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Conflict of laws

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NOTES

Module descriptor

GENERAL INFORMATION

Module title

Conflict of laws

Module code

LA3014

Module level

6

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk

Credit value

30

Courses in which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Conflict of laws is offered as an optional module to students studying on the Standard Entry and Graduate Entry LLB courses. It is also offered as an individual module. Credits from an individual module will not count towards the requirements of the LLB.

Also known as private international law, this is the body of rules applied by the English courts to cases with a foreign element, dealing with core issues of jurisdiction, substantive decision making and recognition of the laws of other jurisdictions. Existing case law has been developed in recent years with the statutory implementation of international conventions and Law Commission reports – but there are questions as yet unsettled, which increases the importance of academic writing and also gives students the chance to present their own solutions.

MODULE AIM

This module introduces students to:

1. Set out the conditions under which a court is competent to hear an action (the question of jurisdiction);
2. Determine by what law the rights of the parties are to be ascertained (the question of choice of law);
3. Specify the circumstances in which the foreign judgment can be recognised and enforced by action in England (the question of recognition and enforcement of foreign judgments).

LEARNING OUTCOMES: KNOWLEDGE

Students are expected to have knowledge and understanding of the main concepts, principles and rules of conflict of laws. In particular they should be able to:

1. Demonstrate a fundamental knowledge and understanding of the purpose and sources and the main elements of conflict of laws;
2. Demonstrate knowledge of a substantial range of major concepts, values, principles and rules of conflict of laws and explain the relationship between them in a number of areas;
3. Demonstrate study in depth and in context of a number of substantive areas of conflict of laws;
4. Demonstrate knowledge and understanding of the social, economic, moral and ethical context of conflict of laws;
5. Demonstrate an understanding of solutions to legal challenges arising from conflict of laws.

LEARNING OUTCOMES: SKILLS

Students completing this module should be able to demonstrate the ability to:

6. Apply legal principles to a range of specific conflict of laws-based problems and present reasoned arguments and conclusions;
7. Demonstrate effective written communication skills in assessed work using appropriate legal terminology specific to conflict of laws;
8. Demonstrate effective reading of legal sources;
9. Conduct complex research tasks using hard copy and online resources and analyse and interpret legal questions and problems;
10. Critique key arguments in judicial opinions and academic writings.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

a. *The nature of private international law.*

b. *Fundamental conceptions: classification. Renvoi.* Public policy. Evasion of the law. The incidental question. Time factor.

c. *Connecting factors, in particular domicile and habitual residence*. Comparison with nationality.

d. *The rules relating to the jurisdiction of English courts in cases involving a foreign element.* Staying foreign actions: the *forum non conveniens* doctrine.

e. *The principles of English private international law relating to the following matters:* Persons: status and capacity. Corporations. The family: validity and effects of marriage. Divorce. Nullity of marriage. Maintenance obligations. Legitimacy. Contracts: form. Interpretation. Illegality. Discharge. Torts. Property: movables and immovable. Transfer of tangible and intangible property. Intestacy. Wills. Administration of estates. Trusts. Procedure and evidence: proof of foreign law. Recognition and enforcement of foreign judgments and decrees.

Note: The syllabus does not include bankruptcy, negotiable instruments, the equitable doctrines of election, satisfaction and performance.

LEARNING AND TEACHING

Module guide

Module guides are the students' primary learning resource. The module guide covers the topics in the syllabus and provides the student with the grounding to complete the module successfully. The module guide includes the Module Descriptor that sets out the learning outcomes that must be achieved. The guide also includes the Core text, Essential and Further reading and a series of activities designed to enable students to test their understanding and develop the relevant skills. The module guide is supplemented each year with the pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- mini lectures are provided for some modules;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple choice questions with feedback are available for some modules.

The Online Library

The Online Library provides access to:

- the professional legal databases Lexis+ and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core texts

Students should refer to the following core texts and specific reading references are provided for this text in each chapter of the module guide:

- **Hill, J. and M. Ní Shúilleabháin *Clarkson & Hill's conflict of laws*. (Oxford: Oxford University Press, 2016) fifth edition [ISBN 9780198732297].**
- **Torremans, P. et al. (eds) *Cheshire, North & Fawcett: private international law*. (Oxford: Oxford University Press, 2017) 15th edition [ISBN 9780199678990].**

ASSESSMENT

Learning is supported through tasks in the module guide and online activities. The formative assessment will help students to reach the module learning outcomes tested in the summative assessment.

Summative assessment is through a timed unseen examination. Students must answer three questions out of six from a choice of essay and problem questions. Please be aware that the format and mode of assessment may need to change in light of events beyond our control. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

During the assessment for this module, you are permitted to access the following:

- ***Hart core statutes on conflict of laws 2023–24*** **(Bloomsbury).**

1 Introduction

Contents

Introduction

Whenever English law addresses a legal problem that has a foreign element, there is a potential conflict of laws. Suppose you buy a computer in New York, but when you return to England it turns out to be faulty. You want to have it replaced, as would be your right against the retailer in English law, but the US retailer refuses to respond. If the matter comes to court, whose laws should apply – those of England, or those of the USA? Suppose you go to live and work in the Middle East, meet someone and have a child. If you later marry the person and return to live in London, whose laws determine the validity of the marriage and the legitimacy of the child? Alternatively, if your company sold unsatisfactory goods to a foreign country, and a judgment was made against you there, could that judgment be enforced in England?

These are complex issues, particularly since there are many different countries with different legal systems. In essence, whenever conflict of laws arises, the key issues are:

- Whose courts have jurisdiction?
- Whose laws are to be used?
- Can the judgment be enforced?

These questions are at the core of this module guide, and they range across every facet of human activity in which the law may play a role.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **explain the three questions that are asked by 'conflict of laws'**
- **define what is meant by foreign law**
- **use the concepts and language of conflict of laws appropriately**
- **identify what aspects of a case will be considered procedural rather than substantive.**

1.1 What is 'conflict of laws'?

1.1.1 The questions posed by conflict of laws

Conflict of laws is that part of English law which comes into operation whenever we are confronted by a legal problem that has a foreign element. Foreign elements can be of many kinds. For example, a contract may be made in France; it may require delivery of goods to Canada. An accident may occur as a result of negligence in Italy: the driver comes from Paris, the injured from England and they wish to pursue litigation in an English court. A painting may be stolen from an art gallery in Dresden and sold by the thief to an art dealer in Switzerland; the painting is now to be auctioned in London and, not surprisingly, the Dresden gallery, having traced the painting, wants it back. An English woman has gone through a ceremony of marriage in Pakistan; the marriage is in polygamous form and she subsequently discovers her 'husband' has two other wives. She wants to know her status: is she married or not and is her marriage polygamous or monogamous? If he attempts to divorce her using a method acceptable within his religion (the *talaq*), she wants to know what effect this will have in England. These are just a few examples of foreign elements.[†] You will see as you study this subject that there are many others.

[†] What other problems can you think of which have foreign elements?

Conflict of laws poses three questions or, to put it another way, there are three main aims of this subject. They are:

- To set out the conditions under which a court is competent to hear an action. This is the question of **jurisdiction**.
- To determine by what law the rights of the parties are to be ascertained. In a contract dispute, for example, it is necessary to determine the law governing the contract (its 'applicable law'). This is the question of **choice of law**.
- Where a dispute has been litigated in another country, to specify the circumstances in which the foreign judgment can be recognised and enforced by action in England. This is the question of **recognition and enforcement of foreign judgments**.

The first two questions must be asked and answered every time we are faced with a problem which has a foreign element. The third question only arises where there is a foreign **judgment**.

What is meant by 'foreign law'?

For the purposes of conflict of laws the expression 'foreign law' (or 'foreign system of law') means a legal system in a territory other than that in which the court functions. So, as far as an English court is concerned, Scots law is no less foreign than French law or the law of South Korea or the law in a Commonwealth country.

1.1.2 The concepts and language used

There is a clear structure to conflict of laws. It has a methodology, and this section will introduce you to it. As we have already said, it will first have to be determined whether the court has **jurisdiction**. The question of jurisdiction is highly significant and there are complex rules (which will be discussed in later chapters). For the moment we will assume that the English court has jurisdiction both over the parties and the cause of action.

The next stage is to determine the **juridical nature** of the question that requires a decision. For example, is it a question of breach of contract or the commission of a tort? Is it a question about capacity to marry or one relating to whether the appropriate formalities of marriage have been observed? Until this question is answered, it is impossible to apply the appropriate rule for the choice of law and thus to ascertain the applicable law. Therefore, it is essential to **characterise** the cause of action. Is it contract or tort? Is it capacity (also known as essential validity) to marry or formal validity of marriage? Having characterised (this is sometimes described as 'classifying'), the court must select the legal system that governs the matter. Conflict

lawyers call this the *lex causae* (the law applicable to the dispute). This is the first of a number of classical expressions in Latin which all students of Conflict of laws must learn and use.

Connecting factors

The selection of the governing law is conditioned by what is called a **connecting factor**. This varies with the facts and circumstances. For example, say a British subject dies intestate, domiciled in Italy, and leaves shares in England and a house in Scotland. The shares (which belong to a category of property called **movables**) will be distributed according to his *lex domicilii* (the law of his domicile) – in other words, according to Italian law. His house (which belongs to a category of property called **immovables**) will be distributed according to the *lex situs* (the law of the place where the property is situated) – which is the law of Scotland.

There are numerous connecting factors and you will learn and use these in the course of studying this subject. It may be helpful if the main examples are set out here.

The main personal connecting factor in England is the *lex domicilii* (the law of the domicile). Civil law jurisdictions (France, Germany, Italy, etc.) use instead the *lex patriae* (the law of nationality). In English law there is also increasing use of residence, particularly **habitual residence**, as a personal connecting factor. The personal connecting factor is dominant in many questions of family law, for example where someone has the capacity to marry. Not all family law questions are governed by it: for example, if the question arises as to the validity of a marriage which does not comply with the local law, this is referred to by a different connecting factor, the *lex loci celebrationis* (the law of the place where the marriage is celebrated).

Other connecting factors include:

- *lex fori* (the law of the court in which the trial is taking place) (for example, questions of procedure are so governed)
- *lex contractus* (the law which governs a contract): at common law this was referred to as the **proper law**: under the Rome I Regulation it is referred to as the 'applicable law'
- *lex loci delicti* (the law of the place where the tort was committed)
- *lex loci actus* (the law of the place where a transaction was carried out)
- *lex incorporationis* (the law of the place of incorporation): this governs assignments of registered shares
- *lex protectionis* (the law under which legal protection of an intellectual property right is conferred).

1.2 Procedure and substance

CORE TEXT

- **Clarkson and Hill, Chapter 4 'Contractual obligations', Section III 'Determining the applicable law' and Section IV 'The limits of the applicable law': A 'Introduction' and B 'Limits on freedom of choice'. (See Section 1.3 'Reading'.)**

There is one aspect of conflict of laws in which the domestic law of the country where the legal proceedings are taking place is dominant. All matters of **procedure** are governed by the *lex fori* (in our case, English law). This means that a rule of the *lex causae* which conflicts with it will not be applied. In simple terms, the *lex causae* governs issues of substance, not those of procedure. Of course, a question of characterisation may arise: is the issue one of procedure or of substance?

1.2.1 What matters are procedural?

You must grasp this distinction and have an understanding of which issues are regarded as matters of procedure. We only offer an outline (a) because much of the detail is for the practitioner rather than the student, and (b) because some of the questions (e.g. damages) are easier to understand when substantive areas of law (e.g. torts) are studied.

By the end of this section you should, however, understand the distinction between substance and procedure and its significance, and have an insight into the main issues which English law regards as within the remit of its own law because it characterises them as procedural.

Matters characterised as procedural include the following.

The nature of the remedy

The forum grants its own remedies. Nevertheless, English law will refuse a remedy if it is so different from that provided by the *lex causae* as 'to make the right sought to be enforced a different right' (*Phrantzes* v *Argenti* [1960] 2 QB 19, 36).

The method of enforcing a judgment

The *lex fori* determines what property of the defendant is available to satisfy the judgment, and in what order.

Parties

This is about who can sue and be sued. Thus, it has been held that proceedings cannot be commenced in the name of a dead person even though this was possible by the *lex causae* (*Banque Internationale de Commerce de Petrograd* v *Goukassow* [1923] 2 KB 682). However, if a foreign entity enjoys legal personality under the law where it was established, it can participate in English proceedings. An example is the Indian temple ('little more than a pile of stones') in *Bumper Development Corp* v *Commissioner of Police for the Metropolis* [1991] 1 WLR 1362.

Evidence

This includes questions such as: whether a witness is competent or not, whether something needs to be proved by writing or not, whether certain evidence proves a certain fact or not or whether something is admissible as evidence. One area of difficulty is **presumptions**. Irrebuttable presumptions of law (e.g. that in s.184 of the Law of Property Act 1925 that the older person dies first) are rules of substance (*Re Cohn* [1945] Ch 5). Many rebuttable presumptions (e.g. presumption of resulting trust) are also rules of substance. It is less certain whether, for example, a presumption of marriage or legitimacy is a rule of substance or one of procedure.

Statutes of limitations

At common law, this was regarded as procedural. The law was changed by the Foreign Limitation Periods Act 1984 and it is now a substantive matter. However, realising that an English court might encounter a very long limitation period (say 50 years) or a very short one (say six months), s.2(1) of the Act provides that a court can refuse to apply a foreign law which conflicts with English policy: the *lex fori* would then be applied. This provision was invoked in a case where the foreign limitation period was 12 months and the plaintiff had spent some of this time in hospital and had been led to believe her claim would be met (*Jones* v *Trollope Colls Cementation, The Times,* 26 January 1990).

Self-assessment questions

1. **Why do you think matters of procedure are governed by the *lex fori?* On what basis should the characterisation of a rule be based? Look at *Re Cohn* [1945] Ch 5 or *Leroux* v *Brown* [1852] 12 CB 801.**
2. **F and D are domiciled in X. D is F's daughter. D claims that by the law of X F is under an obligation to provide her with a dowry. The amount of the dowry**

is within the discretion and varies in accordance with F's wealth and social position and the number of his children, and with D's behaviour. F is now in England and D sues him. What problems will she have? *Phrantzes* v *Argenti* [1960] 2 QB 19 may help you.

3. **M, who is domiciled in Y, leaves by will movable property to her daughter, D, who is also domiciled in Y. M and D came to England as refugees. M and D are killed in a car crash. It is uncertain which of them died first. By the law of Y they are presumed to have died together. English law (see s.184 of the Law of Property Act 1925) says M died first. Which rule will an English court apply? Look at *Re Cohn* [1945] Ch 5.**
4. **A is injured in a road accident in Z caused by the negligence of an employee of B and Co. She spends seven months in hospital. She then starts proceedings in England within the three-year English limitation period, but after the expiry of the one-year limitation period under the law of Z. Will the English court apply the limitation period of the law of Z?**

Summary

One question which the *lex fori* reserves for itself and thus excludes from the scope of the *lex causae* concerns matters of procedure. There are characterisation problems here (see Chapter 2), for it is by no means certain whether something is substantive or procedural. In most areas, however, the law is fairly clear, as the examples given in this chapter show.

1.3 Reading

Core texts

We recommend the following, and they are repeatedly referred to in the chapters that follow. In subsequent chapters we will refer to these texts by their short form: 'Clarkson and Hill', 'Cheshire, North and Fawcett', 'Dicey, Morris and Collins', 'Hartley', etc.

- **Hill, J. and M. Ní Shúilleabháin *Clarkson & Hill's conflict of laws*. (Oxford: University Press, 2016) 5h edition [ISBN 9780198732297]. This is a straightforward presentation of the subject (referred to as Clarkson and Hill throughout the module guide).**
- **Torremans, P. et al. (eds) *Cheshire, North & Fawcett: private international law*. (Oxford: Oxford University Press, 2017) 15th edition [ISBN 9780199678990]. This is much more detailed and more rigorously analytical. But it is also more difficult for a beginner (referred to as Cheshire, North and Fawcett throughout the module guide).**

Other useful textbooks

- **Briggs, A. *The conflict of laws*. (Oxford: Oxford University Press, 2019) 4th edition [ISBN 9780198845232] (available in VLeBooks via the Online Library). 'Briggs' is short, very thoughtful and excellent once you have grasped the detail from Clarkson and Hill or Cheshire, North and Fawcett. It is a perfect revision instrument and will stretch your thinking.**
- **Hartley, T.C. *International commercial litigation: text, cases and materials on private international law*. (Cambridge: Cambridge University Press, 2020) 3rd edition [ISBN 9781108721134] (available in Cambridge Core via the Online Library). This book makes very interesting reading on issues of jurisdiction as it provides a detailed analysis of the Brussels Regulation (recast).**
- **Rogerson, P. *Collier's conflict of laws*. (Cambridge: Cambridge University Press, 2013) 4th edition [ISBN 9780521735056].**
  'Collier' is an alternative to Clarkson and Hill. It is very student-friendly and written in a lively style. It is not as comprehensive as Clarkson and Hill or Cheshire, North and Fawcett.

Practitioner text

- **Lord Collins of Mapesbury and J. Harris (eds) *Dicey, Morris & Collins: the conflict of laws*. (London: Sweet & Maxwell, 2022) 16th edition [ISBN 9780414102040]. *Dicey, Morris & Collins* is excellent for reference purposes; there are regular supplements to the two bulky volumes (the supplements are themselves substantial, and have their own ISBNs). It is to be hoped that you will be able to access it in a local university library, as it is very expensive.**

Cases

You should read as many cases as you can, and certainly those indicated in this text. As you study, think about the rules, the principles underlying them and the policies they uphold. Conflict of laws is both practical and highly academic, and often the answers are not clear beyond question. Think about the alternatives: the textbook will help you to do this. You will find, for example, that different books are impressed by different arguments. Weigh up these arguments, and see what conclusions you come to.

New cases are reported in:

- ***Lloyd's Law Reports***
- ***All England Reports* (particularly their Commercial Reports and European Reports)**
- ***Weekly Law Reports*.**

1.4 The impact of Brexit on conflict of laws: the position so far

The withdrawal of the UK from the European Union (EU) is bound to have a significant impact on aspects of English conflict of laws, such as choice of applicable law, jurisdiction and recognition and enforcement of foreign judgments. Conversely, other areas like arbitration, including enforcement of arbitral awards, are not affected by Brexit.

When it comes to choice of law, the relevant pre-Brexit rules were contained in the Rome I Regulation (for disputes arising out of contractual obligations) and the Rome II Regulation (for disputes arising out of non-contractual obligations). Post-Brexit and under the Withdrawal Agreement, these instruments will continue to govern contracts or harmful events occurring before the end of the implementation period (31 December 2020). After that date, the position will probably not change, as the provisions of the Rome I and II Regulations are of universal application. This means that EU Member States must generally respect clauses of this nature, irrespective of whether the applicable law is that of an EU Member State or of a third country. As far as the UK is concerned, both Rome I and II Regulations are now retained EU law. This means that both EU Member States and UK courts will continue to uphold English and other UK-applicable law clauses.

In terms of jurisdiction, the Withdrawal Agreement provided that the Brussels I Recast Regulation will govern UK proceedings that were initiated before the end of the implementation period. As the Withdrawal Agreement does not include similar transitional provisions in respect of the Lugano Convention, it is unclear whether this will be the case for Switzerland, Norway and Iceland. The UK has made a commitment to apply the Lugano Convention rules to proceedings initiated before the end of the implementation period but it is not yet known what the approach of the other Lugano Convention parties will be. From 1 January 2021, these international arrangements no longer apply to the UK, as the Brussels I Recast Regulation and Lugano Convention operate on the basis of mutual reciprocity between states. In the absence of a new agreement mirroring the Brussels I Recast Regulation, one option available to the UK to deal with this problem would be to apply to join the Lugano Convention in its own right. The problem with this approach, however, is that all contracting parties, including the EU, must consent to inviting the UK to join the Convention. As the European Commission has formally objected to extending such an invitation, the situation, as things stand, remains unclear. It should be noted that, from 1 January

2021, the UK has acceded to the Hague Choice of Court Convention 2005 in its own right. Whether this means that the Hague Convention provides protection in relation to exclusive jurisdiction clauses entered into before that date but since 1 October 2015 (when the UK was a party to the Hague Convention through its EU membership), or whether it will only apply to exclusive jurisdiction clauses entered into on or after 1 January 2021, is still under debate.

The Brussels I Recast Regulation and the Lugano Convention were also the main pre-Brexit instruments in respect of the enforcement of judgments. The Regulation will continue to apply to the enforcement of judgments given in proceedings that were initiated prior to the exit date. The position on the enforcement of Lugano Convention judgments remains, however, unclear as the stance of the Lugano states on the issue is still unknown. From 1 January 2021, it looks as if the enforcement of UK judgments in the EU and Lugano Convention contracting states will become more complicated. The Hague Convention (despite its limitations) may be of assistance in these circumstances in that it generally requires any judgment granted by the court specified in an exclusive jurisdiction clause to be recognised and enforced in other contracting states.

Activities 1.1–1.7

1.1 What is the nature and scope of conflict of laws?

1.2 What is meant by the question of jurisdiction? Try to think of a problem that may require the application of more than one foreign law.

1.3 What do you understand by 'choice of law'?

1.4 In England is the law of Northern Ireland considered to be foreign law?

1.5 In New York what is the status of the law of Illinois?

1.6 Explain *lex causae* and *lex fori*.

1.7 What do you understand by 'connecting factor'?

Reminder of learning outcomes

By this stage you should be able to:

- **explain the three questions that are asked by 'conflict of laws'**
- **define what is meant by 'foreign law'**
- **use the concepts and language of conflict of laws appropriately**
- **identify what aspects of a case will be considered procedural rather than substantive.**

Good luck with your studies.

Michael Freeman and Manos Maganaris

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the three questions that are asked by 'conflict of laws'	☐	☐	☐
I can define what is meant by foreign law	☐	☐	☐
I can use the concepts and language of conflict of laws appropriately	☐	☐	☐
I can identify what aspects of a case will be considered procedural rather than substantive.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
1.1	What is 'conflict of laws'?	☐	☐
1.2	Procedure and substance	☐	☐
1.3	Reading	☐	☐
1.4	The impact of Brexit on conflict of laws: the position so far	☐	☐

NOTES

2 Fundamental concepts and issues

Contents

Introduction

This chapter introduces you first to the problem of characterisation. It is a difficult subject, not made easier by the fact that English courts have not always characterised in the same way. You will note that 'characterisation' is also called 'classification'. It is a basic analytical tool, which is discussed here for this reason. It is a concept you will come to understand better as you familiarise yourself with the subject. This chapter also deals with what is meant by an incidental question – a question that arises in connection with the major question in a case – and the approaches that exist to answering it.

Another important problem arises with *renvoi* (French for 'sending back'). We need to explain what is meant by 'law' when a reference is made to foreign law; for example, does a reference to 'French law' mean French internal law, or the whole of French law, including its conflict of laws rules? The word 'law' is ambiguous and a number of approaches have been suggested. Different models of *renvoi* will be discussed.

A further issue is public policy in the conflict of laws and its relationship to human rights. Public policy can arise in any area but two areas in particular cause problems, namely status and contract. These are singled out for treatment in Section 2.5 which deals with the exclusion of foreign law. In addition to the public policy ground, English courts have refused to entertain actions for the enforcement of penal, revenue and other public laws of foreign states. We explore the basis for these exclusions and analyse what each of the headings involves.

Finally, Section 2.7 teaches us how we conceptualise foreign law – as fact – and how it is proved in an English court. Many cases which have foreign elements are litigated without any reference to foreign law, either because it is not pleaded or because it is not proved. An example with which you will be familiar (from contract law) is *Suisse Atlantique* [1967] 1 AC 361.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- **explain the purpose of characterisation (classification) and indicate the basis on which English courts characterise cases**
- **indicate where the principal difficulties in characterisation arise**
- **explain what is meant by 'the incidental question' with examples from the case law and describe ways to solve the incidental question**
- **explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this**
- **describe the different concepts of *renvoi* and give examples from cases**
- **explain the role of public policy in the conflict of laws**
- **indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws**
- **appreciate the role of the Human Rights Act where there is a fundamental breach of international law**
- **explain why English courts refuse to enforce certain laws of foreign states**
- **identify and give examples of the areas in which such exclusions are made**
- **explain the implications of regarding foreign law as fact**
- **explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.**

2.1 Characterisation – an illustration: *Ogden* v *Ogden*

Core text

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', B.3(A)(ii)(a) 'The *lex fori*'.**

Essential reading

- **Case: *Ogden* v *Ogden* [1908] P 46.**

We will start with an illustration drawn from the notorious case of *Ogden* v *Ogden*. A domiciled Frenchman, who was 19, married a domiciled English woman in England without first obtaining the consent of his surviving parent, which he was required to do by Article 148 of the French Civil Code. The husband obtained an annulment of the marriage in a French court on the ground of want of consent. The wife then went through a ceremony of marriage in England with a domiciled Englishman. The second 'husband' petitioned for a decree of nullity on the ground that at the time of the ceremony his 'wife' was still married to the Frenchman. The court had to decide whether the first marriage was valid. There were two connecting factors: the husband was domiciled in France; the marriage was solemnised in England. This indicates the existence of two rules:

- the essential validity of the marriage (that is, the husband's capacity) must be governed by French law
- the formal validity of the marriage ceremony is determined by English law.

So what the English court had to decide was whether the French law, the purpose of which was to protect French minors from marrying without parental permission, applied to a marriage in England. If the French rule was characterised as within matters of essential validity it would apply to marriages wherever they were celebrated and the marriage in England would accordingly be void. The second marriage would then, of course, be valid. If, on the other hand, it was characterised as a matter of formal validity, it would be governed by the *lex loci celebrationis* (English law) and the first marriage would be valid (English law rules that a marriage of a minor without parental consent is valid). The English court would therefore come to a different conclusion from the French court. It would, of course, enable the second husband to extricate himself from his marriage (which would be bigamous).

The Court of Appeal concluded that the French rule was formal. Indeed, it suggested that every rule requiring parental consent to a marriage must be characterised as formal. The result was that Mrs Ogden was in the eyes of English law not Mrs Ogden but the wife of a Frenchman. Of course, French law denied this: if asked it would say she was married to her second husband.

Characterisation is not some abstract academic game. Think of the consequences that it had here. The woman in this case ends up as married to two different men on different sides of the Channel. In France, she is married to an Englishman, who does not want her. In England, she is married to a Frenchman, who does not want her. And in 1908 it was probably worse than this because at that time (but not now) married women automatically acquired their husband's domicile. So, according to English law, she was domiciled in France and an English court would have lacked jurisdiction to dissolve her marriage. Nor, it is thought, would a French court have been prepared to dissolve her English marriage. So it is distinctly possible that a woman married to different men in different jurisdictions could do nothing further about her status and, presumably, could never marry again.

2.2 The difficulties that arise with characterisation

Let us look again at what characterisation involves. It requires us to allocate the question in issue to its correct legal category. Its goal is to reveal the relevant rule for the choice of law. In most cases the answer will be clear: there will be no dispute that the case is concerned with breach of contract or succession to movables.

The difficulties occur:

- in penumbral cases, rather than those found within the core; Hart in (1958) 71 *Harvard Law Review* 615 discusses the difference
- where English law and the relevant foreign law do not agree on what the correct characterisation is
- where the concept is unknown in English law: how, for example, is an English court to characterise 'deferred dower' – as property or as maintenance? (see *Shahnaz* v *Rizwan* [1965] 1 Q B 390). Similarly, courts in civil law countries have had difficulties with the English trust concept.

2.2.1 What basis for characterisation?

Lex fori

The question is how English courts characterise. In *Ogden* v *Ogden* the Court of Appeal characterised the rule in the French Civil Code according to the *lex fori*. As Dicey, Morris and Collins (p.35) point out:

> The principal argument put forward in favour of this view is that if the foreign law is allowed to determine in what situations it is to be applied, the law of the forum† [*lex fori*] would lose all control over the application of its own conflicts rules, and would no longer be master in its own home.

† **Forum** (Latin) = public place. In legal terms it means the state in which a case is being heard.

The problem is that it may lead to the forum refusing to apply a rule of foreign law which would be applicable if it were properly understood, as happened in *Ogden* v *Ogden*. It might also apply a rule of a foreign system where according to that law it is not applicable: the result would be that the law applied would be neither the law of the foreign system nor that of England. The *lex fori* approach also stumbles where there is no equivalent or close analogy in the forum to the rule of foreign law. What, for example, is an English court to do when it is asked to adjudicate on the French institution of community of property, as it did in *De Nicols* v *Curlier* [1900] AC 21?

Lex causae

An alternative approach is to characterise in accordance with the *lex causae,* that is, the appropriate foreign law. According to one leading thinker, 'every legal rule takes its classification from the legal system to which it belongs' (Wolff, M. *Private international law*. (Oxford: Clarendon Press, 1950) second edition, p.154). *Re Maldonado* [1953] 2 All ER 300 p.223 is often cited as an example of this. The argument for this approach is that to say that the foreign law is to govern and then not to apply its characterisation is tantamount to not applying it at all. This is superficially convincing but it is arguing in a circle to say that the foreign law governs the process of characterisation before the process of characterisation has led to the selection of the appropriate legal system. Also, it must not be overlooked that the potential conflict may not be between English law and a foreign system, but between two potentially applicable foreign laws: how and why are we to choose one rather than the other?

An examination of *Re Maldonado* will reveal some of the difficulties. It concerned a woman domiciled in Spain who died intestate and without living relatives. She left movable property in England and this was claimed by both the Spanish Government and the British Crown. This raised the question of whether the applicable law was Spanish law (which said it went to the Spanish State) or English law (under which it went to the Crown). This in turn depended upon whether it was a question of succession to movables (in which case the Spanish rule would apply) or whether it raised a question of *bona vacantia* (ownerless property), in which case it would be covered by the rule that title to property is governed by the *lex situs*, and this would lead to the application of English law. The Court of Appeal held that since, under Spanish law, the Spanish State succeeded to the property as the 'final heir', it was entitled to the movables in England. The property was never ownerless, with the result that the English rule never came into the picture. Had the Spanish State claimed

as *bona vacantia*, the position would have been different. The decision looks right; the approach certainly seems preferable to that adopted in *Ogden* v *Ogden*. But the difference between the two rules is only verbal. And, as Dicey, Morris and Collins argue (p.40), 'is it desirable that the right to property in England should depend on a verbal formulation with no real content?'.

2.2.2 Other cases

There are a number of cases in which questions of characterisation have come before the English courts. Some of these are discussed at relevant points in this module guide. You might like to look at: *Re Hoyles* [1911] 1 Ch 179; *Re Wilks* [1935] Ch 645; *Re Priest* [1944] Ch 58; *Re Cohn* [1945] Ch 5; *Apt* v *Apt* [1948] P 83; *Macmillan Inc* v *Bishopsgate Investment Trust plc* [1996] 1 All ER 585; *Raiffeisen Zentralbank* v *Five Star General Trading* [2001] QB 825.

Unfortunately, the cases give little indication of the method of characterisation used by the court to reach its conclusion. However, in one of the more recent cases (*Macmillan Inc* v *Bishopsgate Investment Trust plc*) there is a quite lengthy discussion. Auld LJ accepted that 'the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence'. Looked at in this way, characterisation is 'a process of refining English conflict rules by expressing them with greater precision' (Dicey, Morris and Collins, p.52). So, if the rule says 'succession to movables is governed by the *lex domicilii* of the deceased', characterisation involves deciding which issues should be governed by the *lex domicilii*. 'Succession' is a compendious term which embraces a bundle of issues that are regarded as appropriate for determination by the *lex domicilii*.

Activities 2.1–2.4

2.1 Explain 'characterisation'.

2.2 When are questions of characterisation most likely to arise?

2.3 Do the English cases adopt any particular theory of characterisation? Are they consistent?

2.4 What is wrong with characterising according to the *lex fori*?

Summary

Although characterisation is ever-present in conflict of laws, it is apparent most often where there is disagreement between English law and foreign law on the correct classification of an issue, and where the English court is confronted by a concept it does not know. Bad characterisation, as happened in *Ogden* v *Ogden*, can have serious consequences, as is evident from that case.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the purpose of characterisation (classification) and indicate the basis on which English courts characterise cases**
- **indicate where the principal difficulties in characterisation arise.**

2.3 The 'incidental question'

Core text

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', B.3(D) 'The incidental question'.**

Essential reading

- **Gotlieb, A.E. 'The incidental question revisited – theory and practice in the conflict of laws' (1977) 26 *ICLQ* 734 (available in HeinOnline and JSTOR via the Online Libary).**

An incidental question is one that arises in connection with the major question in a case. Thus while the main question may be succession, we also need to know whether the person claiming as the deceased's widow is indeed his widow. The incidental question here would be the validity of the marriage.

The best way to understand the incidental question is to give an example. Suppose a Greek national dies domiciled in Greece leaving movables in England. The English rule would refer the distribution of this part of his estate to Greek law. Suppose also that under Greek law his widow is entitled to a proportion of his estate. The marriage was in England and, though valid by English domestic law (which an English court would apply since it is the *lex loci celebrationis*), is void by Greek domestic law (which is applicable under Greek conflict of laws rules) because no Greek priest was present at the ceremony. Should the widow's claim be determined by the English or Greek conflict rule? There are different views:

- on one view, the widow **should not** be permitted to share in the estate because otherwise full effect would not be given to the English conflict rule that succession to movables is governed by Greek law
- on another view, she **should** be permitted to do so otherwise full effect would not be given to the English conflict rule that the validity of the marriage is governed by English law.

The incidental question is rarely found in the cases. The most obvious examples are found in divorce and remarriage cases. Two will be cited to illustrate the problem further.

Schwebel v *Ungar*

The facts of *Schwebel* v *Ungar* [1964] 48 DLR (2d) 644 (a Canadian Supreme Court decision) are that a Jewish husband and wife domiciled in Hungary married in Hungary. They later decided to emigrate to Israel. While en route in Italy the husband divorced his wife by issuing a Jewish bill of divorcement (known as a '*get*'). Under the law of Hungary (their domicile) and Italian law, the divorce was invalid, but it was recognised by the law of Israel. They acquired a domicile of choice in Israel. Subsequently, the wife went to Toronto and, while she was still domiciled in Israel, married a second husband. He brought proceedings for nullity on the ground that the marriage was bigamous. The Supreme Court of Canada held that the marriage was valid. There are different interpretations of this case (you may consult Dicey, Morris and Collins, pp.54–56), but it is possible that what the court was doing was upholding the second marriage without recognising the divorce. If this is right, it means that the court decided the incidental question (the validity of the divorce) by the conflict rules of Israel, the country whose law governed the main question (the wife's capacity to marry).

Lawrence v *Lawrence*

The facts of *Lawrence* v *Lawrence* [1985] Fam 106 are that the first husband and his wife married in Brazil. Subsequently, the wife divorced the husband in Nevada (this was not recognised in Brazil) and the next day married the second husband in Nevada. The second husband petitioned for a declaration as to the validity of this second marriage. The incidental question arose from the fact that, under Brazilian law – the law of the wife's domicile – to which English choice of law rules referred capacity to marry, she lacked capacity to marry the second husband. The Court of Appeal (by a number of routes which will be discussed later in this guide) upheld the validity of the second marriage. They did this by giving primacy to the divorce recognition issue at the expense of that of capacity to marry.

You will have noted that for an incidental question to arise:

- there must be a main issue governed (under English conflict rules) by a foreign law
- there must be a subsidiary question involving a foreign element which has its own choice of law rule (this could have arisen separately)

- this choice of law rule should lead to a conclusion different from that which would have been reached had the law governing the main question been applied.

There are different views on the solution to adopt. Lipstein (see [1972 B] *CLJ* 67, 90–96) favours the law governing the main issue. Dicey, Morris and Collins (p.59) believe that the determination of the problem will depend on the nature of the individual case and the policy of the forum towards this.

Self-assessment question

On the facts of *Schwebel* v *Ungar*:

- **If the wife had petitioned the courts of Ontario for a declaration that her divorce was valid, what do you think they would have ruled?**
- **If after the second marriage the husband had petitioned for a declaration of status, the courts would have ruled that he was still married. What implications would this have had for the wife?**

Activities 2.5 and 2.6

2.5 When does an incidental question arise?

2.6 What is a court to do when confronted with an incidental question?

Summary

Not every conflict of laws problem will hinge on a single issue. Sometimes a further question will be posed. Should this further (incidental) question be referred to the same law that governs the main issue, or to a different rule? There is no categorical answer to this, and different views have been expressed both by authors and within the case law.

Reminder of learning outcomes

By this stage you should be able to:

- **explain what is meant by 'the incidental question' with examples from the case law and describe ways to solve the incidental question.**

2.4 *Renvoi*: an explanation

Core text

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', B.3(C).**

Essential reading

- **Briggs, pp.17–21 (available in VLeBooks via the Online Library).**
- **Briggs, A. 'In praise and defence of *renvoi*' (1998) 47 *ICLQ* 877 (available in multiple Online Library databases).**

When it is decided that an issue is governed by the **law** of a particular country, what is the meaning to be given to the word 'law'? When an English court decides that the *lex causae* is French law, does this mean the rules of French domestic law, as these would apply to a wholly internal case, or does it refer to law in its wider sense, including French conflict of laws rules? This ambiguity in the expression 'French law' gives rise to the difficult problem of *renvoi*.

2.4.1 Approaches to *renvoi*

The problem may be understood best by using an illustration. Suppose T dies intestate and a question arises concerning succession to his estate. T is British but has died domiciled in France. English conflict rules say that succession to his movables is governed by French law as this was his domicile. Suppose that by French domestic law, A would succeed to the estate, but that according to French conflict of laws rules, succession would be governed by the *lex patriae* and this is the law of England. Suppose also that as a matter of English domestic law, B would succeed. What is the court to do? There are three possibilities.

First, the court might apply the French domestic rule. This would require proof of the domestic law of France, but not of its conflict rules. If this were done, the court would find in favour of A. This is simple and, some might add, rational (see *Re Annesley* [1926] Ch 692, 708–09; *Re Askew* [1930] 2 Ch 259, 278).

Second, the court might interpret the choice of law rule as pointing to French law, including its conflict of laws rules. This would refer back to English law. The court could then interpret this as being English domestic law and find for B. This is known as 'accepting the *renvoi*'. This method requires proof of the conflict rules for the foreign country, but it does not require proof of the foreign rules about *renvoi*. It is usually called the theory of 'single' or 'double' *renvoi*. There are famous French authorities supporting this view (*Forgo*'s case in 1883 and *Soulié*'s case in 1910) and Article 27 of the Introductory Law of the German Civil Code of 1900 also enjoins it. *Forgo*'s case is discussed by Cheshire, North and Fawcett, p.59.

Third, the court might decide the case in the same way as it would be decided by the French court. So, if the French court would refer to English law and would interpret that reference to mean English domestic law, then the English court would apply English domestic law. If, on the other hand, the French court would refer to English law and interpret that reference to mean English conflict of laws, and would 'accept the *renvoi*' from English law and apply French domestic law, then the English court would apply French domestic law. This method requires proof not only of the conflict rule of the foreign country (in this case relating to succession), but also the foreign rules about *renvoi*. This approach represents the present doctrine of the English courts. It is usually called the theory of 'total' or 'double' *renvoi*.

2.4.2 Application of *renvoi*

The doctrine has been applied to:

- formal and intrinsic validity of wills
- cases of intestate succession
- legitimation by subsequent marriage.

There are indications that it might apply to:

- formal validity of marriage
- capacity to marry
- matrimonial property.

It should be stressed that it does not apply in the fields of contract or in relation to torts (see Private International Law (Miscellaneous Provisions) Act 1995 s.9(5)).

The principal difficulties

There are three main difficulties in the application of the English doctrine.

- It makes everything depend on the evidence of foreign experts. It requires proof not only of foreign choice of law rules, but of foreign rules about *renvoi*. See Wynn-Parry J's comment in *Re Duke of Wellington* [1947] Ch 506, 515.
- The problem of a reference to the national law of a British citizen. It seems that Continental lawyers do not always understand the difference between 'British' and 'English'. In *Re Askew*, for example, the expert witness stated: 'I am informed and believe that John Bertram Askew was an Englishman (sic). Therefore, English law would be applied by the German court' ([1930] 2 Ch 259, 276).
- There may be an inextricable circle. The effect of applying the doctrine of total *renvoi* is to make the decision turn on whether the foreign court rejects the *renvoi* doctrine or adopts a theory of single or partial *renvoi*. But if the foreign court also adopts the doctrine of total *renvoi*, then logically no solution is possible unless either the English or the foreign court abandons its theory, for otherwise a perpetual *circulus inextricabilis* is constituted. As Dicey, Morris and Collins remark

(p.88), 'It is hardly an argument for the doctrine of total *renvoi* that it is workable only if the other country rejects it.'

