L.C. 993*; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281, [2011] 1 Lloyd's Rep. 664*. See also *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265*. Giuliano-Lagarde Report, p.20. Such a contract may be a consumer contract: see below, paras 30-092 et seq.

387. Dicey, Morris and Collins, para.33-115, where it is pointed out that this conclusion is not uncontroversial. Such a contract may be a consumer contract: see below, paras 30-092 et seq.

388. cf. Swiss Private International Law Act 1987 art.117(3)(d). Such a contract may be a consumer contract: see below, paras 30-092 et seq.

389. Dicey, Morris and Collins, para.33-228. See *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059*; *Chalbury McCouat International Ltd v PG Foils Ltd [2010] EWHC 2050 (TCC), [2011] 1 Lloyd's Rep. 23*. Such a contract may be a consumer contract: see below, paras 30-092 et seq.

390. *Hillside (New Media) Ltd v Baasland [2010] EWHC 3336, [2010] 2 C.L.C. 986*. Dicey, Morris and Collins, para.33-454. Such a contract may be a consumer contract: see below, paras 30-092 et seq.

391. *Bergmann v Kenburn Waste Management Ltd [2002] EWCA Civ 98, [2002] F.S.R. 45*.

392. *Waldweise Stiftung v Lewis [2004] EWHC 2589 (Ch)*; *Gorjat v Gorjat [2010] EWHC 1537 (Ch)*.

393. *Ophthalmic Innovations International (United Kingdom) Ltd v Ophthalmic Innovations International Inc [2004] EWHC 2948 (Ch), [2005] I.L.Pr. 109*.

394. *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195*. See also *Ark Therapeutics Plc v True North Capital Ltd [2005] EWHC 1585 (Comm), [2006] 1 All E.R. (Comm) 138* (letter of intent).

395. *Standard Bank Plc v Agrinvest International Inc [2007] EWHC 2595 (Comm), [2008] 1 Lloyd's Rep. 532*.

396. Application of the presumption would point to the law of the characteristic performer's principal place of business unless *under the terms of the contract* performance must be effected through a place of business other than the principal place of business: *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059*. cf. *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024, [2004] 2 C.L.C. 696*; *Trafigura Beheer BV v Kookmin Bank Co [2005] EWHC 2350 (Comm), [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep. 455*.

397. See *Raiffeisen Zentralbank Osterreich AG v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408*.

398. Dicey, Morris and Collins, para.32-120. And see *Swaddling v Administration Officer (C-90/97) [1999] E.C.R. I–1075* (consideration of meaning of habitual residence in the context of Council Regulation 1408/71 on the application of social security schemes to employed persons, to selfemployed persons and to members of their families moving within the Community [1971] O.J. L149/366, as amended).

399. Dicey Morris, and Collins, paras 6-125—6-130. As to the definition in art.19 of the Rome I Regulation, see below, paras 30-163 et seq.

400. *Kapur v Kapur [1984] F.L.R. 920*; *R. v Barnet LBC Ex p Nilish Shah [1984] 2 A.C. 309*; *Mark v Mark [2005] UKHL 42, [2006] 1 A.C. 98*. See also *Re M. (Minors) (Residence Order: Jurisdiction) [1993] 1 F.L.R. 495*; *A v A (Child Abduction) [1993] 2 F.L.R. 225*; *D. v D. (Custody: Jurisdiction) [1996] 1 F.L.R. 574*; *Re S. (A Minor) (Custody: Habitual Residence) [1998] A.C. 750*; *Nessa v Chief Adjudication Officer [1999] 1 W.L.R. 1937*.

401. See *Ikimi v Ikimi [2001] EWCA Civ 873, [2002] Fam. 72* (where spouses had consistently maintained two matrimonial homes in different jurisdictions, they could be habitually resident in both jurisdictions at the same time for the purposes of jurisdiction to grant a divorce under Domicile and Matrimonial Proceedings Act 1973 s.5(2)); *Mark v Mark [2005] UKHL 42*. See also *Leyvand v Barasch, The Times, March 23, 2000* (possibility of ordinary residence in two countries, in the context of security for costs). cf. *Cameron v Cameron (1996) S.L.T. 306*

(person can only have one habitual residence, a view which is probably confined to the context of the Hague Convention on the Civil Aspects of Child Abduction 1980, implemented in Child Abduction and Custody Act 1985 Pt I: see Dicey, Morris and Collins, para.6-129).

402. cf. art.10(a) of the United Nations Convention on the International Sale of Goods 1980.

403. *Hack v Hack (1976) 6 Fam. Law 177*; *Mark v Mark [2005] UKHL 42, [2006] 1 A.C. 98*; but cf. *Re J. (A Minor)(Abduction) [1990] 2 A.C. 562*.

404. See below, paras 30-163 et seq.

405. cf. Cheshire, North and Fawcett, p.716. The concept of "central administration" is adopted as one of the definitions of "domicile" in Council Regulation 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters art.60(1)(b), but the Regulation does not elaborate on its meaning. See also art.19(1) of the Rome I Regulation, below, para.30-164.

406. s.42.

407. cf. *The Rewia [1991] 2 Lloyd's Rep. 325*; *Alberta Inc v Katanga Mining Ltd [2008] EWHC 2679 (Comm), [2009] I.L.Pr. 175*. See also *The Deichland [1990] Q.B. 361*; *Re Little Olympian Each Ways Ltd [1995] 1 W.L.R. 560*; Dicey, Morris and Collins, paras 30-005—30-006. The "central administration" of a company for the purposes of art.60(1)(b), which was part of a group of companies, was the place where, through its relevant organs according to its own constitutional provisions, it took the essential decisions of its entrepreneurial management, not the place of business of the parent company of the group: *Young v Anglo Amercian South Africa Ltd [2014] EWCA Civ 1130, [2014] 2 Lloyd's Rep. 606*.

408. Dicey, Morris and Collins, paras 11-115—11-125. See *Adams v Cape Industries Plc [1990] Ch. 433, 523–531*.

409. *Saccharin Corp Ltd v Chemische Fabrik AG [1911] 2 K.B. 516*; *The Theodothos [1977] 2 Lloyd's Rep. 428*.

410. See *South India Shipping Corp Ltd v Export-Import Bank of Korea [1985] 1 W.L.R. 585*.

411. *Saccharin Corp Ltd v Chemische Fabrik AG [1911] 2 K.B. 516*; *South India Shipping Corp Ltd v Export-Import Bank of Korea [1985] 1 W.L.R. 585*; *Okura & Co Ltd v Forsbacka Jernverks A/B [1914] 1 K.B. 715*; *Domansa v Derin Shipping and Trading Co Inc [2001] 1 Lloyd's Rep. 362*. In the case of a bank account, performance, i.e. repayment of the sum deposited, is to be effected through the branch where the relevant account is kept and the country in which the branch is situated will be the relevant place of business: *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc [1998] 2 All E.R. 821*.

412. Dicey, Morris and Collins, paras 33-224—33-247. As to the Rome I Regulation, see below, para.30-192.

413. Giuliano-Lagarde Report, p.21. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [49]–[51] of the Opinion.

414. See *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059* .

415. Giuliano-Lagarde Report, p.10. The distinction between a contract to transfer land and an actual transfer of land, may, however, become blurred: see *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 2 Ch. 502, 512, 515, 522–524*; see also *Webb v Webb (C-294/92) [1994] E.C.R. I–1717, [1994] Q.B. 696*; *Gaillard v Chekili (C-518/99) [2001] E.C.R. I–2771*; *Prazic v Prazic [2006] EWCA Civ 497, [2006] 2 F.L.R. 1128*; cf. *Re Hayward [1997] Ch. 45*; *Ashurst v Pollard [2001] Ch. 595*. As to the common law rules relating to the transfer of immovables, see Dicey, Morris and Collins, paras 23-062—23-074. Article 4(3) will not apply where the contractual obligation relating to immovables is excluded from the Convention by virtue of art.1. Such cases will be governed by common law rules. At common law the system of

law with which a contract with regard to an immovable was most closely connected was sometimes said to be the lex situs: see, e.g. *British South Africa Co v De Beers Consolidated Mines Ltd, 523*. But, as is shown by that case, this was not an invariable rule.

416. Giuliano-Lagarde Report, p.23. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411* at [41]–[48].

417. cf. *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd (1932) 48 C.L.R. 565*.

418. cf. *Sanders v Van der Putte (73/77) [1977] E.C.R. 2383*; *Dansommer A/S v Gotz (C-8/98) [2000] E.C.R. I–393, [2001] 1 W.L.R. 1069*. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*, per Bot A.G. at [49]–[51] (lease).

419. Dicey, Morris and Collins, paras 33-233, 33–244–33-247; Plender and Wilderspin, 4th edn (2014), para.7-016; see Timeshare Act 1992, as amended by Timeshare Regulations 1997 (SI 1997/1081) which implement in the United Kingdom EU Directive 94/97 [1994] O.J. L280/83 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. See also on timeshares, Directive 2008/122/EC of the European Parliament and of the Council of January 14, 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/10, implemented in the UK by SI 2010/2960, as amended by SI 2011/1065 and repealing and replacing Timeshare Act 1992. Where the timeshare property is situated in a contracting state to the Brussels or Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, other than the United Kingdom, an English court may have no jurisdiction over a claim for misrepresentation or breach of contract brought by a timeshare purchaser against a timeshare owner since the claim may be one the object of which is a tenancy of immovable property, and such claims are subject to the exclusive jurisdiction of the situs of the immovable according to art.16(1) of each Convention: see *Klein v Rhodos Management Ltd (C-73/04) [2005] E.C.R. I–867*. Where however the timeshare purchaser has financed the purchase with money lent by a bank, art.16(1) does not impose this jurisdictional bar on a claim against the bank pursuant to the provisions of ss.56(2) and 75 of the Consumer Credit Act 1974 ("connected lender" liability, discussed Vol.II); *Jarrett v Barclays Bank [1999] Q.B. 1*, overruling *Lynch v Halifax Building Society and Royal Bank of Scotland Plc [1995] C.C.L.R. 42*; and see *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316*. The position would appear to be the same under Council Regulation 44/2001 art.22(1) and Council Regulation 1215/2012 art.24(1). The Consumer Protection (Distance Selling) Regulations 2000 regs 7–20 do not apply to a contract which is a "timeshare agreement" within the meaning of the Timeshare Act 1992 and to which that Act applies: Consumer Protection (Distance Selling) Regulations 2000 reg.6(1).

420. Dicey, Morris and Collins, para.33-233. Contrast art.4(1)(c) and (d) of the Rome I Regulation and on timeshare arrangements, art.6(4)(c). See on timeshares, Directive 2008/122/EC of the European Parliament and of the Council of January 14, 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/10, implemented in the UK by SI 2010/2960, as amended by SI 2011/1065 and repealing and replacing Timeshare Act 1992. And see n.420, above.

421. Dicey, Morris and Collins, paras 33-264—33-292.

422. Rome Convention art.4(4). For the position under art.5 of the Rome I Regulation, see below, paras 30-209 et seq. See *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411* (a case on carriage by rail).

423. Where a party who contracts to carry goods for another does not carry them himself but arranges for a third party to do so, art.4(4) will apparently apply, since the term *"carrier"* means the party who undertakes to carry the goods whether or not he performs the carriage himself: Giuliano-Lagarde Report, p.22; see Dicey, Morris and Collins, para.33–271. As to the meaning of "principal place of business", see Dicey, Morris and Collins, para.33–272; *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

424. The place of loading is that agreed at the time of the conclusion of the contract: Giuliano-Lagarde Report, p.22; Dicey, Morris and Collins, para.33–273; *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

425. The place of discharge is that agreed at the time of the conclusion of the contract: see authorities in preceding note.

426. *"Consignor"* apparently refers to "any person who consigns goods to the carrier": Giuliano-Lagarde Report, p.21; *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. See Dicey, Morris and Collins, para.33–275. As to the meaning of "principal place of business", see Dicey, Morris and Collins, para.33–274 and above, para.30-011.

427. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

428. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. Dicey, Morris and Collins, para.33–252. As to carriage of persons under the Rome I Regulation, see below, paras 30-210 et seq.

429. Cheshire, North and Fawcett, p.717.

430. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

431. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. See Dicey, Morris and Collins, para.33–266; cf. Schultsz, *Contract Conflicts* (1982), pp.185, 192, 198.

432. Dicey, Morris and Collins, para.33–267.

433. ! Giuliano-Lagarde Report, p.21; Scrutton on Charterparties, 23rd edition (2015), paras 1.013 et seq.. Article 4(2) will apply to such charters: Dicey, Morris and Collins, para.33–266; *Martrade Shipping & Transport GmbH v United Enterprise Corp [2014] EWHC 1884 (Comm), [2014] 2 Lloyd's Rep. 198*.

434. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*; *Martrade Shipping & Transport GmbH v United Enterprise Corp [2014] EWHC 1884 (Comm), [2014] 2 Lloyd's Rep. 198*.

435. See Vol.II, paras 35-002 et seq., 36-003 et seq.

436. Rome Convention art.21. See above, para.30-027; cf. *The Hollandia [1983] 1 A.C 565*; *Trafigura Beheer BV v Mediterranean Shipping Co SA [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep. 622*.

437. *Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch), [2004] I.L.Pr. 597*.

438. *Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch)*.

439. Dicey, Morris and Collins, paras 32–124 et seq., 33–117 et seq., 33–154—33–155, 33–220, 33–235—33–236, 33–277—33–278, 33–303 et seq., 33–412, 33–454; Kaye, pp.186–191; Hill (2004) 53 I.C.L.Q. 325; Atrill (2004) 53 I.C.L.Q. 549; Briggs (2001) 72 B.Y.I.L. 437, 465–470; Lagarde (1981) 22 Virginia J.Int.L. 91.

440. Rome Convention art.4(5).

441. Giuliano-Lagarde Report, p.23.

442. Giuliano-Lagarde Report, p.22.

443. Giuliano-Lagarde Report, p.22.

444. For cases where Rome Convention, art.4(2), has been applied without reference to art.4(5), see *W. H. Martin Ltd v Feldbinder Spezialfahrzeugwerke GmbH [1998] I.L.Pr. 794*; *Raiffeisen Zentralbank Osterreich AG v National Bank of Greece SA [1999] 1 Lloyd's Rep. 408*; *Dinka Latchin v General Mediterranean Holdings SA [2002] C.L.C. 330*; *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2002] C.L.C. 352*; *Ferguson Shipbuilders Ltd v Voith Hydro GmbH (2000) S.L.T. 229*. In *ISS Machinery Services Ltd v Aeolian Shipping SA [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep. 641*, the court determined the law of the country with which the contract was most closely connected without reference to art.4(2).

445. *Credit Lyonnais v New Hampshire Insurance Co [1997] 2 Lloyd's Rep. 1, 5*, per Hobhouse L.J.

446. *Societe Nouvelle des Papeteries de l'Aa v BV Machinefabriek BOA (1992) N.J. 750*. See on this case Struycken [1996] LMCLQ 18; Plender and Wilderspin, 4th edn (2014), paras 7–024—7–025. And see *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*.

447. This summary was approved in *Sax v Tchernoy [2014] EWHC 795 (Comm)*. See also *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH [2001] 1 W.L.R. 1745, 1750*. cf. *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.R. 1022*.

448. *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019, [2002] C.L.C. 533* at [41]; *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059* at [10]–[12]; *Iran Continental Shelf Oil Co v IRI International Corp [2002] EWCA Civ 1024, [2004] 2 C.L.C. 696*, [77]–[91]; *Waldweise Stiftung v Lewis [2004] EWHC 2589 (Ch)*; *Ophthalmic Innovations International (United Kingdom) Ltd v Ophthalmic Innovations International Inc [2004] EWHC 2948 (Ch), [2005] I.L.Pr. 109*; see also *Bergmann v Kenburn Waste Management Ltd [2002] EWCA Civ 98, [2002] F.S.R. 45*; *Commercial Marine Piling Ltd v Pierse Contracting Ltd [2009] EWHC 2241 (TCC), [2009] 2 Lloyd's Rep. 659*; *Pablo Star v Emirates Integrated Telecommunications Co PJSC [2009] EWCA Civ 1044*; *Gard Marine & Energy Ltd v Tunnicliffe [2010] EWCA Civ 1052, [2011] I.L.Pr. 10*; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep. 664*. cf. *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*; *Deutsche Bank Suisse SA v Khan [2013] EWHC 482 (Comm)*; *Surrey (UK) Ltd v Mazandaran Wood & Paper Industries [2014] EWHC 3165 (Comm)*.

449. Giuliano-Lagarde Report, p.20; North, *Contract Conflicts* (1982), pp.3, 15, reprinted in Essays in Private International Law (1993), p.23.

450. Dicey, Morris and Collins, para.33–125. And see *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*.

451. See cases cited in n.449, above.

452. *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH [2001] 1 W.L.R. 1745* ; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019*.

453. Above, para.30-011.

454. Giuliano-Lagarde Report, p.20.

455. *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH [2001] 1 W.L.R. 1745* ; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019*; *Bergmann v Kenburn Waste Management Ltd [2002] EWCA Civ 98*; *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916*. cf. *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*. For circumstances in which the presumptions in art.4(3) and 4(4) may be rebutted, see Dicey, Morris and Collins, paras 33–235—33–236, 33–277—33–278. See also *Surrey (UK) Ltd v Mazandaran Wood & Paper Industries [2014] EWHC 3165 (Comm)*.

456. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; cases cited in preceding note; Dicey, Morris and Collins, para.32–127. And see *Ferguson Shipbuilders Ltd v Voith Hydro GmbH (2000) S.L.T. 229*.

457. *[2010] Q.B. 411*.

458. *[2010] Q.B. 411* at [53]–[64]; see *Gard Marine & Energy Ltd v Tunnicliffe*, above; *British Arab Commercial Bank Plc v Bank of Communications [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep. 664*; *Sapporo Breweries Ltd v Lupofresh Ltd [2012] EWHC 2013 (QB)*; *Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365* (agency contract); see *BNP Paribas SA v Anchorage Capital Europe LLP [2013] EWHC 3073 (Comm)*; *Schlecker v Boedeker (C-64/12) [2014] Q.B. 320*; Okoli and Arishe 8 J. Priv. Int. L. 513.

459. ! *C-305/13, [2015] Q.B. 319*. Like the *ICF* case, this case also concerned art.4(4) but again the same principles apply when the question relates to rebutting the otherwise presumed applicable law.

460. ! *C-305/13 [2015] Q.B. 319* at [49].

461. See n.457, above.

462. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; above, para.30-077; *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd [2005] EWCA Civ 422, [2007] 2 Lloyd's Rep. 72* (letter of credit issued by Indonesian bank which became insolvent, confirmed by another Indonesian bank with no place of business in England, the credit to be advised through an English bank which did not confirm the credit, documents to be presented in England and payment to be made there, led to conclusion that although presumptively the contract between the beneficiary and the confirming bank was governed by Indonesian law, pursuant to art.4(2) of the Rome Convention, the above connections with England justified disregarding the presumption, pursuant to art.4(5). But (at [67]) there were no circumstances justifying displacement of the presumption in relation to the contract between the issuing bank and the confirming bank). See also *Bank of Credit and Commerce Hong Kong Ltd v Sonali Bank [1995] 1 Lloyd's Rep. 227*; *Batstone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd [1996] C.L.C. 1902, 1910*; *Habib Bank Ltd v Central Bank of Sudan [2006] EWHC 1767 (Comm), [2006] 2 Lloyd's Rep. 412*.

463. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*.

464. *[1994] 2 Lloyd's Rep. 87, 93*, per Mance J.

465. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; cf. *Offshore International SA v Banco Central SA [1977] 1 W.L.R. 399*. See also *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd [2005] EWCA Civ 422*; *Governor & Co of the Bank of Ireland v State Bank of India [2011] NIQB 22*.

466. Benjamin's Sale of Goods, 9th edn (2014), para.26–076.

Chitty on Contracts 32nd Ed.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(e) - Certain Consumer Contracts and Individual Employment Contracts

Introduction

30-091

Articles 5 and 6 of the Rome Convention contain special rules for determining, respectively, the law applicable to certain consumer contracts and individual employment contracts. The central provisions of these articles are linked by a common underlying philosophy, namely that the consumer and the employee, respectively, are in a weaker position to the other contracting party. As such, the general choice of law rules contained in arts 3 and 4 of the Convention required modification so as to achieve, respectively, the aim of consumer and employee protection. [467]

"Certain consumer contracts" [468]

30-092

Article 5 contains the choice of law rules applicable to certain consumer contracts. These rules apply to a contract:

> "… the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object." [469]

A more precise definition was avoided so as not to introduce conflict with definitions which are found in national law, [470] though it is likely that an autonomous meaning will be ascribed to contracts that fall within the provision. [471] In terms, art.5 is capable of applying to a wide variety of contracts including contracts for the sale, hire or pledge of movables [472]; insurance contracts (to the extent that these are not excluded from the Convention) [473]; banking contracts; and wagering contracts. [474] A contract which, for an exclusive price, provides for a combination of travel and accommodation (a so-called "package tour") is specifically made subject to the Article. [475] On the other hand, contracts of carriage are specifically excluded from the operation of art.5, [476] as are contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. [477] Where a contract entered into by a consumer is not within the category of contracts covered by art.5, or art.5 is, for some other reason, inapplicable, the governing law will be determined by reference to the general choice of law rules contained in arts 3 and 4 of the Rome Convention. [478]

Choice of law by the parties

30-093

A key element in art.5 is the restriction on the effect of a choice of law contained in a contract which is subject to that Article. Notwithstanding art.3:

> "… a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence",

if any one of three specified conditions is satisfied. [479] The first condition is where, in the country of the consumer's habitual residence, the contract was preceded by a specific invitation addressed to the consumer, or by advertising, and the consumer had taken in the country of his habitual residence all the steps necessary on his part for the conclusion of the contract. [480] Any invitation must thus be specific to the particular consumer bringing this claim. As to "advertising", the Giuliano-Lagarde Report suggests that the other contracting party must have intended to advertise to the consumer in the latter's country of habitual residence [481]: if this view is accepted, the condition will be extremely restrictive in effect. [482] The provision refers to the "steps" necessary for the conclusion of the contract being taken in the consumer's country so as, apparently, to "avoid the classical problem of determining the place where the contract was concluded". [483] But this does not answer the question whether legal or factual steps are envisaged. To the extent that the Giuliano-Lagarde Report states that "steps" includes writing or any action taken in consequences of an offer or advertisement, the implication appears to be that factual steps are those contemplated. [484] According to the second condition, the effect of a choice of law will be limited, as described above, if the other party or his agent [485] received the consumer's order in the country where the consumer was habitually resident. [486] Although this condition overlaps with the first, the overlap is not complete: thus the second condition will apply:

> "… where the consumer has addressed himself to a stand of a foreign firm at a fair or exhibition taking place in the consumer's country or to a permanent branch or agency of a foreign firm established in the consumer's country even though the foreign firm has not advertised in the consumer's country in a way covered" [487]

by the first condition. The third condition is expressly limited to contracts for the sale of goods. The limits on the effect of a choice of law will also apply, in the case of a sale of goods, if the consumer travelled from the country of his habitual residence to another country and there gave his order, provided the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. [488] The provision is intended to catch "cross-border excursion selling" (more common on the European Continent than in the United Kingdom [489]) whereby, for example, the owner of a store in one country arranges one-day bus trips for consumers in a neighbouring country to buy in his store. [490]

Application to contract concluded "on-line"

30-094

Article 5 was drafted when the impact of the internet on the conclusion of contracts was unknown. [491] It is now common for consumers to conclude a contract with (it will be assumed in this discussion) a seller over the internet, so that the question arises as to how art.5 may be applied to such transactions. In light of the fact that the Rome Convention did not anticipate the internet, it is unsurprising that the application of art.5 in this context gives rise to considerable difficulty and, as will be seen below, the revised provision to be found in art.6 of the Rome I Regulation purports to take account of internet consumer transactions. [492] Nonetheless, it is proposed to offer some speculative remarks on the application of the text of the Rome Convention to such transactions. [493] For the purpose of the following discussion it is assumed that the eventual contract between the consumer and the seller is concluded on the seller's standard terms which contain an express choice of the law of a country other than that in which the consumer is habitually resident. [494] The chief difficulties revolve around the application of the first two conditions of art.5(2) in the internet context. [495]

Article 5(2): first condition: specific invitation

30-095

There would appear to be no difficulty in concluding that a specific invitation can be addressed to a consumer by a seller through electronic mail. Nonetheless, the provision requires the specific invitation to precede the conclusion of the contract and that the specific invitation be addressed to the consumer in the latter's country of habitual residence. These requirements raise the question of when and where a communication by electronic mail is received for these purposes. It is suggested that such a communication is received when it is accessed by the consumer and that it is immaterial that the communication is earlier received and stored on a server before it is accessed by the consumer. [496] Where a consumer accesses his electronic mail in the country in which he has his habitual residence, then it will be evident that he has received the specific invitation in that country. Difficulty arises, however, when the consumer accesses his electronic mail, as, for example, when travelling in a country other than that in which he habitually resides. Common sense suggests that the first condition in art.5(2) should continue to apply, since it is hard to justify relieving the seller of the legal risk which would otherwise be placed upon him by such a chance occurrence. It is, however, impossible to reconcile such an outcome with the actual wording of the provision, though a very bold interpretation of the language might enable the court to conclude that if the consumer did not act immediately on the invitation, retained the communication and then re-accessed it in the country of his habitual residence that circumstance could constitute receipt for the purposes of the provision. [497] It might also be argued that the provision gives rise to an evidential presumption that the consumer did receive the specific invitation in the country of his habitual residence which presumption it is incumbent on the seller to rebut. [498]

Article 5(2): first condition: advertising

30-096

A second considerable difficulty with the first condition in art.5(2) in the context of the present discussion relates to advertisements and websites. There can be little doubt that a website which seeks to promote a seller's products can constitute "advertising" for the purposes of the provision. [499] The problem is that such an advertisement can be accessed from most, if not all, parts of the world, thus, supposedly, opening up a seller to potential liability under a wide variety of foreign laws. On one view it can be argued that a seller should bear the risk of a choice of law in the contract being overridden by the mandatory rules of the consumer's habitual residence, since a seller must be aware of the potential reach of his website and because bearing this risk is part of cost of doing business on the internet, which must be balanced against the commercial benefits of doing business in this manner. [500] A rather narrower interpretation of the provision is, however, possible. This involves drawing an analogy with an example suggested in the Giuliano-Lagarde Report of a consumer who responds to an advertisement which appears in an American publication which has been sold in Germany. According to the Report, this situation would not fall within art.5 unless the advertisement had appeared in special editions of the publication intended for distribution in European countries. [501] This remark may be construed to indicate that the condition under discussion is only applicable if a consumer, either individually or more generally as a consumer, has been "targeted" in the country of his habitual residence by a seller. [502] This interpretation will not, of course, be easy to apply in the context of sales through websites which are, in principle, accessible throughout the world. If, however, the seller specifies that the site is only addressed to a particular country or countries, the conclusion can perhaps be drawn that consumers habitually resident in that country or those countries are covered by art.5, whereas consumers habitually resident elsewhere are not. [503] The same conclusion might be drawn if the material on the website is expressed in a language which is readily understood in relatively few countries. If there is no country based limitation stated on the website or if the material on it is expressed in a language which is readily understood in many countries (for example, English) then it will be hard to conclude that the seller was targeting any particular consumer or group of consumers but, rather, was directing its activities towards consumers world wide. In such a case, it seems appropriate to regard the seller rather than the consumer as bearing the legal risk and to conclude that the situation falls within art.5. [504]

Article 5(2): first condition: “all the steps necessary”

30-097

The last requirement of the first condition is that the consumer takes in the country of his habitual residence all the steps necessary on his part for the conclusion of the contract. In relation to a contract concluded by electronic mail, this will involve a consumer sending relevant communications to the seller from the country of the consumer’s habitual residence. [505] In relation to a response by a consumer to an advertisement on a seller’s website, this, normally, will involve a consumer indicating his agreement to the terms and conditions by “clicking” on an appropriate icon on the relevant site which action must take place in the country of his habitual residence. [506]

Article 5(2): second condition

30-098

The second condition in art.5(2) also causes considerable difficulty in the case of contracts for the sale of goods since it requires that the other party or his agent received the consumer’s order in the country in which the consumer is habitually resident and doubts may arise, first, as to the meaning of “agent” in this context and, secondly, as to where the order is “received”.

Article 5(2): second condition: “agent”

30-099

As to the meaning of “agent” it is submitted that neither a web server nor a passive third party service provider can be regarded as an agent of the seller for these purposes. [507] A server can be located anywhere and is a communications medium, the location of which is not necessarily related in any way to the seller’s business. A passive third party service provider merely provides a technical mechanism whereby the seller can pass information to potential customers. If, however, the third party service provider took action on behalf of the seller, such as processing orders, it might be possible to say that the provider was a “person acting on behalf of the trader” [508] and to conclude, in these circumstances, that the provider was an agent. [509]

Article 5(2): second condition: “received”

30-100

It would appear, at least technically, that an order by electronic mail is “received” by the seller or his agent at the server where the mail is stored and that an order addressed to a website is “received” by the seller or his agent at the server on which the website is established. [510] If this is the meaning of “received” in this context, the order will be received in the country of the consumer’s habitual residence only if the server is located in that country. Such a conclusion could produce unfortunate consequences, for example, in a case in which a consumer, habitually resident in England, approaches the English agent of a seller based, e.g. in France, and places his order on a website hosted for the agent by a third party in Brazil. If it is concluded that the order is received in Brazil, then the consumer could not rely on the mandatory rules of English law to the extent that they are more favourable to him than the rules of the foreign law expressly applicable to the contract. [511] It is suggested, admittedly without any authority, that such a result may be avoided by construing the country in which the order is “received” as the country in which the physical place of business of the seller or his agent from which the relevant server is accessed by the seller or his agent, as the case may be, is situated: if one of those places is the country in which the consumer is habitually resident, then the requirements of the provision should be regarded as satisfied, irrespective of whether the relevant server is also located in the same country. [512]

Mandatory rules

30-101

Provided the relevant contract falls within art.5 and provided one of the conditions discussed in the preceding paragraphs applies, the choice of law in the contract shall not have the result of "depriving" the consumer of the protection of the mandatory rules of the law of the country in which he is habitually resident. "Mandatory rules", for these purposes, would seem to be defined by reference to art.3(3) [513]: they are rules of the law of that country "which cannot be derogated from by contract" and it is not necessary in addition (though it will often be the case) that they are also rules which apply "whatever the law applicable to the contract". [514] In the context of art.5, such rules will relate to consumer protection. [515]

The relationship between these mandatory rules and the chosen law is, however, somewhat obscure. First, the rules of the chosen law may be more favourable to the consumer than the mandatory rules of the country of his habitual residence. In such circumstances, it cannot reasonably be said that the consumer is "deprived" of the protection of the mandatory rules of the country of his habitual residence since he is better off than he would have been had those rules been applied. Conversely, he would be deprived of the protection of those rules if the chosen law were less favourable to him than the mandatory rules of his habitual residence. Accordingly, the correct interpretation of art.5(2) is that it enables a consumer to rely on the mandatory rules of the law of his habitual residence if they are more favourable to him than the chosen law or on the chosen law if it is more favourable to him than the mandatory rules of the law of his habitual residence. [516] The law of the habitual residence thus defines the minimum, but not the maximum protection available to the consumer. This solution is, it is suggested, preferable to one which would allow the consumer to rely, cumulatively, on the mandatory rules of both the law of the habitual residence and the chosen law, [517] despite the potential difficulties which may be presented in deciding, in any given case, which set of rules is most favourable to the consumer. There seems to be no obvious justification in giving a consumer "double protection" just because the contract falls within art.5 of the Convention, and contains a choice of law.

EU consumer protection legislation

30-102

The European Community has produced a substantial body of law designed to protect consumers which has to be transposed into national law by Member States. Such legislation is generally mandatory in character, it being provided, normally, that the legislation cannot be avoided by the choice of the law of a non-Member State in the contract. [518] Examples of English legislation implementing Community rules may be briefly mentioned here. [519] The Council Directive on unfair terms in consumer contracts was implemented in the Unfair Terms in Consumer Contracts Regulations 1999. [520] The Regulations contain an anti-avoidance provision to the effect that the:

> "Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States." [521]

The Consumer Protection (Distance Selling) Regulations 2000 [522] implement the Directive on the protection of consumers in respect of distance contracts. [523] The anti-avoidance provision in these Regulations is nearly, but not quite, identical to that contained in the 1999 Regulations and stipulates that the:

> "Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the

territory of a Member State." [524]

The Sale and Supply of Goods to Consumers Regulations 2002 [525] implements the Directive on certain aspects of the sale of consumer goods and associated guarantees. [526] The anti-avoidance provision contained in the Directive [527] is not directly transposed into the Regulations which implement it, it being apparently thought that prevention of avoidance through a choice of law clause could be achieved by application of the anti-avoidance provision contained in the Unfair Contract Terms Act 1977. [528] Whether this is correct is highly questionable, not least because many cross-border consumer contracts will not fall within the 1977 Act because they will be "international supply contracts" within the meaning of s.26 of the Act and are thus excluded from the scope of that Act altogether. [529] Similar provisions are now found in the Consumer Rights Act 2015. Section 74 of the 2015 Act provides that, where a consumer contract has a close connection with the UK, a choice of law of a country or territory other than an EEA State as the contract's applicable law does not affect the application of Pt 2's provisions governing unfair contract terms. [530] Section 32 makes special provision for choice of law for "sales contracts". [531] Accordingly, s.32 provides that where the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a sales contract, but the sales contract has a close connection with the United Kingdom, Ch.2 of the Act applies despite that choice. [532]

Rules which are mandatory irrespective of applicable law

30-103

Independently of art.5, art.7(2) enables a court to restrict the scope of the chosen law through the application of English mandatory rules in a situation where those rules apply irrespective of the law applicable to the contract. [533] Unlike the mandatory rules applicable through art.5(2), these mandatory rules need not relate to consumer protection.

Chosen law governs other issues

30-104

Mandatory rules do not apply to strike down the chosen law in toto. The chosen law will apply to the extent that it does not conflict with any applicable mandatory rules.

Habitual residence

30-105

The meaning of this concept was discussed above, para. 30–078 of this chapter.

Applicable law in the absence of choice

30-106

Where a consumer contract falling within art.5 does not contain a choice of law, art.5(3) provides that notwithstanding art.4, the contract shall be governed by the law of the country in which the consumer has his habitual residence, [534] if it is entered into in circumstances giving rise to any one of the three conditions described above. [535] If none of those conditions exist or if the contract falls outside art.5, then the law applicable to the contract will be determined, in the absence of a choice satisfying art.3, according to the provisions of art.4 of the Convention.

Individual employment contracts [536]

30-107

Article 6 of the Rome Convention contains special choice of law rules which are expressed to apply to "individual employment contracts". The policy which informs these provisions is the need to secure "more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship", [537] i.e. the employee. In particular, it was necessary to curb, in this context, the wide freedom to choose the applicable law permitted by art.3. [538] No doubt, the philosophy of employee protection will be influential in the interpretation and application of art.6. [539] Very broadly, art.6 permits the parties to choose the law to govern an employment contract, but provides that the choice of law cannot have the result of depriving the employee of the protection of the mandatory rules of the law which would be applicable were there no choice of law in the contract. [540] In the absence of a choice of law, the applicable law is, in general, that of the country in which the employee habitually carries out his work in performance of the contract even though he is temporarily employed in another country. [541] In this respect the European Court has held that in a situation where an employee carries out his activities in more than one country, the country in which the employee habitually carries out his work in performance of the contract is that in which or *from which*, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer. [542] If he does not habitually carry out his work in any one country, as defined above, then the applicable law will be that of the country in which the place of business through which he was engaged is situated. [543] For these purposes, "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment; further, the possession of legal personality by the employer does not constitute a requirement which must be fulfilled by the place of business of the employer; and, finally, the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a "place of business" if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking. [544] But the rules in art.6(2)(a) and 6(2)(b) will be displaced if it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of that other country will govern. [545]

Meaning of "employment contract"

30-108

Article 6 contains no definition of the concept of "employment contract". That the Article is expressed to apply to "individual" employment contracts indicates that the provision is not intended to apply to collective agreements but only to contracts entered into by individual employees. [546] Accordingly, the law applicable to a collective agreement will be determined by reference to the general choice of law rules contained in arts 3 and 4 of the Convention. [547]

"Employment": autonomous meaning [548]

30-109

More particularly, different legal systems may have different criteria or principles for determining whether a particular contract is an employment contract. [549] It is thus necessary to formulate an approach to the resolution of this problem for the purposes of art.6. [550] The obvious approach which suggests itself is the development of an autonomous meaning for the concept so as to secure uniformity of application amongst contracting states. [551] The danger with such an approach, however, is that the autonomous definition might result in a particular state's employment law being applied to a contract even though that state would not regard the contract as one of employment, or conversely, in a particular state's employment law not being applied to a contract even though that state's law regarded it as being a contract of employment: in either case the applicable law is distorted, a result which is only avoided if the autonomous definition accords with the definition which prevails in the relevant state's law.

Alternative "classification" approach

30-110

A different approach could be based in principles of classification. Here, however, the English court should not classify the contract according to the lex fori, i.e. according to its own criteria for determining whether a contract is one of employment. To do so would again risk the distortion of the applicable law if the forum's conception of a contract of employment did not correspond with that prevailing in the applicable law or vice versa. The risk referred to can, however, be minimised if the forum is prepared to classify the relevant contractual relationship according to the lex causae. On this view the English court should apply the rules of art.6 so as to determine the governing law and then decide whether, according to that law, the relevant contract is one of employment. If it is so classified, then the court should apply the rules of the applicable law concerned with employment contracts. If it is not so classified, the court should apply the general choice of law rules contained in arts 3 and 4 of the Convention to determine the applicable law. Although this approach is open to a considerable objection, viz that it necessitates determining the law applicable under art.6 before the process of classification has determined that art.6 is applicable, it has the merit of avoiding the distortion of the applicable law which is inherent in other situations. Whether a lex causae approach [552] or an approach based on autonomous interpretation [553] cannot be regarded as settled, though it must be admitted that the autonomous approach is the most likely one to be adopted. [554]

Choice of law by the parties and mandatory rules

30-111

Although the parties may choose the law to govern an employment contract, [555] the effect of that choice is expressly limited by art.6(1) which provides that the choice of law shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the country the law of which would be applicable to the contract were there no choice of law. [556] For these purposes, a "mandatory rule" bears the meaning given to that expression by art.3(3) of the Convention, i.e. such a rule is one which cannot be derogated from by contract [557] and it is not necessary, in addition, that the rule be a rule which applies irrespective of the law applicable to the contract [558] though some mandatory rules in the employment context may possess this additional characteristic. [559] The Giuliano-Lagarde Report informs that these mandatory rules:

> "… consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law." [560]

However, it will fall to the legal system of which the rule forms part to determine whether a rule is mandatory and also the circumstances in which the rule is mandatory. [561]

Mandatory rules of English law

30-112

In the English context, it has been held that the rules of English law in respect of restrictive covenants in employment contracts are not mandatory rules for the protection of employees for the purposes of art.6. [562] Such rules are part of the general law of restraint of trade which are, in turn, part of the general law of contract. [563] While it may be true that covenants in employment contracts are harder to justify than covenants contained in commercial agreements, the rules applicable to both types of agreement are based on the principle of what is reasonably necessary to protect the covenantee's legitimate interest and not on the need to protect employees. A more discerning view might, however, suggest that the appropriate approach to take in cases where the interests of employees are involved is to regard the rule as mandatory for the purposes of such cases. Nonetheless, the law relating to

such covenants has been said to be rooted in public policy so that where the employment contract is governed by a foreign law which would, in conflict with English law, regard the covenant as valid, the foreign law may be denied application on public policy grounds, pursuant to art.16 of the Convention. [564]

Statutory rules

30-113

Statutory rules which have the specific purpose of protecting employees, are, however, likely to qualify as mandatory rules for the purposes of art.6. Modern statutes often indicate this explicitly by stating that the statutory rules apply irrespective of the law which governs the contract of employment. [565] Where there is no such explicit indication in the statute itself, then whether a particular rule is mandatory will depend on the construction of the statute. [566]

Territorial limitations

30-114

Although a particular statutory right may be available irrespective of the law applicable to the contract of employment, the scope of the relevant right may be subject to a territorial limitation. Thus, for example, the Equal Pay Act 1970 applied only to employment at an establishment in Great Britain as defined in the Act. [567] Many of the principal statutory employment rights are contained in the Employment Rights Act 1996. Several provisions of the Act were originally expressed not to apply where the employee ordinarily worked outside Great Britain, [568] but this provision was repealed [569] without being replaced with any different limitation, thus leaving the proper scope of the statute to judicial construction. In *Serco Ltd v Lawson* [570] the House of Lords had to decide on the proper reach of the provisions of the Employment Rights Act 1996 which provide for the right not to be unfairly dismissed. It was held that this depended on the construction of the relevant provisions in the light of the circumstances of the particular case. Primarily, the provisions apply where the employee is working in Great Britain at the time of the dismissal, as opposed to what was contemplated as the place of work at the time of the conclusion of the contract of employment. Where, however, the employee was a peripatetic worker working in several countries, such as an airline pilot, the work would be performed in Great Britain if the employee's base was in Great Britain at the time of the dismissal. As regards expatriate employees working overseas, the relevant provisions apply if a strong connection between the employment and Great Britain at the relevant time can be established. Such may be the case where an employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain or where an expatriate employee is working in what is in effect an extra-territorial enclave in a foreign country (e.g. a military base). Although the House of Lords was careful to point out that the territorial reach of a statutory right might differ according to which particular right was in issue, it is likely that the principles in *Serco Ltd v Lawson* [571] will be held to apply to other rights contained in the Act. The principles in *Serco Ltd v Lawson* [572] have been somewhat expanded in more recent cases. Thus it has been held by the Supreme Court that the right not to be unfairly dismissed covered employees who worked or were based abroad where the employment had much stronger connections both with Great Britain and with British employment law than with any other system of law, particularly when the employee's employer was not just based in Great Britain but was the British government itself and the employee was employed under a contract governed by English law in an international enclave that had no particular connection with the country in which the international enclave happened to be situated. [573] And the Supreme Court has most recently held that the connection with Great Britain must be sufficiently strong to enable it to be said that Parliament intended a local (UK) Employment Tribunal to deal with the claim: this is, ultimately, a question of degree. [574] In relation to the rights now contained in the Equality Act 2010, where no explicit scope of territorial application are indicated, that application, it would seem, is determined by the principles in *Serco Ltd v Lawson*, as extended, as described above.

Rights derived from European law

30-115

Different principles may apply where the relevant right in the Employment Rights Act 1996 derives from European law. Here there is an obligation to give direct effect to the European right through interpretation of the relevant English law with the consequence that *Serco Ltd v Lawson* [575] may not apply and the scope of the right may depend, instead, on whether the contract of employment is governed by English law or by the law of another Member State. [576]

Chosen law more favourable

30-116

Where the chosen law gives less protection to the employee than would the mandatory rules of the law of the country which would have been applicable in the absence of choice, then the mandatory rules of the latter law will prevail over the chosen law. Conversely, where the chosen law is more favourable to the employee than the mandatory rules of the law which would be applicable in the absence of choice, then it can hardly be said that the employee is "deprived" of the protection of mandatory rules since he is better off under the chosen law, so that the chosen law should prevail. [577] Where, however, the rules of the chosen law and the mandatory rules of the law which would be applicable in the absence of choice are not in direct conflict but offer different rights or remedies to an employee (say compensation for unfair dismissal under the chosen law, in contrast with reinstatement under the law applicable in the absence of choice) more difficulty arises. Article 6(1) merely says that the employee is not to be deprived of the protection of mandatory rules: it does not say he cannot have the benefit of the protective regime of both laws and since he would be deprived of reinstatement if he received only compensation, it could be said that he has been deprived of the protection of applicable mandatory rules. But it is difficult to accept that it was intended to benefit the employee in this way just because his contract contains a choice of law [578] and, therefore, it is suggested that the correct solution in such situations is to apply the law most favourable to the employee [579] despite the fact that it may not always be easy, in any given situation, to determine which law is most favourable. [580]

Rules which are mandatory irrespective of applicable law

30-117

It would seem implicit in art.6(1) that mandatory rules applicable thereunder should relate to the protection of employees. However, art.7(2) can also apply to employment contracts [581] to secure the application of English rules in a situation where they are mandatory irrespective of the law applicable to the contract. Such rules need not necessarily relate to employment protection, but many will. [582]

Applicable law in absence of choice

30-118

In effect art.6(2) supplies two presumptions as to what the applicable law will be in the absence of a choice of law, each presumption being rebuttable according to the proviso to art.6(2) if it appears from the circumstances as a whole that the contract is more closely connected with another country. [583] Where the employee habitually carries out his work in performance of the contract in a particular country then the law of that country will govern (subject to the proviso) even if the employee is temporarily employed in another country. But this provision must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one country, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of the provision, is that in which or from which, in the light of all the factors which characterise the work, the employee performs the greater part of his obligations towards his employer. [584] Article 6(2)(b) provides that if the employee does not habitually carry out his work in any one country then the applicable law will (subject to the proviso) be the law of the country in which the place of business through which he was engaged is situated. [585] Article 6(2)(a) is thus concerned solely with the situation where the

employee habitually carries out his work in one country only, as described above (which is not a literal meaning). Where the work is habitually carried out in more than one country, art.6(2)(b) applies. Thus, where art.6(2)(a) is not satisfied, the concept of the place of business through which the employee was engaged must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment: the possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of art.6(2)(b); and the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a place of business if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract and even though the authority of the employer has not been formally transferred to that other undertaking. [586] This will also be the case where the employee habitually carries out his work in no particular country or where he habitually carries out his work in a place which is not a country (e.g. on a ship or oil rig). [587]

30-119

If it appears from the circumstances as a whole that the contract is more closely connected with another country than it is with the country indicated by art.6(2)(a) or 6(2)(b), as the case may be, then the law of that other country will be the governing law. How easy it will be to displace art.6(2)(a) and 6(2)(b) will depend on the strength which will be accorded to those presumptive rules. In *Schlecker v Boedeker (C-64/12)*, a German national and resident worked exclusively in the Netherlands for 11 years. However, the law of the Netherlands was displaced in favour of the law of Germany (which was less favourable to the employee). The court identified as significant factors suggestive of a connection the fact that Germany was the country where the employee paid taxes and was covered by social security schemes, pension provision, sickness insurance and invalidity schemes. The court also made it clear that parameters relating to salary determination and working conditions would be important. The court did not seem to be influenced by the fact that the law applicable through the presumptions was more protective of the employee than the law which would govern if the proviso were invoked. [588] As to other factors which might serve to trigger the proviso, the law of the residence or centre of business operations of the employer might, in the case of an employer engaging employees of various nationalities in different parts of the world, be regarded as being more closely connected with the contract than the law indicated by the presumption. [589] But each case will depend on its particular facts. [590]

Contract and tort

30-120

In English law an employee may elect to sue his employer, for injuries caused by the negligence of the employer, in either contract or tort. [591] There does not appear to be anything in the Rome Convention which excludes this option similar in effect to that reached in the common law. [592]

Effect of Rome II Regulation

30-121

When the Rome II Regulation on the law applicable to non-contractual obligations applies [593] it would seem that the claimant will not be able to frame the claim as a claim in tort if the law governing the tort would be more favourable to the claim than the law applicable to the contract. [594] This is because the expression “non-contractual obligations”, which includes tort, must be given an autonomous meaning [595] and that meaning will, presumably, be distinct from an obligation which sounds in contract. [596]

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96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and

Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh, *Autonomy in International Contracts* (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

467. Giuliano-Lagarde Report, pp.23, 25.

468. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 33–002—33–054; Hill, *Cross-Border Consumer Contracts* (2008); Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2009); Plender and Wilderspin, 4th edn (2014), Ch.9; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.203–220; Basedow, *The Enforcement of International Contracts in the European Union* (2004), pp.269–288; Straetmans, *The Enforcement of International Contracts in the European Union* (2004), pp.295–322; Morse in Lomnicka and Morse (eds), Contemporary Issues in Commercial Law (1997), pp.117–135; Hartley, *Contract Conflicts* (1982), Ch.6; Morse (1992) 41 I.C.L.Q. 1. Gillies (2007) 3 J. Priv. Int. L. 89; Tang (2007) 3 J. Priv. Int. L. 113; Gillies (2008) 16 International Journal of Law and Information Technology 242. For the application of the provisions to contracts concluded "on-line", see below, paras 30-094 et seq. As to the position under art.6 of the Rome I Regulation, see below, paras 30–231 et seq. As to the formal validity of such contracts, see below, para.30–321.

