EDINBURGH LAW ESSENTIALS

Private International Law

David Hill

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PRIVATE INTERNATIONAL LAW

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1 INTRODUCTION

Private international law is the branch of law in each legal system that regulates cases with a foreign element. What this foreign element may be will vary but its existence is a necessary prerequisite before the rules of private international law will be engaged. Where all elements of a case are connected to Scotland then the rules of private international law will have no role to play and the case will be disposed of according to domestic Scots law. However, as soon as this foreign element does exist, whether this be as a consequence of the parties themselves or the subject matter of the dispute, the rules of private international law will become operative.

The increasing availability and ease of international travel and communication has fundamentally altered the world in which we live. Problems of private international law, once relegated to the periphery of a legal system, are now to the fore in almost every branch of private law. Overseas travel is no longer restricted to the wealthy and most individuals now visit foreign countries regularly, whether this be for purposes of business, education or pleasure. Even a relatively small business is likely to have a number of international suppliers and clients. International relationships of a personal nature, and the children thereof, are now commonplace. Should there be a contractual dispute between a company based in Scotland and a supplier based in Germany, or a breakdown of a marriage between a Scottish man and an Australian woman who live together with their children in England, the challenge for private international law is to provide a set of rules capable of doing justice in the given circumstances.

THE THREE PILLARS OF PRIVATE INTERNATIONAL LAW

Private international law has three key objectives:

(1) to set out the conditions under which a court will have jurisdiction to deal with a case containing a foreign element;
(2) once jurisdiction is confirmed, to identify the system of law that will be applied in order to resolve the dispute; and
(3) to determine the circumstances in which a foreign judgment will be recognised and, if necessary, enforced.

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Jurisdiction

The first issue to be decided by the Scottish court is whether it has jurisdiction to hear a case which contains a foreign element. Jurisdiction is premised upon the court having some connection to the dispute, such as the fact that a contractual obligation was, or should have been, performed in Scotland, or the fact that spouses lived together as man and wife in Scotland. In a purely domestic case there will be only one appropriate forum but when a foreign element exists the rules of private international law attempt to achieve justice by delimiting the jurisdiction of the Scottish courts in order to avoid conflicts of jurisdiction with the courts of other countries. Accordingly, the Scottish jurisdictional rules identify the circumstances in which it is considered legitimate for a Scottish court to take jurisdiction over a case, even though the case has connections to a foreign country, or even a number of foreign countries. Further, as it is inevitable that in certain circumstances the same or similar proceedings may be continuing in the courts of two different countries in parallel, the rules of jurisdiction also determine what effect such foreign proceedings will have on the Scottish proceedings. As we shall see in later chapters, there are two distinct approaches to the problem of parallel proceedings: a flexible approach that originally developed in Scotland, and a more rigid approach adopted in EU legislative instruments. Finally, it is also possible for parties to clothe the courts of a particular country with jurisdiction via agreement. In certain contexts, primarily in relation to civil and commercial matters, this right of party autonomy is generally unfettered and parties are able to choose the courts of any country, whether or not that country has an objective link to the dispute. In other contexts, such as where one party is considered to be in a "weaker" position, or due to the specific nature of the dispute, the choice may be confined to a limited number of pre-established jurisdictions.

Choice of law

Once the jurisdiction of the court has been established, the rules of private international law then operate to identify the law which the court should apply in order to determine the dispute before it. As with jurisdiction, the principal concern of the choice of law rules is to identify an applicable law which is connected to the dispute and is considered to be the law most appropriate to determine the rights of the parties. As we shall see, just because a Scottish court is able to claim jurisdiction, this does not necessarily mean that Scots law will be the most appropriate law. Instead, the Scottish court will, where appropriate, apply foreign rules of law in order to determine the dispute before it. If this were not the case and the Scottish court, along with its foreign counterparts, always applied its own

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law in every case before it, this would lead to the problem of "forum shopping" in which a pursuer shops around the available forums in order to find the legal system most favourable to his case. Only by being open to the application of foreign rules of law can the problem of forum shopping be minimised, if not entirely prevented, and significant steps have been taken, particularly within the European Union, to ensure that, no matter where a case is brought, the same applicable law will be identified. Finally, and reflective of the approach taken towards questions of jurisdiction, it may also be possible for parties to come to an agreement as to the law to be applied to determine their dispute.