Self-assessment questions

1. **Should the doctrine of *renvoi* be abolished so that any reference to a foreign system of law is a reference solely to its domestic law?**

   Why do you think *renvoi* is ruled out in contract and tort cases?

   Do you think the difficulties of applying total *renvoi* have been exaggerated?

2. **H and W are Polish nationals domiciled in Poland. They marry in Italy in accordance with a form prescribed by Polish domestic law, but not in a form prescribed by Italian domestic law. Evidence is given that the Italian courts would recognise a marriage celebrated in Italy in accordance with the forms prescribed by the law of the parties' common nationality. H and W have now come to England and H claims he is not married to W. What do you think an English court would do? (Look at *Taczanowska* v *Taczanowski* [1957] P 301.)**

3. **Mrs Smith is a British citizen, domiciled in England. Her husband got a job in China working for a branch of an English corporation in Beijing. She was injured at their residence in Beijing provided by the employer. She is suing the employer in England in contract and tort. If Chinese law includes its conflict of laws rules, it will confer discretion on the English court to apply English substantive law, which has a more generous limitation period. What should the English court do? You may get assistance from Cheshire, North and Fawcett, pp.68–69.**

Summary

Where reference is made to a foreign law, this could be interpreted as a reference to the law it would apply in a case without a foreign element, or to the whole of its law including its conflict of laws rules. If it is the latter, this might refer back (*renvoi*) to the first system. This could go on forever! So what are we to do to solve this? Different theories have developed to tackle the puzzle. But is *renvoi* a good idea? There are different views on this, as you will have gathered if you have read Briggs.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this**
- **describe the different concepts of *renvoi* and give examples from cases.**

2.5 Public policy and the exclusion of foreign law

Core text

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', B.1 'Rationale of choice of law rules'.**

Essential reading

- **Carter, P. 'The role of public policy in English conflicts of law' (1993) 42 *ICLQ* 1 (available multiple Online Library databases).**

An English court will not apply a foreign law, otherwise applicable according to English rules of the conflict of laws, if the law, or the result of its application, is contrary to public policy. As Lord Simon of Glaisdale put it in *Vervaeke* v *Smith* [1983] 1 AC 145, 164:

> There is abundant authority that an English court will decline to recognise or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy.

In the conflict of laws it is obviously necessary that public policy be kept within limits, for otherwise the whole basis of the system is liable to be frustrated. The courts should

be, and are, therefore slower to invoke public policy in cases involving a foreign element than when a domestic legal issue is involved. That said, it must be stressed that with the Human Rights Act 1998 now in operation we may expect English courts to adopt a broader concept of public policy than before. Thus, as Briggs observes:

> It has not yet been held that a rule of foreign law which allows a husband to divorce his wife, but not *vice versa*, should not be recognised, but discrimination between the sexes is hardly more acceptable than that between the races.

Are the Islamic *talaq* and the Jewish *get* now contrary to public policy? Or will the courts tread warily so as to avoid the suspicion of discriminating against religions? Insight into attitudes taken by English courts may be sought in *Oppenheimer* v *Cattermole* [1976] AC 249 (Nazi law depriving absent German Jews of their nationality and confiscating their property said to be 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all' *per* Lord Cross at p.278). See also *Williams & Humbert Ltd* v *W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 428 *per* Lord Templeman.

What is usually in question is not the foreign law as such, but the results of its recognition or enforcement in England in a particular case. Thus even in the days when English law set its face against polygamy – it takes a more liberal view now – it treated the children of a polygamous marriage as legitimate (see *Bamgbose* v *Daniel* [1955] AC 107) and wives were allowed to assert rights of succession on the grounds that they were wives (*Coleman* v *Shang* [1961] AC 481; *Re Sehota* [1978] 1 WLR 1506).

Public policy may not only induce a court to refuse to recognise or enforce a contract or a marriage, etc. which is valid under applicable foreign law. It may also lead to its enforcement or recognition: that is, we must enforce what is invalid under its applicable foreign law. For example, foreign legislation which invalidates a contract or a marriage may be disregarded if it is penal or discriminatory. If foreign exchange control legislation is passed as 'an instrument of oppression' it may be disregarded on grounds of public policy (*Re Helbert Wagg & Co Ltd* [1956] Ch 323, 351).

Public policy can be invoked in any area of conflict of laws. We will see it subsequently in relation to the recognition and enforcement of foreign judgments. Here we will concentrate on its role in two areas: contract and status.

2.5.1 Public policy and contract law

At common law English courts have refused to enforce:

- champertous† contracts (*Trendtex Trading Corpn* v *Crédit Suisse* [1982] AC 679)
- contracts in restraint of trade
- contracts involving trading with the enemy (*Dynamit AG* v *Rio Tinto Co* [1918] AC 260)
- contracts breaking the laws of friendly foreign countries (*Foster* v *Driscoll* [1929] 1 KB 470).

† **Champertous**: from champerty, a situation where someone helps to finance a legal action in return for a share of any damages won.

In each case the contract was valid under its applicable law. On the other hand, a foreign contract made without consideration will be enforced in England (*Re Bonacina* [1912] 2 Ch 394). The fact that it is contrary to the common law does not make it contrary to public policy. Article 16 of the Rome Convention and Article 21 of Rome I Regulation provide that the application of the law of any country may be refused if its application is manifestly incompatible with the public policy of the relevant forum (consequently, for our purposes, English public policy). Note the word 'manifestly', suggesting a very limited role for public policy in this area. The cases just discussed are good instances of manifest incompatibility. This subject is further discussed in Chapter 7 'Contracts'.

2.5.2 Public policy and status

The courts have said or held that incapacities imposed on account of slavery (most famously in *Somersett's case* [1771] 20 St Tr 1), religion or religious vocation (*Re Metcalfe's Trusts* [1864] 2 De G J & S 122), alien nationality (*Re Helbert Wagg & Co Ltd* [1956] Ch 323, 345–46), race (*Oppenheimer* v *Cattermole* [1976] AC 249, 265, 276–78, 282–83), divorce

(*Scott* v *AG* [1886] 11 P D 128), physical incompetence (*Re Langley's Settlement* [1962] Ch 541, 556–57) and prodigality (*Worms* v *De Valdor* [1880] 49L J Ch 261 and *Re Selot's Trusts* [1902] 1 Ch 488) will be disregarded. Public policy may also require that a capacity existing under a foreign law should be disregarded in England: see to this effect *Cheni* v *Cheni* [1965] P 85, 98, though in this case a law which allowed a marriage between an uncle and a niece was not regarded as so objectionable as to be overridden by English public policy when the marriage had nothing to do with England. In *Mohamed* v *Knott* [1969] 1 QB 1, a marriage with a girl of 13 in Northern Nigeria was recognised as valid in England (both spouses were domiciled in Nigeria).

Courts have also said they have 'residual discretion' to refuse to recognise a foreign status conferred or imposed upon a person by the law of their domicile or a foreign decree of divorce or nullity of marriage granted by a foreign court (see *Gray* v *Formosa* [1963] P 259 at 269, 270, 271 and *Lepre* v *Lepre* [1965] P 52, 63). This may be criticised. Thus Grodecki ((1962) 11 *ICLQ* 578, 582) commented:

> to state the law in terms of judicial discretion… is to admit that no certainty or predictability is attainable in this matter.

2.5.3 Public policy and international law

It is part of English public policy that the courts should give effect to clearly established rules of international law.

The best illustration of this is *Kuwait Airways Corporation* v *Iraq Airways Co* (*Nos 4 and 5*) [2002] 2 AC 883. Following the invasion of Kuwait by Iraq in 1990, aircraft belonging to KAC were seized and flown by IAC to Iraq. The Revolutionary Command Council of Iraq purported to divest KAC of its title to its aircraft and transfer this to IAC. KAC brought proceedings in England for the return of the aircraft or payment of their value, and for damages. The House of Lords held that it is legitimate for an English court to have regard to the content of international law when deciding whether to recognise a foreign law. The acceptability of a foreign law must be judged by contemporary standards. Iraq's invasion of Kuwait and the seizure of its assets were gross violations of established rules of international law of fundamental importance. So recognition or enforcement of the expropriatory decree were manifestly contrary to the public policy of English law.

Where there was a fundamental breach of international law, no connection was needed with England for the public policy exception to operate, since it is not based on a principle of public policy which is domestic in character. In this case public policy operated as an exception to the tort choice of law rules.

For further discussion, see Rogerson (2003) 56 *Current Legal Problems* 265.

Summary

English courts will not apply a foreign law if the law, or the result of its application, is contrary to public policy. Public policy is used sparingly, for otherwise it could undermine the whole rationale of conflict of laws. Its application can be seen by examining its role in relation to contract and to status, and in relation to international law.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the role of public policy in the conflict of laws**
- **indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws**
- **appreciate the role of the Human Rights Act where there is a fundamental breach of international law.**

Self-assessment questions

1. **Define public policy. Does this doctrine have any dangers?**
2. **Evaluate the observation by Lord Parker in *Dynamit AG* v *Rio Tinto Zinc Co* [1918] AC 260, that '…private international law is really a branch of municipal law and**

obviously there can be no breach of municipal law in which the general policy of such law can be properly ignored'.

3. **What do you think the impact of the Human Rights Act 1998 has been on this area of law?**
4. **Will English law recognise a marriage where the wife is 10 years old? What difference would it make if she is the husband's stepdaughter? Or if the husband himself is only 12?**
5. **Imagine a legal system that does not allow adulterers to remarry. Would English law recognise such an incapacity? See *Scott* v *AG* [1886] 11 P D 128. What of a legal system that does not permit those with HIV infection to marry? Or a legal system which did not allow persons of a particular religion to marry?**

2.6 Penal, revenue and other public laws

CORE TEXT

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', B.3(F) 'Exclusion of foreign law'.**

2.6.1 The basis of non-enforcement

It is an almost universal principle that one state will not enforce the **penal** and **revenue** laws of another state.

Why not? Because enforcement of such claims is an extension of the sovereign power which imposed the taxes or penalties and 'an assertion of sovereign authority by one state within the territory of another, as distinct from the patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties' (per Lord Keith in *Government of India* v *Taylor* [1955] AC 491, 511; see also Lord Goff in *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, 808).

Who decides whether a law is a penal law or a revenue law or another public law? The answer is that this is a matter for English law: so whether the foreign system would so classify the law is irrelevant (*USA* v *Inkley* [1989] QB 255). See also *Tasarruff* v *Demirel* [2007] 1 WLR 2508.

Attempts to enforce such laws may be direct or indirect. Neither is permitted. Indirect enforcement occurs where the foreign state (or its nominee) seeks a remedy which is not based on the foreign rule in question but which is designed to give it extra-territorial effect. It can also occur where a private party raises a defence based on the foreign law to assert the right of the foreign state. As an example of the latter you might read *Banco de Vizcaya* v *Don Alfonso de Borbon y Austria* [1935] 1 KB 140. (The bank sought delivery of securities owned by the former King of Spain and held by his agent in London to deliver them to the Spanish State, which had declared his property forfeit on account of his alleged treason.)

2.6.2 Categories of law that are excluded

We will look separately at the different categories of law which English courts will refuse to enforce.

Penal laws

> The courts of no country execute the penal laws of another
> (Chief Justice Marshall in *The Antelope (1825)* 10 Wheat 66, 123).

What is a penal law? In *Huntington* v *Attrill* [1893] AC 150, 156 'penal' was defined to include not only crimes in the strict sense but 'all breaches of public law punishable by pecuniary mulct† or otherwise, at the instance of the state government, or someone representing the public' and 'all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or

† **Mulct**: an obsolete word (verb or noun – noun in this instance) meaning the extraction of money (i.e. a fine).

other municipal laws, and to all judgments for such penalties'. It is not necessary that the law in question is found in the criminal code of the foreign country. So, for example, a law intended to protect the historic heritage of New Zealand by forfeiting to the Crown historic articles illegally exported was held to be penal (see *AG of New Zealand* v *Ortiz* [1984] AC 1, 34–35 per Ackner and O'Connor LJJ: the House of Lords affirmed on different grounds).

Revenue laws

There is a well-recognised rule – it goes back nearly 300 years – that courts will not collect the taxes of foreign states. The reason is that 'tax gathering is not a matter of contract but of authority and administration as between the state and those within its jurisdiction' (*Government of India* v *Taylor* [1955] AC 491, 514). So, the courts do not enforce foreign revenue laws, nor judgments based on foreign revenue claims.

What is meant by 'revenue law'? There is no definition but it clearly includes income tax, capital gains tax, a succession duty, a municipal contribution (such as the UK's 'council tax') and customs duties. Interestingly, it has been held that the recovery of social security payments and legal aid contributions do not come within this exclusionary rule (see *Weir* v *Lohr* [1967] 65 DLR (2d) 717 and *Connor* v *Connor* [1974] 1 NZLR 632).

Public laws

Although there is very little authority for this additional category, it is rational that claims for the enforcement of foreign laws which are analogous to penal and revenue laws should be dealt with similarly. These would include, for example, laws about nationalisation, exchange control and laws regulating the duties of those employed in the security services. Two cases illustrate the point.

AG of New Zealand v *Ortiz* [1984] AC 1

The New Zealand Government sought to recover a valuable Maori carving which had been illegally exported from New Zealand. The carving had been bought by Ortiz and was in the possession of Sotheby's, the auctioneers, for sale on behalf of Ortiz. A New Zealand statute provided that historic articles exported without permission were forfeited to the Crown. In the Court of Appeal Lord Denning MR held that the New Zealand statute could not be enforced because it was a public law (for the other two judges it was a penal law). The House of Lords upheld the Court of Appeal on different grounds, and pointed out that the views of the Court of Appeal on the applicability or enforceability of penal or public law were *obiter*.

US v *Inkley* [1989] QB 255

The US Government sought to enforce in England a default judgment obtained against the defendant in Florida. He had been arrested on fraud charges and given an appearance bond as a condition of his being released on bail. The Court of Appeal refused to enforce the judgment. It was a penal law. However, Purchas LJ and Heilbron J accepted that there is a third residual category – foreign public law – which the court will not enforce. Oddly, they relied on Ackner LJ's judgment in *Ortiz*, although Lord Ackner did not think there was such a residual category.

The *Spycatcher* cases

Litigation arising from the notorious *Spycatcher* book provides us with a third example. The book had been written by a former member of the British security services, in breach of the Official Secrets Act. The UK Government sought to stop publication of the book in Australia and New Zealand. The High Court of Australia accepted that there was a principle that the court should not enforce foreign public laws. It suggested that rather than refer to 'public laws', it would be better to refer to 'public interests' or 'governmental interests' since this would signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government. It refused the injunction on the ground

that it would not enforce a claim arising out of acts of a foreign state in the exercise of such powers in the pursuit of national security (see *AG (UK)* v *Heinemann Publishers Australia Pty Ltd* [1988] 165 CLR 30). In New Zealand, the court refused an injunction since the material in the book was by now well known. However, the court accepted the residual category of 'public laws', though it thought a secret service agent's duty of confidentiality should be enforced, at any rate if the local sovereign supported the claim (*AG for the UK* v *Wellington Newspapers* [1988] 1 NZKR 129).

ACTIVITIES 2.7–2.10

2.7 Define 'penal law'.

2.8 Why do states generally refuse to enforce the penal and revenue laws of other countries?

2.9 Give three examples of matters that may come under the heading of 'revenue law'.

2.10 Explain 'public law'.

Summary

English courts will not enforce penal, revenue and other similar public laws of foreign states. To do otherwise would be to recognise the assertion of sovereign authority by one state within the territory of another. What constitutes a penal law and a revenue law is clear. Courts are still trying to come to a clear conclusion as to what comes within 'other public law'.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain why English courts refuse to enforce certain laws of foreign states**
- **identify and give examples of the areas in which such exclusions are made.**

SELF-ASSESSMENT QUESTIONS

1. **X incurs a penalty of £1,000 for breaking the law of Saudi Arabia by importing a bottle of whisky. The penalty is recoverable in the courts of Saudi Arabia in an action for debt brought by the Saudi Government. X is now in England. Can the Saudi Government recover £1,000 from him in an action in an English court? If not, why not?**
2. **Under legislation the City Council of Auckland (New Zealand) is authorised to carry out improvements in the city and charge the cost to the owners of the property affected. One of these owners lives in London. The Council sues her in London for the sum due. Can the claim be maintained? If not, why not?**
3. **X brings manuscripts to England from Bulgaria despite a decree of the Bulgarian Government forbidding their export. X seeks to sell them in London to Y. The Bulgarian Government claims an injunction to prevent the sale. Will it succeed? What defence is available to X?**

2.7 Proof of foreign law

CORE TEXT

- **Clarkson and Hill, Chapter 1 'Introduction', Section II 'The conflicts process', C 'Recognition and enforcement of foreign judgments'.**

ESSENTIAL READING

- **Fentiman, R. 'Foreign law in English courts' (1992) 108 *LQR* 142 (available in Westlaw via the Online Library).**

We conceptualise foreign law as fact. This has two consequences:

- it must be pleaded

- it must be proved.

An English court does not take judicial notice of foreign law.

Mode of proof

The foreign law must be proved by expert evidence: see *Glencore International AG* v *Metro Trading Inc* [2001] 1 Lloyd's Rep 283; [2001] 1 All ER Comm 103. Expertise in foreign law is easier to describe than define. A judge or legal practitioner from the foreign country is always competent. Statute provides that:

> in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to foreign law irrespective of whether he has acted or is entitled to act as a practitioner [in the foreign country]
>
> (Civil Evidence Act 1972 s.4(1)).

So an academic lawyer who has specialised in the law of the foreign country is competent (an example is *Bodley Head* v *Flegon* [1972] 1 WLR 680). Someone with practical knowledge of the law, though not a lawyer, is also competent (e.g. the ex-Governor of Hong Kong in *Cooper-King* v *Cooper-King* [1900] P 65).

An English court will not conduct its own searches into foreign law. But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at these as part of the evidence.

If the evidence is uncontradicted, the English court should be reluctant to reject it. But it may reject evidence which is 'patently absurd' or 'obviously false'.

If there is conflicting testimony, the court is bound to decide for itself which it believes. Under certain statutes, proof of foreign law may sometimes be dispensed with. The details of these should not concern you.

Burden of proof

The burden of proving foreign law lies on the party who bases their claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law.

Self-assessment questions

1. **Critically examine the concept of proof of foreign law in common law rules.**
2. **What implications follow from regarding foreign law as fact? Think of the role of the appellate court (see *Parkasho* v *Singh* [1968] P 233) or the unlikely event of a conflict case being tried by a jury.**
3. **Do you think the methods of proving foreign law in an English court are satisfactory?**
4. **Are the following to be regarded as experts? Give your reasons.**
   i. **A Bishop: the question in issue relates to the Canon law.**
   ii. **An American Professor of Russian law: the question relates to Russian law.**
   iii. **An Iraqi lawyer, in exile for the last 12 years, on current Iraqi law.**
5. **Given the difficulties of proving foreign law, should the court have the power to decline to hear the case, thus forcing litigation to take place in the courts of a country familiar with the foreign law in question?**

Summary

English law regards foreign law as a fact. If it is not raised or proved, the court will apply English law. The burden of proof is on the party who bases their claim or defence on foreign law. Expert evidence is required: what constitutes expertise is easier to describe than to define. It is not limited to practitioners in law.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the implications of regarding foreign law as fact**
- **explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.**

Sample examination questions

Question 1 Is it right for courts to characterise an issue in a case with a foreign element as they would characterise a case with no foreign elements?

Question 2 What do you consider the best approach to characterisation to be?

Question 3 Iraq invades Kuwait and seizes its aircraft. Iraqi legislation is then enacted purporting to dissolve Kuwait Airways and transfer its assets to Iraqi Airways. If Kuwait Airways sues Iraqi Airways in London, will the English court recognise the Iraqi legislation? Or will it refuse to do so? You may find *Kuwait Airways Corp* v *Iraqi Airways Co* [2002] 2 AC 883 helpful in answering this question. You might also like to read P. Rogerson (2003) 56 *Current Legal Problems* 265 on this case.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the purpose of characterisation (classification) and indicate the basis on which the English courts characterise cases	☐	☐	☐
I can indicate where the principal difficulties in characterisation arise	☐	☐	☐
I can explain what is meant by 'the incidental question' with examples from the case law and describe the ways to solve the incidental question	☐	☐	☐
I can explain the ambiguity of a reference to a foreign 'law' and describe the different approaches to unravelling this	☐	☐	☐
I can describe the different concepts of *renvoi* and give examples from the cases	☐	☐	☐
I can explain the role of public policy in the conflict of laws	☐	☐	☐
I can indicate areas where the Human Rights Act 1998 may influence the application of public policy in the conflict of laws	☐	☐	☐
I can appreciate its role where there is a fundamental breach of international law	☐	☐	☐
I can explain why English courts refuse to enforce certain laws of foreign states	☐	☐	☐
I can identify and give examples of the areas in which such exclusions are made	☐	☐	☐
I can explain the implications of regarding foreign law as fact	☐	☐	☐
I can explain how foreign laws must be proved in an English court and state who is competent to give expert evidence on a matter of foreign law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
2.1	Characterisation – an illustration: *Ogden* v *Ogden*	☐	☐
2.2	The difficulties that arise with characterisation	☐	☐
2.3	The 'incidental question'	☐	☐
2.4	*Renvoi*: an explanation	☐	☐
2.5	Public policy and the exclusion of foreign law	☐	☐
2.6	Penal, revenue and other public laws	☐	☐
2.7	Proof of foreign law	☐	☐

3 Domicile and residence

Contents

Introduction

This chapter discusses the personal connecting factors used in English conflict of laws. It examines the general principles of domicile and the ways in which domicile is ascertained. The three different concepts of domicile – domicile of origin, domicile of choice and domicile of dependency – are each considered. A section at the end of this chapter discusses residence, in particular habitual residence, a concept which is becoming more important.

Solving domicile problems comes with practice, so we have included a number of activities relating to it. You should also read the cases to see how judges undertake the exercise. A test of how well you have understood domicile issues is whether you can answer the sample examination questions at the end of the chapter with confidence.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **define and explain the concept of domicile**
- **use the principles of domicile to determine where a person is domiciled**
- **explain how the domicile of dependants, particularly children, is established**
- **distinguish between domicile and habitual residence.**

3.1 The concept of domicile

Core text

- **Clarkson and Hill, Chapter 6 'Domicile, nationality and habitual residence'.**

Essential reading

- **Cases: *Winans* v *AG* [1904] AC 287; *Ramsay* v *Liverpool Royal Infirmary* [1930] AC 588; *IRC* v *Bullock* [1976] 1 WLR 1178; *Re Furse* [1980] 3 All ER 838.**

3.1.1 Why domicile is important

Domicile (the *lex domicilii*) has a dominating role in family and matrimonial property law and a role in other areas of law such as the capacity of persons to make contracts. It also plays a part in the law of taxation. There is only one concept of domicile: accordingly, a case on whether a taxpayer has acquired a domicile in England is also authority for the question of whether someone has the capacity to marry or make a will.

Domicile cannot be defined with precision

Old cases such as *Whicker* v *Hume* [1858] 7 HLC 124, 160 defined domicile as 'permanent home'. However, you will find many reported cases where a person has lived in a place for 30 or 40 years and has not been held to have acquired domicile there. After reading the cases listed above under Essential reading, you may conclude that the persons in question (such a person is often called the *propositus*) had permanent homes in England, but in none of the four cases was a domicile acquired in England.

Domicile is 'an idea of law'

The notion of domicile as 'an idea of law' can be found in *Bell* v *Kennedy* [1868] LR 1 Sc & Div 307, 320. Domicile diverges from the notion of permanent home in three ways:

> The elements required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. Thus, to acquire a domicile of choice in a country a person must intend to reside in it permanently or at least indefinitely.
>
> The law attributes a domicile to everyone, whether they have a permanent home or not. A vagrant, for example, has a domicile.
>
> Certain persons, for example children under 16, cannot acquire independent domiciles. They may thus have permanent homes in places in which they are not domiciled, because the person upon whom they are dependent is domiciled elsewhere.

Domicile connects a person with the law of a country

For these purposes, England and Scotland, Victoria and New South Wales, California and Texas, for example, are separate systems. So if X emigrates to the USA but cannot decide whether she will live in Florida or Oregon, she does not acquire a domicile of choice and will retain her existing domicile until she does so.

Countries may cease to exist or these boundaries may change

The Soviet Union broke up in the 1990s; so did Yugoslavia, and Czechoslovakia became two countries (the Czech and Slovak Republics). Surprisingly, little thought has been given to the consequences of these changes for the law of domicile. It may be supposed, for example, that someone with a Yugoslav domicile in 1990 who lives in Dubrovnik became domiciled in Croatia when that country was created, and that whether someone with a Czechoslovakian domicile is now domiciled in the Czech Republic or the Slovak Republic will depend on whether they lived in Prague or Bratislava at the time of the split.

3.1.2 The principles of domicile

The basic principles, set out in *F* v *F* [2009] 2 FLR 1496, 1503, are that:

- no person can be without a domicile (see *Mark* v *Mark* [2006] 1 AC 98)
- no person can at the same time, for the same purposes, have more than one domicile (see *IRC* v *Bullock* [1976] 1 WLR 1178, 1184)
- an existing domicile is presumed to continue until it is proved that a new domicile has been acquired (*Winans* v *AG* [1904] AC 287, 289).

The burden of proving a change of domicile lies with those who assert it. The change of a domicile must be proved on a balance of probabilities, not beyond reasonable doubt.

For the purpose of an English rule of the conflict of laws, the question of where a person is domiciled is determined according to English law. (See *Re Annesley* [1926] Ch 692; *Lawrence* v *Lawrence* [1985] Fam 106, 132.)

3.2 The ascertainment of domicile

3.2.1 The domicile of origin

Every person acquires at birth a domicile of origin.

This is the domicile of your father at the time of your birth if you are legitimate. It is the domicile of your mother if you are illegitimate or if your father dies before you are born.

Foundlings have a domicile of origin in the country in which they are found.

A domicile of origin may be changed as a result of adoption, but not otherwise.

A domicile of origin is more tenacious than a domicile of choice. It is more difficult to prove it has been abandoned. If a person leaves the country of their domicile of origin, intending never to return to it, they continue to be domiciled there until they acquire a domicile of choice in another country. But if a person leaves the country of their domicile of choice, intending never to return to it, they cease to be domiciled in that country: unless and until they acquire a new domicile of choice, their domicile of origin revives.

3.2.2 Domicile of choice

Every independent person can acquire a domicile of choice by the combination of **residence** and **intention** of permanent or indefinite residence.

Residence

'Residence' means physical presence 'as an inhabitant' (see *IRC* v *Duchess of Portland* [1982] Ch 314, 318–19). It is not necessary that residence should be of long duration. In an American case (*White* v *Tennant* 8 SE 596 [1888]), part of a day was enough. An immigrant can acquire a domicile immediately on arrival in a country if they intend to settle there.

In *Puttick* v *AG* [1980] Fam 1, it was held that a domicile of choice cannot be acquired by **illegal** residence (in this case it was claimed by a member of a German terrorist group). It may not follow that an English court would say that domicile of choice could not be acquired by illegal residence in a country outside the United Kingdom: for example, an Al-Qa'ida member with a domicile of origin in Saudi Arabia living permanently in Germany.

Intention

'Intention' is intention to reside permanently or indefinitely in a country, that is not for a limited period or a particular purpose. If the person leaves upon the occurrence of a

contingency, this possibility will be ignored if the contingency is vague and indefinite (e.g. winning the lottery), but if it is clearly foreseen and reasonably anticipated (e.g. coming to the end of employment), it may prevent the acquisition of a domicile of choice.

Naturalisation is relevant, but it is not decisive as a matter of law. It is a circumstance, and any circumstance which is evidence of a person's residence, or of their intention to reside permanently or indefinitely, must be considered in determining whether they have acquired a domicile of choice in that country.

Most disputes as to domicile turn on the question of whether the necessary intention accompanied the residence. A court has said

> There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime
>
> (*Drevon* v *Drevon* [1864] 34 L J Ch 129, 133).

Cheshire, North and Fawcett (p.155) say:

> Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, ***amours***, prejudices, health, religion, financial expectations…

A person whose domicile is in question may testify as to their intention, but courts view the evidence of an interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to the hearsay rule. Declarations of intention:

> must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions
> (*Ross* v *Ross* [1930] AC 1, 6–7).

It has been said that to acquire a domicile of choice there must be:

> a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness
> (*Udny* v *Udny* [1869] LR 1 Sc & Div 441, 458).

This can be seen by examining certain categories of persons.

Summary

Domicile is the most significant connecting factor in English conflict of laws. It has a dominating role in family and matrimonial property law. It is difficult to define, but easier to understand in practice. There are important principles of domicile. Everyone is born with a domicile of origin, which remains (if only in abeyance). Domicile of choice can be acquired by residence and an intention to reside permanently or indefinitely.

Reminder of learning outcomes

By this stage you should be able to:

- **define and explain the concept of domicile**
- **use the principles of domicile to determine where a person is domiciled.**

3.3 Domicile and categories of persons

Prisoners

A prisoner normally retains their domicile. But they can form an intention to reside permanently or indefinitely, in which case they acquire a domicile of choice there.

Persons liable to deportation

Such a person's residence will be precarious and so they are unlikely to be able to form an intention to remain. But if they form the necessary intention, they acquire the domicile of choice.

Once a person has acquired a domicile of choice they do not lose it merely because a deportation order has been made against them. (*Cruh* v *Cruh* [1945] 2 All ER 545.) They lose it only when they are actually deported.

Refugees and fugitives

If a **political refugee** intends to return to the country from which they have fled as soon as the political situation changes, they retain their domicile there unless the desired political change is so improbable that this intention is discounted and is treated as merely an exile's longing for their native land. But if their intention is not to return even when the political situation has changed, they can acquire a domicile of choice in the country to which they have fled. Contrast the cases of *Re Lloyd Evans* [1947] Ch 695 and *May* v *May* [1943] 2 All ER 146.

In the cases of a **fugitive** from **criminal justice**, the intention to abandon domicile will readily be assumed, unless the punishment they seek to escape is trivial or there is a relatively short period of prescription barring liability to punishment. See *Re Martin* [1900] P 211. But in *Moynihan* v *Moynihan* (*Nos 1 and 2*) [1997] 1 FLR 59, it was held that M, who had left the UK to avoid arrest on serious fraud charges, had, at his death, acquired a domicile of choice in the Philippines, where he had lived for 20 years, built up a thriving business, acquired properties, married and had children.

Invalids

Does a person who resides in a country for the sake of their health acquire a domicile there? The objections are (i) the residence has been taken up for a special motive, and (ii) it may not be freely chosen. These factors make it improbable that a domicile has been acquired. If someone goes to a country for treatment, they clearly do not acquire a domicile there. But someone who settles in a new country because they believe that they will enjoy better health there may well intend to live there permanently or indefinitely (see *Hoskins* v *Matthews* [1855] 8 De GM & G 13 for an example).

Members of the armed forces

It was once thought that members of the armed forces could not, as a matter of law, acquire a domicile of choice during service. But it is now settled that such a person can acquire a domicile of choice if that is their intention (*Donaldson* v *Donaldson* [1949] P 363). Of course, it rarely will be.

Employees

If a person goes to a country merely to work, they do not acquire a domicile of choice there. So when a barrister with an English domicile of origin was appointed Chief Justice of Ceylon, and he went to Ceylon intending to stay until he had earned his pension, he retained his English domicile (*AG* v *Rowe* [1862] 1 H&C 31). However, if a person goes to the country not merely to work, but also to settle in it, they do acquire a domicile of choice.

Diplomats

Generally, diplomats do not form the intention of settling in the country to which they have been accredited. But, if they form the intention of residing permanently or indefinitely, they can, like everybody else, acquire a domicile of choice in that country. An example is found in the South African case of *Naville* v *Naville* [1957] (1) SA 280.

Loss of domicile

We have seen how domicile is acquired. We must now look at the ways in which it is lost. As we have already learned, domicile of origin cannot be lost as such. Even when a

domicile of choice is acquired, the domicile of origin will remain as a resource to fill up any gap when a domicile of choice is abandoned.

A domicile of choice can be abandoned by a person when they cease to reside in a country and cease to intend to reside there permanently or indefinitely. When a domicile of choice is abandoned either a new domicile of choice is acquired, or the domicile of origin revives by operation of law.

Self-assessment questions

1. **Suraj – who has a domicile of origin in India – left to join the rest of his family in New South Wales (Australia), which became his domicile of choice. Five years later, following the collapse of their business, the entire family emigrated to the USA, intending to settle there and 'make a new start'. What is Suraj's domicile at the moment of his arrival in the USA? Why?**
2. **Odetta, an asylum seeker from Rwanda, had her application for asylum in the UK refused and was sent to a detention centre pending deportation. She had wished and intended to establish her domicile in the UK. She did not want to return to Rwanda because she was wanted for questioning in connection with the killings there some years ago. Can she claim that she is domiciled in England?**
3. **Jane, who has spent only three weeks of her life (80 years) in Ireland, has Irish domicile at the time of her death. She was born in India, kept her British citizenship all her life and spent 50 years in Italy, where she died. Her only connection with Ireland is the three weeks she spent there and the fact that her father was born in that country. If you assume that she has failed to acquire a new domicile, what country is Jane deemed to be domiciliary of?**

Summary

Intention is crucial when the acquisition of a new domicile is in issue. It can be tested out by examining a number of categories of persons, such as refugees, fugitives, employees and invalids.

3.4 Domicile of dependency

The domicile of a dependent person is the same as, and changes with, the domicile of the person on whom they are, as regards domicile, legally dependent.

A dependent person cannot acquire a domicile of choice by their own act.

Until 1 January 1974 there were three categories of dependent persons: married women, children and those suffering from a mental disorder.

3.4.1 Married women

Married women ceased to be dependent persons on 1 January 1974 and since then have been able to acquire a domicile of choice independently of their husbands. But this Act is not retrospective and many women who married before it came into operation will still have their husband's domicile (albeit as one of quasi-choice).

Until 1 January 1974 a married woman (even if a minor) was dependent for the purposes of the law of domicile upon her husband. So it was the same as, and changed with, the domicile of her husband. This applied even where they were living apart and had done so for many years: see for example *Re Scullard* [1957] Ch 107 (separation of 46 years; in different countries for 30 of those years). Lord Denning MR described the married woman's domicile of dependency as 'the last barbarous relic of a wife's servitude' (*Gray* v *Formosa* [1963] P 259, 267).

The domicile of a married woman is now ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile (see s.1(1) Domicile and Matrimonial Proceedings Act 1973).

The transitional provision of the 1973 Act s.1(2) needs to be examined carefully. To date it has only been interpreted by Nourse J[†] in *IRC* v *Duchess of Portland* [1982] Ch 314. The provision states that where immediately before 1 January 1974 a woman was married and then had her husband's domicile of dependence, she is treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after that date.

This means that Mrs A who settled in New York in 1970 acquired a domicile of choice in New York on 1 January 1974 but Mrs B who always intended to settle in New York but was still living with Mr B on 1 January 1974 retains his domicile as a domicile of choice (or quasi-choice) and cannot acquire a domicile of choice until she resides as an inhabitant in New York and intends to live there permanently or indefinitely. This can cause problems, as the Duchess of Portland found.

[†] You should study Nourse J's judgment carefully. Ask yourself whether you find his arguments convincing, particularly where he suggests the same test applies for the abandonment of a domicile of quasi-choice (a 'deemed' domicile of choice) as applies to a 'genuine' domicile of choice. You will find it helpful to read Wade, J. 'Domicile: a re-examination of certain rules' [1983] 32 *ICLQ* 1.

3.4.2 Children

The domicile of a child 'under 16' is quite complicated.

- if **legitimate**, it is that of the child's father
- if the child is **legitimated**, it is that of their father from the time of the legitimation (remember such a child will have their mother's domicile as a domicile of origin)
- if the child is **illegitimate or their father is dead** it is that of their mother
- if the child has **no parents**, their domicile probably cannot be changed
- if the child is **adopted**, their domicile is determined as if they were the legitimate child of the adoptive parent or parents.

One anomaly that must be understood is that a mother who changes her domicile will only change the domicile of a child dependent on her if what she does furthers the child's interest. Fathers are not so constrained. See *Re Beaumont* [1893] 3 Ch 490.

The 1973 Act created an exception to the rules just set out. You should examine s.4 of this Act very carefully. It applies to legitimate and legitimated children under 16 whose parents are living apart or were living apart at the death of the mother. In such cases the child's domicile is determined as follows:

- if the child has their home with their mother and no home with their father, their domicile is, and changes with, the domicile of their mother
- if this has applied to the child at any time and they have not since had a home with their father, their domicile is, and changes with, the domicile of their mother
- if at the time of their mother's death, the child's domicile was the same as their mother because of either of these rules, and they have not since had a home with their father, the domicile of the child is the domicile their mother last had before she died.

3.4.3 Those suffering from a mental disorder

The law as regards such persons can be briefly stated. They cannot acquire a domicile of choice and retain the domicile they had when they began to be legally treated as suffering from a mental disorder. However, if the child was born with a mental disorder or later acquires such a disorder while a dependent child, their domicile is determined, so long as they continue to suffer from such disorder, as if they were still a dependent child.

Summary

The only persons today who can have a domicile of dependency are children and those suffering from a mental disorder. But married women did formerly, and many who married before the change in the law in January 1974 will still share their husband's domicile.

3.5 Residence

Core text

- **Clarkson and Hill, Chapter 6 'Domicile, nationality and habitual residence', Section V 'Habitual residence'.**

'Residence', 'ordinary residence' and 'habitual residence' are increasingly used as personal connecting factors. Of these, 'habitual residence' is the most significant for the student of conflict of laws. We will concentrate on it here. As you study it, observe the differences with the concept of domicile.

The term 'residence' is found in the Hague Conventions and often makes its way into English law through this route. The Hague Conventions do not define 'habitual residence'. The Court of Appeal has said that it is primarily a question of fact to be decided by reference to the circumstances of each particular case (see *Re M* [1993] 1 FLR 495).

'Habitual' indicates a quality of residence, rather than its length (see *Cruse* v *Chittum* [1974] 2 All ER 940). It has been said that it means 'a regular physical presence which must endure for some time' (*Cruse* v *Chittum* [1974] 2 All ER 940, 942 *per* Lane J). It cannot be acquired in a day since 'an appreciable period of time and a settled intention' are required (*Re J* [1990] 2 AC 562). 'Settled intent' has been identified as intent to take up long-term residence in the country concerned (*A* v *A* [1993] 2 FLR 225, 235). But this comes close to conflating habitual residence with domicile, and a settled purpose to reside in a country does not necessarily involve any long-term plan. Habitual residence may continue during temporary absences (see *Oundjian* v *Oundjian* [1979] 1 FLR 198). It will be lost if a person leaves a country with a settled intention not to return to it.

It is possible to have no habitual residence (but one would have to be a nomad). Habitual residence in two (or more) places is also possible.

Many cases which hinge on habitual residence are involved with the sensitive issue of international child abduction. This is not in the syllabus and accordingly this module guide does not explore this issue further.

Self-assessment questions

1. **Make a list of the differences between the concept of habitual residence and the concept of domicile.**
2. **A child who has habitual residence in England is taken to Australia for a custody hearing. Custody, which was originally vested in the mother, who is habitually resident in England, is conferred by the Australian court on the father, who is habitually resident in Australia. The mother then takes the child back to England. Is the habitual residence of the child in England or in Australia?**

Activities 3.1–3.8

3.1 Raj, who is 12 years old and legitimate, was born in England to a father with an Indian domicile. His father has now been posted to Dubai and is intending to live there until he retires. Where is Raj's domicile?

3.2 What are the various types of domicile?

3.3 Can a person have more than one domicile at a time?

3.4 On what basis does a person acquire a domicile of choice?

3.5 Why is naturalisation not a decisive factor in establishing domicile?

3.6 Chou, who has a Singapore domicile of origin, was sent by his company in Singapore to work in London, where he has remained for 15 years. He has now retired but cannot return to Singapore because of his involvement in political activities in England of which the Singapore Government disapproves. Where is he domiciled?