469. Rome Convention art.5(1). Thus, e.g. art.5 will not apply to contracts made by e.g. manufacturers or traders who buy goods or obtain services for business purposes, or to professionals who acquire goods or services for professional purposes: see Giuliano-Lagarde Report, p.23. For other difficulties in interpreting the language of art.5(1), see Dicey, Morris and Collins, paras 33–002 et seq.

470. Giuliano-Lagarde Report, p.23.

471. cf. *Société Bertrand v Paul Ott KG (150/77) [1978] E.C.R. 143*; *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermogensverwaltung und Beteiligungen GmbH (C-89/91) [1993] E.C.R. I–139*; *Brenner v Dean Witter Reynolds Inc (C-318/93) [1994] E.C.R. I–4725*; *Benincasa v Dentalkit Srl (C-269/95) [1997] E.C.R. I–3767*; *Mietz v Intership Yachting Sneek BV (C-99/96) [1999] E.C.R. I–2277*; *Gabriel v Schlank & Schlick GmbH (C-96/00) [2002] E.C.R. I–6367*; *Engler v Janus Versand GmbH (C-27/02) [2005] E.C.R. I–1481, [2005] I.L.Pr. 83*; *Gruber v Bay Wa AG (C-464/01) [2005] E.C.R. I–439, [2006] Q.B. 204*. According to the Giuliano-Lagarde Report, p.23, the scope of the Article "should be interpreted in the light of its purpose which is to protect the weaker party and in accordance with other international instruments with the same purpose such as the Judgments Convention" (i.e. the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, above, para.30–017). In the above mentioned cases the European Court has consistently stressed that "consumer" in the relevant provisions of the Brussels Convention should be strictly construed as limited to private final consumers who are not engaged in trade or professional activities. This will normally serve to exclude legal persons and traders, unless, possibly, such persons are acting entirely outside their trade or professional activities and can establish that they were in a weaker bargaining position in relation to the supplier. cf. *Chris Hart (Business Sales) Ltd v Niven (1992) S.L.T. (Sh Ct) 53*.

472. Sales of securities are excluded: Giuliano-Lagarde Report, p.23.

473. Rome Convention art.1(3). See Giuliano-Lagarde Report, p.23.

474. See *Hillside (New Media) Ltd v Baasland [2010] EWHC 3336 (Comm), [2010] 2 C.L.C. 986*.

475. Rome Convention art.5(5). In Germany it has been held that a timeshare contract is not a contract the object of which is a supply of services for the purposes of Rome Convention art.5(1): BGH NJW 1997, 1697; Knöfel (1998) I.C.L.Q. 439, 443. cf. Rome I Regulation art.6(4)(b), below, paras 30–233 et seq.

476. Rome Convention art.5(4)(a).

477. Rome Convention art.5(4)(b).

478. Above, paras 30–046 et seq.

479. Rome Convention art.5(2). See, in particular, Dicey, Morris and Collins, paras 33–009—33–113. See also *Hillside (New Media) Ltd v Baasland [2010] EWHC 3336 (Comm), [2010] 2 C.L.C. 986* at [42]–[43].

480. Rome Convention art.5(2), first indent.

481. Giuliano-Lagarde Report, p.24. cf. *Standard Bank London Ltd v Apostolakis [2002] C.L.C. 939*; *Rayner v Davies [2002] EWCA Civ 1880, [2003] 1 All E.R. (Comm) 394*; *Gabriel v Schlank & Schlick GmbH (C-96/00) [2002] E.C.R. I–6367*.

482. As to contracts concluded “on-line”, see below, paras 30–094 et seq.

483. Giuliano-Lagarde Report, p.24.

484. Giuliano-Lagarde Report, p.24. Thus the fact that such factual steps (e.g. in relation to offer and acceptance) are deemed, as a matter of law, to occur elsewhere matters not.

485. “Agent” is intended to refer to all persons acting on behalf of the trader: Giuliano-Lagarde Report, p.24.

486. Rome Convention art.5(2), second indent.

487. Giuliano-Lagarde Report, p.24.

488. Rome Convention art.5(2), third indent.

489. Giuliano-Lagarde Report, p.24; Kaye, p.149.

490. Giuliano-Lagarde Report, p.24.

491. See North (2001) 50 ICLQ 477, 503; Hill, *Cross-Border Consumer Contracts* (2008); Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2009). See also *Hillside (New Media) Ltd v Baasland [2010] EWHC 3336 (Comm), [2010] 2 C.L.C. 986*.

492. See below, paras 30–245 et seq.

493. Dicey, Morris and Collins, paras 33–017—33–023; Benjamin’s Sale of Goods, 9th edn (2014), paras 26–047 et seq.; Murray, *Law & the Internet* (2000), p.17; Niemann, *Communications Law* 99; Kronke in Boele-Woelki and Kessedjian (eds), Internet: Which Court Decides? Which Law Applies (1998), p.65; Schu (1997) 5 International Journal of Law and Information Technology 192; Gillies (2007) 3 J. Priv. Int. L. 89; Tang (2007) 3 J. Priv. Int. L. 113.

494. See, e.g. standard terms of amazon.co.uk (choice of the law of Luxembourg (http://www.amazon.co.uk)); standard terms of amazon.fr. (choice of the law of Luxembourg (http://www.amazon.fr.)).

495. The terms of the third condition make it clear that it cannot apply to an internet contract: see above.

496. Schu, pp.210–211. cf. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce ("Directive on electronic commerce") [2000] O.J. L178/1 art.11(1) and (3) and the UK implementing legislation, the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) reg.11(2)(a).

497. Schu, pp.210–211.

498. Schu, pp.210–211.

499. Dicey, Morris and Collins, para.33–019.

500. Dicey, Morris and Collins, para.33–019. cf. *Dow Jones & Co Inc v Gutnick [2002] HCA 56; (2003) 210 C.L.R. 575*; *King v Lewis [2004] EWCA Civ 1329, [2005] I.L.Pr. 185*. The Directive on electronic commerce (above, n.495) and the Electronic Commerce (EC Directive) Regulations 2002 (above, n.495) are generally thought to support a "country of origin" principle for regulating electronic commerce, a principle which might be thought to be inconsistent with interpreting art.5(2) in favour of the consumer. However, it is submitted that the Directive and the Regulations have no bearing on the matter under discussion for the following reasons: (1) the Directive and the Regulations are explicitly expressed not to apply to the freedom of the parties to choose the law applicable to their contract and to consumer contracts (art.3(3) and Annex, reg.4(4) and Sch.); (b) Recital 55 of the Directive (not reproduced in the Regulations) states that "this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence"; (c) the Directive explicitly states that it does not establish additional rules of private international law (art.1(4) and Recital 23). The latter provisions are not reproduced in the Regulations, a highly questionable exclusion but one which does not detract from the proposition that the Directive and the Regulations are irrelevant in the present context.

501. Giuliano-Lagarde Report, p.24.

502. cf. *King v Lewis [2004] EWCA Civ 1329, [2005] I.L.Pr. 185*.

503. The seller may take technical steps to block access from particular countries or structure the transaction in such a way as to ascertain the consumer's habitual residence before any contract is concluded: see Gringras, *Laws of the Internet*, 2nd edn (2003), p.51.

504. Such an interpretation would produce consistency with art.15(3) of Council Regulation 44/2001 (above, para.30–017) which provides that the rules of the Regulation concerned with consumers apply, inter alia, if: "the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of those activities" and also with art.17(1)(c) of the recast Regulation, which is identical. For the virtually identical language adopted in art.6 of the Rome I Regulation, see below, paras 30–245 et seq.

505. See Schu, p.215.

506. See Niemann, p.100; Schu, p.192.

507. Chissick and Kelman, *Electronic Commerce: Law and Practice*, 3rd edn (2002), para.4–35; Niemann 100. Nor, it is submitted, should so-called "electronic agents" be treated as agents for these purposes: cf. Wetzenboeck (2001) 9 International Journal of Law and Information Technology 204; Øren (2001) 9 Journal of Law and Information Technology 249.

508. Giuliano-Lagarde Report, p.24.

509. Chissick and Kelman, pp.4–34.

510. Schu, p.216.

511. The example assumes that the first condition of Rome Convention art.5(2) is inapplicable.

512. cf. Directive on electronic commerce (above, para.30–095) art.11(1) and Recital 19; Electronic Commerce (EC Directive) Regulations 2002 reg.11(2)(a); *Menashe Business Mercantile Ltd v William Hill Organization Ltd [2002] EWCA Civ 1702, [2003] 1 W.L.R. 1462*.

513. Above, paras 30–060 et seq.

514. cf. Rome Convention art.7(1) which does not have the force of law in the UK: Contracts (Applicable Law) Act 1990 s.2(2), above, para.30–062.

515. Examples in English law might include the provisions of the Unfair Contract Terms Act 1977 and some provisions of the Consumer Credit Act 1974: see *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316* ("connected lender" liability under Consumer Credit Act 1974 s.75 applies in respect of all transactions entered into using credit cards issued under consumer credit agreements regulated by the 1974 Act whether they are entered into in the United Kingdom or elsewhere).

516. See Dicey, Morris and Collins, para.33–014.

517. cf. Philip in North (ed.), Contract Conflicts (1982), p.81, at p.99.

518. See Dicey, Morris and Collins, paras 33–043—33–054.

519. For other examples, see Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987/2117), as amended by SI 1988/958, and replaced by Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816) implementing Council Directive 1985/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31, as to which see *Travel Vac SL v Sanchis (C-423/97) [1999] E.C.R. I–2195*; *Deutsche Bausparkasse Badenia AG (C-350/03) [2005] E.C.R. I–9215*; Enterprise Act 2002 Pt 8 (and see SI 2003/1374, SI 2003/1593), replacing; Stop Now Orders (EC Directive) Regulations 2001 (SI 2001/1422), implementing Directive 1998/27 on injunctions for the protection of consumers' interests [1998] O.J. L166/51; Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), implementing Directive concerning the distance marketing of consumer financial services [2002] O.J. L271/16. See generally Regulation 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection co-operation) [2004] O.J. L346/1; Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), implementing Directive 2005/29 concerning unfair business-to-consumer commercial practices and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 and Regulation 2996/2004 (Unfair Commercial Practices Directive) [2005] O.J. L149/22; Directive 2008/484 of the European Parliament and of the Council on credit agreements for consumers [2008] O.J. L33/10, implemented in the UK in SI 2010/1010; Directive 2008/122 of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of time-share, long-term holiday product, resale and exchange contracts [2009] O.J. L33/10, implemented in the UK in SI 2010/2960, as amended by SI 2011/1065; Directive 2009/22 of the European Parliament and of the Council on injunctions for the protection of consumers' interests [2009] O.J. L110/30 (codified version); Directive 2011/83 of the European Parliament and of the Council on consumer rights, [2011] O.J. L304/64. On issues of EU law relating to distance selling, see *Gysbrechts and Santerel Inter BVBA (C-205/07) [2009] 2 C.M.L.R. 45*; *Electrosteel Europe SA v Edil Centro SpA (C-87/10) [2011] I.L.Pr. 28*; *Muhlleitner v Yusufi (C-190/11) [2012] I.L.Pr. 46*; Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final. This proposal was withdrawn on December 16, 2014: COM(2014) 910 final. See also *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)*; *Refcomp SpA v Axa Corporate Solutions Assurance SA (C-543/10) [2013] 1 Lloyd's Rep.449*.

520. SI 1999/2083, as amended by SI 2001/1186, revoking and replacing Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159). For the Directive see [1993] O.J. L95/29. See also *Oceano Grupo Editorial SA v Rocio Murciano Quintero (C-241/98 to*

C-244/98) [2000] E.C.R. 4941; *Mostaza Claro v Centro Movil Milenium SL (C-168/05) [2006] E.C.R. I–10421*; *Standard Bank London Ltd v Apostolakis [2002] C.L.C. 939*. For contracts entered into after October 1, 2015, the Unfair Terms in Consumer Contracts Regulations 1999 are replaced by the Consumer Rights Act 2015.

521. reg.9. For detailed discussion of this formula, see Benjamin's Sale of Goods, 9th edn (2014), paras 26–114 et seq. In *Commission of the European Communities v Kingdom of Spain (C-70/03) [2004] E.C.R. I–7999* the European Court found that Spain had not properly transposed the antiavoidance provision of the Directive into national law.

522. SI 2000/2334, as amended by SI 2005/689.

523. Directive on the protection of consumers in respect of distance contracts [1997] O.J. L144/19.

524. reg.25(5). For detailed discussion of this formula, see Benjamin's Sale of Goods, 9th edn (2014), paras 26–119 et seq.

525. SI 2002/3045.

526. Directive on sale of consumer goods and associated guarantees [1999] O.J. L171/12.

527. 1999 Directive art.7(2).

528. Unfair Contract Terms Act 1977 s.27(2). See Department of Trade and Industry, Consumer and Competition Policy Directorate, Directive 1999/44/EC of the European Parliament and of the Council of May 25, 1999 on certain aspects of the sale of consumer goods and associated guarantees, Transposition Note.

529. For the detailed argument, see Benjamin's Sale of Goods, 9th edn (2014), paras 26–124 et seq.; and see Law Commission, Unfair Terms in Contracts (Law Com. No.292, 2005), paras 7.4–7.6. It has been argued that Unfair Contract Terms Act 1977 s.26 is in breach of the EC Treaty art.12 in that it discriminates against purchasers who are nationals of EU Member States: see Burbidge [2000] N.L.J. 1544. The section may also be in breach of arts 28 and 29 of the Treaty as constituting a restriction on the free movement of goods and of art.49 as constituting a restriction on the free movement of services. See also *Philip Alexander Securities & Futures Ltd v Bamberger [1997] I.L.Pr. 73*.

530. See para.38-386 below.

531. Defined by s.5.

532. 2015 Act s.32(1). See para.38–494 below.

533. cf. Lasok and Stone, *Conflict of Laws in the European Community* (1987), p.385. cf. *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161*.

534. Above, para.30–078.

535. Above, paras 30–093 et seq.

536. Merrett, *Employment Contracts in Private International Law* (2011); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Ch.11; Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 33–059—33–102; Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp.384–385; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.224–238; Polak, *The Enforcement of International Contracts in the European Union* (2004), pp.323–342; Morse, *Contract Conflicts* (1982), Ch.7; Gillies (2010) 41 I.L.J. 355; Scott [2010] L.M.C.L.Q. 640; Barnard [2009] 38 I.L.J. 122; Hoey and McArdie [2008] Jur. Rev. 291; Cavalier and Upex (2006) 55 I.C.L.Q. 587; Morse (1992) 41 I.C.L.Q. 1; Smith and Cromack (1993) 22 I.L.J. 1. In

1976 the European Commission published a proposal for a Regulation concerning conflict of laws in employment relationships: see COM(175) 653 final, discussed by Hepple, *Harmonisation of Private International Law by the EEC* (1978), p.390; Forde, *Legal Issues of European Integration* 85. Had this proposal not been withdrawn in 1981 ([1981] O.J. C307/3) and reached fruition it would have taken precedence over art.6 pursuant to art.20 of the Rome Convention. See also Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1. This Directive has not been formally implemented in the United Kingdom by specific regulations, but it has been said that the repeal of the Employment Rights Act 1996 s.196 by the Employment Relations Act 1999 s.32(3) (below, para.30-114n.568) has facilitated implementation of the Directive by extending rights which are derived from European Union legislation (and also, normally, English employment law) to workers who are "temporarily" working in Great Britain: see Hansard, HC Vol.336, col.32. This Directive takes precedence over the Rome Convention, pursuant to art.20. See on the Directive *Mazzoleni and Inter Surveillance Assistance SARL (C-165/98) [2001] E.C.R. I–2189*; *Finalarte Sociedade de Construcao (C-49/98, C-50/98, C-52/98–C-54/98 and C-68/98, C-71/98) [2001] E.C.R. I–7831*; *Portugaia Construcoes Ltd (C-164/99) [2002] E.C.R. I–787*; *Ruffert v Land Nidersachen (C-346/06) [2008] 2 C.M.L.R. 39*; *Svenska Staten v Holmqvist (C-310/07) [2009] I.C.R. 675*. See generally *Koelzsch v État du Grand-Duché de Luxembourg (C-29/10) [2012] Q.B. 210*; *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr. 16*; *Schlecker v Boedeker (C-64/12) [2014] Q.B. 320*; Smith and Villiers (1996) Jur. Rev. 167. As to the position under art.8 of the Rome I Regulation, see below, paras 30–278 et seq.

537. Giuliano-Lagarde Report, p.25.

538. Above, paras 30–046 et seq.

539. cf. the position with regard to "certain consumer contracts", above, paras 30–092 et seq.

540. Rome Convention art.6(1). As to whether a choice of law in an employment contract has been demonstrated with reasonable certainty, see *Chunilal v Merrill Lynch International Inc [2010] EWHC 1467 (Comm)*; *OJSC TNK-BP Holding v Lazurenko [2012] EWHC 2781 (Ch)*.

541. Rome Convention art.6(2)(a).

542. *Koelzsch v État du Grand-Duché de Luxembourg (C-29/10) [2012] Q.B. 210*. And see *Chunilal v Merrill Lynch International Inc [2010] EWHC 1467 (Comm)*; *Schlecker v Boedeker (C-64/12) [2014] Q.B. 320*.

543. Rome Convention art.6(2)(b).

544. *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr 16*.

545. Rome Convention art.6(2), proviso. *Schlecker v Boedeker (C-64/12) [2014] Q.B. 320*.

546. Giuliano-Lagarde Report, p.25.

547. cf. *Monterosso Shipping Corp Ltd v International Transport Workers Federation [1982] I.C.R. 675*; *Dimskal Shipping Co Ltd v International Transport Workers Federation [1992] 2 A.C. 152*. This may be an example of a contract for which the characteristic performance cannot be determined so that Rome Convention art.4(2) is not applicable.

548. See Merrett, Ch.3; Plender and Wilderspin, 4th edn (2014), paras 11–006 et seq.

549. See Eörsi, *International Encyclopedia of Comparative Law*, Vol.XI, Ch.4, pp.34–35.

550. See Merrett, Ch.3; Plender and Wilderspin, 4th edn (2014), paras 11–006 et seq.; Dicey, Morris and Collins, paras 33–063—33–066.

551. See *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB), [2008] 1 All E.R. (Comm) 401*; *Base Metal Trading Ltd v Shamurin [2003] EWHC 2419 (Comm), [2004] 1 All E.R. (Comm) 159*,

reversed in part but not on this point, *[2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*; *Swithenbank Foods Ltd v Bowers [2002] EWHC 2257 (QB), [2002] 2 All E.R. (Comm) 974*. The Giuliano-Lagarde Report gives little guidance other than to say that art.6 covers void contracts and de facto employment relationships "in particular those characterised by failure to respect the contract imposed by law for the protection of employee": pp.25–26. The "Posted Workers" Directive (above, n.535), provides that the definition of a worker for the purposes of the Directive is that which applies in the law of the Member State to whose territory the worker is posted: art.2(2). See *Pugliese v Finmeccanica SpA (C-437/00) [2003] I.L.Pr. 346*. See also *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723, [2007] I.L.Pr. 706*; *Petter v EMC Europe Ltd [2015] EWCA Civ 828; [2016] I.L.Pr. 3*; *WPP Holdings Italy SRL v Benatti [2007] EWCA Civ 263, [2007] 1 W.L.R. 2310*; Cavalier and Upex (2006) 55 I.C.L.Q. 587. In *Holterman Ferho Exploitatie BV v Spies von Bullesheim (C-47/14) [2015] I.L.Pr. 44* the Court of Justice of the EU adopted an autonomous meaning in the context of Section 5 of the Judgments Regulation.

552. Favoured by Dicey, Morris and Collins, para.33–065.

553. Favoured by Kaye, p.223.

554. See *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*; *Samengo-Turner v JH Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723*.

555. For an example, see *Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21, [2002] 1 W.L.R. 2304* at [31]–[41]. The choice of law must satisfy the requirements of art.3(1): see *Base Metal Trading Ltd v Shamurin [2003] EWHC 2419, [2004] 1 All E.R. (Comm) 159*, reversed in part but not on this point, *[2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*; *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*.

556. As to which, see below, paras 30-118—30-119.

557. Above, paras 30-063 et seq. cf. *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161*.

558. cf. art.7(2), discussed below, para.30-117 and art.7(1), above, para.30-062 which does not have the force of law in the UK: Contracts (Applicable Law) Act 1990 s.2(2).

559. See statutes referred to in n.564, below.

560. Giuliano-Lagarde Report, p.25.

561. See above, paras 30–046 et seq. Where the rule derives from European law, it may be mandatory even if there is no explicit indication in the rule itself: see *Bleuse v MBT Transport Ltd [2008] I.C.R. 488 (EAT)*.

562. *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*. Reliance was placed on the passage in the Giuliano-Lagarde Report, p.25, quoted in the preceding paragraph. It is submitted that this conclusion is highly questionable. See below.

563. *Duarte v Black & Decker Corp [2007] EWHC 2720*.

564. *Duarte v Black & Decker Corp [2007] EWHC 2720*, but this is highly questionable.

565. e.g. Equal Pay Act 1970 s.1(1), as amended by Sex Discrimination Act 1975 ss.1(11) and Contracts (Applicable Law) Act 1990 s.5 and Sch.4; Trade Union and Labour Relations (Consolidation) Act 1992 ss.285(2), 287, 289; Employment Rights Act 1996 Pt VIII ss.203, 204(1); National Minimum Wage Act 1998 s.25(1).

566. e.g. Patents Act 1977 ss.39–43 (compensation provisions for employee's inventions probably mandatory); cf. *Chiron Corp v Organon Teknika Ltd (No.2) [1993] F.S.R. 567* (Patents Act 1977 s.44, since repealed by Competition Act 1998 s.70, applies to contract governed by foreign

law). Each of the following anti-discrimination statutes has now been superseded by the Equality Act 2010, which contains no explicit indication of the territorial reach of the relevant provisions: see below. Sex Discrimination Act 1975 (mandatory); Race Relations Act 1976 (mandatory); Disability Discrimination Act 1995 (mandatory); Employment Equality (Religion and Belief) Regulations 2003 (SI 2003/1660, as amended by SI 2004/437, SI 2004/2520 and SI 2007/2269) (mandatory); Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661, as amended by SI 2004/2519 and SI 2007/2269) (mandatory); Employment Equality (Age) Regulations 2006 (SI 2006/1031) (mandatory).

567. Equal Pay Act 1970 s.1(1), as amended by Sex Discrimination Act 1975 s.8, Sex Discrimination Act 1975 s.10(1) and 10(1A) inserted by SI 2005/2467 reg.11. See for examples of similar limitations, Race Relations Act 1976 ss.4, 8(1) and 8(1A); Disability Discrimination Act 1995 ss.4, 68 and *Williams v University of Nottingham [2007] I.R.L.R. 660 (EAT)*; cf. Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263) reg.34. Now superseded by the Equality Act 2010, which contain no explicit territorial limitations: see below.

568. s.196.

569. Employment Relations Act 1999 s.32(3). Apparently the repeal was thought to facilitate implementation of the Posted Workers Directive (above, para.30–109). See Dicey Morris and Collins, para.33–091; Merrett, Ch.7.

570. *Serco Ltd v Lawson [2006] UKHL 3, [2006] I.C.R. 250*. See Dicey, Morris and Collins, paras 33–090—33–095.

571. *[2006] UKHL 3*.

572. *[2006] UKHL 3*.

573. *Duncombe v Secretary of State for Children Schools and Families [2011] UKSC 36, [2011] I.C.R. 1312*. See too *Ministry of Defence v Wallis [2011] EWCA Civ 231, [2011] I.C.R. 617*; *British Airways Board v Mak [2011] EWCA Civ 184, [2011] I.C.R. 735*.

574. *Ravat v Halliburton Manufacturing & Services Ltd [2012] UKSC 1*. See also *Simpson v Intralinks Ltd [2012] I.C.R. 1343 (EAT)*; *Rogers v Ministry of Defence, February 1, 2013 (UKEAT/0455/12/ZT) (EAT)*; *Bates von Winklehof v Clyde & Co LLP [2012] EWCA Civ 1207, [2013] I.C.R 883, reversed on different grounds [2014] UKSC 32, [2014] I.C.R 730*; *Creditsights Ltd v Dhunna [2014] EWCA Civ 1238*; *Olsen v Gearbulk Services Ltd [2015] I.R.L.R. 818 (EAT)* ; Merrett (2015) I.L.J. 53.

575. *[2006] UKHL 3*.

576. *Bleuse v MBT Transport Ltd [2008] I.C.R.488 (EAT)* (right to paid annual leave under Working Time Regulations 1998 applied where English law was the law applicable to the contract of employment). cf. *Duncombe v Secretary of State for Children Schools and Families [2011] UKSC 14, [2011] I.C.R. 495* (no European right established for vindication); *Fuller v United Healthcare Services EAT September 4, 2014*; *Smania v Standard Chartered Bank, EAT December 5, 2014*.

577. cf. in relation to consumer contracts, above, para.30–101.

578. cf. Philip in North (ed.), Contract Conflicts (1982), pp.81, 99–100. The principle of the “more favourable” law is recognised in the “Posted Workers” Directive (above, para.30–109): see Preamble para.(18) and art.3(7).

579. See *Bleuse v MBT Transport Ltd (2007) UKEAT/339/07*.

580. Dicey, Morris and Collins, para.33–071; Kaye, pp.228–229.

581. cf. Lasok and Stone, *Conflict of Laws in the European Community* (1987), p.385.

582. See, e.g. statutes referred to in n.566, above. cf. *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB)*.

583. Rome Convention art.6(2)(a).

584. *Koelzsch v État du Grand-Duché de Luxembourg (C-29/10) [2012] Q.B. 210*.

585. See *Booth v Phillips [2004] EWHC 1437 (Comm), [2004] 1 W.L.R. 3292*.

586. *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr. 16*. cf. *Booth v Phillips*, above.

587. *Booth v Phillips [2004] EWHC 1437 (Comm)*; Giuliano-Lagarde Report, p.26.

588. cf. *Booth v Phillips [2004] EWHC 1437 (Comm)*. See Dicey, Morris and Collins, para.33–078. cf. *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176*.

589. In *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176*, it was held that the contract was most closely connected with Dutch law for this reason.

590. *Base Metal Trading Ltd v Shamurin [2003] EWHC (Comm) 2419, [2004] 1 All E.R. (Comm) 159*, reversed in part, but not on this point, *[2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*. Other factors suggested as relevant in common law decisions include the residence and domicile of the employee (*South African Breweries v King [1899] 2 Ch. 173 (affirmed [1990] 1 Ch. 273)*) and the language and form of the contract (*South African Breweries v King*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176*; *Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R 1136 (affirmed [1983] 1 W.L.R. 1151)*). If the contract is held to be governed by foreign law according to art.6(2), the English court may still apply any English mandatory rules by virtue of art.7(2): see above, para.30–112.

591. e.g. *Matthews v Kuwait Bechtel Corp [1959] 2 Q.B. 57*; *Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R. 1136 (affirmed [1983] 1 W.L.R. 1151)*; *Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21, [2002] 1 WLR 2304*; *Base Metal Trading Ltd v Shamurin [2003] EWHC (Comm) 2419, [2002] C.L.C. 322*; *Booth v Phillips [2004] EWHC 1437 (Comm), [2004] 1 W.L.R. 3292*; contrast *Johnson v Coventry Churchill International Ltd [1992] 3 All E.R. 14* (action in tort only, case not framed in contract).

592. Dicey, Morris and Collins, paras 32–026, 33–083—33–085.

593. Above, paras 30–031.

594. Above, paras 30–031.

595. Rome II Regulation Recital 11.

596. cf. Plender and Wilderspin, 4th edn (2014), para.2–054 et seq.; Merrett, pp.188 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 3. - The Rome Convention [96]

(f) - Voluntary Assignments and Subrogation

Voluntary assignments

30-122

Article 12 of the Rome Convention provides choice of law rules relating to the voluntary assignment of rights. This provision, which is probably similar to the common law, [597] will apply to assignments made after April 1, 1991, [598] but before December 17, 2009, when it is replaced by art.14 of the Rome I Regulation. [599]

Assignor and assignee

30-123

> "The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') are governed by the law which applies to the contract between assignor and assignee." [600]

Although the reference to "voluntary assignment" in this provision is not expressly limited to contractual assignments, the fact that the applicable law is that of the "contract between assignor and assignee" indicates that only contractual voluntary assignments are within art.12. The law applicable to the contract between assignor and assignee will be determined according to the rules of the Convention discussed earlier in this chapter. [601]

Assignability, etc

30-124

Article 12(2) provides that:

> "The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged." [602]

Accordingly, whether a right (which need not be of a contractual nature) is capable of being assigned will be determined by the law which creates the right. [603] That law will also govern the relationship

between assignee and debtor. [604] Since that law also governs the conditions under which the assignment can be invoked against the debtor and any question of whether the debtor's obligations have been discharged, it will determine questions of priorities as between competing valid assignments of the same debt (e.g. whether notice of the assignment must be given to the debtor). [605]

Contract and property

30-125

There is some controversy as to whether art.12 is applicable to the proprietary as well as the contractual effects of an assignment. [606] The issue received some consideration in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC*. [607] A bank had taken an assignment of a policy of marine insurance, issued by French insurers but governed by English law, from a shipowner, as part of an arrangement whereby the bank lent money to the shipowner to assist in the purchase of a ship. The ship was lost and the bank sought to recover the insurance moneys from the insurers in proceedings to which the shipowner and cargo owner were parties, by invoking the assignment. The bank argued, on the basis of art.12(2) of the Rome Convention, that English law determined whether the assignment could be so invoked since English law governed the policy and was thus the law governing the right to which the assignment related, which under art.12(2) was the law which determined the conditions under which the assignment could be invoked against the debtor. Since the bank had given notice of the assignment to the insurers in accordance with English law, there was, argued the bank, no impediment to its claim. The cargo owners (who had obtained attachment orders in France of the insurance and proceeds) argued that art.12(2) of the Rome Convention had no application since the claim by the bank was proprietary in nature and the Convention only applied to contractual obligations. [608] The relevant applicable law was thus the lex situs of the right assigned [609] which in the instant case was French law and under French law the bank could not invoke the assignment against the insurers because it had not complied with a requirement of French law whereby notice of the assignment had to be given through a French bailiff. The Court of Appeal, adopting a broad interpretation of "contract", took the view that, for the purposes of the Rome Convention, the issue could legitimately be treated as a contractual one. [610] More particularly, art.12(2) "manifests the clear intention to embrace the issue and to state the appropriate law by which it must be determined". [611] Reinforcing the propositions set out in the previous paragraph, the court went on to say that by virtue of art.12(2):

> "… the contract giving rise to the obligation governs not merely its assignability, but also 'the relationship between the assignee and the debtor' and 'the conditions under which the assignment can be invoked against the debtor', as well as 'any question whether the debtor's obligations have been discharged'." [612]

The provision:

> "… on its face … treats as matters within its scope, and expressly provides for, issues both as to whether the debtor owes moneys to and must pay the assignee (their 'relationship') and under what 'conditions', e.g. as regards the giving of notice." [613]

Although the question was not considered by the Court of Appeal, the thrust of the decision would make it seem likely, as submitted in the previous paragraph, that the law governing the right assigned will also, pursuant to art.12(2), decide questions of priorities as between competing voluntary assignments of that right. [614]

Subrogation [615]

30-126

Article 13 of the Rome Convention contains a choice of law rule which is expressed to apply to "subrogation". However, in this context "subrogation" bears a limited meaning: art.13 is concerned only with cases where a creditor has a claim in *contract* against the debtor and a third person "has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty". [616] Thus the provision extends to a contract of guarantee where the guarantor has paid the creditor and is thus subrogated to the latter's rights against the debtor, [617] but not to subrogation by operation of law when the debt to be paid originates in a tort (e.g. where the insurer succeeds to the insured's right of action against the tortfeasor). [618] Although the extract from art.13(1) quoted above suggests that the third party must have a *duty* to satisfy the creditor, the Giuliano-Lagarde Report suggests that the provision may also apply to a situation in which a person has paid without "being obliged so to do by contract or law" [619] but by virtue of having an "economic interest recognised by law" as prevails in some legal systems. [620] But the Report follows this observation, extremely obscurely, by saying that the court "has a discretion in this respect", a comment which does little to clarify the position.

Applicable law

30-127

In circumstances falling within art.13(1):

> "… the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent." [621]

Thus the law applicable to the relationship between creditor and debtor determines the rights which the former has against the latter. But the law which creates the duty in the third party to satisfy that creditor determines whether and to what extent, the third party is subrogated to those rights. [622]

Co-debtors

30-128

The rule described in the previous paragraph applies to cases where several persons (debtors) are subject to the same contractual claim and one of them has satisfied the creditor. [623] Thus, if one debtor satisfies the creditor, it is the law governing the duty which requires him to do this which will determine whether he is subrogated to the creditor's rights against the other debtors.

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96. Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), Chs 32 and 33; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Ch.13; Meeusen, Pertegas and Straetmans, *The Enforcement of International Contracts in the European Union* (2004); Plender and Wilderspin, *The European Private International Law of Obligations* 4th edn (2014), Chs 4-15; Fentiman, *International Commercial Litigation* 2nd edn (2015), Chs 3-6; Nygh, *Autonomy in International Contracts* (1999); Kaye, *The New Private International Law of Contract of the European Community* (1993); Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; North, *Contract Conflicts* (1982); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Anton, *Private International Law*, 2nd edn (1990), Ch.11; Diamond (1986) 216 Recueil des Cours IV, 233; North (1990) 220 Recueil des Cours I, 3, 176-205; North [1980] J.B.L. 392; Morse (1982) 2 Yb. Eur. L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1.

597. See *Lee v Abdy (1886) 17 Q.B.D. 309*; *Republic de Guatemala v Nunez [1927] 1 K.B. 669*; *Re*

Anziani [1930] 1 Ch. 407; *Campbell Connelly & Co Ltd v Noble [1963] 1 W.L.R. 252*; *Trendtex Trading Corp v Crédit Suisse [1982] A.C. 679*; see also *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3) [1996] 1 W.L.R. 387*; 26th edition of this work, para.2185; Dicey, Morris and Collins on the Conflict of Laws, 14th edn (2006), paras 24–051—24–054; Cheshire, North and Fawcett, Private International Law 14th edn (2008), Ch.30; Moshinsky (1992) 109 L.Q.R. 591; Struycken [1998] L.M.C.L.Q. 345. Where the right assigned arises under a contract excluded from the Convention under art.1, it is not clear whether art.12 or the common law applies, but since art.12 applies to voluntary assignments, involuntary assignments will be governed by common law rules: see Dicey, Morris and Collins, paras 24–055 et seq. Although art.12 applies to the assignment of noncontractual rights, it may not apply to non-contractual assignments of a voluntary nature (unless by way of gift, see Giuliano-Lagarde Report, p.10). Such non-contractual voluntary assignments will be governed by common law rules (which apply the same principles as art.12 in this field). Article 12 does not apply to the assignment of duties: Giuliano-Lagarde Report, p.35. For full discussion, see Dicey, Morris and Collins, paras 24–051—24–079; Flessner and Verhagen, *Assignment in European Private International Law* (2006); Kieninger, *The Enforcement of International Contracts in the European Union* (2004), pp.363–387. And see below, paras 30–289 et seq.

598. Rome Convention art.17.

599. See below, paras 30–289 et seq.; *Cox v Ergo Versicherung AG (No.2) [2012] EWCA Civ 1001*.

600. Rome Convention art.12(1). See *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 85* at [43] (art.12(1) regulates the position of assignor and assignee as between themselves); *Waldweise Stiftung v Lewis [2004] EWHC 2589 (Ch)*; *Gorjat v Gorjat [2010] EWHC 1537 (Ch)* at [10]–[12].

601. Above, paras 30–046 et seq. Where art.4(2) applies (see above, paras 30–070 et seq.) the characteristic performance appears to be that of the assignor. See *Gorjat v Gorjat*, above at [11]–[12] (characteristic performance of assignment by way of gift that of the assignor/donor).

602. Logically, the question of assignability must be resolved before one reaches the question of the validity of the assignment—dealt with in art.12(1). For the reasons for the curious draftsmanship of art.12, see Giuliano-Lagarde Report, p.34.

603. See *Waldweise Stiftung v Lewis [2004] EWHC 2589 (Ch)*. See also *Peer International Corp v Termidor Music Publishers Ltd [2003] EWCA Civ 1156, [2004] Ch. 212*; *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475* at [304]. cf. *Campbell Connelly and Co Ltd v Noble [1963] 1 W.L.R. 252*; *Trendtex Trading Corp v Crédit Suisse [1982] A.C. 679*, for the same rule at common law. If the right assigned is contractual, the applicable law will be decided according to the rules of the Convention unless the relevant contract is excluded from the scope of the Convention.

604. The relations between assignor and debtor (other than the issue of assignability), if a contract exists between them, will be governed by the law applicable to that contract identified by reference to the rules of the Convention: Giuliano-Lagarde Report, p.35.

605. This was probably the common law rule: Dicey, Morris and Collins, para.24-054; Cheshire, North and Fawcett, pp.1229-1235; *Le Feuvre v Sullivan (1855) 100 Moo. P.C. 1*; *Kelly v Selwyn [1905] Ch. 117*; cf. *Republica de Guatemala v Nunez [1927] 1 K.B. 669, 695* (obiter in favour of lex fori); McKendrick, *Goode on Commercial Law*, 4th edn (2010), pp.1240-1241; Rogerson, *Collier's Conflict of Laws*, 4th edn (2013), p404 (lex situs of debt).

606. Dicey, Morris and Collins, para.24-064 takes the view that proprietary effects are included. Contrast Goode, 4th edn (2010), pp.1240-1241 and Moshinsky (1992) 109 L.Q.R. 591, who take the view that they are not. See, generally, Plender and Wilderspin, 4th edn (2014), Ch.13.

607. *[2001] EWCA Civ 68, [2001] Q.B. 825*. For comment, see Plender and Wilderspin, 4th edn (2014), paras 13-033 et seq.; Stevens, *Cross-Border Security and Insolvency* (2001), pp.213-216; Stevens and Struycken (2002) 118 L.Q.R. 15; Briggs [2001] 72 B.Y.B.I.L. 461.

608. See above, para.30-030.

609. Relying, inter alia, on Goode, Commercial Law, 2nd edn (1995), pp.1129-1130.

610. *[2001] EWCA Civ 68, [2001] Q.B. 825* at [34]-[43].

611. *[2001] EWCA Civ 68* at [43].

612. *[2001] EWCA Civ 68*.

613. *[2001] EWCA Civ 68*. The court referred to two decisions of the German Supreme Court to similar effect: see *Raiffeisen [2001] EWCA Civ 68* at [49]-[50]; see also von Bar (1989) 53 RabelsZ 462. The court also referred to a decision of the Dutch Hoge Raad, discussed by Struycken [1998] L.M.C.L.Q. 345 and Koppenol-Laforce (1998) N.I.L.R. 129: see *[2001] EWCA Civ 68, [2001] Q.B. 825* at [51]-[52].

614. Dicey, Morris and Collins, para.24-062.

615. See Dicey, Morris and Collins, para.32-211; Plender and Wilderspin, 4th edn (2014), paras 13-045 et seq.; Takahashi, *Claims for Contribution and Reimbursement in an International Context* (2000), pp.78-82; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.327-330; Morse (1992) 2 Ybk. Eur. L. 107, 158. As to the position under the Rome I Regulation, see below, paras 30-289 et seq.

616. Rome Convention art.13(1).

617. Giuliano-Lagarde Report, p.35.

618. Giuliano-Lagarde Report, p.35; *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA [2005] EWHC 454 (Comm), [2005] 1 C.L.C. 347* and C-185/07 [2009] E.C.R. I-663, [2009] 1 A.C. 1138; and see Third Parties (Rights Against Insurers) Act 2010 s.18.

619. Giuliano-Lagarde Report, p.35.

620. Giuliano-Lagarde Report, p.35.

621. Rome Convention art.13(1).

622. See *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*, above.

623. Rome Convention art.13(2). As to the position under the Rome I Regulation, see below, paras 30-289 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(a) - In General

History

30-129

The provisions inserted into the EC Treaty by the Treaty of Amsterdam [624] which are concerned with the introduction of "measures in the field of judicial cooperation in civil matters" envisaged revisions of the Rome Convention. [625] In an action plan announced in December 1998, the Council and the Commission indicated an intention to:

> "… begin revision, where necessary, of certain provisions of the Convention on the Law Applicable to Contractual Obligations, taking into account special provisions on conflict of law rules in other Community instruments." [626]

In January 2003, the Commission issued a Green Paper "on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation" [627] as part of a process of consultation on a wide variety of issues concerning the Convention. [628] The Hague Programme, adopted by the Council on November 5, 2004, called for work to be pursued actively on the rules of conflict of laws regarding contractual obligations (Rome I). [629] This resulted, in December 2005, in a proposal, presented by the Commission, for the conversion of the Rome Convention into a Regulation of the European Parliament and the Council. [630] After much debate and discussion, new provisions on the law applicable to contractual obligations were established in Regulation (EC) 593/2008 of June 17, 2008 on the law applicable to contractual obligations (Rome I) [631] (hereafter the "Rome I Regulation" or the "Regulation"). The Regulation entered into force on July 24, 2008 [632] and is applicable in the Member States in relation to contracts concluded on or after December 17, 2009. [633] As a Regulation, the Rome I Regulation is directly applicable and no United Kingdom legislation is required to bring it into effect. [634]

Position of the United Kingdom

30-130

The original position of the United Kingdom was that it would not, at the outset, participate in the adoption and application of the proposed Regulation. [635] The United Kingdom was, however, involved in discussions concerning the Commission's Proposal and continued to consider its position over the course of negotiations of the text. In July, 2008, the United Kingdom indicated its willingness to opt into the final instrument [636] and, in response to a request to this effect, the Commission so accepted. [637]

Legal basis

30-131

The Commission's original Proposal and the eventual Rome I Regulation are based on art.61(c) of the EC Treaty [638] which enables the Council to adopt measures in the field of judicial cooperation in civil and commercial matters, as provided for in art.65, which refers to "measures in the field of judicial co-operation in civil matters with a cross-border impact [639]" to be taken "to the extent necessary for the proper functioning of the internal market". [640] Such measures may include "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction". [641] According to Recital 6 to the Regulation, the:

> "… proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which the action is brought." [642]

While these remarks seem based on rhetoric rather than empirical research, it would seem that the "internal market" justification for harmonised conflict of laws rules is now too well established to be seriously challenged.

The Rome I Regulation in outline [643]

30-132

Since the structure and scope of the Rome I Regulation differs considerably from the Rome Convention, it will be helpful, at the outset, to identify, in outline, the structure and subject matter of the Rome I Regulation. After an initial Preamble and 46 Recitals, the Regulation is arranged into four Chapters. Chapter I is concerned with scope. Chapter II headed "Uniform rules" contains the relevant choice of law rules for determining the law applicable to a contract consisting of: a general rule on freedom to choose the governing law (art.3); a general rule to determine the applicable law in the absence of choice (art.4); specific choice of law rules to determine the law applicable to contracts of carriage (art.5), consumer contracts (art.6), insurance contracts (art.7), and individual employment contracts (art.8). Article 9 is concerned with "overriding mandatory provisions". Articles 10-13 are concerned with specific issues: consent and material validity (art.10); formal validity (art.11); scope of the applicable law (art.12); and incapacity (art.13). Articles 14-17 deal respectively with: voluntary assignment and contractual subrogation (art.14); legal subrogation (art.15); multiple liability (art.16); and set-off (art.17). Chapter II concludes with a rule as to the burden of proof (art.18). Chapter III headed "other provisions", contains rules dealing with the following matters: the definition of "habitual residence" (art.19); the exclusion of renvoi (art.20); public policy (art.21); states with more than one legal system (art.22); relationship with other provisions of Community law (art.23); relationship with the Rome Convention (art.24); relationship with existing international conventions (arts 25 and 26); a review clause (art.27); and application in time (art.28). Chapter IV contains one provision concerned with date of entry into force and application (art.29).

Interpretation

30-133

The Rome I Regulation will be subject to interpretation by the Court of Justice of the European Union (hereafter the "European Court"). A national court may make a reference to the European Court, even in cases where there is a judicial remedy under national law. [644] There are no explicit guides to interpretation in the Regulation itself, though on occasion guidance can be found in the Recitals. [645] The European Court and national courts will doubtless have regard to the need for uniformity in the interpretation and application of the Regulation amongst Member States and to this end will normally endeavour to attribute autonomous meanings to terms which are likely to have different meanings in

the law of the Members States. [646] Furthermore it is suggested [647] that the substantive scope and the provisions of the Regulation should be consistent with Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels 1 recast) [648] and Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II). [649] It may also be possible to have regard to the Giuliano-Lagarde Report on the Rome Convention [650] where the terminology of the Regulation coincides with that contained in the Rome Convention or in circumstances where the somewhat different terminology of the Regulation is unlikely to imply any substantive change from that used in the Convention. [651]

Relationship with other provisions of Community law

30-134

Article 23 of the Regulation provides that subject to an exception in art.7, concerned with insurance contracts, [652] the Regulation does not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of laws rules relating to contractual obligations. [653] Recital 40 [654] states that the Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules contained in the Regulation, and further stipulates that the application of provisions of the applicable law designated by the rules of the Regulation should not restrict the free movement of goods and services regulated by Community instruments. [655]

Relationship with the Rome Convention

30-135

Article 24 makes provision for the relationship between the Regulation and the Rome Convention. It provides first, [656] that the Regulation will replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which the Regulation does not apply pursuant to art.299 of the EC Treaty. Secondly, [657] it provides that in so far as the Regulation replaces the provisions of the Rome Convention, any reference to the Convention shall be understood as a reference to the Regulation.

Relationship with existing international conventions

30-136

Article 25(1) provides that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time the Regulation is adopted [658] and which lay down conflict of laws rules relating to contractual obligations. This notwithstanding, as between Member States, the Regulation takes precedence over conventions concluded exclusively between two or more such States in so far as such conventions concern matters covered by the Regulation. [659] Article 26(1) [660] requires Member States to notify the Commission of the aforementioned conventions by June 17, 2009 and after that date Member States are required to notify the Commission of all denunciations of such conventions. The Commission is obliged to publish in the Official Journal of the European Union within six months of receipt, a list of the aforementioned conventions and a list of denunciations. [661]

Review clause

30-137

Article 27 of the Rome I Regulation provides for review of certain matters arising in connection with the Regulation. No later than five years after the entry into force of the Regulation, [662] the Commission is required to submit to the European Economic and Social Committee a report on the application of

the Regulation and if appropriate, the report shall be accompanied by proposals to adapt the Regulation. [663] The report is to include: (i) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced if any: and (ii) an evaluation on the application of art.6 (concerned with consumer contracts), in particular as regards the coherence of Community law in the field of consumer protection. [664] It is likely that review of the particular matters of insurance contracts and consumer contracts was prompted by the fact that these matters had proved controversial in the negotiation of the Regulation. [665] No later than two years after the entry into force of the Regulation, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claims over a right of another person, the report to be accompanied if appropriate, by a proposal to amend the Regulation and an assessment of the impact of the provisions to be introduced. [666] The requirement for review of these matters was similarly prompted by their controversial nature in the course of negotiations. [667]

General scope of the Regulation

30-138

A number of general questions arise as to the scope of the Regulation (as opposed to the specific questions which are included in or excluded from the Regulation by the text of the instrument). [668] The general scope of the Regulation is indicated in art.1(1) which provides that the Regulation:

> "… shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters."

This formulation (which is different from that contained in the equivalent provision of the Rome Convention) [669] reflects the language of: (a) Council Regulation 125/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels I recast") (hereafter the "Judgments Regulation recast") [670]; and (b) Regulation 864/2007 on the law applicable to non-contractual obligations ("Rome II") (hereafter the "Rome II Regulation"). [671] As explained above, [672] Recital 7 to the Regulation indicates that the substantive scope and the provisions of the Rome I Regulation should be consistent with those instruments which means that identical terminology in each instrument should be interpreted in the same way.