Recognition and enforcement

Issues of jurisdiction and choice of law arise when the Scottish court is asked to consider an ongoing dispute. In contrast, questions of recognition and enforcement occur when a foreign court has previously considered itself to have jurisdiction over a case, has decided that case according to the law it considered appropriate to determine the rights of the parties, and the successful party subsequently wishes to have the foreign judgment recognised and enforced in Scotland. The recognition and enforcement of foreign judgments is essential if parties are to be treated justly and fairly, as to refuse to recognise foreign judgments would force the successful party to go to the expense and inconvenience of beginning fresh proceedings in Scotland (and any other country in which they wished to have the judgment recognised and enforced). Significant steps have been taken within the European Union to facilitate the free movement of judgments by ensuring the almost automatic recognition of a judgment granted in one Member State in all other Member States, and these developments will be considered further in the relevant chapters.

THE NAME OF THE SUBJECT

The subject is variously known as "private international law", "international private law" and "the conflict of laws". This is merely a difference of nomenclature and, however described, the core of the subject is that it is the branch of law which seeks to regulate the international relations of private individuals. This can be contrasted with the subject of public international law which seeks to regulate relations between states. As regards the third formulation, it should be noted that it is not the laws themselves which will be in conflict. Indeed, one of the principal aims of the subject is to avoid such conflicts. Instead, the conflict is to be found as between the individual litigants who will have conflicting views as to the

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most appropriate law to be applied in the case. It is the first of these terms, "private international law", that will be utilised throughout this book.

THE MEANING OF "COUNTRY"

Already in this introduction, and many more times throughout this book, reference will be made to "foreign" courts and "foreign" laws, or the fact that elements of a particular dispute are located "overseas" in another "country". This reference to a foreign country should not be read in the political sense and, instead, a "country" for the purposes of private international law denotes any territorial unit with a separate system of law. Consequently, the United States of America is not a "country" for the purposes of private international law and reference is instead made to its constituent parts, such as the states of New York or Texas. Similarly, Scotland is a separate "country" for the purposes of private international law and the other component parts of the United Kingdom are as much a foreign country as, say, France or Germany. In light of this, the issue of "intra-UK" conflicts will be considered at various points throughout this book, although, it must be admitted, there is a large degree of similarity among the rules of private international law adopted in each part of the United Kingdom.

HARMONISATION

There has been a significant trend in recent years towards the harmonisation of the rules of private international law. While the extent of harmonisation varies, there are now certain areas in which a number of states, particularly the EU Member States, adopt harmonised rules of jurisdiction, choice of law and recognition and enforcement. Such rules ensure that the courts of different countries assume jurisdiction on identical grounds and, once jurisdiction is assumed, apply the same law to determine the relevant issues. This unified approach then facilitates the recognition and enforcement elsewhere of the resultant judgments. The majority of topics considered in this book have been subject to at least some degree of harmonisation, with such developments emanating from two principal sources.

The Hague Conference on Private International Law

The Hague Conference on Private International Law is a global inter-governmental organisation, founded in 1893, which has developed a number of multilateral legal instruments, some having met with notably

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more success than others. The Conference boasts a current membership of 77 members (76 states and the European Union) and a number of non-member states are also party to various conventions. Arguably the Conference's most successful instrument has been the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction which will be considered in Chapter 11.