3.7 How is 'habitual residence' usually defined?

3.8 What is the importance of proof in habitual residence?

Reminder of learning outcomes

By this stage you should be able to:

- **explain how the domicile of dependants, particularly children, is established**
- **distinguish between domicile and habitual residence.**

Sample examination questions

Question 1 **The law of domicile 'remains rooted in its Victorian origins when the establishment of a home was an affair of a lifetime' (Clarkson and Hill, p.326). Discuss.**

Question 2 **Is the law of domicile in need of reform?**

Question 3 **Would we be better to select habitual residence or nationality as a personal connecting factor?**

Question 4 **Sam was born in Greece in 1942 to parents who were domiciled in Greece. Shortly after his birth, his father, Ben, went to France to join the French resistance forces. A year later Sam's mother, Ruth, received news that Ben had been killed and she remarried Josh, whose domicile of origin was in Hungary. Josh was Jewish and on the run from the Nazis, and had found his way to Greece. In 1944 Sam, Ruth and Josh were deported by the Nazis to Auschwitz in German-occupied Poland. Josh was killed shortly after arrival, but Sam and Ruth miraculously survived. In 1946 they took a ship to Palestine, then under British mandate, but this was turned back by the British. Sam was, however, smuggled in. The ship sank on the high seas and Ruth drowned.**

Ben had not in fact been killed and was still in France. After the war he qualified as a lawyer in France and prospered. He had no idea that his son had survived the war. He became a committed Zionist, was involved in charitable activities for Israel and frequently talked about emigrating to Israel. In 1954 his law firm set up an office in Cairo, and he agreed to transfer there. He enjoyed the lifestyle in Egypt and began to think that his future lay there. He was, however, forced to leave in 1957. He returned to France but could not settle and, in 1958, decided to see if he liked living in Israel.

He was reunited with his son and the two of them lived together in Israel until 1959. Ben retained links with his law firm in France, which was about to set up a branch in Sydney, and Ben and Sam moved to Australia. In 1960, Sam went to university in Sydney. In 1963, just before his 21st birthday, he got a postgraduate scholarship to Harvard. He did not like living in the United States but, when he obtained his PhD in 1966, he was offered a very good job in Minnesota. He found the climate too cold and was looking for another post (he had applied for jobs in Australia) when war broke out in Israel in 1967 and he returned to Israel.

Sam stayed in Israel for 10 years. He married, obtained a university appointment, integrated into Israeli society and rediscovered his Jewish roots. Then, in 1977, he went to South Africa to take up a university appointment in Cape Town. He could not settle in South Africa. He despised the apartheid regime, became an outspoken critic and joined the African National Congress. He was arrested and sentenced to a lengthy term of imprisonment in 1982. He was released in 1992. He came to England, took a job as a school teacher and obtained UK citizenship. He always talked of returning to Israel if 'there was ever true peace'. In 2002 he heard that his elderly father was unable to look after himself any longer in Sydney. He thought of bringing him over to England but was advised that Australia would be better for the health of both of them.

Sam set out for Australia last week. The taxi taking him to Heathrow crashed and he was killed. Where did Sam die domiciled?

Advice on answering the questions

Domicile questions require a clear head and logical thinking. It is often helpful to draw a chart for yourself. It will sometimes be necessary to consider a person's domicile on alternative lines of reasoning. Always find the person's domicile of origin first, and always trace each step in their life. Work out the significance of every fact you are given and you should be able to come to a reasoned, step-by-step decision. Do not waste time setting out the detailed law: go straight to the problem set.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain and define the concept of domicile	☐	☐	☐
I can use the principles of domicile to determine where a person is domiciled	☐	☐	☐
I can explain how the domicile of dependants, particularly children, is established	☐	☐	☐
I can distinguish between domicile and habitual residence.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
3.1	The concept of domicile	☐	☐
3.2	The ascertainment of domicile	☐	☐
3.3	Domicile and categories of persons	☐	☐
3.4	Domicile of dependency	☐	☐
3.5	Residence	☐	☐

NOTES

4 Jurisdiction

Contents

Introduction

Jurisdiction has become the central focus of conflict of laws. More cases relate to jurisdiction issues than the rest of the subject put together. We will have to study two parallel jurisdictional frameworks, one now governed by Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation (recast)), which repealed Regulation 44/2001, and the other by traditional or common law rules. In addition, it should be noted that, under the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479), the Brussels Regulation (recast) ceased to apply to the UK with effect from 1 January 2021.

After a brief review of the historical background we turn to look at the law governing jurisdiction. Before we do so we must take note of categories of institutions and persons who cannot be sued in the English courts (immunity). Here we encounter an overlap between conflict of laws and public international law. The subject of state immunity is of greater relevance to public international law and, for the purposes of conflict of laws, an outline knowledge only is required. By the end of this chapter you should have this outline knowledge.

We must next look at the traditional (common law) rules of jurisdiction. These only apply where the defendant is not domiciled in a Member State of the European Union, for example when the defendant is a New York corporation or a Russian domiciled in Russia or elsewhere outside the EU. These rules are less complex than the EU regime. By the end of this chapter you must know these rules.

Unlike the fairly rigid set of rules in the EU regime you will see that the common law is relatively flexible. In particular, the courts possess the power to stay proceedings. We will be concentrating on jurisdiction *in personam* (you do not need to study jurisdiction *in rem*).

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- **outline the historical background to the jurisdiction rules laid down by the EU legislation**
- **explain the relationship between the EU regime and the common law traditional rules**
- **describe the extent to which states and international bodies are immune from the jurisdiction of the English courts**
- **explain the limits to the doctrine of state immunity**
- **describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales**
- **explain what is meant by 'presence' and 'submission to the jurisdiction'.**

4.1 Historical background

Core text

- **Clarkson and Hill, Chapter 3 'Foreign judgments', Section I 'Introduction'.**

First, a few words of historical introduction. Until 1 January 1987, the High Court had jurisdiction over persons who were present in England at the time of service of process and in certain specified cases over persons who were outside England. In the latter case it was generally necessary for permission to be obtained from the court for issue of process and its service outside the jurisdiction (see Section 4.3.2 below). In each case the court's jurisdiction was subject to a discretion (in the former case to stay proceedings – although these powers did not really emerge until the 1980s – and in the latter to refuse leave).

In 1968 the original Contracting States of the European Union signed the Brussels Convention. The UK, Ireland and Denmark acceded to it in 1978 (there was an Accession Convention, which contained some important modifications of the 1968 Convention). In 1982 Greece joined and in 1989 Spain and Portugal acceded (this accession convention, the San Sebastian Convention, made a number of substantive changes). Austria, Finland and Sweden have since joined, and the Regulation also applies to all the countries which joined the European Union in May 2004, namely Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, as well as Bulgaria and Romania, which joined in 2007, and Croatia, which joined in 2013. In addition, a parallel Convention was signed at Lugano in 1988: this bound the states of the European Union and of the European Free Trade Area (the remaining EFTA countries are Iceland, Norway and Switzerland).

With effect from 1 March 2002, for 14 of the then Member States of the European Union (that is all except Denmark) the Brussels Convention was replaced by the Council Regulation (EC) 44/2001 (Brussels Regulation). That Regulation has, with effect from 10 January 2015, been repealed and replaced by Regulation 1215/2102 (Brussels Regulation (recast)).

With the UK's departure from the EU, the Brussels Regulation (recast) no longer applies to civil and commercial cases commenced in the UK on or after 1 January 2021.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the historical background to the jurisdiction rules laid down by the EU legislation**
- **explain the relationship between the EU regime and the common law traditional rules.**

4.2 Immunities

Core text

- **Cheshire, North and Fawcett, pp.496–518 (available on the VLE).**

Subject to some exceptions (see below) a foreign state is **immune** from the jurisdiction of the English courts. See the State Immunity Act 1978 s.1(1), and Lord Atkin's classic statement in *The Cristina* [1938] AC 485, 490:

> the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

Does this conflict with the European Convention on Human Rights (ECHR) Article 6(1)? In *Al-Adsani* v *UK* (2001) 34 EHRR 273, the European Court of Human Rights (ECtHR) accepted that, in cases of sovereign immunity, the right of access to a court under Article 6(1) is engaged. Therefore, to be compatible with Article 6(1), the limitation

on jurisdiction under the doctrine of sovereign immunity has to pursue a legitimate aim and be proportionate. The case was a civil claim against Kuwait alleging torture. A majority of the ECtHR said that the

> grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The restriction is proportionate to the aim pursued, since state immunity reflects 'a generally accepted rule of international law'. See also *Jones* v *Minister of Interior of Kingdom of Saudi Arabia* [2007] 1 AC 270. British nationals alleged they were tortured by Saudi officials, and they sued the Saudi state and the officials in England. The House of Lords held that the state and its officials were both entitled to immunity. It was contended that the restriction imposed by the law of state immunity was disproportionate, since the proscription of torture by international law had the authority of a peremptory norm, precluding the grant of immunity to states or individuals sued for committing acts of torture. The House of Lords found itself unable to accept that torture could not be a governmental or official act. Immunity under the 1978 Act was not disproportionate as it was inconsistent with a peremptory norm of international law. Therefore, there was no infringement of the claimants' rights under Article 6(1) of the Convention. Cases like *Jones* were not envisaged when the 1978 Act was passed. Should it be reconsidered?

'State' includes the sovereign, the government and any department of government.

4.2.1 Limits of state immunity

State immunity may be limited in three respects:

- a state can **submit** to the jurisdiction of the English courts (s.2(1))
- a state is not immune in proceedings relating to a commercial transaction entered into by the state or an obligation of the state which, by virtue of a contract, fails to be performed wholly or partly in the UK (s.3(1))
- a state is not immune in proceedings relating to a **contract of employment** between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed in the UK (s.4(1)).

English courts have no jurisdiction to entertain an action or other proceeding against any person entitled to immunity under the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968. So, for example, an ambassador cannot be sued.

English courts have no jurisdiction to entertain an action or other proceeding against an **international organisation** or its officials specially protected by or under statute.

ACTIVITIES 4.1 AND 4.2

4.1 What are the origins of state immunity?

4.2 Pursuant to the State Immunity Act 1978, state immunity may be limited. Under what circumstances can this happen?

SELF-ASSESSMENT QUESTIONS

1. **Why is there state immunity?**
2. **Decide and explain the following:**
   i. **A, an English company, is granted a concession by the government of X to work mines in X. X government repudiates the contract. A brings an action for damages in England. Does the court have jurisdiction?**
   ii. **B, an English company, agrees to supply arms to the government of Y. The contract is governed by English law. Y government refuses to pay for the arms. B sues in England. Does the court have jurisdiction?**
   iii. **C, a British citizen, is employed by the government of Z to run its tourist office in London. He is dismissed and sues for damages. Does the English court have jurisdiction?**

iv. **D is injured in a motor accident caused by the negligence of H, the chauffeur of a foreign ambassador, who is a member of the service staff of the mission. He was driving the ambassador's car. H is a citizen of that country. Is H liable to pay damages to D? If he was not on official business but was taking his wife for a run in the country, would your answer be different? Is the ambassador vicariously liable, in either case? What about the liability of the insurance company? (See *Dickinson* v *Del Solar* [1930] 1 KB 376.)**

v. **E, a British citizen, is arrested and tortured in prison in X. Can he sue (i) the state of X; (ii) the torturer in England?**

Summary

State immunity is a firmly established principle, but it has been abused and therefore the modern legislation (the State Immunity Act 1978) imposes important limits on it. Whether these limits are sufficient is coming to be doubted.

Reminder of learning outcomes

By this stage you should be able to:

- **describe the extent to which states and international bodies are immune from the jurisdiction of the English courts**
- **explain the limits to the doctrine of state immunity.**

4.3 Jurisdiction under the traditional rules

Core text

- **Clarkson and Hill, Chapter 2 'Civil jurisdiction', Section II 'Bases of jurisdiction in personam'.**

4.3.1 Presence within the jurisdiction

An action may be commenced by service of a claim form on the defendant while they are present in England and Wales. Their presence may be fleeting. The test is not residence.

Thus in *Maharanee of Baroda* v *Wildenstein* [1972] 2 QB 283, the defendant was visiting the Ascot races in England (and the litigation had no connection with England – it would certainly have been stayed today). And in *Colt Industries Inc* v *Sarlie* [1966] 1 All ER 673, the defendant was visiting England for a few days and not in connection with any possible litigation. The only exception to this liberal exercise of jurisdiction is if the defendant was enticed into the jurisdiction fraudulently or improperly. The presence test was reaffirmed in *Chellaram* v *Chellaram (No.2)* [2002] 3 All ER 17.

Rules for companies, etc.

Where the defendant is a partnership, the claim form may be served on any one of the parties who is present in England or at the principal place of business within the jurisdiction.

As far as companies are concerned

1. A company registered in England may be served by leaving the claim form at, or sending it by post to, the company's registered office (Companies Act 2006 s.1139(1)).
2. The rules for suing an overseas company are contained in the 2006 Act, Part 34. An overseas company is defined as a company incorporated outside the UK (s.1044). A document may be served on an overseas company whose particulars are registered
   a. by leaving it (or sending it by post to) the registered address of any person registered in the UK authorised to accept service on the company's behalf; or

b. if there is no such person, or the person refuses service, by leaving it or sending it by post to any place of business of the company in the UK.

There are alternative methods of service (e.g. personal service). A document can be served personally on a company by leaving it with a person holding a senior position within the company, such as a director. But there is some uncertainty over whether this applies to a foreign company.

Submission to the jurisdiction

The High Court has jurisdiction to entertain a claim against a person who submits to the jurisdiction of the court. The person may do this by acknowledging service or instructing a solicitor to accept service on their behalf. Note also that:

- commencing an action as a claimant will give the court jurisdiction over a counterclaim
- an acknowledgment of service to protest that the court does not have jurisdiction **does not** constitute submission (*Re Dulles' Settlement (No.2)* [1951] Ch 842)
- an application for a stay is not a submission to the jurisdiction, because it is not inconsistent with a protest to the jurisdiction (*Williams & Glyn's Bank* v *Astro Dinamico* [1984] 1 WLR 438)
- it is possible to submit to the jurisdiction of the court by agreeing in a contract that the English courts shall have jurisdiction. But choosing English law to govern the contract does not amount to an agreement to submit to the jurisdiction (*Dunbee Ltd* v *Gilman & Co (Australia) Pty Ltd* [1968] 2 Lloyd's Rep 394)
- parties cannot by submission confer jurisdiction on the court to entertain proceedings beyond its authority (e.g. a dispute about title to foreign land).

4.3.2 Service out of the jurisdiction

Because of the presence rule, English courts will not always have jurisdiction in cases where jurisdiction would be appropriate (e.g. over an English contract made and broken in England). There is some irony in this in that the rule itself sometimes gives an English court jurisdiction in totally inappropriate cases, like the *Maharanee of Baroda* case.

As a result, since 1852, it has been possible with permission to serve a claim form out of the jurisdiction. This is now governed by the Civil Procedure Rules (CPR 6.30). The jurisdiction is discretionary. The court will not give permission unless satisfied that England is 'the proper place in which to bring the claim' (CPR 6.37(3)). The claimant must show that:

- there is a serious issue to be tried
- the claim comes within one of the paragraphs of CPR 6.20
- England is the *forum conveniens*, that is, the forum in which the case can most suitably be tried in the interests of the parties and the ends of justice (on which see *Spiliada Maritime Corp* v *Cansulex Ltd* [1987] AC 460).

It is easier to establish that the English court will normally be regarded as the natural forum in a claim in tort if the tort was committed in England (*The Albaforth* [1984] 2 Lloyd's Rep 98).

There are 19 grounds for service outside the jurisdiction. The most important are:

In relation to contract

- If the contract was made within the jurisdiction.
- If the contract was made through an agent trading or residing within the jurisdiction.
- If the contract is governed by English law.

- If the contract contains a term that the court shall have jurisdiction to determine any claim in respect of the contract (only if either the subject matter of the dispute falls outside the EU jurisdiction regime or none of the parties to the contract is domiciled in a Member State).
- If a breach of contract is committed within the jurisdiction.

In relation to tort

- If the claim is made in tort where
  - damage was sustained within the jurisdiction, or
  - the damage sustained resulted from an act committed within the jurisdiction.

The term 'damge' means either that 'significant damage' was sustained in England or that the damage resulted from 'substantial and efficacious acts' committed by the defendant in England: see *Metall and Rohstoff AG* v *Donaldson Lufkin & Jenrette* [1990] 1 QB 391, 437.

An interesting illustration is *Berezovsky* v *Michaels* [2000] 2 All ER 986. You should try to read this case (which critics said could turn England into the libel capital of the world).

In relation to property

- Where the whole subject matter of the action is land within the jurisdiction, for example an action for the recovery of land: see *Agnew* v *Usher* [1884] 14 QBD 78.
- Where a claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land within the jurisdiction. For example an action against the assignees; a lease for breach of covenant to repair (*Tassell* v *Hallen* [1892] 1 QB 321).
- Where a claim is made for a debt secured on immovable property within the jurisdiction. For example, an action for non-payment of a bank loan secured by a mortgage of a house.

In relation to restitution

- Where the defendant's alleged liability arises out of acts committed within the jurisdiction. This includes an action for equitable relief for breach of confidence. See *Douglas* v *Hello! Ltd* [2003] EWCA 139.

In relation to multiple defendants

- Where a claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party to the action. The second defendant will not be a 'necessary or proper party' if they have a good defence in law to the claim and it is therefore bound to fail. Nor will they be if the claimant's rights are predominantly against the first defendant. There is a particular reluctance to exercise the discretion to allow service out of the jurisdiction under this head, perhaps because it is not founded upon a territorial connection between the claim, the subject matter of the action and the jurisdiction of the English courts.

Self-assessment questions

1. **B is domiciled in New York. A wishes to sue B in London. In what circumstances can he do so?**
2. **Jurisdiction based on presence has been described as excessive. Why? Can it be justified?**
3. **Your client, a Malaysian company, wishes to contest the jurisdiction of the English court over it. The dispute arises out of a contract that an employee of the Malaysian company made with an English company. Advise the company as to how it can do this without submitting to the court's jurisdiction.**

4. **Explain when an English court will give leave to serve a claim form on a defendant in Russia where the claim is for damages for breach of contract.**

5. **There is a power station accident in Bulgaria and this causes damage to crops on a farm in England. The farmer wishes to sue the Bulgarian power station in England. Can he do this? Explain.**

Summary

The traditional rules of jurisdiction require the defendant either to be present within the jurisdiction of the courts of England and Wales or to submit to this jurisdiction. There is also the possibility of serving a claim form out of the jurisdiction with the leave of the court.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales**
- **explain what is meant by 'presence' and 'submission to the jurisdiction'.**

SAMPLE EXAMINATION QUESTIONS

Question 1 A tennis player from California owes a considerable amount of money to an English company. He will be in England for the Wimbledon tennis championship next week. Can the company serve a claim form on him?

Question 2 Suppose (on the facts of Question 1) the tennis player decides not to come. The contract concerned was made in California and there is no express choice of applicable law. Can the company get permission to serve the claim form on the player in California, out of the jurisdiction? Explain how.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can outline the historical background to the jurisdiction rules laid down by the EU legislation	☐	☐	☐
I can explain the relationship between the EU regime and the common law traditional rules	☐	☐	☐
I can describe the extent to which states and international bodies are immune from the jurisdiction of the English courts	☐	☐	☐
I can explain the limits to the doctrine of state immunity	☐	☐	☐
I can describe the circumstances in which an action may be commenced on a defendant (a) within and (b) outside the jurisdiction of England and Wales	☐	☐	☐
I can explain what is meant by 'presence' and 'submission to the jurisdiction'.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
4.1	Historical background	☐	☐
4.2	Immunities	☐	☐
4.3	Jurisdiction under the traditional rules	☐	☐

NOTES

5 Stays and restraint of proceedings

Contents

Introduction

We have seen when an English court has jurisdiction. But in this chapter we will see that it does not have to exercise it. It may **stay** the proceedings. In effect this may force a claimant to sue abroad, or to seek arbitration. The power to stay is derived from the court's inherent jurisdiction. It is exercised in three situations:

- where the doctrine of *forum non conveniens* applies
- where there is a foreign choice of jurisdiction clause
- where there is an agreement on arbitration.

English courts cannot regulate foreign courts in the same way. So they cannot stay proceedings in a foreign court. However, they have developed what is called the **anti-suit injunction**, which attempts to restrain a party from litigating in a foreign court. The injunction is to the litigant, not the foreign court. But, of course, its effect is to restrain litigation in another jurisdiction and for that reason is to be exercised cautiously. Here we examine the circumstances in which an anti-suit injunction may be granted. By the end of the chapter you should understand these, and in particular the differences between the way this jurisdiction is exercised and the *forum non conveniens* doctrine.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **explain the concept of *forum non conveniens* and the two-stage inquiry that is involved**
- **explain the significance of a foreign jurisdiction clause and the effect of an arbitration agreement**
- **explain and give examples of anti-suit injunctions**
- **state the general basis on which anti-suit injunctions may be granted.**

5.1 Stays of English proceedings

Core text

- **Clarkson and Hill, Chapter 2 'Civil jurisdiction', Section III 'Declining jurisdiction and staying proceedings', B.1 'The development of the doctrine', 2 'General principles' and 3 'The effect of a dispute-resolution clause'.**

5.1.1 The doctrine of *forum non conveniens*

The current doctrine of *forum non conveniens* crystallised in the *Spiliada* case [1987] AC 460. Until the late 1970s or early 1980s English courts had been reluctant to stay English proceedings. Some judges had even seen English justice as a boost to the British economy – Lord Denning once quipped that 'ours was a good forum to shop in'. But in *The Abidin Daver* [1984] AC 398 Lord Diplock said that 'judicial chauvinism has been replaced by judicial comity'.

The basic principle is set out by Lord Goff in the *Spiliada* case:

> … a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

A **two-stage inquiry** is involved. The **first** stage requires the defendant to show that there is another available forum which is clearly more appropriate. The **second** stage is concerned with the requirements of justice.

What is the appropriate forum?

To satisfy the first stage the defendant must show that:

- there is another available forum, and
- it is clearly more appropriate.

We will first look at the issues involved in deciding that there is another available forum. This should not be a difficult inquiry but it has been complicated by a decision of the Court of Appeal in *Mohammed* v *Bank of Kuwait* [1996] 1 WLR 1483. The case involved an Iraqi plaintiff who had worked in Kuwait for a Kuwaiti bank. He wished to sue in England because he could not go to Kuwait and because there were restrictions on his ability to have a legal representative of his choice. The Court of Appeal held that another forum had to be 'available in practice to the plaintiff to have his dispute resolved'. But this is an issue that goes to the second stage of the inquiry, where the burden shifts to the claimant. A subsequent Court of Appeal (in *Askin* v *Absa Bank* [1999] L S Gaz R.32) accepts this criticism and, as we shall see, the House of Lords in *Connelly* v *RTZ Corp* [1998] AC 854 were clear that injustice which took the form of not being able to pursue a case abroad because of the lack of financial assistance arose at the second stage of the inquiry. Perhaps therefore too much significance should not be attached to the *Mohammed* ruling.

The other forum must be **clearly more appropriate**. The court will look to connecting factors. These will include factors relating to convenience and expense such as the availability of witnesses and factors such as the law governing the relevant transaction, and the place where the parties reside and carry on business. An example is seen in *Rockware Glass Ltd* v *MacShannon* [1978] AC 795. Four Scotsmen suffered industrial injuries in Scotland. The defendants were English companies with registered offices in England. All the witnesses, including the medical ones, lived in Scotland. Writs were served at the English registered office, so that the English court clearly had jurisdiction. But should it exercise it? The defendants thought not, and they convinced the court that the appropriate ('natural') forum for trial was Scotland. Every significant factor pointed to Scotland. A stay was granted.

Absence of a 'more appropriate' forum

There are cases where there is no clearly more appropriate forum abroad because there is more than one such forum abroad and none of them is clearly more appropriate than the other(s). So in *European Asian Bank AG* v *Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356, a West German sued an Indian bank for payment under a letter of credit following events in India and Singapore. A stay was refused because neither India nor Singapore was clearly more appropriate for the trial of the action than England.

The requirements of justice

The second stage of the inquiry looks to the **requirements of justice**. At this point the burden of proof shifts to the claimant, who must justify their claim to sue in England. On this you should read *Connelly* v *RTZ Corp plc* [1998] AC 854. The plaintiff was domiciled in Scotland and worked in a uranium mine operated by a Namibian subsidiary of the defendant, an English company. He suffered cancer and sued the defendant and one of its English subsidiaries for negligence in England. No financial assistance was available to the plaintiff in Namibia, but it was available in England. The first instance judge granted a stay. The Court of Appeal and the House of Lords considered this wrong. The plaintiff accepted that Namibia was the jurisdiction with which his action had the closest connection, so that *prima facie* a stay should be granted. But it was held that it should nevertheless be refused because justice so required. Lord Goff noted that if there is a clearly more appropriate forum overseas, generally speaking the plaintiff will have to take that forum as he finds it, even if it is less advantageous to him than the English forum. In normal circumstances, therefore, the court will not refuse to grant a stay because of the absence of financial assistance in the overseas forum. *Connelly*[†] was an exceptional case, one that could not be tried at all without the benefit of financial assistance because the issues, particularly medical issues relating to causation, were complex. You might read Lord Hoffmann's dissent: do you agree with his arguments?

[†] A note on *Connelly:* when he sued RTZ in England he lost!

A similar case is *Lubbe* v *Cape plc* [2000] 4 All ER 268. The case was brought by nearly 3,000 South African claimants and Cape plc in the English courts despite South Africa being the most appropriate forum. The action arose out of the asbestos business carried on by South African subsidiaries of Cape plc. Many of the claimants had been employed by the subsidiaries, and were injured in the course of their employment. Others lived in the vicinity of the subsidiaries' factories. The claimants argued that their action was against the parent company and its failure to impose proper health and safety measures on its subsidiaries. The parent company is incorporated in England, and is therefore subject to the English court's jurisdiction. It agreed, however, to submit to the jurisdiction of the South African courts, which made the South African courts 'available' to the claimants. Of course, this enables an English company to decide to be sued where it is more advantageous to it, and also make it more difficult for claimants to know where to sue. The CA had held that South Africa was the most appropriate and natural forum, and the claimants did not appeal against this part of the judgment. They appealed the CA's ruling that substantial justice could be done in South Africa. Lord Bingham, following Lord Goff in *Connelly*, said that normally claimants must take the clearly more appropriate forum as they find it, but that in exceptional circumstances the absence of certain advantages could amount to a denial of substantial justice. The claimants argued that the English proceedings were financed by a contingency fee agreement which was not available in South Africa. This, the HL held, was sufficient to refuse a stay, thus enabling proceedings to take place in England.

The House of Lords also addressed the question that a stay of proceedings could amount to a breach of the European Convention on Human Rights, that if proceedings could not continue because of lack of funding, the claimants would be deprived of a fair trial. Lord Bingham responded that the application of the *Spiliada* principles meant that:

> he would not conceive that the court would grant a stay in any case where adequate funding and legal representation of the claimant were adjudged to be necessary in the doing of justice and these were clearly shown to be unavailable in the foreign forum though available here.

Thus English parent companies who operate through subsidiaries in countries where claimants face greater financial and other hurdles in bringing their claims may well find themselves sued in England.

Self-assessment question

Write a summary of Section 5.1 in no more than 100 words.

5.2 Foreign jurisdiction clauses

Because contractual obligations should be honoured, there is a *prima facie* rule that an action brought in England in breach of an agreement to submit to a foreign jurisdiction will be stayed. However, the court has a discretion, and may allow an action to continue if the ends of justice will be better served by a trial in this country.

5.2.1 Discretion to stay an action

The principles on which the decision whether or not to stay an action were set out in *The Eleftheria* [1970] P 94. They are that:

- the court is not bound to grant a stay: it has a discretion
- the discretion should be exercised in favour of a stay unless strong cause for not doing so is shown
- the burden of proving such strong cause is on the claimant
- in exercising its discretion the court should take account of all the circumstances of the case.

In particular, the following matters should be looked to:

- where the evidence is and the effect of this on convenience and expense of trial
- whether the law of a foreign court applies
- with what country the parties are connected
- whether D is genuinely seeking trial in the foreign country or merely procedural advantages
- whether C would be prejudiced by having to sue in the foreign country because he would:
    a. be deprived of security for his claim
    b. be unable to enforce any judgment
    c. be faced with a time bar not applicable in England, or
    d. for 'political, racial, religious or other reasons be unlikely to get a fair trial'.

In addition, judges should not be drawn into making comparisons between the two systems of justice in the English courts and the relevant foreign court (*The El Amria* [1981] 2 Lloyd's Rep 119).

You will notice that the factors listed are broadly similar to those considered under the doctrine of *forum non conveniens*. But the principle that parties should abide by their agreement makes the English courts less reluctant to stay English proceedings where there is a foreign jurisdiction clause. Since the starting point is that they should be stayed, the burden is on the claimant to show why not. In cases of *forum non conveniens* it is on the defendant.

How then does a claimant escape from an exclusive jurisdiction clause? They cannot do so by framing their claim in tort. This too obvious strategem was squashed in *The Sindh* [1975] 1 Lloyd's Rep 372. They can escape from it by showing that it is void. To do this it is necessary to show that the foreign jurisdiction clause is of no effect (or that the whole agreement is void). For example, see *Trendtex Trading Corp* v *Crédit Suisse* [1982] AC 679 (an assignment of a cause of action in England was void as being against English public policy but this did not vitiate the jurisdiction agreement in favour of the Swiss courts).

An exclusive jurisdiction clause may also be void because of the terms of a statute. Thus an exclusive jurisdiction clause in a bill of lading in breach of the Carriage of Goods by Sea Act 1971 (which incorporated the Hague-Visby Rules) that had the effect of lessening the carrier's liability was held to be null and void (*The Hollandia* [1983] 1 AC 565).

5.2.2 Arbitration agreements

These are governed by the Arbitration Act 1996.

An English court is required to grant a stay of proceedings only if a number of conditions are satisfied. These are:

- the arbitration agreement must be 'in writing' (s.5); this is defined broadly
- the legal proceedings in question must be 'in respect of a matter which under the agreement is to be referred to arbitration' (s.9(1))
- the arbitration agreement must not be 'null and void, inoperative or incapable of being performed' (s.9(4))
- the defendant has not submitted to the court's jurisdiction by taking a step in the proceedings to answer the substantive claim (s.9(3))
- the subject matter of the dispute must be capable of settlement by arbitration.

If these conditions are satisfied, the defendant is entitled to a stay.

SELF-ASSESSMENT QUESTIONS

1. **Explain the doctrine of forum *non conveniens*. Distinguish the two stages of the enquiry. Why does the burden shift at the second stage?**
2. **Does the application of the *forum non conveniens* doctrine encourage litigants to come to English courts? Does it encourage 'forum shopping'?**
3. **In what circumstances may an English court compare the respective merits of 'English justice' with that found in a foreign jurisdiction?**
4. **Discuss the implications of a jurisdiction agreement in relation to bringing proceedings elsewhere. Does an arbitration agreement have the same effect?**
5. **Consider the view that the decisions in *Connelly* v *RTZ* and *Lubbe* v *Cape plc* have made it too easy to sue global corporations in England.**

Summary

That an English court has jurisdiction does not mean that it will accept it. Where the English court is not the *forum conveniens,* or where there is a foreign jurisdiction clause or arbitration agreement pointing to trial in another country, the court has discretion to stay the English action.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the concept of *forum non conveniens* and the two-stage inquiry that is involved**
- **explain the significance of a foreign jurisdiction clause and the effect of an arbitration agreement.**

5.3 Restraint of foreign proceedings

Core text

- **Clarkson and Hill, Chapter 2 'Civil jurisdiction', Section III 'Declining jurisdiction and staying proceedings', B.5 'The Brussels I Regulation and non-Member States', Section IV 'Provisional measures' and Section V 'Restraining foreign proceedings: anti-suit injunctions'.**

Anti-suit injunctions

There are three categories of case in which an English court may grant an anti-suit injunction:

- where a person has behaved, or threatened to behave, in a manner which is unconscionable (their conduct is 'vexatious or oppressive')
- where a person has invaded, or threatened to invade, the legal or equitable right of another
- where the bringing of the proceedings abroad would be in breach of an agreement.

The first category is where the pursuit of proceedings abroad is vexatious or oppressive. See *Société Nationale Industrielle Aérospatiale* v *Lee Kui Jak* [1987] AC 871. It is not easy to define what is meant by 'vexatious' or 'oppressive'. It is not easy to draw the line between litigation to obtain an unfair advantage (this is vexatious or oppressive) and litigation to obtain an advantage of which it would be unjust to deprive the claimant (which is clearly not vexatious or oppressive).†

† Remember that an anti-suit injunction does not purport to halt foreign proceedings: it prevents an individual within the jurisdiction of the English courts from pursuing such proceedings.

In the *Aérospatiale* case, the Privy Council (sitting on appeal from the Court of Appeal in Brunei) held that an injunction should be granted to restrain the plaintiff from continuing proceedings in Texas. The Brunei court was the natural forum – this was where the helicopter crash took place and where the businessman who was killed and his widow were resident – and the continuance of the Texas litigation would be vexatious or oppressive because the defendants would suffer serious injustice in being unable in those proceedings to claim an indemnity from a third party. They were able to claim this in the Brunei court, because the third party was willing to submit to the courts of Brunei, but not to those of Texas.

In *Midland Bank plc* v *Laker Airways Ltd* [1986] QB 689, an anti-suit injunction was granted to restrain an English plaintiff from pursuing proceedings against an English defendant in the USA claiming damages under US anti-trust legislation. It was said to be unconscionable conduct for Laker to bring this anti-trust suit: the alleged liability of the bank arose out of banking acts done in England and which were intended to be governed by English law. Further, the defendant had no relevant presence or business connections with the USA.

Comity

An injunction may be granted even where England is not the natural forum, if 'the conduct of the foreign state is such as to deprive it of the respect normally required by comity'† (*per* Lord Goff in *Airbus Industrie GIE* v *Patel* [1999] 1 AC 119, 140). There had been an aircraft crash in India and the defendants (English claimants) brought proceedings in Texas against the plaintiffs, who were the plane's manufacturers. The plaintiffs sought an injunction from the English courts restraining the defendants from continuing with the Texas proceedings. The House of Lords held that the grant of an injunction was inconsistent with comity. The English courts had no interest in, and no connection with, the matter to justify interference.

† **Comity**: normal friendly and courteous behaviour towards other sovereign states.

Breach of legal or equitable rights

A defendant in proceedings abroad may seek an anti-suit injunction where the proceedings involve the breach of his legal or equitable rights. For example, he has an equitable defence to the claim, such as estoppel.

An example of this is where there is an arbitration clause or a clause conferring exclusive jurisdiction on the English courts and despite this there is an attempt to sue abroad. It is said that in such circumstances an injunction should be granted unless there are 'special countervailing factors' (*per* Steyn LJ in *Continental Bank NA* v *Aeakos Compania Naviera SA* [1994] 1 WLR 588, 598). An injunction may be refused, even though there is an exclusive jurisdiction clause in favour of the English courts, where, in a case involving many parties, foreign proceedings provide the best means of submitting the whole dispute to a single tribunal. See *Donohue* v *Armco Inc* [2002] 1 All ER 749.

SELF-ASSESSMENT QUESTIONS

1. **What does an anti-suit injunction restrain? What happens if it is broken? Does it have the same implications as the purported use of such an injunction has where the foreign court is in the European Union?**
2. **Why should the requirement emphasise 'vexation or oppression'? Would it not be enough if it could be shown that there was another clearly more appropriate forum for the litigation?**
3. **Is the restraint of foreign proceedings a jurisdiction that the English courts should exercise at all?**

ACTIVITIES 5.1–5.4

5.1 When will an English court restrain foreign proceedings?

5.2 Define 'vexatious or oppressive'.

5.3 What is meant by 'comity'?

5.4 What is 'forum-shopping'?

Summary

This chapter looks at the English courts' jurisdiction to restrain the pursuit of foreign legal proceedings by issuing an anti-suit injunction. The grounds for restraint differ from those for staying an English action on *forum non conveniens* grounds.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain and give examples of anti-suit injunctions**
- **state the general basis on which anti-suit injunctions may be granted.**

SAMPLE EXAMINATION QUESTIONS

Question 1 Discuss critically the doctrine of *forum non conveniens*.

Question 2 In what circumstances can a defendant escape from a jurisdiction which he now thinks is unlikely to do him justice?

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the concept of *forum non conveniens* and the two-stage inquiry that is involved	☐	☐	☐
I can explain the significance of a foreign jurisdiction clause and the effect of an arbitration agreement	☐	☐	☐
I can explain and give examples of anti-suit injunctions	☐	☐	☐
I can state the general basis on which anti-suit injunctions may be granted.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
5.1	Stays of English proceedings	☐	☐
5.2	Foreign jurisdiction clauses	☐	☐
5.3	Restraint of foreign proceedings	☐	☐

Notes

6 Foreign judgments

Contents

Introduction

This chapter examines the **conditions** for enforcement of a foreign judgment and the defences which may be raised where there is an attempt to enforce such a judgment. At the end of the chapter the question of when a foreign judgment may be **recognised** is considered. By the end of this chapter you should understand the conditions and the defences. Remember we are talking about the enforcement of a judgment of a court outside the European Union, such as a court in New York or Tokyo or Moscow.

By the end of this chapter you should understand how recognition and enforcement are effected in this regime and you should know in particular what defences are available. You should also be able to compare the Brussels regime with the traditional one based on common law principles, in particular understanding the ways in which defences operate in the two regimes. Thus, for example, it is important for you to understand the different approaches to fraud, natural justice and public policy in the two regimes.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **state the conditions on which an English court will enforce a foreign judgment at common law**
- **compare the attitude of English courts to subsidiary companies with that of US courts**
- **explain how English courts treat mistakes made in foreign judgments**
- **list the defences against enforcement of a foreign judgment**
- **explain what is meant by 'fraud' in this context**
- **state the conditions on which foreign judgments will be recognised and enforced by English courts**
- **state the grounds on which an English court may refuse to do so**
- **explain the circumstances in which the courts of the UK and EU will recognise and enforce each others' judgments following the departure of the UK from the EU.**

6.1 The status of foreign judgments

Core text

- **Clarkson and Hill, Chapter 3 'Foreign judgments', Section I 'Introduction'.**

Foreign judgments have no direct operation in England. Nevertheless, they may be recognised or enforced in England. English courts have recognised and enforced foreign judgments since the 17th century. It was at one time supposed that the basis of enforcement was to be found in the doctrine of **comity**. Later this theory was superseded by what is called the doctrine of **obligation** (see *Schibsby* v *Westenholz* (1870) LR 6 QB 155). It followed that provided the foreign court had jurisdiction to give judgment (according to English conflict of laws rules), the judgment is conclusive in England, unless it is impeachable for reasons of fraud, public policy, etc., and it is not merely *prima facie* evidence of the defendant's liability, as once had been assumed to be the case. The obligation doctrine has been restated in the modern case of *Adams* v *Cape Industries plc* [1990] Ch 433. The CA accepted the obligation doctrine, but also expressed the view that the same notion of comity lay behind the recognition of judgments: 'the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found' (at p.552).

When we studied jurisdiction we saw there were parallel systems, one based on common law principles (the so-called traditional rules), and the other now found in the EU regime. Questions relating to the recognition and enforcement of judgments similarly have to be separated into recognition and enforcement at common law, and recognition and enforcement under the 'Brussels regime'.†

† There are a number of other statutory enforcement regimes, in particular under the Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933 (Clarkson and Hill, Chapter 3 'Foreign judgments', Section III 'Statutory regimes based on the common law' provide a summary). These statutory provisions are relatively unimportant – at least for students – and are never examined.

Activities 6.1 and 6.2

6.1 What is the status of a judgment of a Brazilian court in England?

6.2 On what basis does an English court recognise a foreign judgment?

6.2 Foreign judgments: recognition and enforcement at common law

Core text

- **Clarkson and Hill, Chapter 3 'Foreign judgments', Section II 'Recognition and enforcement at common law'.**

6.2.1 Conditions for enforcement

For a judgment to be entitled to enforcement at common law the following conditions must be satisfied:

- the foreign court must have been a court of competent jurisdiction
- its judgment must be final and conclusive
- the judgment must be for a fixed sum of money.

If these criteria are satisfied, the foreign judgment is *prima facie* entitled to enforcement. And it will be enforced unless the judgment debtor† can establish a defence which negatives the effect of the judgment in England.

† **Judgment debtor**: person against whom a court judgment has been made, and who is therefore now obliged to pay money that they owe.

The court will be one of competent jurisdiction where it has exercised jurisdiction on one of the bases of jurisdiction recognised as acceptable according to English rules of private international law. The question is not whether the court in Moscow believes it has jurisdiction, but whether the English court, applying its conflict of laws rules, says it has jurisdiction.

The foreign court has jurisdiction over an **individual defendant** if, they are resident within the foreign country (*Emanuel* v *Symon* [1908] 1 KB 302) or present within the foreign country (*Carrick* v *Hancock* (1895) 12 TLR 59). It may be said that casual presence is hardly a satisfactory basis of jurisdiction, but, of course, English courts exercise jurisdiction over defendants on this basis.

Companies and their subsidiaries

A **company** cannot be resident or present as such, though it can carry on business abroad. This can amount to residence or presence if (i) it has a fixed place of business from which it has carried on its own business for more than a minimal time and (ii) the business is transacted from that fixed place of business (*Adams* v *Cape Industries plc* [1990] Ch 433, 530–531). This is easily established where there is a branch office: it is more difficult where the business is conducted by a representative, an agent or an employee.