"Situations involving a conflict of laws"

30-139

This expression seems to indicate that the situation must be one which implicates the need to make a choice of law in relation to a particular contractual obligation which falls within the provisions of the Regulation.

"Civil and commercial matters"

30-140

This expression (found in the Judgments Regulation recast and the Rome II Regulation) must be interpreted in a manner consistent with each of those Regulations. [673] Very broadly a "civil and commercial matter" is a matter which raises an issue of private law, as opposed to public law. It may serve to exclude from the scope of the Regulation, public law contracts such as administrative contracts under French law. [674] The expression also seems to mean that the scope of the Regulation will be more limited than that of the Rome Convention which is not limited to civil and commercial matters. It is unclear whether it is also intended to exclude from the scope of the Regulation any

contract to which a government is a party. [675] It is suggested, however, that where a government enters into a contract in the exercise of its peculiarly public powers, the Rome I Regulation will not apply. [676] Where, in contrast, a government enters into a contract acting, in effect, as a private party, it is possible that the Regulation will apply, but this is far from clear. [677]

"Revenue, customs and administrative matters"

30-141

The exclusion of contractual obligations arising out of these matters from the scope of civil and commercial matters follows the Judgments Regulation recast [678] and the Rome II Regulation [679] and interpretation of their content should follow that adopted in relation to those instruments, particularly the Judgments Regulation recast. [680]

Application of law of non-Member States

30-142

Article 2 of the Regulation provides that any law specified by the Regulation shall be applied whether or not it is the law of a Member State. [681] Thus, the Regulation is to have "universal effect", as was the case with the Rome Convention. [682]

Application of law of a country

30-143

It is also legitimate to deduce from art.1(1) taken in conjunction with art.2 and other provisions of the Regulation, that the applicable law must be the law of a "country". [683] Thus it will not be possible for the applicable law to be a non-state body of law [684] or a system of religious law. In this respect the Regulation takes the same position as prevailed under the Rome Convention. [685]

States with more than one legal system

30-144

Where a state comprises several territorial units each of which has its own rules of law in respect of contractual obligations (e.g. the United States) each territorial unit is to be considered as a country for the purposes of identifying the applicable law under the Regulation. [686]

Renvoi

30-145

Article 20, headed "Exclusion of renvoi", provides that the application of the law of any country specified by the Regulation means the rules of law in force in that country other than its rules of private international law, unless provided otherwise in the Regulation. Renvoi is thus generally excluded. The exception appears to be limited to one provision (art.7(3)) concerned with insurance contracts. [687]

Meaning of "contractual obligations"

30-146

The Regulation only applies to determine the law applicable to “contractual obligations”, an expression that is not specifically defined in the Regulation itself. In general terms, subject to what is said below, the same observations may be made here as were made in relation to the meaning of the same expression in the Rome Convention. [688] There can be no doubt that the expression will be given an “autonomous” meaning and will, thus, not necessarily be limited to obligations which the law of the English forum would regard as contractual. [689] Equally, it is suggested that the basis of the autonomous meaning will be found to lie in an obligation which is voluntarily assumed by agreement between the parties. [690]

Meaning of “non-contractual obligations”

30-147

The Rome II Regulation provides uniform choice of law rules for determining the law applicable to noncontractual obligations arising out of tort/delict, unjust enrichment, culpa in contrahendo and negotiorum gestio. [691] The meaning of contractual obligation for the purposes of the Rome I Regulation will necessarily involve delimiting the respective scope of the Rome I Regulation and the Rome II Regulation. [692] In this respect, attention may be drawn to three particular points.

Obligations arising out of pre-contractual dealings

30-148

Obligations arising out of pre-contractual dealings between the parties will be governed by art.12 of the Rome II Regulation dealing with culpa in contrahendo [693] and thus will not fall within the Rome I Regulation. [694] Article 12(1) of the Rome II Regulation provides, as a general rule, that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of the contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or would have been applicable to it had it been entered into. [695] Presumably the law that applies to the contract or would have been applicable to it had it been entered into, will have to be determined by reference to the choice of law rules contained in the Rome I Regulation.

Consequences of nullity of a contract

30-149

As discussed below, [696] art.12(1)(e) of the Rome I Regulation provides that the applicable law governs the consequences of nullity of the contract. As explained above earlier in this chapter the Rome Convention allowed contracting states to make a reservation to this provision which the United Kingdom duly did, since in the view of United Kingdom legal systems this issue was to be classified not as contractual, but as restitutionary, in character. [697] No such reservation is permitted by the Rome I Regulation, and thus art.12(1)(e) will have to be applied. A question arises, however, because the Rome II Regulation contains in art.10 [698] a choice of law rule concerning unjust enrichment into the category of which the consequences of nullity of the contract could be construed to fall. It is suggested, however, that this issue should be governed by the rules in the Rome I Regulation and not by art.10 of the Rome II Regulation, though it cannot be said that this conclusion is entirely clear. Article 10(1) of the Rome II Regulation provides that if a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with the unjust enrichment, it shall be governed by the law that governs that relationship. [699] This could be interpreted to mean that the consequences of nullity of a contract are governed by the law applicable to the contractual obligation out of which the unjust enrichment arises. Nonetheless, it is suggested that the relative scope of the Rome I Regulation and the Rome II Regulation will be determined to be mutually exclusive.

Contract and tort

30-150

In relation to the Rome Convention, it was held in England that where English law allowed concurrent claims in contract and tort, there was nothing in the Rome Convention to prevent a claimant from framing a claim in tort rather than contract if it was advantageous to do so. [700] It is suggested, however, that this option will not be available as between the choice of law rules contained in the two Regulations. [701] The scope of each Regulation will be determined to be mutually exclusive.

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624. Treaty of Amsterdam art.65. See [1997] O.J. C340/1. For the history, see Plender and Wilderspin, *The European Private International Law of Obligations*, 4th edn (2014), Ch.4.

625. See, in particular, Treaty of Amsterdam art.65B.

626. Action Plan [1999] O.J. C19/1.

627. Green Paper COM(2002) 654final. See also the Opinion of the European Economic and Social Committee on the Green Paper [2004] O.J. C108/1.

628. See also Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan COM(2003) 427 final.

629. Hague Programme [2005] O.J. C53/1. See Recital 5 to the Rome I Regulation.

630. Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM(2005) 650 final. For discussion of the Proposal, see Lando and Nielsen (2007) 3 J. Priv. Int. L. 89 and the Comments of the Max Planck Institute for Comparative and International Private Law in (2007) 71 Rabels Zeitschrift 225.

631. Rome I [2008] O.J. L177/6.

632. Rome I art.29.

633. ❗Rome I arts 28 and 29. A contract entered into before December 17, 2009 is not brought within the scope of the Rome I Regulation because it is amended or varied after that date unless it is a variation of such magnitude that a new contract must be regarded as having been concluded: *Greece v Nikiforidis (C-135/15) [2017] I.C.R. 147* at [39].

634. But see Rome I art.22(2). Legislation to deal with the application of the Regulation in respect of conflicts between the laws of the component parts of the United Kingdom is contained in SI 2009/3064 (England and Wales and Northern Ireland) and in SSI 2009/410 (Scotland). As to insurance contracts, see SI 2009/3075.

635. See Recital 18 to the Commission Proposal. See Recital 45 to the Regulation.

636. See Council of the European Union, Press Release, 11653/08 (Presse 205), p.26. This will, presumably, require amendment to Recital 45 to the Regulation. The decision was taken after consultation, based on Ministry of Justice, Consultation Paper: Rome I—Should the UK opt in? (April, 2008). Denmark did not take part in the adoption of the Regulation and is not bound by it or subject to its application: Recital 46 to the Regulation. Ireland did participate in the adoption of the Regulation: Recital 44.

637. See Commission Decision of December 22, 2008 on the request of the United Kingdom to accept Regulation (EC) of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [2009] O.J. L10/22.

638. See Preamble to the Regulation.

639. See Recital 1 to the Regulation.

640. See Recitals 1 and 6 to the Regulation.

641. See Recital 2 to the Regulation.

642. See also Recitals 3 and 4 to the Regulation.

643. See for discussion, Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Chs 32 and 33; Fentiman, *International Commercial Litigation*, 2nd edn (2015), Chs 4-6; Plender and Wilderspin, *The Private International Law of Obligations*, 4th edn (2015), Chs 4-15; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Ch.18; Merrett, *Employment Contracts in Private International Law* (2011); Tang, Electronic Consumer Contracts in the Conflict of Laws (2009); Hill, *Cross-Border Consumer Contracts* (2008); Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009); Bonomi (2008) 10 Yb. P.I.L. 165; Lein (2008) 10 Yb. P.I.L. 177; Asensio (2008) 10 Yb. P.I.L. 199; Ancel (2008) 10 Yb. P.I.L. 221; Guiterrez (2008) 10 Yb. P.I.L. 233; Garcimartin Alferez (2008) 10 Yb. P.I.L. 245; Heiss (2008) 10 Yb. P.I.L. 261; Bonomi (2008) 10 Yb. P.I.L. 285; Merrett (2009) 5 J.Priv. Int. L. 49; Merkin (2009) 5 J.Priv. Int. L. 69; Ferrari, 2009 Rev. Crit. d.i.p. 459; Crawford, 2010 S.L.T. 17; Kenfack, 2009 Clunet 3; Francq, 2009 Clunet, 41; Haftel, 2010 Clunet 761; Spagnolo (2010) 6 J. Priv. Int. L. 417; Scott [2010] L.M.C.L.Q. 640; Yuksel (2011) 7 J. Priv. Int. L. 149; Boonk [2011] L.M.C.L.Q. 227.

644. art.267 TFEU.

645. e.g. Rome I Recitals 7-10. Reference is made to the Recitals at appropriate points in this section and in s.5.

646. For exceptions see Rome I art.1(2)(b) and (c) and Recital 8.

647. Rome I Recital 7.

648. Regulation (EU) 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast): [2012] O.J. L351/1; Pocar, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.343; *Koelzsch v État du Grand Duché de Luxembourg (C-29/10) [2012] Q.B. 210*; Crawford and Carruthers (2014) 63 I.C.L.Q. 1. On issues of territorial scope of the Regulation, see Dickinson [2012] L.M.C.L.Q. 86.

649. Regulation 864/2007 on law applicable to non-contractual obligations [2007] O.J. L199/40.

650. Above, para.30-019.

651. See e.g. in Rome I art.3(3), below, para.30-177; Recital 15.

652. See below, paras 30-252 et seq. Specific choice of law rules for certain insurance contracts were to be found in a series of Directives. See above, para.30-044.

653. See Rome I Recital 40, first and second sentences.

654. Rome I Recital 40, third and fourth sentences.

655. The example given is Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) [2000] O.J. L178/1. See above, para.30-095.

656. Rome I art.24(1).

657. Rome I art.24(2); Dickinson [2012] L.M.C.L.Q. 86.

658. i.e. June 17, 2008.

659. Rome I art.25(2). See Recital 41. According to Recital 42 the Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to contractual obligations.

660. Rome I art.26 applies from June 17, 2009.

661. Rome I art.26(2).

662. i.e. June 17, 2013.

663. Rome I art.27(1).

664. Rome I art.27(1)(a), (6).

665. See below, paras 30-231 et seq., 30-252 et seq.

666. Rome I art.27(2). The review has not yet been concluded.

667. See below, paras 30-289 et seq.

668. See below, paras 30-351 et seq.

669. See above, para.30-021.

670. See above, para.30-017.

671. See above, para.30-121 and below, para.30-288.

672. See para.30-133.

673. Recital 7 to the Rome I Regulation. See Dicey, Morris and Collins, 15th edn (2012), paras 11-029 et seq.; Dicey Morris and Collins, 15th edn (2012), paras 32-025, 34-015. Both the Judgments Regulation recast and the Rome II Regulation specifically exclude from their scope "the liability of the State for acts and omissions in the exercise of State authority" (art.1(1)). See Dicey, Morris and Collins, 15th edn (2012), para.34-015. See generally on the Rome II Regulation, Dickinson, *The Rome II Regulation* (2008).

674. cf. Dicey, Morris and Collins, 15th edn (2012), para.32-015; Foyer, 1991 Clunet 605; Audit, *Droit International Privé*, 4th edn (2006), para.829.

675. See preceding note.

676. cf. *Kleinworth Benson Ltd v Glasgow City Council [1999] 1 A.C. 153*.

677. See Dicey, Morris and Collins, para.32-024.

678. Judgments Regulation recast art.1(1).

679. Rome II Regulation art.1(1).

680. See Dicey, Morris and Collins, 15th edn (2012), para.11-032.

681. Member State for these purposes means all the Member States except Denmark: Rome I art.1(3), subject to arts 3(4) and 7.

682. Above, para.30-022.

683. See, e.g. Rome I arts 3-8.

684. Rome I Recital 13 states that the Regulation does not preclude parties from incorporating by reference into their contract a non-state body or law or an international convention. More generally, incorporation by reference of foreign provisions of law into the contract (above, para.30-028) is also permitted. Recital 14 states that should the Community adopt in an appropriate legal instrument rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply these rules. cf. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final. This proposal was withdrawn on December 16, 2014: COM(2014) 910 final.

685. Above, para.30-047.

686. Rome I art.22(1). cf. the Rome Convention, above, para.30-023.

687. See below, para.30-272.

688. Above, paras 30-030 et seq.

689. Above, para.30-030. See, for example, in the context of an "implied in law" obligation *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd [2016] EWHC 2774 (Comm)* and, in the context of a claim made under the French tourism code, *Committeri v Club Mediterranee SA [2016] EWHC 1510 (QB)*.

690. cf. *Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157*. See Dicey, Morris and Collins, 15th edn (2012), para.32-016; above, para.30-030.

691. For discussion, see Dicey, Morris and Collins, 15th edn (2012), paras 34-016 et seq.

692. Dicey, Morris and Collins, 15th edn (2012), paras 34-016, et seq.

693. For discussion, see Dicey, Morris and Collins, 15th edn (2012), at para.43-016 and Ch.36; Dickinson, above, Ch.13.

694. Rome I art.1(2)(i); Recital 10 to the Rome I Regulation. For the purposes of the Rome II Regulation, culpa in contrahendo must be given an autonomous meaning: see Recital 30 to the latter Regulation.

695. Rome II art.12(2) supplies a default rule applicable where the governing law cannot be determined by reference to art.12(1).

696. para.30-329.

697. Above, paras 30-032 et seq.

698. For discussion, see Dicey, Morris and Collins, 15th edn (2012), para.30-162.

699. Rome II art.10(2)-(4) supplies default rules to be applied if the applicable law cannot be determined on the basis of art.10(1).

700. Above, para.30-031.

701. Dicey, Morris and Collins, 15th edn (2012), paras 34-017 et seq.; Dickinson, above, paras 3.86 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(b) - Exclusions

Specifically excluded matters

30-151

Article 1(2) and art.1(3) of the Rome I Regulation specifically exclude certain matters from the material scope of the Regulation. Since many of these matters replicate the equivalent provisions in the Rome Convention, they will not be discussed in detail here. [702] The following paragraphs emphasis matters excluded where there are differences between the Rome Convention and the Regulation.

Capacity of natural persons

30-152

Article 1(2)(a) is in the same terms as art.1(2)(a) of the Rome Convention [703] and excludes questions involving the status or legal capacity of natural persons without prejudice to the special rule on incapacity contained in art.13 of the Regulation. [704]

Family relationships

30-153

The choice of law rules contained in the Regulation do not apply to obligations arising out of family relationships, and relationships deemed by the law applicable to such relationships to have comparable affects, including maintenance obligations. This provision, found in art.1(2)(b) of the Regulation, expresses, in somewhat different terms, part of art.1(2)(b) of the Rome Convention [705] which also excluded obligations arising out of family relationships. In the Regulation there is an additional exclusion of obligations arising out of relationships deemed by the law applicable to such relationships to have comparable effects to family relationships. Recital 8 to the Regulation states that "family relationships should cover parentage, marriage, affinity, and collateral relatives" and also states that the reference:

> "… to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised."

This would be apt to exclude civil partnerships as understood in English law. [706]

Matrimonial property regimes, etc

30-154

Article 1(2)(c) excludes obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession. [707] Although in part, this provision is based on art.1(2)(b) of the Rome Convention, [708] there is a significant addition in that the exclusion is extended to property regimes arising out of relationships deemed to have comparable effects to marriage under the law applicable to such relationships. It will be for the law of the Member State in which the court is seised to determine whether the particular relationship has the necessary comparable effects. [709]

Bills of exchange etc

30-155

Article 1(2)(d) of the Regulation excludes obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. This provision is a replica of art.1(2)(c) of the Rome Convention. [710] Recital 9 to the Regulation states that obligations:

> "… under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character."

Thus, if under the relevant governing law a bill of lading is a negotiable instrument and the obligation in question arises out of its negotiable character, the rules contained in the Regulation will not apply. [711]

Arbitration agreements and agreements on the choice of court

30-156

Article 1(2)(e) excludes arbitration agreements and agreements on the choice of court from the scope of the Regulation. The provision replicates art.1(2)(d) of the Rome Convention. [712]

Questions governed by the law of companies, etc

30-157

Article 1(2)(f) excludes questions governed by the law of companies and other bodies corporate or unincorporated such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body. With one minor linguistic change, of no substantial effect (body "unincorporate" in the Rome Convention becomes body "unincorporated" in the Regulation), this provision reproduces art.1(2)(e) of the Rome Convention. [713]

Power of agent to bind principal, etc

30-158

According to art.1(2)(g), the Regulation does not apply to the question whether an agent is able to

bind a principal, or an organ to bind a company or body corporate or unincorporated, in relation to a third party. With minor linguistic changes, of no substantial effect, art.1(2)(g) reproduces art.1(2)(f) of the Rome Convention. [714]

Trusts

30-159

Questions concerning the constitution of trusts and the relationship between settlors, trustees and beneficiaries, are excluded by art.1(2)(h) in terms which are identical with art.1(2)(g) of the Rome convention. [715]

Evidence and procedure

30-160

Article 1(3) of the Regulation, reproducing the effect of art.1(2)(h) of the Rome Convention [716] provides that the Regulation does not apply to evidence and procedure, without prejudice to art.18, concerned with the burden of proof. [717]

Pre-contractual dealings

30-161

As pointed out above, [718] art.1(2)(i) provides that the Regulation does not apply to obligations arising out of dealings prior to the conclusion of a contract. Such obligations are regarded as non-contractual obligations and thus will fall within art.12 of the Rome II Regulation. [719] Article 1(2)(j) has no counterpart in the Rome Convention.

Insurance

30-162

The Rome Convention contained no discrete rules for determining the law applicable to insurance contracts and indeed did not apply at all to determine the law applicable to an insurance contract covering risks situated in the territories of the European Community. [720] In contrast, art.7 of the Rome I Regulation contains elaborate choice of law rules for determining the law applicable to insurance contracts which are discussed later in this section. [721] There is however, in art.1(2)(j) of the Regulation an exclusion of a specific type of insurance from the Regulation regime, namely insurance contracts arising out of operations carried out by organisations other than undertakings referred to in art.2 of Directive 2002/83 concerning life insurance [722] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work. [723]

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[702]. See above, paras 30-034 et seq.

[703]. Above, para.30-035.

[704]. Rome I art.13 is discussed below, para.30-325.

[705]. Above, para.30-036.

706. Civil Partnerships Act 2004.

707. See Proposal for Council Regulations for matrimonial property regimes and registered partnerships COM(2011) 126 final; COM(2011) 127 final. Following the failure to reach a political agreement on these proposals, on March 2, 2016, the European Commission adopted a proposal for a Council decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships (COM(2016) 108 final). The Commission also published proposals for two new Regulations, a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2016) 106 final) and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (COM(2016) 107 final). Council Regulation 2016/1103 of 24 June 2016 ([2016] O.J. L183/1) will apply in Member States which participate in advanced cooperation from January 29, 2019 in the context of matrimonial property and the property consequences of registered partners.

708. Above, para.30-036.

709. Recital 8 to the Rome I Regulation. For English law, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Ch.28.

710. Above, paras 30-037—30-038; Boonk [2011] L.M.C.L.Q. 227; Aikens [2011] L.M.C.L.Q. 482.

711. See, for English law, Dicey, Morris and Collins, 15th edn (2012), para.30-020.

712. Above, para.30-039. As is pointed out below an arbitration clause or a jurisdiction clause may be relevant in determining whether a choice of law has been made for the purposes of art.3 of the Rome I Regulation: see below, para.30-173; Yuksel (2011) 7 J. Priv. Int. L. 149.

713. Above, para.30-040.

714. Above, para.30-041. The Commission's original Proposal contained choice of law rules in relation to agency: see art.7 of the Proposal.

715. Above, para.30-042.

716. Above, para.30-043; Illmer [2009] C.J.Q. 237. See more generally, Garnett, *Substance and Procedure in Private International Law* (2012).

717. Discussed below, paras 30-354 et seq.

718. Above, para.30-148.

719. See also Recital 10 to the Rome I Regulation.

720. Above, paras 30-044 et seq.

721. Below, paras 30-252 et seq.

722. Directive 2002/83 concerning life insurance [2002] O.J. L345/1.

723. See art.3(3) of Directive 2002/83, preceding note.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(c) - Habitual Residence

Introduction

30-163

The Rome I Regulation makes frequent reference to the law of a party's habitual residence [724] and it will be convenient, at this point, to identify and discuss the definition of this concept which is to be found in art.19 of the Regulation. According to Recital 39 to the Regulation for "the sake of certainty there should be a clear definition of habitual residence, in particular for bodies corporate" which:

> "… should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation." [725]

Companies, etc

30-164

For the purposes of the Regulation, art.19(1) provides that the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. "Central administration" will undoubtedly be given an autonomous meaning. It is an expression to be found, but not defined, in the Rome Convention. Some suggestions are made above as to the possible outlines of an autonomous meaning in the context of the discussion of the expression, as used in the Convention. [726]

Branch, agency, etc

30-165

Article 19(2) of the Regulation provides that where:

> "… the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence." [727]

It is unlikely that application of this provision will give rise to any particular difficulty in practice. It is likely, however, that the expression "branch, agency, or any other establishment" will be interpreted

consistently with the same expression as found in art.7(5) of the Judgments Regulation recast. [728]

Natural persons

30-166

The Regulation provides that the "habitual residence of a natural person acting in the course of his business activity shall be his principal place of business". [729] "Principal place of business" will surely be given an autonomous meaning. Some suggestions as to the possible contours of this are made in the context of the discussion of the expression, as used in the Rome Convention, earlier in this chapter. [730]

Natural person not acting in the course of business

30-167

No definition of habitual residence is provided in relation to a person who is not acting in the course of a business activity. Should this question arise for consideration, the solution will have to be found, it would seem, in general principles which will found the basis of an autonomous meaning. [731]

Relevant time

30-168

According to art.19(3) of the Regulation when determining a party's habitual residence the relevant point in time is to be the time of conclusion of the contract. It would seem that that point in time will have to be determined by reference to the law which is alleged to be applicable to the contract in question. [732]

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724. Rome I arts 4, 5, 6, 7, 10 and 11.

725. cf. Judgments Regulation recast art.63(1); Rome II Regulation art.23. The Rome Convention did not contain a specific definition of habitual residence but makes reference to concepts employed in the definition found in art.19 of the Regulation. See above, paras 30-078 et seq.

726. Above, paras 30-079 et seq.

727. There is no comparable provision in the Rome Convention. cf. Rome II Regulation art.23(1), second paragraph.

728. See Recital 7 to the Rome I Regulation. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 11-296 et seq.

729. Rome I art.19(1).

730. Above, para.30-080.

731. Some of these are identified and discussed in the context of the Rome Convention: see above, para.30-078.

732. Rome I art.10(1): below, paras 30-305 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(d) - Freedom of Choice

Introduction

30-169

As is the case in the equivalent provision in the Rome Convention, [733] art.3 of the Rome I Regulation enshrines the principle of party autonomy whereby parties may choose the law to govern a contract. [734] The freedom of the parties to choose the governing law is described in Recital 11 to the Regulation as one of the "cornerstones" of the system of conflict of laws rules in matters of contractual obligations. Although art.3 of the Regulation reflects the same philosophy as art.3 of the Convention, there are differences in wording and detail between the two provisions to which attention is drawn in the following paragraphs.

General principle

30-170

Article 3(1) of the Regulation provides quite generally that a "contract shall be governed by the law chosen by the parties". The law chosen must be that of a country and it is not open to parties to choose, for example, a non-State body of law such as the "lex mercatoria" or "general principles of international commercial law". [735] It is, nonetheless, open to the parties to incorporate by reference into the contract a non-State body of law or an international convention. [736] Further, it would seem [737] that where the parties have chosen a foreign law to govern the contract, but do not plead or prove the content of the foreign law, then, at least in England, the court will apply English law since the principle that foreign law, as a fact, must be pleaded and proved is a rule of evidence or procedure to which the Regulation does not apply. [738] This could also be seen as a procedural choice of English law made in the course of proceedings, within art.3(2) of the Regulation. [739]

Making the choice

30-171

The second sentence of art.3(1) provides, first, that the choice may be made expressly. In this respect the Regulation replicates the Rome Convention. [740] The provision then goes on to state that the choice may also be "clearly demonstrated by the terms of the contract or the circumstances of the case". This formula is different to that used in the Rome Convention which required that the choice be "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case". [741]

"Clearly demonstrated" etc

30-172

The change of language to “clearly demonstrated” would appear to be designed to impose a higher standard of indication that an “implied” choice of law has been made than that imposed by the Rome Convention. [742] The change in standard may be a response to suggestions that courts in some Member States were too liberal in, or inconsistent in, finding that a choice of law had been demonstrated with reasonable certainty under the Rome Convention formula, [743] suggestions which themselves may be questioned. [744] Whether the wording of art.3(1) of the Regulation will, in practice, produce significantly different outcomes in particular cases is open to doubt. [745]

Relevant factors

30-173

Subject to the potentially different standard referred to in the previous paragraph, there is no reason to doubt that the factors which were found to be relevant as indicating an “implied” choice of law under the Rome Convention [746] will be regarded as relevant in deciding whether a choice of law has been “clearly demonstrated” under the Regulation. It is worth noting that Recital 12 to the Regulation states that an:

> “… agreement of the parties to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law was clearly demonstrated.” [747]

There seems to be no reason, in principle, however, why an exclusive jurisdiction clause conferring jurisdiction on the courts of a non-member State should not, in an appropriate case, have the same effect. And, further there is no reason to believe that the specific mention of a jurisdiction clause indicates an intention that arbitration clauses should not be relevant. [748]

Partial choice of law

30-174

The third sentence of art.3(1) provides that by “their choice the parties can select the law applicable to the whole or a part only of the contract”. This repeats the equivalent provision of the Rome Convention, discussed earlier in this chapter. [749]

Changing the choice

30-175

Article 3(2) of the Regulation provides that the:

> “… parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.”

This (with minor differences of wording which have no substantive effect) reproduces art.3(2) of the Rome Convention, discussed earlier in this chapter. [750]

Limitations on choice

30-176

Article 3 of the Rome I Regulation specifies two circumstances in which the effect of a choice of law by the parties may be limited. The first, reflecting art.3(3) of the Rome Convention [751] (but differently worded), limits the effect of a choice in what may be described as "internal situations". [752] The second, which has no counterpart in the Rome Convention limits the effect of the choice by reference to certain provisions of Community law. [753] Additionally, the effect of a choice may be limited by "overriding mandatory provisions" [754] and by reference to public policy. [755]

Article 3(3): internal situations

30-177

Article 3(3) of the Regulation provides that:

> "… where all other elements relevant to the situation at the time of the choice are located in a country other than a country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement."

The change of wording from that adopted in the Rome Convention is, apparently, designed to bring the language into line, as far as possible, with art.14(2) [756] of the Rome II Regulation, art.14 of which allows the parties, in certain circumstances, to choose the law applicable to certain non-contractual obligations. [757] According to Recital 15 to the Regulation, the rule in art.3(3) applies whether or not the choice of law was accompanied by a choice of court or tribunal and the revised wording is not intended to indicate any substantial change, compared with art.3(3) of the Rome Convention, as discussed earlier in this chapter. [758]

Article 3(4): Community law

30-178

Article 3(4) stipulates that where:

> "… all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement."

The effect of this provision is that where the elements relevant to the situation at the time of the choice [759] are limited only to Member States, the English forum must apply mandatory provisions of Community law, as implemented in the United Kingdom, where necessary, even if the contract is governed by the law of a non-Member State. [760] For the purposes of art.3(4) the term "Member State" means all the Member States, including Denmark. [761]

"Overriding mandatory provisions"

30-179

Article 9 of the Regulation imposes two potential limitations on the effect of a choice of law by reference to "overriding mandatory provisions". These are defined (or described) in art.9(1) as:

> "… provisions the respect for which is regarded as crucial by a country for safeguarding its public interests such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

It will be noted that the provisions which fall within art.9 must be provisions which apply irrespective of the law applicable to the contract. [762] They must be distinguished from "provisions which cannot be derogated from by agreement" referred to in art.3(3) and (4) and should be construed more restrictively. [763]

Overriding mandatory provisions: law of the forum

30-180

Article 9(2) of the Regulation stipulates that nothing "in this regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". This provision replicates, in effect, though with different terminology, art.7(2) of the Rome Convention, as discussed earlier in this chapter. [764]

Overriding mandatory provisions: law of country of performance

30-181

Article 9(3) of the Regulation contains a limited version of what was art.7(1) of the Rome Convention (which did not apply in the United Kingdom). [765] It provides that effect:

> "… may be given to the overriding mandatory provisions of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

Article 9(3) imposes a potential limitation on the effect of a choice of law by reference to overriding provisions of the law of the country of performance where a contract, valid by its governing law, has to be or has been performed in a country where such performance would be or was unlawful under that country's law. The provision, the application of which is discretionary, is discussed in detail later in this chapter. [766]

Public policy

30-182

Article 21 of the Regulation, headed "[p]ublic policy of the forum" provides that the:

> "… application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum."

This provision reproduces the effect of art.16 of the Rome Convention. [767] It is capable of limiting the effect of a choice of foreign law where the English court would regard that law as manifestly incompatible with English public policy. It is discussed in detail later in this chapter. [768]

Consent to the choice of law

30-183

Article 3(5) of the Regulation reproduces art.3(4) of the Rome Convention. [769] According to art.3(5) the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of arts 10, 11 and 13. As with art.3(4) of the Rome Convention, discussed earlier in this chapter, the existence and validity of the consent of the parties to the choice of law is governed by the law the parties purported to choose. [770]

Party autonomy and particular contracts

30-184

The provisions relating to party autonomy in relation to contracts subject to special rules under the Regulation will be discussed in relation to each particular contract so subject. [771]

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733. Above, paras 30-046 et seq.

734. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 32-040 et seq.; Plender and Wilderspin, *The European Private International Law of Obligations*, 4th edn (2015), Ch.6; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2009), pp.690 et seq.; Fentiman, *International Commercial Litigation* 2nd edn (2015), pp.196 et seq.; Heiss, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.1.

735. See above, para.30-047. Nor, apparently, a religious law: see *Dubai Islamic Bank PJSC v Energy Holding BSC [2013] EWHC 3186 (Comm)*.

736. Recital 13 to the Regulation. Should the Community adopt in an appropriate legal instrument rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules: Recital 14.

737. Subject to the possibility that the European Court may take a different view.

738. Rome I art.1(3). Above, paras 30-048, 30-160.

739. See below para.30-175; and see Fentiman, *International Commercial Litigation*, 2nd edn (2015), paras 5.77-5.78.

740. Above, para.30-049.

741. Above, paras 30-050 et seq.

742. There is no Recital in the Regulation which indicates that this is the intention. cf. Dicey, Morris and Collins, 15th edn (2012), p.1809, n.217 (no significance in change of language in Rome I which was intended to bring the English and German text into line with the French text of the Rome Convention). The same view was expressed in *Lawlor v Sandvik Mining and Construction Mobile Crushers & Screens Ltd [2013] EWCA Civ 365* at [3], relying on this authority. And see *Caresse Navigation Ltd v Office National De L'Electricite [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep. 337*.

743. See Consultation Paper, para.50.

744. See Morse, *The Enforcement of International Contracts in the European Union* (2004), p.191.

745. What were "marginal" cases under the Rome Convention might be decided differently under the Regulation: see, e.g. *Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All E.R (Comm) 873*. But whether this would be an inevitable or, indeed, desirable, outcome is far from clear.

746. Above, paras 30-050 et seq.

747. It is not clear whether this means that a non-exclusive jurisdiction clause cannot be relevant.

748. Above, para.30-051. As to the relevance of subsequent conduct, see above, para.30-053.

749. Above, paras 30-055 et seq.

750. Above, para.30-057. This provision was discussed and applied in *Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch)*.

751. Above, paras 30-060 et seq.; Plender and Wilderspin, 4th edn (2015), pp.163 et seq.; Cheshire, North and Fawcett, pp.694 et seq.; Bonomi (2008) 10 Y.B.I.L. 285.

752. Rome I art.3(3).

753. Rome I art.3(4).

754. Rome I art.9.

755. Rome I art.21.

756. Recital 12 to the Rome I Regulation.

757. For discussion see Dicey, Morris and Collins, 15th edn (2012), para.32-087.

758. Above, paras 30-060 et seq.

759. For discussion of this expression, see above, para.30-061.

760. cf. *Ingmar GB Ltd v Eaton Leonard Technologies Inc (C-381/98) [2000] E.C.R. I-9305*.

761. Rome I art.1(3).

762. Discussed below, para.30-363.

763. Recital 37 to the Regulation. See below, para.30-363.

764. Above, para.30-062.

765. Above, para.30-062.

766. Below, paras 30-362 et seq.

767. Above, para.30-068; below, paras 30-368 et seq.

768. Below, paras 30-368 et seq.

769. Above, para.30-058.

770. Above, para.30-058.

771. Below, paras 30-209 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(e) - Applicable Law in the Absence of Choice

Background

30-185

The Rome Convention established, as a general principle, that in the absence of choice, a contract should be governed by the law of the country with which it was most closely connected. [772] This law was to be discovered by reference to a general presumption pointing to the characteristic performer's habitual residence, central administration, principal place of business or place of business, as the case may be, [773] or by reference to specific presumptions in respect of contracts the subject matter of which is a right in immovable property or a right to use immovable property [774] and contracts for the carriage of goods. [775] The general presumption did not apply if the characteristic performance could not be determined and the presumption could be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. [776] Article 4 of the Rome I Regulation, however, adopts a somewhat different structure.

Structure of art.4 of the Regulation

30-186

Article 4(1) of the Regulation provides, to the extent that the applicable law has not been chosen and subject to the choice of law rules applicable to particular contracts contained in arts 5-8, a series of rules for specific contracts. Where the contract is not covered by art.4(1) or where the elements of the contract would be covered by more than one of the types of contract referred to in art.4(1), art.4(2) provides that the contract will be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Article 4(3) provides a rule of displacement whereby where it is clear from all the circumstances that the contract is manifestly more closely connected with a country other than that indicated in art.4(1) or (2), the law of that other country shall apply. Article 4(4) provides a "default rule" to the effect that where the applicable law cannot be determined pursuant to art.4(1) or 4(2), the contract shall be governed by the law of the country with which it is most closely connected. After examining the principles behind art.4 of the Regulation, the following paragraphs will discuss the various elements in this structure.

Principles

30-187

The approach taken in art.4 of the Rome Convention was an attempt to reconcile the competing requirements of certainty and flexibility in the determination of the applicable law. [777] However, it appears to have been thought that the conceptual structure of art.4 of the Convention was undesirably complex and inherently uncertain, allowing national courts in Member States to interpret the provision in divergent ways. [778] Thus, for example, English courts have emphasised the flexibility

of art.4 and have tended to place greater weight on the closest connection principle at the expense of the presumptions. [779] In contrast, Scottish courts and some continental courts have tended to emphasise the presumptions at the expense of the flexibility of the closest connection principle. [780] Divergent approaches have lead to uncertainty. [781] The approach taken in art.4 of the Regulation is to tighten the balance between flexibility and certainty with a view, also, to producing more uniform outcomes in the national courts of Member States. [782] ! This much is recognised in Recital 16 to the Regulation where it is stated that to:

> "… contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation."

Specific rules

30-188

Article 4(1) of the Regulation provides that to the extent that the law applicable to the contract has not been chosen in accordance with art.3, [783] the law applicable to the contract shall be determined, in respect of certain identified contracts, as follows. It is likely that an autonomous meaning will be attributed to the contracts so identified where necessary. [784]

Sale of goods

30-189

! Article 4(1)(a) provides that a contract for the sale of goods [785] ! shall be governed by the law of the country [786] where the seller has his habitual residence. [787] In effect, this reproduces in concrete form the outcome reached under art.4(2) of the Rome Convention. [788]

Provision of services

30-190

According to art.4(1)(b) a contract for the provision of services [789] shall be governed by the law of the country where the service provider has his habitual residence. [790] This specific rule reaches the same outcome as would application of art.4(2) of the Rome Convention. [791]

Sale of goods or provision of services?

30-191

In some cases it may be necessary to determine whether the relevant contract is a contract for the sale of goods or one for the provision of services. In the context of the Brussels I Regulation art.5(1)(b), it has been held that the latter provision must be interpreted as meaning that where the purpose of the contract is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, the contract must be classified as a contract for the sale of goods. [792] In the context of the Rome I Regulation, however, a contract of this character might be regarded as falling within art.4(2) of that Regulation as a contract

where the “elements of the contract would be covered by more than one of points (a) to (h)” of art.4(1). [793]

Immovables

30-192

Article 4(1)(c) stipulates that a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated. This is subject to an exception in art.4(1)(d) where it is provided that a tenancy of immovable property concluded for a temporary period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country. [794] It will be noted that neither provision requires that the immovable be situated in a Member State. Article 4(1)(c) is a rather different formulation to that found in art.4(3) of the Rome Convention, [795] while art.4(1)(d) has no counterpart in that Convention. Taken together, art.4(1)(c) and (d) appear to be based on art.24(1) of the Judgments Regulation recast which is in very similar terms, and is likely to be interpreted consistently with the latter provision so far as possible. [796]

Franchise contract

30-193

A franchise contract, according to art.4(2)(e), shall be governed by the law of the country where the franchisee has his habitual residence. [797] It is likely, although the question has not been decided, that the same outcome would be reached under art.4(2) of the Rome Convention. [798]

Distribution contract

30-194

Article 4(1)(f) deals with a distribution contract and provides that such a contract shall be governed by the law of the country where the distributor has his habitual residence. [799] It is likely, however, that where a “distribution” contract is to be fulfilled by individual contracts of sale and purchase, the applicable law will be determined by art.4(2) rather than by art.4(1)(f) since the elements of the contract are covered by art.4(1)(a) and art.4(1)(f). [800]

Sale of goods by auction

30-195

Article 4(1)(g) provides a specific rule for a contract for the sale of goods by auction. It stipulates that such a contract shall be governed by the law of the country where the auction takes place, if such a place can be determined. It may not be possible to determine where an auction takes place, in some situations, where the auction is conducted over the internet. [801]

Contract concluded within multilateral system

30-196

Article 4(1)(h) of the Regulation provides that:

> "… a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point 17, of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law."

This choice of law rule creates a specific rule for certain types of financial contract, as defined in the Markets in Financial Instruments Directive 2004 (MiFID) [802] art.4(1)(17). [803] Normally, such contracts will contain a choice of law by the parties. [804] However, it was felt that this rule was desirable in order to preserve the high degree of legal certainty required in international financial systems of this character. [805] Article 4(1)(h) is designed to ensure that, in the absence of a choice of law by the parties to the contract, a single law will nonetheless govern the contract. [806]

Contract not covered by art.4(1), etc

30-197

According to art.4(2) of the Regulation where:

> "… the contract is not covered by paragraph 1 [of art.4] or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence." [807]

This choice of law rule deals with two different situations as described below.

Contract outside art.4(1)

30-198

Where the contract is not a specific contract identified in art.4(1), the contract will be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. First, it is likely that many contracts not specifically listed, as such, in art.4(1) will be regarded as contracts for the provision of services and thus will be covered by art.4(1)(b) of the Regulation. This may be true, for example, of a contract of hire; a contract between banker and customer; a contract of loan; a contract between lawyer and client; a contract between principal and agent, unless it is a distribution contract [808]; a contract of bailment; a construction contract; a wagering contract; and, probably, a reinsurance contract [809]; a contract of guarantee; and at least certain aspects of a letter of credit. [810] Secondly, if the contract is one in which this conclusion cannot be drawn, the characteristic performance of the contract will have to be identified. There is no reason to think that the concept of characteristic performance under the Regulation will be interpreted any differently to the way it was interpreted under art.4(2) of the Rome Convention. [811] Thirdly, the applicable law in respect of such a contract will then be that of the country where the party who is to effect that performance has his habitual residence, as defined in the Regulation. [812]

Elements of contract covered by more than one point of art.4(1)

30-199

Article 4(2) of the Regulation also supplies a choice of law rule to deal with situations where the "elements of the contract would be covered by more than one of points (a) to (h)" of art.4(1). In such a situation the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. [813]

Scope of provision

30-200

The type of situation envisaged by the second aspect of art.4(2) is one in which the contractual relationship between the parties involves rights and obligations which are capable of being categorised as falling within more than one of the specified types of contract in art.4(1). [814] An example might be a contract of sale and distributorship, [815] which is covered by art.4(1)(a) and (b). [816] The provision takes account of the possibility that a particular contractual relationship may not fall tidily into one category or another.

Characteristic performance

30-201

Application of the concept of characteristic performance in this situation is not, however, without difficulty since the characteristic performance of each contract covered may be different. The point is addressed to some extent, in Recital 19 to the Regulation which states that, in such situations, "the characteristic performance of the contract should be determined having regard to its *centre of gravity* ". [817] The obvious question which arises is as to how the "centre of gravity" is to be determined. It may be that it will be taken to be the performance of the substantial or principal obligations under the contract, but even if this is correct, it may not necessarily be easy to determine, in any given case, what these obligations are to be taken to be. [818] It may also be that in the case of complex contracts it will not be possible to determine the characteristic performance so that the choice of law rule contained in art.4(4) [819] will come into play.

Applicable law

30-202

If it is possible to determine the characteristic performance of the contract in the situation under consideration, the applicable law will be that of the country in which the party who is to effect that performance has his habitual residence, as defined in the Regulation. [820]

Rule of displacement

30-203

Article 4(3) of the Regulation provides that where:

> "… it is *clear* from all the circumstances of the case that the contract is *manifestly* more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply." [821]

The purpose of this provision, described in Recital 20 to the Regulation as an "escape clause", is to permit a degree of flexibility [822] in cases where application of the law indicated by art.4(1) or (2), as the case may be, would not, for various possible reasons, produce appropriate results. [823] It will be noted, however, as indicated by the words emphasised in the provision, set out above, that art.4(3) is more tightly drawn than the equivalent provision in art.4(5) of the Rome Convention which permitted the presumptions in art.4(2)–(4) of the Convention to be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. [824] The introduction of the words "clear" and "manifestly" appear to include an intention that the rules in

❗ Nonetheless, application, even of this language, involves a margin of appreciation in the context of particular cases and how it will be applied in particular cases remains to be seen.

Relevant factors

30-204

❗ In order to determine whether it is clear that the contract is manifestly more closely connected with a country other than that indicated in art.4(1) or (2), account may be taken of "all the circumstances of the case". These would include, but are not necessarily limited to, factors which were regarded as relevant for this purpose in cases falling within the Rome Convention. [826] More specifically, Recital 20 to the Regulation states that "account should be taken inter alia of whether the contract in question has a very close relationship with another contract or contracts". The advice in this Recital may be of particular importance in respect of related contracts such as letters of credit or guarantees where it is of commercial importance that a single law be applied to a transaction rather than having different laws applying to the component parts of the transaction. [827] ❗

Applicable law

30-205

Where art.4(3) operates to displace the rules in art.4(1) and (2), the applicable law will be the law of the country with which the contract is manifestly more closely connected.

Residual rule

30-206

Article 4(4) of the Regulation supplies what might be called a residual choice of law rule in the following terms:

> "Where the applicable law cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."

The effect of this rule is explained in Recital 21 to the Regulation.

> "In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected."

This provision will prove of importance in relation to a contract which is not specified in art.4(1), or which is a complex contract made up of more than one contract specified in art.4(1), the characteristic performance of which cannot be determined under art.4(2). More obviously, it will be of importance in relation to contracts which do not have a characteristic performance, e.g. barter or exchange. [828]

Relevant factors

30-207

Article 4(4) does not in terms place any limits on the factors which may be taken into account in determining the law of the country with which the contract is most closely connected. Although all will depend on the particular circumstances of the case, generally, factors regarded for this purpose under art.4(5) of the Rome Convention may surely be taken into account. [829] More specifically, Recital 21 to the Regulation states that "account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts". Article 4(4) clearly involves a margin of appreciation, depending on the circumstances of the case, as to the weight to be attributed to the various factors involved. [830]

Applicable law

30-208

Where art.4(4) of the Regulation is applicable, the applicable law is, obviously, the law of the country with which the contract is most closely connected.

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772. Above, para.30-070.

773. Above, paras 30-071 et seq.

774. Above, paras 30-081 et seq.

775. Above, paras 30-084 et seq.

776. Above, paras 30-087 et seq.

777. See above, para.30-089.

778. Ministry of Justice, Consultation Paper, Rome I—Should the UK opt in? (April 2008) (hereafter "Consultation Paper") para.50. cf. Dicey, Morris and Collins, 15th edn (2012), paras 32-072 et seq.

779. See, e.g. *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019, [2002] C.L.C. 533*; above, paras 30-089 et seq. See generally Plender and Wilderspin, 4th edn (2015), pp.175 et seq.; Cheshire, North and Fawcett, pp.707 et seq.; Fentiman, *International Commercial Litigation* 2nd edn (2015), pp.207 et seq.; Magnus, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.51; Ferrari, 2009 Rev. Crit. d.i.p. 459.

780. See, e.g. *Caledonia Subsea Ltd v Microperi Srl (2002) S.L.T. 1022*; *Societe Nouvelle des Papeteries de l'Aa v BV Machinefabriek BOA (1992) N.J. 750* (Dutch Hoge Raad); above, para. 30-089 et seq.

781. Consultation Paper, para.50. See *Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuisen BV (C-133/08) [2010] Q.B. 411*.

782. ⚠Consultation Paper, para.51. See generally on choice of law governing commercial disputes in the absence of express choice Arzandeh [2015] L.M.C.L.Q. 525

783. Without prejudice to the particular contracts dealt with in Rome I arts 5 to 8.

784. cf. Recital 17. It should be noted that these specific rules are not described as "presumptions". cf. Rome Convention art.4(2), above, para.30-071.

785. ⚠According to Recital 17, the concept of "sale of goods" should be interpreted in the same way as when applying art.5 of Regulation 44/2001 (the Judgments Regulation, now art.7 of Regulation 1215/2012 the Judgments Regulation recast) in so far as sale of goods is covered by that Regulation. As to sale of goods by auction, see below, para.30-195. The autonomous Community meaning of "sale of goods" is likely to be broad enough to encompass the sui generis supply contracts of the sort considered in *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans) [2016] UKSC 23*, given that such contracts are "in commercial terms" regarded as contracts for the sale of goods (*[2015] EWCA Civ 1058 at [33], [2016] 2 W.L.R. 1072*). In *Molton Street Capital LLP v Shooters Hill Capital Partners LLP [2015] EWHC 3419 (Comm)* it was disputed whether a sale of junk bonds was a sale of "goods" within the meaning of art.4(1)(a) but it was unnecessary to decide the point as the seller of the bonds was also the characteristic performer under the default in art.4(2).

786. i.e. the applicable law cannot be, say a religious law in this or in any other provision of Rome I art.4.

787. As to the meaning of which, see above, paras 30-163 et seq.

788. Above, para.30-076.

789. According to Rome I Recital 17, the concept of "provision of services" should be interpreted in the same way as when applying art.5 of the Judgments Regulation (now art.7 Judgments Regulation recast) in so far as provision of services is governed by that Regulation. Two specific contracts for the provision of services, franchise contracts and distribution contracts are dealt with separately: see below, paras 30-193, 30-194.