In the *Adams* case, the corporation carried on business by means of a subsidiary company. The facts were that D, an English company which mined asbestos, and E, its worldwide marketing subsidiary, carried on business in the USA through F, companies incorporated in the US state of Illinois. Asbestos mined by D was sold for use in an asbestos factory in Texas. A (206 plaintiffs) was injured working at the factory. A sued for damages in the Federal Court in Tyler, Texas. D took no part in the proceedings, though they had done in previous Tyler actions involving different plaintiffs, and a default judgment was awarded against them by the US Court.

Could the default judgment be enforced in England? The CA held that it could not. It held that D was not present in Illinois since F, D's representatives, were carrying on their own business and not that of D.

But were not the English company and its American subsidiary a single economic unit? This 'radical' idea has found favour in the USA where the emphasis is on the economic realities of the situation. But it did not appeal to the English courts, which preferred the conventional conceptual analysis – the *Salomon* principle – that the parent and the subsidiary are separate legal entities. Of course, this means that an English company can set up business abroad in such a way that it is not present or resident there. Judgments against it will then not be enforceable in England. The same analysis will apply if it carries on business abroad through associated companies.

The trial was in Texas. Suppose D had been resident or present in Illinois? The CA thought this might have been sufficient because the trial was in a federal court. But a federal court judge sitting in Texas has to apply Texas rules on jurisdiction, and a federal judgment is a foreign judgment when it comes to enforcement within the USA.

Submission to jurisdiction by voluntary appearance

If a person submits to the jurisdiction of a foreign court, they cannot afterwards say that the court did not have jurisdiction over them. Submission may be founded in agreements to submit that are less than explicit – for example by a contract which confers jurisdiction as regards disputes to a foreign court. This was the case in *Copin* v *Adamson* [1874] LR 9 Ex Ch 345, where, by taking shares in a French company whose articles of association provided that disputes arising during liquidation should be submitted to a French court, a domiciled Englishman had agreed to submit to the French court's jurisdiction and its judgment could be enforced against him in England. There are different views on whether an agreement to submit can be implied: for example Scott J *obiter* in *Adams* v *Cape Industries plc* seemed to accept that an implied agreement to submit might be sufficient.

The effect of appearances to protest against jurisdiction

What of an appearance to protest against jurisdiction? Is this a submission? The Civil Jurisdiction and Judgments Act 1982 s.33(1) provides that:

> … the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely:

(a) to contest the jurisdiction of the court;

(b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;

(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.

Other tests of jurisdiction

Nothing else founds jurisdiction. So the following **do not** found jurisdiction:

- political nationality
- domicile
- locality of cause of action (e.g. contract broken or tort committed in the country)
- choice of governing law (e.g. no jurisdiction in Japan merely because Japanese law is the applicable law)
- possession of immovable property in the jurisdiction
- foreign judgment based on service out of jurisdiction.

Other suggestions have been made. For example, that the test should be 'a real and substantial connection with the action': this was adopted by the Canadian Supreme Court in *Morguard Investments Ltd* v *De Savoye* [1991] 76 DLR (4th) 256. Another suggestion is that we should accord recognition but not enforcement where the foreign court is the natural forum (see Briggs [1992] 109 *LQR* 549).

'Final and conclusive'

Secondly, the foreign judgment must be final (i.e. it must be *res judicata* by the law of the country where it was given). A provisional judgment is not *res judicata.* For example, see *Nouvion* v *Freeman* [1889] 15 App Cas 1: a Spanish judgment, which could be abrogated by the adjudicating court, was not *res judicata.* See also *Blohn* v *Desser* [1962] 2 QB 116, an Austrian judgment against a firm rather than an individual. To have rendered her personally liable a separate action would have had to be brought against her individually and she would have been able to raise various defences. Held: that even if the judgment could be regarded as having been given against her personally, it was not final and conclusive.

The requirement of finality means that the judgment must be final in the particular court in which it was given. It does not mean that there must be no right of appeal. An action can be brought in England even if an appeal is pending in the foreign court.

Fixed sum

The judgment must be for a fixed sum. There is no question of enforcing a foreign decree of specific performance or for specific delivery or restitution of chattels. This is contested by the Supreme Court of Canada: see *Pro Swing* v *Elta Golf* [2007] 273 DLR (4th) 663 where it was said that the door should be opened to modern equitable remedies, such as injunctions.

Provided the judgment meets these tests, an English court will enforce it, unless it can be impeached by the judgment-debtor on one of the grounds to be discussed. It is irrelevant that the judgment is wrong: the English court does not sit as a Court of Appeal against a judgment pronounced by a foreign court which was competent to exercise jurisdiction over the parties.

Mistakes

But suppose it got the English law wrong? This was tested in *Godard* v *Gray* [1870] LR 6 QB 139. A French court took a mistaken view of English law and thus quantified damages wrongly. The judgment-debtor pleaded this mistaken view of English law in defence. The plea failed. The court held that there could be no difference between a mistake as to English law and any other mistake.

Although this was once doubted (see Lindley LJ in *Pemberton* v *Hughes* [1899] 1 Ch 781), it is now clear that if a foreign court makes a mistake as to its own jurisdiction, so that it hears a case when it had no jurisdiction to do so, an English court will not enforce its judgment (see *Papadopoulos* v *Papadopoulos* [1930] P 55; *Adams* v *Adams* [1971] P 188). Any other conclusion would be inconsistent with the principle that we do not question a foreign court's jurisdiction.

If the foreign court has erred in its own rules of procedure, an English court will still enforce its judgment. So in *Pemberton* v *Hughes*, where in divorce proceedings a wife had received nine days' notice of the proceedings instead of the 10 prescribed by Florida law, the Court of Appeal held that the judgment was binding in England.

Defences which were available before the foreign court should have been raised there and accordingly cannot be raised in England. Thus, in *Israel Discount Bank of New York* v *Hadjipateras* [1984] 1 WLR 137, the defendant raised the issue that he had only entered into a guarantee under the undue influence of his father for the first time when enforcement of a New York judgment against him was sought in England. He could have raised it during the New York proceedings. Held: since it was available to him in New York, he could not now raise it in England. But suppose the defence of undue influence had not been available under New York law? Or what if the defence had been available, but the factual existence of undue influence had only emerged after the New York proceedings? We await answers to these questions.

Reminder of learning outcomes

By this stage you should be able to:

- **state the conditions on which an English court will enforce a foreign judgment at common law**
- **compare the attitude of English courts to subsidiary companies with that of US courts**
- **explain how English courts treat mistakes made in foreign judgments.**

6.3 The nine available defences

We must now examine the defences that are available to the defendant. There are nine.

1. Judgment obtained by fraud

The first is that the foreign judgment was obtained by fraud. Fraud may take one of a number of forms. The judge may have taken a bribe. The defendant may have been deprived of the opportunity to take part in the foreign proceedings because of a trick (e.g. saying you were going to arbitration and going to court behind the defendant's back as in *Ochsenbein* v *Papelier* [1873] 8 Ch App 695) or because of a threat of violence (*Jet Holdings Inc* v *Patel* [1990] 1QB 335).

But what if the fraud was raised in the court abroad? It is clear that in normal circumstances fraud can be raised as a defence even if it has been raised and dismissed abroad. This was stated in *Abouloff* v *Oppenheimer* (1882) 10 QBD 295 (see also *Vadala* v *Lawes* [1890] 25 QBD 310) and restated relatively recently in *Jet Holdings Inc* v *Patel*. The plaintiffs brought an action in California to recover money allegedly misappropriated by the defendant. The defendant appeared and claimed that he had suffered and been threatened with violence by the president of the plaintiff company. The defendant failed to attend a medical examination, and a default judgment was entered. The Court of Appeal held that this could not be enforced in England. It took the view that the plaintiffs had implicitly (even expressly) asserted to the Californian court that the defendant's account of violence was untrue. If it was true, this (and the actual incidents of violence relied on) could amount to fraud. See also *Owens Bank* v *Bracco* [1992] 2 AC 443.

Can the *Abouloff* rule (as it is called) be avoided? There are two ways of doing this. The first is by distinguishing it. An example is *House of Spring Gardens Ltd* v *Waite* [1991] 1 QB 241. It was alleged that an Irish judgment had been obtained by fraud but there had

been a second case in Ireland which had determined that there had not been fraud. It was held that this second judgment created an estoppel: the first could not thus be questioned.

The second way of avoiding the *Abouloff* rule is that the court has an inherent power to prevent misuse of its process so that:

> Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a ***prima facie*** case of fraud (see ***Owens Bank Ltd*** v ***Etoile Commerciale SA*** [1995] 1 WLR 44).

If the fraud was not raised abroad, it can be raised in England notwithstanding that the decision not to raise it in the foreign proceedings was deliberate. This means in effect that you can reserve the defence of fraud, only raising it in enforcement proceedings if judgment goes against you (see *Syal* v *Hayward* [1948] 2 KB 443). And remember that a failure to raise undue influence abroad was not treated in this way in *Israel Discount Bank of New York* v *Hadjipateras* [1984] 1 WLR 137.

2. Public policy

The second is where the foreign judgment is contrary to English public policy. Examples are undue influence, duress and coercion (see *Israel Discount Bank of New York* v *Hadjipateras* [1984] 1 WLR 137). See also *Re Macartney* [1921] 1 Ch 522 (a Maltese judgment awarding the mother on behalf of an illegitimate child perpetual maintenance against the estate of the deceased father contrary to public policy since it was not limited to minority). And *Vervaeke* v *Smith* [1983] 1 AC 145: a foreign judgment will not be recognised if it is inconsistent with a previous decision of a competent English court in proceedings between the same parties. It has been held that the enforcement of a judgment for exemplary or punitive damages is not contrary to public policy (*SA Consortium General Textiles* v *Sun and Sand Agencies Ltd* [1978] QB 279): interestingly, the German Federal Supreme Court has refused such a Californian judgment recognition on public policy grounds.

This must now be seen in the light of human rights law. In *Al-Bassam* v *Al-Bassam* [2004] EWCA Civ 857, the CA said the first instance judge was right to voice concern that the judgment of a foreign court given in proceedings which, in the eyes of English law, had failed to meet the standards of a fair trial, would not be recognised in England. An English court 'will have regard to its own obligations to act in a manner which is not inconsistent with the Convention right (in Article 6 of the ECHR) to a fair trial'.

3. A breach of Article 6 of the ECHR

There is a separate defence, the source of which is Article 6 of the ECHR. In *Drozd and Janousek* v *France and Spain* [1992] 14 EHRR 745 it was said that an ECHR Contracting state may incur responsibility if it assists in the enforcement of a foreign judgment obtained in flagrant breach of Article 6. In *Pellegrini* v *Italy* [2001] 35 EHRR 44 it was said the breach did not have to be 'flagrant'. In *Govt of the USA* v *Montgomery (No.2)* [2004] 3 WLR 2241, the House of Lords accepted that Article 6 can have indirect effect in cases of enforcement of foreign judgments. The dictum in *Drozd* was accepted, so that there must be a flagrant breach of Article 6. The Lords refused to accept the wider principle in *Pellegrini*. See Fawcett (2007) 56 *ICLQ* 1.

4. Revenue, penal or other public laws

The fourth ground relates to foreign revenue, penal or other public laws (see also Chapter 5). English courts will not enforce foreign revenue, penal or other public laws either directly or through the recognition of a foreign judgment. See *USA* v *Inkley* [1989] QB 255 (enforcement refused of a bail appearance bond). But an order by a criminal court that a defendant compensate their victim is enforceable (*Raulin* v *Fischer* [1911] 2 KB 93). So, a civil judgment, combined with a criminal judgment may be actionable in England, as creating a separate and independent course of action.

5. Natural justice

The fifth ground is that a foreign judgment contrary to natural justice will not be enforced. It is not clear what 'natural justice' means. In *Jacobson* v *Frachon* [1927] 138 L T 386, Atkin LJ said it involved 'the court being a court of competent jurisdiction, having given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant… and notice (to) afford… an opportunity of substantially presenting his case before the court'. So two elements of natural justice are due notice and a proper opportunity to be heard. In addition, in *Adams* v *Cape Industries plc* [1990] Ch 433 (see above), it was held it could extend to a lack of judicial assessment of damages (damages had been fixed on an average basis, rather than an individual entitlement according to evidence).

6. Multiple damages

The sixth ground is statutory. The Protection of Trading Interests Act 1980 provides (s.5(2)) that a court in the UK cannot enforce a judgment for multiple damages. This targets US anti-trust laws. The prohibition applies to all the judgment, not just its non-compensatory part (see *Lewis* v *Eliades* [2004] 1 WLR 692). It has been extended to similar Australian judgments.

But where a foreign court gives a composite judgment with both a multiplied award and ordinary compensatory damages, it is possible to separate the different parts, and enforce the latter, but not the former. An illustration is the case of *Lewis* v *Eliades* (a US judgment for $8 million – $1.1 million for racketeering – a multiple damages award – and $6.8 million for breach of fiduciary duty and fraud). The Court of Appeal enforced the latter part of the judgment.

7. Matter previously determined by an English court

The seventh ground – which overlaps with that of public policy – is that a foreign judgment will not be recognised if the matter has previously been determined by an English court. Thus, in *Vervaeke* v *Smith* [1983] 1 AC 145, the English courts refused recognition to a Belgian judgment annulling a marriage in London involving a Belgian sex worker, who was domiciled in Belgium but worked in Paddington (west London), because an English court had already determined it was a valid marriage. The difference hinged on English law's refusal to accept the notion of a 'sham marriage' (one entered into in this case to avoid deportation) and Belgian law, which said that such a marriage was not a marriage at all.

8. Matter previously determined by another foreign court

The eighth ground is where a foreign judgment is given on a matter previously determined by a court in another foreign state. Thus, if there are two conflicting foreign judgments, both of which satisfy the conditions for recognition or enforcement, the earlier judgment will prevail, unless the circumstances are such that the party wishing to rely on the earlier judgment is estopped from doing so (see *Showlag* v *Mansour* [1995] 1 AC 431).

9. Foreign judgment in breach of arbitration or jurisdiction clause

The ninth ground is where a foreign judgment has been given in breach of an arbitration or jurisdiction clause (s.32 of the Civil Jurisdiction and Judgments Act 1982). However, a jurisdiction or arbitration clause cannot provide a defence to recognition or enforcement if it was illegal, void, unenforceable or incapable of being performed (s.32 (2)). An illustration is *Tracomin SA* v *Sudan Oil Seeds* [1983] 1 All ER 404. The contract referred any dispute to arbitration in England. Nevertheless, P sued D in Switzerland. The Swiss court concluded the arbitration clause was of no effect and ordered D to pay damages. The CA refused to enforce the judgment. English law was the proper law and under this the arbitration clause was valid. D was therefore entitled to rely on it as a defence to the Swiss judgment.

Activities 6.3 and 6.4

6.3 When will an English court regard a foreign court as competent to try an action?

6.4 What is the *Abouloff* defence?

Self-assessment questions

1. **Explain the scope of the 'natural justice' defence. Does it extend too far?**
2. **Define 'fraud' for the purposes of raising it as a defence to the enforcement of a foreign judgment. Give examples of what constitutes fraud, and what does not.**
3. **Courts in the UK will not enforce a judgment for multiple damages. Why not? Why then will they enforce a judgment awarding punitive damages?**
4. **In common law, can an English court enforce a foreign judgment for:**
   i. **restitution**
   ii. **exemplary damages**
   iii. **payment of unpaid taxes**
   iv. **a fine arising from a criminal offence**
   v. **a personal debt**
   vi. **compensation for criminal injury**
   vii. **a judgment given in breach of the ECHR?**

Reminder of learning outcomes

By this stage you should be able to:

- **list the defences against enforcement of a foreign judgment**
- **explain what is meant by 'fraud' in this context.**

6.4 Recognition and enforcement of judgments between UK and EU courts following Brexit

Core text

- **Clarkson and Hill, Chapter 3 'Foreign judgments', Section IV 'Recognition and enforcement under the Brussels I Regulation'.**

Following the departure of the UK from the EU, the Brussels Regulation (recast) no longer applies to civil and commercial cases that commenced on or after 1 January 2021. The UK and EU will each continue to enforce the judgments of the other for proceedings issued before 1 January 2021. In that respect, Article 89 of the Withdrawal Agreement provides that judgments of the European Court of Justice shall have binding force in the UK. Article 89 of the Agreement additionally provides that decisions adopted by institutions, bodies, offices and agencies of the EU before the end of the transition period are binding within the UK. Finally, Article 67 of the Agreement provides that UK judgments in respect of proceedings issued before 1 January 2021 will continue to be enforceable in other Member States.

As regards proceedings commenced after 1 January 2021, the following are relevant:

The Hague Choice of Court Convention 2005

The Hague Convention has been in force in the UK since 1 October 2015 through the EU's accession to it. Following Brexit, the UK has acceded to the Hague Convention in its own right (effective from 1 January 2021). There are, however, some key differences between the two regimes. First, the Hague Convention only applies to exclusive jurisdiction clauses. Second, the Convention prevents parallel proceedings taking place in another contracting state. Therefore, the Hague Convention appears to be less comprehensive than the previous regime.

The Lugano Convention 2007

In April 2020, the UK applied to accede in its own right to the Lugano Convention, an instrument that is similar to the Brussels Regulation (recast) in that both ensure the contractual choice of jurisdiction of the parties is enforced and that judgments from the courts of Member States are enforceable across the European Union but which also applies to Iceland, Norway and Switzerland. Accession to the Convention requires the consent of all contracting parties to it. In June 2020, the European Commission formally blocked the accession of the UK to the Lugano Convention. It stated that:

> For the European Union, the Lugano Convention is a flanking measure of the internal market and relates to the EU-EFTA/EEA context. In relation to all other third countries the consistent policy of the European Union is to promote cooperation within the framework of the multilateral Hague Conventions. The United Kingdom is a third country without a special link to the internal market. Therefore, there is no reason for the European Union to depart from its general approach in relation to the United Kingdom. Consequently, the Hague Conventions should provide the framework for future cooperation between the European Union and the United Kingdom in the field of civil judicial cooperation.

It concluded that 'it was not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention'.

So, for the time being, the UK will continue to determine questions of jurisdiction and enforcement of judgments either under the Hague Choice of Court Convention 2005 (where there is an exclusive jurisdiction clause), or under common law (in the absence of one).

SELF-ASSESSMENT QUESTION

What is the state of play in respect of the reciprocal recognition and enforcement of judgments of UK and EU courts following the departure of the UK from the European Union?

Summary

With the UK's departure from the EU, the Recast Brussels Regulation and the Lugano Convention no longer apply to civil and commercial cases commenced in the UK on or after 1 January 2021.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **state the conditions on which foreign judgments will be recognised and enforced by English courts**
- **state the grounds on which an English court may refuse to do so**
- **explain the circumstances in which the courts of the UK and EU will recognise and enforce each others' judgments following the departure of the UK from the EU.**

SAMPLE EXAMINATION QUESTION

In what circumstances is a judgment from a court in Los Angeles impeachable in an English court?

ADVICE ON ANSWERING THE QUESTION

Examination questions on this subject tend to be essay questions. They test knowledge and understanding of defences in particular and expect a detailed knowledge of these (particularly the 'fraud' defence').

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the conditions on which an English court will enforce a foreign judgment at common law	☐	☐	☐
I can compare the attitude of English courts to subsidiary companies with that of US courts	☐	☐	☐
I can explain how English courts treat mistakes made in foreign judgments	☐	☐	☐
I can list the defences against enforcement of a foreign judgment	☐	☐	☐
I can explain what is meant by 'fraud' in this context	☐	☐	☐
I can state the conditions on which foreign judgments will be recognised and enforced by English courts	☐	☐	☐
I can state the grounds on which an English court may refuse to do so	☐	☐	☐
I can explain the circumstances in which the courts of the UK and EU will recognise and enforce each others' judgments following the departure of the UK from the EU.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
6.1	The status of foreign judgments	☐	☐
6.2	Foreign judgments: recognition and enforcement at common law	☐	☐
6.3	The nine available defences	☐	☐
6.4	Recognition and enforcement of judgments between UK and EU courts following Brexit	☐	☐

NOTES

7 Contracts

Contents

Introduction

In this chapter we will examine the choice of law process in contract. Until 1 April 1991 the rules were a matter of common law. Since that date and until 16 December 2009, the law was substantially governed by the Rome Convention, enacted by the Contracts (Applicable Law) Act 1990 which harmonised the choice of law rules for contract throughout the Member States of the European Union. From 17 December 2009 the rules applicable to choice of law in contract are incorporated in Regulation (EC) No 53/2008 of the European Parliament and the Council (commonly known as the Rome I Regulation), which has completely replaced the Rome Convention.

It should be pointed out that, as a result of Brexit, The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 were enacted. Pursuant to the latter, the provisions of Rome I will continue to apply with a view to determining the proper law of the contract.

You should be able to find the applicable law of a contract. Having found it we will see that it governs most contractual questions that can arise – but not all. Later in this chapter we will take the questions that arise in contract and see how each is answered. By the end of this chapter you should understand material validity, formal validity, capacity and incapacity, the scope of the applicable law (including performance) and illegality. We will consider each of these subjects in turn.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- **explain the choice of law process in contract**
- **explain the concepts of 'characteristic performance' and 'mandatory rules'**
- **explain the conditions that apply to choice of applicable law by parties to a contract**
- **state what rules apply in the absence of such a choice**
- **solve problems which require you to work out the applicable law of the contract**
- **explain the importance of material and formal validity**
- **outline the common law rules that are applied in cases where capacity is in question**
- **state what matters come within the scope of the applicable law**
- **explain what rules apply when a contract involves some illegality.**

Core text

- **Clarkson and Hill, Chapter 4 'Contractual obligations'.**

Essential reading

- **Garcimartín Alférez, F.J. 'The Rome I Regulation: Much ado about nothing?' (2008) 2 *The European Legal Forum* (E), 61–80 (available on the VLE).**

7.1 Rome I Regulation

The Rome I Regulation applies to contractual obligations in any situation involving a choice between the laws of different countries (Article 1(1)). The Regulation does not define 'contractual obligations', but it is clear that we should adopt a broad European approach to the concept. At common law we were prepared to regard as a contract a promise that lacked consideration (see *Re Bonacina* [1912] 2 Ch 394): so there is no reason why our view of contract should now be confined to our own concept of it.

Exclusions

The Rome I Regulation excludes some matters though they involve contractual obligations. The exclusions are:

- Questions involving status or legal capacity of natural persons subject to Article 13.
- Obligations arising out of family relationships and maintenance obligations.
- Contractual obligations relating to rights in property arising out of a matrimonial relationship, and wills and succession.
- Obligations arising under bills of exchange, cheques and promissory notes, and other negotiable instruments to the extent that the obligations under other negotiable instruments arise out of their negotiable character.
- Arbitration agreements and agreements on the choice of court.
- Questions governed by company law such as the creation, legal capacity, internal organisation or winding up of companies and the personal liability of officers and members as such for the obligations of the company or body.
- The question of whether an agent is able to bind a principal, or an organ to bind a company or unincorporated association, to a third party.
- The constitution of trusts and the relationship between settlors, trustees and beneficiaries.
- Questions of evidence and procedure.
- Certain life insurance contracts.

Rome I makes it clear that a reference to the law of a country is a reference to the domestic law of that country. *Renvoi* thus has no part to play (Article 20).

Determining the applicable law

The main thrust of Rome I is to provide rules to enable us to determine the **applicable law** of a contract. If we ignore for a moment specialised contracts, the rules are to be found in Articles 3 and 4 of the Regulation. Article 3 deals with express choice (including a choice which may be implied from the terms of the contract or the circumstances of the case). Article 4 deals with the determination of the applicable law in the absence of choice. Each of the Articles must be examined in turn.

7.2 Choice of law

7.2.1 Freedom to choose

Article 3 bears the heading 'Freedom of Choice' and expresses the basic principle of party autonomy. This principle was accepted in the common law. Thus, Lord Reid in *Whitworth Street Estates (Manchester) Ltd* v *James Miller and Partners Ltd* [1970] AC 583, 603 said:

> Parties are entitled to agree what is to be the proper law of their contract … There is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled.

See also Lord Wright in *Vita Food Products Inc* v *Unus Shipping Co Ltd* [1939] AC 277, 290:

> Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on ground of public policy.

Article 3 provides that the parties are free to choose the law to govern their contractual relationship. So a contract may include a specific clause providing that the contract 'shall be governed by the law of Germany'. You will have noted that Lord Wright – in the leading common law authority – was hunting about for a limitation to complete freedom. He found it in the necessity for the choice to be *bona fide*, legal and not contrary to public policy. This raises the obvious question as to whether the parties have **complete** freedom of choice under Rome I: can they choose a law which has no connection with either of them or the subject matter of the contract? Suppose an English company and a Germany corporation contract about the supply of German beer to an English supermarket chain. Could they agree that their rights and obligations be governed by the law of Peru? The answer is 'yes': Rome I allows the choice of a law which has no connection with the contract. Parties may have a good reason for doing this (seeking a neutral law or choosing the law which governs the financing or insurance of the contract), but they may also have none.

7.2.2 Provisions limiting the effect of choice

The Regulation does not invalidate a choice of law, but there are a number of provisions which limit the effect of a choice of law by the parties. These will be dealt with more fully below, but here we should be aware of them.

First, there are what are called **mandatory rules**, that is rules of the law which cannot be 'derogated from by contract' (Article 3(3)). The rules providing controls on exemption clauses contained in the Unfair Contract Terms Act 1977 (see s.27 (2)) would be one example. If parties to an entirely German contract (which contains an exemption clause) choose French law to govern it, the courts of any Contracting State which tries the case will have to apply any controls on exemption clauses in the German equivalent of the 1977 Act. This will prevent evasions of the law, but will also knock out some choices made for perfectly legitimate reasons.

Second, Article 9(2) provides that nothing in the Regulation shall restrict the application of the rules of law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract: so, for example, an express choice of foreign law may be nullified or limited by the terms of English legislation such as the Unfair Contracts Terms Act 1977 s.27(2).

The third limitation and the fourth relate to **consumer** contracts and **employment** contracts. Articles 6(2) and 8(1) provide that a choice of law made by the parties does not have the effect of depriving the consumer or employee of the protection of certain mandatory rules: in the case of consumers, under the law of their habitual residence; in the case of employees, under the law which would be applicable in the absence of a choice of law.

Fifth, a choice of foreign law will not prevent the forum from disregarding it if its application would be manifestly incompatible with the **public policy** of the forum (Article 21).

Subject to these limitations the parties may choose the law to govern their contract. The Convention states they may choose the 'law of a country'. It is therefore generally thought that they cannot choose the *lex mercatoria* (the internationally accepted principles of trade law) or the principles of European contract law or even public international law. But it may be said by way of riposte that if the parties are free to choose they ought to be able to choose whatever they think is best for them.

They **cannot** make a choice which is meaningless. What is meaningless will, of course, depend upon what a court subsequently thinks. A good illustration is the common law case of *Compagnie D'Armement Maritime SA* v *Cie Tunisienne de Navigation* [1971] AC 572. The Court of Appeal held that the clause 'This contract shall be governed by the laws of the flag of the vessel carrying the goods' was meaningless in a contract which contemplated that it would be performed in a number of different vessels flying different flags. The HL by 3–2 did not agree: it held French law governed since the flag 'primarily' flying was that of France. You may find the CA's interpretation more convincing. Another example is found in *Shamil Bank of Bahrain* v *BeximCo Pharmaceuticals* [2004] WLR 1784 where the contract expressed that it had to be governed by English law 'subject to the principles of the Glorious Sharia'a'. Since it was not clear which principles were to be incorporated, the clause was self-contradictory and meaningless.

Dépeçage

Parties may choose different laws to govern different parts of their contract. For example, an index-linking clause may be made subject to a law different from the rest of the contract. This 'pick and choose' approach is called *dépeçage*. If parties do choose in this way their choices must be **logically consistent**. So, for example, the choice would fail if the parties were to make repudiation for non-performance refer to different laws (i.e. one for the vendor, the other for the purchaser). It would then be necessary to determine (under Article 4) the applicable law in the absence of express choice.

The parties cannot choose a **floating** applicable law. This was the common law position too. Thus, in *Armar Shipping Co Ltd* v *Caisse Algérienne d'Assurance* [1981] 1 WLR 207 the CA held that it was not right to take into account, in determining whether a Lloyd's average bond was governed by English law, the fact that it was subsequently decided by the parties that general average adjustment should take place in London. The applicable law must exist and be identifiable at the time when the contract is made.

7.2.3 Delayed choice of law

Article 3(2) 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 made under this Article or of other provisions of this Regulation.

So parties who do not make a choice initially can subsequently make one. Until they do so their contract will be governed by the applicable law in the absence of choice (determined under Article 4). Also, parties who have made a choice can vary it subsequently. The effect of this will be that one law will govern their rights and obligations until the variation, and a different one afterwards. There are problems with this, and these have been anticipated. Article 3(2) therefore also provides that any variation shall not prejudice the formal validity of the contract (the contract might have become formally invalid under the new law) or adversely affect the rights of third parties.

Summary

Rome I Regulation is committed to party autonomy, so parties are free to choose the law to govern their contract (the applicable law). There are some limitations to this. Even if they have not chosen the applicable law they may do so subsequently.

7.3 In the absence of express choice

There may not be an express choice of applicable law. But it may still be possible to infer a choice under Article 3(1) if such a choice (and it is a choice) can be 'clearly demonstrated by the terms of the contract or the circumstances of the case'.

7.3.1 Implied choice

Examples of where a choice may be implied from the terms of a contract are:

- where the contract is in a standard form known to be governed by a particular system of law
- where there is a choice of forum clause or an arbitration clause naming the place of arbitration.

More doubtful would be where the parties have referred to a particular currency. Since we are looking for parties' intentions, it may be more difficult to infer them 'with reasonable certainty' from a currency reference. There are many reasons for choosing a particular currency (e.g. its international character or negotiability).

The most common term from which a choice of applicable law will be implied is the choice of the **courts** of a particular country to determine a dispute. The maxim *qui elegit iudicem elegit ius* (if you choose a judge you choose their law) is often cited. But whether a choice of law can be inferred from an arbitration clause will depend on the circumstances. No choice can be inferred from an arbitration clause which does not indicate the place of arbitration. But one which clearly contemplates that the arbitration will take place in a particular country will permit an inference that the parties intended that the law of that country should be applied. Thus, in *Egon Oldendorff* v *Libera Corporation (No.2)* [1996] 1 Lloyd's Rep 380; [1996] CLC 482 it was held that a choice of English law was to be inferred from the choice of English arbitration for the determination of disputes arising out of a well-known English language form of charterparty. It was a reasonable inference that German and Japanese parties, having agreed a 'neutral forum', had also intended that forum to apply English law.

The inference can be drawn also from the circumstances of the case. Examples are (a) where there is an express choice in a related transaction, and (b) where there is a previous course of dealing under contracts containing an express choice and this clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties.

If there are conflicting inferences it cannot be said that a choice has been demonstrated with reasonable certainty. It becomes necessary then to turn to the rules (in Article 4) on applicable law in the absence of choice.

7.3.2 Article 4

Where the parties have not chosen an applicable law and one cannot be inferred, Article 4 of Rome I will be resorted to by the courts. Compared to its predecessor in the Rome Convention, Article 4 of Rome I is much simpler and contains more detailed rules in relation to the most commonly entered types of contract. Under Article 4(1)(a), a contract for the sale of goods is governed by the law of the country where the seller has habitual residence, and under Article 4(1)(b) a contract for the provision of services will be governed by the law of the service provider's habitual residence. Article 19 of Rome I provides clarity in relation to what is considered to be habitual residence. It defines the latter as being the place of central administration in the case of companies and other corporate or unincorporated bodies. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or performance under the contract is the responsibility of a branch, agency or other establishment, the place where that branch or agency or establishment, is located shall be the place of habitual residence. For a natural person acting in the course of a business, the habitual residence is their principal place of business.

Article 4(1)(c–h) determines the applicable law for other types of contract.

In those circumstances where none of the rules of Article 4(1) apply to the contract, either because the type of contract is not covered or the particular contract falls within more than one limb of Article 4(1), Article 4(2) comes into play for the purposes of choice of law. It stipulates that the contract will be governed by the law of the country where the party required to effect the characteristic performance (the seller) has habitual residence. 'Characteristic performance' is not defined in Rome I (or the Rome Convention in that respect). It is said to link the contract to the social and economic environment of which it will form a part. It is not difficult to identify the characteristic performance if only one party has to perform (e.g. a contract of gift). Where, as is more likely, there are two performances (e.g. one party performs services or sell goods, the other pays for them), it is not immediately obvious which of the performances constitutes the essence of the contract. Giuliano and Lagarde state that the characteristic performance is usually the performance for which payment is due. You may ask why the payment of money is not the performance which is characteristic of the contract.

It is important to note here that Article 4(2) can only provide guidance if the characteristic performance of the contract can be identified. If that proves impossible, then the general escape clause of Article 4(4) will come to the rescue.

Article 4(3) provides a rule of displacement. It constitutes an exception to Articles (1) and (2), in those exceptional circumstances where a country other than the one indicated in the latter appears to have a closer connection to the contract. The contract must be manifestly more closely connected to the other country. Guidance as to the meaning of the term 'manifestly' is provided by Recital 20 of Rome I, which states that the decision of whether a contract is manifestly more connected with a country other than the one indicated should take into account, among other factors, whether the contract has a very close relationship with another contract or contracts.

Where the applicable law cannot be determined under either Article 4(1) or (2), namely when it cannot be determined where the person effecting characteristic performance has habitual residence, Article 4(4) provides that the contract will be governed by the law of the country with which it is most closely connected. It should be emphasised that this rule will apply only in those circumstances where the application of Article 4, in its strict sense, would produce undesirable results. English courts have, in the past, been willing to resort to this general escape clause and displace the presumptions of the Rome Convention.

In *Definitely Maybe* v *Marek Lieberberg Konzertagentur GmbH* [2001] 2 All ER (Comm) 1, DM (a company based in England) contracted with ML (a German concert promoter) to provide the services of the pop group Oasis at two festivals in Germany. Noel Gallagher (NG), Oasis's guitarist, did not play in Germany. ML argued that Oasis without NG was not the group contracted for, and refused to pay the full price for Oasis's services. DM wished to sue ML in England. ML was domiciled in Germany. For an English court to have jurisdiction under Article 5(1) of the Brussels Convention, the place of performance of the obligation in question would have to have been England. The obligation in question was the duty to pay. But the place of performance of an obligation may depend upon which system of law governs the contract. Under German law the place of performance of an obligation to pay is the debtor's domicile; under English law it is the place where money is to be received. So, whether an English court had jurisdiction depended on the law governing the contract. There was no choice of applicable law.

The court therefore had to look to Article 4 and in particular to Article 4(2) of the Rome Convention. The characteristic performance was for Oasis to perform concerts in Germany. DM is located in England and so English law would be the governing law of the contract. The court thought this a case which called for displacement of the presumption: 'The centre of gravity of the dispute was Germany'. The court thought that Germany would provide the more convenient forum for deciding to what extent Oasis without NG was worth anything and, if so, how much. This meant that DM could not sue in England under Article 5(1) of the Brussels Convention (the Council Regulation 44/2001) since German law said the place of performance of the obligation to pay was where the debtor was domiciled, and this was Germany. You should read this case: it is a particularly good illustration not just of the **displacement** process but also of the **interrelationship of jurisdiction** and **choice of law questions**.

Another example illustrating displacement is *Kenburn Waste Management* v *Bergman* [2001] All ER (D) 155. The case centred upon an agreement between a German and an English company that the German company would not communicate with the English company's customers. The defendant was allegedly in breach of this agreement. There was no choice of law clause. The communication would take place from Germany to England. The law governing as a result of the presumption would have been German law: the characteristic performance was to be effected by the defendant. The court held the presumption to be rebutted: the defendant's obligations could be performed anywhere in the world, but the effect had to take place in England, and the contract was to protect the claimant's business in England.

For a third example see the older case of *Bank of Baroda* v *Vysya Bank* [1994] 2 Lloyd's Rep 87: an Indian bank issued a letter of credit in favour of an Irish company to be confirmed by a bank in London, and payable in London. The performance which was characteristic of the contract was the issue of a letter of credit in London. The central administration of the party which was to effect the performance was in India, and so under Article 4(2) it was presumed that the contract was most closely connected with India. The presumption was displaced in favour of English law: the contract between the Indian bank and the confirming bank in London (which was an Indian bank with a branch in London) was governed by English law, and it was important that all aspects of the letter of credit transaction should be governed by the same law.

For other examples, see *Ennstone Building Products* v *Stanger* [2002] 2 All ER (Comm) 479 and *Sierra Leone Telecommunications Co Ltd* v *Barclays Bank plc* [1998] 2 All ER 821. For a different approach to the relationship between Articles 4(2) and 4(5) taken by a Dutch court, see *Struycken* [1996] *LMCLQ* 18, who discusses *Société Nouvelle des Papeteries de l'Aa SA* v *BV Machinefabrike BOA* (a 1992 Dutch decision). This is also discussed in Clarkson and Hill, p.223.

Consumer and employment contracts

There are special rules in Rome I dealing with consumer contracts, and with individual employment contracts (see Articles 6 and 8). The aim is to provide protection to the weaker party (the consumer and the employee). The details of these provisions are not in the syllabus: some introduction to them is in the section on mandatory rules (which follows).

We turn now to limitation on the applicable law (briefly discussed above). We are principally concerned with **mandatory rules**. This is not a concept known to English law, at least under this name. They are an exception to the general philosophy of contract, where party autonomy is the key. Mandatory rules are designed either to protect a specified group (consumers or employees) or the national economic system (rules on such matters as monopolies, export control, exchange control). The state's interest may be so strong that it will uphold this protection or these laws even though the issue is, in principle, governed by a different law as a result of the rules on applicable law in Articles 3 and 4.

Summary

Where there is no express choice of applicable law, there may nevertheless be a choice that can be inferred from the terms of the contract or the circumstances of the case. In default, the applicable law is that with which the contract is most closely connected. The process for finding this is set out in Article 4 and hinges on the 'characteristic performance' and 'territorial connection' presumptions in Article 4(2). These presumptions may be rebutted.

7.4 Mandatory rules

Mandatory rules are those rules which 'cannot be derogated from by agreement' (Article 3(3)). To determine whether the rules of a particular country are mandatory, reference must be made to the law of that country. The effect given to mandatory rules under the Regulation is to override the normal rules on the applicable law contained within it.

The concept of mandatory rules is used in various provisions in the Regulation:

- Article 3(3): the limitation on freedom of choice
- Article 6(2): consumer contracts
- Article 8(1): individual employment contracts
- Article 9(2): mandatory rules of the forum
- Article 9(3): overriding mandatory rules of a foreign country
- Article 11(5): formal validity as regards contracts for the use of immovable property.

These provisions share the same definition of a mandatory rule, but otherwise they differ from each other:

i. on the question of which country's mandatory rules are being referred to
ii. on the type of mandatory rules with which they are dealing, and
iii. on the effect given to a mandatory rule (under the first three provisions the effect is to override parties' freedom to choose the applicable law; under the latter three it is to override all the rules on applicable law including those in the absence of choice).

This is more fully explained by Cheshire, North and Fawcett, pp.745–46.

7.4.1 Article 9(1)

According to Article 9(1):

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as 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 should be pointed out that these provisions will apply both in circumstances when the parties have made a choice of law or, in the absence of choice of law, when the applicable law has to be determined under the Regulation.

Article 9(2) provides that:

> Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law of the forum.

The sorts of law this Article is designed to protect are rules on cartels, competition and restrictive practices, and consumer protection.

Article 9(3) deals with the mandatory rules of countries **other than the forum**. It states:

> 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 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 is an improvement on the position previously adopted by the Rome Convention in Article 7(1). It is more clearly worded and, very importantly, more specific than its predecessor as it is limited to the rules of the country of performance and only to those rules which render performance unlawful.

Rules with overriding effect

The first problem is to identify rules which have an overriding effect, that is that will apply irrespective of the otherwise applicable law. The policy is likely to be embodied in statute. As a general rule, a statute will not say when it is to apply: in those cases it will apply to a contract with foreign elements only if English law is the applicable law. So, for example, in a contract of sale which is by virtue of Article 4 governed by German

law, the implied terms of the Sale of Goods Act 1979 will not apply. They are mandatory in terms of Article 3(3), but not overriding for the purposes of Article 9(2).