790. As to the meaning of which, see above, paras 30-163 et seq.

791. Above, para.30-076.

792. See *Car Trim GmbH v KeySafety Systems SRL (C-381/08) [2010] 2 All E.R. (Comm) 770*. cf. *Falco Privatstiftung v Weller-Lindhorst (C-533/07) [2009] E.C.R. I–3327* (contract under which owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of art.5(1)(b) of the Brussels I Regulation). On intellectual property and Rome I, see Nishitani in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.51. On assignment of intellectual property rights under Rome I, see Torremans (2008) 4 J. Priv. Int. L. 397.

793. See below, paras 30-199 et seq.

794. As to the meaning of habitual residence, see above, paras 30-163 et seq.

795. Above, para.30-081.

796. See Recital 7 to the Rome I Regulation. For discussion of art.22(1) of the Judgments Regulation (now art.24(1) of the Judgments Regulation recast), see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Ch.23. See generally, Dicey, Morris and Collins, 15th edn (2012), paras 33-038 et seq.

797. As to the meaning of habitual residence, see above, paras 30-163 et seq. On franchise contracts and Rome I, see Gutierrez (2008) 10 Yb. P.I.L. 233; Dicey, Morris and Collins, 15th edn (2012), paras 33-063 et seq.

798. cf. above, para.30-076.

799. As to the meaning of habitual residence, see above, paras 30-163 et seq. On distribution contracts and Rome I, see Ancel (2008) 10 Yb. P.I.L. 221; Dicey, Morris and Collins, 15th edn (2012), paras 33-063 et seq. cf. *Corman-Collins SA v La Maison du Whisky SA (C-9/12) [2014] Q.B. 31* (discussing meaning of "distribution contract" in the context of the Judgments

Regulation).

800. See below, paras 30-199 et seq. Distribution contracts give rise to some difficulty under the Rome Convention: see above, para.30-076.

801. Some contracts of this character may be consumer contracts subject to art.6 of the Regulation: see below, paras 30-231 et seq.; Dicey, Morris and Collins, 15th edn (2012), para.33-011.

802. Directive 2004/39 on markets in financial instruments, amending Council Directives 85/611 and Directive 2000/12 and repealing Council Directive 93/22: [2004] O.J. L145/1. The Directive purports to provide a harmonised regulatory regime for investment services across the Member States of the European Economic Area. See generally Garcimartin Alferez (2008) 10 Yb. P.I.L. 245; Nishitani in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.85; Nishitani in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe*, p.129; Dicey, Morris and Collins, 15th edn (2012), paras 33-391 et seq. The original Directive has been replaced by Directive 2014/65/EU (MiFID 2) although the deadline for compliance with the new Directive has been extended to January 2018 (COM(2016) 56 final).

803. MiFID art.4(1)(17) defines these financial instruments by reference to Section C of Annex I to the Directive. Relevant financial instruments are: transferable securities; money-market instruments; units in collective investment undertakings; various forms of options, futures, swaps, forward rate agreements, and other derivative contracts; derivative instruments for the transfer of credit risk; and financial contracts for differences. As to the meaning of "multilateral trading facility" ("MTF"), for the purposes of the Directive, see art.4(1)(15). See, too, Recitals 18 and 30 to the Regulation.

804. Consultation Paper, para.52.

805. Consultation Paper, para.52.

806. Consultation Paper, para.52.

807. See Rome I Recital 19. As to the meaning of habitual residence, see above, paras 30-163 et seq. See on these Dicey, Morris and Collins, 15th edn (2012), paras 32-075 et seq.

808. See above, para.30-076.

809. Rome I art.7 (below, paras 30-252 et seq.) does not apply to reinsurance contracts.

810. See below, para.30-206. cf. on letters of credit *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil Iraq [2013] EWHC 3494 (Comm), [2014] 1 All E.R. (Comm) 942*.

811. Above, paras 30-072 et seq.

812. Above, paras 30-163 et seq.

813. As to the meaning of habitual residence, see above, paras 30-163 et seq.

814. See Recital 19 to the Regulation.

815. See *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2002] C.L.C. 352*; above, paras 30-075, 30-076.

816. Above, paras 30-199 et seq.

817. Emphasis added.

818. cf. *Shenavai v Kreischer (C-266/85) [1987] E.C.R. 239*; *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

819. See below, paras 30-206 et seq.

820. Above, paras 30-163 et seq.

821. Emphasis added.

822. See Recital 16 to the Regulation. See Dicey, Morris and Collins, 15th edn (2012), paras 32-078 et seq.; Okoli and Arishe (2012) 8 J. Priv. Int. L. 513.

823. Consultation Paper, para.51.

824. Above, paras 30-089 et seq.

825. ❗This would be consistent with the policy of casting art.4(1) and (2) in the form of rules, rather than presumptions. See *BNP Paribas SA v Anchorage Capital Europe LLP [2013] EWHC 3073 (Comm)* at [64] (art.4(3) "deliberately places a high hurdle in the way of a party seeking to displace the primary rule"); *Molton Street Capital LLP v Shooters Hill Capital Partners LLP [2015] EWHC 3419 (Comm)* at [94] ("The new language and structure suggests a higher threshold, which requires that the cumulative weight of the factors connecting the contract to another country must clearly and decisively outweigh the desideratum of certainty in applying the relevant test in Article 4.1 or 4.2") and *Schlecker v Boedeker (C-64/12) [2014] Q.B. 320* (rule of displacement in art.6(2) of Rome Convention and art.8(4) of the Rome I Regulation dealing with employment contracts).

826. Above, paras 30-089 et seq.

827. ❗Consultation Paper, para.54. cf. *Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep. 87*; *PT Pan Indonesia Bank Ltd Tbk v Marconi Communications International Ltd [2005] EWCA Civ 422, [2005] 2 All E.R (Comm) 325* (letters of credit); *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2002] EWCA Civ 2019, [2002] C.L.C. 533* (guarantee); and see *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265*; *Aquavita International SA v Ashapura Minechem Ltd [2015] EWHC 2807 (QB)* and Enonchong [2015] L.M.C.L.Q. 194; above, para.30-089.

828. cf. above, para.30-075. And see *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265*.

829. Above, paras 30-089 et seq. cf. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

830. cf. above, para.30-203.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(f) - Contracts of Carriage [831]

Background

30-209

❗ As explained earlier in this chapter, the Rome Convention, with one exception, provided no special rules relating to contracts of carriage. [832] Thus, party autonomy was permitted under the general rule in art.3 of the Rome Convention. [833] In the absence of a choice of law, art.4(4) of the Convention established a special presumption relating to contracts for the carriage of goods, [834] which presumption could be displaced by reference to art.4(5) of the Convention. Article 3 applied also to permit party autonomy in relation to contracts for the carriage of passengers. [835] In the absence of a choice of law, the relevant presumption was, in relation to a contract for the carriage of passengers, that stated in art.4(2) of the Convention, which would normally lead to the application of the law of the carrier's habitual residence, central administration, principal place of business or place of business, as the case may be, [836] but this presumption could, of course, be displaced by reference to art.4(5) of the Convention. [837] The choice of law rules for consumer contracts contained in art.5 of the Convention did not apply to contracts of carriage, subject to an exception for so called package tours. [838] In contrast, at least generally, to the position under the Convention, art.5 of the Rome I Regulation provides more specific choice of law rules for contracts of carriage, the effect of which is explained in the following paragraphs.

Structure and scope of art.5

30-210

Article 5 of the Rome I Regulation applies to determine the law applicable to a contract of carriage of goods and to a contract for the carriage of passengers. In the absence of any contrary indication in the provision, it also seems to apply to carriage irrespective of the means of transport involved. [839] Article 5(1) is concerned with the choice of law rules applicable to contracts for the carriage of goods. It supplies a rule, not unlike the presumption contained in art.4(4) of the Rome Convention, [840] and based, broadly, on a combination of connecting factors, to determine the law applicable to the contract in the absence of a choice of law satisfying art.3 of the Regulation. Article 5(2) deals with the choice of law rules applicable to a contract for the carriage of passengers. This allows a more limited form of freedom to choose the applicable law designed to achieve an adequate level of protection of passengers. [841] In the absence of a choice of law, which complies with the provision, the determination of the applicable law is based, broadly, on a combination of connecting factors and not on the approach involved in the more general presumption, applicable to a variety of contracts, which is found in art.4(2) of the Rome Convention. [842] Article 5(3) of the Regulation provides a rule of displacement (or "escape clause") allowing displacement of the law of the country indicated, in the absence of choice, by art.5(1) or (2), where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country. In such cases the applicable law will be the law of the other country. [843] A contract of carriage (with one limited exception) is not a consumer contract for the purposes of the Regulation. [844] Where, however, the contract is a mixed

contract for the carriage of goods and passengers it is conceivable, that, in the absence of a choice of law governing the contract as a whole, the application of art.5(1) and (2) might result in the contract having two different applicable laws. [845]

International conventions

30-211

Many aspects of international transport are governed by international conventions to which Member States may be parties. [846] As pointed out above, [847] art.25(1) of the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time of the adoption of the Regulation [848] and "which lay down conflict-of-laws rules relating to contractual obligations". Most conventions concerning international transport contain uniform substantive law rules rather than conflict of laws rules and thus it would seem that these conventions continue to apply, irrespective of the Regulation. [849] Rules contained in international conventions may also be regarded as overriding mandatory provisions of the law of the forum, applicable by virtue of art.9(2) of the Regulation. [850]

Carriage of goods

30-212

Article 5(1) of the Regulation provides as follows:

> "To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply."

The law applicable in the absence of choice under art.5(1) may be displaced by reference to the rule of displacement contained in art.5(3). [851]

Meaning of contract for carriage of goods

30-213

The meaning of "contract for the carriage of goods" is not defined in the text of the Regulation. However, Recital 22 to the Regulation states that in this regard:

> "… no change is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods."

One may deduce from this that "contract for the carriage of goods" has the same meaning under the Regulation as it has under the Convention, as discussed earlier in this chapter. [852]

Choice of law by the parties

30-214

In accordance with art.3(1) of the Regulation, the parties to a contract for the carriage of goods are free to choose the law applicable to it subject to any constraints on that freedom imposed by other provisions of the Regulation. [853] The choice will often be made expressly, [854] but if it is not it will be necessary to enquire whether a choice has been clearly demonstrated by the terms of the contract or the circumstances of the case. The use of arbitration clauses, often contained in standard forms intimately linked to the law of a particular country may well be relevant factors, [855] but the outcome in any given case will ultimately depend on the particular circumstances of the case.

Applicable law in the absence of choice

30-215

To the extent that the applicable law has not been chosen in accordance with art.3, art.5(1) supplies choice of law rules for determining the applicable law. These consist of what may be called a "general rule" and a "residual rule".

General rule

30-216

Generally, the applicable law will be the law of the country of the habitual residence [856] of the carrier, [857] provided that the place of receipt or the place of delivery or the habitual residence [858] of the consignor [859] is *also* situated in that country. The "place of receipt" would seem to mean the place where the carrier receives the goods from the consignor. [860] The "place of delivery" would seem to mean the place where the carrier is required to deliver the goods. [861] Although it is not explicitly stated in the Regulation, it would also seem that the place of receipt and place of delivery are those agreed at the time of the conclusion of the contract. [862]

Meaning of "carrier"

30-217

The meaning of "carrier" is not defined in the text of the Regulation. However, Recital 22 states that:

> "… the term 'carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage itself."

This reflects the position under the Rome Convention. [863]

Meaning of "consignor"

30-218

The meaning of consignor, also, is not defined in the text of the Regulation. Recital 22, however, explains that "the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier". [864]

Residual rule

30-219

If the requirements in art.5(1), referred to above are not met, art.5(1) supplies a residual rule to the

effect that “the law of the country where the place of delivery as agreed by the parties shall apply”. It is not clear whether the relevant place of delivery agreed by the parties is that agreed upon at the time the contract is concluded or whether, if the parties subsequently agree on a different place of delivery, that different place may be the relevant place. Consistency with the general rule suggests the place originally agreed upon, but this conclusion might be thought to be unrealistic. Alternatively a subsequent agreement to change the place of delivery may be a relevant factor in determining whether the residual rule (or indeed the general rule) may be displaced by reference to art.5(3) of the Regulation. [865]

Rule of displacement

30-220

Article 5(3) provides that where:

> “… it is clear from all the circumstances of the case that the contract, in the absence of a choice of law is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.”

This rule of displacement is formulated in terms which are to the same effect as those contained in art.4(3) of the Regulation. The rule attempts to address the need for certainty (as established by art.5(1)) and the need for flexibility in appropriate cases. [866]

Carriage of passengers

30-221

The Rome Convention contained no specific rule relating to contracts for the carriage of passengers, and dealt with the question through the application of the general rules contained in arts 3, 4(2) and 4(5) of the Convention. [867] In contrast art.5(2), in conjunction with art.5(3), of the Regulation seeks to take specific account of this matter.

Principles

30-222

Article 5(2) of the Regulation addresses two questions, namely the freedom to choose the applicable law and the question of the law applicable in the absence of choice. The provision restricts the power of the parties to choose the governing law by limiting the laws which may be chosen. This is with a view to ensuring an adequate level of protection for passengers. [868] Determination of the law applicable in the absence of choice is based on what can be called a general rule establishing a combination of connecting factors and what may be called a residual rule, applicable if such factors are not present. Both the general rule and the residual rule are subject to displacement under art.5(3) of the Regulation.

Choice of law by the parties

30-223

The principle of party autonomy in the context of contracts for the carriage of passengers is found in the second paragraph of art.5(2). This provides that the:

> "… parties may choose as the law applicable to the contract in accordance with Article 3 only the law of the country where: (a) the passenger has his habitual residence [869]; or (b) the carrier has his habitual residence [870]; or (c) the carrier has his place of central administration [871]; or (d) the place of departure is situated; or (e) the place of destination is situated."

The provisions at (d) and (e) do not require comment. Some brief remarks may usefully be made on the provisions at (a), (b) and (c).

Habitual residence of passenger

30-224

As pointed out earlier in this section, art.19(1) of the Regulation defines the habitual residence of a natural person acting in the course of his business activity as his principal place of business. [872] Where, however, as will commonly be the case, a passenger is not so acting, then the habitual residence of that natural person will have to be identified by reference to general principles. [873]

Habitual residence and central administration of carrier

30-225

Paragraph two of art.5(2) refers, in points (b) and (c), to the habitual residence and central administration of the carrier [874] as separate places, the laws of which may be chosen to govern the contract. At first sight this appears curious since art.19(1) defines the habitual residence of companies and other bodies corporate or unincorporated (which the carrier will normally be) as the place of central administration. [875] Article 19(2) of the Regulation, however, provides that where:

> "… the contract is concluded in the course of the operations of a branch, agency, or any other establishment, or if under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch agency or any other establishment is located shall be treated as the place of habitual residence." [876]

In relation to an international carrier with branches, etc. in many different countries, it would be possible to choose, as the governing law, the country in which the branch, etc. is situated if the passenger's ticket is issued through that branch, etc. This could lead to a proliferation of possibly applicable laws in respect of contracts of passengers in relation to the same carriage. [877] Point (c) of art.5(2) avoids this outcome by focussing on the place of central administration only, usually the place where the head office is situated, thus implicitly excluding the application of art.19(2) of the Regulation. [878] Point (c) of art.5(2), of course, will cover situations where the ticket is issued through the carrier's place of central administration, i.e. the head office. [879]

Making the choice

30-226

Any choice of the laws of the countries available under art.5(2) must, of course, satisfy the requirements of art.3 of the Regulation.

Applicable law in the absence of choice

30-227

To the extent that the applicable law has not been chosen, as described in the previous paragraphs (which is perhaps unlikely in the case of a contract for the carriage of passengers) art.5(2) contains a choice of law rule to cover the situation. This choice of law rule may be broken up into what might be described as a "general rule" and a "residual rule".

General rule

30-228

Article 5(2) first stipulates that the applicable law, in the absence of choice:

> "… shall be the law of the country where the passenger has his habitual residence, [880] provided that either the place of departure or the place of destination is in that country."

This rule is, it seems, designed to reflect the interests of passengers.

Residual rule

30-229

If the requirements of the general rule are not met, art.5(2) goes on to provide that "the law of the country where the carrier has his habitual residence shall apply". For these purposes, it appears that habitual residence means what it is defined to mean in art.19 of the Regulation [881] and, thus, art.19(2) will also apply and is not excluded, as earlier discussed. [882]

Rule of displacement

30-230

The law applicable in the absence of choice under art.5(2) may be displaced by reference to art.5(3) where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that found to be applicable under art.5(2) in which case the law of the other country will apply. As is the case with art.5(1) and art.5(3), this serves the needs of certainty (supplied by art.5(2)) and the need for flexibility in appropriate cases.

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831. Dicey, Morris and Collins, 15th edn (2012), paras 33R-071 et seq., 33R-091 et seq.; Plender and Wilderspin, 4th edn (2015), Ch.8; Nishitani in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.99; Kenfack, 2009 Clunet 3; Okoli [2015] L.M.C.L.Q. 512.

832. Above, paras 30-084 et seq.

833. Above, paras 30-046 et seq.

834. Above, paras 30-084 et seq.

835. Above, paras 30-046 et seq.

836. Above, paras 30-072 et seq.

837. Above, paras 30-089 et seq.

838. Above, paras 30-092 et seq.

839. cf. above, para.30-084.

840. Above, paras 30-084 et seq.

841. See Recital 32 to the Regulation.

842. Above, paras 30-072 et seq.

843. cf. above, para.30-087.

844. Rome I art.6(4)(b), discussed below, para.30-235. The exception is in relation to "package tours". See too Recital 32.

845. cf. above, para.30-084; *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*.

846. See Vol.II, Chs 35, 36; Dicey, Morris and Collins, 15th edn (2012), paras 33-080 et seq., 33-111 et seq.

847. See para.30-136.

848. i.e. July 24, 2008, the date of entry into force, as opposed to December 17, 2009, the date of application. See arts 25-29.

849. It may also be doubted whether conventions establishing uniform substantive rules, as opposed to choice of law rules, fall within art.25(2) where it is provided (see above, para.30-136) that the Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by the Regulation. This is because the Regulation is concerned with choice of applicable law, rather than uniform substantive law. And see Recital 41.

850. cf. *The Hollandia [1983] 1 A.C. 565*; above, para.30-067; Dicey, Morris and Collins, 15th edn (2012) paras 33-080 et seq., 33-111 et seq.

851. Below, para.30-220.

852. Above, paras 30-084 et seq. And see *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411* at [33]-[35], [37]. For more detail see Dicey, Morris and Collins, 15th edn (2012), paras 33-092 et seq.

853. Above, paras 30-176 et seq.

854. cf. *OT Africa Line Ltd v Magic Sportwear Corp [2005] EWCA Civ 710, [2005] 2 Lloyd's Rep. 170* .

855. See Giuliano-Lagarde Report, p.17; Dicey, Morris and Collins, 15th edn (2012), para.33-098. See also Recital 12 (exclusive jurisdiction clause); above, para.30-173.

856. As to the meaning of which, see above, paras 30-163 et seq. Other concepts mentioned in art.5 which are not specifically defined should be given an autonomous meaning.

857. As to the meaning of which, see below, para.30-217.

858. As defined above, paras 30-163 et seq.

859. As to the meaning of which see below, para.30-218.

860. This expression seems to correspond to "place of loading" in art.4(4) of the Rome Convention.

See above, para.30-084.

861. This expression seems to correspond to “place of discharge” in art.4(4) of the Rome Convention. See above, para.30-084.

862. cf. Giuliano-Lagarde Report, p.22.

863. See above, para.30-084.

864. As to the position under the Rome Convention, see above, para.30-084.

865. There seems to be no reason why events subsequent to the conclusion of the contract should not be taken into account in the application of art.5(3) and also, possibly, in the application of art.5(1). cf. above, para.30-053; Dicey, Morris and Collins, 15th edn (2012), para.33-106.

866. See Rome I Recital 16.

867. Above, paras 30-046 et seq. A contract for the carriage of passengers was not a consumer contract for the purposes of art.5 of the Rome Convention: art.5(4)(a) of the Convention: above, para.30-092.

868. Rome I Recital 32 where it also stated (as it is in art.6(4)(b) of the Regulation itself) that art.6, dealing with consumer contracts, does not generally apply to contracts of carriage. And see Consultation Paper, para.57.

869. See below, para.30-224.

870. See below, para.30-225.

871. See below, para.30-225.

872. Above, para.30-166.

873. Above, para.30-167. The relevant time for determining habitual residence is the time of conclusion of the contract: Rome I art.19(3).

874. Carrier would seem to bear the same meaning in Rome I art.5(2) as it bears in art.5(1). See above, para.30-217.

875. See above, para.30-164.

876. See above, para.30-165.

877. Consultation Paper, para.59.

878. Consultation Paper, para.59. One suspects that, normally, the carrier’s law will be chosen in the contract.

879. Consultation Paper, para.59.

880. As defined above, para.30-167.

881. Above, paras 30-164 et seq.

882. Above, para.30-225.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(g) - Consumer Contracts

Background

30-231

Article 5 of the Rome Convention made particular provision for “certain consumer contracts”. [883] Generally, such contracts (which were somewhat narrowly defined and from the category of which certain types of contract were excluded) were governed by the law chosen by the parties subject to the limitation that a choice of law could not have the effect of depriving the consumer of the protection of the mandatory rules of the law of the country in which the consumer had his habitual residence in certain (narrowly defined) situations. [884] In the absence of choice, the contract was governed by the law of the consumer’s habitual residence if one of the situations where a choice of law would be controlled by reference to mandatory rules was present, but in other cases the applicable law in the absence of choice was governed by the general rule in art.4 of the Convention. [885] It was seen in the earlier discussion of art.5 of the Convention that it was particularly difficult to apply the provision to contracts concluded “on-line” and also that the provision supplied a somewhat limited degree of protection to consumers. [886] Article 6 of the Regulation makes fresh provision for consumer contracts endeavouring to take account, amongst other things, of the effect of electronic commerce on consumer transactions and the need for increased levels of consumer protection. [887]

Structure of art.6

30-232

Article 6(1) of the Regulation deals, firstly, with the definition of contracts to which art.6 applies, [888] excluding certain contracts which are not covered by art.6(1) as a result of art.6(4) of the Regulation, [889] and also stipulates that where art.6(1) applies the contract will be governed by the law of the country in which the consumer is habitually resident. [890] Article 6(2) allows the parties to choose the applicable law, but restricts that capacity by reference to provisions which the law of the country which would be applicable in the absence of choice, which cannot be derogated from by agreement. [891] If the requirements of art.6(1)(a) or (b) are not fulfilled and the contract is not excluded by virtue of art.6(4), the applicable law will be determined by art.6(3) of the Regulation. [892] There is no escape clause, as such, based on the principle that a contract within art.6 may be governed by the law of another country, when it is clear that the contract is manifestly more closely connected with a country other than that the law of which would be applicable under other provisions of art.6. The article thus seeks, as will be seen below, to achieve the purpose of protecting consumers. In addition, art.6(1) seeks to deal with consumer transactions involving electronic commerce. [893]

Specific exclusions

30-233

Before considering the general scope of, and the provisions of, art.6 of the Regulation, it is necessary to draw attention to certain types of contract which are specifically excluded from the scope of the article, by art.6(4).

Contract for the supply of services

30-234

The special rules in art.6 do not apply, first, to contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. [894] This reflects the exclusion of such contracts from art.5 of the Rome Convention. [895] The law applicable to such contracts will thus be determined by art.3 or 4 of the Regulation, as the case may be. [896]

Contract of carriage

30-235

Secondly, art.6. does not apply to:

> "… a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of June 13, 1990 on package travel, package holidays and package tours." [897]

Unless, therefore, the contract of carriage relates to package travel, art.6 will not apply and the law applicable to the contract of carriage will be determined in accordance with art.5 of the Regulation. [898] Broadly speaking, a contract relates to package travel if it is a contract which, for an inclusive price, provides for a combination of travel and accommodation. [899] This exclusion generally reflects the position under the Rome Convention. [900]

Immovable property, etc

30-236

Thirdly, art.6(4)(c) of the Regulation excludes a:

> "… contract relating to a right in rem in immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC." [901]

Unless, therefore, the contract relates to the right to use immovable property on a timeshare basis, as defined in the Directive, [902] art.6 will not apply and the applicable law in such circumstances will be determined in accordance with art.3 of the Regulation, or, as the case may be, art.4 of the Regulation, in particular art.4(1)(c) and (d). [903]

Rights and obligations constituting a financial instrument, etc

30-237

Fourthly, art.6(4)(d) excludes the choice of law rules in art.6 in relation to:

> "… rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings, in so far as these activities do not constitute provision of a financial service."

The scope of this exclusion is explained in Recitals to the Regulation. Financial services such as investment services and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/29 (MiFID), [904] and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611 on the co-ordination of laws, regulations and administrative provisions relating to collective investment in transferable securities (UCITS) [905] should be subject to art.6 of the Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities [906] or to the subscription and redemption of units in collective investment undertakings, that reference should *include* all aspects binding the issuer or the offeror to the consumer, but should *not include* those aspects involving provision of financial services. [907] Recital 28 states that it is important to ensure that rights and obligations which constitute a financial instrument [908] are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Further, wherever such instruments are issued or offered, the contractual relationship between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the consumer's habitual residence (a principal feature of the choice of law rules in art.6 [909]) as there is a need to ensure uniformity in the terms and conditions of an issuance or offer. [910] Recital 29 states that for the purposes of the Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscriptions and redemption of units in collective investment undertakings should include the terms governing amongst other things, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in arts 10, 11, 12 and 13 of the Regulation, [911] thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law. [912]

Contract concluded within system falling within art.4(1)(h)

30-238

A contract falling within the scope of art.4(1)(h) of the Regulation, [913] is, finally, excluded from the scope of art.6. [914] The rationale for excluding contracts concluded within such multilateral systems is to ensure that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within such systems or with the operator of such systems. [915]

Scope of, and general rule in, art.6

30-239

The overall scope of art.6 and the general rule which it establishes are dealt with in art.6(1) which provides as follows:

> "Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ('the consumer') with another person acting in the exercise of his trade or profession ('the professional') shall be governed by the law of the country where the consumer has his habitual

residence, provided that the professional:

(a)

pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b)

by any means directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities."

It will be noted that, subject to the excluded matters referred to earlier, to which must be added, contracts of insurance covered by art.7, [916] there is no particular restriction on scope based on category of the contract. [917] It is sufficient to bring art.6 into operation that the contract be concluded within the principles established in the provision.

Contract between consumer and professional

30-240

First, to be covered by art.6, the contract must be concluded by a consumer, who must be a natural person, for a purpose which can be regarded as being outside his trade or profession, with a professional, who may be a natural or legal person, but who must be acting in the course of his trade or profession. [918] This part (and other parts) of art.6(1) will, doubtless, be given an autonomous meaning which, in so far as possible, will be consistent with that given to similar provisions in art.17(1) of the Judgments Regulation recast [919] and which may reflect the fact that the consumer is the weaker party to the contract. [920] Following the approach of the European Court to the Judgments Regulation, it is possible that: (a) the provision will not apply to a contract which a natural person has concluded with a view to pursuing a trade in the future [921]; (b) the provision will not apply to a claim by an assignee of a consumer, where the assignee is acting in the course of its trade or professional activity [922]; and (c) that the provision will not apply where a natural person concludes a contract for purposes which are in part within, and in part outside his trade or profession, unless the trade, or professional purpose is so limited as to be negligible in the context of the overall supply. [923]

Habitual residence

30-241

If the contract falls within the scope of the principle identified in the previous paragraph, the law applicable to the contract will be the law of the consumer's habitual residence [924] provided one of the additional requirements in art.6(1)(a) or (b) are met. "Habitual residence" for these purposes, will have to be determined by reference to general principles since art.19(1) of the Regulation only defines the habitual residence of a natural person acting in the course of a business activity [925] and a natural person so acting cannot be a consumer.

"Pursues his commercial or professional activities", etc

30-242

Article 6(1)(a) will lead to the application of the law of the consumer's habitual residence if the professional pursues his commercial or professional activities in the country [926] where the consumer has his habitual residence. This provision would appear to cover cases where the professional pursues his commercial or professional activities directly in the country of the consumer's habitual residence by carrying out those activities there at a place of business there. It would also seem to cover cases where the professional pursues the relevant activities in the country where the consumer is habitually resident through a branch, agency or other establishment which is situated in that country. [927] It is also necessary that the contract falls within the scope of relevant activities pursued in the country where the consumer is habitually resident. [928] Article 6(1)(a) of the Rome 1 Regulation is inspired by art.15(1)(c) of the Judgments Regulation (now art. 17(1)(c) of the Judgments Regulation recast) concerned with jurisdiction in respect of consumer contracts, and, so far as possible, should be interpreted consistently with that provision. [929]

"By any means directs such activities", etc

30-243

Article 6(1)(b) will lead to the application of the law of the consumer's habitual residence if the professional by "any means directs his professional or commercial activities to that country or to several countries including that country" and the contract falls within the scope of such activities. [930] This provision is also inspired by art.15(1)(c) of the Judgments Regulation (now art.17(1)(c) of the Judgments Regulation recast) and should, so far as possible, be interpreted consistently with that article. [931] This aspect of art.6(1) is designed to take account of the development of distance selling techniques, particularly techniques involving electronic commerce. [932] The latter form of technique could not realistically be accommodated within the provisions of art.5 of the Rome Convention. [933] The key concept in art.6(1)(b) is that of "directs such activities", an expression which requires further elucidation. It will be convenient to consider "traditional" techniques for directing activities and those involving electronic commerce, separately.

"Traditional" techniques

30-244

Traditional distance techniques would include specific invitations to a consumer to purchase [934] which invitation is received by the consumer in the country where he is habitually resident. Such an invitation may be by mail order or by door-step selling. [935] Advertising in the country of the consumer's habitual residence (even if accompanied by advertising in other countries) would also be covered: such advertising might be through general dissemination in the press or by radio, television or mail order catalogue. [936] The notion of advertising may also cover offers made to a consumer in person through an agent or door-to-door salesman, if or to the extent that, this technique does not fall within art.6(1)(a). [937] It also seems that the notion of directing activities by such means involves some specific intent to advertise in the consumer's country of habitual residence [938] an intention the existence of which may be derived from the nature of the publication in an appropriate case. [939] It will be noted that art.6(1)(a) of the Regulation does not require, unlike the position under the Rome Convention, [940] that the consumer take in the country of his habitual residence all the steps necessary on his part for the conclusion of the contract.

Techniques involving electronic commerce

30-245

It has already been pointed out that it was only possible to accommodate developments in electronic commerce within art.5 of the Rome Convention with considerable artifice. [941] It was, in particular, the need to take account of these developments that prompted art.6(1) of the Regulation. [942] The more general and flexible character of art.6(1)(b) enables electronic techniques to be accommodated within art.6 with greater ease. However, the precise way in which the requirement of "directs" activities applies in this context is uncertain, [943] although the following suggestions may be made.

Electronic mail

30-246

Where a professional sends specific invitations or advertisements to a particular consumer or group of consumers in the country of habitual residence, there seems little doubt that art.6 will come into play provided a contract is concluded as a consequence. [944] This will be so whether or not the contract is concluded by traditional means (e.g. by a response from the consumer by letter or facsimile) or "on-line". [945]

Websites

30-247

It would seem clear that promotional material available on a professional's website can amount, in principle, to advertising. [946] More difficult, however, is when the availability of this material in the country of the consumer's habitual residence will be a consequence of the professional directing activities to that country. There is some (but not much) guidance in Recital 24 which invokes a joint declaration by the Council and Commission on art.15(1)(c) of the Judgments Regulation (now art.17(1)(c) of the Judgments Regulation recast). According to this [947]:

> "… for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities." [948]

Further, the declaration also states that the:

> "… mere fact that an internet site is accessible is not sufficient for Article 15 to be applicable [949] although a factor will be that this internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor." [950]

From these remarks it is possible to draw the following conclusions, as regards art.6(1)(b). First, the concept of targeted activity only becomes relevant where a contract is concluded at a distance (by whatever means) as a result of those activities. [951] Secondly, the website need not necessarily be an interactive one: if the site invites consumers to mail or fax orders then it aims to conclude distance contracts. [952] Thirdly, however, a site which offers information to potential consumers all over the world but, say, refers them to a local distributor or agent for the purpose of concluding the actual contract does not aim to conclude distance contracts. Furthermore, art.6(1)(b) is not subject to any condition that the consumer has taken, in the country of his habitual residence, all the steps necessary on his part for the conclusion of the contract. This will reduce the difficulties encountered, in this respect, in the application of the Rome Convention. [953] In the joined cases *Pammer v Reederei Schlüter GmbH & Co KG (C-585/08)* and *Alpenhof v Heller (C-144/09)* [954] the European Court considered the application of art.15(1)(c) of the Judgments Regulation, which is in the same terms as the pre-conditions in art.6. The European Court considered when a business using a website can be considered to "direct" its activity to a particular state. The European Court held that it must be decided whether, prior to the conclusion of any contract with the consumer, it is apparent from the website and the trader's overall activity that the trader was envisaging doing business with consumers in Member States including the consumer's home Member State. It went on to provide a non-exhaustive list of potentially relevant indicators including:

> "the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers." [955]

In relation to the relevance of language or currency the European Court noted:

> "So far as concerns the language or the currency used, the joint declaration of the Council and the Commission mentioned in paragraph 11 of the present judgment and reproduced in recital 24 in the preamble to Regulation No 593/2008 states that they do not constitute relevant factors for the purpose of determining whether an activity is directed to one or more other Member States. That is indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States." [956]

By contrast, the mere accessibility of a website in a Member State is insufficient. The same is true of the mention of an email address or other contact details as those factors would be present even if the trader intended to trade only with consumers in its own Member State.

Contract falls within scope of such activities

30-248

Both art.6(1)(a) and art.6(1)(b) are subject to the condition that the contract falls within the scope of the relevant activities which are pursued in, or directed towards, the country where the consumer is habitually resident. As pointed out in the preceding paragraph, this is an important limitation on the scope of art.6(1) in the particular matter of electronic commerce. Beyond this, however, much is left to the courts of Member States and to the European Court, in identifying the scope of the provision with a view to producing certainty of outcome in what are likely, for the most part, to be relatively small claims. [957]

Choice of law by the parties

30-249

It is well known that contracts between professionals and consumers often, if not generally: (a) contain a choice of law which; (b) is found in the professional's standard terms and conditions; which (c) applies the law of the professional's "country"; and which (d) is not normally open to negotiation by the consumer (assuming the consumer was even aware of it [958]). The original Proposal from the Commission did not permit, in effect, a choice of law in a consumer contract, and the only law that would be applicable under the Proposal would be the law of the consumer's habitual residence. [959] This was in contrast to art.5 of the Rome Convention which allowed a limited form of party autonomy [960] and caused concern in business sectors, particularly the small business and electronic commerce sectors which routinely provide goods and services to consumers in the European Union. [961] In consequence, art.6(2) of the Regulation provides that notwithstanding art.6(1), the parties may choose the law applicable to a contract which fulfils the requirements of art.6(1), in accordance with art.3 of the Regulation. Such:

> "… a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law, which, in the absence of choice, would have been applicable on the basis of [art.6(1)]."

This, in effect, permits the limited autonomy recognised in art.5 of the Convention and prevents avoidance of compulsory provisions of the law of the country which would be applicable in the absence of choice, by the choice of another country's law. [962]

Application of arts 3 and 4

30-250

If the requirements of art.6(1)(a) or (b) are not fulfilled art.6(3) provides that the law applicable to a contract between a consumer and professional shall be determined pursuant to arts 3 and 4 of the Rome I Regulation, i.e. by the general rule governing choice of law by the parties [963] or, in the absence of a choice of law, by the general rule governing the determination of the law applicable in the absence of choice. [964]

Review clause

30-251

As already pointed out, [965] art.27(1) of the Regulation contains a review clause which requires the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Rome I Regulation, that Report to be accompanied, if appropriate, by proposals to amend the Regulation. Explicitly, art.27(1)(b) requires the report to include an evaluation of the application of art.6, in particular as regards the coherence of Community law in the field of consumer protection. [966]

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883. See above, paras 30-092 et seq.

884. Above, paras 30-093 et seq.

885. Above, para.30-106.

886. Above, paras 30-094 et seq.

887. See Recitals 23 and 24 to the Regulation. See generally, Dicey, Morris and Collins, 15th edn (2012), paras 33R-125 et seq.; Plender and Wilderspin, 4th edn (2015), Ch.9; Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2009); J. Hill, *Cross-Border Consumer Contracts* (2008), especially Ch.12; Gillies (2008) 16 International Journal of Law and Information Technology 242; Garcimartin Alferez (2009) 5 J. Priv. Int. L. 85. And see Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final. This proposal was withdrawn on December 16, 2014: COM(2014) 910 final.

888. Below, paras 30-239 et seq.

889. Below, paras 30-233 et seq.

890. Below, paras 30-239 et seq.

891. Below, para.30-249.

892. Below, para.30-250.

893. Recital 24 to the Regulation.

894. Rome I art.6(4)(a). As to the meaning of habitual residence, see above, paras 30-163 et seq.

895. art.5(4)(b) of the Convention; above, para.30-092.

896. Above, paras 30-169 et seq.

897. Directive 90/314 on package travel [1990] O.J. L158/59 art.6(4)(b). The Directive is implemented in the United Kingdom by the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288). A new Package Travel Directive (2015/2302/EU) entered into force on December 31, 2015 and must be implemented by July 1, 2018.

898. Above, paras 30-209 et seq.

899. cf. Rome Convention art.5(4)(b) and (5); above, para.30-092. See *Pammer v Reederei Schlüter GmbH & Co KG (C-585/08)* and *Pammer v Hotel Alpenhof (C-144/09) [2010] ECR I-12527*.

900. Above, para.30-092.

901. This Directive must now be taken to mean Directive 2008/122 of the European Parliament and of the Council of January 14, 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/10, implemented in the UK by SI 2010/2960, as amended by SI 2011/1065 and repealing Timeshare Act 1992. See Recital 27 to the Rome I Regulation.

902. See SI 2011/2960 Pt 2.

903. Above, paras 30-169 et seq.

904. Directive 2004/29 [2004] O.J. L145/1. Very broadly, section A covers: reception and transmission of orders in relation to financial instruments; execution of orders on behalf of clients; dealing on own account; portfolio management; investment advice; underwriting and/or placement of financial instruments on a firm commitment basis; placing of financial instruments without a firm commitment basis; and the operation of multilateral trading facilities. In general terms section B covers: safekeeping and administration of financial instruments and related matters; granting credits and loans to an investor in certain cases in relation to a transaction involving a financial instrument; advice to undertakings on capital structure, industrial strategy, and related matters and advice and services relating to mergers and acquisitions; foreign exchange services connected with the provision of investment services; investment research, financial analysis and other recommendations relating to transactions in financial instruments; services relating to underwriting; and certain investment services and activities related to derivatives. As to the meaning of “financial instrument”, see below, n.910. The original Directive has been replaced by Directive 2014/65/EU (MiFID 2) although the deadline for compliance with the new Directive has been extended to January 2018 (COM(2016) 56 final).

905. Directive 85/611 on the co-ordination of laws relating to collective investment in transferable securities [1985] O.J. L375/3, as amended by Directive 2005/1 [2005] O.J. L79/9. In July 2012, the European Commission formally adopted a reform of the UCITS Directive, commonly referred to as UCITS V, which was enacted and published in July 2014. UCITS V (Directive 2014/91/EU) amends the previous version of the UCITS Directive, known as UCITS IV (Directive 2009/65/EC). The UCITS V Directive has an implementation deadline of March 18, 2016. Unlike the UCITS IV Directive, the UCITS V Directive does not recast the UCITS Directive. Instead, it amends and stands alongside the UCITS IV Directive.

906. According to Recital 30 “transferable securities” are instruments referred to in Directive 2004/39 (MiFID) art.4. These are, broadly, defined in art.4(18) as: shares and other securities equivalent to shares; bonds or other forms of securitised debt; and any other securities giving the right to acquire or sell any such transferable securities.

907. Rome I Recital 26. And see Consultation Paper, para.66. See Nishitani in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.85; Garcimartin Alferez (2008) 10 Yb. P.I.L. 245; (2009) 5 J. Priv. Int. L. 85.

908. According to Recital 3 “financial instruments” are instruments referred to in art.4 of Directive 2004/39 (MiFID). According to art.4(17) such instruments are those specified in Annex C to the Directive. Very broadly, these are: transferable securities; money market instruments, units in collective investment undertakings; certain options, futures, swaps, forward rate agreements and derivative contracts; derivative instruments for the transfer of credit risk; and financial contracts for differences.

909. See below, paras 30-241 et seq.

910. Rome I Recital 28.

911. Below, paras 30-289 et seq.

912. See also Consultation paper, para.66. There is no exclusion equivalent to art.6(4)(d) of the Rome I Regulation in the Rome Convention.

913. Above, para.30-196.

914. Rome I art.6(4)(e).

915. Rome I Recital 28. Recital 31 states that nothing in the Regulation shall prejudice the operation of a formal arrangement designated as a system under art.2(a) of Directive 98/26 on settlement finality in payment and securities settlement systems [1998] O.J. L166/45. And see Consultation Paper, para.67.

916. See also Rome I Recital 32. But see Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 (SI 2009/3075) reg.4.

917. cf. the position under the Rome Convention, above, para.30-092.

918. cf. the Rome Convention art.5(1), above para.30-092.

919. See Recitals 7 and 24 to the Rome Regulation.

920. See Recital 23 to the Rome Regulation.

921. See *Benincasa v Dentalkit Srl (C-269/95) [1997] E.C.R. I-3767*.

922. See *Shearson Lehman Hutton Inc v TVB (C-89/91) [1993] E.C.R. I-139*.

923. See, e.g. *Gruber v Bay Wa AG (C-464/01) [2005] E.C.R. I-439, [2006] 2 W.L.R. 205*. See also *Gabriel v Schlank & Schick GmbH (C-96/00) [2002] E.C.R. I-6367*; *Verein für Konsumen-teninformation v Henkel (C-167/00) [2002] E.C.R I-8111*; *Standard Bank London Ltd v Apostolakis [2000] I.L.Pr. 766*; *Standard Bank London Ltd v Apostolakis (No.2) [2001] Lloyd’s Rep. Bank. 240*.

924. And see Rome I art.6(2), below, para.30-249. The law of the consumer’s habitual residence will also govern the formal validity of the contract: see art.11(4), below, para.30-314.

925. Above, paras 30-166 et seq.

926. Which need not be a Member State.

927. cf. art.19(2) of the Regulation, above, para.30-165. For these purposes, "agency" ought to include appointment of a commercial agent who receives orders, on behalf of the professional, in the country where the consumer is habitually resident: cf. Rome Convention art.5(2), second indent, above, para.30-094. See also *Ingmar GB Ltd v Eaton Leonard Technologies Inc (C-381/98) [2000] E.C.R. I-9305*; but contrast *Blanckaert and Willems PVBA v Trost (139/80) [1981] E.C.R. 819* (independent commercial agent not an "agency" for the purposes of art.5(5)).

928. See below, para.30-248.

929. See Recitals 7 and 24 to the Rome I Regulation.

930. See below, para.30-248. There need not be any causal connection: *Lokman Emrek v Vlado Sabranovic (C-218/12)*.

931. See Recitals 7 and 24 to the Rome I Regulation.

932. Recital 24 to the Regulation.

933. Above, paras 30-094 et seq.

934. cf. Rome Convention art.5(2), first indent, above, paras 30-093, 30-095 et seq.

935. Dicey, Morris and Collins, 15th edn (2012), paras 33-131—33-137.

936. Dicey, Morris and Collins, 15th edn (2012), paras 33-131—33-137.

937. Above, para.30-242.

938. cf. Rome Convention art.5(2), first indent; Giuliano-Lagarde Report, p.24; above paras 30-093, 30-096.

939. See preceding note. Thus, for example, such an intention could be derived when an advertisement is contained in a European edition of an American newspaper intended to circulate in European countries, including that where the consumer is habitually resident, but might not be so derived from the mere availability of an American newspaper (with no European edition) in such countries. It seems that so-called "cross-border excursion selling" (above, para.30-093) will also be covered. On whether the contract must be a distance contract see *Muhlleitner v Yusufi (C-190/11)*.

940. Above, para.30-093.

941. Above, paras 30-094 et seq.

942. Recital 24 to the Regulation.

943. Consultation Paper, para.64. See Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2009); Hill, *Cross-Border Consumer Contracts* (2008), Ch.12; Gillies (2008) 16 International Journal of Law and Information Technology 242.

944. See below, para.30-248.

945. See Explanatory Memorandum to the Commission's original Proposal, p.7. The difficulties, in this respect, in the application of the Rome Convention (above, paras 30-094 et seq.) will not arise.

946. For the Rome Convention, see above, para.30-096.

947. The passages of the joint declaration quoted in this paragraph are set out in Recital 24 to the

Regulation.

948. See below, para.30-248.

949. This possibility had been of considerable concern to the electronic commerce industry. The same concern was expressed in negotiations on the Rome I Regulation in that mere accessibility would have exposed the operator to liability under the law of any country in which the website was accessible.

950. cf. above, para.30-096.

951. See Explanatory Memorandum to the Commission's original Proposal, p.7. cf. *Muhlleitner v Yusufi (C-190/11)*; *Lokman Emrek v Vlado Sabranovic (C-218/12)*.

952. See preceding note.

953. cf. above, para.30-095.

954. *[2012] Bus.L.R. 972*.

955. *[2012] Bus.L.R. 972* at [83].

956. *[2012] Bus.L.R. 972* at [84].

957. See Recital 24 of the Rome I Regulation.

958. ! See above, para.30-094. On click-wrapping and jurisdiction agreements under the Judgments Regulation see *El Majdoub v CarsOnTheWeb.Deutschland GmbH (C-322/14) [2015] 1 W.L.R. 3986*, and see *Verein für Konsumenteninformation v Amazon EU Sarl (C-191/15)* on standard terms.

959. See art.5 of the Proposal.

960. Above, para.30-093.

961. See Consultation Paper, para.61 where some of these concerns are referred to.

962. As to these compulsory provisions (mandatory rules, rules which cannot be derogated from by agreement), see above, paras 30-176 et seq. It is also possible that party autonomy may be further limited by overriding mandatory provisions (which are different from rules which cannot be derogated from by agreement) under art.9 of the Regulation: see above, paras 30-179 et seq. and below, paras 30-362 et seq. See also Recitals 25 and 37 to the Regulation.

963. Above, paras 30-169 et seq.

964. Above, paras 30-185 et seq.

965. Above, para.30-137.

966. See also the Declaration by the French delegation relating to art.6 stating that in any revision of the Judgments Regulation, the provisions relating to jurisdiction must be consistent with art.6 of the Rome I Regulation: Council of the European Union, 2005/0261, CODEC 388 JUSTCIV 53, April 7, 2008.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(h) - Insurance Contracts

Background

30-252

The Rome Convention provided no discrete choice of law rules to determine the law applicable to insurance contracts. According to art.1(3) of the Convention, the rules contained in the Convention did not apply to contracts of insurance which covered risks situated in the territories of the Member States of the European Communities: in order to determine whether a risk was situated in those territories the court had to apply its internal law. [967] Where the risk was situated within the territories of the Member States, the relevant choice of law rules were to be found in Directives concerned with non-life insurance and life insurance [968] which were ultimately implemented in United Kingdom law in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001. [969] It followed from this that arts 3, 4 and 5 of the Rome Convention applied to determine the law applicable to an insurance contract only in cases where the risk was situated outside the territories of the Member States. [970] Furthermore, the rules in Convention (unaffected by the Directives) applied to determine the law applicable to a reinsurance contract. [971] The result of this combination of different sources and the difficulties of demarcating their respective application was a complex and detailed (in the case of the Directives) body of rules, which were referred to earlier in this chapter, [972] but which, because of their detail and complexity were not considered in this chapter. [973] In contrast, art.7 of the Rome I Regulation provides a discrete set of choice of law rules to determine the law applicable to insurance contracts. These choice of law rules are, in substance, a combination of and simplification (to some extent, at least) of the position under the Rome Convention and the Directives [974] and do not involve any significant changes. The following paragraphs attempt to identify the main principles and features of art.7. [975] It will be helpful, at the outset, to set out the structure of the article.

Structure of art.7 [976]

30-253

Article 7 consists of six paragraphs and several sub-paragraphs, dealing, respectively, with: scope (art.7(1)); the law applicable to a contract covering a “large risk” within the meaning of the article (art.7(2)); the law applicable to an insurance contract other than a contract covering a large risk (art.7(3)); additional rules to determine the law applicable to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance (art.7(4)); a provision clarifying, for the purposes of art.7(3) and 7(4), the situation where the insurance contract covers risks situated in more than one Member State (art.7(5)); and a provision indicating how the country in which the risk is situated is to be identified when it is necessary to do so for the purposes of the article (art.7(6)).

Scope

30-254

Article 7(1) of the Regulation stipulates that art.7 shall apply to insurance contracts referred to in art.7(2) (which deals with contracts covering "large risks"), [977] whether or not the risk covered is situated in a Member State, [978] and to all other insurance contracts covering risks situated inside the territory of the Member States. [979] It is specifically provided that art.7 does not apply to reinsurance contracts. [980]

Exclusion in art.1(2)(j)

30-255

By way of preliminary observation, it should be noted that, under art.1(2)(j), the Regulation does not apply at all, to insurance contracts which are the subject of that provision, as mentioned earlier in this section. [981]

Reinsurance

30-256

Article 7 does not apply to reinsurance contracts. [982] The law applicable to such contracts will therefore be determined by art.3 of the Regulation if the parties have made a choice of law satisfying that provision, [983] or, in the absence of a choice of law, by art.4 of the Regulation. [984] For the purposes of art.4(1) of the Regulation a contract of reinsurance would appear to be a contract for the provision of services and would thus be governed under the general rule by the law of the country where the reinsurer, as service provider, has his habitual residence. [985] Application of that law may be displaced under art.4(3) of the Regulation. [986] The purpose of art.7 of the Regulation is, inter alia, to take account, where appropriate, of the fact that it is thought that the insured is in a "weaker" position compared with the insurer. [987] That consideration is not relevant in relation to reinsurance contracts.

Situs of risk

30-257

As a result of art.7(1) of the Regulation, the relevant choice of law rules for the purpose of art.7 depend, in part, on whether the insurance contract covers risks situated inside the territories of the Member States or risks situated in a non-Member State. Further, the choice of law rules in art.7, on occasion, refer to the law of the Member State in which the risk is situated. It is therefore convenient to identify the rules for determining the *situs* of a risk at this point.

Meaning of "Member State"

30-258

Although, normally, Member State, for the purposes of the Regulation, means the Member States to which the Regulation applies i.e. Denmark is excluded, [988] art.1(4) of the Regulation provides that for the purposes of art.7, Member State means all the Member States so that Denmark is included. Thus, art.7 will apply where the *situs* of the risk is in Denmark.

Rules for determination of situs of risk

30-259

As regards non-life insurance, the country in which the risk is situated, is, according to art.7(6) of the

Regulation, to be determined in accordance with art.2(d) of the Second Council Directive 88/357 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services. [989] According to art.2(d) of the Directive, the Member State where the risk is situated means: the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same policy; the Member State of registration, where the insurance relates to vehicles of any type; the Member State where the policyholder took out the policy in the case of policies of a duration of four months or less covering travel or holiday risks, whatever the class concerned; and in all cases not explicitly covered by the foregoing provisions the Member State where the policyholder has his habitual residence or, if the policyholder is a legal person, the Member State where the latter's establishment [990] to which the contract relates, is situated. As regards life assurance, the country in which the risk is situated shall, according to art.6(4), be the country of commitment within the meaning of art.1(1)(g) of Directive 2002/83 concerning life assurance. Article 1(1)(g) defines Member State of the commitment as the Member State where the policyholder has his/her habitual residence or, if the policyholder is a legal person, the Member State were the latter's establishment [991] to which the contract relates, is situated.

Choice of law rules applicable

30-260

The following paragraphs seek to describe the relevant choice of law rules elating to contracts covering large risks, under art.7(2) of the Regulation, and the relevant choice of law rules relating to contracts covering other risks which are contained in art.7(3) of the Regulation.

Large risks

30-261

Article 7(2), first sub-paragraph, of the Regulation provides that an:

> "… insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of July 24, 1973 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [992] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation."

The second sub-paragraph of art.7(2) states that to:

> "… the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances that the contract is manifestly more closely connected with another country, the law of that other country shall apply."

Meaning of "large risk"

30-262

According to art.5(d) of the Directive a large risk is defined as a risk which is classified as a risk relating to: damage or loss of, railway stock, aircraft, ships (sea, lake, river and canal vessels), goods in transit, aircraft liability, liability for ships (as above), [993] credit (covering general insolvency, export credit, instalment credit, mortgages, and agricultural credit), suretyship (covering direct and indirect

suretyship), [994] damage and loss to vehicles, certain events involving fire and natural forces, other damage to property, motor vehicle liability, general liability and miscellaneous financial loss. [995]

Choice of law by the parties

30-263

In relation to an insurance contract covering a large risk, as defined in the previous paragraph, the parties may choose the law [996] applicable to the contract in accordance with art.3 of the Regulation, [997] irrespective of the country in which the relevant risk covered is situated, as a result of art.7(2) of the Regulation.

Applicable law in absence of choice

30-264

The second sub-paragraph of art.7(2) stipulates that in the absence of a choice of law satisfying art.3 of the Regulation, the contract will be governed, as a general rule, by the law of the country [998] in which the insurer has his habitual residence. [999] This sub-paragraph also provides that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply. This approach, in effect, reproduces art.4(1) and (3) of the Regulation in the specific context of insurance contracts covering large risks. [1000]

Other insurance contracts not falling within art.7(2)

30-265

Where the insurance contract is one which does not fall within art.7(2), the relevant choice of law rules are to be found in art.7(3) of the Regulation. As provided in art.7(1), these choice of law rules only apply to insurance contracts covering risks situated inside the territory of the Member States. [1001] Article 7(3) of the Regulation is, however, capable of applying (unlike art.7(2) which only applies to non-life insurance) to life assurance. Essentially, non-life risks which are the subject of art.7(3) include the following: accident insurance; sickness insurance; legal expenses insurance; insurance for assistance; credit and suretyship insurance where the risks do *not* relate to a business carried on by the policyholder; and where the policyholder does not carry on a business which satisfies certain detailed requirements of the First Non-Life Directive, [1002] land vehicle insurance, fire insurance, damage to property, motor vehicle liability, general liability (other than aircraft liability and liability for ships) and insurance against miscellaneous financial loss. [1003]

Choice of law by the parties

30-266

Article 7(3) of the Regulation establishes a more limited form of party autonomy in relation to the classes of insurance contract referred to in the previous paragraph, by specifying the laws that may be chosen to govern the insurance contract under art.3 of the Regulation.

Law of Member States where risk situated

30-267

Article 7(3)(a) allows, first, the choice of the law of any Member State where the risk is situated at the time of the conclusion of the contract. This would seem to mean that where the risk is situated in more than one Member State, the law of any such state may be chosen.

Habitual residence of policyholder

30-268

The parties are permitted to choose, secondly, the law of the country where the policyholder has his habitual residence, [1004] by art.7(3)(b) of the Regulation. It will be noted that the country the law of which may be chosen need not be a Member State.

Life assurance

30-269

As regards the case of life assurance, art.7(3)(c) allows, thirdly, choice of the law of the Member State of which the policyholder is a national. While this principle presents no problem where the policyholder is a national of a Member State which is a unitary state, its application creates difficulty in respect of the United Kingdom in that it requires determination of the national law of a British citizen. [1005] Strictly speaking, there is no such law, at least in the field of contract, but only English law, Scottish law and Northern Irish law. And there appears to be no principle that determines what link must exist between an individual and a particular unit within the United Kingdom which can serve to demonstrate what the national law of a British citizen is to be. [1006] It is possible, however, though the matter is far from clear, that the relevant "national" law will be that unit of the United Kingdom with which the individual is most closely connected to at the time of conclusion of the contract. [1007]

Risks limited to events occurring in one Member State

30-270

Article 7(3)(d) provides that, fourthly, where the insurance contract covers risks limited to events occurring in a Member State other than the Member State where the risk is situated, the parties may choose the law of the former Member State. Presumably, this provision would permit a liability policy covering a lawyer qualified to practice in England and France to contain an effective choice of French law in relation to any indemnity for negligence in respect of advice on French law given in France (the policy being so limited) if the lawyer was habitually resident in England, where the risk would thus be situated. [1008]

Policyholder pursues commercial or industrial activity

30-271

Fifthly, art.7(3)(e) of the Regulation states that where the policyholder of a contract to which art.7(3) applies:

> "… pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States",

the parties may choose the law of any of the Member States concerned or the law of the country of habitual residence of the policyholder. [1009]

Supplementary freedom of choice

30-272

The second sub-paragraph of art.7(3) of the Regulation provides that where, in the cases set out in art.7(3)(a), art.7(3)(b) and art.7(3)(e):

> "… the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom."

This, it must be said, is a somewhat obscure provision, but the following points may be made. First, art.7(3)(b) of the Regulation does not require the policyholder to be habitually resident in a Member State: the provision refers to the "country" where the policyholder is habitually resident. [1010] It would, therefore, seem that art.7(3), second sub-paragraph is not limited in scope, as regards, art.7(3)(b), to cases where the policyholder is habitually resident in a Member State. Secondly, the same conclusion would seem to follow in respect of art.7(3)(e) to the extent that that provision refers to the law of the "country" of habitual residence of the policyholder. [1011] Thirdly, the reference to the grant of greater freedom to choose the applicable law in the law of the Member States concerned is a reference to choice of law rules: thus a species of the doctrine of renvoi is introduced into the provision. [1012] Fourthly, however, it is not clear, from the terms of the Regulation, what choice of law rules are being referred to since the Rome I Regulation is the source of the relevant choice of law rules in all the Member States, [1013] and that Regulation limits the power to choose by reference to art.7. In the circumstances any conclusion on this issue must be speculative, but it is suggested that the reference in art.7(3), second sub-paragraph is to art.3 of the Regulation. Thus, if art.3 gives greater freedom of choice than the law which can be chosen under art.7(3)(a), art.7(3)(b) and 7(3)(e), the parties may take advantage of that freedom if the law of the Member States identified in art.7(3)(a), (b) and (e) so permit. [1014]

30-273

It has further been provided that where in relation to a case to which art.7(3) of the Regulation applies, the law referred to in art.7(3)(a) or 7(3)(b), or one of the laws referred to in art.7(3)(c), is the law of any part of the United Kingdom, the parties to the contract may also choose as the law applicable to the contract (a) the law of another country: or (b) the law of another part of the United Kingdom if that choice complies with regs 3, 6, and 9-22 of the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 reg.4. [1015] The Regulations also provide [1016] that where the parties may choose the applicable law under the Rome I Regulation or under reg.4 of the Regulations, and where the risk to which the contract relates is covered by Community co-insurance, [1017] co-insurers other than the lead insurer [1018] are not to be treated as parties to the contract.

Applicable law in the absence of choice

30-274

Article 7(3), third sub-paragraph, provides that to the extent that the law applicable to the contract has not been chosen in accordance with art.7(3), the contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion to the contract. There is no escape clause allowing application of the law of another country (or Member State) if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with that other country. [1019] For the purposes of art.7(3), third sub-paragraph, art.7(5) provides that where the contract covers risks situated in more than one Member State, the contract "shall be considered as several contracts each relating to only one Member State". [1020] This might not be thought to be a particularly convenient solution.

Risk situated in non-Member State, etc

30-275

Article 7(3) only applies if the risk is situated in a Member State and also, together with art.7(5), deals

with the situation where the risk is situated in more than one Member State. Where the risk is situated in a non-Member State then the law applicable to the insurance contract will, so it appears, be generally determined by reference to arts 3 and 4 of the Regulation [1021] unless the non-Member State is an EEA state, in which case it is possible that the applicable law will be determined by reference to the relevant provisions of the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001. [1022] Where the risk is situated in both a Member State and a non-Member State, then it may be, drawing an analogy with art.7(5), that the contract will be treated as a series of separate contracts with art.7(3) applying in respect of the risk situated in the Member State and arts 3 and 4 applying in so far as the risk is situated in a non-Member State. Where the risk is situated in both a Member State and an EEA State, then again the contract may be treated as a series of separate contracts with art.7(3) applying to the former situation and the 2001 Regulations applying to the latter situation. Where the risk is situated in two or more non-Member States, then the applicable law will be determined by reference to arts 3 and 4 of the Regulation, in respect of the contract as a whole, and there will, one would think, be no need to treat the contract as a series of separate contracts. [1023]

Compulsory insurance

30-276

Article 7(4) of the Regulation provides additional rules for contracts covering risks for which a Member State imposes an obligation to take out insurance. By virtue of art.7(4)(a), the insurance contract will not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail. For these purposes, where the contract covers risks situated in more than one Member State, art.7(5) provides that the contract shall be considered as constituting several contracts each relating to only one Member State. [1024] Article 7(4)(b), by way of derogation from art.7(2) and (3), permits a Member State to lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

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967. Rome Convention art.1(5); above, paras 30-044 et seq.

968. Above, paras 30-044 et seq.

969. Financial Services and Markets Act 2000 Regulations 2001 (SI 2001/2635, as amended by SI 2001/3452). The Directives, as implemented in the Regulations, applied where the risk was situated in an EEA Member State: see above, para.30-045.

970. For discussion, see Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 33-188 et seq.

971. Rome Convention art.1(4).

972. Above, paras 30-044 et seq.

973. For the details, see Dicey, Morris and Collins, 15th edn (2012), paras 33-188 et seq. The rules contained in the Directives, as implemented in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance Regulations) 2001 do not apply to contracts of insurance entered into on or after December 17, 2009: see Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 (SI 2009/3075) reg.2.

974. Consultation Paper, paras 70-73.

975. The details of the Directives, as implemented in the UK can be traced in Dicey, Morris and

Collins, 15th edn (2012), paras 33-188 et seq.

976. Dicey, Morris and Collins, 15th edn (2012), paras 33R-183 et seq.; Plender and Wilderspin, 4th edn (2015), Ch.10; Heiss (2008) 10 Yb. P.I.L. 261; Merrett (2009) 5 J. Priv. Int. L. 49; Merkin (2009) 5 J. Priv. Int. L. 69; Gruber in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.129.

977. As defined by art.7(2), below, para.30-261.

978. As defined below, para.30-257.

979. As to where a risk is situated, see below, paras 30-257 et seq. More generally, art.7 applies in cases of conflicts between: (a) the laws of different parts of the UK; and (b) the laws of one or more parts of the UK and Gibraltar: see Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 (SI 2009/3075) reg.3.

980. Rome I art.7(1), second sentence.

981. Above, para.30-162.

982. For discussion of the application of Rome I to reinsurance, see Merkin (2009) 5 J. Priv. Int. L. 69.

983. Above, paras 30-169 et seq. cf. Dicey, Morris and Collins, 15th edn (2012), paras 33R-232 et seq.

984. Above, paras 30-185 et seq.

985. As to the meaning of habitual residence, see footnote to art.19.

986. Above, paras 30-203 et seq.

987. See Recitals 23 and 32 to the Regulation. A contract of insurance does not fall within the consumer contract provisions (art.6) of the Regulation: art.6(1) and Recital 32; above, para.30-239. But see Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009 (SI 2009/3075) reg.4.

988. Rome I art.1(4); above, para.30-130. Where the risk is situated in an EEA state rather than a Member State, it would seem that the choice of law rules contained in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 (SI 2001/2635).

989. Directive 88/357 on the co-ordination of laws [1988] O.J. L172/I.

990. For the possible meaning of “establishment”, see Dicey, Morris and Collins, para.33-160.

991. Defined in art.1(1)(c) of the Directive as the head office, agency or branch of an undertaking.

992. Directive 73/239 on the co-ordination of laws [1973] O.J. L228/3, as amended.

993. art.5(d)(i) of the Directive.

994. art.5(d)(ii) of the Directive, which is subject to the proviso that the policyholder is engaged professionally in an industrial or commercial activity or in one of the liberal professions and the risks related to such activity.

995. art.5(d)(iii) of the Directive, which is subject, inter alia, to the policyholder exceeding certain financial limits in respect of balance-sheet total, turnover and a stipulated average number of employees.

996. Which need not be the law of a Member State.

997. Above, paras 30-169 et seq. As to the position under the Rome Convention, see Dicey, Morris, and Collins, 15th edn (2012), para.33-193.

998. Which need not be a Member State.

999. As defined above, paras 30-163 et seq.

1000. Above, paras 30-185 et seq. As to the position under the Rome Convention, see Dicey, Morris, and Collins, 15th edn (2012), para.33-220.

1001. Above, para.30-254. For discussion of these choice of law rules under the Directives, as implemented in the United Kingdom, see Dicey, Morris and Collins, 15th edn (2012), paras 33-198 et seq.

1002. Above, para.30-262.

1003. First Non-Life Directive art.5(d)(iii); above, para.30-262.

1004. As to the meaning of which, see above, paras 30-163 et seq.

1005. See on this question, Dicey, Morris and Collins, 15th edn (2012), paras 33-207 et seq.

1006. See Dicey, Morris and Collins, 15th edn (2012), paras 33-207 et seq.

1007. See previous note. As to “dual nationality”, see Dicey, Morris and Collins, 15th edn (2012), paras 33-207 et seq.

1008. See Dicey, Morris and Collins, 15th edn (2012), paras 33-207 et seq., where it is also pointed out that it may not always be easy to determine whether the events insured against occurred in one Member State. Further, it is possible that the example given might fall within art.7(3)(e), below, para.30-272.

1009. See Dicey, Morris and Collins 15th edn (2012), para.33-201.

1010. See above, para.30-268.

1011. See above, para.30-271.

1012. See above, para.30-145.

1013. The equivalent provision in Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 regs 4(5) and 7(3) provided that the choice of law rules of the Rome Convention were the rules referred to, rather than the rules contained in the Directives. See Dicey, Morris and Collins, 15th edn (2012), paras 33-212 et seq.

1014. cf. *Evialis SA v SIAT [2003] EWHC 863 (Comm), [2003] 2 Lloyd’s Rep. 377*.

1015. SI 2009/3075.

1016. reg.5.

1017. Within the meaning of Council Directive 78/473 on the coordination of laws, regulations and administrative provisions relating to community co-insurance [1978] O.J. L151/25.

1018. Within the meaning of the Directive cited in the previous note.

1019. cf. Rome I art.7(2), second sub-paragraph.

1020. cf. *American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] I.L.Pr. 370*.

1021. See Recital 33 to the Regulation above, paras 30-169 et seq.

1022. Unless the Regulations are repealed consequent on the adoption of Rome I. For discussion, see Dicey, Morris and Collins 15th edn (2012), paras 33-194—33-200.

1023. Where the risk is situated in more than one EEA State, the matter will be governed by the 2001 Regulations.

1024. Above, para.30-275.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(i) - Individual Employment Contracts [1025]

Background

30-277

❗ As regards the Rome Convention, determination of the law applicable to individual employment contracts was governed by art.6 of the Convention. [1026] Very generally, a choice of law in such a contract could not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable to the contract in the absence of choice. [1027] In the absence of choice, an employment contract would be governed by the law of the country in which the employee habitually carried out his work in performance of the contract even if he was temporarily employed in another country, [1028] or, if the employee did not carry out his work in any one country, by the law of the country in which the place of business through which the employee was engaged was situated, [1029] unless it appeared from the circumstances as a whole that the contract was more closely connected with another country, in which case the contract was governed by the law of that country. [1030] These choice of law rules were discussed earlier in this chapter. [1031] In relation to the Rome I Regulation, the relevant choice of law rules are to be found in art.8 of the Regulation. Article 8, essentially repeats art.6 of the Convention but contains some clarification of, and different terminology to, the latter provision. The philosophy behind art.8, is, however, identical to that behind art.6 of the Convention. [1032]

Structure of art.8

30-278

Article 8(1) provides a general rule allowing the parties to choose the governing law, but stipulates that the choice of law may not have the result of depriving the employee of the protection afforded to him by provisions which cannot be derogated from by agreement which are contained in the law that would be applicable in the absence of choice. [1033] Article 8(2), (3) and (4) provide the relevant rules for determining the law to be applied in the absence of a choice of law. [1034] This structure strongly reflects that of art.6 of the Rome Convention, as discussed in section 3 of this chapter. [1035] The following paragraphs describe the main features of art.8 of the Regulation, concentrating in particular on any differences between art.8 and art.6 of the Convention.

Meaning of individual employment contract

30-279

❗ Whatever the position is under art.6 of the Rome Convention, [1036] there can be no doubt that under art.8 of the Rome I Regulation the expression “individual employment contract” will be given an

Further, that meaning should correspond, so far as possible, with the meaning given to the expression in the context of the Judgments Regulation recast. [1038] What the particular meaning will turn out to be may depend on the circumstances of the case but the following considerations may form the broad contours of an autonomous meaning. [1039] The first criterion identifying a contract of employment is the provision of services by one party over a period of time for which remuneration is paid; the second criterion is the existence of control and direction over the provision of the services by the counterparty; and the third criterion is the integration to some extent of the provider of services within the organisational framework of the counterparty [1040] . These criteria are not, however, "hard edged" criteria which can be mechanistically applied, since there may, for example, be degrees of control and degrees of integration within the relevant organisational framework. [1041] And in applying these broad criteria regard must be had, particularly, to the terms of the contract. [1042]

Choice of law by the parties

30-280

Article 8(1) establishes that an individual employment contract shall be governed by the law chosen by the parties in accordance with art.3 of the Regulation. [1043] What is significant about the provision, is, however, that such a choice of law may not have the result of depriving the employee of the protection afford to him by provisions that cannot be derogated from by agreement under the law that would have been applied in the absence of choice.

"Provisions that cannot be derogated from by agreement"

30-281

This expression corresponds to the expression "mandatory rules", as used in art.6(1) of the Rome Convention, which according to art.3(3) of the Convention are rules which "cannot be derogated from by contract". [1044] For the purposes of art.8(1) of the Regulation, likely relevant provisions will, it would appear, be those discussed in the context of the Rome Convention in section 3 of this chapter. [1045] Further, analysis of the question of whether the employee has been "deprived" of the protection of a relevant provision would seem to involve the same process of reasoning as that discussed in connection with art.6(1) of the Rome Convention. [1046]

Applicable law in absence of choice

30-282

In the absence of a choice of law, the applicable law must be determined by reference to art.8(2) or (3) of the Regulation each of which is subject to a rule of displacement contained in art.8(4).

Country in which employee habitually carries out work, etc

30-283

Article 8(2) stipulates that to:

> "… the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which, or failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country."

It will be noted that whereas art.6(2)(a) of the Rome Convention refers to the law of the country *in* which the employee habitually carries out his work, [1047] as does art.8(2) of the Regulation, the Convention, in contrast to the Regulation does not refer to the law of the country *from* which the employee habitually carried out his work in performance of the contract. Article 6(2)(a) of the Rome Convention has, however, been held by the European Court is to be interpreted in a manner equivalent to art.8(2), first sentence, of the Rome I Regulation, so as to include, in a relevant case, the country *from* which the employee habitually carries out his work. [1048] The effect of art.8(2) would seem to be as follows. If the employee habitually carries [1049] out his work in performance of the contract in one country, then that country's law will be, subject to art.8(4), the applicable law. If the employee habitually carries out his work in more than one country, or in no particular country, or in a place which is not a country [1050] then one must ask whether there is one country *from* which the employee habitually carries out his work in performance of the contract. An example of the latter situation might be the case of an airline pilot, based in one particular country who is required to fly aircraft to several different countries. [1051]

Temporarily employed in another country

30-284

The second sentence of art.8(2) is designed to ensure that the place where work is habitually carried out is not to be regarded as having changed if the employee is temporarily employed in another country. Recital 36 to the Regulation explains that:

> "… work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily."

Default rule

30-285

Article 8(3) provides what might be called a "default" rule according to which if the applicable law cannot be determined by reference to art.8(2), the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. [1052] This rule will apply where the employee habitually carries out his work in more than one country, or in no particular country, or in a place which is not a country *and* there is no one country *from* which he habitually carries out his work.

Rule of displacement

30-286

Article 8(4) provides that where:

> "… it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."

This rule is modelled on the proviso to art.6(2) of the Rome Convention, as discussed earlier in this

chapter. [1053] It should be emphasised that there is no requirement in art.8(4) that it must be "clear" from the circumstances as a whole that the contract is "manifestly" more closely connected with a country other than that indicated in art.8(2) or (3) to justify invocation of the rule of displacement. [1054] It may, therefore, in the context of employment contracts, be somewhat more easy to displace the application of the law found to govern the contract by reference, as the case may be, to art.8(2) or (3). [1055]

"Overriding mandatory provisions"

30-287

It should finally be noted that it is conceivable that the effect of a choice of law or of the law that would be applicable in the absence of choice could be limited by reference to overriding mandatory provisions of the law of the forum or perhaps by relevant overriding mandatory provisions of the law of the country where the contract has been or has to be performed. [1056] It is suggested that rules prohibiting discrimination in employment, particularly race discrimination, sex discrimination, sexual orientation discrimination, disability discrimination and age discrimination should be regarded as provisions, respect for which the United Kingdom regards as crucial for protecting its social and perhaps economic and political interests for the purposes of art 9(1) of the Regulation, so that art.9(2) may be applied, particularly when such rules apply irrespective of the law applicable to the employment contract. [1057] Protection against unfair dismissal should also be so regarded, since it reflects the social interest of preventing unfair treatment of employees in the work place. [1058]

Contract and tort

30-288

In English law, an employee may have alternative claims in contract or tort against his employer for, say, breach of contract or negligence, in respect of injuries suffered at work. [1059] As explained earlier in this chapter, it is unlikely that this option will remain, as between the Rome I Regulation in respect of the contractual claim and the Rome II Regulation in respect of the noncontractual (tortious) claim, since the scope of each Regulation will be regarded as mutually exclusive. [1060] It is not entirely clear, however, whether such a claim will be regarded as contractual or tortious in character. It is suggested, with hesitation, that it should be regarded as arising out of a non-contractual obligation. [1061]

1025. Dicey, Morris and Collins, 15th edn (2012), paras 33R-248 et seq.; *Schleker v Boedeker (C-64/12) [2014] Q.B. 320*, above, para.30-203 n.826; Merrett, *Employment Contracts in Private International Law* (2011); Plender and Wilderspin, *The Rome I Regulation: the Law Applicable to Contracts in Europe* (2009), p.171; Barnard (2009) I.L.J. 122; Scott [2010] L.M.C.L.Q. 640; Merrett (2010) I.L.J. 355; Merrett (2015) I.L.J. 53. And see generally *Koelzsch v État du Grand Duché de Luxembourg (C-29/10) [2012] Q.B. 210*; *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr. 16*, interpreting equivalent but not identical provisions of the Rome Convention art.6, above, para.30-107.

1026. Above, paras 30-107 et seq.

1027. Rome Convention art.6(1), above, paras 30-111 et seq.

1028. Rome Convention art.6(2)(a), above, paras 30-118 et seq.

1029. Rome Convention art.6(2)(b) above, paras 30-118 et seq.

1030. Rome Convention art.6(2), proviso, above, para.30-119.

1031. Above, paras 30-107 et seq.

1032. Above, para.30-107. See Recital 35 to the Rome I Regulation. Recital 34 states that art.8 should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] O.J. L18/1, above, para.30-107.

1033. cf. art.6(1) of the Rome Convention, above, para.30-111.

1034. cf. art.6(2) of the Convention, above, paras 30-118 et seq.

1035. Above, paras 30-107 et seq.

1036. Above, paras 30-108 et seq.

1037. ! See *WPP Holdings Italy Srl v Benatti [2007] EWCA Civ 263, [2007] 1 W.L.R. 263*; *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723, [2008] I.C.R. 18*; *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB), [2008] 1 All E.R. (Comm) 401*. In *Holterman Ferho Exploitatie BV v Spies von Büllesheim (C-47/14) [2015] I.L.Pr. 44*, the Court of Justice of the EU adopted an autonomous meaning in the context of Section 5 of the Judgments Regulation.

1038. Judgments Regulation recast art.20. See Recital 7 to the Rome 1 Regulation. And see cases cited in preceding note.

1039. *WPP Holdings Italy Srl v Benatti [2007] EWCA Civ 263* at [46].

1040. ! Each of these three criteria was referred to by the Court of Justice in *Holterman Ferho Exploitatie BV v Spies von Büllesheim (C-47/14) [2015] I.L.Pr. 44* when considering the meaning of employment contract under the Judgments Regulation.

1041. *WPP Holdings Italy Srl v Benatti [2007] EWCA Civ 263* at [47].

1042. *WPP Holdings Italy Srl v Benatti [2007] EWCA Civ 263* at [47].

1043. Above, paras 30-169 et seq.

1044. Above, para.30-062.

1045. Above, paras 30-111 et seq. Where the relevant provision is derived from European law, it may have direct effect, independently of art.8(1); see Recitals 34 and 40 to the Regulation. And see above, para.30-115.

1046. Above, para.30-116.

1047. Above, para.30-118.

1048. *Koelzsch v État du Grand-Duché de Luxembourg (C-29/10) [2012] Q.B. 210*; *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr.16*. See above, para.30-118.

1049. As to the meaning of “habitually carries out his work” see para.30-118 above.

1050. See above, para.30-107.

1051. cf. *Serco Ltd v Lawson [2006] UKHL 3, [2006] I.C.R. 250*.

1052. As to the meaning of “place of business through which the employee was engaged is situated”, see above, para.30-118. cf. *Voogsgeerd v Navimer SA (C-384/10) [2012] I.L.Pr.16*, above, para. 30-118 (a case on the Rome Convention).

1053. Above, para.30-119 and considered in *Schleker v Boedeker (C-64/12) [2014] Q.B. 320*.

1054. cf. Rome I art.4(3); above, para.30-203.

1055. cf. Rome I art.4(4); above, para.30-206.

1056. See below, paras 30-362 et seq. In any event, in practice, the approach in art.8 will normally secure the application of these provisions.

1057. And are within the spatial reach of the relevant rules. See above, para.30-114.

1058. See above, para.30-114. cf. Barnard [2009] I.L.J. 122. cf. restrictive covenants imposed on employees: *Duarte v Black and Decker Corp [2007] EWHC 2720, [2008] 1 All E.R. (Comm) 401* . See Merrett, Ch.9.

1059. Above, para.30-120.

1060. Above, para.30-121.

1061. But cf. *Kalfelis v Schroeder (189/87) [1988] E.C.R. 5565*; *Source Ltd v TUV Rheinland Holding AG [1998] Q.B. 54*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(j) - Voluntary Assignment and Contractual Subrogation

Background

30-289

Article 12 of the Rome Convention contained choice of law rules for determining the law applicable to "Voluntary assignment", as discussed earlier in this chapter. [1062] Article 14 of the Rome I Regulation contains choice of law rules which are expressed to apply to determine the law applicable to "[v]oluntary assignment and contractual subrogation". The gestation of art.14 was not without controversy and it is therefore not surprising that it is one of the areas to be addressed in the review clause in the Regulation. [1063] Article 14(1) and (2), subject to some changes in drafting, reflect the substance of the equivalent rules in art.12(1) and (2) of the Rome Convention. [1064] Article 14(3) of the Regulation is new and addresses, in part, the meaning of the concept of assignment.

Meaning of "voluntary assignment" and "contractual subrogation"

30-290

There can be little doubt that the concept of "assignment" will be given an autonomous interpretation for the purposes of the Regulation. In this respect, art.14(3) provides that the:

> "… concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims."

It is also thought that the inclusion of "contractual subrogation" in art.14 (and the term is not to be found in art.12 of the Rome Convention) is designed to clarify the meaning of assignment by making a more general reference to the process by which claims are transferred. Contractual subrogation, in general terms, involves an agreement whereby a claim of a creditor who has been satisfied by a third party, subrogates the third party to the claim which the creditor would have had against the debtor. In some legal systems, this process, in effect, performs the function of an assignment [1065] and thus should be included in a provision dealing with voluntary assignment since it is a consensual process. [1066]

Relationship between assignor and assignee

30-291

Article 14(1) of the Regulation stipulates that the:

> "… relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person ('the debtor') shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation."

Apart from the inclusion of contractual subrogation, this reproduces art.12(1) of the Rome Convention [1067] though with one other difference. Article 12(1) of the Convention referred to the "mutual obligations of assignor and assignee under a voluntary assignment", whereas art.14(1) of the Regulation refers to the "*relationship* between assignor and assignee under a voluntary assignment". [1068] The use of the term "relationship" is explained in Recital 38 to the Regulation, as follows:

> "In the context of a voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not concern preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question."

Assignability, etc

30-292

Article 14(2) of the Regulation states that the:

> "… law governing *the assigned or subrogated claim* shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment *or subrogation* can be invoked against the debtor and whether the debtor's obligations have been discharged." [1069]

Apart from the linguistic changes which have been italicised, but which do not bring about any substantive change, art.14(2) is a replica of art.12(2) of the Rome Convention, discussed in section 3 of this chapter, [1070] and subject to what is said in the following paragraph, should be interpreted in the same way.

Priorities

30-293

In the earlier discussion of art.12(2) of the Rome Convention it was tentatively suggested that the question of priorities between competing assignments of the same debt could fall within art.12(2) and could thus be governed by the law governing the right to which the assignment related. [1071] This conclusion must now be regarded as unlikely to follow under the Regulation. First, the Commission's original Proposal contained a rule providing that whether the assignment or subrogation could be relied upon against third parties should be governed by the law of the assignor's or the author of the subrogation's habitual residence [1072] which might suggest that priorities were not covered by art.12(2). Secondly, the proposed rule provoked so much criticism that it was eliminated during the negotiations [1073] and the Consultation Paper expresses the view that the question of priorities is for national law. [1074] Thirdly, under the review clause the Commission is required to produce a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of

the assigned or subrogated claim over a right of another person "the report to be accompanied, if appropriate, by a proposal to amend" the Regulation. [1075] This again suggests that these questions are not covered by the present text of art.14(2).

1062. Above, paras 30-122 et seq.

1063. Rome I art.27(2), above, para.30-137, below para.30-293. See Consultation Paper, paras 85-87. cf. the original Proposal of the Commission art.13. The review is currently being conducted and the Ministry of Justice has consulted with "stakeholders". For discussion of this difficult topic, see Dicey, Morris and Collins, 15th edn (2012), paras 24-050 et seq.; Plender and Wilderspin, *Assignment in European Private International Law* (2006); Fentiman, *International Commercial Litigation* 2nd edn (2015), pp.233 et seq.; Garcimartin-Alferez, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009); Perkins [2008] Financial Markets Law Review 238; Bridge (2009) 125 L.Q.R. 671; Verhagen and Van Dongen (2010) 6 J. Priv. Int. L. 1; Hartley (2011) 60 I.C.L.Q. 29; Mollman [2011] L.M.C.L.Q. 262; Goode [2015] L.M.C.L.Q. 289. On the application of Rome I to intellectual property rights, see Torremans (2008) 4 J. Priv. Int. L. 397.

1064. Consultation Paper, para.84.

1065. See, e.g. arts 1249 and 1250 of the French Civil Code. See generally, Friedmann and Cohen, *Payment of Another's Debt in International Encyclopedia of Comparative Law* (1985), Vol.X, Ch.10; Takahashi, *Claims for Contribution and Reimbursement in an International Context* (2000), pp.11-13, 77-82. And see Explanatory Memorandum to the Commission's original Proposal, comment on art.13 ("Voluntary assignment and contractual subrogation perform a similar economic function"); UNCITRAL Convention on the Assignment of Receivables in International Trade art.2 and Explanatory Note para.7 (an "assignment may be a contractual subrogation or a pledge-type transaction").

1066. cf. Rome I art.15, discussed below, paras 30-294 et seq., dealing with "Legal subrogation". And see UNCITRAL Convention (preceding note), Explanatory Memorandum para.7 (assignment may not be a transfer by operation of law (e.g. statutory subrogation) or other non-contractual assignment).

1067. For discussion of art.12(1) of the Convention (which applies equally to art.14(1) of the Regulation), see above, para.30-123. *Cox v Ergo Versicherung AG (No.2) [2012] EWCA Civ 1001*.

1068. Emphasis added.

1069. Emphasis added.

1070. Above, para.30-124. *Cox v Ergo Versicherung AG (No.2) [2012] EWCA Civ 1001*.

1071. Above, paras 30-124—30-125.

1072. Proposal art.14(3).

1073. Consultation Paper, paras 85, 86.

1074. Consultation Paper, para.85.

1075. Rome I art.27(2). See also, Consultation Paper, para.87.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(k) - Legal Subrogation

Background

30-294

Article 13 of the Rome Convention contained provisions expressed to apply to "[s]ubrogation", as discussed earlier in this chapter. [1076] The principal rule was contained in art.13(1) while art.13(2) applied the same rule where several persons were subject to the same contractual claim and one of them had satisfied the debtor. [1077] Article 15 of the Regulation is expressed to apply to "[l]egal subrogation" and reproduces, with a minor linguistic change of no substantive effect, the text of art.13(1) of the Convention. [1078] Article 16 of the Regulation, headed "[m]ultiple liability" deals with cases where a creditor has a claim against several debtors who are liable for the same claim and one of them has already satisfied the claim in whole or in part, i.e. the situation dealt with in art.13(2) of the Convention. [1079] Article 16 is dealt with below. [1080]

Article 15: Principle

30-295

Article 15 of the Regulation provides that where:

> "… a person ('the creditor') has a contractual claim against another ('the debtor') and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship."

This means, as was the case under art.13(1) of the Convention, that, in respect of a contractual claim [1081] the third person may seek to recover from the debtor, through being subrogated to the creditor's claim to the extent permitted by the law which governs his duty to satisfy the creditor. [1082] The text of the provision is discussed in the context of art.13(1) of the Convention and further discussion here is unnecessary. [1083]

"Legal subrogation"

30-296

Article 15 only applies to "legal subrogation", i.e. to subrogation by operation of law and is to be

distinguished from “contractual subrogation” which is part of the subject matter of art.14 of the Regulation. [1084] Thus, art.15 would apply to a contract of guarantee where the guarantor has paid the creditor and is thus subrogated to the latter’s rights against the debtor. [1085] In some civil law systems, legal subrogation is known as “statutory subrogation”. [1086]

1076. Above, paras 30-126 et seq.

1077. Above, para.30-128.

1078. See Plender and Wilderspin, 4th edn (2015), pp.408–409; Dicey, Morris and Collins, 15th edn (2012), para.32–163. Article 15 is discussed in *ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14)*.

1079. Rome Convention art.13(1) and (2) are discussed above, paras 30-126 et seq.

1080. Below, paras 30-297 et seq.

1081. i.e. Rome I Regulation art.15 will not apply to the question of whether an insurer is subrogated to the rights of an insured who has been the victim of a tort. cf. Third Parties (Rights Against Insurers) Act 2010 s.18.

1082. Above, para.30-126.

1083. Above, para.30-127.

1084. Above, paras 30-289 et seq.

1085. Above, para.30-295.

1086. See, e.g. arts 1249, 1251 of the French Civil Code. See also the Commission’s original Proposal art.14 and Explanatory Memorandum thereto.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(l) - Multiple Liability

Principle

30-297

Article 16 of the Regulation (headed "Multiple liability") deals with a debtor's right to recourse from other debtors where the former debtor has paid the creditor in whole or in part. Reflecting art.13(2) of the Convention, [1087] it provides that if:

> "… a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor."

Right of recourse

30-298

It follows from the text of art.16 that where one debtor has already satisfied the creditors claim, whether he may obtain recourse against co-debtors liable for the same claim will be governed by the law applicable to the debtor's obligation towards the creditor, i.e. normally, the law applicable to the contract between the debtor and the creditor. The principle applies whether the debtor has satisfied the creditor in whole or in part. [1088]

Defences

30-299

The second sentence of art.16 of the Regulation (which is not found directly in art.13(2) of the Rome Convention) [1089] makes it clear that as against the debtor who seeks recourse, the co-debtors may rely on any defences they had against the debtor to the extent permitted by the law governing the co-debtors' obligations towards the creditor, i.e. normally the law applicable to the contract between the co-debtors and the creditor.

1087. Above, para.30-128. See Plender and Wilderspin, 4th edn (2015), pp.409–410; Dicey, Morris and Collins, 15th edn (2012), para.32–163.

1088. cf. art.13(2) of the Rome Convention, above, para.30-128.

1089. Above, para.30-128.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 4. - The Rome I Regulation

(m) - Set-off [1090]

Background

30-300

The Rome Convention contained no specific rule relating to the law applicable to the right to set-off. However, it would seem likely that whether a debt is extinguished (or reduced) by set-off, is under the Convention, governed by the law applicable to the contract by virtue of art.10(1)(d) of the Convention which submits to the applicable law, amongst other things, the ways of extinguishing obligations. [1091] In contrast, art.17 of the Rome I Regulation contains a specific rule in relation to this matter. It provides that were:

> "… the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted."

Meaning of "set-off"

30-301

The meaning of "set-off" and the "right to set-off" is not defined in the Regulation, and, presumably, if necessary, the concept will be given an autonomous meaning. It is suggested, first, that if set-off is a claim of a certain kind which the defendant has against the claimant and which can conveniently be tried together with the claim against the defendant, or a counterclaim which can conveniently be tried with the claim against the defendant, then such a form of "set-off" will not fall within the scope of art.17, or, in any event, the scope of the applicable law. Whether a "set-off" of these kinds can be raised (if "set-off" is the correct description) is a question of procedure, governed by the lex fori, [1092] and the Regulation does not apply to matters of procedure. [1093] Conversely, a set-off (to borrow English legal terminology) may amount to an equity [1094] attaching to the claim directly and may operate in total or partial extinction of that claim. [1095] The question whether a set-off of the latter nature exists is one of substance governed by the relevant applicable law. [1096] It is set-off of this latter kind which is, it is suggested, a set-off or a right to set-off which falls within art.17.

Set-off in insolvency proceedings

30-302

❗ The right to assert a set-off under art.17 of the Regulation must be distinguished from the right to assert a set-off in insolvency proceedings, at least where the insolvency proceedings fall within

Council Regulation 1346/2000 on insolvency proceedings. [1097] ! This Regulation provides that, in proceedings which fall within it, the law of the State in which insolvency proceedings are opened will generally apply to determine the conditions under which set-offs may be invoked. [1098] By way of exception to this general rule, art.6(1) of the Regulation on Insolvency Proceedings establishes that:

> "… the opening of insolvency proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim. The effect of this rule is that where the law of the State of opening of insolvency proceedings does not permit set-off, then a creditor may nonetheless rely on set-off if set-off is permitted by the law which governs the insolvent debtor's claim against the creditor." [1099]

If the latter claim is contractual in nature, the law which governs it will be determined by choice of law rules in the Rome I Regulation, *not* including, it would seem, the rule in art.17 of that Regulation, since the Regulation on Insolvency Proceedings contains its own rule as to when set-off may be invoked.

Applicable law under art.17

30-303

Where the right to set-off is not agreed between the parties, set-off shall be governed by the law applicable to the contract creating the claim against which the right to set-off is asserted.

1090. Plender and Wilderspin, 4th edn (2015), pp.410–411; Hellner in Leible and Ferrari, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009), p.251; Dicey, Morris and Collins, 15th edn (2012), para.32–160.

1091. Below, para.30-346.

1092. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.7–039.

1093. Rome I art.1(3); see above, para.30-160.

1094. Dicey, Morris and Collins, 15th edn (2012), para.7–039.

1095. See preceding note where the example given is the compensation de plein droit in French law.

1096. Dicey, Morris and Collins, 15th edn (2012), para.7–039.

1097. !Regulation 1346/2000 on insolvency proceedings [2000] O.J. L160/1. see generally Dicey, Morris and Collins, 15th edn (2012), paras 30–149 et seq. See now on the Insolvency Regulation, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/200 on insolvency proceedings COM(2012) 744 final; Commission Recommendation of 12.3.14 on a new approach to business failure and insolvency: COM (2014) 1500 final. The Insolvency Regulation is to be replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (Recast Insolvency Regulation). The Recast Insolvency Regulation will apply to insolvency proceedings commencing on or after June 26, 2017.

1098. Regulation 1346/2000 art.4(2)(d). See Dicey, Morris and Collins, 15th edn (2012), para. 30–212. As to the meaning of "[s]tate of the opening of insolvency proceedings", see arts 3 and 4(1) of the Regulation on insolvency proceedings.

1099. See generally, Dicey, Morris and Collins, 15th edn (2012), para.30–212.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

Introduction

30-304

This section seeks to identify the various issues which may be governed by the applicable law of the contract and to consider the extent to which laws other than the applicable law may be relevant to the determination of any of these issues in cases which fall, respectively, within the Rome Convention and the Rome I Regulation. [1100] In the background, it must be also borne in mind that other laws may impinge upon the scope of the applicable law through the operation, in particular, of arts 3(3), 5, 6, 7(2) and 16 of the Rome Convention and arts 3(3), 3(4), 6, 8, 9 and 21 of the Rome I Regulation, which were considered earlier in this chapter. Formally, only art.10 of the Convention and art.12 of the Regulation are expressed to be concerned with the "scope of the applicable law". However, other provisions of the Convention, notably art.8 ("material validity"), [1101] art.9 ("formal validity"), [1102] art.11 ("incapacity") [1103] and art.14 ("burden of proof etc") [1104] and other provisions of the Regulation, notably art.10 ("consent and material validity"), [1105] art.11 ("formal validity"), [1106] art.13 ("incapacity") [1107] and art.18 ("burden of proof") [1108] also raise questions as to the relative competence of the applicable law and other relevant laws and thus are appropriate subjects for discussion in this section.

1100. Common law principles are referred to where relevant.

1101. Below, paras 30-305 et seq.

1102. Below, paras 30-311 et seq.

1103. Below, para.30-325.

1104. Below, paras 30-353 et seq.

1105. Below, paras 30-305 et seq.

1106. Below, paras 30-311 et seq.

1107. Below, para.30-325.

1108. Below, paras 30-354 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(a) - Material Validity of the Contract [1109]

Article 8(1) of the Convention and art.10(1) of the Regulation

30-305

Article 8(1) of the Rome Convention which is expressed to apply to the "material validity" of the contract provides as follows:

> "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid."

The terms of this provision are replicated in art.10(1) of the Regulation, save for the obvious fact that in the case of the Regulation, the governing law will be determined by the rules in the Regulation and the provisions in each instrument will be interpreted in the same manner. Material validity, for these purposes, thus includes [1110] the question of whether the contract has come into existence (i.e. matters relating to the formation), [1111] the validity of the contract and the terms thereof, [1112] and the validity of consent to the contract (e.g. questions of mistake, misrepresentation, duress or non-disclosure). [1113] Since arts 8(1) and 10(1) apply to the validity of the contract and its terms they will also apply to some (but not all) issues of legality of the contract. [1114] Where arts 8(1) or 10(1) apply, the relevant applicable law will be the law which would govern the contract under the Convention or the Regulation if the contract or term were valid, the "putative applicable law" or "putative governing law". [1115]

Identification of "putative applicable law"

30-306

Since arts 8(1) and 10(1) stipulate that the governing law is the law which would apply, pursuant to the Convention or the Regulation, if the contract or term were valid, the putative governing law will be determined according to the rules for determining the applicable law which are contained in the Convention or the Regulation as the case may be. Accordingly, where the parties have made a choice of law in the contract and an issue of material validity arises, that chosen law will be the governing law. [1116] In the absence of such a choice the putative applicable law will be determined according to art.4 of the Convention or art.4 of the Regulation. [1117]

Formation of the contract

30-307

At common law, it was generally accepted that the question as to what minimum acts had to be

performed to give rise to a contract was a matter for the "putative proper law" of the contract. [1118] This has been the subject of specific decision in relation to offer and acceptance [1119] and consideration. [1120] Article 8(1) of the Convention and art.10(1) of the Regulation thus repeat the common law rule in this regard in so far as they refer such matters to the putative applicable law. [1121] Article 8(2) of the Convention and art.10(2) of the Regulation however, create an exception to this general rule in the following identical terms:

> "Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in [art.8(1) of the Convention or art.10(1) of the Regulation]."