Some statutes expressly state their scope. The Unfair Contract Terms Act 1977 is an example. It is provided (by s.27(2)) that the Act applies to a contract, notwithstanding the choice of a foreign law if such a choice was

> imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act or in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the UK, and the essential steps necessary for the making of the contract were taken there…

If the statute does not expressly identify the circumstances in which it applies, the court must decide whether or not its provisions are overriding. In *Boissevain* v *Weil* [1950] AC 327 (decided under the common law) the House of Lords interpreted the Defence Regulation which made it an offence for a 'British subject' to carry out certain currency transactions to embrace a loan contract made in Monte Carlo, whose proper law was that of Monaco. †

† Monaco is a tiny independent state situated on the south coast of France. Monte Carlo is its capital.

Article 21 of the Regulation 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'. As the word 'manifestly' indicates, Article 21 should only be used in exceptional circumstances. Examples drawn from common law cases include an agreement to stifle a prosecution (*Kaufman* v *Gerson* [1904] 1 KB 591), an agreement in restraint of English trade (*Rousillon* v *Rousillon* [1880] 40 Ch D 351) and a contract which involved trading with the enemy (*Dynamit A/G* v *Rio Tinto Co* [1918] AC 292). More recently it was held that making contractual payments in violation of UN sanctions enacted into Dutch law was akin to trading with the enemy (*Royal Boskalis NV* v *Mountain* [1999] QB 674, in which one party to a contract governed by the law of Iraq intended that it should be performed in the Netherlands in contravention of Dutch sanctions against Iraq). At common law there were cases where English courts refused to enforce contracts said to be against public policy because they envisaged breaking the law of a friendly foreign state (see, for example, *Foster* v *Driscoll* [1929] 1 KB 470).

ACTIVITY 7.1

Does the Rome I Regulation apply to:

a. **a pre-nuptial agreement**
b. **the question of whether a minor can buy goods which are not necessaries**
c. **a dispute between principal and agent about commission**
d. **a bill of lading**
e. **a contract between an English woman and a French insurance company to insure her African safari trip?**

Summary

The main limitations on freedom of choice are mandatory rules. The state's interests may be so strong that it will uphold certain protections (of consumers, or employees, or the national economic system) regardless of what the parties say in their contract.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the choice of law process in contract**
- **explain the concepts of 'characteristic performance' and 'mandatory rules'**
- **explain the conditions that apply to choice of applicable law by parties to a contract**
- **state what rules apply in the absence of such a choice**
- **solve problems which require you to work out the applicable law of the contract.**

7.5 Validity of contracts

Core text

- **Clarkson and Hill, Chapter 4 'Contractual obligations', Section VI 'Particular aspects of the contract'.**

7.5.1 Material validity

Material validity covers such issues as:

- formation of the contract (offer and acceptance, consideration)
- the validity of consent (mistake, misrepresentation, duress).

Article 10(1) provides that:

> The existence and validity of a contract, or any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

In other words, the law that would be applicable **were** there a contract governs such questions as 'Is there a contract?'. Since it can hardly be the applicable law until it is ascertained that there is a contract, it is usual to refer to the 'putative applicable law'. An example may assist. An English company sends an offer to a Swiss company which accepts by post. The letter of acceptance does not arrive. By English law there is a contract (you will remember 'the postal acceptance rule'); by Swiss law there is no contract. To answer the question of whether there is or is not a contract, reference must be made to what would be the applicable law were there a contract. This will depend on the rules we studied in the previous sections. The parties are free to choose the governing law: this means that they can choose a law under which the contract would be valid. Cheshire, North and Fawcett (p.756) say 'The principle has much to commend it. Businessmen use choice of law clauses in order to avoid the problems of ascertaining the objective governing law and their wishes should be respected whatever the issue'. But they concede that it can lead to unfairness.

So Article 10(2) provides a safeguard in relation to consent. This states that:

> Nevertheless, a party may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence 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 paragraph 1.

This is aimed at tackling the problem which can arise, for example where there is a law that silence constitutes consent. Imagine that A makes an offer to B and inserts a choice of law clause in the contract stating that the law of Utopia governs. B remains silent. Under Utopian law silence constitutes an acceptance. Clearly, it is unfair that B should be contractually bound. Under Article 8(2) he can claim that he did not consent to the contract according to the law of his habitual residence. This applies, provided it would not be reasonable to determine the effect of his silence under Utopian law. It might, of course, be reasonable if there was a continuing business relationship between the parties.

The equivalent of Article 10(2) of the Regulation in the Rome Convention (Article 8(2)) was used in *Egon Oldendorff* v *Libera Corporation* [1995] 2 Lloyd's Rep 64; [1996] CLC 482. The court had to determine whether a contract had been concluded between a German company and a Japanese company and, if so, whether a London arbitration agreement was incorporated in the contract. It was held that English law should apply to these questions and that it would be wrong for Japanese law to determine the effect of the Japanese company's conduct. Japanese law would only be relevant if the arbitration clause were ignored, and to do this would be contrary to ordinary commercial expectations.

Article 10 applies also to questions of **reality** of consent: mistake, misrepresentation, duress, undue influence. In *Dimskal Shipping Co SA* v *I.T.W.F.* [1992] 2 AC 152 it was held that whether a contract was voidable on the ground of economic duress depended on English law as the putative governing law of the contract. The 'contract' was between

shipowners and a trade union which had (in Sweden) 'blacked' the ship until the owners agreed to pay additional wages to the crew and a contribution to the union's welfare fund. The 'contract' was expressed to be governed by English law. It was held that the existence and effect of duress were governed by English law as the putative governing law and not by Swedish law, as the place where the duress allegedly occurred.

7.5.2 Formal validity

Formal validity covers 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. For example, does a contract have to be in writing?

Article 11(1) provides a formal validity rule of alternative reference: a contract is valid if valid by the applicable law or the law of the country where it was concluded. The applicable law is, of course, the putative applicable law. If a contract is varied after it is concluded, subsequent variation does not prejudice formal validity (see Article 3(2)). A variation which formally validates a contract which is invalid at its inception is allowed and will validate the contract from that date.

If the parties are in different countries when the contract is concluded, it will be formally valid if valid by the applicable law (the putative applicable law) or the law of either of these countries (Article 11(2)).

There are special rules for **consumer** contracts: formal validity is governed by the law of the country in which the consumer has their habitual residence (Article 9(5)); and for **immovables**, which are subjected to the mandatory requirements of form of the *lex situs* (Article 9(6)).

Summary

Matters of essential validity are governed by the putative applicable law. Matters of formal validity are governed by the applicable law or the law of the country where the contract is concluded.

7.6 Capacity

The status or **legal capacity** of natural persons is, in general, excluded from the scope of the Regulation (Article 1(2)(a)). This is subject to Article 13. Because capacity falls outside the Regulation it is necessary to look to common law principles to decide what law governs capacity. Article 13 will be examined after this.

The common law rule on capacity to enter into a commercial contract has never been conclusively determined. There are three possible rules: *lex domicilii*, *lex loci contractus* and the proper law. There are cases which contain *dicta* favouring the domiciliary law. They are old and were all decided in the context of marriage and marriage settlements (e.g. *Cooper* v *Cooper* [1888] 13 App Cas 88). The personal law hardly sits comfortably with modern conditions of trade. There is an old authority (*Male* v *Roberts* (1790) 3 Esp 163) supporting the *lex loci contractus*. This too has little to commend it: someone lacking in capacity could merely contract where they did have capacity. A relatively modern Canadian decision (*Charron* v *Montreal Trust Co* (1958) 15 DLR (2d) 240) has held that capacity to enter into a separation agreement is to be determined by the law of the country with which the contract is most substantially connected (i.e. the proper law). In this case, however, this was also the law of the place where the contract was made. For this reason it is weak authority.

The proper law view has the support, albeit *obiter*, of Brightman J in *Bodley Head* v *Flegon* [1972] 1 WLR 680. The issue was whether the Russian author Solzhenitsyn could execute a power of attorney in favour of a Swiss lawyer. It was contended that the contract was void, since he lacked capacity by Russian law, his *lex domicilii*. It was also contended that he lacked capacity by the law of the place where the contract was

made. It was held that the issue was not one of capacity, but of material validity, and was therefore governed by the applicable law, which was Swiss law. The judge went on to hold that, even if it had been the case that Solzhenitsyn lacked capacity by Russian law, the contract would still have been valid, because capacity is also governed by the proper law.

The present law therefore remains in some doubt. There is support for Dicey, Morris and Collins' view (pp.1271–74) that capacity either by personal law or by the objective proper law should be sufficient.

Although questions of capacity are outside the Regulation, there is the strange Article 13. This provides that:

> In a contract … between persons … in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity … from the law of another country only if the other party … was aware of this incapacity at the time of … the contract or was not aware … as a result of negligence.

The purpose of Article 13 is to protect a party who in good faith believed themself to be contracting with a person of full capacity and who, after the contract has been entered into, is confronted by their incapacity. Note that Article 13 only applies:

- where the parties are in the same country
- where there is a conflict of laws.

The person claiming to be under a disability must be deemed to have full capacity by the law of the country where the contract was concluded.

Note also that 'it is not at all clear how the negligence test is to be applied' (Clarkson and Hill, p.251).

Summary

Capacity questions are largely still determined by the common law, since they fall outside the Regulation. This has not yet been finally determined. The better view is that the objective proper law governs, but it seems that the contract will also be valid if there is capacity by the personal law.

7.7 Scope of the applicable law

Article 12 indicates what is the **scope of the applicable law**. It governs:

- interpretation
- performance
- within the limits of the parties 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 various ways of extinguishing obligations, and prescription and limitation of actions
- the consequences of nullity of the contract.

These are examples. Article 12 is not intended to be exhaustive.

In relation to 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 the performance takes place' (Article 12(2)). This gives the *lex loci solutionis* (the law of the place of performance) a role, but it is not clear how much of a role. The court has a discretion to apply it or not, thus introducing uncertainty into the law.

Consequences of breach include the liability of the party to whom the breach is attributable, and claims to terminate the contract for breach. A Dutch court has said it includes strikes (*Buenaventura* v *Ocean Trade Company* [1984] ECC 183). In this case the court

ordered striking crew members of a Saudi Arabian ship lying at Rotterdam to return to work on the basis that the strike was unlawful under Philippine law, the expressly-chosen applicable law. Other matters within the applicable law are questions of causation, and whether the defendant can rely on a defence such as set-off to limit their liability (see *Meridien BIAO Bank GmbH* v *Bank of New York* [1997] 1 Lloyd's Rep 437).

The circumstances in which a contract comes to an end are also for the applicable law to determine. So questions such as frustration, insolvency and novation are governed by the applicable law. We used to regard limitation as a procedural matter, but the Foreign Limitation Periods Act 1984 re-conceptualised it as a substantive matter. The applicable law therefore determines whether a claim is barred by lapse of time.

7.8 Illegality

Article 10 subjects **illegality** to the normal rules of the Regulation. It provides that the existence and validity of a contract shall be determined by the law which would govern it under the Regulation if the contract or term were valid (Article 10(1)). Thus, clearly, a contract which is illegal by its applicable law will not be enforced. This is known as 'putative applicable law'. Article 10(2) of the Regulation provides that a party, in order to establish that they did not consent, may rely upon the law of the country in which they have their habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of their conduct in accordance with the law specified in paragraph 1. The aim of this provision is to offer protection to a party that did not reply to an offer (which in certain countries could imply acceptance).

ACTIVITIES 7.2–7.4

7.2 What is meant by 'putative applicable law'?

7.3 By what law is capacity to enter into a commercial contract governed?

7.4 What questions relating to issues of contract may be referred to the *lex loci solutionis*?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **explain the importance of material and formal validity**
- **outline the common law rules that are applied in cases where capacity is in question**
- **state what matters come within the scope of the applicable law**
- **explain what rules apply when a contract involves some illegality.**

SELF-ASSESSMENT QUESTIONS

1. **Explain why parties are given autonomy to choose the law to govern their contract.**
2. **What is the scope of this freedom? Compare the limits laid down in *Vita Foods* with those found in the Rome I Regulation.**
3. **Explain *dépeçage*. What are its implications?**
4. **Explain 'mandatory rules'. What is their significance?**
5. **Consider the following contracts. What is their applicable law if they were concluded in 2008? Would your answer be different if they were concluded in 2015?**
   i. **A contract between Cheapgoods plc, an English supermarket chain, and Polska Jams, a Polish jam producer, to supply jams. Payment is to be in US dollars at a Polish bank in London upon delivery of the jams. Nothing is said about the applicable law.**

ii. **A contract between a German car manufacturer and a Taiwanese ship owner to charter ships to transport cars from Germany to West Africa. The contract provides for arbitration in London. The contract, which was negotiated by a Taiwanese shipbroker, provided for delivery of the ships in Taiwan and their redelivery there. Previous contracts between these parties were expressly governed by Taiwanese law.**

6. **How would an English court decide the applicable law of the following contracts, all of which were made in 2006? Would the court reach a different decision if the contracts were concluded in 2013?**

   i. **A contract between a Virginian tobacco grower and a Spanish cigarette corporation to manufacture cigarettes with high tar content for sale in the United States and the United Arab Emirates. The contract provides that the law of Dubai governs the contract. Sale of such cigarettes is not permitted in the USA but it is in the UAE, and the contract is lawful by the law of Dubai. The cigarettes are being shipped via the United Kingdom and the US Government has sought an injunction to prevent the cigarettes being imported into the USA.**

   ii. **A publishing contract between an English author, domiciled and resident in England, and a publisher with central administration in the Netherlands which is refusing to pay the author his royalties because the book is considerably longer than that contracted for.**

   iii. **A contract between an Australian company and a Norwegian supermarket chain to supply fruit. The companies have dealt with each other for many years and previous contracts have stipulated that Australian law governs. There is no such clause this time but there is one that provides that any dispute is to be referred to the High Court in London.**

   iv. **A contract between a Spanish sherry producer and a consortium of English off-licences to supply 10,000 bottles of sherry a month. Payment is to be in Euros at a branch of a Spanish bank in London. The contract stipulates that 'in the unlikely event of a dispute arising between us, we will choose the law to govern our contractual relationship'. A dispute has now arisen and the parties cannot agree a law.**

7. **A & Co (Lloyd's underwriters) insure B & Co (Belgian diamond merchants) against loss of their stock. The contract contains a clause that it is to be governed by Belgian law. A & Co claim the contract is void because B & Co did not disclose it was in the habit of smuggling diamonds into Italy, where the loss occurred. If the contract is void under English law, but not under Belgian law, which law will apply?**

8. **By a contract expressly governed by English law, X, who carries on business in England, agrees to sell Y, who carries on business in Switzerland, a quantity of jute bags c.i.f. Genoa. Both parties know that India is the only possible source of supply and that Y intends to resell the bags to South Africa. They also know it is illegal under Indian law to ship jute from India if the ultimate destination is South Africa. Will an English court enforce this contract? You might consult *Regazzoni* v *KC Sethia Ltd* [1958] AC 301.**

Sample examination questions

Question 1 **Explain the concept of 'characteristic performance'. Is it a valuable addition to our law?**

Question 2 **Discuss critically the Rome I Regulation rules for the ascertainment of the applicable law in the absence of choice by the parties. How do they differ, if at all, from the equivalent rules of the Rome Convention?**

Question 3 **By a letter posted in Germany and addressed to A, an Englishman, in England, B (a German) offers to be the sole agent of A's goods in Germany. The letter provides that the sole agency is to be governed by German law. A does not reply. Under German law there is a contract. Under English law there is not. Does B have a cause of action against A?**

Question 4 **A Frenchman living in Paris promises by deed made in England to make a gift to a French charity. The promise is valid, though it does not comply with the notarial form required by the French Civil Code. Is it formally valid? Explain.**

Question 5 **By a contract made in London X & Co, a French firm carrying on business in England, agrees to sell to Y & Co, another firm carrying on business there, a quantity of dates to be shipped by instalments from a port in Turkey, payment to be made in England. An insurrection breaks out in Turkey and X & Co refuses to deliver the dates. By French law it is excused from performance of the contract by *force majeure*; by English law it is liable for breach of contract. The governing law is English law. Is X & Co liable? (You might like to read *Jacobs* v *Crédit Lyonnais* [1884] 12 QBD 389 before answering this question.)**

Question 6 **X, an English youth of 17, agrees – while on holiday in France – to buy a motorbike from Y, a French seller. X has capacity under French law because he is married. He refuses to pay for the motorbike and Y intends to sue him in England. Can X rely on the fact that he does not have capacity under English domestic law? You might like to read Clarkson and Hill on this.**

Advice on answering the questions

When answering a contract question, always check the date of the contract and ensure that you know whether it is governed by the Convention or the Rome I Regulation.

It is important to identify the conceptual problem at issue. This is usually straightforward, but you may get a question which involves more than one. It is important to recognise the scope for laws other than the applicable law and to identify which these are.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the choice of law process in contract	☐	☐	☐
I can explain the concepts of 'characteristic performance' and 'mandatory rules'	☐	☐	☐
I can explain the conditions that apply to choice of applicable law by parties to a contract	☐	☐	☐
I can state what rules apply in the absence of such a choice	☐	☐	☐
I can solve problems which require you to work out the applicable law of the contract	☐	☐	☐
I can explain the importance of material and formal validity	☐	☐	☐
I can outline the common law rules that are applied in cases where capacity is in question	☐	☐	☐
I can state what matters come within the scope of the applicable law	☐	☐	☐
I can explain what rules apply when a contract involves some illegality.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
7.1	Rome I Regulation	☐	☐
7.2	Choice of law	☐	☐
7.3	In the absence of express choice	☐	☐
7.4	Mandatory rules	☐	☐
7.5	Validity of contracts	☐	☐
7.6	Capacity	☐	☐
7.7	Scope of the applicable law	☐	☐
7.8	Illegality	☐	☐

NOTES

8 Torts

Contents

Introduction

This chapter discusses the law applicable to issues in tort. It considers first the common law – which remains applicable to defamation and related claims – and then briefly the determination of the applicable law under the Private International Law (Miscellaneous Provisions) Act 1995 Part III. It concludes with the law as now set out in Rome II Regulation.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **outline the choice of law rules for tort (a) at common law (b) under the 1995 Act and (c) under Rome II Regulation.**
- **explain the 'displacement' process**
- **describe the issues arising over questions of defamation.**

CORE TEXT

- **Clarkson and Hill, Chapter 5 'Non-contractual obligations'.**

8.1 Background: the common law rules

The question of what law governs liability in tort has troubled both courts and writers. At various times it has been suggested that tort liability is governed by the *lex fori*, the *lex loci delicti commissi*,† or a combination of these laws (the 'double actionability' rule). It was suggested by Morris (see [1951] 64 *Harvard LR* 881) that it should be governed by 'the proper law of the tort' (i.e. 'the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation'). Continental European jurisdictions have applied the *lex loci delicti commissi*. In the USA, proper law emerged as the dominant doctrine in the 1960s. The seminal decision was *Babcock* v *Jackson* 191 NE 2d 279 [1963]. Fuld J observed that:

> Justice, fairness and 'the best practical result'… may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

This approach was adopted in the US Second Restatement on the Conflict of Laws, and exerted some influence over the judicial development of the common law in England (see *Boys* v *Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd* v *Bouygues SA* [1995] 1 AC 190). But until the 1995 Act, the common law retained the double actionability rule, which was formulated by Willes J in *Phillips* v *Eyre* [1870] LR 6 QB 1. Willes J stated:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England… Secondly, the act must not have been justifiable by the law of the place where it was done. (pp.28–29)

In *Boys* v *Chaplin*, the House of Lords had the opportunity to reconsider this 19th-century formulation. The majority affirmed that the general rule was as stated in *Phillips* v *Eyre*. The rule was, however, according to Lords Hodson and Wilberforce (whose judgments came to be considered authoritative in subsequent cases) not an invariable one, and was subject to an exception. As a result, 'a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties'. In *Boys* v *Chaplin* the *lex loci delicti* was displaced, and English law applied (both plaintiff and defendant were British servicemen stationed in Malta and one suffered injury as a result of the other's negligence). Subsequently, in the *Red Sea* case, it was held that the exception could equally well be invoked to disapply the *lex fori* and secure the sole application of the *lex loci delicti*. And this principle was approved in *Pearce* v *Ove Arup Partnership Ltd* [1999] 1 All ER 769.

† *Lex loci delicti commissi* (Latin). You may already have worked this out: 'the law of the place where the wrong was committed'.

Summary

The common law had a double actionability rule. But it eventually came to be recognised that this was a general rule only, and could be displaced by a law which had a more significant relationship with the occurrence and the parties.

8.2 The 1995 Act

The Private International (Miscellaneous Provisions) Act 1995 introduced reform. From the time this came into operation in 1996, the English tort choice of law rules were a combination of the common law and this statute. These rules will continue to apply in relation to those torts (including defamation and invasion of privacy) which fall outside the scope of Rome II. The 1995 Act put tort choice of law rules largely on a statutory basis by abolishing the common law rules and by introducing new statutory rules. The general rule (in s.11) applied the law of the country in which the events constituting the tort or delict occur. Where the elements of these events occur in different countries, there is a series of rules to identify the applicable law (s.11(2)). For example, for a course of action in respect of personal injury the applicable law is that of the country where an individual sustained the injury (s.11(2)(a)). There is also a displacement rule, which applies a flexible exception (see s.12). This provides that where it is substantially more appropriate for the applicable law for determining the issues arising in the case to be the law of some other country than the one stipulated by the general rule, the general rule will be displaced and the law of that other country will apply. An illustration of this process is *Edmunds* v *Simmonds* [2001] 1 WLR 1003. There are no special rules for particular torts with the exception of defamation. The common law rules continue to apply to defamation cases.

8.3 Rome II Regulation

Before Brexit, the UK was bound by the rules for choice of law set out in the Rome II Regulation, which allowed parties to adopt a choice of law for non-contractual obligations. From 1 January 2021 onwards, under The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, the UK will, with some minor exceptions, continue to apply the rules of Rome II.

Rome II Regulation came into force in all European Community Member States (except Denmark) from 11 January 2009. Rome II governs all non-contractual obligations, including restitution and equitable obligations. It does not have retrospective effect. The traditional English common law and statutory rules will continue to apply to events giving rise to damage which occurred before 11 July 2007 (when this Regulation was adopted).

8.3.1

The Regulation applies to situations involving a conflict of laws in respect of non-contractual obligations in civil and commercial matters (Article 1(1)). A wide variety of matters is excluded from the scope of the Regulation, for example, non-contractual obligations arising out of family relationships including maintenance obligations. Also excluded are non-contractual obligations arising out of matrimonial property regimes, and wills and succession. Other exclusions include non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments; those arising out of the law of companies; and those arising out of violations of privacy and rights relating to personality including defamation. Article 1(3) provides that the Regulation does not apply to evidence and procedure.

8.3.2

Rome II is intended to be of **universal** application. It applies regardless of whether the situation giving rise to the obligation and the obligation itself has any connection with an EU Member State. There is no need for either party to be domiciled or resident in a Member State. The only thing that matters is that the dispute is tried in a Member State. Article 3 provides that 'Any law specified by this Regulation shall be applied whether or not it is the law of a Member State'.

8.3.3

Renvoi has **no** place in the choice of law rules (Article 24). The applicable law refers to the domestic law of the country in question.

8.3.4

The general rule is set out in Article 4. It comprises three rules: a general principle, an exception to this, and an '**escape clause**', which functions as a let-out to both the general principle and its exception. The three rules together are not dissimilar from the English statutory choice of law rules.

8.3.5

Article 4 applies to a 'non-contractual obligation arising out of a tort/delict'. But not included are product liability, unfair competition, acts restricting free competition, environmental damage, infringement of intellectual property rights and industrial action. There are separate rules for these in Articles 5–9.

8.3.6

Article 4(1) provides that:

> Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the events giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

8.3.7

The words 'unless otherwise provided for' make it clear that this provision is subject to other provisions in the Regulation. Article 4(1) is thus subject to:

i. the exception in Article 4(2)

ii. the escape clause in Article 4(3)

iii. specific rules for special torts in Article 5–9

iv. the right of the parties to choose the applicable law (in Article 14)

v. limitations on the applicable law

   a. overriding mandatory provisions of the forum (in Article 16)

   b. public policy (in Article 26).

Article 4(1) presupposes that it is always possible to identify the country where the damage occurs. This is not always so: for example, it may not always be possible to ascertain where the damage occurred if perishable goods being transported across Europe in a refrigerated lorry gradually rot due to the refrigeration breaking down. At some unknown point the refrigeration breaks down and the goods rot. Presumably, the only answer is to apply the law of the place where the damage was discovered. Also, with economic torts such as negligent misstatement, there can be very real problems in ascertaining the place of damage. Here, it may be necessary to resort to the rule which applies the law of the country with which the tort is more closely connected (under Article 4(3)).

8.3.8

Article 4(2) sets out an exception to Article 4(1). This provides that '...where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.'

Habitual residence can change, but it is habitual residence at the time when the damage occurs which is relevant.

8.3.9

The escape clause is in Article 4(3). This provides:

> Where it is clear from all the circumstances of the case that the tort/delict 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.

It is not enough that the tort/delict is more closely connected with a country other than that indicated in paragraphs 1 or 2; it must be manifestly more closely connected. So the escape clause only applies to exceptional situations. An example is given. It might be based on a 'pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.'

8.3.10

Article 4(3) operates as an escape clause from both Article 4(1) and (2). It is assumed that Article 4(3) is likely to operate more commonly as an exception to Article 4(1).

8.3.11

There are specific rules for special torts. Only that for product liability is considered here. Article 5 applies where there is a non-contractual obligation arising out of damage caused by a product. It is in two paragraphs. The first is complicated: it sets out a 'cascading' series of rules to which there is a lack of foreseeability exception. All of this is subject to Article 4(2). The second paragraph of Article 5 provides an escape from paragraph 1, based on a manifestly closer connection with another country.

The first of the cascading rules is in Article 5(1) (a), which provides that the law applicable is 'the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country'. The victim will normally have acquired the product and been injured in the state of their habitual residence but, even if they acquired it abroad and are injured in a state other than that of their habitual residence, the law of their habitual residence will still apply. The requirement that the product was marketed in that country is designed to protect the interests of the producer. If the product is not marketed in the country in which the person sustaining the damage had their habitual residence, paragraph (a) does not apply, and you move to paragraph (b). This provides that the law is applicable to 'the law of the country in which the product was acquired, if the product was marketed in that country.' If paragraph (b) does not apply, one moves to paragraph (c), which provides that the law applicable is 'the law of the country in which the damage occurred, if the product was marketed in that country.

8.3.12

Rome II also applies to unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. Unjust enrichment is considered in the next chapter.

SELF-ASSESSMENT QUESTION

What is the applicable law in the following cases:

- **A, an English resident, suffers injuries in France when travelling as a passenger in a car hired by his English friend, B, from X & Co, a car rental company, domiciled in England, with branches all over Europe. B hired the car at X & Co's branch in Calais. A's injuries are caused by X and Co's failure to maintain the vehicle properly in France. A sues X & Co in England. What law determines the standard of care expected of X & Co?**
- **X & Co, an English company, owns a business magazine which is published in New York. One issue contains a statement that A, a well-known New York politician, is guilty of corruption. This is an actionable libel by English law, but not by New**

York law because A is a public official. If A were to sue X & Co in England, would his claim succeed?

Activities 8.1–8.3

8.1 Why does it remain important to know the common law rules for choice of law in tort?

8.2 State the Rome II choice of law rule which an English court will apply to an action brought for negligence committed in Germany.

8.3 A, a Maltese resident, suffers injuries in an accident in Malta caused by the negligence of B, an English resident holidaying in Malta. By Maltese law, A cannot recover damages for pain and suffering. A sues B in England. Can A recover damages for pain and suffering?

Summary

The rule in Rome II applies the law of the country in which the damage occurs. But it is possible to displace this law if significant factors relating to parties, events, circumstances or consequences connect the tort with another country. There are exceptions to these rules. Defamation is still governed by the common law rule.

Reminder of learning outcomes

By this stage you should be able to:

- **outline the choice of law rules for tort (a) at common law and (b) under the 1995 Act and (c) under Rome II Regulation**
- **explain the 'displacement' process**
- **describe the issues arising over questions of defamation.**

Sample examination questions

Question 1 The common law was described as anomalous, unjust and uncertain. Are these criticisms fair?

Question 2 Mr and Mrs Adams, who are UK nationals domiciled in England, have for many years corresponded with Mr and Mrs Sharma, Indians who live in Delhi. Last year the Sharmas persuaded the Adamses to go on a climbing holiday with them in the Himalayas. On the plane going to Delhi the Adamses met two French students (Claude and Marie) and agreed that they could accompany them without payment on the climbing trip. When the six of them got to the Himalayas in Nepal Mr Adams hired the services of two local sherpas who were to act as their guides and transport their luggage. Almost immediately after the climb began, an accident occurred. The rope carrying the party broke and Claude plunged to his death. Mrs Adams fractured her skull and one of the sherpas was so severely injured that he will spend the rest of his life in a wheelchair. The rope had not been properly tied because Mr Adams had been too busy chatting and drinking with Mr Sharma and the two of them were inebriated.

Assume that under the law of Nepal:

a. there is a gratuitous passenger statute

b. wives are not permitted to sue their husbands

c. there is a state compensation fund to provide for injured sherpas; maximum sum payable is the equivalent of £5,000

d. damages awarded against an inebriated defendant are punitive.

Advise Marie (who is Claude's executor), Mrs Adams and the sherpa, all of whom wish to sue Mr Adams in England.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can outline the choice of law rules for tort (a) at common law (b) under the 1995 Act and (c) under Rome II Regulation.	☐	☐	☐
I can explain the 'displacement' process	☐	☐	☐
I can describe the issues arising over questions of defamation.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
8.1	Background: the common law rules	☐	☐
8.2	The 1995 Act	☐	☐
8.3	Rome II Regulation	☐	☐

9 Restitutionary remedies

Contents

Introduction

Given that the domestic law of restitution is in its infancy it should be no surprise that the conflict of laws in this area is still developing. After discussing the issue of characterisation, this chapter explores an important aspect of restitution – that of unjust enrichment.

9.1 Rome II Regulation (Article 10)

Rome II Regulation (Article 10) sets out special choice of law rules for unjust enrichment. This gives an example of unjust enrichment – payments of amounts wrongly received – but does not offer a definition of 'unjust enrichment'. Remember that, under The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, the rules of Rome II still apply in the UK.

9.2 Characterising unjust enrichment

It is first necessary therefore to characterise unjust enrichment because it is not always clear whether an obligation arises out of unjust enrichment, contract, tort or equity. Only if it is unjust enrichment will Article 10 apply.

9.2.1

At common law the English courts characterised the cause of action and the issue. See *Macmillan Inc* v *Bishopgate Investment Trust* [1996] 1 WLR 387. But in the context of the Regulation, characterisation should not be carried out through English eyes. There is a full discussion of this in Cheshire, North and Fawcett, pp.836–42.

9.2.2

Article 10 contains four rules. It provides that:

> If a non-contractual obligation arising out of unjust enrichment... concerns a relationship existing between the parties, such as one arising out of contract or tort/delict, that is closely connected with that unjust enrichment, it should be governed by the law that governs that relationship.

9.2.3

Where the law applicable cannot be determined in either of these ways, 'it shall be the law of the country in which the unjust enrichment took place' (Article 10(3)). But which is that country? This could refer to:

a. the place where the legal event giving rise to the claim occurred
b. the place in which the act was committed responsible for conferring the benefit or enrichment
c. the place where the impoverishment occurs
d. the place where the enrichment occurs.

Cheshire, North and Fawcett prefer the **country in which the unjust enrichment occurred**. They point out that this is the rule in Germany, and that the German law was influential in the development of Article 10 (see p.847).

9.2.4

Article 10(4) contains an **escape clause**.

> Where it is clear from all 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 paragraphs 1, 2 or 3, the law of that other country shall apply.

It is not certain where this escape clause will operate.

Self-assessment questions

1. **Why is characterisation so important in this area of conflict of laws?**
2. **Why is it difficult to formulate a choice of law rule?**

NOTES

10 Property

Contents

Introduction

English domestic law divides property into real property and personal property. Civil law systems use a different classification: **movables** and **immovables**. English conflict of laws has adopted this, as the most universal classification. Similarly, whereas we distinguish between choses in possession and choses in action, for conflict of laws purposes we adopt the civilian classification of **tangible** movables and **intangible** movables. This chapter introduces these concepts, explores some of the implications of the different classifications, and also looks at transfers involving tangible and intangible movables. As far as tangible movables are concerned, we first explore the possible choice of law rules, and then, having established the dominance of the *lex situs*, examine the difficulties which occur when this changes. Some limitations to the *lex situs* are noted. With intangible movables, it is first necessary to solve how their *situs* is found (where **is** a debt located?). The choice of law rules regarding assignment is then discussed and proprietary and contractual questions are differentiated. Finally, there is a brief discussion of negotiable instruments and of shares.

Jurisdiction and choice of law in relation to immovables situated outside England are relatively straightforward, since the *lex situs* is held to apply in all but a small number of exceptions.

What system of law regulates the rights of a husband and wife in the movable and immovable property which either of them may possess at the time of marriage or may acquire afterwards? This is the final subject of this chapter. It is necessary to consider separately two types of case: first, where the parties have not made a prenuptial contract or settlement; second, where there is such a contract or settlement. Different countries have different rules about the effect of a marriage on the property of the spouses: some have a system of community of property: others (including England) operate a system of separate property.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- **explain movables and immovables, tangible and intangible movables, the implications of the differences and the classification issues involved**
- **explain the choice of law rules for transfers of tangible movables and assignments of intangible movables**
- **in relation to intangible movables, demonstrate the distinction between proprietary and contractual questions**
- **state the rules which apply to negotiable instruments and shares**
- **explain the *Moçambique* rule of jurisdiction and the exceptions to it**
- **state the choice of law rule for immovable property**
- **describe the operation of *lex situs* in respect of capacity, the formalities and the essential validity of transfers**
- **in relation to matrimonial property, identify the applicable law where there is no marriage contract or settlement**
- **explain the effect that a change of domicile has on matrimonial property**
- **outline the law relating to prenuptial marriage contracts and settlements.**

10.1 Classifications of property

Core text

- **Clarkson and Hill, Chapter 9 'Property', Section I 'Movables and immovables'.**

10.1.1 Movable and immovable property

To determine whether an item of property is a movable or an immovable we do not look to English conceptual distinctions. Rather, we look to the *lex situs* of the property. Were we not to do so, we would find ourselves reaching conclusions that the courts of the relevant countries would not agree with and would not enforce. To take an example, if A dies intestate, domiciled in England and owning a farm in Bulgaria with animals on it, then if the animals are classified as movables, they will be inherited by whomever is entitled to them under English law (intestate succession to movables is governed by the law of the last domicile of the deceased). Were they to be regarded as immovables (as in a very old case, slaves were in Jamaica (see *Ex p. Rucker* [1834] 3 LJ Bcy 104), they would descend to whomsoever is entitled to them by Bulgarian law (the *lex situs* governs intestate succession to immovables).

Thus, leasehold land in England (which is personal property in English law) is an interest in an immovable. So, in *Freke* v *Lord Carbery* [1873] LR 16 Eq 461, a testator died domiciled in Ireland, leaving a leasehold house in England. The question was whether the validity of the disposition should be governed by English or Irish law. If the property were regarded as an immovable, English law (the *lex situs*) governed. But if it were classified as a movable, Irish law (the testator's domiciliary law) applied. It was held that the property in question was to be classified as immovable. The validity of the disposition was thus governed by English law, according to which it was invalid.

A second example can be found in *Re Berchtold* [1923] 1 Ch 192. B died domiciled in Hungary possessed of freehold land in England, which was settled on trust for sale with power to postpone sale. Was this movable or immovable property? English law regarded land held on trust for sale as personalty. Was it therefore movable property? But the first question is whether the land was immovable or movable. And, since land is an immovable by English law, the interest was an interest in an immovable, and so English law governed. Only then did the question whether it was realty or personalty arise, to determine who, under English law, was entitled to it.

10.1.2 Tangible and intangible property

The distinction between **tangible** movables and **intangible** movables is very similar to the distinction English law draws between choses in possession and choses in action. The rules relating to tangible movables apply to such things as paintings, jewellery and cars. The rules relating to intangible movables apply to interests such as shares, patents, copyright, debts and trade marks. It becomes less clear where title to an intangible interest (e.g. shares in a company) is represented by a tangible document (a share certificate). Questions might arise which require us to distinguish who is entitled to possession of the certificates from who is entitled to the shares themselves. This is discussed further below.

Summary

Property is divided into movable property and immovable property. Movable property is itself divided into tangible and intangible movable property. There are characterisation issues, for answers to which we look to the *lex situs*.

Reminder of Learning outcomes

By this stage you should be able to:

- **explain movables and immovables, tangible and intangible movables, the implications of the differences and the classification issues involved.**

ACTIVITIES 10.1–10.4

10.1 What are movable and immovable property?

10.2 What is land held on trust for sale but not yet sold?

10.3 What is the distinction between tangible and intangible movable property?

10.4 How is the task of classification (characterisation) undertaken?

10.2 Tangible movable property

CORE TEXT

- **Clarkson and Hill, Chapter 9 'Property', Section II 'Transfers inter vivos', B 'Tangible movables'.**

First, we look at the law governing the transfer of tangible movables. A number of laws have been suggested in an effort to work out the best choice of law rule:

- the law of the domicile of the parties
  But what if the parties have different domiciles?
- the *lex loci actus* (where the transaction took place)
  Its equivalent in contract (the *lex loci contractus*) is out of favour, so why invoke a similar notion here?
- the *lex actus* (the proper law of the transaction)
  What if there is no transaction (e.g. a theft?)
  Or more than one transaction in different countries?
- the *lex situs*
  This is simple and certain (except where goods are in transit).

10.2.1 The *lex situs*

The *lex situs* is supported by *dicta* in many cases: see *Re Anziani* [1930] 1 Ch 407, 420, *Hardwick Game Farm* v *Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, 330 and *Bank voor Handel en Scheepvaart NV* v *Slatford* [1953] 1 QB 248, where Devlin J (at p.257) said: 'there is little doubt that it is the *lex situs* which, as a general rule, governs the transfer of movables when effected contractually'.

It is now clear that the *lex situs* governs the transfer of tangible movables. Thus, where the *situs* remains constant in one country, that country's law will determine title to the goods. So, the validity of a pledge in England of goods in Scotland is determined by Scottish law (*Inglis* v *Robertson* [1898] AC 616).

Where the *situs* is changed by the goods being moved from one country to another, the problem is more complicated. To illustrate, let us look at the case of *Cammell* v *Sewell* [1858] 3 H&M 617; [1860] 5 H&M 728. Timber belonging to the plaintiff was shipped from Russia to England on a Prussian† vessel. The ship was wrecked on the coast of Norway. The ship's master sold the timber to the defendant in Norway. This gave the defendant title under Norwegian law, but not by English law. The plaintiff claimed the timber when the defendant subsequently brought it to England. It was held that the title acquired by the defendant when the timber was in Norway prevailed.

† Prussia was the most important German state prior to the 19th-century unification of Germany.

More recently the question was raised in *Winkworth* v *Christie, Manson & Woods Ltd* [1980] 1 Ch 496. Works of art belonging to the plaintiff were stolen from him in England and taken to Italy, where D2 bought them in good faith. He later sent them back to England to be sold at auction by D1. The plaintiff brought proceedings against the defendants in England for a declaration that the works of art had at all times been his property. Had title passed to D2 as a result of the sale in Italy? By English law, it would not have passed. By Italian law, it would, because the buyer acted in good faith. But which law should apply? It was held – following *Cammell* v *Sewell* – that Italian law, as the law of the country where the goods were situated at the time of the delivery, governed the question.

You may think this conclusion is unfair to the plaintiff. But would not a result the other way have been unfair to D2? He was an innocent purchaser. Slade J justified his conclusion by saying:

> Commercial convenience may be said imperatively to demand that proprietary rights to movables shall generally be determined by the *lex situs* (p.512).

10.2.2 Exceptions

There are some exceptions to this general rule.