The purpose of this provision is to "solve the problem of the implications of silence by one party as to the formation of the contract", [1122] but it is not confined to that issue since the "word 'conduct' must be taken to cover both action and failure to act by the party in question". [1123] In deciding whether it would not be reasonable to determine the effect of a party's conduct in accordance with the putative applicable law, regard must be had to all the circumstances of the case and not only to the circumstances in which the party claiming not to have consented has acted. [1124] In this regard, the court should give particular consideration to the practices followed by the parties inter se as well as their previous business relationships. [1125] This suggests that art.8(2) and art.10(2) may be relied upon by both natural and legal persons. [1126] It is possible, however, that the provision will be more liberally applied in favour of natural persons than it will be in favour of commercial organisations. [1127] This much appears from the brief consideration given to the application of art.8(2) in *Egon Oldendorff v Libera Corp (No.1)*. [1128] Here it was assumed, without argument, that the Article could be relied on by a legal person and that the habitual residence of a Japanese corporation was in Japan. It was held that English law should apply to determine whether a clause providing for arbitration in London was incorporated into the contract because the contract was governed by English law. The defendants argued in favour of the application of art.8(2), contending that Japanese law governed, as the law of their habitual residence, claiming that it would be unreasonable to determine the effects of their conduct in accordance with English law. [1129] It was held, however, that it would be unreasonable not to apply English law and unreasonable to apply Japanese law. If the latter law was applied, that would in effect ignore the arbitration clause, a result which would not accord with normal commercial expectations. This supports the sensible conclusion that legal persons engaging in commercial transactions should receive little protection from art.8(2) of the Convention or art.10(2) of the Regulation in typical commercial situations and that what protection they might receive should be limited to unusual situations where the strict application of art.8(1) of the Convention or art.10(2) of the Regulation would produce a result which is *commercially unreasonable*.

30-308

Article 8(2) of the Convention and art.10(2) of the Regulation, it must be emphasised, only have the effect of releasing a party from a contract to which he would otherwise be bound under art.8(1) or 10(2). The provisions cannot have the effect of binding a party to a contract to which he would not be bound under the applicable law. [1130]

Validity of consent

30-309

The exceptional principle in art.8(2) and art.10(2) seems likely to be confined to the existence of consent, as opposed to the question of whether consent, admittedly given, was invalidated by mistake, misrepresentation, duress, undue influence or non-disclosure. [1131] Whether these factors vitiate consent would be a matter for the putative applicable law, pursuant to art.8(1) of the Rome Convention and art.10(1) of the Regulation. [1132]

Validity of contract or terms

30-310

Whether the contract itself is materially (or essentially) valid is a matter for the law which would govern it if it were valid. Thus it would seem that art.8(1) of the Convention and art.10(1) of the Regulation will apply to determine the question, for example, of whether a contract is invalid as being in unreasonable restraint of trade. [1133] If the contract is illegal by its applicable law it will be unenforceable in England. [1134] The same principle applies to the material validity of a term of the contract. [1135] Thus, the validity of a term purporting to limit or exempt one party from liability will be governed by the law which would apply to the contract assuming the term were valid. [1136] In substance, this position is the same as that reached by the common law, though the cases tended to speak, in this context, of control by the "proper law" rather than the "putative proper law". [1137]

1109. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 32R–082 et seq.; Plender and Wilderspin, *The European Private International Law of Obligations*, 4th edn (2015), pp.436–441; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), pp.744–746; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.269–279.

1110. See Cheshire, North and Fawcett, p.745.

1111. See below, paras 30-307 et seq.

1112. See below, paras 30-309 et seq.

1113. See below, para.30-309.

1114. See below, paras 30-357 et seq.

1115. This was very much the approach of the common law: see the 26th edition of this work, paras 2175–2177. As to consent to choice of the applicable law (art.3(4) of the Convention, art.3(5) of the Regulation), see above, paras 30-058, 30-183.

1116. art.3(1) of, respectively, the Convention and the Regulation. See *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*; see also *Egon Oldendorff v Libera Corp (No.2) [1996] 1 Lloyd's Rep. 380*; *Merrill Lynch Capital Services Inc v Municipality of Piraeus [1997] C.L.C. 1214*; *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd's Rep. 784*.

1117. If the contract is subject to arts 5 or 6 of the Convention, the applicable law will be determined according to those provisions: see above, paras 30-092 et seq. If the contract is subject to arts 5, 6, 7 or 8 of the Regulation, the applicable law will be determined by those provisions. At common law, it was sometimes suggested that the "putative proper law" should be determined without reference to any choice of law made by the parties, i.e. on purely objective grounds (see, e.g. Cheshire and North, *Private International Law*, 11th edn (1987), pp.471–477), but this may have rested on a confusion between the putative proper law and the distinct concept of the proper law objectively determined. The weight of authority, however, supported the view that both an express and implied choice of law could constitute the putative proper law: see *The Parouth [1982] 2 Lloyd's Rep. 351*; *The Mariannina [1983] 1 Lloyd's Rep. 12*; *The T.S. Havprins [1983] 2 Lloyd's Rep. 356*; *The Iran Vojdan [1984] 2 Lloyd's Rep. 380*; *Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 A.C. 152*; *The Lake Avery [1997] 1 Lloyd's Rep. 540*; *Society of Lloyd's v Fraser [1998] C.L.C. 1630, 1652*; *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd's Rep. 784*. See also *Marc Rich & Co AG v Soc Italiana Impianti P.A. [1989] 1 Lloyd's Rep. 548*. cf. *Mackender v Feldia [1967] Q.B. 590*; *The Heidberg [1994] 2 Lloyd's Rep. 287*; *Dornoch Ltd v Mauritius Union Assurance Co Ltd [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep. 475*; *Oceanic Sun Line Shipping Co Inc v Fay (1988) 165 C.L.R. 197*.

1118. See authorities cited in previous note; Jaffey (1975) 24 I.C.L.Q. 603; Libling (1979) 42 M.L.R.

169; Thomson (1980) 43 M.L.R. 650; Briggs [1990] L.M.C.L.Q. 192.

1119. *Albeko Schumaschinen AG v Kamborian Shoe Machine Co [1961] 111 L.J. 519*. See also *The Parouth [1982] 2 Lloyd's Rep. 351*; *Union Transport Plc v Continental Lines SA [1992] 1 W.L.R. 15, 23*; *Midgulf International Ltd v Group Chimique Tunisien [2010] EWCA Civ 66, [2010] 1 C.L.C. 113*; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA [2011] EWHC 589* (Admlty).

1120. *Re Bonacina [1912] 2 Ch. 394*.

1121. See *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*; *The Epsilon Rosa (No.2) [2002] EWHC 2033 (Comm), [2002] 2 Lloyd's Rep. 701, affirmed on other grounds, [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep. 509*; *Morin v Bonhams and Brooks Ltd [2003] EWHC 467 (Comm), [2003] 2 All E.R. (Comm) 36*; affirmed without reference to the point *[2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep. 702*; *Horn Linie GmbH & Co v Panamerica Formas E Impresos [2006] EWHC 373 (Comm), [2006] 2 Lloyd's Rep. 44*.

1122. Giuliano-Lagarde Report, p.28.

1123. Giuliano-Lagarde Report, p.28.

1124. Giuliano-Lagarde Report, p.28.

1125. Giuliano-Lagarde Report, p.28.

1126. As to the meaning of habitual residence in the context of the Rome I Regulation, see above, paras 30-163 et seq.

1127. See *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*; *Horn Linie GmbH & Co v Panamericana Formas E Impresos [2006] EWHC 373 (Comm), [2006] 2 Lloyd's Rep. 44*.

1128. *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*; *Horn Linie GmbH & Co v Panamericana Formas E Impresos [2006] EWHC 373 (Comm)*. See also *The Epsilon Rosa (No.2) [2002] EWHC 2033 (Comm)*; *Morin v Bonhams and Brooks Ltd [2003] EWHC 467 (Comm)*; *Toyota Tsusho Sugar Trading Ltd v Prolat SRL [2014] EWHC 3649 Comm), [2015] 1 Lloyd's Rep 344*.

1129. The onus of establishing that art.8(2) and, presumably, art.10(2) apply lies on the party who relies upon either provision: *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64, 71*; *The Epsilon Rosa (No.2) [2002] EWHC 2033*; *Horn Linie GmbH & Co v Panamericana Formas E Impresos [2006] EWHC 373 (Comm)* (same principle applies in relation to consent to a jurisdiction clause and a choice of law clause).

1130. *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64, 71*.

1131. *The Epsilon Rosa (No.2) [2002] EWHC 2033 (Comm), [2002] 2 Lloyd's Rep. 701, affirmed on other grounds, [2003] EWCA Civ 938*; *Morin v Bonhams and Brooks Ltd [2003] EWHC 467 (Comm), [2003] 2 All E.R. (Comm) 36*; affirmed without reference to the point *[2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep. 702*; *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291, [2008] Q.B. 195*. cf. *Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 A.C. 152, 168*, per Lord Goff, who appears to regard economic duress as relating both to formation and validity of a contract. cf. Dicey, Morris and Collins, para.32–167. This paragraph was approved in *Sapporo Breweries Ltd v Lupofresh Ltd [2012] EWCA Civ 948, [2013] 2 Lloyd's Rep. 444*

1132. *Halpern v Halpern (Nos 1 and 2) [2007] EWCA Civ 291*. cf. *Ark Therapeutics Plc v True North Capital Ltd [2005] EWHC 1585 (Comm), [2006] 1 All E.R. (Comm) 138*; *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyd's Rep. 784*. This was the better view of the position at common law: see *Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 A.C. 152*; Dicey, Morris and Collins, paras 32–166—32–168; 26th

edition of this work, para.2175. Contrast *Mackender v Feldia [1967] 2 Q.B. 590*. cf. *The Lake Avery [1997] 1 Lloyd's Rep. 540*. As to the existence and validity of consent to a choice of law (art.3(4) of the Convention, art.3(5) of the Regulation), see above, paras 30-058, 30-183.

1133. See *Duarte v Black & Decker Corp [2007] EWHC 2720 (QB), [2008] 1 All E.R. (Comm) 401*. cf. *Roussillon v Roussillon (1880) 14 Ch. D. 351*. The foreign law upholding or denying the validity of the contract may be refused application on the grounds of public policy: Rome Convention art.16, Rome I Regulation art.21, below, paras 30-368 et seq.

1134. cf. *Kahler v Midland Bank Ltd [1950] A.C. 24*. For other aspects of illegality, see below, paras 30-357 et seq.

1135. See *Egon Oldendorff v Libera Corp (No.1) [1995] 2 Lloyd's Rep. 64*. See also *Ark Therapeutics Plc v True North Capital Ltd [2005] EWHC 1585 (Comm), [2006] 1 All E.R. (Comm) 138*.

1136. *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L. 318*; *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd [1998] 2 Lloyd's Rep. 139* reversed in part, but not on this point, *[1999] 1 Lloyd's Rep. 387 CA*; *Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 All E.R. (Comm) 519*; *Amiri Flight Authority v BAE Systems Plc [2002] EWHC 2481 (Comm), [2003] 1 All E.R. (Comm) 1*; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2009] EWCA Civ 290, [2009] 1 Lloyd's Rep. 702*; and see *Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm)*. cf. *P. & O. Steam Navigation Co v Shand (1865) 3 Moo. P.C.(N.S.) 272*; *Re Missouri S.S. Co (1889) 42 Ch. D. 321*; *Jones v Oceanic Steam Navigation Co [1924] 2 K.B. 730*; *Sayers v International Drilling Co NV [1971] 1 W.L.R. 1176*; *Coast Lines Ltd v Hudig & Veder Chartering NV [1972] 2 Q.B. 34*; *Coupland v Arabian Gulf Oil Co [1983] 1 W.L.R. 1136* (affirmed *[1983] 1 W.L.R. 1153*).

1137. See the 26th edition of this work, para.2183.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(b) - Formal Validity of the Contract [1138]

Introduction

30-311

The position which ultimately came to be accepted at common law [1139] was that a contract was formally valid if it complied with the formal requirements of either the law applicable to the contract, [1140] or the law of the place where the contract was made. [1141] Article 9 of the Rome Convention expresses the same principle as the general rule for formal validity. [1142] The Article contains, however, special rules concerning the formal validity of consumer contracts, [1143] certain contracts with regard to immovables [1144] and the formal validity of acts intended to have legal effect relating to an existing or contemplated contract. [1145] Article 11 of the Rome I Regulation is based on the same principles but because it is drafted in different language and contains additional principles, it is necessary to separate the discussion of this issue as between the two instruments. By way of prelude to that discussion, it is necessary to discuss an issue which is common to both instruments (and which, it is thought, will be dealt with in the same way in relation to each of them), namely, the meaning of the expression “formal validity”.

Meaning of formal validity

30-312

A difficulty which obtained in the common law and one which persists under the Rome Convention and the Rome I Regulation concerns the requirements which are properly to be characterised as affecting formal validity. English common law had relatively few formal requirements and there was also a tendency to regard requirements which appeared, at first sight, to be formal, as questions of procedure to be governed by the lex fori, [1146] even though, had the requirement been treated as formal, its application would have been determined by the relevant governing law. [1147] Neither the Convention nor the Regulation provides any definition of formal requirements. The Giuliano-Lagarde Report suggests, however, that it is:

> “… nevertheless permissible to consider ‘form’, for the purposes of art.9, as including every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective.” [1148]

This observation, if accepted, indicates that it is possible that the category of formal requirements will expand at the expense of the category of procedure and evidence. [1149] Where a requirement (e.g. of writing) is imposed by the law of the forum with a view to protecting a party to a transaction who is presumed to be in a weaker bargaining position, [1150] such a requirement would seem to be neither formal nor procedural but substantive in effect. [1151] Under the Rome Convention and the Rome I

Regulation, such requirements, if not contained in the applicable law, will nonetheless be applicable if they are construed as mandatory rules or overriding mandatory provisions of the law of the forum, the application of which is required by respectively art.7(2) of the Convention or art.9(2) of the Regulation. [1152]

Rome Convention: general rules

30-313

Where a contract is concluded between persons who are in the same country, the contract will be formally valid if it satisfies the formal requirements of the law which governs the contract under the Convention or the formal requirements of the law of the country where it is concluded. [1153] Where the contract is concluded between persons who are in different countries, the contract will be formally valid if it satisfies the formal requirements either of the law applicable to it under the Convention or the law of one of those different countries. [1154] Where the contract is concluded by an agent, the relevant country for the purpose of the foregoing rules is the country where the agent acts. [1155]

"Certain consumer contracts"

30-314

The general rules concerning formal validity do not apply to a contract which falls within art.5 of the Convention if the contract is concluded in any of the circumstances described in art.5(2). [1156] In such circumstances the formal validity of the consumer contract is governed by the law of the country in which the consumer has his habitual residence. [1157]

Immovables [1158]

30-315

The formal validity of a contract with regard to an immovable is, in general, governed by the general rules relating to formal validity described above. [1159] However, art.9(6) of the Convention establishes an additional rule, in this respect, for contracts the subject matter of which is a right in or a right to use immovable property. [1160] Such a contract:

> "Shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract." [1161]

The effect of this provision is to impose the mandatory requirements of form of the lex situs, which have the necessary characteristics, on the contract even though the contract is not concluded in the country where the immovable is situated and the law governing the contract is not that of the lex situs. Cases in which such rules exist are likely to be "rather rare". [1162]

Acts intended to have legal effect

30-316

> "An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under the Convention

> governs or would govern the contract or of the law of the country where the act was done." [1163]

This provision covers unilateral acts, connected with a concluded contract, such as notice of termination, remission of a debt, declaration of rescission or repudiation, [1164] or such acts which are connected with a contemplated contract, for example an offer expressed to be open for a specified time. [1165]

Effect of change of applicable law

30-317

Article 3(2) of the Rome Convention enables the parties to a contract to change the law which governs it. [1166] However, the change in the applicable law shall not prejudice the formal validity of the contract. [1167] Thus, the contract is valid in respect of form, if it complies with the formal requirements of either the original governing law or the new governing law or the law of the country or countries where the parties were when they concluded the contract. [1168]

Effect of several applicable laws

30-318

Where a contract is subject to several applicable laws (either, e.g. because the parties have selected different laws to govern different parts of the contract pursuant to art.3(1), [1169] or because the court has, by way of exception, severed the contract pursuant to art.4(1)), [1170] the Giuliano-Lagarde Report suggests that, in relation to the issue of formal validity:

> "… it would seem reasonable to apply the law applicable to the part of the contract most closely connected with the disputed condition on which its formal validity depends." [1171]

Rome I Regulation: general rules

30-319

Article 11(1) of the Rome I Regulation provides that a:

> "… contract concluded between persons who, or whose agents are, in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it under this Regulation or of the law of the country where it is concluded."

This, in effect, is the same position as is taken in art.9(1), combined with art.9(3), of the Rome Convention. [1172] According to art.11(2):

> "… a contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of either of the countries where either of the parties or their agent is present at the time of the conclusion, or of the law of the country where either of the parties had his habitual

residence at that time."

This provision reflects, first, art.9(2), combined with art.9(3) of the Convention. [1173] Secondly, unlike the Convention, however, art.11(2) of the Regulation also permits a reference to the law of either of the parties' habitual residence, [1174] as a law by which formal validity may be determined. In this respect, therefore, the Regulation is more liberal, as regards the applicable law to determine formal validity, than is the Convention.

Unilateral acts

30-320

Article 11(3) of the Regulation, reflecting a slightly different structure to art.9 of the Convention, then deals with unilateral acts "intended to have legal effect relating to an existing or contemplated contract". Such an act:

> "… is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time."

Although the equivalent provision in art.9(4) of the Rome Convention referred to an "act" rather than a "unilateral act", it appears that the Convention contemplated a unilateral act, so that no change of substance is intended by this linguistic difference. [1175] The difference between the Convention and the Regulation is, however, that the Regulation, in addition to the laws by which formal validity can be determined under the Convention, also permits formal validity to be determined by the law of the country where the person by whom the act was done had his habitual residence [1176] at the time the act was done. In this respect, therefore, the Regulation is also more liberal in its approach to formal validity than the Rome Convention. [1177]

Consumer contracts

30-321

Where contracts are consumer contracts falling within art.6 of the Regulation, art.11(4) of the Regulation provides that the "form of such contracts shall be governed by the law of the country where the consumer has his habitual residence" and excludes art.11(1)–(3). [1178] This provision is obviously different to that in the Rome Convention, because the Regulation defines consumer contracts and the circumstances in which the choice of law rules relating thereto will apply in a different manner. [1179] But each instrument employs the law of the consumer's habitual residence as the governing law.

Immovables

30-322

In general, the formal validity of a contract with regard to an immovable is governed, under the Regulation, by the general rules described above. [1180] Article 11(5) of the Regulation, however, establishes an additional rule, in this respect, in relation to "a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property", a different formulation to that contained in art.9(6) of the Rome Convention, which is the equivalent provision to art.11(5). [1181] The formal validity of such a contract falling within art.11(5) of the Rome I Regulation shall be governed by:

> "… the requirements of form of the law of the country where the property is situated if by that law: (a) those requirements of form are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract, and (b) those requirements cannot be derogated from by agreement."

The effect of this provision, notwithstanding the different terminology to that used in art.9(6) of the Rome Convention, is, it would seem, the same as that reached under the Convention. [1182]

Change of applicable law and several applicable laws

30-323

Where the parties agree to change the applicable law, pursuant to art.3(2) of the Regulation, [1183] the position appears to be the same as under the Rome Convention. [1184] Where the parties have selected the law applicable to a part only of the contract, under art.3(1) of the Regulation, and, say, the law applicable to the other part or parts, has to be determined by reference to art.4 of the Regulation, [1185] then again the position would appear to be the same as under the Rome Convention. [1186]

1138. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 32R–127 et seq.; Cheshire, North and Fawcett, pp.747–750; Plender and Wilderspin, 4th edn (2015), pp.441–443; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.281–295; Lagarde, *Contract Conflicts* (1982), pp.51–54.

1139. See the 26th edition of this work, paras 2178–2180; Dicey & Morris on the Conflict of Laws, 11th edn (1987), pp.1207–1213.

1140. *Van Grutten v Digby (1862) 31 Beav. 561*; *Re Bankes [1902] 2 Ch. 333*; *Viditz v O'Hagan [1899] 2 Ch. 569*, reversed on other grounds *[1900] 2 Ch. 87*. See also *Society of Lloyd's v Fraser [1998] C.L.C. 1630, 1652*.

1141. *Guépratte v Young (1851) 4 De G. & Sm. 217*.

1142. Rome Convention art.9(1)–(3). See below, para.30-313.

1143. Rome Convention art.9(5). See below, para.30-314.

1144. Rome Convention art.9(6). See below, para.30-315.

1145. Rome Convention art.9(4). See below, para.30-316.

1146. See *Leroux v Brown (1852) 12 C.B. 801*; *G. & H. Montage GmbH v Irvani [1990] 1 W.L.R. 667, 684*. For consideration of issues relating to formalities in the context of commercial transactions and electronic commerce, see Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions, Advice from the Law Commission (December 2001). cf. *Integral Petroleum SA v SCU-Finaz AB [2015] EWCA Civ 144* (a rule of Swiss law requiring the acts of a company to be authorised by two signatories went to capacity not formal validity).

1147. As in *Leroux v Brown (1852) 12 C.B. 801* (Statute of Frauds 1677 s.4). This decision has been much criticised: see, e.g. *Monterosso Shipping Co Ltd v International Transport Workers Federation [1982] I.C.R. 675*. But it was approved in *G. & H. Montage GmbH v Irvani [1990] 1 W.L.R. 667*. See too, below, n.1136.

1148. Giuliano-Lagarde Report, p.29. This definition does not include the special requirements which have to be fulfilled where there are persons under a disability to be protected, such as the need

in French law for the consent of a family council to an act for the benefit of a minor, or where an act is to be valid against third parties, for example the need in English law for a notice of statutory assignment of a chose in action: Giuliano-Lagarde Report, p.29.

1149. The rules in the Rome Convention and the Rome I Regulation do not apply to evidence and procedure: above, paras 30-043, 30-160. This process might result in a reversal of *Leroux v Brown (1852) 12 C.B. 801*, since s.4 of the Statute of Frauds 1677 could be treated as a formal requirement, the applicability of which depends on art.9. A different approach would be to treat s.4 as subject to art.14(2) (as to which, see below, para.30-356) which permits any act intended to have legal effect to be proved in any manner permitted by the law of the forum or in any manner permitted by the law which renders the contract formally valid under art.9, provided the mode of proof can be administered by the forum. If s.4 falls within this provision, *Leroux v Brown* would be reversed since the contract could have been proved by oral testimony under its French governing law: see Dicey, Morris and Collins, para.32–179; Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp.366–367.

1150. See, e.g. Consumer Credit Act 1974 ss.60–65.

1151. cf. *English v Donnelly (1958) S.C. 494*, not followed in *Hong Kong Shipping Ltd v The Cavalry [1987] H.K.L. Rep. 287*; cf. *Kay's Leasing Corp Pty Ltd v Fletcher (1964) 116 C.L.R. 124*; *Golden Acres Ltd v Queensland Estates Ltd [1969] St. R. Qd. 378* (affirmed on different grounds sub nom. *Freehold Land Investments Ltd v Queensland Estates Ltd (1970) 123 C.L.R. 418*); *Nike Information Systems Ltd v Avac Systems Ltd (1979) 105 D.L.R. (3d) 455*; *Greenshields Inc v Johnston (1981) 119 D.L.R. (3d) 714* (appeal dismissed *(1981) 131 D.L.R. (3d) 324*); *Bank of Montreal v Snoxell (1982) 143 D.L.R. (3d) 349*.

1152. Above, paras 30-067, 30-180.

1153. Rome Convention art.9(1).

1154. Rome Convention art.9(2).

1155. Rome Convention art.9(3).

1156. Rome Convention art.9(5). As to art.5, see above, paras 30-092 et seq.

1157. Rome Convention art.9(5). As to the meaning of habitual residence, see above, para.30-078.

1158. See Dicey, Morris and Collins, 15th edn (2012), paras 33–056 et seq.

1159. See above, para.30-313.

1160. The scope of the provision is coterminous with that of art.4(3): see Giuliano-Lagarde Report, p.32.

1161. See Dicey, Morris and Collins, 15th edn (2012), paras 33–056 et seq.

1162. Giuliano-Lagarde Report, p.32. In relation to a contract for the sale or other disposition of English land, the Law of Property (Miscellaneous Provisions) Act 1989 s.2(1) is likely to be regarded as mandatory for the purposes of art.9(6): see Dicey, Morris and Collins, 15th edn (2012), paras 33–056 et seq.

1163. Rome Convention art.9(4).

1164. Giuliano-Lagarde Report, p.29. The requirement, in English law, that a contract unsupported by consideration must be by deed, would not seem to be a rule affecting formal validity, but would rather seem to be a rule of substance affecting the material validity of the contract, and would thus be applicable where the contract is, or would be, governed by English law. cf. *Re Bonacina [1912] 2 Ch. 394*.

1165. Lasok and Stone, *Conflict of Laws in the European Community* (1987), p.305; Kaye, p.291. Article 9(4) does not apply to public acts (e.g. the act of a notary in authenticating a transaction). The formal validity of such acts is governed by the general rules in Rome Convention art.9(1)–(3): Giuliano-Lagarde Report, p.29.

1166. Above, para.30-057.

1167. Rome Convention art.3(2), second sentence.

1168. Giuliano-Lagarde Report, p.30; Lagarde, *Contract Conflicts* (1982), pp.49, 52–53.

1169. Above, paras 30-055 et seq.

1170. Above, para.30-082.

1171. Giuliano-Lagarde Report, p.30.

1172. Above, para.30-313.

1173. Above, para.30-313.

1174. As to the meaning of which, see above paras 30-163 et seq.

1175. See above, para.30-316.

1176. As to the meaning of which, see above, paras 30-163 et seq.

1177. Above, para.30-313.

1178. As to the meaning of habitual residence, see above, paras 30-163 et seq.

1179. Above, paras 30-231 et seq.

1180. Subject to Rome I art.6(4)(c) excluding, for the most part, contracts relating to immovables from the consumer contract provisions in art.6, so that art.11(5) will not normally apply to the formal validity of such contracts.

1181. Above, para.30-315.

1182. Above, para.30-315.

1183. Above, para.30-175.

1184. Above, para.30-057.

1185. Rome I art.4 does not, as such, permit “severance”.

1186. Above, para.30-082.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(c) - Capacity [1187]

Introduction

30-324

Subject to an exception, discussed below, [1188] the uniform rules of the Rome Convention and the Rome I Regulation do not apply to questions involving the status or legal capacity of natural persons. [1189] Nor do the rules apply to the legal capacity of bodies corporate or unincorporate. [1190] Accordingly the law applicable to determine the contractual capacity of a natural person will, subject to the exception, be governed by common law rules, and the law governing the contractual capacity of a body corporate or unincorporate will be entirely governed by common law rules.

Natural persons

30-325

Despite contrary suggestions in older authorities, [1191] it is submitted that the contractual capacity of a natural person is governed by the law applicable to the contract. [1192] In this context, however, the applicable law means that law objectively ascertained, without taking account of any choice of law in the contract itself. [1193] The one intrusion on this state of affairs is to be found in art.11 of the Convention and art.13 of the Regulation (entitled “incapacity”) which provide as follows:

> “In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.” [1194]

In terms, this rule is of limited effect. It only applies to contracts concluded between persons who are in the same country, one of whom must be a natural person who has capacity under that country’s law, but who seeks to rely on a lack of capacity under the law of another country. That lack of capacity may only successfully be invoked if the other contracting party was aware of it or was unaware of it as a result of negligence. [1195]

Corporations

30-326

The contractual capacity of a corporation depends both on its constitution and on the law applicable to the contract which is concluded. Thus in so far as a corporation’s capacity to enter into a contract

depends on its constitution, the law of the country of incorporation is the governing law, [1196] though the corporation must also possess capacity under the law applicable to the contract. [1197] It may, accordingly, be taken to lack capacity to enter into a contract if the law of the country of incorporation so holds because of a limitation on its powers under its constitution (e.g. the doctrine of ultra vires) [1198] or if the law applicable to the contract so holds on the basis of a principle of capacity which is unrelated to its constitutional powers. [1199] According to art.1(2)(e) of the Rome Convention and art.1(2)(f) of the Rome I Regulation, as pointed out above, [1200] the legal capacity of a corporation is not covered by the Convention or by the Regulation. But the Giuliano-Lagarde Report states that this reference is to limitations which may be imposed by law on companies or firms. [1201] It does not extend to ultra vires acts by organs of the company or firm, [1202] which are excluded by art.1(2)(f) of the Convention and art.1(2)(g) of the Regulation, which provide inter alia, that the Convention and the Regulation do not apply to the question whether an organ can bind a body corporate or unincorporate to a third party. [1203] Since the combined effect of respectively, art.1(2)(e), (f) and (g) is to exclude the contractual capacity of a corporation, however arising, exclusion of ultra vires acts under art.1(2)(f) or (g) rather than under art.1(2)(e) or (f) appears to produce no practical consequence, since in either case the common law rules described above will continue to apply. [1204]

1187. See the 26th edition of this work, para.2181; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 33R–168 et seq.; Cheshire, North and Fawcett, pp.750–753; Blaikie, 1984 S.L.T. 161.

1188. Below, para.30-325.

1189. arts 1(2)(a) of the Convention and of the Regulation.

1190. art.1(2)(e) of the Convention and art.1(2)(f) of the Regulation; and art.1(2)(f) of the Convention and art.1(2)(g) of the Regulation.

1191. In favour of the lex loci contractus, see *Simonin v Mallac (1860) 2 Sw. & Tr. 67, 77*; *Sottomayor v De Barros (No.2) (1879) 5 P.D. 94, 100–101*; *Baindail v Baindail [1946] P. 122, 128*; *McFeetridge v Stewarts and Lloyds Ltd (1913) S.C. 773*; *Bondholders Securities Corp v Manville [1933] 4 D.L.R. 609*; cf. *Male v Roberts (1800) 3 Esp. 163*. In favour of the law of the domicile, see *Sottomayor v De Barros (No.1) (1877) 3 P.D. 1, 5*; *Re Cooke's Trusts (1887) 56 L.J. Ch. 637, 639*; *Cooper v Cooper (1883) 13 App. Cas. 88, 89, 100*; *Viditz v O'Hagan [1900] 2 Ch. 87*.

1192. *Charron v Montreal Trust Co (1958) 15 D.L.R. (2d) 240*; see also *The Bodley Head Ltd v Flegon [1972] 1 W.L.R. 68*; *Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All E.R. (Comm) 873*. It is possible that the law of the domicile would be applied if it would give capacity but the objective governing law would not: see Dicey, Morris and Collins, 15th edn (2012), paras 32–169 et seq.

1193. See *Cooper v Cooper (1883) 13 App. Cas. 88, 108*; Dicey, Morris and Collins, 15th edn (2012), paras 32–169 et seq.

1194. There is a slight difference in the wording of art.13 of the Regulation where "this incapacity" becomes "that incapacity", but the difference is of no substantive significance. Such a rule is not uncommon in civil law countries which regard contractual capacity as a matter of status to be governed by the personal law: see Giuliano-Lagarde Report, p.34.

1195. The wording implies that the burden of proof lies on the party lacking capacity to show that the other party knew of the incapacity or should have known of it: Giuliano-Lagarde Report, p.34.

1196. *Risdon Iron and Locomotive Works Ltd v Furniss [1906] 1 K.B. 49, 56–57*; *Banque Internationale de Commerce de Petrograd v Goukassow [1923] 2 K.B. 682, 690–691*; *Janred Properties Ltd v ENIT [1989] 2 All E.R. 444*; *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 A.C. 418*; *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc [1998] 2 All E.R. 821*; *Merrill Lynch Capital Services Inc v Municipality of Piraeus*

[1997] C.L.C. 1214; *Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep. 159*; *Grupo Torras SA v Al-Sabah [1999] C.L.C. 1469*, reversed in part on other grounds, *[2001] C.L.C. 221*; *Continental Enterprises Ltd v Shandong Zucheng Foreign Trade Group Co [2005] EWHC 92 (Comm)*; *Laemthong International Lines Co Ltd v Artis (No.3) [2005] EWHC 1595 (Comm)*. See also *Marubeni Hong Kong and South China Ltd v Government of Mongolia [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198, affirmed on other grounds, [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497*; Foreign Corporations Act 1991 s.1; Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917), inserting modified versions of Companies Act 2006 ss.43–48 and 51, in respect of the execution of documents by overseas companies. See also *Integral Petroleum SA v SCU-Finaz AB [2015] EWCA Civ 144* (a rule of Swiss law requiring the acts of a company to be authorised by two signatories applied as the law of incorporation).

1197. See references in preceding note and: *General Steam Navigation Co v Guillou (1843) 11 M. & W. 877*; *Pickering v Stephenson (1872) L.R. 14 Eq. 322*; *Bateman v Service (1881) 6 App. Cas. 386, 389*; *Banco de Bilbao v Sancha and Rey [1938] 2 K.B. 176*; *National Bank of Greece and Athens SA v Metliss [1958] A.C. 509*; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2) [1967] 1 A.C. 853*.

1198. For these purposes, the expression "constitution" comprises all that bundle of powers, duties and abilities to exercise legal rights that can be attributed to the corporation which are to be derived from the law of the place of incorporation, including relevant provisions of public or administrative law: see *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2011] 1 All E.R. 190*; see also *Standard Chartered Bank v Ceylon Petroleum Corp [2011] EWHC 1785 (Comm)*; *Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm)*. cf. *Janred Properties Ltd v ENIT [1989] 2 All E.R. 444*.

1199. There is little likelihood of this happening in practice where English law is the applicable law. The nearest English analogy is the now repealed law of Mortmain: see Dicey, Morris and Collins, 15th edn (2012), paras 30–022 et seq.

1200. Above, paras 30-040, 30-157.

1201. See Giuliano-Lagarde Report, p.12 where the example given is a limitation on power to acquire immovable property.

1202. Giuliano-Lagarde Report, p.13. See, too, Dicey, Morris and Collins, 15th edn (2012), paras 30–022 et seq.

1203. Above, paras 30-040, 30-157.

1204. art.11 of the Convention and art.13 of the Regulation (above, para.30-325) only apply to contracts entered into by natural persons.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(d) - Particular Issues [1205]

Introduction

30-327

Article 10(1) of the Rome Convention and art.12 of the Rome I Regulation, which are expressed in virtually identical language, and each of which is entitled “Scope of the applicable law”, stipulate that the law applicable to a contract by virtue of the Convention or the Regulation will govern “in particular” the following matters: interpretation [1206]; performance [1207]; within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law [1208]; the various ways of extinguishing obligations, and prescription and limitation of actions, [1209] and the consequences of nullity of the contract. [1210]

Rome Convention: consequences of nullity

30-328

In relation to the last issue it must, however, be immediately pointed out that in cases falling within the Rome Convention, the applicable law will *not* be applied to determine the consequences of nullity of the contract in United Kingdom law. This is because the Convention recognises the power of contracting states to enter a reservation to this particular provision, which power was exercised by the United Kingdom. [1211] Accordingly, art.10(1)(e) does not have the force of law in the United Kingdom. [1212] In the law of United Kingdom jurisdictions the consequences of nullity of the contract belong to the law of restitution, and, as such, the relevant choice of law rules are those applicable to restitution rather those applicable to contractual obligations. [1213] This may, however be affected by the Rome II Regulation which contains choice of law rules on unjust enrichment which is apt to include the consequences of nullity of a contract, but this is most unclear as the latter concept is to be interpreted in an autonomous fashion and since, as pointed out below, the consequences of nullity of a contract are under the Rome I Regulation, a matter for the law applicable to the contract, it may well be that unjust enrichment under the Rome II Regulation on the law applicable to non-contractual obligations will be interpreted to exclude this issue from its scope. [1214]

Rome I Regulation: consequences of nullity

30-329

In contrast to the position under the Rome Convention, the law applicable to the contract under the Rome I Regulation will apply to determine the consequences of nullity of a contract [1215] and Member States have no power to make a reservation on the matter. This would seem to mean that, under the Rome I Regulation, the law applicable to the contract, or which would have been applicable to the contract had it been valid, [1216] will be the governing law rather than the rules governing unjust enrichment contained in the Rome II Regulation, because of the principle of mutually exclusive

interpretation, as between the Rome I Regulation and the Rome II Regulation, described above. [1217]

Overlapping categories

30-330

Questions may arise, of course, which overlap the particular categories of issue expressly referred to in art.10(1) of the Convention and art.12(1) of the Regulation. For example whether a contract has been frustrated may relate to interpretation, or performance, or to the extinguishing of obligations, [1218] while, in respect of the Rome I Regulation, the question may relate to the consequences of nullity of the contract. [1219] But since the applicable law governs all of these issues, no practical consequence can result from placing frustration (or any other overlapping question) in one category or another.

Non-exhaustive list

30-331

The list of issues in art.10(1) and art.12(1) is not intended to be exhaustive, [1220] so that in consequence, national courts may refer other issues which may arise in a contractual context to the law which governs the contract. Some of these issues are discussed at a later point. [1221]

Interpretation

30-332

At common law, a contract was construed and interpreted according to the canons of construction that prevailed in the law applicable to the contract. [1222] The same principle is adopted in the Rome Convention [1223] and in the Rome I Regulation. [1224] Thus the applicable law will determine the meaning to be given to particular words or phrases in the contract, for example the meaning of payment in "gold", [1225] "pounds" [1226] or "shillings". [1227]

Performance

30-333

Article 10(1)(b) of the Rome Convention and art.12(1)(b) of the Rome I Regulation provide that the applicable law shall govern "performance" of the contract. [1228] The scope of these provisions must, initially, be delimited by reference to art.10(2) of the Convention and art.12(2) of the Regulation, each of which provide that in:

> "… relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place."

The distinction between "performance" and "manner of performance" is the distinction between the substance of the obligation to be performed and the mode of performance of that obligation. [1229] Whereas the former matter is governed by the law applicable to the contract, [1230] the latter question is governed by the law of the place of performance [1231] which may be a law other than the governing law where the governing law is not that of the country in which the contract was to be performed. [1232] As far as "performance" is concerned, the Giuliano-Lagarde Report informs that it:

> "… appears to embrace the totality of the conditions, resulting from the law or from the

> contract, in accordance with which the acts essential for the fulfilment of the obligation must be performed …“ [1233]

This observation lacks clarity but is rendered less difficult by the examples which follow, namely: the diligence with which the obligation must be performed; conditions relating to the place and time of performance; the extent to which the obligation can be performed by a person other than the party liable; the conditions as to performance of the obligation both in general and in relation to certain categories of obligation (joint and several obligations, alternative obligations, divisible and indivisible obligations, pecuniary obligations); where performance consists of the payment of a sum of money, the conditions relating to the discharge of the debtor who has made the payment, the appropriation of the payment, the receipt, etc. [1234]

Manner of performance

30-334

The foregoing issues must be distinguished from those which merely affect the “manner of performance” which are subject to art.10(2) of the Convention and art.12(2) of the Regulation. The latter expression is not defined in the Convention: no precise meaning is given to it in the various laws of contracting states, and, indeed, the drafting group was not prepared to provide a strict (or one might add, any) definition of it. [1235] In consequence, the Giuliano-Lagarde Report opines that it will be for the lex fori to determine what is meant by the expression. [1236] This view has, however, been challenged, it being suggested that it would be more appropriate to draw the distinction in a uniform manner on the basis of a Convention interpretation of the distinction. [1237] The latter view has much to be said for it. The expression “manner of performance” remains undefined in the Rome I Regulation. It is suggested, however, that in relation to this instrument, an autonomous interpretation is most likely to be preferred.

Examples

30-335

However the distinction is ultimately to be drawn, the Giuliano-Lagarde Report mentions, as examples of rules affecting the manner of performance:

> “… the rules governing public holidays, the manner in which goods are to be examined, and the steps to be taken if they are refused.” [1238]

Thus, for example, if a contract governed by English law provides that the seller will deliver goods to the buyer in Paris “during usual business hours”, it will be for French law to determine what business hours are “usual”, since this relates to the manner of performance, but it will be for English law to determine whether performance of the contract is excused by force majeure. [1239] And if, pursuant to a contract governed by English law, a seller agrees to deliver goods to the buyer in Barcelona for export to Athens, Spanish law will determine whether an export licence is required, though English law will determine whether the seller or the buyer is contractually obliged to obtain a licence and whether, if no licence is obtained, one or other of the parties is in breach of contract. [1240] Equally, in a contract of sale, the applicable law will determine matters such as the person other than the buyer (if any) to whom delivery may be made, the identity and quantity of goods to be delivered, the nature of any additional duties of the seller in relation to the goods, and the documents, if any, that must be prepared and tendered by the seller. [1241] But questions relating to the mode of delivery such as the usages governing the unloading of goods at a particular port, will be regulated by the law of the place of performance. [1242]

Discretion

30-336

Although the Convention and the Regulation perpetuate a distinction drawn in the common law between the "substance" of performance and the "manner" of such performance, there may be one difference between art.10(2) and art.12(2) and the position at common law. At common law, reference of matters affecting the manner of performance to the law of the place of performance seems to be a choice of law rule the application of which does not depend on any discretionary element. Article 10(2) and art.12(2), on the other hand, require simply that "regard shall be had" to the law of the country in which performance takes place. According to the Giuliano-Lagarde Report, the court:

> "May consider whether such law has any relevance to the manner in which the contract should be performed and has a discretion whether to apply it in whole or in part so as to do justice between the parties." [1243]

If this view is correct, the role and operation of art.10(2) and art.12(2) becomes somewhat uncertain in scope.

Consequences of breach, etc

30-337

According to art.10(1)(c) of the Rome Convention, the applicable law governs, within the limits of the powers conferred on the court by its procedural law, the consequences of breach including the assessment of damages in so far as it is governed by rules of law. The equivalent provision in art.12(1)(c) of the Rome I Regulation is largely expressed in identical language except that the expression "consequences of breach" becomes "the consequences of the total or partial breach of obligations". It would seem that it is most unlikely that any substantive change is intended by this different wording, since breach in art.10(1)(c) would surely be apt to cover either a total or partial breach. The expressions "consequences of breach" and "consequences of total or partial breach" are capable of wide interpretation. [1244] According to the Giuliano-Lagarde Report, which may be taken as a guide to the meaning of both expressions, the former expression refers to:

> "… the consequences which the law or the contract attaches to the breach of a contractual obligation, whether it is a matter of the liability of the party to whom the breach is attributable or of a claim to terminate the contract for breach. Any requirement of service of notice on the party to assume his liability also comes within this context." [1245]

The expressions would therefore appear to include the question of whether an innocent party has a right to treat the contract as repudiated or to rescind the contract. [1246] The expressions (and the remaining words of art.10(1)(c) and art.12(1)(c)) also raise questions as to the effect of the applicable law on remedies, which questions are discussed in the two paragraphs which follow.

Damages

30-338

At common law a distinction is drawn between rules relating to remoteness of damage and heads of damages which are governed by the law applicable to the contract, [1247] and rules relating to the measure or quantification of damages which are governed by the lex fori since they are treated as a matter of procedure. [1248] It would seem incontrovertible that remoteness and heads of damage in contract are matters for the applicable law according to art.10(1)(c) and art.12(1)(c). [1249] More doubt surrounds the question of measure or quantification of damages. Article 10(1)(c) and art.12(1)(c) state that *assessment* of damages is a matter for the applicable law in so far as it is governed by rules of law. According to the Giuliano-Lagarde Report, this formulation is intended to exclude assessment of

damages which is only concerned with questions of fact [1250] (e.g. arithmetical calculation of loss where the formula for such calculation is not dictated by rules of law). Where, however, a rule of law imposes a limit on compensation, [1251] or draws distinctions between penalties and liquidated damages, [1252] or provides a principle by which the measure of damages for, say, non-delivery of goods can be calculated, [1253] the applicability of the rule will depend on the governing law. In this context (as in other contexts in art.10(1)(c) and art.12(1)(c)) the scope of the applicable law is limited by "the powers conferred on the court by its procedural law". Thus, for example, an English court could refuse to award damages in the form of periodical payments as required by the law governing the contract, if there was no procedural machinery for making such an award. [1254]

Other remedies

30-339

Although the matter has received little discussion and is the subject of only scanty authority, it was generally stated that at common law the availability of the equitable remedies of specific performance or injunction was a matter for the lex fori. [1255] The position appears to be different under the Rome Convention and the Rome I Regulation, since the availability of a particular remedy would seem to be a consequence of breach which is referable to the applicable law pursuant to either art.10(1)(c) of the Convention or art.12(1)(c) of the Regulation. [1256] The applicable law should thus determine the availability of an injunction [1257] or a decree of specific performance. Such availability will, of course, be subject to the procedural proviso to both arts 10(1)(c) and 12(1)(c), i.e. to "the limits of the powers conferred on the court by its procedural law". Thus the English court could refuse, for example, a decree of specific performance if the order would require constant supervision by the court, according to English principles. [1258]

Interest

30-340

At common law, liability to pay contractual interest and the rate of interest payable in respect of a contractual debt were determined by the law applicable to the contract under which the debt was incurred. [1259] This is also the position under the Rome Convention and, it is submitted, under the Rome I Regulation though it would seem that this result is reached by reference to art.10(1)(b) of the Convention or art.12(1)(b) of the Regulation ("performance") since the liability to pay contractual interest and the rate thereof relate to the substance of the obligation to be performed. [1260] Where interest was claimed as damages for non-payment of a debt, the better view was that liability at common law similarly depended on the law applicable to the contract. [1261] The rate of interest payable as damages was, however, governed by the lex fori. [1262] Under the Rome Convention, the right to claim interest as damages would seem to be a consequence of breach governed by the applicable law pursuant to art.10(1)(c) of the Convention and the same position would seem to prevail under art.12(1)(c) of the Rome I Regulation. [1263] It is also submitted that under the Convention and the Regulation the rate of such interest should continue to be a matter of procedure governed by the lex fori, a result which is not at variance with the terms of the Convention or the Regulation since neither instrument applies to procedure. [1264]

Exchange losses

30-341

The right to claim contractual interest and interest by way of damages must be distinguished from the question whether a contracting party who has paid a contractual debt after the due date is liable for exchange losses if the currency in which payment is expressed to be paid depreciates in value relative to the currency in which the other contracting party operates. The existence of such liability depended, at common law, on the law applicable to the contract. [1265] The same result should follow under the Rome Convention since the question relates to the consequences of breach, governed by the applicable law by virtue of art.10(1)(c) of the Convention and under the Rome I Regulation by

virtue of art.12(1)(c). [1266]

"Statutory interest"

30-342

The Late Payment of Commercial Debts (Interest) Act 1998 [1267] makes provision with respect to interest on the late payment of certain debts. By virtue of Pt I of the Act, it is an implied term in a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, [1268] other than an "excepted contract", [1269] that any "qualifying debt" [1270] created by the contract carries simple interest, referred to as "statutory interest", [1271] subject to and in accordance with Pt I of the Act. [1272] Part II of the Act describes the circumstances in which contract terms are permissible to oust or vary this right to statutory interest. [1273] Section 12 of the Act contains provisions dealing with the scope of the application of the Act in the context of cases involving the conflict of laws. [1274] According to s.12(1), the provisions of the Act do *not* have effect in relation to a contract governed by the law of a part of the United Kingdom by choice of the parties if: (a) there is no significant connection between the contract and that part of the United Kingdom; and (b) but for that choice the applicable law would be a foreign law, defined as the law of a country outside the United Kingdom. [1275] This would seem to mean that if the parties have chosen, say, English law to govern the contract in accordance with either art.3(1) of the Rome Convention or art.3(1) of the Rome I Regulation, [1276] but there is no significant connection between the contract and England, and, absent the choice of English law, the contract would, according to art.4 of the Convention or art.4 of the Regulation, [1277] be governed by the law of a country outside the United Kingdom, e.g. that of France, the provisions of the 1998 Act will not apply. This would appear to be the case even if the contract did have a significant connection with a part of the United Kingdom other than that whose law had been chosen in the contract, since the provision, in terms, requires the absence of a significant connection with the part whose law has been chosen. Conversely, the Act *will* apply where English law is chosen but, apart from that, the contract would be governed by the law of a country outside the United Kingdom, if there is, nonetheless, a significant connection between the contract and England. Section 12(1) thus envisages that a contract may have a *significant connection* with the part of the United Kingdom whose law has been chosen even though, pursuant to art.4 of the Rome Convention or art.4 of the Rome I Regulation, it is *most closely connected* with a country outside the United Kingdom. The factors which may be taken to constitute a significant connection are not identified in the Act and when such a connection will or will not be held to exist will depend on the circumstances of individual cases. However, by way of example, such a connection may be found to exist, in a contract of sale, where English law is chosen and England is also the place where the purchase price is to be paid, but apart from that choice of law the contract would be governed by the law of France pursuant to art.4(2) of the Rome Convention or art.4(1)(a) of the Rome I Regulation [1278] since France is the country in which the seller's principal place of business is situated. Further, the provisions of the Act would appear to apply if the law of one part of the United Kingdom is chosen in the contract, but in the absence of that choice the applicable law would be the law of another part of the United Kingdom. This result appears to ensue irrespective of whether a significant connection between the contract and the part of the United Kingdom whose law has been chosen does or does not exist. This is because s.12(1) only applies where in the absence of choice, the contract would be governed by a foreign law [1279] and that law is, as pointed out above, defined as the law of a country outside the United Kingdom. [1280]

30-343

Section 12(2) of the 1998 Act is an anti-avoidance provision. [1281] It provides that the Act *has* effect in relation to a contract governed by a foreign law by choice of the parties if: (a) but for that choice, the applicable law would be the law of a part of the United Kingdom; *and* (b) there is no significant connection between the contract and any other country other than that part of the United Kingdom. The effect of the provision would seem to be that if, say, a contract contains a choice of French law satisfying art.3(1) of the Rome Convention or art.3(1) of the Rome I Regulation, [1282] but were it not for that choice, the applicable law would, under art.4 of the Convention or art.4 of the Regulation, [1283] be English law, the Act *will* apply unless the contract has a significant connection with a country other than England. That significant connection may be with the country whose law has been chosen, France in this example, or with a different foreign country, for example Luxembourg, or even with a part of the United Kingdom other than England, for example Scotland. For although the expression

"country" is not defined in the Act, it is tolerably clear that the expression includes the different parts of the United Kingdom in s.12(2) since the subsection expressly refers to "any country other than that *part of the United Kingdom*" whose law has been chosen [1284] and that form of words is, in the above example, apt to include Scotland. What will be found to constitute a significant connection for the purposes of the subsection will, as suggested above depend on the circumstances of the individual case, but, as was the case with s.12(1), it is clear that although the contract has its closest connection with the law of a particular part of the United Kingdom, the contract may, nonetheless, have a significant connection with a country other than that part of the United Kingdom.

30-344

Section 12(2) only controls the avoidance of the Act by a choice of foreign law, i.e. the law of a country outside the United Kingdom. [1285] Where, however, an issue arises in English proceedings involving a contract which contains a choice of the law of a different part of the United Kingdom, the Act would appear to apply on general principles, [1286] unless it is disapplied because the circumstances of the case fall within s.12(1). [1287] The Act also seems to apply where the contract contains no choice of law but, as a result of applying art.4 of the Rome Convention or art.4 of the Rome I Regulation, [1288] the applicable law is the law of a part of the United Kingdom. [1289]

30-345

The rate of statutory interest under the 1998 Act shall be that prescribed by the Secretary of State. [1290]

Extinguishing obligations, etc

30-346

Article 10(1)(d) of the Convention and art.12(1)(d) of the Regulation submit the various "ways of extinguishing obligations, and prescription and limitation of actions" to the applicable law. As to the various ways in which an obligation may be extinguished, it is possible that whether a contract has been discharged by performance or by frustration will fall under art.10(1)(b) or art.12(1)(b) ("performance") rather than art.10(1)(d) or art.12(1)(d), but this will make no practical difference since in either event the issue will be governed by the applicable law. [1291] Discharge (or extinction) by accord and satisfaction, [1292] moratorium, [1293] outbreak of war [1294] or legislation [1295] would seem to fall within art.10(1)(d) of the Convention and within art.12(1)(d) of the Regulation [1296] and, as such, would be determined by the applicable law. Similarly, the question of whether a contractual debt or liability has been discharged by novation would be a matter for the law applicable to the contract which gives rise to the contractual debt or liability according to art.10(1)(d) or 12(1)(d), as the case may be. [1297] It would also seem likely that whether a debt has been extinguished by set-off is a matter for the applicable law by virtue of art.10(1)(d) of the Convention. [1298]

Set-off and the Rome I Regulation

30-347

As discussed earlier in this chapter, art.17 of the Rome I Regulation provides a specific rule for determining the law applicable to set-off. [1299]

Prescription and limitation of actions

30-348

Article 10(1)(d) of the Convention and art.12(1)(d) of the Regulation also refer prescription and the limitation of actions to the applicable law. Although, at common law, there was a distinct tendency to classify the rules relating to limitation of actions as procedural and thus as a matter for the lex fori, [1300] a considerable inroad on this principle was made by the Foreign Limitation Periods Act 1984. [1301]

Broadly speaking, that Act requires that the rules for the limitation of actions of the lex causae [1302] are to be applied, which means, in the case of contract, the limitation rules of the governing law [1303] and not those of the lex fori. The same principle is applied by art.10(1)(d) and art.12(1)(d). Where the Convention or the Regulation apply, the rules as to prescription and limitation of actions will be governed by the applicable law as a result of art.10(1)(d) or art.12(1)(d) rather than as a result of the 1984 Act. [1304] The Rome Convention, the Rome I Regulation and the Foreign Limitation Periods Act 1984 permit a foreign period of limitation to be denied application if its application would infringe public policy. [1305] According to s.2(2) of the 1984 Act, application of a foreign period of limitation conflicts with public policy:

> "… to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

Although art.16 of the Rome Convention and art.21 of the Rome I Regulation require that the application of a foreign rule must be "manifestly incompatible with the public policy of the forum" it does not seek to define the content of the forum's public policy as such. Accordingly, the "undue hardship" aspect of public policy referred to in s.2(2) of the 1984 Act can in all probability [1306] be applied as part of English public policy through art.16 of the Convention or art.21 of the Regulation. [1307]

Limitation in equity [1308]

30-349

It is unclear (and there is no relevant authority) whether the equitable doctrines of laches and acquiescence or equivalent doctrines in foreign law are matters which relate to "prescription and limitation of actions" for the purposes of art.10(1)(d) and art.12(1)(d) or whether such doctrines relate to the "consequences of breach" within the meaning of art.10(1)(c) or art.12(1)(c) or whether such principles are matters of procedure and thus not within the scope of either of the foregoing rules. It is tentatively submitted that such doctrines should be accorded a substantive characterisation and should thus in principle be a matter for the governing law of the contract. [1309] It is also tentatively submitted that since these doctrines relate to the circumstances under which certain remedies are available, they should be regarded as falling within art.10(1)(c) and art.12(1)(c) rather than art.10(1)(d) and art.12(1)(d). If the contract is governed by a foreign law it will be for that foreign law to determine the circumstances in which a particular remedy is available, as a consequence of breach, including the issue of whether the claimant has acted in good time in seeking that remedy. It would appear to be unlikely that foreign rules on the latter question would extend beyond the powers conferred on the English court by its procedural law.

Consequences of nullity of contract

30-350

Although, according to art.10(1)(e) of the Convention, the consequences of nullity of the contract are governed by the applicable law, the United Kingdom has entered the permitted reservation to this provision so that art.10(1)(e) does not have the force of law in the United Kingdom. [1310] The consequences of nullity of the contract will be determined according to the choice of law rules applicable to restitutionary claims. [1311] As explained above, however, in cases falling within the Rome I Regulation, the applicable law, pursuant to the Regulation, will govern the consequences of nullity of the contract, as a result of art.12(1)(e) which is applicable in the United Kingdom. [1312]

Other unspecified issues

30-351

Article 10(1) and art.12(1) do not purport to provide a list of issues which is exhaustive of those intended to be governed by the applicable law. [1313] Courts in contracting states and Member States will thus be free to submit unspecified issues to that law. Thus it has been held, in the context of the Convention, that whether a person is a party to a contract is a matter for the applicable law. [1314] Amongst other unspecified issues are certain aspects of the effects of a contract, [1315] i.e. aspects of the rights and obligations of the parties under the contract (though some of these are covered by the nominated issues in art.10(1) and art.12(1)). More particularly, neither list explicitly refers to the extent to which the rights and obligations of the parties to the contract affect third parties. There seems no reason to doubt that this issue is a matter for the applicable law, [1316] as it has been held to be at common law. [1317] Similarly, whether a defence, e.g. that of contributory negligence, to a contractual claim is available, should depend on the law applicable to the contract, [1318] unless, on proper characterisation, the defence arises out of an aspect of the law which has its own rules of the conflict of laws which are different to the conflict of laws' rules governing contracts. [1319]

30-352

Two further issues, illegality and public policy, and foreign currency obligations, are reserved for special consideration in the concluding sub-sections of this chapter. The former presents special problems in the English conflict of laws while the latter goes beyond pure questions of the conflict of laws. [1320]

1205. See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 32R–140 et seq.; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2002), pp.753, 758; Plender and Wilderspin, 4th edn (2015), Ch.14; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.297–310; Lagarde, *Contract Conflicts* (1982), p.49, at pp.54–57.

1206. Rome Convention art.10(1)(a), art.12(1)(a) of the Regulation.

1207. Rome Convention art.10(1)(b), art.12(1)(b) of the Regulation. As to the "manner of performance", see art.10(2) of the Convention, art.12(2) of the Regulation.

1208. Rome Convention art.10(1)(c), art.12(1)(c) of the Regulation.

1209. Rome Convention art.10(1)(d), art.12(1)(d) of the Regulation.

1210. Rome Convention art.10(1)(e), art.12(1)(e) of the Regulation.

1211. Rome Convention art.22(1)(b).

1212. Contracts (Applicable Law) Act 1990 s.2(2).

1213. See North, *Contract Conflicts* (1982), p.3, at pp.16–17; Giuliano-Lagarde Report, p.33; cf. *Caterpillar Financial Services Corp v SNC Passion [2004] EWHC 569 (Comm), [2004] 2 Lloyd's Rep. 99* at [16]. On the choice of law rules applicable to restitution, see generally, Dicey, Morris and Collins, 15th edn (2012) para.32–162; Cheshire and North, Ch.20; Panagopoulos, *Restitution in Private International Law* (2000); Rose, *Restitution and the Conflict of Laws* (1995); Dickinson [1996] LMCLQ 556. See also *Baring Bros & Co Ltd v Cunninghame DC [1997] C.L.C. 108 (Outer House of the Court of Session)*.

1214. See above, para.30-149.

1215. Rome I art.12(1)(e).

1216. And see art.10(1) of the Regulation, above, para.30-149.

1217. Above, para.30-149.

1218. Dicey, Morris and Collins, 15th edn (2012), para.32–162.

1219. Rome I art.12(1)(e). The consequences which flow after it has been determined that the contract has been frustrated according to its applicable law will probably not be determined by the Rome Convention at all, because of the United Kingdom's reservation to art.10(1)(e), discussed above, para.30-032 above. See below, para.30-350.

1220. "The law applicable to a contract … shall govern *in particular*" [emphasis added].

1221. Below, para.30-351.

1222. e.g. *St Pierre v South American Stores Ltd [1937] 3 All E.R. 349*; *AB Bofors-Uva C.A.V. Ltd v AB Skandia Transport [1982] 1 Lloyd's Rep. 410*.

1223. Rome Convention art.10(1)(a). And see *The Ikariada [1999] 2 Lloyd's Rep. 365, 373*; *OT Africa Line Ltd v Magic Sportswear Corp [2005] EWCA Civ 710, [2005] 2 Lloyd's Rep. 170*; *CGU International Insurance Plc v Astrazeneca Insurance Co [2005] EWHC 2755 (Comm), [2006] C.L.C. 162*.

1224. Rome I art.12(1)(a).

1225. cf. *St Pierre v South American Stores Ltd [1937] 3 All E.R. 349*. See also *Feist v Société Intercommunale Belge d'Electricité [1934] A.C. 161*; *Treseder-Griffin v Co-operative Insurance Society Ltd [1956] 2 Q.B. 127*; *The Rosa S. [1989] Q.B. 419*; *S.S. Pharmaceutical Co v Quantas Airways [1991] 1 Lloyd's Rep. 288*. See below, paras 30-371 et seq.

1226. cf. *Bonython v Commonwealth of Australia [1951] A.C. 201*.

1227. cf. *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] Q.B. 189*. If, however, there is no doubt as to the identity of the currency referred to, then it is for the law of the country whose currency is mentioned to determine what is legal tender in that currency: this seems to rest on an "implied" choice of law (art.3(1) of the Rome Convention, above, para.30-050 and below, paras 30-371 et seq.) which implied choice may be limited to this question alone (i.e. the issue is "severed", see above, paras 30-055 et seq. and below, para.30-374) and submitted to its own governing law under art.3(1) of the Convention or the Regulation, as the case may be.) cf. *Pyrmont v Schott [1939] A.C. 145*. See Dicey, Morris and Collins, 15th edn (2012), para.37–010. As to currency questions, see further, below, paras 30-371 et seq.

1228. *Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] EWHC 11 (Comm), [2003] 1 All E.R. (Comm) 703*; *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*. As to illegality by the law of the place of performance, see below, paras 30-357 et seq.

1229. *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*. This distinction was recognised in the common law. See *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589*; *Mount Albert BC v Australian Temperance & General Mutual Life Assurance Society [1938] A.C. 224*; *Bonython v Commonwealth of Australia [1951] A.C. 201*. See the 26th edition of this work, para.2184.

1230. *Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] EWHC 11 (Comm)*; *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83*.

1231. *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*.

1232. *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*.

1233. Giuliano-Lagarde Report, p.32.

1234. Giuliano-Lagarde Report, pp.32–33.

1235. Giuliano-Lagarde Report, p.33.

1236. Giuliano-Lagarde Report, p.33.

1237. Dicey, Morris and Collins, 15th edn (2012), paras 32–146 et seq.

1238. Giuliano-Lagarde Report, p.33. See also *Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] EWHC 11 (Comm), [2003] 1 All E.R. (Comm) 703*; *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*.

1239. cf. *Jacobs v Crédit Lyonnais (1884) 12 Q.B.D. 589*; Dicey, Morris and Collins, 15th edn (2012), para.32–151.

1240. cf. *Pound & Co Ltd v Hardy & Co Inc [1956] A.C. 588*; Dicey, Morris and Collins, 15th edn (2012), para.32–151.

1241. See Benjamin's Sale of Goods, 9th edn (2014), paras 26–167—26–168.

1242. See *Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] EWHC 11 (Comm), [2003] 1 All E.R. (Comm) 703*; *East West Corp v DKBS 1912 A/S [2003] EWCA Civ 83, [2003] Q.B. 1509*. cf. *Robertson v Jackson (1845) 2 C.B. 412*.

1243. Giuliano-Lagarde Report, p.33.

1244. See Kaye, pp.304–305. See also the Dutch case, *Buenaventura v Ocean Trade Co [1984] E.C.C. 183*, cited in Cheshire and North, p.598, where it was said (before the Rome Convention entered into force) that the expression must be construed widely, and could include strikes so that striking crew members on a Saudi Arabian ship lying at a Dutch port could be ordered to return to work on the ground that the strike was illegal under the governing law of the contract, the law of the Philippines: sed quaere.

1245. Giuliano-Lagarde Report, p.33. See also *Arcado v SA Haviland (9/87) [1988] E.C.R. 1539, 1555* (art.10(1)(c) governs consequences of total or partial failure to comply with obligations under the contract and consequently the contractual liability of the party responsible for breach); cf. *Kuwait Oil Tanker Co S.A.K v Al Bader [2000] 2 All E.R. (Comm) 271, 333–334* (no view expressed as to whether right to claim interest was one of "the consequences of breach").

1246. Dicey, Morris and Collins, 15th edn (2012), para.32–153; Kaye, p.305.

1247. *D'Almedia Araujo Lda v Sir Frederick Becker & Co Ltd [1953] 2 Q.B. 329* (where the question of the existence of a duty to mitigate damage was also said to be governed by the law applicable to the contract); *Livesley v Clemens Horst Co [1925] 1 D.L.R. 159*. A contractual term which limits the obligation to pay damages for a breach of contract or a statutory provision which is deemed to operate as such a term has been held to be substantive at common law: see *Cope v Doherty (1858) 2 De G. &J. 614* at 626; *Allen J. Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd [1976] 2 N.S.W.L.R. 192, 196–197*; *Harding v Wealands [2006] UKHL 32, [2007] 2 A.C. 1* at [44]–[46]; and see *Stevens v Head (1993) 176 C.L.R. 433, 458*. See also *Boys v Chaplin [1971] A.C. 356*; Dicey, Morris and Collins, 15th edn (2012), para.32–154.

1248. *D'Almedia Araujo Lda v Sir Frederick Becker & Co Ltd [1953] 2 Q.B. 328, 338*; *Livesley v Clemens Horst Co [1925] 1 D.L.R. 159*; see also *Harding v Wealands [2006] UKHL 32*; *Boys v Chaplin [1971] A.C. 356, 378, 381–382, 383, 394*; *Edmunds v Simmonds [2001] 1 W.L.R. 1003*; *Hulse v Chambers [2001] 1 W.L.R. 2386*; *Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21, [2002] 1 W.L.R. 2304*; and material cited in preceding note. cf. *John Pfeiffer Pty Ltd v Rogerson (2000) 203 C.L.R. 503*; *Régie Nationale des Usines Renault SA v Zhang (2003) 210 C.L.R. 491* .

1249. As would the existence of a duty to mitigate damage: cf. above, n.1250.

1250. Giuliano-Lagarde Report, p.33.

1251. Giuliano-Lagarde Report, p.33. In *Harding v Wealands [2006] UKHL 32, [2007] 2 A.C. 1* it was held that a statutory ceiling on damages in tort imposed by a foreign law was procedural rather than substantive and that the quantification of damages in tort was exclusively a matter for the law of the forum. But it was accepted that a contractual term which limits the obligation to pay damages for breach of contract or a statutory provision which is deemed to operate as such a term was substantive: *[2006] UKHL 32* at [44]–[46]. In any event the views expressed in *Harding v Wealands*, above cannot affect the position under either the Rome Convention or the Rome I Regulation. See also *Wall v Mutuelle de Poities Assurances [2014] EWCA Civ 138, [2014] 1 W.L.R. 4263*.

1252. Dicey, Morris and Collins, 15th edn (2012), para.32–153. And see *Excalibur Ventures LLC v Texas Keystone Inc [2013] EWHC 2767 (Comm)* at [1422]–[1423] (date and principles according to which damages are to be assessed a matter for law applicable to the contract).

1253. See, e.g. Sale of Goods Act 1979 ss.51(2) and (3); Vol.II, paras 44-387 et seq.

1254. See Morse (1982) 2 Ybk. Eur. L. 107, 154–155; cf. *The Indian Grace [1992] 1 Lloyd's Rep. 124*, reversed, on other grounds, *sub nom. Republic of India v India S.S. Co [1993] A.C. 410*.

1255. *Baschet v London Illustrated Standard Co [1900] 1 Ch. 73*; *Boys v Chaplin [1971] A.C. 356, 394* ; Dicey, Morris and Collins, 15th edn (2012), para.7–011. See also *Warner Brothers Pictures Inc v Nelson [1937] 1 K.B. 209* where the point was neither raised nor discussed.

1256. Dicey, Morris and Collins, 15th edn (2012), para.32–155; Cheshire, North and Fawcett, pp.755–757. Dicta in *Harding v Wealands [2006] UKHL 32, [2007] 2 A.C. 1* at [32] suggest that the nature of the available remedy is a matter of procedure, at common law, but this cannot affect the position under either the Rome Convention or the Rome I Regulation.

1257. This refers to a final injunction. The right to an interlocutory injunction would seem to be a matter of procedure for the lex fori as would other forms of interlocutory relief. See for the position under the Rome II Regulation *Actavis UK Ltd v Eli Lilly & Co [2014] EWHC 1511 (Pat), [2014] 4 All E.R. 331*.

1258. See above, n.1257.

1259. See e.g. *Mount Albert BC v Australasian Temperance & General Mutual Life Insurance Society [1938] A.C. 224*. See generally on interest Dicey, Morris and Collins, 15th edn (2012), paras 7–082 et seq. As to other currency questions, see below, paras 30-371 et seq. For a discussion of prejudgment interest in the conflict of laws, see Guest, *Lex Mercatoria: Essays in Honour of Francis Reynolds* (2000), p.271.

1260. Dicey, Morris and Collins, 15th edn (2012), paras 7–085 et seq.

1261. *Miliangos v George Frank (Textiles) Ltd (No.2) [1977] Q.B. 489, 496–497*; *Helmsing Schiffahrts GmbH v Malta Drydocks Corp [1977] 2 Lloyd's Rep. 444, 449–450*; *Lesotho Highlands Development Authority v Impregilo SpA [2002] EWHC 2435 (Comm), [2003] 1 All E.R. (Comm) 22*, affirmed without deciding this point, *[2003] EWCA Civ 1159, [2003] 2 Lloyd's Rep. 497*. The contrary view, that the question is a matter of procedure governed by the lex fori, was expressed in *Midland International Trade Services v Sudairy, Financial Times, May 2, 1990* (Hobhouse J.) and in *Kuwait Oil Tanker Co SAK v Al Bader, The Independent, January 11, 1999* (Moore-Bick J.). On appeal in the latter case, the Court of Appeal found it unnecessary to express a concluded view: see *[2000] 2 All E.R. (Comm) 271, 339–344*. In *Lesotho Highlands Development Authority v Impregilo SpA*, Morison J. preferred the view expressed in the text and in Dicey, Morris and Collins, 15th edn (2012), paras 7–099 et seq., but the Court of Appeal, again found it unnecessary to express a concluded view. The House of Lords allowed an appeal from the decision of the Court of Appeal, *[2003] UKHL 43, [2006] 1 A.C. 221*, but no view was expressed on the point. The case was concerned with an arbitrator's power to award interest and it was held that Arbitration Act 1996 s.49(3) had not been expressly excluded by the parties. In *Yukos Capital SARL v OJSC Oil Co Rosneft [2014] EWHC 2188 (Comm)* the converse issue was considered, namely, when an agreement to arbitrate excluded an award of interest under s.35A of Senior Courts Act 1981. For an earlier but inconclusive case on the

point, see *Zebrarise Ltd v De Nieffe [2004] EWHC 1842 (Comm), [2005] 1 Lloyd's Rep. 154*. In *Kuwait Oil Tanker Co SAK v Al Bader*, above, the Court of Appeal found it unnecessary to express a view on whether the right to claim compound interest should be regarded as substantive or procedural in nature. cf. *Abdel Hadi Abdallah Al Qahtani & Sons Beverage Industry Co v Antliff [2010] EWHC 1735 (Comm)*; *Maher v Groupama Grand Est [2009] EWCA Civ 1191, [2010] 1 W.L.R. 1564* (a case on interest on damages in tort). See also *Gater Assets Ltd v Nak Naftogaz Ukrainy (No.3) [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep. 295* at [19] (English procedural rules, including those relating to interest, apply to English judgment); *JSC BTA Bank v Ablyazof [2013] EWHC 867 (Comm)* (interest under s.35A of Senior Courts Act 1981 essentially a procedural remedy).

1262. This is controversial: in favour, see *Rogers v Markel Corp [2004] EWHC 1375 (QB), [2004] EWHC 2046 (QB)*; *Miliangos v George Frank (Textiles) Ltd (No.2) [1977] Q.B. 489*; against, see *Helmsing Schiffahrts GmbH v Malta Drydocks Corp [1977] 2 Lloyd's Rep. 444*. The Law Commission conducted a thorough examination of the question and has concluded that the view expressed in the text should be preferred: see Law Com. No.124, 1983, paras 2.32, 3.55 and Law Com. Working Paper No.80, 1981, paras 4.22–4.27. See also, *The Pacific Colocotronis [1981] 2 Lloyd's Rep. 40*; *Swiss Bank Corp v State of New South Wales (1993–94) 33 N.S.W.L.R. 63*; Dicey, Morris and Collins, 15th edn (2012), paras 7–100 et seq.

1263. Giuliano-Lagarde Report, p.32; Dicey, Morris and Collins, 15th edn (2012), paras 7–087, 7–098 et seq. And see *Lesotho Highlands Development Authority v Impregilo SpA [2000] EWHC 2435 (Comm)*. cf. *Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All E.R. (Comm) 271, 333–334* (no view expressed on question of whether the right to claim interest by way of damages belonged to the "consequences of breach" for the purposes of art.10(1)(c) of the Rome Convention).

1264. *Lesotho Highlands Development Authority v Impregilo [2003] EWCA Civ 1159, [2003] 2 Lloyd's Rep. 497*, reversed, without reference to the point, *[2005] UKHL 43, [2006] 1 A.C. 221*; Rome Convention art.1(2)(h); Rome I Regulation art.1(2)(i); Dicey, Morris and Collins, 15th edn (2012), paras 7–098 et seq. It is possible, however, that the applicable law may have rules which fix the computation of interest, in which case it is possible that, under the Rome Convention and Rome I, in such cases, the rate of interest may be regarded as governed by the applicable law.

1265. *President of India v Lips Maritime Corp [1988] A.C. 395*; *Ozalid Group (Export) Ltd v African Continental Bank Ltd [1979] 2 Lloyd's Rep. 331*; *International Minerals and Chemicals Corp v Karl O. Helm AG [1986] 1 Lloyd's Rep. 81*; *Rogers v Markel Corp [2004] EWHC 2046 (QB)*; *Isaac Naylor & Sons Ltd v New Zealand Co-operative Wool Marketing Association Ltd [1981] 1 N.Z.L.R. 361*.

1266. The cases in the preceding note establish that the question is one of remoteness of damage which is thus governed by the applicable law according to art.10(1)(c) of the Convention and art.12(1)(c) of the Regulation; see also *Milan Nigeria Ltd v Angeliki B Maritime Co [2011] EWHC 892 (Comm)*. Dicey, Morris and Collins, 15th edn (2012), para.37–084.

1267. As amended by Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674), fully in force from August 7, 2002. These Regulations partially implement Directive 2000/35 on combating late payment in commercial transactions [2000] O.J. L200/35.

1268. Late Payment of Commercial Debts (Interest) Act 1998 ss.1(1), 2(1), (2), (3), (7), 12(3).

1269. Defined in s.2(5) and (7) as a consumer credit agreement within the meaning of the Consumer Credit Act 1974, a contract intended to operate by way of mortgage, pledge, charge or other security and any other contract specified in an order made by the Secretary of State.

1270. ss.1(1), 3(1).

1271. s.1(2).

1272. s.1(1).

1273. ss.7 10.

1274. cf. Unfair Contract Terms Act 1977 s.27. See on this section *Bulk Ship Union SA v Clipper Bulk Shipping Ltd [2012] EWHC 2595 (Comm), [2012] 2 Lloyd's Rep. 533*; *Martrade Shipping and Transport v United Enterprises Corp [2014] EWHC 1884 (Comm)*.

1275. s.12(3). cf. Unfair Contract Terms Act 1977 s.27(1).

1276. Above, paras 30-046 et seq., 30-169 et seq.

1277. Above, paras 30-070 et seq., 30-185 et seq.

1278. Above, paras 30-070 et seq., 30-185 et seq.

1279. s.12(1)(b).

1280. s.12(3).

1281. cf. Unfair Contract Terms Act 1977 s.27(2).

1282. Above, paras 30-046 et seq., 30-169 et seq.

1283. Above, paras 30-070 et seq., 30-185 et seq.

1284. Emphasis added. cf. s.12(3), defining foreign law as the law of a country outside the *United Kingdom* (emphasis added).

1285. s.12(3).

1286. The Act applies in England and Wales and in Scotland and is expressly stated to extend to Northern Ireland: s.17(5).

1287. Above, para.30-342.

1288. Above, paras 30-070 et seq., 30-185 et seq.

1289. This is because the Act extends to each part of the United Kingdom.

1290. s.6. A debt does not carry statutory interest if, or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of a statute other than the 1998 Act:s.3(2).

1291. Dicey, Morris and Collins, 15th edn (2012), paras 32–156 et seq.

1292. cf. *Ralli v Denistoun (1851) 6 Ex. 488*.

1293. cf. *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323*; *National Bank of Greece and Athens SA v Metliss [1958] A.C. 509*; *Adams v National Bank of Greece SA [1961] A.C. 509*. The distinct question raised in the last two cases as to whether there was a successio in universum jus on the amalgamation of the banks would not fall within either the Convention rules because of art.1(2)(e), or within the Regulation because of art.1(2)(f). That question will be determined according to the law of the place of incorporation: see further *The Rio Assu [1999] 1 Lloyd's Rep. 201*; *J.H. Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora [1999] 2 All E.R. (Comm) 577*; *Eurosteel Ltd v Stinnes AG [2000] 1 All E.R. (Comm) 964*; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd [2000] 2 Lloyd's Rep. 550*; Dicey, Morris and Collins, 15th edn (2012), paras 30R–020 et seq.

1294. cf. *Re Anglo-Austrian Bank [1920] 1 Ch. 69*.

1295. cf. *Perry v Equitable Life Insurance Co (1929) 45 T.L.R. 468*; *R. v International Trustee for the*

Protection of Bondholders AG [1937] A.C. 500; *Mount Albert BC v Australasian Temperance & General Mutual Life Assurance Society [1938] A.C. 224*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 340*.

1296. See Dicey Morris and Collins, 15th edn (2012), para.32–157. The same principle applied at common law: see *Wight v Eckhardt Marine GmbH [2003] UKPC 37, [2004] 1 A.C. 147*; 26th edition of this work, para.2192. For the special case of discharge by bankruptcy, see Dicey, Morris and Collins, 15th edn (2012), para.31–114.

1297. See *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 825* at [34]. cf. *Re United Railways of the Havana and Regla Warehouses Ltd [1960] Ch. 52* (reversed on other grounds sub nom. *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007*). See also *Wight v Eckhardt Marine GmbH [2003] UKPC 37, [2003] 3 W.L.R. 414* at [13]–[14].

1298. Dicey, Morris and Collins, 15th edn (2012), paras 7–039—7–040. A set-off which is merely a claim of a certain kind which the defendant has against the claimant and which can be conveniently tried together with the claimant's claim against the defendant is procedural and thus a matter for the lex fori both at common law and under the Rome Convention: see *Meher v Dresser (1864) 16 C.B.(N.S.) 646*.

1299. See above, paras 30-300 et seq.

1300. As to the common law position, see Dicey, Morris and Collins, 15th edn (2012), para.7–055; Cheshire and North, p.73. cf. *John Pfeiffer Pty Ltd v Rogerson (2000) 203 C.L.R. 503* (obiter to effect that statutes of limitation substantive at common law).

1301. For comment, see Dicey, Morris and Collins, 15th edn (2012), paras 7–058 et seq.; Cheshire, North and Fawcett, pp.80–81; Carter (1985) 101 L.Q.R. 68; Stone [1985] L.M.C.L.Q. 497. The 1984 Act implements recommendations of the Law Commission: see Law Com. No.114, 1982.

1302. Foreign Limitation Periods Act 1984 s.1(1).

1303. The foreign lex causae is defined to include both procedural and substantive rules in respect to limitation: Foreign Limitation Periods Act 1984 s.4. But renvoi is excluded: ss.1(5), 4(2). A foreign rule under which a limitation period is or may be extended or interrupted, in respect to the absence of a party from any specified jurisdiction or country, must be disregarded: s.2(3). If the lex causae confers a discretion, it should be exercised, so far as practicable, in the manner in which it is exercised in comparable cases by the courts of that country: s.2(4). English law will, however, determine the time at which proceedings have been commenced: s.1(3).

1304. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV (C-133/08) [2010] Q.B. 411*. See *Ennstone Building Products Ltd v Stanger Ltd [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059* at [5], [43]; Dicey, Morris and Collins 15th edn (2012), paras 7–062, 32–161. And see *Crédit Lyonnais v New Hampshire Insurance Co [1997] 2 Lloyd's Rep. 1*; *Zebrarise Ltd v De Nieffe [2004] EWHC 1842 (Comm), [2005] 1 Lloyd's Rep. 154*. As to restitutionary claims and the Foreign Limitation Periods Act 1984, see *Barros Mattos Junior v MacDaniels Ltd [2004] EWHC 1323 (Ch), [2005] 1 W.L.R. 247*.

1305. Foreign Limitation Periods Act 1984 s.2(1), (2); Rome Convention art.16; Rome I Regulation art.21. And see below, paras 30-368 et seq. The 1984 Act is not intended to apply to periods of limitation referred to in the contract itself: see Law Com. No.114, 1982, para.4.52; Dicey, Morris and Collins, 15th edn (2012), para.7–056. At common law such periods were probably substantive and thus referable to the law governing the contract: Dicey, Morris and Collins, para.7–054; cf. *Harding v Wealands [2006] UKHL 32, [2007] 1 A.C. 1* at [44]–[46]; *Allan J. Panozza & Co Pty Ltd v Allied Interstate (Queensland) Pty Ltd [1976] 2 N.S.W.L.R. 192*. It is unclear whether such a clause would be regarded as affecting limitation of actions for the purpose of art.10(1)(d) or art.12(1)(d), but if it does not it would nevertheless be regarded as a way of extinguishing an obligation which is also governed by the applicable law according to each provision.

1306. On undue hardship, see *The Komninos S. [1990] 1 Lloyd's Rep. 541* (reversed but not on this point *[1991] 1 Lloyd's Rep. 370* (undue hardship where defendants agreed to an extension of time which turned out to be ineffective under foreign lex causae)); *Jones v Trollope Colls Cementation Overseas Ltd, The Times, January 26, 1990* (12 months' limitation period caused undue hardship where plaintiff had spent time in hospital and had been led to believe her claim would be met); *Arab Monetary Fund v Hashim [1993] 1 Lloyd's Rep. 543* (impossible to hold that application of a threeyear limitation period caused undue hardship); *Harley v Smith [2010] EWCA Civ 78*; *Naraji v Shelbourne [2011] EWHC 3298 (QB)* considered in *Bank St Petersburg, Alexander Savelyev v Vitaly Arkhangelsky, Julia Arkhangelskaya [[2013] EWHC 3674 (Ch)*. See also s.1A of the Foreign Limitation Periods Act 1984 on the extension of limitation periods because of mediation of certain cross-border disputes, inserted by SI 2011/1133 Pt 3 reg.29.

1307. Dicey, Morris and Collins, 15th edn (2012), paras 7–062, 32–161 (but undue hardship under the 1984 Act may be less stringent than public policy under Rome I).

1308. See above, paras 28-135 et seq.

1309. See Dicey, Morris and Collins, 15th edn (2012), para.7–063.cf. Foreign Limitation Periods Act 1984 s.4(3) which provides that the Act does not prevent the court, in the exercise of any discretion, from refusing equitable relief on the grounds of acquiescence or otherwise, but does require that, in applying the equitable rules, regard shall be had in particular to the provisions of a foreign applicable law. cf. Restatement, Second, Conflict of Laws, para.142 (substantive).

1310. See above, paras 30-032, 30-149.

1311. See preceding note.

1312. Above, paras 30-032—30-149.

1313. See above, para.30-331.

1314. *Laemthong International Lines Co v ARTIS (No.3) [2005] EWHC 1595 (Comm)*.

1315. See Dicey, Morris and Collins, 15th edn (2012), para.32–142. As to set-off, see *Meridien Biao Bank GmbH v Bank of New York [1997] 1 Lloyd's Rep. 437* and above, para.30-300; Rome I Regulation art.17, above, paras 30-300 et seq.

1316. See *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] Q.B. 825* at [34]; *Navig8 Pte v Al-Riyadh Co for Vegetable Oil Industry [2013] EWHC 328 (Comm)*; *Secure Capital SA v Credit Suisse AG [2015] EWHC 388 (Comm), [2015] 1 Lloyd's Rep. 536* at [34]. This is subject to the exclusion of "the question of whether an agent is able to bind a principal, or an organ to bind a body corporate or unincorporate, to a third party": art.1(2)(f) of the Convention art.1(2)(g) of the Regulation, above, paras 30-041, 30-158. cf. *Atlas Shipping Agency (UK) Ltd v Suisse Atlantique Société D'Armement Maritime SA [1995] 2 Lloyd's Rep. 188*. On agency see also *PEC Ltd v Asia Golden Rice [2014] EWHC 1583 (Comm)*.

1317. *Scott v Pilkington (1862) 2 B. & S. 11*. See the 26th edition of this work, para.2177.

1318. See *Meridien Biao Bank GmbH v Bank of New York [1997] 1 Lloyd's Rep. 437*.

1319. *Meridien Biao Bank GmbH v Bank of New York [1997] 1 Lloyd's Rep. 437* (set-off in insolvency proceedings). See also *Re Bank of Credit and Commerce International SA (No.10) [1997] Ch. 213* (English rule on insolvency set-off (Insolvency Rules 1986 r.4.90) always to be applied in English insolvency proceedings). As to set-off and the Rome I Regulation, see art.17, above, paras 30-300 et seq.

1320. Below, paras 30-357 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(e) - Burden of Proof, etc. [1321]

Generally

30-353

Article 14 of the Rome Convention and art.18 of the Rome I Regulation each contain two provisions expressed to be applicable to burden of proof. One such provision deals, in effect, with the burden of proof and presumptions, [1322] the other with "contracts or acts intended to have legal effect". [1323]

Burden of proof and presumptions

30-354

Article 14(1) of the Convention and art.18(1) of the Regulation provide that the law governing the contract pursuant to the rules of the Convention or, as the case may be, the Regulation, applies to the extent that it contains, in the "law of contract", the expression used in the Convention, or in "matters relating to contractual obligations", the expression used in the Regulation, rules which raise presumptions of law or determine the burden of proof. In relation to the burden of proof, the tendency of the common law was to characterise the burden of proof as a procedural matter to be governed by the lex fori. [1324] The effect of art.14(1) and art.18(1), however, is that the applicable law will determine the location of the burden of proof provided that the relevant rules for identifying its location are contained *in the law of contract*, for the purposes of the Convention, or involve *matters of contractual obligations*, for the purposes of the Regulation. The meaning of these italicised words is by no means clear, though it is suggested that the difference in formulation in, respectively, the Convention and the Regulation, is not intended to have any substantive effect and that each formulation should be construed in the same fashion. The Giuliano-Lagarde Report suggests that a rule relating to the burden of proof is a rule contained in the law of contract:

> "… to the extent that the law of contract determines it with regard to contractual obligations … that is to say only to the extent to which the rules relating to the burden of proof are in effect rules of substance," [1325]

as opposed to rules which are part of procedural law. The example given is art.1147 of the French Civil Code which provides that a debtor who has failed to fulfil his obligation shall be liable for damages "unless he shows that this failure is due to an extraneous cause outside his control". [1326]

30-355

In relation to presumptions, art.14(1) and art.18(1) only apply to presumptions of law. [1327] At

common law, an irrebuttable presumption of law is regarded as substantive [1328]: it is probably the case that rebuttable resumptions of law bear the same characteristic. [1329] Article 14(1) and art.18(1) appear to contemplate the inclusion of both types of presumption under the aegis of the applicable law, subject to the relevant presumption being contained, again, in the law of contract. As far as irrebuttable presumptions of law are concerned, it is not easy to think of pertinent examples in the law of contract. This is because, in effect, an irrebuttable presumption of law is a rule of substantive law and what might, in some legal systems, be formulated as an irrebuttable presumption of law, [1330] is more likely, in the English law of contract, to be formulated as a rule of substantive contract law. [1331]

Examples of rebuttable presumptions spring more readily to mind and might include, in English law, the presumption of undue influence in relation to contracts between persons in a special relationship with one another (e.g. parent and child). [1332] Although this presumption may arise in other areas of the law, for example the law of trusts, that should not preclude it from being contained in the law of contract for the purposes of art.14(1) and art.18(1). [1333]

Contract or act intended to have legal effect

30-356

Article 14(2) of the Rome Convention and art.18(2) of the Rome I Regulation provide that a contract or act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in art.9 of the Convention or art.11 of the Regulation, under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum. Thus, in English proceedings, a contract, or the terms thereof, may be proved by any method of proof available in English law. If a law applicable by virtue of art.9 or art.11 [1334] would render the contract formally valid, the English court can allow any method of proof permitted by that law to the extent that such method of proof can be administered by the forum. [1335] According to the Giuliano-Lagarde Report, this proviso enables the court to disregard modes of proof which its law of procedure cannot generally allow, such as an affidavit, the testimony of a party, or common knowledge. [1336]

1321. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 7–043 et seq., 32–034; Cheshire, North and Fawcett, *Private International Law*, 14th edn (1999), pp.88–89; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.331–341; Lasok and Stone, *Conflict of Laws in the European Community* (1987), pp.354–355; Morse (1982) 2 Ybk. Eur. L. 107, 156–157.

1322. Rome Convention art.14(1), Rome I Regulation art.18(1), below, paras 30-354 et seq.

1323. Rome Convention art.14(2), Rome I Regulation art.18(2), below, para.30-356.

1324. e.g. *The Roberta (1937) 58 Ll.L. Rep. 159*. For criticism, see Dicey, Morris and Collins, 15th edn (2012), para.7–034; Cheshire, North and Fawcett, pp.88–89.

1325. Giuliano-Lagarde Report, p.36.

1326. Giuliano-Lagarde Report, p.36. For possible examples in English law see above, para.7-075 (Misrepresentation Act 1967 s.2(1)); paras 15-078, 15-100 (Unfair Contract Terms Act 1977 ss.11(5), 12(3)); Vol.II, para.38-222 (Unfair Terms in Consumer Contracts Regulations 1999 reg.5(4); for seller or supplier who claims that a term was individually negotiated to show that it was) (for contracts entered into after October 1, 2015, the Unfair Terms in Consumer Contracts Regulations 1999 are replaced by the Consumer Rights Act 2015); para.39-506 (Consumer Credit Act 1974 s.171(4)(b); Consumer Protection (Distance Selling) Regulations 2000 reg.21(3); if in proceedings falling within reg.21(1) or (2), a consumer alleges that any use made of a payment card was not authorised by him it is for card issuer to prove that the use was authorised); (plaintiff has legal burden of proving fault when frustration pleaded as defence to action on contract: *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd [1942] A.C.*

154); para.15-155 (burden of proof and force majeure clauses); para.25-024 (burden on party seeking to enforce altered instrument to show that alteration made in circumstances such as not to invalidate it); Vol.II, para.33-012 (burden of proving loss not caused by failure to take care rests on bailee); Vol.II, para.42-101 (insurance); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 reg.17 (Vol.II, para.38-090) and Consumer Rights Act 2015 s.2(4) (Vol.II, para.38-354).

1327. This is clearly stated in the text of Rome Convention art.14(1) and the Rome I Regulation art.18(1). In some cases, however, a rule formulated as presumption of law in one legal system, may not be so formulated in another. In the Giuliano-Lagarde Report, p.36, reference is made to a procedural presumption: "[W]hereby the claim of a party who appears is deemed to be substantiated if the other party fails to appear, or the rule making silence on the party to an action with regard to the facts alleged by the other party equivalent to an admission of those facts", but neither of these rules involves any "presumption" in English law.

1328. Dicey, Morris and Collins, 15th edn (2012), para.7–036.

1329. Dicey, Morris and Collins, 15th edn (2012), para.7–036.

1330. It is noteworthy that the Giuliano-Lagarde Report gives no examples.

1331. See, e.g. Unfair Contract Terms Act 1977 s.12(2); Unfair Terms in Consumer Contracts Regulations 1999 reg.5(4), Vol.II, para.38-222. For contracts entered into after October 1, 2015, the Unfair Terms in Consumer Contracts Regulations 1999 are replaced by the Consumer Rights Act 2015.

1332. Above, paras 8-078 et seq.

1333. See text at nn.1331-1336, above.

1334. Above, para.30-312.

1335. For the possible effect of this provision on *Leroux v Brown (1852) 12 C.B. 801*, see above, para.30-312.

1336. See Giuliano-Lagarde Report, pp.36–37.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(f) - Illegality and Public Policy [1337]

Illegality

30-357

The question of whether a contract is unenforceable or void for illegality justifies separate treatment because it involves reference to a number of different principles at common law [1338] and possible reference to several provisions of, respectively, the Rome Convention and the Rome I Regulation.

Illegality under applicable law

30-358

First, a contract is unenforceable for illegality to the extent that it is illegal under its governing law, according to common law rules, [1339] or, under the rules of the Rome Convention or the Rome I Regulation, illegal by the law which would be applicable to the contract if the contract (or term thereof) was valid. [1340]

Illegality under English law

30-359

Secondly, at common law, if any party in making or performing the contract commits, or assists another to commit, in England, a criminal offence under English law [1341] or commits abroad an act which is a criminal offence under English law by virtue of a statutory provision having extra-territorial operation, [1342] then even though the governing law is not English law, the contract is unenforceable in England by the party in question. [1343] In cases falling within the Rome Convention, this principle would seem to continue to have effect since the rules applicable by virtue of it appear to be mandatory rules of the law of the English forum which apply irrespective of the law applicable to the contract, so that, accordingly, art.7(2) may be invoked to secure their application. [1344] It would also seem that these rules are, for the purposes of the Rome I Regulation, overriding mandatory provisions the respect for which would be regarded as crucial by England for safeguarding its public interests and which would be applicable, irrespective of the law otherwise applicable to the contract under the Regulation. [1345] As such, art.9(2) of the Regulation may be invoked to secure their application. [1346]

Act illegal under law of country where to be performed

30-360

Thirdly, in *Ralli Bros v Compania Naviera Sota y Aznar*, [1347] the Court of Appeal established a common law rule that where an act required by a contract to be performed in a foreign country

becomes illegal under that country's law, the contractual obligation to perform that act is discharged. Applying that principle, it was held that where under a contract governed by English law, charterers had agreed to pay freight in Spain to shipowners at a particular rate, and the Spanish government, after the conclusion of the contract, promulgated an order that freight should not exceed a fixed sum which was less than the agreed rate, the charterers were only obliged to pay the fixed rate rather than the agreed rate. The exact scope of this decision is, however, controversial. It has been suggested that the principle of *Ralli Bros* applies whether or not the contract is governed by English law. [1348] But the better view, it is submitted, is that for the principle to apply, the applicable law must, as it was in *Ralli Bros* itself, be English law. [1349] If the latter view is accepted, it follows that *Ralli Bros* established a principle of the domestic English law of contract relating to discharge by supervening illegality [1350] and does not establish a rule of the conflict of laws. [1351] Accordingly, the effect of illegality by the law of the place of performance where a contract is governed by a foreign law is a matter for that foreign law. [1352]

Ralli Bros and The Rome Convention

30-361

The next question which arises is as to the status of the principle in *Ralli Bros* in cases which fall within the Rome Convention. Since the United Kingdom has made a reservation to art.7(1) of the Convention, that article cannot be used to give effect, even as a matter of discretion, to the *Ralli Bros* principle. [1353] If the principle only applies, as suggested above and by a dictum in the Court of Appeal which found it unnecessary to express a final view on the point, [1354] where the contract is governed by English law, than it will operate, where relevant, if English law is the applicable law of the contract. [1355]

But if, contrary to this view, it is eventually decided that the principle is of wider import so that it applies irrespective of the law applicable to the contract, it is difficult to accommodate it within the Convention. The first possibility is to argue that it can be applied pursuant to art.16, [1356] as a principle of English public policy, but it is doubtful whether the principle bears the character of a rule of English public policy. [1357] Secondly, but more doubtfully, the principle of *Ralli Bros* could be construed as a mandatory rule of English law, applicable by virtue of art.7(2) of the Convention. Thirdly, but even more doubtfully, it has been suggested that the principle could be applied by virtue of art.10(2) of the Convention, [1358] but this is most unlikely since art.10(2) only submits to the law of the place of performance minor matters affecting the detail of performance rather than the substance of the obligation to be performed, [1359] and the latter, not the former, was what was at issue in the *Ralli Bros* case.

Effect of Rome I Regulation

30-362

To the extent that the principle in *Ralli Bros* is a rule of the domestic English law of contract (and this it is submitted is the better view), it will continue to apply in cases falling within the Rome I Regulation where, pursuant to the rules contained in the Regulation, English law is the law applicable to the contract. [1360] It is, however, unnecessary to consider whether the rule is of wider import, since the Regulation provides a specific rule enabling account to be taken of illegality by the law of the place of performance and the existence of this rule appears to mean that otherwise illegality by the law of the place of performance will only be relevant where, under the law applicable to the contract, account is taken of such illegality. Article 9(3) of the Regulation provides as follows:

> "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or nonapplication."

The second sentence of this formulation is taken from art.7(1) of the Rome Convention, but the first sentence is of narrower import than the equivalent provision in the Convention which allowed effect to be given to the mandatory rules of the law of another country with which "the situation has a close connection". [1361] In contrast, art.9(3) of the Regulation only allows account to be taken of relevant rules of the place of performance. Thus art.9(3) only appears to be relevant where a contract, valid by its applicable law, is alleged to be invalid by reference to that provision.