- **First**, an English court may refuse to recognise the effect of the *lex situs* if it is considered to be contrary to English public policy. But the *lex situs* would need to be particularly outrageous for public policy to override it (e.g. a Nazi expropriatory law).
- **Second**, according to Slade J in the *Winkworth* case, where the purchaser claiming title did not act in good faith. But it is possible for a purchaser who does not act in good faith to obtain a good title in English law (see Sale of Goods Act 1979 s.48). Why should English law take a different stance when a foreign law is in issue?
- **Third**, where goods are in transit and their *situs* is casual or unknown at the time of the transaction, a transfer valid and effective by its proper law should be valid and effective in England.
- **Fourth**, where an English statute prescribes the application of English law (i.e. there is a mandatory rule). There is probably no such statute.
- **Fifth**, note the unsuccessful attempt to expand the categories of permitted exceptions in *Glencore Int* v *Metro Trading Int* [2001] 1 Lloyd's Rep 284; [2001] 1 All ER Comm 103. The litigation arose out of the collapse of an oil storage facility operated by MTI in Fujairah in the UAE. The claimants had entered into agreements with MTI, in terms of which they delivered oil products to MTI for storage. MTI became insolvent, and the claimants asserted proprietary rights to the oil then held by MTI. There were competing claims by several banks, and by the purchasers of various cargo parcels of fuel oil. The question was what law governed non-contractual liabilities which MTI and the purchasers may have incurred to the claimants. MTI and the producers alleged that the transfer of title to the oil was governed by the law of Fujairah, under which property passed to MTI and then to the purchasers. The claimants argued that relevance should be placed on the law governing the contracts between themselves and MTI:
  - So the issue was, as between the immediate parties to the contract under which goods are delivered by one party to the other, whether the passing of the property is governed by the intention of the parties as expressed in the contract (the proper law) or by the law of the place where the property is situated (the *lex situs*) where these do not coincide in their effect.
  - The claimant argued that English law as the proper law of the contract should apply. The court did not agree: it applied the law of Fujairah, as the *situs* of the oil:

    > It would be highly anomalous if questions of the title to the goods were to be governed by English law as the proper law of the contract if the seller had not purported to re-sell the goods to a third party, but by the *lex situs* if he had.

  - Cheshire, North and Fawcett (p.1266) retort that it would not be anomalous, but rather 'fact-sensitive'.

It should also be noted that if – for example in *Winkworth* – the Italian law would refer to English law, an English court would apply English law. This was the view of Slade J in that case and it seems right.

10.2.3 *Renvoi*

When English law refers to the law of the *situs*, does the doctrine of *renvoi* apply? This question arose in *The Islamic Republic of Iran* v *Berend* [2007] 2 All ER (Comm) 132. The case concerned the disputed ownership of a fragment of limestone relief believed to originate in 5th-century BCE Persepolis. The defendant claimed to have acquired title to the fragment when it was delivered to her in Paris in 1974, following purchase at an auction in New York. Should the English court apply French domestic law or the relevant French conflict of laws rules as well as French domestic law? The court did not introduce *renvoi* and so the question was determined in accordance with French domestic law, under which valid title was acquired in 1974. The judge said 'Whether or not *renvoi* should apply in any given circumstance is largely a question of policy'.

SELF-ASSESSMENT QUESTION

Write a summary of Section 10.2 in no more than 100 words.

10.3 Intangible movable property

We now turn to questions involving the assignment of intangible movables (intangibles). A preliminary point must be made. Unlike a piece of tangible property, an intangible does not physically exist: the law therefore has to **ascribe** a *situs* to intangibles. Intellectual property rights (copyrights, etc.) have their *situs* where, by the law which governs their creation, they can be effectively transferred and, if they are assigned, where their holder is. A share issued by a company is situated where the register is kept – if it is kept in two or more countries, the *situs* of a share is the place where the register is kept in which the shares can be effectively dealt with. The *situs* of a debt is where it is properly recoverable or can be enforced, that is usually where the debtor resides – if this is two or more countries, the *situs* is where payment is expressly or implicitly stipulated for.

10.3.1 Provisions of the Rome I Regulation

The question of which law governs the transfer of intangible movables is far from certain. There are old and inconsistent common law authorities. Some certainty, at least as regards some issues, has been injected into the law by Article 14(1) of Rome I Regulation, which has replaced Article 12 of the Rome Convention. Article 14 will apply not only to contractual aspects of the assignation, but also to the proprietary ones according to Recital 38. Article 14 states that the relationship between the assignor and the assignee under a voluntary assignation or contractual subrogation of a claim against another person shall be governed by the law that applies to the contract between the assignor and the assignee under the Regulation (Article 3 if a choice of law has been made, or Article 4 in its absence).

Remember that, following Brexit, the rules of the Regulation still apply as a result of the enactment of The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (the 'Regulations'). Under the latter, the UK will continue to apply Rome I to determine the proper law of the contract (with some minor exceptions).

In principle, this should be the proper law of the contract, but old cases (e.g. *Lee* v *Abdy* [1886] 17 QBD 309) support rather the law of the place of acting. In *Republica de Guatemala* v *Nunez* [1927] 1 KB 669, Scrutton LJ was of the view that it was either the *lex domicilii* or the *lex loci actus*. Cheshire, North and Fawcett are of the opinion that: 'Just as there has been a development in the general common law rules of contract in favour of the proper law as the law to govern capacity, so there should also be a similar development in the particular context of assignment'.

The assignment of a debt may raise questions that can only be answered by first considering the legal effect of the transaction to which the debt owes its origin. This view is now found in Article 14(2) of the Rome I Regulation, which states that the law governing the assigned or subrogated claim shall determine its assignability.

This will include such a fundamental question as whether the right may be assigned at all. Thus in *Trendtex Trading Corporation* v *Crédit Suisse* [1982] AC 679, the assignability of an English cause of action was held to be governed by English law and not by Swiss law, the proper law of the assignment.

Where the right assigned does not arise out of a contract (for example an intellectual property right) it is not really possible to talk of the applicable law. There are different views as to what a court should do in such circumstances. Cheshire, North and Fawcett hope the courts will apply Article 12 by analogy. Collier submits the governing law should be the *lex situs*.

The question of priorities

Another question which arises concerns **priorities**. This may be illustrated by *Kelly* v *Selwyn* [1905] 2 Ch 117. There was an assignment in 1891 in New York by X to his wife of an interest in English trust funds. Notice wasn't given to the trustees until 1903, none being required by the law of New York, where X was domiciled at the time of the assignment. In 1894 X assigned the same interest to the plaintiff in England and immediate notice of this was given to the trustees. Held: the plaintiff ranked first, since the rights of the claimant fell to be considered by English law. It is not clear whether English law was chosen by the judge as the *lex fori*, the *lex situs* or the law governing the validity of the assignment. Cheshire, North and Fawcett say the third view was what really dictated the judge's decision (the governing law of the trust fund was English law). This approach is confirmed by Article 14(2) of the Rome I Regulation.

The Regulation is only concerned with contractual obligations. So it is arguable that the proprietary effect of an assignment of an intangible should be governed by the *lex situs*. An assignment valid by virtue of Article 12(1) could still not confer title on the assignee if by the *lex situs* it does not do so. However, this is not the view of Cheshire, North and Fawcett (pp.1288–89) or Dicey, Morris and Collins (pp.980 and 983). The Dutch Supreme Court (in 1997) also does not agree (the case is discussed by H. Struycken [1998] *LMCLQ* 35). Nor it seems does the Court of Appeal. In *Raiffeisen ZentralBank Österreich AG* v *Five Star General Trading LLC* [2001] QB 825 the claimant was the assignee of a marine insurance policy made with French insurers but governed by English law. By French law (the *lex situs* of the assignment), the assignee could not recover, since notice of the assignment had not been given to the insurers by or through a French bailiff. By English law, the law governing the contract of insurance, he could recover, since notice had been given in writing, which was all that was required. It was held that Article 12(2) applied, and English law governed the matter. Clarkson and Hill (p.483) see 'an obvious attraction to applying the *lex situs* to proprietary questions concerning intangibles' and cite *Macmillan Inc* v *Bishopsgate Investment Trust plc* [1996] 1 WLR 387. This involved competing claims to shares in a New York incorporated company, although the transactions on which the claims were based had been effected in London. The Court of Appeal held that the issue as to who has title to shares should be decided by the *lex situs*. Clarkson and Hill point out that the implication of the application of the *lex situs* to proprietary questions is that 'an assignee under a contract of assignment which is valid according to the applicable law may, nevertheless, be unable to claim title to the intangible in question'.

10.3.2 Involuntary assignments

There are also assignments which take place without the agreement of the assignor and assignee. These are **involuntary** assignments. The **garnishee order** is the best example. This is a method of execution of a judgment by attachment of a debt. In purely domestic proceedings the garnishee is effectively discharged from further liability once he has paid the judgment creditor. Where there is a foreign element, the position is more complicated (e.g. the garnishee may be in one country and the debt situated in another). In garnishment proceedings in England, it is necessary that the garnishee be within the jurisdiction or have submitted to the jurisdiction. But it is not necessary that the judgment debtor is in the jurisdiction or that the debt is situated within the jurisdiction. If the debt is enforceable within the jurisdiction, the court has

the jurisdiction to garnish it. As far as the garnishee is concerned, there is a risk that, having complied with an order made in one country, he will remain liable to pay his debt a second time if sued by the judgment debtor in a foreign court, if this were to refuse to recognise the validity of the order. This was argued in *Swiss Bank Corporation* v *Boehmische Industrial Bank* [1923] 1 KB 673. SB had recovered judgment for a large sum of money against BI, a company carrying on business in Czechoslovakia. BI had an account at a London bank and SB issued a garnishee summons against the bank. It was argued that to make a garnishee order would be inequitable since the bank, if later sued in Czechoslovakia, would be ordered to pay the sum again. It was held that since the debt was situated here and the Czech bank had submitted to jurisdiction, there was no more than a theoretical risk that it would have to pay twice over. A garnishee order may be refused if there is a real risk that the debtor will have to pay again: see *Deutsche Schachtbau* v *Shell International Petroleum Co Ltd* [1990] 1 AC 295. There was a concern here that the foreign court was indulging in judicial extortion.

10.4 Negotiable instruments and shares

There is a full account of the choice of law rules relating to **negotiable instruments** in Cheshire, North and Fawcett (pp.1294–97). The Bills of Exchange Act 1982 s.72 provides:

> The validity of a bill as regards … form is determined by the law of the place of issue, and the validity as regards … form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made…
>
> The interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill, is determined by the law of the place where such contract is made.

In two of the relevant cases since the Act, little attention has been paid to this statutory provision. In *Alcock* v *Smith* [1892] 1 Ch 238, the court applied the *lex loci actus*. In *Embiricos* v *Anglo-Austrian Bank* [1904] 2 KB 870, the *lex loci actus* was again applied (though Cheshire, North and Fawcett point out (p.1296) that what may have been in the mind of the court was the *lex situs*, since this necessarily coincided with the law of the place of acting). Section 72, however, played a decisive part in the third case, *Koechlin et Cie* v *Kestenbaum* [1927] 1 KB 889. The Court of Appeal held that s.72 had settled the choice of law rule in favour of the law of the place of acting (the *lex loci actus*).

Shares

Questions relating to title to **shares** are governed by the *lex situs* of the shares. Shares are deemed to be situated in the country where they can be effectively dealt with as between the shareholder and the company. Many of the issues involved may be illustrated by examining *Macmillan Inc* v *Bishopsgate Investment Trust plc* [1996] 1 WLR 387. P (a wholly-owned subsidiary of one of the Robert Maxwell[†] group of companies) owned shares in a New York incorporated company. The share register was in New York. The shares were transferred into the name of D1 as nominee and deposited with the Depository Trust Co (DTC) in New York. Later, without P's knowledge, some of the shares were used by Maxwell companies to secure loans from three banks, who became D2. These loans were secured initially either by deposit of the share certificates in England or by transfer of the shares to D2 through the DTC system in New York. Eventually, all the shares were registered in New York in the names of the banks. P sought a declaration that it was beneficially entitled to the shares as being held by D2 on trust for it. Was P's claim governed by New York law (in which case it would fail since D2 were *bona fide* purchasers without notice of P's claim, or by English law, under which P could rely on constructive notice of its claim). The Court of Appeal classified the issue as proprietary, not restitutionary (see Chapter 9). The issue was, it said, whether D2 had a good defence as *bona fide* purchasers for value without notice of P's claim. The question then was which law was to be applied to the issue of priority of title to the shares. The Court of Appeal concluded that the applicable law was that of the *situs* of the shares (i.e. New York law).

[†] The business affairs of Robert Maxwell, one-time Labour MP and publishing tycoon, were extremely complicated by the time of his mysterious death in 1991. Maxwell had defrauded the shareholders and pension funds of several of his companies and embezzled large sums of money.

It is necessary to distinguish the *situs* of shares from the *situs* of the share certificates (at least where the shares are non-negotiable). In *Macmillan* the court said that the *situs* of such share certificates is where the certificates physically are situated at the time of the transfer.

Self-assessment questions

1. **A painting is stolen from a church in Italy. The thief sells it to an art dealer in Switzerland who brings it to England to have it auctioned at a major auction house in London. The church seeks a declaration from the English court that the title to the painting still vests in it. By the law of what country will the case be decided?**
2. **Mr A, who is domiciled in X, insured his life with an English insurance company. He subsequently assigned it to Mrs A in X. By the law of X the assignment is invalid because donations between spouses are invalid. Can Mrs A claim on the policy in England (by the law of which such an assignment is valid)?**
3. **Explain the conflict of laws issue which may arise in garnishment proceedings.**
4. **Write a critical note on *Macmillan Inc* v *Bishopsgate Investment Trust plc*.**

Summary

In the case of negotiable instruments such as bills of exchange the choice of law is the *lex loci actus*. Matters relating to shares are governed by the *lex situs*, which is the place where issues between the owner and the issuing company can effectively be dealt with.

Reminder of learning outcomes

By this stage you should be able to:

- **explain the choice of law rules for transfers of tangible movables and assignments of intangible movables**
- **in relation to intangible movables, demonstrate the distinction between proprietary and contractual questions**
- **state the rules which apply to negotiable instruments and shares.**

10.5 Jurisdiction over immovable property situated outside England

Core text

- **Clarkson and Hill, Chapter 2 'Civil jurisdiction', Section III 'Declining jurisdiction and staying proceedings', B.4 'Cases involving immovable property not regulated by the Brussels I Regulation'.**

10.5.1 The *Moçambique* rule

In *British South Africa Co* v *Companhia de Moçambique* [1893] AC 602 the House of Lords held that as a general rule the English courts have no jurisdiction to try any action involving the determination of title to or the right to possession of immovable property situated out of England. In parenthesis it may be noted that this was extended to bar actions concerning the validity or infringement of rights arising under foreign copyright or other intellectual property laws (*Tyburn Productions Ltd* v *Conan Doyle* [1991] Ch 75). This self-denying rule was extended in *Hesperides Hotels* v *Aegean Turkish Holidays Ltd* [1979] AC 508 to bar an action in respect of an alleged conspiracy in England to trespass upon a hotel in Cyprus. But this was reversed by the Civil Jurisdiction and Judgments Act 1982 s.30, which provides that jurisdiction to entertain proceedings for trespass, or any other tort affecting immovable property, extends to property situated outside England 'unless the proceedings are principally concerned with a question of title to, or the right to possession of that property'.

The *Moçambique* rule is subject to two exceptions. First, where an English court is administering a trust or will which consists in whole or part of foreign land, and the question of title arises incidentally. Secondly, it is said that English courts can act *in personam* upon a person within their jurisdiction to enforce a personal obligation when the subject matter is land abroad. It does this by making a decree of specific performance, and treating them as in contempt of court if they disobey. There are three requirements:

- the defendant is within the **jurisdiction** (or can be served under CPR 6.20)
- the subject matter of the action
  - arises out of a **contract** between the parties, or
  - concerns **fraudulent** or other **unconscionable** conduct, or
  - arises from an **equitable** or **fiduciary** relationship
- the act the defendant is ordered to do is not **illegal** or impossible by the *lex situs*.

10.5.2 Choice of law

The choice of law rules could not be more straightforward, since there is almost total dominance of the *lex situs*. There are exceptions to the *lex situs* in the case of succession, but none as regards *inter vivos* transfers. The rule was authoritatively stated in *Nelson* v *Bridport* [1846] 8 Beav 547. Lord Langdale MR stated:

> The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated (at p.570).

There is criticism of the rule today but it is likely to survive any onslaught because:

> at the end of the day, only the law of the *situs* can control the way in which land, which constitutes part of the *situs* itself, is transferred (Cheshire and North, p.1256).

'Law of the *situs*' means the whole of the law of the *situs*. This is one area where the doctrine of *renvoi* applies (see *Re Ross* [1930] 1 Ch377; *Re Duke of Wellington* [1947] Ch 506).

Capacity to convey or take a conveyance of foreign land is governed by the *lex situs*. In *Bank of Africa* v *Cohen* [1909] 2 Ch 129, a married woman, domiciled in England, by a deed executed in England, agreed to make a mortgage to a bank in England of her land in South Africa to secure the debts of her husband. Under South African law she lacked the capacity to do this. It was held she had no capacity to enter into the agreement. Buckley LJ said 'Mr Dicey's language I think is correct, that a person's capacity to make a contract with regard to an immovable is governed by the *lex situs*'. But was the South African rule intended to protect married women domiciled in other countries?

The formal validity of a transfer of immovables is governed by the *lex situs*. See *Adams* v *Clutterbuck* [1883] 10 QBD 403 (a conveyance between two domiciled Englishmen of shooting rights in Scotland was valid despite not being under seal, which was required by English law – it was not required by Scots law).

Essential validity too is governed by the *lex situs*. Thus, a disposition of English land which contains limitations that infringe the rule as to perpetuities is void (*Re Grassi* [1905] 1 Ch 584, 592). The *lex situs* determines what legal estates can legally be created and the incidents of those estates.

ACTIVITIES 10.5 AND 10.6

10.5 What is the *Moçambique* rule?

10.6 What exceptions are there to the *Moçambique* rule?

Summary

Under the *Moçambique* rule English courts have no jurisdiction over actions regarding title or possession of properties situated overseas (though they may try certain torts

related to such properties). There are some minor exceptions relating to wills and trusts that include foreign land. The choice of law in matters relating to immovable property outside England and Wales is the *lex situs*. This includes matters of capacity, though as usual there are some minor exceptions.

Self-assessment questions

1. **A man of 20 who is domiciled in the Netherlands (by the law of which he is a minor) owns freehold land in London. Can he convey it? Explain.**
2. **A domiciled Scotsman conveys to a purchaser, also a Scots domiciliary, the right of shooting over land on the Yorkshire Moors in Northern England. The conveyance is by an instrument not under seal. This does not comply with English law. Is the conveyance valid? Explain.**
3. **A domiciled Englishman conveys land in New York upon trusts which infringe the New York rule against perpetuities. Are the trusts valid? What additional information do you require to answer this question?**

Reminder of learning outcomes

By this stage you should be able to:

- **explain the *Moçambique* rule of jurisdiction and the exceptions to it**
- **state the choice of law rule for immovable property**
- **describe the operation of *lex situs* in respect of capacity, the formalities and the essential validity of transfers.**

10.6 Matrimonial property

Core text

- **Clarkson and Hill, Chapter 9 'Property', Section III 'Matrimonial property'.**

10.6.1 Effect of the matrimonial domicile

In the absence of a **marriage contract** or **settlement** the effect of the marriage on the movable property of the spouses is governed by the matrimonial domicile. The effect of marriage on immovable property would seem to be governed by the *lex situs*.

What is meant by 'matrimonial domicile'? This has been held to be the domicile of the husband at the time of the marriage. Thus, in *Re Egerton's Will Trusts* [1956] Ch 593, a domiciled English soldier married a domiciled French woman in England. They agreed they should set up home in France 'as soon as possible', but it took them two years. On the husband's death his widow claimed that the estate was to be administered in community as under French law. This claim was rejected. France may have been their intended matrimonial home – and Cheshire had argued that this should be the test – but the husband's domicile at the time of the marriage was England. This was the law of the matrimonial home. The judge accepted that in exceptional circumstances this presumption could be rebutted in favour of the intended matrimonial home (if the parties went at once and were then possessed of little property). Of course, now that a married woman can have her own domicile, it might be easier to displace the law of the husband's domicile. A frequently-cited South African decision is *Estate Frankel* v *The Master* [1950] (1) SA 220: a West German and a Czech married in Czechoslovakia, having agreed to go to live in South Africa. They did so four months after the marriage. The South African court held that West German law, under which their property was not held in community, applied, not South African law under which it was.

Change of domicile

What is the effect of a change of matrimonial domicile in such cases? There are two competing theories, those of 'immutability' and 'mutability'. Mutability is the favoured doctrine in the USA and there is an old Scottish case supporting it (*Lashley* v *Hog* [1804] 4 Paton 582). Under this doctrine, rights to property acquired after the change of

domicile are regulated by the law of the parties' domicile at the date of its acquisition. Under immutability, the parties' property acquired after the change of domicile is subject to the regime which was established before the change of domicile.

Lashley v *Hog* concerned a Scotsman with an English domicile who married a domiciled English woman, and then re-acquired a domicile in Scotland. They died and their daughter brought an action in the Scottish court claiming a share in the husband's (her father's) movable property. Her argument was that it was subjected during the husband's lifetime **after the change of domicile** to community of property, and she was entitled in right of her mother. The House of Lords agreed. The question of how much this case offers to mutability depends upon interpretation of the *ratio decidendi*. It seems that the Lords may have seen the case as one relating to testamentary, rather than matrimonial, law. Certainly, that was how the House of Lords interpreted it in *De Nicols* v *Curlier* [1900] AC 21. Cheshire, North and Fawcett (p.1370) conclude that 'A more decisive authority than *Lashley* v *Hog* must be found before it can be categorically asserted that the proprietary relations of husband and wife change with a change of their domicile'. They believe that 'the clue' to a statement of the law is the distinction between 'inchoate and vested rights'. They conclude (p.1021) that 'if it should ultimately be decided that the proprietary rights of spouses change with a change in their domicile, this would presumably be subject to the exception that rights vested in either party under the law of some previous domicile remain unaffected'. And, as they note, this view was accepted in two Canadian decisions: *Pink* v *Perlin & Co* [1898] 40 NSR 260 and *Re Heung Won Lee* [1963] 36 DLR (2d) 177. And, presumably, now that both spouses can change their domicile, it should require a change by both to affect their property.

Thus far everything said has related to movables. Of course, rights in relation to immovable property are governed by the *lex situs*. See *Welch* v *Tennent* [1891] AC 639. One implication of this is that a holiday home purchased by a husband domiciled in England in a country where property was held as community property would find – you may think to his surprise – that the holiday home was community property.

SELF-ASSESSMENT QUESTION

What is the case for mutability? Why do you think it is the dominant doctrine in the USA?

10.6.2 Prenuptial contracts

We turn now to the situation where the parties have made a prenuptial contract. First, note that this is governed by the common law because the Rome I Regulation does not apply to contractual obligations relating to 'rights in property arising out of a matrimonial relationship'. If a contract is made it will govern proprietary rights even if domicile changes – the mutability/immutability question does not arise – and applies whether the property is movable or immovable.

Express and tacit contracts

No distinction is drawn between an express and a tacit contract. The leading case is *De Nicols* v *Curlier* [1900] AC 21 (the 'Café Royal' case). H and W, French nationals with a French domicile, married in France without making an express contract as to their proprietary rights. Nine years after their marriage, they came to England, acquired a domicile here and became wealthy, as their small café became the Café Royal† in Regent Street. H died, having disposed of all his property in his will without taking account of the wife's entitlement to a half share under the French system of community property. Had their change of domicile affected their legal position in relation to the property? The House of Lords considered first their movables. Expert evidence as to French law – this would be different today – was that parties who marry without an express marriage contract were bound by an implied contract to comply with the system of community. Lord Macnaghten concluded:

> if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile.

† The Café Royal is a large and famous establishment in Regent Street, one of central London's most expensive and sought-after locations.

The question of the English immovables was then considered by Kekewich J (in *Re De Nicols* [1900] 2 Ch 410). He held that the French implied contract extended to immovables in England as well. There are weaknesses in Kekewich J's judgment – there usually were. On this see Cheshire, North and Fawcett (p.1373) and also the useful discussion in Dicey, Morris and Collins (pp.1071–73). There is support for the application to immovables of the law governing the prenuptial contract in *Chiwell* v *Carlyon* [1897] 14 SC 61 (South Africa) (the case is fully discussed in Cheshire, North and Fawcett, p.1374).

The law on capacity to make a marriage contract is far from certain. If we reason by analogy to commercial contracts we would (probably) conclude that the proper law of the contract should govern. If we use the model of capacity to marry, then we would conclude that the *lex domicilii* should govern, that is capacity would be governed by the law of the domicile of the party alleged to be incapable. The better view is that capacity is governed by the proper law of the contract, which is usually (but not necessarily) the law of the matrimonial domicile. One can point to cases which superficially support the *lex domicilii* but on examination none of these cases is convincing or, indeed, totally supports that proposition (see *Cooper* v *Cooper* (1888) 13 App Cas 88; *Re Cooke's Trusts* [1887] 56 LJ Ch 637 and *Viditz* v *O'Hagan* [1900] 2 Ch 87). There is a good analysis of these cases in Cheshire, North and Fawcett (pp.1355–77).

For a marriage contract to be **formally** valid it needs to be so either by the **proper law** or the *lex loci contractus*. Compliance with either of these laws is sufficient. See *Van Grutten* v *Digby* [1862] 31 Beav 561 and *Guépratte* v *Young* [1851] 4 De G & Sm 217.

The essential validity of a marriage contract is governed by its **proper law**. This may be expressly chosen: in the absence of choice, the proper law will be the law of the country with which the contract is most closely connected. There is a presumption in favour of the law of the matrimonial domicile: *Re Fitzgerald* [1904] 1 Ch 573. The proper law will continue to govern even if the parties go to live in a country where a different law prevails.

A marriage settlement may create a trust. If it does, essential validity will be governed by reference to the Recognition of Trusts Act 1987 (see Chapter 11).

The Civil Partnership Act 2004 is silent on choice of law rules regarding the property rights of civil partners. It is probable that they will be determined by the same rules as those of married persons.

10.6.3 The European instruments

Regulations 2016/1103 and 2016/1104 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and property consequences of registered partnerships respectively, provide for uniform rules aiming at facilitating the delivery of the relevant judgments in cross-border disputes. The two Regulations are almost identical in terms of the numbering of the articles and the content. Both Regulations came into force on 29 January 2019 and they only apply to 19 Member States, with the UK (which was then still part of the European Union) having opted out on the basis that it does not have matrimonial regimes within its family law. The two instruments apply to marriages that were celebrated and civil partnerships that were entered into on or after 29 January 2019. They also apply in respect of issues of recognition and enforcement where proceedings were initiated before 29 January 2019, as long as the decision is given after that date.

According to Article 21 of both Regulations, the rules on applicable law are universal in scope. Therefore, the law of any state (and that includes non-EU Member States) may be found to be applicable. The law provided by the Regulations is applicable to all property, irrespective of the country the property is situated in.

The Regulations come into play in the event of the death of one of the spouses/partners (Article 4) or in the case of divorce/dissolution or annulment of the partnership (Article 5). In the former case, the court in a competent Member State, in accordance with Regulation 650/2012 (see Section 11.2), will have jurisdiction in matters arising from the matrimonial property/property consequences of the registered partnership.

In the case of divorce/dissolution or annulment, the court seized will have jurisdiction, as long as the spouses/partners are in agreement. It should be pointed out that Articles 4 and 5(1) are only applicable in cases where a competent court has been seized.

In other circumstances, or when spouses/partners fail to reach an agreement according to Article 5, jurisdiction lies with the courts of the Member State in the territory of which the spouses/partners have their habitual residence. Articles 6, 7, 8 and 9 provide for jurisdictional alternatives but, if eventually no court is found to have jurisdiction, a court may be found to have secondary jurisdiction according to Article 10. Article 11 allows for *forum necessitatis*, as a last resort.

Pursuant to Article 22, spouses/partners or future partners may choose the law of the state they want to apply to their matrimonial property regime/property consequences of the registered partnership. In the absence of a choice of law agreement, Article 26 makes provisions in relation to the applicable law. It should be pointed out that the two instruments differ slightly on the jurisdictional basis that the parties may adopt for the choice of law agreement because of the uncertainty as to whether a country would recognise the registered partnership. The same applies in respect of the applicable law in the absence of a choice of law agreement.

Finally, in accordance with Article 36, a decision given in a Member State shall be recognised in the other Member States without any special procedure being required. Similarly, a decision enforceable in one Member State shall be enforceable in another Member State when it has been so declared in accordance with the procedure provided for in Articles 44 and 47 of the Regulations.

Summary

In different legal systems marriage has different effects on property. Conflict of laws distinguishes between those where there is no marriage contract or settlement and those where there is. Where there is no contract or settlement, the main problem occurs where the parties move from one country to another. The main issues relating to contracts revolve around capacity and formal and essential validity.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- **in relation to matrimonial property identify the applicable law where there is no marriage contract or settlement**
- **explain the effect that a change of domicile has on matrimonial property**
- **outline the law relating to prenuptial marriage contracts and settlements.**

Sample examination questions

Question 1 In 1937 the Nazi Government in Germany looted the house of a German Jew. Among the property stolen was a valuable painting. The painting was sold in Germany to an Austrian art gallery. (You may assume that property in the painting passed to the art gallery under the German law of the time.) There is currently in London an exhibition of paintings and the Austrian art gallery has lent the London gallery the painting in question. The grandson of the German Jew is now seeking the return of the painting. Advise him.

Question 2 What scope is there for the application of laws other than the *lex situs* in determining questions relating to the transfer of tangible movables and the assignment of intangibles.

Question 3 Clarissa, whose domicile of origin was in England, married Pierre, a wealthy French property developer with a domicile in France in 1965. By the law of France, unless parties agree to the contrary, there is community of property between married couples. The matrimonial home was set up in France where they lived until 1970. In 1970, when Pierre had accumulated 10 million dollars, they moved to England. Pierre's property development continued to prosper and when he died in 2006 he was worth 30 million dollars. He also had a chateau in France, worth 5 million Euros.

By the law of France Clarissa is entitled to half of Pierre's property. She wants to know whether she can claim half of his assets. Pierre's brother is contesting the claim.

Advise Clarissa.

Question 4 What if Clarissa and Pierre had made a marriage contract and she had agreed that on Pierre's death her maximum entitlement was 1 million dollars?

Use the facts of Question 3 to advise Clarissa.

Question 5 Discuss critically the law regulating the effect of marriage on property in the English conflict of laws. Should civil partnership have the same effect? What about cohabitation?

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain movables and immovables, tangible and intangible movables, the implications of the differences and the classification issues involved	☐	☐	☐
I can explain the choice of law rules for transfers of tangible movables and assignments of intangible movables	☐	☐	☐
I can in relation to intangible movables, demonstrate the distinction between proprietary and contractual questions	☐	☐	☐
I can state the rules which apply to negotiable instruments and shares	☐	☐	☐
I can explain the *Moçambique* rule of jurisdiction and the exceptions to it	☐	☐	☐
I can state the choice of law rule for immovable property	☐	☐	☐
I can describe the operation of *lex situs* in respect of capacity, the formalities and the essential validity of transfers	☐	☐	☐
I can, in relation to matrimonial property, identify the applicable law where there is no marriage contract or settlement	☐	☐	☐
I can explain the effect that a change of domicile has on matrimonial property	☐	☐	☐
I can outline the law relating to prenuptial marriage contracts and settlements.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
10.1	Classifications of property	☐	☐
10.2	Tangible movable property	☐	☐
10.3	Intangible movable property	☐	☐
10.4	Negotiable instruments and shares	☐	☐
10.5	Jurisdiction over immovable property situated outside England	☐	☐
10.6	Matrimonial property	☐	☐

11 Succession and trusts

Contents

Introduction

This chapter begins by discussing the administration of estates and succession. On the first question it examines the circumstances in which an English court may appoint a representative and those when an English court will recognise the grant of a foreign representative. On succession it discusses succession to both movables and immovables, focusing in each case on questions relating to capacity, formal validity and essential validity.

We then go on to the related issue of trusts. Before 1987, when the Recognition of Trusts Act was passed, English conflict of laws offered very little guidance on the choice of law rules governing trusts, or the rules for the recognition of foreign trusts. An explanation is the virtual absence of the concept outside the common law world. As a result of the Hague Convention on the Law Applicable to Trusts and on their Recognition (the Hague Trusts Convention, concluded in 1985), the Recognition of Trusts Act 1987 was passed in the UK. Our main interest with regard to the Convention was to secure recognition of English trusts by the courts of other countries. The Act deals – despite its name – with choice of law as well as recognition questions.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **explain the rules for administration of estates**
- **outline the main issues relating to intestate succession and to wills, including capacity, formal validity, essential validity, construction and revocation**
- **state the choice of law and recognition rules for trusts**
- **state the law on variation of trusts.**

11.1 Succession

Core text

- **Clarkson and Hill, Chapter 9 'Property', Section IV 'Succession'.**

11.1.1 Appointment of representatives

Upon the death of a testator or an intestate, the question arises as to who is to pay the deceased's debts and distribute their assets in accordance with the will or the rules of intestate succession. This task is undertaken by the personal representative. In England, the personal representative must obtain the authority of the court before they can act (even if they are appointed in the will).

Two types of issue may arise.

First, under what circumstances can an English court appoint a representative? The courts have a wide jurisdiction to make a grant of representation. A grant may be made even when the deceased leaves no property in England (see Administration of Justice Act 1932 s.2(1) and Supreme Court Act 1981 s.25(1)). A grant will normally extend to all the deceased's property, wherever this is situated. But whether the English representative will be able to deal with the property situated in foreign countries will depend upon whether the English grant is recognised there. Where the deceased died domiciled in a foreign country, the English court will make the grant in the first instance to the person entrusted with the administration of the estate under the law of the deceased's domicile.

Second, when will the English court recognise a grant of a foreign representative? The status of an administrator appointed by a foreign court is not recognised in England: their title relates only to property that lies within the jurisdiction of the country from which they derive their authority. Therefore, they have no right to take or recover by action property in England without a grant from an English court. If, without such a grant, they succeed in obtaining property in England, they are liable as an executor *de son tort* to account for assets received. Although a foreign administrator is not permitted to sue in England as the representative of the deceased, they may enforce by action a right that is personal to themself, and which they are entitled to assert in their own individual capacity.

All matters of administration are governed by the law of the country in which the grant is obtained.

11.1.2 Succession to movables

Most systems adopt the principle of **unity of succession** (i.e. questions of succession are governed by one single law). English law, by contrast, adheres to the principle of scission, that is issues of movables and immovables are governed by different laws, respectively the *lex domicilli* and the *lex situs*).

Where the deceased dies intestate, movable property is distributed according to their *lex domicilii* at the time of their death.

Testamentary succession to movables is governed exclusively by the *lex domicilii* of the deceased as it existed at the time of their death. A subsequent change in the *lex domicilii* is in general of no effect. *Lynch* v *Provisional Government of Paraguay* (1871) LR 2 P&D 268 illustrates this.

Capacity

Capacity to make a will is determined by the testator's domiciliary law: *Re Fuld's Estate (No.3)* [1968] P 675. Where the testator changes their domicile after making a will, which law governs? There is no authority on this, but in principle it should be the domiciliary law at the time of making the will. The capacity of a legatee to take a bequest is determined by either their domicile or the law of the testator's domicile. In *Re Hellman's Will* (1866) LR 2 Eq 363, the law most favourable to the *propositus* was selected.

Formal validity

Formal validity is governed by the Wills Act 1963. Under this a will is treated as properly executed if its execution conforms to the internal law – there is no scope for *renvoi* – of the law in force in any of:

- the territory where the will was **executed**
- the territory where the testator was **domiciled**
  either at the time of making the will
  or the time of their death
- the territory where the deceased was **habitually resident**
  either at the time of making the will
  or at the time of their death
- the state of which the testator was a **national**
  either at the time of making the will
  or at the time of their death.

Essential validity

The **essential validity** of a will (or of any particular gift of movables in it) is determined by the law of the country in which the testator was domiciled at death. This determines whether and to what extent a will is invalid by reason of a requirement that a certain part of the estate (the *legitima portio*) must go to a particular person or class of persons. *Renvoi* has been applied here: *Re Annesley* [1926] Ch 692. An illustration is *Re Groos* [1915] 1 Ch 572. A Dutch national made her will in the Netherlands, constituting her husband heir of her movable property except for 'the legitimate portion to which her descendents were entitled'. She died domiciled in England, leaving a husband and five children. By Dutch law the legitimate portion was three-fourths of the estate. By English law it was nothing. Held: since the will operated under English law, the whole estate passed to her husband.

But there is a distinction between a right to give and a right to receive. For example, there is no reason in principle why a legatee domiciled in France should not take despite the bequest being contrary to the English rule against perpetuities.[†] The object of the perpetuity rule is local, and cannot justifiably be invoked to destroy a bequest of money that is to be enjoyed and administered in a foreign country. US and Australian courts have come to this conclusion. See Cheshire, North and Fawcett, p.1346.

[†] The rule against perpetuities prevents settlors creating perpetual trusts. At some point, the beneficiaries must be free to wind up the trust and call for a transfer of the trust rights to them. The only exception is with regard to charitable trusts, to which no perpetuity period attaches.

Interpretation (or construction) of wills of movables is governed by the law intended by the testator. Although the law is not beyond doubt, the best approach is to look to the testator's law of domicile at the time when the will was made. This is, of course, the law with which the testator was most likely to be familiar. Of course, this rule will be displaced if it is the case that the testator intended construction according to some other system of law.

Revocation of a will

A will can be **revoked** in three ways. Each must be treated separately.

By a later will

A will purporting to revoke an earlier will is formally valid if it satisfies the requirements of any one of the laws by which, under the Wills Act 1963, its formal validity is determinable. Additionally, the revoking will is effective if it complies with the requirements of any one of the laws qualified to govern the formal validity of the **earlier** will.

By destruction of the will

This is governed by the common law principle of domicile. A problem is created if the testator has one domicile at the time of the act of destruction, and another at the time of death. An effective revocation by the earlier law may be ineffective by the later. The better view is that the legal effect of the act of destruction falls to be determined at the time of its performance.

By marriage

In English law – though in few others – a will is revoked by a subsequent marriage, unless explicitly stated to be in contemplation of it. The question that may arise is whether it is the domiciliary law at the time of the marriage or at the time of death which determines the effect of marriage on the will. If the former, then its effect must be tested by the *lex domicilii* at the time of the marriage; if the latter, by the *lex domicilii* at the time of the death. English law has classified this as a rule of **matrimonial law**, rather than of testamentary law. This seems right as it is essentially a doctrine concerned with the relationship of marriage: see *Re Martin* [1900] P 211. If the spouses have different domiciles (possible since 1974), it will be the domicile of the testator at marriage which is the governing law.

Summary

English law adheres to the principle of scission: movables and immovables are governed by different laws. Succession to movables is governed by the testator's *lex domicilii* at the time of death. Capacity is also governed by the testator's domiciliary law. The law relating to formal validity is in the Wills Act 1963. Essential validity is determined by the law of the country in which the testator is domiciled at the time of death. Wills may be revoked by a later will, destruction of a will, or marriage.

11.1.3 Succession to immovables

Intestate succession to immovables is governed by the *lex situs*. This rule can be criticised (see Morris [1969] 85 *LQR* 339, 348–52). It is a historical anomaly. You should read *Re Collens* [1986] Ch 505 for a good example of the complications of the rule.

Testamentary succession to immovables is also governed by the *lex situs*.

Although there is little authority, there is no doubt that the *lex situs* determines both capacity to make a will of immovables and capacity to take a bequest.

Formal validity is governed by the Wills Act 1963. Accordingly, compliance with any one of the provisions of s.1 is sufficient. Additionally, the Act retains the common law rule that compliance with the formalities of the *lex situs* is sufficient (s.2(1)(b)). The provision actually says 'the internal law in force in the territory where the property is situated', thus excluding *renvoi*.

Essential validity is governed by the *lex situs*, including its choice of law rules. The doctrine of *renvoi* is thus used here.

It is generally accepted that a will of immovables must be considered according to the system **intended** by the testator. This is presumed to be the law of the testator's domicile at the time when the will is made, but the presumption may be rebutted if the evidence is adduced from the language of the will proving that they made the disposition with reference to some other legal system. But if the interest which arises from such construction is not permitted or recognised by the law of the *situs*, the latter law must prevail. See *Studd* v *Cook* [1883] 8 App Cas 577 and *Re Miller* [1914] 1 Ch 511 (Cheshire, North and Fawcett, pp.1353 and 1354, provides is a useful discussion of these cases).

In general, **revocation** is dealt with as it is for movables (Section 11.1.2). But where revocation by subsequent marriage is at issue, there is some dispute about whether this should be referred to the *lex situs* or the law of domicile at marriage. One English authority (*Re Caithness* [1891] 7 TL R 354) supports the *situs*. An Australian case (*Re Micallef's Estate* [1977] 2 NSWLR 929) supports the *lex domicilii*. Cheshire, North and Fawcett (pp.1358) supports the *lex domicilii*. You can read about *Re Micallef's Estate* there.

11.2 The EU Succession Regulation (Brussels IV)

Regulation (EU) 650/2012 on 'jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession' (also referred

to as 'Brussels IV') was adopted on 4 July 2012. It has been in force in relation to the deaths of residents of the succession countries since 17 August 2015, and constitutes a major step towards the facilitation of cross-border successions. It should be noted that the United Kingdom, Ireland and Denmark opted out of Brussels IV and as a consequence they are not covered by its provisions. The rationale behind the decision of the United Kingdom and Ireland to opt out had to do with concerns in relation to the obligation of one Member State to apply clawback provisions applicable to lifetime gifts in the law of another state. In England and Wales, for example, no such provisions exist, but instead individuals are given full rights of lifetime and testamentary disposition over their property.

Consequently, the departure of the UK from the EU will not change much in terms of how the Regulation affects the former after 31 January 2020. The Regulation will still apply to estates that are connected to both the UK and an EU Member State that is bound by the Regulation.

11.2.1 Overview of the EU Succession Regulation

The Regulation consists of seven chapters. Chapter I (Scope and Definitions), Chapter II (Jurisdiction), Chapter III (Applicable Law), Chapter IV (Recognition, Enforceability and Enforcement of Decisions), Chapter V (Authentic Instruments and Court Settlements), Chapter VI (European Certificate of Succession) and Chapter VII (General and Final Provisions). The objectives of the Regulation as enshrined in Recitals 7 and 8 are to remove obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications, enable EU citizens to organise succession matters in advance and guarantee the rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession. It should be noted that Brussels IV does not affect the situation of people who remain resident in their home country. It does not introduce any harmonisation of national laws.

See the summary of the Regulation – 'Jurisdiction, applicable law and a European Certificate in succession matters'.

11.2.2 *Renvoi*

Article 34 of the Regulation states:

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

   (a) to the law of a Member State; or

   (b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

The situation with regard to *renvoi* under the Regulation has been summarised as follows:

> In most circumstances, *renvoi*… will no longer be relevant under Brussels IV. However, *renvoi* will be relevant where the law which applies to a deceased's estate under Brussels IV rules is that of a non-Brussels IV state, and that state's law makes a *renvoi* to the law of a Brussels IV state or to the law of another non-Brussels IV state, which would apply its own domestic law.
>
> Where a choice of national law has been made (and in certain other circumstances), no *renvoi* will apply.
>
> Lawrence Graham LLP 'The long arm of EU law: the new European Succession Regulation', 14 March 2013.

11.2.3 European Certificate of Succession

In regard to the European Certificate of Succession introduced under the Regulation, the following comments have been made:

> The importance of ESC [the European Certificate of Succession] results mainly from its use and meaning, which establishes a presumption regarding the status of heirs, legatees or that the content of the ESC is authentic...
>
> ESC will not present authentic instrument, judicial decision and an enforceable title and will not replace national documents or procedures, but will rather present a certificate with probative value which reflects elements identified by the law applicable to the succession.
>
> Ivanc, T. 'European Succession Certificate' University of Maribor, Slovenia.
>
> As the UK has opted out [of Brussels IV], the Certificate won't be given automatic recognition in the UK and Confirmation or Probate will still be needed in relation to assets in the UK.
>
> Morton Fraser Lawyers, 'EU succession – what has changed?', 11 September 2015.

Self-assessment question

Mr Jones is a national of Utopia who is domiciled in Urbania. He died intestate recently in England. He left a house in Utopia and shares in companies in England. He had three children (a son and two daughters), the youngest of whom is 13. His wife died five years ago. Under the law of Utopia the deceased's estate devolves to a surviving son. Under the law of Urbania, a child under 16 cannot inherit and the other two children would take jointly. By English law all children are entitled to share the estate equally. Under the law of Urbania, intestate succession to property is governed by the deceased's *lex patriae*. Under the law of Utopia, it is governed by the *lex domicilii*.

Advise the administrator of the estate on the distribution of Mr Jones's assets.

Activities 11.1–11.3

11.1 In relation to wills, what issues of capacity arise?

11.2 In what circumstances may a will be formally valid?

11.3 How can a will be revoked?

Summary

Both testate and intestate succession to immovables are governed by the *lex situs*. Formal validity is governed by the Wills Act 1963, and essential validity by the *lex situs*, including its choice of law rules (so *renvoi* is used in this context).

Reminder of learning outcomes

By this stage you should be able to:

- **explain the rules for administration of estates**
- **outline the main issues relating to intestate succession and to wills, including capacity, formal validity, essential validity, construction and revocation.**

11.3 Trusts: the Hague Trusts Convention rules

Core text

- **Cheshire, North and Fawcett, pp.1382–96 (available on the VLE).**

The Hague Trusts Convention applies to trusts created **voluntarily** and **evidenced in writing** (Article 3), and not therefore to oral trusts. Common law principles apply to oral trusts: these do not differ materially from those of the Convention. Trusts created by judicial decision are included, not by the Convention, but by s.1(2) of the Recognition of Trusts Act 1987. Accordingly, many constructive trusts are included, but not when such a trust has been created by way of remedy.

A trust is defined (Article 2(1)) as 'the legal relationship created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose'. (This therefore includes charitable trusts.)

Preliminary issues

When the trust has been created by a voluntary testamentary or *inter vivos* trust, there is an important preliminary issue – whether the instrument which creates the trust is valid. Article 4 states that this question falls outside the Convention: the answer will depend on the law governing wills (or, if there is a settlement, contracts). Whether the assets have been validly and effectively transferred to the trustees is also a preliminary issue. This will be determined by the *lex situs*.

Choice of law

The Hague Trusts Convention adopts the principle of **party autonomy** (Article 6). It provides that a trust is governed by the law chosen by the settlor. This choice may be express or implied from the terms of the instrument which creates, or the writing which evidences, the trust, interpreted in the light of the circumstances of the case. There is no guidance in the Convention on what is an implied choice. If no choice is made, the applicable law is the law with which the trust is 'most closely connected'. *Chellaram* v *Chellaram* [1985] Ch 409 suggests that this is to be ascertained by reference in particular to:

a. the place of administration designated by the settlor

b. the *situs* of the assets

c. the trustee's place of residence or business

d. the objects of the trust and the places where these are to be fulfilled.

See also *Iveagh* v *IRC* [1954] Ch 364, where the settlor's domicile was referred to. The relative weight of these factors is still to be decided.

Renvoi is excluded by the Convention (Article 17).

The Convention allows for **severability** (Article 9). So, the construction of the terms of a trust instrument might be governed by a law different from that which governs the trust (e.g. the domicile) even if the settlor has not expressly stipulated this.

There are limits on freedom of choice:

- the choice must not be meaningless
- mandatory rules of the forum, mandatory rules of other countries applicable by reason of the forum's private international law rules, and the forum's rules on public policy may be applied, notwithstanding the choice of another applicable law. Article 8 lists a range of matters governed by the applicable law. These include:
  - appointment and removal of trustees
  - rights and duties of trustees
  - powers of investment of trustees
  - liabilities of trustees to beneficiaries
  - variation or termination of the trust
  - duties of trustees to account for their administration.

Limitations on recognition

Article 11(1) provides that 'a trust created in accordance with the law specified in the Convention must be recognised as a trust'. There are limitations on recognition. By Article 13, English courts need not recognise a trust if its significant elements are, but for the choice of the applicable law, the place of administration and the habitual residence of the trustee, more closely connected with a state or states which **do not**

have the institution of the trust or the **category** of trust involved. English courts may continue to apply **mandatory rules** of English law, that is 'provisions of the law of the forum which must be applied even to international situations' (Article 16). You might compare this definition with that in the Rome Convention (see Chapter 7). A possible example is the rule against perpetuities. In addition, Article 15 of the Convention provides that the Convention 'does not prevent' the English court applying provisions in a law designated by its own conflicts rules in so far as such provisions cannot be derogated from by voluntary act, relating to certain matters in particular. These are:

- the protection of minors and incapable persons
- the personal and proprietary effect of marriage
- succession rights, especially indefeasible shares of spouses and relatives
- transfer of title to property and security interests therein
- protection of creditors on an insolvency
- protection of third parties acting in good faith.

If recognition of a trust is thereby prevented, the court must try to give effect to the objects of the trust by other means.

Article 18 provides the Convention's provisions may be disregarded if their application would be 'manifestly incompatible' with English **public policy**.

The jurisdiction or power to vary the terms of a **foreign trust** is unaffected by the Act. This can be done under the Variation of Trusts Act 1958: see *Re Ker's Settlement* [1963] Ch 553. In *Re Paget's Settlement*, Cross J, however, did warn that where there are substantial foreign elements involved, the court must consider carefully whether it is proper to exercise the jurisdiction. Further, it can only vary such a trust if the law governing the trust allows it to be varied (see Article 8(2)(h)).

Where an English settlement is concerned, s.1(1) of the 1958 Act allows the court to approve an arrangement revoking the settlement and substituting for it a foreign settlement and foreign trustees. They will not approve it if they do not think the variation is proper, as in *Re Weston's Settlement* [1969] 1 Ch 223, where the aim was to avoid taxation.

Self-assessment questions

1. **Does the Hague Trusts Convention apply to:**
   i. **charitable trusts?**
   ii. **constructive trusts?**
   iii. **resulting trusts?**

   (**You may find Hayton [1987] 36 *ICLQ* 260 useful.**)
2. **In what circumstances will a foreign trust be recognised?**
3. **In what circumstances may we refuse to recognise a foreign trust?**
4. **When will an English court vary an English settlement and a foreign trust?**

Summary

The law on trusts is to be found in the Recognition of Trusts Act 1987. Despite its name, this deals with choice of law as well. The underlying principle of this is party autonomy. There are limitations on recognition, which are set out above.

Reminder of learning outcomes

By this stage you should be able to:

- **state the choice of law and recognition rules for trusts**
- **state the law on variation of trusts.**

SAMPLE EXAMINATION QUESTIONS

Question 1 **Mrs Smith, who is domiciled in England, makes a will leaving her property to her sister. Ten years later she moves to the Netherlands and acquires a domicile there. She has recently died leaving a large bank account in a branch of NatWest bank in London and a house in the Netherlands. Her husband wishes to contest the will in England. Advise him.**†

Question 2 **Should we abandon the principle of scission? If so, what rule should we substitute in its place?**†

† For Question 1 you should read *Re Groos* (1915) 1 Ch 572.

† For Question 2 you should first explain scission. Then try to think of problems that applying one law might cause. Which would it be? Would it have to be one of the existing choice of law rules?

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the rules for administration of estates	☐	☐	☐
I can outline the main issues relating to intestate succession and to wills, including capacity, formal validity, essential validity, construction and revocation	☐	☐	☐
I can state the choice of law and recognition rules for trusts	☐	☐	☐
I can state the law on variation of trusts.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
11.1	Succession	☐	☐
11.2	The EU Succession Regulation (Brussels IV)	☐	☐
11.3	Trusts: the Hague Trusts Convention rules	☐	☐

12 Marriage and other adult relationships and the status of children

Contents

Introduction

This chapter investigates the conflict of laws rules to determine whether a marriage is valid or not. There are many reasons why a marriage may not be valid, such as failure to comply with formal requirements, being under age, or the parties not being respectively a man and a woman. For choice of law purposes, rules about the validity of marriage are divided into those concerned with formal validity and those dealing with essential validity (the substance of the marriage relationship itself).

The choice of law rule for **formal** validity is the *lex loci celebrationis*. The choice of law rule for **essential** validity is the personal law of the parties at the time of celebration of the marriage.

The final section of this chapter (Section 12.5) considers questions relating to the status of children, in particular legitimacy and legitimation.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **state the conflict rules that apply to matters of (a) formal and (b) essential validity in respect of marriage**
- **explain how English law responds to polygamous marriages, and to civil partnerships and cohabitation**
- **explain who can marry in a polygamous form, and when**
- **state the rules governing legitimacy and legitimation**
- **explain the circumstances in which foreign legitimations will be recognised by an English court.**

CORE TEXT

- **Clarkson and Hill, Chapter 7 'Marriage'.**

ESSENTIAL READING

- **Hartley, T. 'The policy basis of the English conflict of laws of marriage' (1972) 35 *MLR* 571 (available in HeinOnline and JSTOR via the Online Library).**

12.1 Formal validity of marriage

12.1.1 The *Lex loci celebrationis* rule

Although it will (or should) be obvious what matters are formal and what essential, systems of law differ and questions of characterisation therefore arise (see the discussion of *Ogden* v *Ogden* in Chapter 2). Problems have arisen in particular in relation to proxy marriages and parental consent.

Proxy marriages

English law requires the parties to be present at the ceremony. Some other systems (mainly in South America) allow for **proxy marriages**. In *Apt* v *Apt* [1948] P 83, the requirement of presence (according to the *lex fori*) was classified as relating to the method of giving consent, not the fact of consent. Had it been classified as the latter it would have been an issue of essential validity. By classifying it as relating to method of giving consent, it was an issue of formal validity, and therefore governed by the *lex loci celebrationis*. This was Argentinian law, by which the marriage (between an English domiciliary and an Argentinian domiciliary) was valid. See also *Pazpena de Vira* v *Pazpena de Vira* [2001] 1 FLR 460 (proxy marriage in Uruguay). An even more striking example is *McCabe* v *McCabe* [1994] 1 FCR 257, in which an English court upheld the formal validity of a marriage in Ghana under customary law where **neither** spouse was present (they were both in England).

Parental consent

English law requires parental consent for 16 and 17 year olds, but a marriage without consent is valid (we regard it as an issue of form, not capacity). As we saw in Chapter 2, we also characterise foreign rules relating to parental consent as an issue relating to form (*Ogden* v *Ogden* [1908] P 46). Thus, a marriage in England between an English-domiciled woman and an under-age French national domiciled in France is valid because it is formally valid by the *lex loci celebrationis*. See also *Lodge* v *Lodge* [1963] 107 Sol Jo 437.

There is hardly a rule of conflict of laws more firmly entrenched than that which says that the formal validity of marriage is governed by the *lex loci celebrationis*. So, in *Berthiaume* v *Dastous* [1930] AC 79, a couple who were domiciled in Quebec married in a Roman Catholic church in France. French law requires a civil ceremony. It was irrelevant that Quebec law did not. The marriage was void. In *McCabe* v *McCabe* [1994] 1 FLR 410, a marriage between an Irish domiciliary and a Ghanaian one according to Akan custom in Ghana – which seemed to require that the groom provided the family of the bride with something to drink (acceptance of which constituted consent to the marriage), but not his physical presence – was formally valid because it satisfied Ghanaian law, the *lex loci celebrationis*.

This rule extends even to **retrospective validation** by the *lex loci celebrationis* of a marriage originally void under that law. See *Starkowski* v *A-G* [1954] AC 155: a marriage of two Poles in Vienna, void at the time but retrospectively validated by legislation, was held by the House of Lords five years later to be a valid marriage, even though the parties were now domiciled in England , where the wife had remarried. The effect of the decision was to hold the child of the first marriage legitimate and render illegitimate the child of the second marriage. The case raises interesting questions, including what the court would have held had the second marriage preceded the validation. Would this retrospectively invalidate the second marriage? Another interesting question is what an English court would say to foreign legislation which retrospectively invalidated valid marriages. (This happened in Spain after the 1930s civil war.) We may assume that an English court would refuse to recognise such legislation on **public policy** grounds.

12.1.2 Exceptions

There are common law and statutory exceptions to the *lex loci celebrationis* rule. The **statutory exceptions** – the details of which you need not know – apply to consular marriages and military marriages.

Common law exceptions

There are three common law exceptions (this is the correct use of the well-known but usually incorrectly used 'common law marriage'[†]). A common law marriage is one which complies with the English common law as it stood in 1753. There are three situations today in which common law marriages may be regarded as formally valid:

- where English common law applies
- where there is insuperable difficulty in complying with the local law
- where there is belligerent occupation.

[†] The term 'common law marriage' is often used inaccurately to describe the situation of an unmarried couple living together as if married. Such 'marriages' are not recognised in law, although cohabitants increasingly benefit from the same legal protections as married couples.

The first two examples can be discussed briefly. The English common law will apply where the Crown exercises extraterritorial jurisdiction over British citizens. There are no surviving examples of this: the case of *Wolfenden* v *Wolfenden* [1946] P 61 illustrates this (the marriage was in Hupeh in China). This is not a true exception, since the common law is deemed to be the local law for British citizens. Second, where there is insuperable difficulty complying with the local law (e.g. because only polygamous marriage is available).

The third exception is more significant and led to a lot of case law in the 1950s and 1960s. Oddly, the common law marriage doctrine was extended to marriages celebrated by members of occupying forces in Germany and Italy in the aftermath of the Second World War. The leading case is *Taczanowska* v *Taczonowski* [1957] P 301. Two Polish domiciliaries married in Italy without complying with local Italian formalities. The marriage was upheld as a valid common law marriage. The husband was a member of the Polish occupying forces. The rationale of the *locus regit actum* principle was said to be the presumption that parties marrying in a country submit themselves to its law, a presumption deemed inapplicable where a conqueror was involved. Clarkson and Hill (p.353) describe the decision as 'extraordinary' and prefer the Australian approach (see *Savenis* v *Savenis* [1950] SASR 309) which allows circumvention of the general rule only where there is an 'insuperable difficulty'. An obvious riposte to the English court is why, if the presumption was rebutted, was the spouses' personal law (Polish law) not applied. The parties had no connection with England, and certainly none with English common law pre-1753. *Taczanowska* has been followed many times. And in *Merker* v *Merker* [1963] P 283 an attempt was made to explain it differently. An army of occupation or 'an organised body of escaped prisoners of war' formed an 'enclave' within which it was unreasonable to apply the local law. But why just 'escaped' prisoners of war? What about concentration camp inmates? And why apply pre-1753 English law? The law is most unsatisfactory.

We have constantly referred to the *lex loci celebrationis*. Does this mean the domestic law of the relevant country or all of its law including its conflict of laws rules? In other words, does *renvoi* apply? In *Taczanowska* v *Taczanowski* it was accepted that this was an area where *renvoi* had a part to play. The court said Italian law would refer to the parties' *lex patriae* (Poland) and that, if the marriage was formally valid by Polish law, it would be valid in English eyes too. In fact this was irrelevant because the marriage was not valid according to Polish law. There is a good discussion of the *renvoi* question in Clarkson and Hill, pp.34–43.

Summary

Questions of formal validity are governed by the *lex loci celebrationis*. So well-established is this rule, that even a marriage that is formally invalid will be regarded as valid if retrospectively validated. Characterisation questions arise. English law characterises questions of parental consent and issues relating to the validity of a proxy marriage as matters of formal validity. There are some exceptions to the *locus regit actum* rule, in particular the so-called common-law marriage.

12.2 Essential validity of marriage

We turn now to questions of **essential validity**. This is sometimes called 'capacity' but essential capacity goes beyond conventional capacity questions. For essential validity it is the **personal** law which is important. The *lex loci celebrationis* plays a minor role only. Were it to be the governing law, it would be possible to escape a restriction by marrying where it didn't apply, for example to enter into a same-sex marriage, where this is allowed (e.g. in the Netherlands, Canada and Spain).

There are a number of suggestions as to what 'personal law' should mean in this context:

- domicile (of both): the dual domicile doctrine
- the intended matrimonial home
- real and substantial connection
- an alternative reference test
- either party's domicile
- a variable rule.

We will now consider each of these models.

12.2.1 Dual domicile

Both case law and juristic argument largely support the dual domicile test. According to this, the law of each party's domicile at the date of the marriage has to be considered. If either party lacks capacity by the law of their domicile, the marriage is void. Thus, if two 15 year olds marry in Paraguay and one of them is domiciled in England (where you have to be 16 to get married) and the other is domiciled in Paraguay (where the minimum age for marriage is 14 for boys and 12 for girls), the marriage will be void. The dual domicile doctrine has much to commend it. It fits in with reasonable expectations. It is relatively easy to apply. It is however not particularly appropriate where a couple marry prior to emigrating: there is a case for the law of their new home governing the validity of their relationship.

12.2.2 Intended matrimonial home

The intended matrimonial home doctrine was strongly advocated by Cheshire. In fact (and rather deceptively) this doctrine offers a basic presumption in favour of the law of the country in which the husband is domiciled at the date of the marriage. The presumption can be rebutted if at the time of the marriage the parties intended to establish their matrimonial home somewhere else, and did so within a reasonable time. Cheshire formulated the doctrine at a time when (i) if a couple had different domiciles, they were likely to make their home where the man lived, and (ii) on marriage the woman took his domicile as a domicile of dependency. Today, if there is to be a presumption it would be in favour of dual domicile (see below). The question then is whether it should ever be displaced in favour of 'home', and whether a 'proper law' concept has any place here. The case for the intended matrimonial home is strongest where ties are immediately severed and a couple emigrate. But the doctrine can only be applied retrospectively. Suppose the boat sinks and it becomes important to determine validity of marriage for a succession question? Or suppose they change their mind: they don't move (war has broken out, one of them has become ill) or they move twice or three times – is the validity of the marriage to be constantly re-assessed? It is also an argument against the intended matrimonial home doctrine that it would lead to some uncomfortable conclusions. For example, a 13-year-old from England marries in a jurisdiction which permits marriage at such an age, intending to spend the rest of their life there, or conversely – and much more commonly – a 13-year-old from Northern Nigeria marries there and intends to come to live in England. On the intended matrimonial home doctrine the first marriage is valid and the second is invalidated by their emigration. And, of course, there are problems of proof and interpretation. What

is meant by 'intended'? How soon does the intention have to be put into effect? How long does one have to live in the new country? We clearly cannot stipulate a time but do they have to acquire (or intend to acquire) a domicile there? The doctrine may be thought to inject too much uncertainty into the law.

12.2.3 Real and substantial connection

Another view with a little judicial support and some among academic writers is that the essential validity of marriage should be governed by the law of the country with which the marriage has its most real and substantial connection. This will, of course, normally be the country where the matrimonial home is. It enables factors like domicile and nationality to be taken into account too. The test was formulated by Lord Simon in *Vervaeke* v *Smith* [1983] 1 AC 145 (see Chapters 2 and 6). He said it should be applied at least to 'the question of the sort of quintessential validity in issue in this appeal, the question of which law's public policy should determine the validity of marriage' (p.166) (English law said the marriage of convenience was a valid marriage; Belgian law said it wasn't). But which questions are included? All prohibitions on marriage are statements of public policy. Are they all therefore 'quintessential'? The test has its supporters (e.g. Fentiman [1985] *CLJ* 256) but it question-begs: it does not answer the problem, but rather restates the question. It is vague and unpredictable. It would introduce undue uncertainty into the law.

12.2.4 Alternative reference test

There is some support for an alternative reference test (i.e. a marriage would be valid if it is so regarded either by the dual domicile test or the intended matrimonial home doctrine). The Law Commission rejected this (see Working Paper No. 89, para.3.20) and Jaffey (p.330) describes it as 'an abdication of the quest for a rational choice of law rule'. It has support in *Lawrence* v *Lawrence* [1985] 1 All ER 506.

Another posited test is that a marriage should be regarded as essentially valid if it is valid under either party's prenuptial domiciliary law. Under this 'rule' more marriages would be valid. But there is nothing else to commend it. As the Law Commission noted (Working Paper No. 89, para.3.38) it 'would enable a party to evade the requirements of his domiciliary law and would also lead to limping relationships'.

12.2.5 A variable rule?

But why a single rule? In *Radwan* v *Radwan (No.2)* [1973] Fam 35, Cumming-Bruce J said:

> It is arguable that it is an over-simplification of the common law to assume that the name test for purposes of choice of law applies to every kind of incapacity – non-age, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity (p.51).

Cheshire, North and Fawcett (p.923) are scathing: this would lead to 'uncertainty, anarchy and ultimately injustice'. Clarkson and Hill (p.362), by contrast, say that it has 'much to commend it', pinpointing the different social and policy factors underlying each incapacity and explaining how it fits with an 'interest' analysis (see p.364). Looked at in this way, the prohibition on polygamy might be referred to the intended matrimonial home doctrine (as it was in *Radwan* v *Radwan*) and that on minimum age for marriage, there to protect minors from improvident marriages, to that person's personal law.[†]

[†] There is a lot of literature on this subject. You might consult Hartley (1972) 35 *MLR* 571, Jaffey (1982) 2 *Ox JLS* 368 and Davie (1994) 23 *Anglo-Am L Rev* 32.

An exception

Whatever the choice of law rule, there is an exception. If the marriage is celebrated in England, and one party is domiciled in England at the time of the marriage, the validity of the marriage is governed by English law. Any invalidity under the law of the foreign domicile of the other party is ignored. This exception was laid down in *Sottomayor* v *de Barros (No.2)* [1879] 5 PD 94 (a marriage in England between first cousins, H being domiciled in England and W in Portugal whose law prohibited such marriages). Cheshire, North and Fawcett (p.919) describe the exception as 'xenophobic'. It is defended in Clarkson and Hill (p.365):

> Inevitably, the *lex fori* will adopt a role of protecting English interests, values and institutions… Marriages contracted in England have a greater potential impact in England than marriages contracted abroad and, accordingly, there is greater interest in ensuring conformity to the standards of English law.

The Law Commission has recommended the exception be abolished (Working Paper No. 89, paras 3.46–3.48).

Public policy issues

Does the *lex loci celebrationis* have a role to play in determining essential validity? It was assumed in *Breen* v *Breen* [1964] P 144 that a marriage must be valid by the law of the country of celebration. The decision is universally criticised, and there is authority in Australia (*Re Swan's Will* [1871] 2 VLR (IE & M) 47) and Canada (*Reed* v *Reed* [1969] 6 DLR (3d) 617) the other way. Of course, when the marriage takes place in England we do expect English law's rules to be satisfied: we wouldn't allow a 13 year old to marry in England. This is discussed further by Clarkson [1990] 10 *LS* 80.

When a foreign domiciliary law governs the capacity of the parties to a marriage, it will not be recognised if it is repugnant to public policy. This discretion is exercised sparingly. Thus, in *Cheni* v *Cheni* [1965] P 85, a marriage celebrated in Cairo between an uncle and a niece, both domiciled in Egypt, was held to be valid. Reasonable tolerance had to be shown. Marriages between uncle and niece were accepted in Jewish law (the couple were Jewish) and by many Christian churches. It would therefore be unjustifiable to stigmatise as unconscionable a capacity acceptable 'to many people of deep religious convictions, lofty ethical standards and high civilisation' (*ibid.*, p.99).

Renvoi

Does *renvoi* have a part to play in questions of essential validity? There is a decision which says so: *R* v *Brentwood Superintendent Registrar of Marriages, ex p. Arias* [1968] 2 QB 956. There are good reasons for excluding *renvoi* in this area of law (see Clarkson and Hill, pp.42–43).

Summary

Essential validity of marriage is governed by the personal law. Both case law and juristic argument largely support the dual domicile test. But other tests have been advocated. Cheshire was a strong supporter of the 'intended matrimonial home' doctrine. Whatever the test, there is unlikely to be more than a minor role for the *lex loci celebrationis* (though the significance of *Sottomayor* v *de Barros* cannot be underestimated). Nor can public policy be entirely ignored, though it is used most sparingly.

12.3 Polygamous marriage

12.3.1 Definition

In 1866 Lord Penzance defined 'marriage, as understood in Christendom… as the voluntary union for life of one man and one woman to the exclusion of all others' (*Hyde* v *Hyde* [1866] LR 1 P&D 130). He held that a marriage he assumed to be potentially polygamous could not be dissolved because the matrimonial laws of England are wholly inapplicable to polygamy. Parties to a polygamous marriage were 'not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England' (*ibid.*, p.138). Although much has changed since 1866, there remain interesting issues relating to polygamous marriages. These will now be considered.

First, by what law is it determined whether a marriage is monogamous or polygamous? This has never been finally determined but there is sound argument for holding that the *lex loci celebrationis* should determine the nature and incidents of the marriage according to its own view, but then the forum should classify. This view was taken in *Lee* v *Lau* [1967] P 14. This involved a marriage in Hong Kong in which the husband, under Chinese customary law, could take 'tsipsis' (concubines or secondary

wives). This was held to be a potentially polygamous marriage. Cheshire, North and Fawcett (p.931), by contrast, argue that the nature of the marriage should be determined by the *lex domicilii*. You may consult *M* v *M* [2001] 2 FLR 6 as an illustration of the problem.

12.3.2 Can the nature of a marriage change?

We must consider mutability both from polygamy to monogamy, and monogamy to polygamy. A marriage which is **potentially** polygamous may subsequently become monogamous as a result of some event or a change in the law. Thus, in *Cheni* v *Cheni* [1965] P 85 the birth of a child had rendered the marriage monogamous; in *Ali* v *Ali* [1968] P 564, the acquisition of a domicile in England changed a potentially polygamous marriage into a monogamous one; in *Parkasho* v *Singh* [1968] P 233, a change in Indian law, which prevented the husband marrying further wives, rendered the marriage monogamous in the eyes of English law. A marriage which is **in fact** polygamous cannot be changed to a monogamous one, for example by a change of domicile of one or both of the wives (see *Re Sehota* [1978] 3 All ER 385).

But can a monogamous marriage become a polygamous one? Consider the facts of *A-G of Ceylon* v *Reid* [1965] AC 720. Alan married Edna monogamously (in a Roman Catholic church). Then, 26 years later, he converted to Islam and married Fatima. It was held that his second marriage was a valid polygamous one, so he couldn't be convicted of bigamy. So Alan had two wives and was validly married to both. But what is the effect of the second marriage on the first? Is it monogamous or has it been converted into a polygamous one by Alan's change of religion? In *Reid's* case, it was accepted that from Alan's perspective he was married to Fatima, from Edna's he was committing adultery with her. In other words, Alan was married polygamously, and Edna was married monogamously. Any other conclusion would be unfair to the first wife: her rights as a monogamous wife must be protected. For another example, see *Nabi* v *Heaton* [1981] 1 WLR 1052.

12.3.3 Capacity to marry polygamously

The most important question relating to polygamy today concerns **capacity** to contract a polygamous marriage. By what law is this governed? The *lex loci celebrationis* can be ruled out, though it has some support in Canadian decisions. The choice then lies between the law of the domicile and the law of the intended matrimonial home. Support for the *lex domicilii* may be found in well-entrenched authorities and Parliament has certainly legislated on the assumption that domicile is the test. However, in *Radwan* v *Radwan (No.2)* [1973] Fam 35, Cumming-Bruce J applied the intended matrimonial home doctrine. When the facts of this case are read it is obvious why. The marriage concerned Abdul, an Egyptian domiciled in Egypt, already married to Iqbal, and Mary, who was domiciled in England. They married in the Egyptian Consulate in Paris (public international lawyers will be astonished to discover that the judge held this to be France!) and settled in Egypt. They left after the 1956 Suez affair, having spent five years in Egypt, and moved to England, where Abdul – after changing his name to Jean-Pierre – acquired a domicile. They lived in England for 14 years. Nearly 20 years into marriage and with nine children, Jean-Pierre purported to divorce Mary by *talaq* (*talaq* is discussed in Chapter 13). He did this at the UAR[†] embassy. Cumming-Bruce J held this to be England and a *talaq* in England cannot dissolve a marriage. When Mary responded by petitioning for divorce, Jean-Pierre claimed he and Mary were not married because she lacked the capacity to enter into a polygamous marriage. Apply her *lex domicilii* and this is the conclusion to which you would come. But invoke the intended matrimonial home doctrine and you can save the marriage, grant a divorce and make the necessary ancillary orders. You cannot really blame Cumming-Bruce J, but hard cases can make bad law. This decision has, not surprisingly, attracted a lot of criticism (e.g. Wade [1973] 22 *ICLQ* 571, Karsten [1973] 36 *MLR* 291 and Cheshire, North and Fawcett, (pp.936–37)). It also has some support (see Clarkson and Hill [1978] 41 *MLR* 38 and Clarkson and Hill, p.400).

[†] **UAR**: Egypt was a constituent part of the short-lived United Arab Republic.

12.3.4 Statutory provisions

Since *Radwan* Parliament has enacted a number of statutory provisions. In 1973 it passed Sections 11 and 14 of the Matrimonial Causes Act. Section 11(d) states a marriage is void

> in the case of a polygamous marriage entered into outside England and Wales [if] either party was at the time of the marriage domiciled in England and Wales.

This provision has to be read with s.14(1), the effect of which is that s.11 does not apply if the validity of the marriage is to be determined by a foreign law. So, s.11(d) is not a conflicts rule but a rule of English domestic law. If *Radwan* is wrong and is not followed, a polygamous marriage entered into outside England by a party domiciled in England is void. But if *Radwan* is applied and the intended matrimonial home is a country where polygamy is the norm (e.g. Saudi Arabia) then the validity of the polygamous marriage is determined by Saudi Arabian law. If, however, the intended matrimonial home was, for example, Germany, the marriage would be void. In other words, if *Radwan* is correct and capacity to enter into a polygamous marriage is governed by the law of the intended matrimonial home, this choice of law rule survives s.11(d). (As to whether this question should be so governed see Section 12.2.2.)

Before we can look at the second statutory provision, we must appreciate a rather more serious concern than the sort that arose in *Radwan*. This was that of the immigrant (or immigrant's child) domiciled in England who returned to, say, Pakistan and married there in polygamous form, never intending polygamy and probably oblivious to the implications of s.11(d). *Hussain* v *Hussain* [1983] Fam 26 illustrates this. The husband was domiciled in England but he married in Pakistan in polygamous form. When the marriage broke down, the wife petitioned in England for judicial separation. The husband argued that the marriage was void by virtue of s.11(d). The Court of Appeal disagreed. It was valid because an English domiciliary cannot enter a polygamous marriage and 'a marriage can only be potentially polygamous if at least one of the spouses has the capacity to marry a second spouse' (*ibid.*, p.32). In the case of a person domiciled in England, there was no capacity to enter an actually polygamous marriage because s.11(b) rendered a person who is actually married incapable of marrying a second spouse. This decision would save immigrants' marriage from the taint of s.11(d), but only if it was the man who was the English domiciliary. If a woman domiciled in England were to marry in Pakistan a man with a Pakistani domicile in polygamous form, he could take further wives, and so the marriage (in English eyes) would be void. To solve this, s.11 has been amended (see Private International Law (Miscellaneous Provisions) Act 1995 Sch.1 para.2(2)) so as to limit its operation to actually polygamous marriages. And s.5 of the 1995 Act now provides that

> A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.

This goes further than *Hussain* v *Hussain* and will ensure that marriages in polygamous form are valid even where the English domiciliary is the wife. The Act only preserves **potentially polygamous** marriages from s.11(d), not actually polygamous ones. And it has retrospective effect (so a marriage before the commencement of the Act is validated by the Act).

Effects of recognition of polygamous marriages

Where once a polygamous marriage was not recognised at all, today it is recognised for almost all purposes. Since 1972, it has been possible to secure matrimonial relief, overruling *Hyde* v *Hyde* (see above). A polygamous marriage is recognised so as to render void a subsequent monogamous marriage: see *Baindail* v *Baindail* [1946] P 122. The children of a polygamous marriage are legitimate (*Sinha Peerage Claim* [1946] 1 All ER 348), and are entitled to succeed to all property in England with the possible exception of entailed interests and titles of honour that devolve with property: see *Bamgbose* v *Daniel*

[1955] AC 107. Spouses qualify as such for succession purposes: see *Coleman* v *Shang* [1961] AC 481. A polygamous wife qualifies as the wife of the deceased under the Inheritance (Provision for Family and Dependants) Act 1975. So in *Re Sehota* [1978] 3 All ER 385, where a husband left his estate to W2, the court made an order for provision to be made to W1. Polygamously-married wives are recognised under income tax legislation (see *Nabi* v *Heaton* [1983] 1 WLR 626). There are some exceptions: for example, polygamous spouses are denied rights to a widow's pension under the state pension scheme: *R* v *Dept of Health ex p Misra* [1996] 1 FLR 129, and polygamous marriages are largely denied recognition for immigration purposes if there is another wife who is, or since the marriage has been, in the UK (Immigration Act 1988 s.2(2)). However, polygamous marriages are recognised for the purposes of deportation (Immigration Act 1971 s.5(4), as amended).

Summary

Although polygamous marriages are recognised for most purposes now, a number of issues remain. By what law is it determined when a marriage is polygamous? There are arguments supporting a combination of the *lex loci celebrationis* and *lex fori* and others supporting the *lex domicilii*. Can the nature of a marriage change? This causes greater problems when the change is from monogamy to polygamy. Perhaps the most important question concerns capacity to marry polygamously. The question is most acute when someone with an English domicile marries in polygamous form in a country where polygamy is permitted.

Reminder of learning outcomes

By this stage you should be able to:

- **state the conflict rules that apply to matters of (a) formal and (b) essential validity in respect of marriage**
- **explain how English law responds to polygamous marriages, and to civil partnerships and cohabitation**
- **explain who can marry in a polygamous form, and when.**

Activities 12.1–12.4

12.1 What are the exceptions to the *lex loci celebrationis* rule?

12.2 Why does the *lex loci celebrationis* rule play a minor role in issues of essential validity?

12.3 What is the law that governs the capacity to contract a polygamous marriage?

12.4 Is a polygamous marriage recognised?

Self-assessment questions

1. Mrs Jones, who is domiciled in England, is concerned about the marital status of her three daughters, all of whom have domiciles of origin in England.

i. Kylie, when aged 20, took a short-term secretarial job in Dubai. While there she married Abdul, who is domiciled in Dubai. The ceremony was in polygamous form. She is back in England, having discovered that Abdul already had two wives, and is living with her English-domiciled boyfriend, Tony. She wishes to marry Tony.

ii. Lauren, when 19, went as a nurse to war-torn Bosnia. While there she went through a marriage with Fritz, a Swiss national, who was serving with the peace-keeping forces. The ceremony was not recognised by the law in Bosnia which required a civil registration. The ceremony was performed by a soldier who is a lay preacher in his church in Sweden.

iii. Michelle, when 17, married Maurice in a register office in England. Maurice was also 17 and by French personal law his parents' consent was required before he could marry. He did not have this consent. Michelle has heard that the court in France recently annulled the marriage on the ground of absence of parental consent. Michelle is eager to marry John, who is domiciled in England.

Advise Mrs Jones.[†]

[†] In Question 1 identify the issues raised. Do they relate to formal validity or essential validity? Is any issue of characterisation involved?

2. **What is the case for and against referring capacity to marry to the law of the intended matrimonial home?**†

3. **Are the following valid marriages according to English conflict of laws rules?**†

   i. **a marriage between an English domiciliary and a woman domiciled in X, valid at the time of the ceremony, but subsequently invalidated by a Presidential decree in X which invalidates all marriages between citizens of X and foreigners.**

   ii. **A marriage in Y between two domiciliaries of Y. He is 21 and she is 11. The minimum age for marriage in Y is 10 for girls. The police in London want to prosecute him for unlawful sexual intercourse with a girl under 16. You might consult *Mohamed* v *Knott* [1969] 1 QB 1.**

   iii. **A marriage in England between a man and his former daughter-in-law (his wife having died) which is valid in England but not allowed by the law of Z, where the daughter-in-law is domiciled.**

4. **Was *Radwan* v *Radwan (No.2)* rightly decided?**†

5. **Explain when someone who is domiciled in England and Wales may:**

   i. **marry polygamously**

   ii. **marry monogamously by going through a polygamous ceremony.**

† For Question 2 see the evaluation in Cheshire, North and Fawcett pp.724–31.

† Question 3: Pay attention to the public policy questions in each of these problems. Do you think it appropriate to invoke public policy? Explain.

† There are differing views on *Radwan*. Read I. Karsten [1973] 36 *MLR* 291 for the view that it is wrong; A. Jaffey [1978] 41 *MLR* 38 defends the decision.

12.4 Same-sex marriages

Until relatively recently, English law required parties to a marriage to be respectively male and female. If they were not, the marriage was void. This was also the law elsewhere but now an increasing number of countries are permitting same-sex marriages and the United Kingdom became one of them as a result of the introduction of the Marriage (Same Sex Couples) Act 2013. The Act is to an extent an evolution of the Civil Partnership Act 2004, legalising same-sex marriages in England and Wales from March 2014 onwards. The Act does not extend to Scotland or Northern Ireland, although same-sex marriages have been lawful in Scotland since December 2014 and in Northern Ireland since January 2020.

Under the 2013 Act:

- same-sex couples can marry in civil ceremonies;
- same-sex couples who were married abroad under foreign law and who were consequently treated as civil partners in England and Wales are now recognised as being married in England & Wales;
- religious organisations and their representatives are shielded from successful legal challenge if they do not wish to marry same sex couples;
- civil partners can convert their partnership into a marriage, if they wish; and individuals can change their legal gender without having to end their marriage.

In particular:

- According to s.1, the marriage of same-sex couples is lawful.
- Pursuant to s.11 (1), in the law of England and Wales, marriage has the same effect in relation to same-sex couples as it has in relation to opposite-sex couples.
- Additionally, according to s.11 (2), the laws of England and Wales (including all England and Wales legislation whenever passed or made) has effect in accordance with subsection (1).