"Overriding mandatory provisions"

30-363

As explained earlier in this chapter, overriding mandatory provisions are defined in art.9(1) as:

> "… provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract"

under the Regulation. [1362] It will be noted that these rules are to be distinguished from "provisions which cannot be derogated from by agreement" referred to, for example, in art.3(3) of the Regulation, [1363] since they must possess the additional characteristic of being applicable irrespective of the law applicable to the contract. Such rules must be construed "more restrictively" [1364] than the rules referred to in art.3(3). But it would seem that art.9(1) necessarily entails the conclusion that it will be for the law of the country of which the rule forms part to determine whether it possesses the necessary characteristics and that the forum must scrutinise the rule to ensure that this is the case. [1365] Examples of potentially relevant rules might be provisions imposing economic sanctions on a particular country, [1366] rules imposing an embargo on exports to a particular country, [1367] rules imposing price, or exchange, controls [1368] and rules prohibiting cartels. [1369]

Relevant country

30-364

Article 9(3) allows effect to be given to overriding mandatory provisions of the "country where the obligations arising out of the contract have to be or have been performed". The relevant country (which need not be a Member State) may, thus be either the country where, as required by the contract, performance must take place, or the country where performance actually takes place if it is not required that performance take place there. [1370] The list of the overriding mandatory provisions to which the court of the forum may give effect in art.9 of the Rome I Regulation is exhaustive and must accordingly be interpreted as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed. [1371]

Performance "unlawful"

30-365

The relevant overriding mandatory provisions must render performance unlawful. It would seem that performance may be unlawful for these purposes if, at the time the contract is concluded, it would be unlawful to perform the relevant obligations [1372] and where performance becomes unlawful, subsequent to the conclusion of the contract, by reason of, e.g. supervening legislation. [1373] It would appear, however, to be insufficient that performance of the obligations under the contract has been excused, e.g. by force majeure. [1374]

Discretion

30-366

Article 9(3) contains a discretionary principle, in the sense that the forum is not required to give effect to the relevant provisions. This much is clear from the opening words of the provision ("effect may be given") and from the second sentence of the provision where supposed guidance is given as to the considerations to be taken into account in considering whether to give effect to the relevant provisions. Although it is said that the application of the provision is envisaged only in exceptional circumstances, [1375] it cannot be said with any confidence that reference to the "nature and purpose" of the relevant provisions and to "the consequences of their application or non-application" provides sure guidance. How these formulae will be applied remains to be seen and will doubtless depend on the circumstances of individual cases. It is suggested, however, that the forum will take account of the extent to which the "public interests" of the country to which the provisions belong will be furthered by application of the rule in the instant case, a factor which will have to be balanced against the interest of the country whose law is applicable to the contract in upholding the contract, and, perhaps, to the interests of the forum in upholding a contract valid by its applicable law. It is also suggested that it is inappropriate for the forum to take account of purely political considerations and that account should primarily be taken of considerations of legal policy which affect the parties to the contract, but it is not obvious that either formula referred to above enables a clash of these interests to be easily resolved. [1376]

Illegality under other foreign law

30-367

Illegality under any foreign law, be it the law of one party's nationality, [1377] or of a country where performance may, but need not, take place, [1378] or of the place of contracting [1379] does not per se affect the enforceability of the contract either at common law or, because of the United Kingdom's reservation to art.7(1) of the Convention, [1380] under the provisions of the Rome Convention. Article 9(3) of the Rome I Regulation, likewise, does not allow illegality by the law of a party's nationality or the law of the place of contracting to affect the validity of the contract per se, but it does open up the possibility of application of the law of the place of performance where the obligations arising out of the contract have been, but do not have to be, performed in a particular country. [1381]

Public policy [1382]

30-368

It is axiomatic, and a general principle of the conflict of laws, that the forum will not apply a foreign law which is contrary to the public policy of the forum. The public policy principle may have the result of rendering void or unenforceable a contract which is valid under its foreign governing law or it may result in the enforcement of a contract which is invalid by its governing law, if, in either case, the forum regards the public policy principle as applicable. The principle of public policy is recognised in art.16 of the Rome Convention which provides that the:

> "… application of a rule of law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum."

and art.21 of the Rome I Regulation, which provides, subject to substituting the words "rules of the law of any country" with the words "a provision of the law of any country", to identical effect. These provisions clearly reflect the common law subject to the expression "manifestly incompatible", an expression designed to indicate that overzealous resort should not be made to the public policy doctrine. [1383] It is also important to stress that art.16, art.21 and the common law are concerned with

public policy in the international sense, rather than the public policy in the domestic sense. Thus, for example, the fact that a contract, valid under its foreign governing law, lacks a requirement (e.g. consideration [1384]) which is essential to its validity under English law, is insufficient to render the public policy principle applicable. [1385] There must be some more fundamental objection to the application of a foreign law before public policy, in the international sense, may be invoked. [1386] Further, at common law and under art.16 of the Convention, it is the *application* of the foreign law in the circumstances of the case which must infringe English public policy rather than the *content* of the foreign law as such. [1387] The position will surely be the same under art.21 of the Rome I Regulation.

30-369

Since the application of the doctrine of public policy must depend very much on the circumstances of individual cases, it is not possible to categorise the situations justifying its invocation with any precision. However, in the past, English courts have refused to enforce champertous contracts, [1388] contracts in restraint of trade, [1389] contracts involving trading with the enemy, [1390] and contracts involving collusive arrangements for a divorce. [1391] The principle will also apply where the parties make the contract with the intention that its performance should involve the commission in a foreign and friendly country of an act which would violate that country's laws. [1392] It has also been held that public policy is infringed where the contract, or circumstances in which it was made, render it incompatible with English ideas of justice and morality. [1393] Thus a contract governed by (and valid by) its foreign applicable law may be held unenforceable in England because it was entered into as a result of coercion. [1394] And where a contract governed by English law involved a transaction, to be performed abroad, which was contrary to a head of English public policy based on general principles of morality, the same public policy applying in the country of performance, the contract was similarly unenforceable. [1395]

30-370

There is no reason to doubt that similar conclusions to the above may be reached by applying art.16 of the Rome Convention or art.21 of the Rome I Regulation subject, possibly, to the requirement that the application of foreign law be "manifestly incompatible" with public policy necessitating a more cautious view of the doctrine than was exhibited in some of the decisions rendered at common law, because the intention behind art.16 and art.21 is that public policy should be used in only exceptional circumstances. [1396] On the other hand, art.16 and art.21 import a new dimension into the content of public policy as understood in traditional English conflict of laws, for public policy, in these contexts, must be understood as including European Community public policy. [1397]

1337. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), paras 5–009, 32–083 et seq., 33R–181 et seq.; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), pp.139–146, 728–743, 758–761; Kaye, *The New Private International Law of Contract of the European Community* (1993), pp.239–268, 345–350; Peruzetto, *The Enforcement of International Contracts in the European Union* (2004), pp.343–361. The separate questions of illegality and public policy in the conflict of laws are, nonetheless, closely linked and not always clearly distinguished: see *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*; *Soleimany v Soleimany [1999] Q.B. 785*; *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd [1999] Q.B. 740 affirmed, [2000] Q.B. 288*. cf. *Ispahani v Bank Melli Iran [1998] Lloyd's Rep. Bank. 133*; *Tekron Resources Ltd v Guinea Investment Co Ltd [2004] EWHC 2577 (Comm), [2004] 2 Lloyd's Rep. 26*; *Barros Mattos Junior v MacDaniels Ltd [2004] EWHC 1188 (Ch), [2005] 1 W.L.R. 247*; *Marlwood Commercial Inc v Kozeny [2006] EWHC 872 (Comm)*; *Donegal International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397*; *R v V [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep. 97*.

1338. See the 26th edition of this work, paras 2187-2191.

1339. *Kahler v Midland Bank Ltd [1950] A.C. 24*; *Zivnostenska Banka v Frankman [1950] A.C. 57*; *Barros Mattos Junior v MacDaniels Ltd [2004] EWHC 1188 (Comm), [2005] 1 W.L.R. 247*. The rule rendering the contract illegal under the governing law will not be applied if to do so would

infringe English public policy: see *The Playa Larga [1983] 2 Lloyd's Rep. 171, 189–190*; see also *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 345–346, 351–352*.

1340. Rome Convention art.8(1), art.10(1) of the Regulation. This is, again, subject to compliance of the applicable law with English public policy: see *Hathurani v Jassat [2010] EWHC 2077 (Ch)*.

1341. e.g. *Clugas v Penaluna (1791) 4 T.R. 466*.

1342. e.g. *Boissevain v Weil [1950] A.C. 327*; *Shanshal v Al-Kishtaini [2001] EWCA Civ 264, [2001] 2 All E.R. (Comm) 601*.

1343. The relevant rule of English law must be one which is intended to affect the validity of contracts: see on this aspect of English domestic law, above, paras 16-023 et seq.

1344. Above, para.30-065. See *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161* (stating that mandatory rules of law of the forum should be given a narrow interpretation).

1345. Rome I art.9(1), above para.30-179, below, para.30-363. See *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161* (stating that mandatory rules of law of the forum should be given a narrow interpretation).

1346. Above, para.30-181, below paras 30-362 et seq. See *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161* (stating that mandatory rules of law of the forum should be given a narrow interpretation).

1347. *[1920] 2 K.B. 287*.

1348. *Zivnostenska Banka v Frankman [1950] A.C. 57, 78*; *Mackender v Feldia [1967] 2 Q.B. 590, 601*; *R. v International Trustee for the Protection of Bondholders AG [1937] A.C. 500, 519*; *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG [1939] 2 K.B. 678, 697–698*; *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701* at [46]–[47].

1349. *Kahler v Midland Bank Ltd [1950] A.C. 24, 48*; *Société Co-operative Suisse des Cereales, etc v Plata Cereal Co SA (1949) 80 Ll.L. Rep. 530, 543–544*: *Walton (Grain and Shipping) Ltd v British Italian Trading Co [1959] 1 Lloyd's Rep. 223, 236*; *Bangladesh Export Import Co Ltd v Sucden Kerry SA [1995] 2 Lloyd's Rep. 1, 5*; *Ispahani v Bank Melli Iran [1998] Lloyd's Rep. Bank. 133*; see also *Society of Lloyd's v Fraser [1998] C.L.C. 1630, 1652*; *Fox v Henderson Investment Fund Ltd [1999] 2 Lloyd's Rep. 303*; *Tekron Resources Ltd v Guinea Investment Co Ltd [2004] EWHC 2577, [2004] 2 Lloyd's Rep. 26*; *Continental Enterprises Ltd v Shandong Zucheng Foreign Trade Group Co [2005] EWHC 95 (Comm)*; *Marlwood Commercial Inc v Kozeny [2006] EWHC 872 (Comm)*; *Lilly Icos LLC v 8PM Chemists Ltd [2009] EWHC 1905 (Ch), [2010] F.S.R. 95* at [260]–[266]; Dicey, Morris and Collins, 15th edn (2012), paras 32–094 et seq.; Cheshire, North and Fawcett, pp.759–761; F.A. Mann (1937) 18 B.Y.I.L. 97, 107–113; Morris (1953) 6 Vand. L. Rev. 510; Reynolds (1992) 108 L.Q.R. 553.

1350. See above, paras 23-024 et seq.

1351. See authorities in n.1352, above.

1352. See authorities in n.1352, above.

1353. Contracts (Applicable Law) Act 1990 s.2(2) and Sch.1 art.22. See on the status of the *Ralli Bros* rule in the Convention context, Dicey, Morris and Collins, paras 32–148—32–151; Reynolds, above.

1354. See *Ispahani v Bank Melli Iran [1998] Lloyd's Rep. Bank. 133*. See also *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674, 733–734*; *Tekron Resources v Guinea Investment Co Ltd [2004] EWHC 2577*; *Marlwood Commercial Inc v Kozeny [2006] EWHC 872 (Comm)*.

1355. ⚠See *Eurobank Ergasias SA v Kallirio Navigation Co Ltd [2015] EWHC 2377 (Comm)*, approving this reasoning as expressed in the previous edition of this book.

1356. See below, paras 30-368 et seq.

1357. See Dicey, Morris and Collins, para.32–150. If the only remedy provided by the foreign law compelled the defendant to act illegally in the place of performance, as opposed to paying damages elsewhere, this might justify invocation of public policy as a last resort. cf. *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674, 733–734*.

1358. See Diamond (1986) 216 Recueil des Cours IV, 236, 296.

1359. Above, paras 30-334 et seq.

1360. ⚠See *Eurobank Ergasias SA v Kallirio Navigation Co Ltd [2015] EWHC 2377 (Comm)*, approving this reasoning as expressed in the previous edition of this book.

1361. Above, para.30-062, where it is also pointed out that art.7(1) of the Convention does not have the force of law in the United Kingdom; Cheshire, North and Fawcett, pp.738–741; Nishitani, *The Rome I Regulation: the Law Applicable to Contractual Obligations in Europe* (2009); Hellner (2009) 5 J. Priv. Int. L. 447.

1362. Above, para.30-179.

1363. Above para.30-179.

1364. ⚠Recital 37 to the Regulation. As a derogating measure, art.9 must be interpreted strictly: *Greece v Nikiforidis (C-135/15) [2017] I.C.R. 147* at [44].

1365. cf. above, para.30-064. cf. *United Antwerp Maritime Agencies NV (Unamar) v Navigation Maritime Bulgare (C-184/12) [2014] 1 Lloyd's Rep. 161* (stating that mandatory rules of law of the forum should be given a narrow interpretation). See also *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] EWHC 1987 (Comm)*: for Australian proceedings arising out of this case, see *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109*.

1366. cf. *Regazzoni v K.C. Sethia Ltd [1956] 2 Q.B. 490*; *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728*.

1367. cf. *Regazzoni v K.C. Sethia Ltd [1956] 2 Q.B. 490*; *Cie Europeene des Petroles SA v Sensor Nederland BV, The Hague, 1982 (1983) Int. Legal Mat. 66*.

1368. cf. *Ralli Bros v Compania Naviera Sota y Aznar [1920] K.B. 287*; *Ispahani v Bank Melli Iran [1998] Lloyd's Rep. Bank. 133*.

1369. cf. Dicey, Morris and Collins, 15th edn (2012), para.32–089.

1370. cf. *Kahler v Midland Bank Ltd [1950] A.C. 24* at 48; Dicey, Morris and Collins, 15th edn (2012), para.32–098.

1371. ⚠*Greece v Nikiforidis (C-135/15) [2017] I.C.R. 147* at [49].

1372. cf. *Regazzoni v K.C. Sethia Ltd [1956] 2 Q.B. 490*; *Foster v Driscoll [1929] 1 K.B. 470*.

1373. cf. *Ralli Bros v Compania Naviera Sota y Aznar [1920] K.B. 287*.

1374. cf. *Jacobs v Credit Lyonnais (1884) 12 Q.B.D. 589*.

1375. See Recital 37 to the Regulation.

1376. See Chong (2006) 2 J. Priv. Int. L. 27; Dickinson (2007) 3 J. Priv. Int. L. 53.

1377. *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG [1939] K.B. 678*; *Kahler v Midland Bank Ltd [1950] A.C. 24, 48*; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA [1979] 2 Lloyd's Rep. 98*.

1378. *Kahler v Midland Bank Ltd [1950] A.C. 24, 36, 39, 48*. And see *Zivnostenska Banka v Frankman [1950] A.C. 57, 79*; *Regazzoni v K.C. Sethia Ltd [1956] 2 Q.B. 490, 514, 523*; *Nile Co for the Export of Agricultural Crops v Bennett (Commodities) Ltd [1986] 1 Lloyd's Rep. 555, 581* . See also *Fox v Henderson Investment Fund Ltd [1999] 2 Lloyd's Rep. 303*.

1379. *Vita Foods Products Inc v Unus Shipping Co Ltd [1939] A.C. 277, 297–300*. See F.A. Mann (1937) 18 B.Y.I.L. 97, 107–113. cf. *The Torni [1932] P. 78*; *Re Missouri S.S. Co Ltd (1889) 42 Ch. D. 321, 336*; *The Hollandia [1983] 1 A.C. 565, 576*.

1380. See above, para.30-361.

1381. Rome I art.9(3), above, para.30-362.

1382. See also, above, para.30-068.

1383. *Continental Enterprises Ltd v Shandong Zucheng Foreign Trade Group Co [2005] EWHC 95 (Comm)*; Giuliano-Lagarde Report, p.38. In Recital 37 to the Rome I Regulation it is said that considerations "of public interest justify giving the courts of Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy".

1384. *Re Bonacina [1912] 2 Ch. 394*.

1385. See, e.g. Dicey, Morris and Collins, 15th edn (2012), para.32–188. The distinction is expressed by French jurists as one between ordre public interne and ordre public international.

1386. *Re COLT Telecom Group Plc [2002] EWHC 2815 (Ch), [2003] B.P.I.R. 324*; *Continental Enterprises Ltd v Shandong Foreign Trade Group Co [2005] EWHC 95 (Comm)*. Compare the language of Cardozo J. in *Loucks v Standard Oil Co of New York (1918) 224 N.Y. 99, 120 N.E. 198*: "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing the plaintiff what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home".

1387. There may be exceptional cases, however, where a foreign law involves such a serious infringement of human rights that it should not be recognised as law at all: see *Oppenheimer v Cattermole [1976] A.C. 249*. More generally on the relationship between public international law and public policy, see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 A.C. 883* at [15]–[29]. See also *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*; *Peer International Corp v Termidor Music Publishers Ltd [2003] EWCA Civ 1156, [2004] Ch. 212*. And see Collins (2002) 51 I.C.L.Q. 485. Public policy may also develop by reference to the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998. For consideration of public policy in this context, see *Krombach v Bamberski (C-7/98) [2000] E.C.R. I–1935, [2001] Q.B. 709*; *Regie National des Usines Renault SA v Maxicar SpA (C-38/98) [2000] E.C.R. I–2973*; *Maronier v Larmer [2002] EWCA Civ 774, [2003] Q.B. 620*; *Gambazzi v Daimlerchryser Canada Inc (C-394/07) [2010] Q.B. 388*. See also *Eurofood IFSC Ltd (C-341/04) [2006] E.C.R. I–3813, [2006] Ch. 508*. If such a development is to occur proper allowance should be made for the fact that the case contains foreign elements which are such that the merits of the case should be governed by foreign law according to the normal principles of the conflict of laws.

1388. *Grell v Levy (1864) 16 C.B.(N.S.) 73*; cf. *Trendtex Trading Corp v Crédit Suisse [1982] A.C. 679* ; *Camdex International Ltd v Bank of Zambia [1998] Q.B. 22*; *Fraser v Buckle [1996] 1 I.R. 1*. Although champerty has ceased to be a crime or a tort in England, Criminal Law Act 1967 s.14, it will render a contract illegal.

1389. *Rousillon v Rousillon (1880) 14 Ch. D. 351*, which should be restricted to restraint of trade affecting trade in England. And see *Duarte v Black and Decker Corp [2007] EWHC 2720 (QB), [2008] 1 All E.R. (Comm) 401*, above, para.30-112.

1390. *Robson v Premier Oil and Pipe Line Co [1915] 2 Ch. 124, 136*; *Dynamit A/G v Rio Tinto Co Ltd [1918] A.C. 260*.

1391. *Hope v Hope (1857) 8 De G.M. & G. 731*.

1392. *Regazzoni v K.C. Sethia Ltd [1958] A.C. 301*. And see *De Wutz v Hendricks (1824) 2 Bing. 314*; *Foster v Driscoll [1929] 1 K.B. 470*; *British Nylon Spinners v I.C.I. Ltd [1955] Ch. 37, 52*; *Euro-Diam Ltd v Bathurst [1990] 1 Q.B. 1*; *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*; *Ispahani v Bank Melli Iran [1998] Lloyd's Rep. Bank. 133*; *Soleimany v Soleimany [1999] Q.B. 785* (arbitration award based on such a contract unenforceable in England); *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd [1999] Q.B. 740, affirmed [2000] Q.B. 288* (public policy of sustaining international arbitration awards outweighed public policy of discouraging international commercial corruption); see also *Society of Lloyd's v Fraser [1998] C.L.C. 1630, 1652*; *Fox v Henderson Investment Fund Ltd [1999] 2 Lloyd's Rep. 303*. This rule applies, in all probability, to cases where a contract is governed by a foreign law as well as to cases where it is governed by English law (as was the case in *Regazzoni v K.C. Sethia Ltd*): see *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674, 692, 703, 734–736*; cf. *Ispahani v Bank Melli Iran*. It also applies where the object of the contract is to break the penal or revenue laws of a foreign country (*Regazzoni v K.C. Sethia Ltd*; *Re Emery's Investment Trusts [1959] Ch. 410*; *Euro-Diam Ltd v Bathurst*; *Soleimany v Soleimany*) or foreign exchange control legislation (*Kahler v Midland Bank Ltd [1950] A.C. 24, 27*; *Zivnostenska Banka v Frankman [1950] A.C. 57, 72*; *Re Helbert Wagg & Co Ltd's Claim [1956] Ch. 323, 349, 351*; *Re Lord Cable [1977] 1 W.L.R. 7, 24*; *Ispahani v Bank Melli Iran*, above). An English court will not *enforce* the penal or revenue or other public laws of a foreign country: see *Camdex International Ltd v Bank of Zambia [1997] C.L.C. 714*; Dicey, Morris and Collins, 15th edn (2012), paras 5–020 et seq. See also *Barros Mattos Junior v MacDaniels Ltd [2004] EWHC 118 (Ch), [2005] 1 W.L.R. 247*; *Marlwood Commercial Inc v Kozeny [2006] EWHC 872 (Comm)*; *Islamic Republic of Iran v Barakat Galleries Ltd [2007] EWCA Civ 1374, [2008] 1 All E.R. 1177*. As to exchange control in the conflict of laws, see Dicey, Morris and Collins, 15th edn (2012), paras 37R–061 et seq.

1393. *Kaufman v Gerson [1904] 1 K.B. 591*; *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*. See also *Robinson v Bland (1706) 2 Burr. 1077, 1084*; *Re Missouri S.S. Co (1889) 42 Ch. D. 321, 336*. A contract to oust the jurisdiction of a foreign court (unlike one to oust the jurisdiction of the English court) is not contrary to public policy: cf. *Addison v Brown [1954] 1 W.L.R. 779*.

1394. *Royal Boskalis Westminster NV v Mountain [1999] Q.B. 674*; *Kaufman v Gerson [1904] 1 K.B. 541*. In the former case it was stated, at 689, 729, that the degree of coercion exercised in the particular case is relevant, and whether the degree of coercion exercised in the latter case would be regarded as sufficient today was questionable. In *Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 A.C. 152, 158* it was held that whether a contract was void or voidable for duress depended on the law applicable to the contract, which was English law. However, if the law applicable to the contract is a foreign law and that law would regard the contract as valid despite the presence of duress of an unconscionable degree, the English court will refuse to enforce the contract on the grounds of public policy as happened in *Royal Boskalis Westminster NV v Mountain*, where a contract governed and valid by Iraqi law was procured by threats to use personnel as part of the "human shield" in the course of the Iraq-Kuwait conflict. In *Kaufman v Gerson*, a wife was held to have acted under duress by agreeing to pay sums to her husband's employer under a contract governed and valid by French law, on terms that the employer would refrain from bringing a criminal prosecution against the husband for misappropriation of the employer's funds, hardly duress of the same order.

1395. *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] Q.B. 448*. See also *Tekron Resources Ltd v Guinea Investment Co Ltd [2003] EWHC 2577 (Comm), [2004] 2 Lloyd's Rep. 26*; *Marlwood Commercial Inc v Kozeny [2006] EWHC 872 (Comm)*; *Donegal*

International Ltd v Zambia [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397; *R v V [2008] EWHC 1531 (Comm), [2009] 1 Lloyd's Rep. 97*.

1396. *Continental Enterprises Ltd v Shandong Foreign Trade Group Co [2005] EWHC 95 (Comm)*; Giuliano-Lagarde Report, p.38; Rome I Regulation Recital 37. Suspect decisions (at least on their facts) are, in particular, *Kaufman v Gerson [1904] 1 K.B. 591*; *Addison v Brown [1954] 1 W.L.R. 779*.

1397. Giuliano-Lagarde Report, p.38. On the concept of European Community public policy, see *Krombach v Bamberski (C-7/98) [2000] E.C.R. I–2973, [2001] Q.B. 709*; *Regie National des Usines Renault SA v Maxicar SpA (C-38/98) [2000] E.C.R. I–2973*; *Maronier v Larmer [2002] EWCA Civ 774, [2003] Q.B. 620*; *Eurofood IFSC Ltd (C-340/04) [2006] E.C.R. I–3813, [2006] Ch. 508*; *Gambazzi v Daimlerchryser Canada Inc (C-394/07) [2010] Q.B. 388*; Meidanis (2005) 30 E.L. Rev. 95. See above, para.30-069.

Chitty on Contracts 32nd Ed.

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Volume I - General Principles

Part 10 - Conflict of Laws

Chapter 30 - Conflict of Laws

Section 5. - Scope of the Applicable Law

(g) - Foreign Currency Obligations

Scope of discussion

30-371

The remaining paragraphs of this chapter seek to identify and discuss particular problems of practical importance which may arise, in a contractual context, out of what may be loosely described as “foreign currency obligations”. [1398] The separate treatment of these problems may be justified, first, on the ground that the elucidation of some of these problems involves reference to various different provisions of the Rome Convention and the Rome I Regulation which can be most coherently treated together. Secondly, some of these problems require discussion of rules of English domestic law and procedure rather than rules of the conflict of laws in the strict sense. [1399]

Principle of nominalism

30-372

Where a debt is expressed in the currency of any particular country, the debtor is under an obligation to pay the nominal amount of the debt in whatever is legal tender at the time of payment according to the law of the country in whose currency the debt is expressed, irrespective of any fluctuation in exchange rates which affect that currency. [1400] This principle, the principle of nominalism, applies to claims for unliquidated damages as well as to debts. [1401] As a principle of English domestic law, the principle of nominalism applies to debts and contracts governed by English law. [1402] Where a debt or contract is governed by a foreign law, it will be for that law to determine whether the principle of nominalism applies [1403] but since the principle appears to form “part of the legal systems of all civilised countries” [1404] there is little likelihood of its being inapplicable in any given case.

Legal tender

30-373

The law of the country in whose currency a contractual debt is expressed will determine what is regarded as legal tender for the purpose of its discharge. This is probably because by referring to a particular country’s currency, the parties agree (either impliedly, at common law, [1405] or by virtue of art.3(1) of the Rome Convention, or art.3(1) of the Rome I Regulation [1406]) that the law of that country will determine what constitutes the currency of that country. This result will ensue even if the contract as a whole is governed by a different law: the question of what is the legal tender of the currency in which the contractual debt is expressed will be regarded as a severable part of the contract capable of being governed by its own applicable law which will be the law of the country in whose currency the debt is expressed. [1407] No other law can rationally determine what is meant by that currency.

Money of account

30-374

The “money of account” is the currency in which a debt is expressed or a liability to pay damages is calculated as opposed to the currency in which that debt or liability is to be discharged, described as the “money of payment”. [1408] The former concept thus describes the currency in which the amount due is to be measured. Where the parties have not indicated in the contract itself the particular currency which is the money of account, the relevant currency must be identified by interpreting or construing the contract, the canons of interpretation or construction being those which prevail in the law which governs the contract. [1409] If English law is the applicable law, then in the absence of any intention emerging from the contract itself when construed according to English law, [1410] the parties will be presumed to have intended the currency of the country with which the contract is most closely connected. [1411] This may, but need not necessarily, be the country of the applicable law. [1412]

Currency of damages

30-375

Where damages are claimed for breach of contract, it may be necessary to determine the currency in which such damages are to be calculated, i.e. the money of account. In this context, however, the issue is not one of interpretation of the contract but rather one relating to the assessment of damages which, like interpretation, will be governed by the applicable law of the contract. [1413] If English law is the applicable law, it has been authoritatively stated that the:

> “[First] step must be to see whether, expressly or by implication, the contract provides an answer to the currency question. This may lead to selection of the ‘currency of the contract.’ If from the terms of the contract it appears that the parties have accepted a currency as the currency of account and payment [1414] in respect of all transactions arising under the contract, then it would be proper to give a judgment for damages in that currency … But there may be cases in which, although obligations under that contract are to be met in a specified currency, or currencies, the right conclusion may be that there is no intention shown that damages for breach of contract should be given in that currency or currencies. … If then the contract fails to provide a decisive interpretation, the damages should be calculated in the currency in which the loss was felt by the plaintiff or ‘which most truly expresses his loss.’ This is not limited to that in which it first or immediately arose. In ascertaining which this currency is the court must ask what is the currency, payment of which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation.” [1415]

Money of payment

30-376

The “money of payment” is the precise currency in which the debt or damages is actually payable. This, of course, need not necessarily be the money of account. [1416] Where there is no contractual stipulation as to the money of payment, it is, at common law, determined by the law of the country in which payment is made. [1417] This is because the question of what money tokens the debtor must tender to the creditor is one concerning the mode of performance which is, thus, referable to the law of the place of performance. [1418] Whether this principle continues to apply in cases falling within the Rome Convention or the Rome I Regulation depends upon the correct interpretation of art.10(2) of the Convention and art.12(2) of the Regulation. [1419] Each provision states, so far as relevant, that in relation to the “manner of performance … regard shall be had” to the law of the country in which

performance takes place. One might reasonably surmise that “manner of performance” can be equated with “mode of performance” in the common law context and it would, on this assumption, appear that the common law rule survives, subject to the possibility that, because of the wording of art.10(2) and art.12(2), the rule is of a discretionary character which did not seem to be the case at common law. [1420] One cannot be certain of this conclusion, however, because the Giuliano-Lagarde Report does not include the money of payment among the examples of issues governed by art.10(2) of the Convention. In contrast the Report suggests that “where performance consists of the payment of a sum of money, the conditions relating to the discharge of the debtor who has made the payment” [1421] are governed by art.10(1)(b) of the Convention. [1422] It is likely, however, that this observation is intended only to refer to the money of account. Accordingly, the English courts should interpret art.10(2) to include this issue. It is also submitted that the same interpretation should be accorded to art.12(2) of the Rome I Regulation.

30-377

Where English law is the law of the country of payment, there is a presumption that the money of payment is the same as the money of account. [1423] If the former currency differs from the latter, the exchange rate between them should, it is submitted be determined by the law applicable to the contract since the relevant rate of exchange is an aspect of the quantum of money tokens to be rendered. [1424] A sum payable in England under a contract governed by English law may be paid in units of the money of account or in sterling [1425]: if payment is tendered in sterling the rate of exchange is the rate at which, on the date when payment is due, units of the money of account can be purchased in London at a recognised and accessible market, irrespective of the official rate of exchange. [1426]

Judgments in foreign currency

30-378

Until 1975 it had long been accepted that an English court could only order the payment of debts or damages in English currency; this was so whether the judgment stemmed from a breach of a contract whose applicable law was English or foreign. [1427] The amount due to the judgment creditor in foreign currency had to be converted into sterling at the appropriate exchange rate when the cause of action arose, for example the date of the breach of contract. [1428] This much-criticised [1429] rule was abandoned by the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1430] where the court gave judgment expressed in Swiss francs for the payment of a debt due in that currency. The principle underlying the decision was expressed thus by Lord Wilberforce:

> “… the creditor has no concern with pounds sterling: for him what matters is that a Swiss franc for good or ill should remain a Swiss franc.” [1431]

As a result of the judicial developments which followed that landmark decision, it is now possible to state the law as to judgments in foreign currency with some degree of completeness. [1432] The court may give judgment for an amount expressed in foreign currency or its sterling equivalent at the date when the court authorises enforcement of the judgment [1433]—this latter being the closest practicable date to the date of actual payment, the ideal date for conversion. This rule applies to contractual actions whether the applicable law of the contract is foreign law [1434] or English law. [1435] It is clear that it is not restricted to claims for payment of debts [1436] but extends to claims for damages for breach of contract, [1437] whether the claim be for liquidated [1438] or unliquidated damages. [1439] The rules applicable to judgments have been held to be applicable to arbitration awards, [1440] though it may be that conversion is to be effected as at the date of the award, [1441] rather than at some date closer to that of payment. But the applicability of the rules to arbitral awards must now be read in the light of the decision of the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA*, [1442] discussed below. [1443]

30-379

The rule laid down in *Miliangos* is a rule of procedure, to be applied by English courts whatever may be the law applicable to the contract in issue. [1444] A judgment in foreign currency may be satisfied by payment of the sum due in that currency [1445] or by the appropriate sum in sterling converted as at "the date of payment", i.e. normally [1446] the date when the court authorises enforcement of the judgment in terms of sterling. There are a number of cases where a different conversion date is provided by statute. [1447]

30-380

The rate of interest on the judgment is a matter for the lex fori, even when the judgment is expressed in a foreign currency. [1448] By statute the English court may order that the rate of interest on foreign currency judgments shall be such rate as the court thinks fit. [1449]

Arbitral awards

30-381

Section 48(4) of the Arbitration Act 1996 provides that unless otherwise agreed between the parties in writing, [1450] an arbitral tribunal may order the payment of a sum of money in any currency. The effect of this provision was considered by the House of Lords in *Lesotho Highland Development Authority v Impregilo SpA*. [1451] In the preferred view of Lord Steyn, the power of the tribunal under s.48(4) was unconstrained by the case law pre-dating the 1996 Act. [1452] In the alternative he held that the fact that the tribunal had rendered the award in a currency other than that of the contract did not constitute a serious irregularity in the award, pursuant to s.68 of the Act, which would justify setting the award aside. It was merely an error of law by the tribunal which could not be challenged. [1453] Lord Scott of Foscote and Lord Rodger of Earlsferry preferred the latter view. Lord Hoffmann had reservations in respect of Lord Steyn's preferred view but chose not to express an opinion on the point. Lord Phillips of Worth Matravers dissented. In the light of these opinions it would seem that Lord Steyn's alternative view commands a majority. [1454]

1398. ⚠See Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Ch.37; Cheshire, North and Fawcett, Private International Law, 14th edn (2008), pp.101–109. For an exhaustive account of the problems in this area, see Mann on the Legal Aspect of Money, 7th edn (2012). See too, Law Com. No.124, 1983.

1399. As to interest, see above, paras 30-340 et seq.

1400. The principle goes back to *Gilbert v Brett (1604) Davis 18* (also known as the *Case de Mixt Moneys*). See too, *Re Chesterman's Trusts [1923] 2 Ch. 466*; *Ottoman Bank v Chakarian (No.2) [1938] A.C. 260*; *Pyrmont Ltd v Schott [1939] A.C. 145*; *Marrache v Ashton [1943] A.C. 311*; *Proctor and Gamble Co v Svenska Cellulosa Aktiebolaget SCA [2012] EWCA Civ 1413*. A party may, of course, be able to recover for exchange losses suffered as a result of late payment by the other party: see above, para.30-341. If the currency in which the debt is expressed is devalued between the date of the contract and the date when the payment is due, the question of whether the debt should be "revalorised" (i.e. whether a party should pay more to compensate for the devaluation) will be governed by the law applicable to the contract: *Anderson v Equitable Life Assurance Society of the United States (1929) 45 T.L.R. 468*; *Re Schnapper [1936] 1 All E.R. 322*; *Kornatzki v Oppenheimer [1937] 4 All E.R. 133*; Rome Convention art.10(1)(b); Rome I Regulation art.12(1)(b). See generally Dicey, Morris and Collins, 15th edn (2012), paras 37–036 et seq. Parties may seek to guard against fluctuations in exchange rates by inserting a "gold clause" or similar "protective" clause into the contract: see Dicey, Morris and Collins, 15th edn (2012), paras 37–041 et seq. On the implications of the implementation of a single European currency, see Dicey, Morris and Collins, 15th edn (2012), paras 37–008 et seq.; Mance [1997] European Business L. Rev. 266; Blair [1997] European Business L. Rev. 228.

1401. *The Despina R [1979] A.C. 685, 698*.

1402. *Re Chesterman's Trusts [1923] 2 Ch. 466*.

1403. Dicey, Morris and Collins, para.30–008. See *Société des Hôtels Le Touquet-Paris-Plage v Cummings [1922] 1 K.B. 451*.

1404. Dicey, Morris and Collins, para.36–008.

1405. *Re Chesterman's Trusts [1923] Ch. 466, 483*; see above, para.30-011.

1406. i.e. this suffices to demonstrate a choice with reasonable certainty for the purposes of art.3(1) of the Convention or to clearly demonstrate a choice for the purposes of art.3(1) of the Rome I Regulation: see above, paras 30-046 et seq., 30-169 et seq.

1407. Rome Convention art.3(1) and Rome I Regulation art.3(1) which permit parties to select a law applicable to a part only of a contract: see above, paras 30-055 et seq., 30-174.

1408. See Dicey, Morris and Collins, 15th edn (2012), para.37–004.

1409. Rome Convention art.10(1)(a); Rome I Regulation art.12(1)(a). *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd [1934] A.C. 122*; *Auckland Corp v Alliance Assurance Co Ltd [1937] A.C. 587*; *De Bueger v Ballantyne & Co [1938] A.C. 452*; *Bonython v Commonwealth of Australia [1951] A.C. 201*; *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd [1952] A.C. 493*; *National Mutual Life Association of Australasia Ltd v AG for New Zealand [1956] A.C. 493*.

1410. See, e.g. *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Q.B. 189*.

1411. *Bonython v Commonwealth of Australia [1951] A.C. 201*; *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd [1952] A.C. 493*; *W.J. Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 Q.B. 189*; *Addax Bank BSC v Wellesley Partners LLP [2010] EWHC 1904 (QB)*.

1412. *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd [1934] A.C. 122*; *Bonython v Commonwealth of Australia [1951] A.C. 201*. The process of determining the money of account in English domestic law is similar to, but not, as these cases show, identical with the process of determining the law applicable to the contract according to English conflicts rules. See Dicey, Morris and Collins, 15th edn (2012), paras 37–021 et seq.

1413. Rome Convention art.10(1)(c); Rome I Regulation art.12(1)(c): *Services Europe Atlantique Sud v Stockholms Rederaktiebolag Svea [1979] A.C. 685*.

1414. i.e. the money of account and the money of payment: see text at n.1412, above and below, paras 30-376 et seq. For an example, see *Rogers v Markel Corp [2004] EWHC 2046 (QB)*, although the contract in this case was governed by the law of Virginia which seems to be the same on this point as English law.

1415. *Services Europe Atlantique Sud v Stockholms Rederaktiebolag Svea [1979] A.C. 685*. See *Bain v Field (1920) 5 Ll.L. Rep. 16*; *Ottoman Bank v Chakarian (No.1) [1930] A.C. 277*; *Kraut AG v Albany Fabrics Ltd [1977] Q.B. 182*; *Société Francaise Bunge SA v Belcan NV [1985] 3 All E.R. 378*; *Metaalhandel J.A. Magnus BV v Ardfields Transport Ltd [1988] 1 Lloyd's Rep. 471*; *The Texaco Melbourne [1994] 1 Lloyd's Rep. 473* (loss felt in Ghanaian cedis and measured in that currency despite fall in rate of exchange from 2.75 cedis to dollar at date of breach to 375 at date of judgment; criticised by Knott [1994] L.M.C.L.Q. 311); *Virani Ltd v Manuel Revert Y Cia SA [2003] EWCA Civ 1651, [2004] 2 Lloyd's Rep. 14*. See also *B.P. Exploration Co (Libya) Ltd v Hunt (No.2) [1981] 1 W.L.R. 232 (affirmed [1983] A.C. 352* (restitutionary award under Law Reform (Frustrated Contracts) Act 1943)).

1416. See above, paras 30-375 et seq. The contract may expressly or impliedly stipulate, or one party

may give the other an option to elect, that the money of account and money of payment should be different: see, e.g. *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] A.C. 741* (money of account Nigerian, buyers of goods given option to choose between paying in Nigerian currency or sterling).

1417. *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd [1934] A.C. 122*; *Auckland Corp v Alliance Assurance Co Ltd [1937] A.C. 587*; *Mount Albert BC v Australasian etc. Life Assurance Society Ltd [1930] A.C. 224*.

1418. Dicey, Morris and Collins, 15th edn (2012), paras 37–053 et seq.

1419. See above, paras 30-333 et seq.

1420. See above, paras 30-333 et seq.

1421. Giuliano-Lagarde Report, pp.42, 43.

1422. Above, paras 30-333 et seq.; Rome I Regulation art.12(1)(b), above, paras 30-333 et seq.

1423. See *Auckland Corp v Alliance Assurance Co Ltd [1937] A.C. 587*.

1424. Dicey, Morris and Collins, 15th edn (2012), paras 37–054 et seq.

1425. *Marrache v Ashton [1943] A.C. 311*; *Syndic for Khoury v Khayat [1943] A.C. 507, 514*; Dicey, Morris and Collins, para.36–004. cf. *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd [1952] A.C. 493*; *National Mutual Life Association of Australia Ltd v AG for New Zealand [1956] A.C. 369*. If payment in the foreign currency is impossible, the debtor must pay in sterling: he cannot choose to pay in the foreign currency and then claim that the obligation is discharged or suspended by reason of the impossibility: *Libyan Arab Foreign Bank v Bankers Trust Co [1989] Q.B. 728*.

1426. *Marrache v Ashton [1943] A.C. 311*; *Syndic for Khoury v Khayat [1943] A.C. 507*; *Barclays Bank International Ltd v Levin Brothers (Bradford) Ltd [1977] Q.B. 270*; *George Veflings Rederi A/S v President of India [1979] 1 W.L.R. 59*. *Graumann v Treitel [1940] 2 All E.R. 188* may be explicable on the ground that German law was the applicable law of the contract (see Dicey, Morris and Collins, 15th edn (2012), para.37–055). For a case where there was no recognised and accessible market and no commercial rate of exchange, see *Re Parana Plantations Ltd [1946] 2 All E.R. 214*.

1427. *Manners v Pearson [1989] 1 Ch. 581*; *Tomkinson v First Pennsylvania Banking and Trust Co [1961] A.C. 1007*.

1428. e.g. *Di Ferdinando v Simon Smits & Co [1920] 2 K.B. 409*.

1429. *The Teh Hu [1970] P. 106, 124, 127*; *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] Q.B. 292*; *Schorsch Meier GmbH v Hennin [1975] Q.B. 416*.

1430. *[1976] A.C. 443*.

1431. *[1976] A.C. 443, 466*.

1432. These developments are not restricted to contractual claims but would appear to apply to all claims made in foreign currency: see, e.g. *The Despina R. [1979] A.C. 685*; *Hoffman v Sofaer [1982] 1 W.L.R. 1350* (tort); *B.P. Exploration Co (Libya) Ltd v Hunt (No.2) [1979] 1 W.L.R. 783, 840–841 (affirmed [1983] 2 A.C. 352 (restitution)*); *Re Dynamics Corp of America [1976] 1 W.L.R. 757*; *Re Lines Bros Ltd [1983] Ch. 1*; *Re Lines Bros Ltd (No.2) [1984] Ch. 438* (winding up); *Choice Investments Ltd v Jeromninon [1981] 1 Q.B. 149* (garnishee order against English bank); *Re A Debtor (No.51–SD–1991) [1992] 1 W.L.R. 1294* (debt in statutory demand under Insolvency Act 1986); *Carnegie v Giessen [2005] EWCA Civ 191, [2005] 1 W.L.R. 2610* (charging order may be expressed in foreign currency); *Re Telewest Communications Plc*

[2004] EWHC 924 (Ch), [2004] B.C.C. 342, affirmed [2004] EWCA Civ 728, [2005] B.C.C. 29 (to determine the number of shares to be transferred to claimants under scheme of arrangement pursuant to Companies Act 1985 s.425 (now Companies Act 2006 ss.895 et seq.) it was necessary to express all claims covered by the scheme in a single currency and for this purpose sterling claims were to be converted into US dollars in accordance with average exchange rate); *Fearns v Anglo-Dutch Paint & Chemical Co Ltd [2010] EWHC 2366 (Ch), [2011] 1 W.L.R. 366* (set-off). See, too, *Re Scandinavian Bank Group Plc [1988] Ch. 87* (s.2(5)(a) of the Companies Act 1985 does not require company to have share capital only denominated in sterling). The principle in *Re Scandinavian Bank Group Plc* is now to be found in Companies Act 2006 s.542(3) which provides that shares in a limited company having a share capital may be denominated in any currency and different classes of shares may be denominated in different currencies, subject to s.765, concerned with the EU requirement that the amount needed for the authorised minimum capital of a public company must either be in sterling or euros.

1433. *Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443*; CPR para.40.2.3; and see *The Halcyon Skies [1977] 1 Lloyd's Rep. 22*; *George Veflings Rederi A/S v President of India [1978] 1 W.L.R. 982 (affirmed [1979] 1 W.L.R. 59)*. For counterclaims, see *The Transoceanica Fransesca [1987] 2 Lloyd's Rep. 155*; *Smit Tak International Zeesleepen Bergingsbedriff BV v Selco Salvage Ltd [1988] 2 Lloyd's Rep. 398*; *Mullan v Giambrone [2013] N.I.Q.B. 46*. As to pleading claims in foreign currency, see CPR 1998 PD 16 para.12.1.

1434. e.g. *Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443*.

1435. e.g. *Federal Commerce and Navigation Co Ltd v Tradax Export SA [1977] Q.B. 324* (reversed on another ground *[1978] A.C. 1*); *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd [1977] Q.B. 270*; *Services Europe Atlantique Sud v Stockholms Rederaktiebolag Svea [1979] A.C. 685*.

1436. *Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443*; *Barclays Bank International Ltd v Levin Brothers (Bradford) Ltd [1977] Q.B. 270*.

1437. *Services Europe Atlantique Sud v Stockholms Rederaktiebolag Svea [1979] A.C. 685*; *Société Francais Bunge SA v Belcan NV [1985] 3 All E.R. 378*.

1438. *Federal Commerce and Navigation Co Ltd v Tradax Export SA [1977] Q.B. 324, 341–342, 349, 354* (reversed on another point *[1978] A.C. 1*).

1439. *Services Europe Atlantique Sud v Stockholms Rederaktiebolag Svea [1979] A.C. 685*; and see *Kraut AG v Albany Fabrics Ltd [1977] Q.B. 182*.

1440. *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] Q.B. 292*.

1441. *[1974] Q.B. 292, 305*; cf. *Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443, 469*.

1442. *[2005] UKHL 43, [2006] 1 A.C. 221*.

1443. See para.30-381.

1444. *[1976] A.C. 443, 465*; and see *The Despina R. [1979] A.C. 685, 704*. As a rule of procedure it is unaffected either by the Rome Convention or by the Rome I Regulation.

1445. See CPR r.40.2.3.

1446. The appropriate date in the case of winding-up (both compulsory and voluntary) is that of the winding-up order or resolution: *Re Dynamics Corp of America [1976] 1 W.L.R. 783*; *Re Lines Bros Ltd [1983] Ch. 1*; *Re Lines Bros (No.2) [1984] Ch. 438*. See Insolvency Rules 1986 r.4.91 and in bankruptcy, where the relevant date is the date of the bankruptcy order r.6.111.

1447. See, e.g. Carriage by Air Act 1961 Sch.1 art.22(5) (date of judgment); see Dicey, Morris and

Collins, para.36R–081.

1448. Dicey, Morris and Collins, 15th edn (2012), para.37–088.

1449. Judgments Act 1838 s.17, as amended by Administration of Justice Act 1970 s.44 and SI 1998/2940; Administration of Justice Act 1970 s.44A, inserted by Private International Law (Miscellaneous Provisions) Act 1995 s.1(1). For judgments in the county court, see County Courts Act 1984 s.74(5A), inserted by Private International Law (Miscellaneous Provisions) Act 1995 s.2. The foregoing sections give effect to recommendations of the Law Commission: see Law Com. No.124, 1983, paras 4.1–4.15.

1450. Arbitration Act 1996 s.5(1). See also *Milan Nigeria Ltd v Angeliki B Maritime Co [2011] EWHC 892 (Comm)*.

1451. *[2005] UKHL 43, [2006] 1 A.C. 221*. And see *C v D [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239*.

1452. *[2005] UKHL 43* at [22]. See *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] Q.B. 292*.

1453. *[2005] UKHL 43* at [23].

1454. As to an arbitral tribunal's power to award interest, see Arbitration Act 1996 s.49.