Some differences between same-sex and opposite-sex marriages still remain:

- religious same-sex marriages are possible if the religious organisation 'opts in' by giving explicit consent to marriages of same-sex couples. Clergy from the Church of England and the Church in Wales are prohibited from performing a same-sex marriage;

- adultery is not a reason for divorce;
- nullity on the basis of non-consummation is not available as a ground for divorce in same-sex marriages;
- pension providers need only provide survivor's benefits in respect of contributions from 5 December 2005, i.e. the date of implementation of the Civil Partnership Act 2004.

The Act provides for conversion of civil partnerships to marriage. That procedure became available from December 2014.

When it comes to the recognition of overseas marriages, s.10 states that an overseas marriage is not prevented from being recognised simply because it is the marriage of a same-sex couple. As the Act does not impose requirements for recognition, whether an overseas same-sex marriage will be recognised or not will depend on the usual rules of private international law. Therefore, the marriage must have been properly performed under the laws applicable in the country of celebration; and both the parties to the marriage must have had capacity to marry each other under their 'personal' law. This rule is modified for marriages that take place in England and Wales to the extent that only one of the couple need have capacity in accordance with the law of their domicile.

The Act also requires reviews to be conducted to consider three issues:

- whether belief organisations should be able to conduct legally valid marriage ceremonies;
- the operation and future of the Civil Partnership Act 2004 in England and Wales; and
- relevant differences in survivor benefits offered by occupational pension schemes.

12.5 Legitimacy of children

While the concept of illegitimacy has very little relevance in English law today, there are situations in which it is necessary to determine whether a child is legitimate: for example, succession under a will, whether English or foreign, may be expressly restricted to legitimate children.

By what law is it decided whether a child is **legitimate**? The most obvious approach would be to look to personal law (in English law the *lex domicilii*). But you will recall (see Chapter 3) that domicile of origin depends upon whether you are legitimate or not. If legitimate, you take your father's domicile of origin; if illegitimate, your mother's. There is thus a vicious circle. How can this be broken out of? One answer – albeit a most arbitrary and sexist one – is to say that legitimacy is governed by the law of the **father's domicile** at the date of birth.

But this is to reckon without the leading (and troubling) case of *Shaw* v *Gould* [1868] LR 3 HL 55. This holds that legitimacy depends on the **validity of the parents' marriage**: a child is legitimate only if born in lawful wedlock. But, as Cheshire, North and Fawcett point out (p.1196), 'the issue [is] the status of the children, not of their parents'. You can read a very detailed account of the case in Cheshire, North and Fawcett, pp.1195–97. A different approach was taken by the High Court in *Re Bischoffsheim* [1948] Ch 79. It was held that a child was legitimate where he was legitimate by the domicile of both of his parents, even though the marriage was not valid under English law. This approach was followed in *Motala* v *A-G* [1990] 2 FLR 261, where, in the context of claims to British citizenship, the children of a void marriage in Northern Rhodesia (modern-day Zambia) were held legitimate because they were legitimate by the law of India, the country in which they had their domicile of origin and where both their parents were domiciled. Where parents have different domiciles, it is possible for a child's legitimacy to be determined by reference to the father's domicile alone: see *Hashmi* v *Hashmi* [1972] Fam 36. Cheshire, North and Fawcett argue that *Shaw* v *Gould* should be restricted to the exceptional circumstances of the case and that *Re Bischoffsheim* and cases on legitimation (see below) justify the proposition that a person is legitimate if they are so according to the law of their father's domicile at the time of birth.

Foreign legitimations

A foreign **legitimation by subsequent marriage** will be recognised where the father is domiciled in the foreign country at the time of the marriage (see Legitimacy Act 1976 s.2). There is no need to refer to his domicile at the time of the child's birth.

Some countries have provision for legitimation other than by subsequent marriage (e.g. by parental acknowledgment: see the facts of *Re Luck's Settlement Trust* [1940] Ch 864). The 1976 Act makes no provision for the recognition of such legitimations. In *Re Luck*, the Court of Appeal held, by analogy with the common law rule dealing with the recognition of legitimation, that such a legitimation can be recognised only if it is effective by the law of the father's domicile at the date of the child's birth as well as at the date of the acknowledgement.

Self-assessment questions

1. **Why is the decision of *Shaw* v *Gould* so universally criticised? Can it be reconciled with *Re Bischoffsheim*?**
2. **What is the rule governing legitimacy? Is it satisfactory?**

Reminder of learning outcomes

By this stage you should be able to:

- **state the rules governing legitimacy and legitimation**
- **explain the circumstances in which foreign legitimations will be recognised by an English court.**

Sample examination questions

Question 1 Ann marries Jim in a church in London. Ten years later Jim becomes a Muslim and marries Fatima in a polygamous ceremony in Saudi Arabia. The three of them are now living in one house in England. Both Ann and Fatima want divorces. Advise them.[†]

Question 2 Consider the view that:

'Either English law should recognise a polygamous marriage for all purposes or English law should not recognise polygamous marriages at all.'

Question 3 Charles died in 2002, bequeathing all his property by will 'to the children of my daughter Jennifer'. Charles was domiciled in Valhalla at the time of making the will and at the date of his death.

Jennifer has two children, Bill and Ben. Bill was born out of wedlock in 1990, but Jennifer married his father Harry in 1993. Harry has always been domiciled in Nibelungland. Ben was born in 1996: his father is George, with whom Jennifer had an affair.

According to the law of Valhalla 'children' in a will includes only legitimate and legitimated children. According to that law Bill has not been legitimated. According to the law of Nibelungland, Bill was legitimated by the marriage of his parents.

Advise the executors of Charles's will.

Question 4 Was the Court of Appeal right in *Re Luck's Settlement Trusts* to apply the common law by analogy? Can you think of reasons why not?

[†] You may find *Onobrauche* v *Onobrauche* [1978] 8 Fam Law 107, *Poon* v *Tan* [1973] 4 Fam Law 161 and *Quoraishi* v *Quoraishi* [1985] FLR 780 useful. They are discussed in Clarkson and Hill, p.404.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the conflict rules that apply to matters of (a) formal and (b) essential validity in respect of marriage	☐	☐	☐
I can explain how English law responds to polygamous marriages, and to civil partnerships and cohabitation	☐	☐	☐
I can explain who can marry in a polygamous form, and when	☐	☐	☐
I can state the rules governing legitimacy and legitimation	☐	☐	☐
I can explain the circumstances in which foreign legitimations will be recognised by an English court.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
12.1	Formal validity of marriage	☐	☐
12.2	Essential validity of marriage	☐	☐
12.3	Polygamous marriage	☐	☐
12.4	Same-sex marriages	☐	☐
12.5	Legitimacy of children	☐	☐

13 Matrimonial causes

Contents

Introduction

This chapter is about divorce, judicial separation and annulment of marriage. It looks at questions of jurisdiction, choice of law (divorce and nullity), recognition of foreign decrees, including non-judicial ones such as *talaqs*, and grounds for refusal to recognise foreign decrees.

Finally, it considers financial relief and foreign maintenance orders. After studying this chapter the law relating to jurisdiction, choice of law and recognition should be clear.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- **state the rules governing jurisdiction for matrimonial causes**
- **state the choice of law rules for matrimonial causes, in particular for nullity**
- **explain the circumstances in which a foreign judgment relating to divorce or nullity will be recognised (or refused recognition)**
- **explain the status of the *talaq* divorce**
- **describe the conflict of laws in financial provision**
- **state the rules governing legitimacy and legitimation**
- **explain the circumstances in which foreign legitimations will be recognised by an English court.**

CORE TEXT

- **Clarkson and Hill, Chapter 8 'Matrimonial causes'.**

13.1 Jurisdiction

From 1 January 2021, the Brussels IIa rules no longer apply. New provisions, which essentially replicate those of the repealed Union instrument, have been inserted into s.5(2) of the Domicile and Matrimonial Proceedings Act 1973 by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations. One notable change is the addition of sole domicile to the primary grounds for the purposes of establishing jurisdiction.

So, for cases instituted on or after 1 January 2021, the grounds for jurisdiction are:

a. Both parties to the marriage are habitually resident in England and Wales

b. Both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there

c. The respondent is habitually resident in England and Wales

d. The applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made

e. The applicant is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately before the application was made

f. Both parties to the marriage are domiciled in England and Wales; or

g. Either of the parties to the marriage is domiciled in England and Wales.

As regards habitual residence, the only requirement is to be habitually resident on the day the proceedings were issued, provided there was ordinary residence for the prior six or 12 months, as applicable.

In respect of same-sex divorces and civil partnership dissolutions, rules are introduced in the EU Exit Regulations that mirror those applicable to opposite-sex divorces.

When it comes to the forum, the 'first in time' rule is no longer determinative. The deciding factor will be 'closest connection' and *forum non conveniens* will apply.

13.1.1 Stays of proceedings

The Domicile and Matrimonial Proceedings Act 1973 makes provision for English matrimonial proceedings to be stayed when proceedings are pending in a foreign court other than one of a Member State of the European Union.

The English court **must** order a stay of divorce proceedings in the English court if divorce or nullity proceedings in respect of the same marriage are continuing in another jurisdiction in the British Isles and the parties resided together in that jurisdiction when the English proceedings were begun, or, if they were not then residing together, the place where they last resided together was in that jurisdiction, and either of the parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the commencement of the English proceedings.

Discretion to stay

The traditional rules give the court a discretion to stay proceedings. These apply to all cases where there are proceedings pending in a non-Member State. An English court may stay English proceedings if it appears to the court that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in the other jurisdiction to be disposed of before further steps are taken in England (see Domicile and Matrimonial Proceedings Act 1973 Sch.1, para.9(1)). In the leading case of *De Dampierre* v *De Dampierre* [1988] AC 92, the House of Lords held that in applying the balance of fairness test, courts should have regard to the civil cases on *forum non conveniens* (on which see Chapter 5). So if the foreign court is the clearly more appropriate forum, a stay will ordinarily be granted unless there are circumstances by reason of which justice requires that the

stay should not be granted. *De Dampierre* concerned a French couple. They moved to England, where H was involved in marketing cognac. When the wife set up a business in New York and told H she did not intend to return, H instituted divorce proceedings in France. A few months later W instituted divorce proceedings in England. H applied for the English proceedings to be stayed. The House of Lords held a stay should be granted: France was the appropriate forum. This would deprive W of substantial advantages but this injustice was not determinative given the parties' connections with France.

What sort of factors are relevant when the balance of fairness and convenience is considered? Some taken into account by courts have included the locus of the marriage and location of matrimonial assets (*Krenge* v *Krenge* [1999] 1 FLR 969); and the existence of a pre-nuptial contract governed by the law of the other forum (*C* v *C* [2001] 1 FLR 624). Even if there is a clearly more appropriate forum abroad, on *Spiliada* principles (see Chapter 5) a stay may be refused if justice points to trial in England. Thus in *R* v *R* [1994] 2 FLR 1036 the fact that the wife could obtain a property adjustment, a lump sum and periodical payments in England, while in Sweden all she could get was enforcement of a marriage contract, tilted the balance in favour of proceedings in England continuing.

What are the implementations of *Owusu* v *Jackson* Case C-281/02 for matrimonial proceedings? In *Cook* v *Plummer* [2008] 2 FLR 989 it was said that there were contrary arguments in relation to the *Owusu* ruling, that it was 'deeply unpopular in this jurisdiction', and that the UK was trying to mitigate its unattractive effect by submissions in a review as to the operation of the Regulation. Despite this hesitancy, there can be little doubt that *Owusu* does apply to matrimonial proceedings as well.

Summary

As Brussels IIa no longer applies, for cases starting after 31 December 2020 new jurisdictional rules inserted into s.5(2) of the Domicile and Matrimonial Proceedings Act 1973 by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations apply. Sole domicile as a ground of divorce jurisdiction has been added. Courts in England and Wales have discretion to stay proceedings when there are proceedings continuing in another jurisdiction.

13.2 Choice of law

13.2.1 Divorce and separation

In **divorce** and **separation** English law is applied. It may be asked why. After all we apply foreign law to determine whether a marriage is valid. Is there not a case, you may ask, for applying the parties' personal law to determine whether their marriage may be dissolved? Civilian countries apply the *lex patriae* to determine whether a divorce should be granted. The explanation is partly historical – until relatively recently English law only took jurisdiction where the parties were domiciled in England – and partly on belief that dissolution of marriage is a matter of English public policy (should we really grant a divorce on some 'strange' foreign ground?).

The parties are given limited autonomy to choose the applicable law. It must be a law with which they have a **close connection**.

In the absence of choice of the applicable law, a hierarchical rule is offered. It states that the governing law should be the law of the state where the spouses have their **common habitual residence**. In default, where they had their **last** common habitual residence, in so far as one of them still resides there. Failing that, the law of the state of which both are **nationals**, or in the case of the UK or Ireland, **domiciliaries**. Failing that, where the application is lodged.

It is further proposed that *renvoi* should be excluded, and the applicable law be subject to the **public policy** of the forum.

Rome II has many flaws: see Cheshire, North and Fawcett, pp.957–58.

13.2.2 Nullity

By contrast, choice of law in nullity is more complicated, and the governing law may well be a foreign law. What it is will depend on the reason for the annulment. This in turn depends upon what the impediment to marriage is. It is necessary, therefore, to look at each implement in turn. There are full discussions in Clarkson and Hill (Chapter 7) and Cheshire, North and Fawcett (pp.984–99).

Prohibited degrees of relationship

This has been governed since 1861 by the dual domicile test. *Brook* v *Brook* [1861] 94 L Cas 193 decided a man could not circumvent the prohibition on marrying his deceased wife's sister by marrying her in Denmark. This question was governed by the *lex domicilii* not the *lex loci celebrationis*. See also *Re Paine* [1940] Ch 46.

Lack of age

This is governed by the dual domicile rule. So in *Mohamed* v *Knott* [1969] 1 QB 1 a man of 26 married a girl of 13 in Nigeria. Because the marriage was valid by Nigerian law, English law accepted it was valid. The question may be asked as to what an English court would have done had she been 11 or 9. In other words, when would it invoke public policy? In England the minimum age for marriage is 16. So, what if someone of 21 domiciled in England were to marry a 13 year old in Nigeria? According to *Pugh* v *Pugh* [1951] P 482, the marriage would be void because the 21 year old would lack the capacity to marry someone underage according to English law. In *Pugh* the husband was a colonel in his 40s, the wife a 15-year-old Hungarian. The decision is often criticised: Dicey, Morris and Collins (p.200) comment cynically: 'Was it really the object of the statute to protect middle-aged English colonels from the wiles of designing Hungarian teenagers?' And Smart has asked what reason English law could have had to annul the marriage: see [1986] 14 *Anglo-Am L Rev* 225. A defence is mounted in Clarkson and Hill, pp.368 and 369.

Marriage polygamous; no capacity

The marriage is **polygamous** and there was no **capacity** to enter into such a marriage. This has already been considered in detail: see Chapter 12.

Second monogamous marriage; first possibly still valid

There is a **second** monogamous marriage but there is a doubt whether the decree dissolving or annulling the first marriage is valid. This may be illustrated by reference to *Lawrence* v *Lawrence*. The facts are given in Chapter 2. The wife petitioned in the English court for a nullity decree on the ground that her second marriage was bigamous (she had divorced and remarried in the US state of Nevada and English law would recognise the divorce but the law of Brazil, where she was then domiciled, would not). English and Brazilian law agreed that she lacked the capacity to marry a second time unless she was single. She contended that her capacity to marry H2 was governed by Brazilian law as the law of her ante-nuptial domicile. On this reasoning she argued the second marriage was void. At first instance Lincoln J upheld her second marriage, its validity being governed, so he held, by English law as the law of the intended matrimonial home and thus the law with which the marriage had its most real and substantial connection (as to which see Chapter 12). The Court of Appeal disagreed. It applied English law's conflicts rules on recognition of foreign divorces under which the Nevada divorce was entitled to recognition. The marriage was thus valid because W was single when she married H2. You will observe three different arguments were used in this case:

- void because no capacity by ante-nuptial domicile (W's argument)
- void because there is capacity by intended matrimonial home (real and substantial connection) (Lincoln J's reasoning)
- void because English conflict of laws recognises the divorce (CA's decision).

It may be that the third approach is the only one that can be adopted and used consistently for a variety of situations (including the converse of *Lawrence*, where the divorce (or annulment) is recognised by the domiciliary law and not by English law). The decision in *Lawrence* was confirmed by s.30 of the Family Law Act 1986. See further Clarkson and Hill, pp.375–77.

Lack of consent

There is no authority as to whether this should be classified as raising a question of formal or essential validity (see Cheshire, North and Fawcett, p.790). It is hardly therefore surprising that the law governing lack of consent – such questions as mistake, duress, fraud – should be in doubt. As Cheshire, North and Fawcett observe (*ibid.*): 'The only solution supported by all the direct authorities is reference to English law as the law of the forum … but this is … an abdication from the problem'. An example is *Buckland* v *Buckland* [1968] P 296 (a marriage in Malta between two Maltese domiciliaries which the husband only agreed to because he was threatened with imprisonment for 'minor corruption'. English law was applied, though the only connection with England was that by the time of the proceedings he was domiciled in England). English law has also been applied as the *lex loci celebrationis* (*Parojcic* v *Parojcic* [1958] 1 WLR 1280).

The better view is that issues of consent should be referred to the law of the domicile. The leading case is *Szechter* v *Szechter* [1971] P 286. The case centred on the sad life of Nina Karsow. She was only alive because her mother threw her from a train carrying them to Auschwitz. Her health was not good. When she was imprisoned in the late 1960s for 'anti-state activities' – clearly a trumped-up charge by the anti-semitic Polish Government of the day – Szechter, a blind Polish historian, for whom Nina worked as secretary, persuaded the Polish authorities to release her if the two of them married. To do this Szechter first divorced his wife (this was in reality a 'sham divorce'). Nina's health was deteriorating rapidly and it was obvious that she wouldn't survive the sentence. Szechter and Nina married in prison and the three of them came to England, and Szechter became a Professor of History at the London School of Economics. Nina petitioned for a nullity, so that Szechter and his 'real' wife could remarry. Polish law was the *lex loci celebrationis* and the domicile of both parties at the time of the marriage. English law was the law of domicile at the time of the proceedings and the *lex fori*. Both legal systems agreed that the marriage was void for duress. Sir Jocelyn Simon P held that it was for Polish law, as the law of domicile of the parties at the time of the marriage, to determine the validity of the marriage. It is, however, the view of Cheshire, North and Fawcett (p.793), now supported by Dicey, Morris and Collins (p.688), that the issue of a party's lack of consent to marry should be determined by reference to that party's ante-nuptial domiciliary law.

Physical defects

These may include impotence, wilful refusal to consummate the marriage and mental disorder. It was held by the Court of Appeal in *De Reneville* v *De Reneville* [1948] P 100 that these issues are to be decided by the law of the husband's domicile at the time of the marriage, or preferably the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. Thus, in *Ponticelli* v *Ponticelli* [1958] P 204, a marriage took place in Italy between W, domiciled there, and H, domiciled in England. The matrimonial home was established in England. H petitioned for nullity on the ground of W's wilful refusal to consummate. By Italian law this was not a ground for nullity. Held: that English law governed either as the *lex fori* or as the *lex domicilii* ('the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated'). This is normally the 'husband's domicile at the time of the marriage'. The unfairness of this rule can be seen if the facts are reversed (English-domiciled wife, Italian-domiciled husband, matrimonial home in Italy, he refuses to consummate). On these authorities, W would not get an annulment. Surely, she should be entitled to rely on the law of her domicile at the time of the marriage to determine whether she should get matrimonial relief from the English court.

Incapacities unknown to English law

What is the attitude of English law to a foreign prohibition on marriage unknown to English law? For example, a prohibition on a Muslim man marrying a non-Muslim woman or on marriages across castes or races. Some argue that an English court would reject such a prohibition on public policy grounds (e.g. Dicey, Morris and Collins, p.688 and Cheshire, North and Fawcett, p.737). But the cases do not support this – and why should they? We don't, for example, reject polygamy on public policy grounds. Assuming the foreign incapacity is not regarded as contrary to public policy, it is necessary to determine the appropriate choice of law rule. What would an English court do if confronted with the marriage of a French domiciled Muslim woman who married a non-Muslim English domiciliary in England? This marriage would be saved under the rule in *Sottomayor* v *De Barros (No.2)* (see Chapter 12). But if they married abroad? It is suggested that we would resort to public policy to deny recognition to such an incapacity.

Summary

In divorce and separation no question of choice of law arises: English law applies. In nullity the governing law depends on the reason for the annulment, that is on what the impediment to the marriage is. New questions are arising, for example how English law will respond to a same-sex marriage celebrated abroad.

13.3 Recognition of foreign judgments

There are three distinct schemes for the recognition of foreign judgments given in matrimonial causes:

- Brussles II *bis* (for matrimonial decrees given before 31 December 2020)
- Family Law Act 1986 Part III (rest of world)
- Family Law Act 1986 s.44 (British Isles decrees).

13.3.1 Matrimonial decrees from EU Member States

Courts in England and Wales will continue to apply Brussels lla (and as such recognise a divorce granted in EU member states) if it was granted on or before 31 December 2020.

The law on recognition of matrimonial decrees from Member States is closely modelled on Council Regulation 44/2001. Any divorce, legal separation or annulment pronounced by a court in a Member State is to be recognised without any procedure or formality. Non-recognition is permitted if recognition is manifestly contrary to public policy (Article 22) or if:

- The judgment was given in default of appearance and there was no due and timely service (unless the respondent has accepted the judgment unequivocally)
- The judgment is irreconcilable with a judgment in proceedings between the same parties
- It is irreconcilable with an earlier judgment from a non-Member State in proceedings between the same parties which qualified for recognition.

But the substance of the judgment may not be reviewed (Article 26); recognition may not be withheld because the recognising court would not itself have granted the decree (Article 25); and the jurisdiction of the adjudicating court may not be reviewed or subjected to the test of public policy (Article 24).

On or after 1 January 2021, whether a divorce is automatically recognised will depend on whether the corresponding EU Member State is a signatory to the Hague Convention on the Recognition of Divorces and Legal Separations 1970 (the Hague Divorce Recognition Convention). It should be noted that only 12 EU Member States are signatories to the Convention in question.

Where they are not a signatory, recognition will depend entirely upon the national laws of that country. Legal advice should be taken from a practitioner in the law of that jurisdiction.

13.3.2 The rest of the world

The rules for recognition for the rest of the world ('the traditional rules') are found in the Family Law Act 1986. This distinguishes overseas divorces **by proceedings** from divorces **other than by proceedings**.

Divorces by proceedings

Overseas divorces by proceedings are recognised if they are:

i. effective in the country in which they are obtained. In *D* v *D* [1994] 1 FLR 38, there was evidence that the Ghanaian decree would be set aside on the ground that there was no voluntary submission by the wife (held: the divorce was not effective under Ghanaian law) **and**

ii. one of the parties fulfils one of the jurisdiction requirements.

These are:

Habitual residence. Note that no time is specified. Habitual residence must be interpreted according to English law.

Domicile according to English law or, contrary to the general rule, according to the law of that country in family matters (thus in *Messina* v *Smith* [1971] P 322 six weeks' residence amounted to domicile in Nevada law).

Nationality. It is irrelevant that the person concerned is also a national of another country, as in *Torok* v *Torok* [1973] 3 All ER 101 (Hungarian court has jurisdiction though party now British: by Hungarian law it was impossible to shed nationality).

Divorces other than by proceedings

Overseas divorces other than by proceedings are recognised if they are:

i. obtained in the country of the domicile of the spouses. Where only one spouse is domiciled in that country, it is sufficient provided that the divorce, etc. is recognised by the domicile of the other, **and**

ii. neither party was habitually resident in the UK for one year before the divorce, etc. was obtained.

These grounds are narrower than those for 'proceedings' divorces.

The crucial phrase 'judicial or other proceedings' (s.54(1)) is not defined in the Act. The meaning of 'other proceedings' has been considered in a number of cases. In *Quazi* v *Quazi* [1980] AC 744, the husband, a Pakistani national, obtained a divorce by *talaq* under the law of Pakistan. This required a written notice of the divorce to be sent to the chairman of an administrative body, who then had to set up an arbitration council whose function was to bring about a reconciliation. The effect of the *talaq* was suspended until 90 days after the notice of the *talaq* had been given to the official, but if within that period the husband did not revoke the *talaq* it became effective. The Court of Appeal did not think there had been 'proceedings'. The House of Lords did. Lord Scarman defined proceedings as 'any act or acts officially recognised as leading to divorce in the country where the divorce was obtained and which itself is recognised by the law of the country as an effective divorce' (p.824).

What therefore of the 'bare *talaq*'? A bare *talaq* is a mere pronouncement, orally or in writing, of a *talaq*, without any other formality. Does this amount to 'proceedings'? Different views were expressed initially, but it is now settled that a bare *talaq* does not amount to proceedings. Proceedings does not include 'a private act conducted entirely by parties *inter se* or by one party alone' even if there are witnesses. There must, said the Court of Appeal, be 'a degree of formality and at least the involvement of some agency, whether lay or religious, of, or recognised by, the State as having a

function that is more than probative' (*Chaudhary* v *Chaudhary* [1985] Fam 19). A 'bare' *talaq* followed by a registration process with the Sharia court was held in *El Fadl* v *El Fadl* [2000] 1 FLR 175 to constitute proceedings. A Japanese divorce – the consensual signing of a form – also came within the ambit of proceedings. The state was involved: consent of itself created nothing. See *H* v *H* [2007] 1 FLR 1318.

Transnational divorces

The Family Law Act seems to have been premised on the basis that divorces take place in a single country. But the problem of the transnational divorce must be considered. This is a divorce where some steps towards the divorce are initiated in one country and the divorce is completed by steps in another. For example, H, a national of Pakistan, pronounces *talaq* in England and then, pursuant to Pakistani law, sends a notice of it to the chairman of the relevant body in Pakistan, with a copy to his wife who lives there. The arbitration council is set up in Pakistan and the *talaq* is not revoked. The divorce becomes effective by Pakistani law. Section 44 of the 1986 Act provides that no extra-judicial divorce obtained in the British Isles shall be regarded as effective: only 'overseas' extra-judicial divorces are entitled to recognition. To decide the effect in England of a transnational divorce, we need to distinguish, again, 'proceedings' divorces and those obtained otherwise than by means of proceedings.

Divorce by proceedings

First, divorces obtained by means of proceedings. In *R v Secretary of State for the Home Department, ex p Fatima* [1986] AC 527, H was a Pakistani national who married there but had lived in England since then. Wishing to marry W2 he purported to divorce W1 by *talaq*. W2 was refused entry to the UK by an immigration officer at Heathrow Airport. He concluded the *talaq* would not be recognised and so H was not free to marry W2. Where was the *talaq* obtained? If it was obtained in Pakistan, it would be recognised (because it would have been obtained in the country of H's nationality). If it was obtained in England, it would be denied recognition. Part of the proceedings had taken place in England, others in Pakistan under the Muslim Family Laws Ordinance 1961. The House of Lords concluded that the divorce was not obtained wholly by proceedings in Pakistan because the pronouncement of the *talaq* in England was an essential part of the proceedings. It could not, therefore, be recognised.

This case was decided under earlier legislation. The wording of the 1986 Act is slightly different. But in *Berkovits* v *Grinberg* [1995] Fam 142 it got the same judicial response. In this case a Jewish bill of divorcement (a '*get*') was written in England and delivered to the wife in Israel, of which country both parties were nationals. The divorce was only final when the wife received the *get*. The divorce must be 'effective under the law of the country in which it is obtained' (s.46(1)(a)). The judge concluded that the word 'obtained' connoted a process rather than a single act – rather like, he said, getting a degree! The writing of the *get* in England was part of this process. This process ('the proceedings') had to be constituted in the same country in which the divorce was obtained. It follows that no transnational divorces obtained by proceedings, whether initiated in England or another country, are entitled to recognition. This is a harsh conclusion. It will not inconvenience wealthy Muslims and Israelis – they will need to fly to a Muslim country or Israel respectively – to divorce according to the laws of their religion and nationality. But it will penalise the poor who may not be able to meet these requirements. It will also create limping marriages. The husbands in *Fatima* and *Grinberg* have different statuses according to English law and the laws of their countries of nationality. For a critique of *Berkovits* v *Grinberg* see Reed [1996] Fam Law 100.

Where the divorce is obtained otherwise than by means of proceedings, where is the divorce 'obtained'? Most *talaqs* are obtained where they are pronounced and so cannot be transnational. Clarkson and Hill (p.448) believe it is arguable that the necessary steps for obtaining a *khula* – a divorce requested by a woman – could 'straddle more than one country'. The example is given of a wife in Thailand emailing her husband in Dubai asking for a divorce. He accepts the proposal and utters the '*khula*' in Dubai. This divorce would appear to have been obtained in Dubai and if one or both parties are domiciled in Dubai and the divorce is recognised by the other party's domiciliary law, the divorce is entitled to recognition in England.

13.3.3 Refusal of recognition of an overseas divorce

Section 51 sets out a number of grounds on which the recognition of an overseas divorce may be refused. These are

i. The marriage is void or has been previously annulled or dissolved.

ii. The divorce or legal separation was obtained contrary to natural justice.

There are two grounds for a natural justice claim.

a. **Lack of notice (s.52(3)(a)(i)).** There is no requirement that a party should actually have received notice. Recognition may be refused if in the view of the court such steps for giving notice have not been taken as reasonably should have been taken in the circumstances. There must be a 'fundamental' breach of natural justice (*B* v *B* [2001] 3 FCR 331). An example is *Sabbagh* v *Sabbagh* [1985] FLR 29 (the wife lived in Hendon in London and the only notice she could have received was published in an official gazette in Brazil – a publication 'not normally circulated in Hendon'. Held that, although Brazilian procedures had been properly complied with, she had not received reasonable notice. But the court declined to exercise its discretion to refuse recognition because she had not been unduly prejudiced, having decided not to take part in the proceedings anyway). See also *D* v *D* [1994] 1 FLR 38.

b. **Opportunity to take part (s.51(3)(a)(ii)).** This must be an effective opportunity to place views before the court. So, in *Newmarch* v *Newmarch* [1978] Fam 79, the failure of lawyers in Australia to comply with the wife's instructions in England did not give her the requisite opportunity, and in *Joyce* v *Joyce* [1979] Fam 93, where there was a failure of the authorities in Quebec to ensure that a wife in England who wanted to contest proceedings was represented, a similar conclusion was reached. The court was influenced by the fact that the wife might have been able to go to Quebec if the husband had paid the maintenance which was due. Not being able to go to the foreign jurisdiction is a relevant consideration (see *Mamdani* v *Mamdani* [1984] FLR 669).

iii. It is manifestly contrary to public policy (s.51(3)(c)).

This discretion is to be exercised sparingly (note the word 'manifestly'). As examples, see *Kendall* v *Kendall* [1977] Fam 208 where the proceedings were a fraud on the wife and the Bolivian court – the husband got the wife to divorce him by getting her to sign a document which he told her enabled her to take the children out of Bolivia but was in fact a power of attorney in favour of Bolivian lawyers to start divorce proceedings on her behalf. See also *Re Meyer* [1971] P 298. You may contrast *Eroglu* v *Eroglu* [1994] 2 FLR 287 (a 'divorce of convenience' to enable the Turkish husband to serve less time in the army held not manifestly contrary to public policy since neither of the parties was deceived).

Note where ground (ii) or (iii) is involved the court has a **discretion**. In other words it can recognise the foreign decree, even if a ground for non-recognition is established. It did so in *Newmarch* v *Newmarch* (the English court could order maintenance after the New South Wales divorce, so no one's interests were served by refusing recognition – the wife's intention in contesting the divorce was to secure maintenance, not to stay married).

In relation to extra-judicial divorces there is an additional ground for non-recognition. The court may refuse recognition (a) if there is no official document certifying that the divorce is effective under the law of the country in which it was obtained, or (b) where one of the parties was domiciled in another country when it was obtained, there is no official document certifying that it is valid under the law of that country. This power is discretionary: a divorce with no official document could thus still be recognised.

13.3.4 Recognition of nullity

The grounds for recognition of nullity decrees are the same as those for the recognition of divorces. There are accordingly two regimes: Brussels II *bis* (for decrees given before 31 December 2020) and the Family Law Act 1986.

A problem can arise if a foreign court annuls a marriage which is valid under English conflict of laws rules. If this happens English law recognises the foreign decree – and ensures uniformity of status. This may have the effect of nullifying rights which have existed in English law. *Salvesen* (*or von Lorang*) v *Austrian Property Administrator* [1927] AC 641 illustrates this. (A German decree declared a marriage void *ab initio* 27 years after the marriage, so that the wife was deprived of Austrian nationality, which, in this case, is what she wanted. But suppose she had not wanted this?) One answer to this dilemma is to recognise the effects of the foreign decree, but only prospectively. Another is to decline the foreign annulment contrary to public policy.

Grounds for refusing to recognise a foreign nullity decree

The grounds for refusing to recognise a foreign nullity decree are the same as for a divorce decree.

i. It is **irreconcilable** with a **previous decision** of an English court or by a court elsewhere, and recognised in England (Brussels II Regulation, Article 15(1)(c); Family Law Act 1986 s.51(1)). This ground is mandatory under Brussels II, and discretionary under the 1986 Act. An example is the case of *Vervaeke* v *Smith* [1983] 1 AC 145 (discussed in Chapters 2 and 6).

ii. It is contrary to **natural justice**. This is the same as for foreign divorce decrees.

iii. It is manifestly contrary to **public policy**. Under Brussels II, a decree may not be refused recognition because English law would not allow an annulment on the same facts (Article 18). But under the 1986 Act we can refuse to recognise a nullity degree because the foreign rule by which the marriage is invalid is deemed objectionable. Thus, in *Gray* v *Formosa* [1963] P 259, H, a Roman Catholic domiciled in Malta, married W, domiciled in England, at an English register office. H deserted W, returned to Malta and obtained a nullity decree on the ground that under Maltese law a Roman Catholic could not validly marry except by a religious ceremony. The Court of Appeal refused to recognise the decree holding it was contrary to substantial justice. Sir Jocelyn Simon P (in *Lepre* v *Lepre* [1965] P 52, 64) explained the decision thus: it was 'an intolerable injustice that a system of law should seek to impose extraterritorially, as the condition of the validity of a marriage, that it should take place according to the tenets of a particular faith'.

Self-assessment questions

1. **John (domiciled in England) marries Sieglinde (a German national). For the next 20 years they live mainly in England but spend lengthy periods of time in Germany. John then takes up an appointment in Saudi Arabia. They become habitually resident there but always intend to return to England. Does an English court have jurisdiction if John wants to divorce Sieglinde? Does a German court have jurisdiction? Can Sieglinde divorce John in England?**

2. **Assume the English court has jurisdiction. What law will it apply to:**[†]
   i. **a Maltese domiciled husband who wants a divorce from his Maltese wife (there is no system of divorce in Malta)**
   ii. **a Nigerian girl of 11, domiciled in Nigeria, and validly married by the law in force in Northern Nigeria, who wants a nullity decree because she is under 16.**

3. **Why are we more willing to recognise foreign alien marriages than divorces which do not conform to our standards?**

4. **In what circumstances is a foreign divorce and a foreign annulment likely to be considered contrary to public policy by an English court?**

[†] In Question 2(i), what is the significance of Malta having no system of divorce? Should we invoke public policy in case (ii)? Compare *Mohamed* v *Knott* [1969] 1 QB 1: do you think this is right?

Summary

Brussels IIa Regulation will remain the relevant law for proceedings commenced on or before 31 December 2020. Any final order will have automatic recognition and enforcement across the EU under Brussels II. It will not apply to proceedings commenced after 31 December 2020, unless identical proceedings commenced elsewhere in the EU in or before 2020. Brussels lla rules as to jurisdiction are essentially replicated by s.5(2) of the Domicile and Matrimonial Proceedings Act 1973 in respect of recognition. For proceedings instituted on or after 1 January 2021, whether a divorce is automatically recognised will depend on whether the corresponding EU country is a signatory to the 1970 Hague Divorce Recognition Convention. Where this is not the case, recognition will depend entirely upon the national laws of that country.

13.4 Financial provision

Prior to 1 January 2021, the jurisdiction, recognition and enforcement of financial orders made in an EU Member State was governed by the EU Maintenance Regulation (Regulation 4/2009). The Maintenance Regulation created a common framework across the EU (apart from Denmark in certain cases). It further facilitated the process where a divorce and financial order made in one country could be enforced in another country. This Regulation has been repealed but it will continue to apply to proceedings and requests initiated before the exit date. For cases starting after that date, courts in England and Wales decide if they have jurisdiction using the relevant non-EU rules (unless parties have, before the end of the transition period, made a choice of law agreement in accordance with the EU rules). These rules are different depending on the type of maintenance case before the court.

When it comes to recognition and enforcement, in respect of cases that started before 1 January 2021, the Withdrawal Agreement states that, in order for a maintenance decision made in England and Wales to be recognised and enforced in another EU member state, it must be recognised and must have a declaration of enforceability before it can be enforced there. It should also be accompanied by the documents required under Article 28, subject to the exceptions in Article 29. A maintenance decision made in another EU Member State (except Denmark) that is to be recognised and enforced in England and Wales does not need to be registered for enforcement. For cases started after 31 December 2020, the UK abides by the rules of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in relation to other states parties, which include all EU Member States except Denmark. The 1973 Hague Maintenance Enforcement Convention will continue to operate between the UK and Denmark.

ACTIVITIES 13.1–13.3

13.1 In what circumstances will an English court recognise a *talaq*?

13.2 Explain the 'transnational' divorce. What problems does it cause?

13.3 In what circumstances is a foreign divorce and a foreign annulment likely to be considered contrary to public policy by an English court?

SELF-ASSESSMENT QUESTION

Write a critical note on:

- **the decision in *Radwan* v *Radwan (No. 2)***
- **the decision in *Lawrence* v *Lawrence***
- **the decision in *Gray* v *Formosa*.**

Summary

From 1 January 2021, the EU framework regulating family law (the Regulations that sought to harmonise the law relating to jurisdiction and allowed the mutual recognition of divorces across the EU) no longer applies in the UK. In place of these EU Regulations, the UK has reverted to a combination of national laws and international conventions.

Reminder of learning outcomes

By this stage you should be able to:

- **state the rules governing jurisdiction for matrimonial causes**
- **state the choice of law rules for matrimonial causes, in particular for nullity**
- **explain the circumstances in which a foreign judgment relating to divorce or nullity will be recognised (or refused recognition)**
- **explain the status of the *talaq* divorce**
- **describe the conflict of laws in financial provision**
- **state the rules governing legitimacy and legitimation**
- **explain the circumstances in which foreign legitimations will be recognised by an English court.**

Sample examination questions

Question 1 **'The new rules on the recognition of foreign divorces and annulments, together with the new power to award financial relief after recognition, leave little or no scope for recognition to be refused on grounds of public policy.' Discuss.**

Question 2 **Is English law consistent in recognising the effects of polygamy willingly, but *talaq*s only with great reluctance?**

Question 3 **Ahmed, a Muslim domiciled in Plenty, goes through two ceremonies of marriage there in polygamous form. The first is with wife Jumilla, who is domiciled in Plenty. The second is with Mary, who is domiciled in England and is on a short holiday in Plenty.**

Ahmed comes to England as a student, retaining his domicile in Plenty. He brings with him both Jumilla and Mary. However, he soon tires of Jumilla and divorces her by a *talaq* delivered in England.

He then meets and falls in love with Suma, another student who is resident in England, but domiciled in Plenty. They decide to go on holiday together in Plenty, and while there go through a ceremony of marriage in Muslim form. Subsequently, they both return to England to continue their studies. But Ahmed gets a good job in England and intends to stay there. Three years later, however, he changes his mind and returns to Plenty, leaving Jumilla, Mary and Suma behind in England.

By Muslim law in force in Plenty, a man can have up to four wives at the same time, and can divorce any of them by *talaq* pronounced in front of a Muslim cleric.

Advise:

a. Jumilla, who wishes to petition for a declaration as to the validity of her divorce.

b. Mary, who wishes to petition for a nullity decree.

c. Suma, who wishes to petition for a divorce.

All three women wish to do so in England.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the rules governing jurisdiction for matrimonial causes	☐	☐	☐
I can state the choice of law rules for matrimonial causes, in particular for nullity	☐	☐	☐
I can explain the circumstances in which a foreign judgment relating to divorce or nullity will be recognised (or refused recognition)	☐	☐	☐
I can explain the status of the *talaq* divorce	☐	☐	☐
I can describe the conflict of laws in financial provision	☐	☐	☐
I can state the rules governing legitimacy and legitimation	☐	☐	☐
I can explain the circumstances in which foreign legitimations will be recognised by an English court.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
13.1	Jurisdiction	☐	☐
13.2	Choice of law	☐	☐
13.3	Recognition of foreign judgments	☐	☐
13.4	Financial provision	☐	☐

Notes