The European Union

Of increasing importance at the regional European level are the measures adopted by the European Union. Such developments have a relatively recent history, with a key change occurring on 1 May 1999 following the entry into force of the Treaty of Amsterdam, Art 65 of which empowered the EU to take measures in the field of judicial co-operation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market. This power was extended further with the entry into force of the Treaty of Lisbon on 1 December 2009. The Treaty of Lisbon amended the EU's two core treaties: the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), with the latter being re-named the Treaty on the Functioning of the European Union (TFEU). Article 81 of the TFEU removed the requirement that measures on judicial co-operation in civil matters having cross-border implications be "necessary" for the proper functioning of the internal market and replaced this with the more permissive phrase that the EU adopt such measures "*particularly* when necessary for the proper functioning of the internal market" (emphasis added).

A variety of instruments have been introduced as a result of these powers, some of which have their origins prior to the entry into force of the Treaty of Amsterdam. A number of these developments will be considered throughout this book, particularly the Brussels I Regulation (Chapters 3 and 4), the Brussels IIa Regulation (Chapters 8 and 11), the Rome I Regulation (Chapter 5) and the Rome II Regulation (Chapter 6). As the United Kingdom has reserved the right to decide on a case-by-case basis whether it will participate in any particular instrument there are also a number of initiatives, such as the Rome III Regulation, to which the United Kingdom is not party.

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Essential Facts

- Private international law is the branch of law in each legal system that regulates cases with a foreign element.
- Private international law has three main objectives: (1) to determine jurisdiction; (2) to identify the applicable law; and (3) to facilitate the recognition and enforcement of foreign judgments.
- There has been a significant trend in recent years towards the harmonisation of private international law, principally as a result of the work of the Hague Conference on Private International Law and the European Union.

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2 PERSONAL CONNECTING FACTORS

As a consequence of the growing ease and availability of international travel, it is becoming increasingly common for individuals to develop connections with a number of legal systems during the course of their lives. At the same time, there is also an expectation that, regardless of where a person may happen to be at any given point, certain legal matters – primarily issues of legitimacy, adoption, marital status and succession – should always be governed by the law to which that person "belongs". This is known as the doctrine of personal law: a doctrine which seeks to identify the most appropriate law to deal with issues of status, regardless of the fact that the individual in question (the *propositus*) may have links (perhaps very strong links) to other systems of law.

While there is broad agreement that an individual should be "connected" to a particular law, there is less agreement regarding precisely how this connection should be established. The traditional connecting factor adopted in Scotland and almost all common-law countries is that of domicile, while most of the civil-law jurisdictions of continental Europe opt instead for the law of an individual's nationality. Both these traditional connecting factors are gradually being marginalised by the rise to prominence of the contemporary connecting factor of habitual residence.

DOMICILE

Domicile is the tie or connection between an individual and a place governed by a single system of law. Because domicile denotes a connection between an individual and a single system of law it follows that there is no such thing as a British domicile – only a Scottish domicile, an English domicile etc. Domicile is a personal matter that can be changed without state authorisation, and even without an individual realising that such a change has occurred. Accordingly, there is no "register" of domicile and any disputes as to a person's domicile can be resolved only following adjudication by the court.

The central principle underlying the concept of domicile is the identification of a person's permanent home. When international mobility was rare and the large majority of people would be born, would live and would ultimately die in the same country, often without ever leaving its confines,

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domicile was a relatively simple and straightforward concept. Now, however, to equate the concepts of home and domicile is too simplistic due to the attribution of the latter being subject to a number of strict legal rule – rules which can appear to pay little attention to the factual realities of a person's life. In conjunction with the sharp increase in international mobility, these strict legal rules have led to a wide gulf developing between the common-sense understanding of a person's home and the legal concept of domicile – a gulf exacerbated by the failure of numerous attempts at fundamental reform of the concept. Indeed, as will be identified below, it is perfectly possible for an individual to be domiciled in a country he has never visited. Further complexity is apparent in Scotland following the partial reform of the law as a result of s 22 of the Family Law (Scotland) Act 2006.

General principles

There are three general principles that underpin the law of domicile and influence the more detailed rules considered below:

(1) *Every individual must have a domicile*. An individual will be attributed a domicile from the moment he is born to the moment he dies and, while this domicile may change, there can be no gaps in an individual's domicile. An individual will therefore be ascribed a domicile even if the circumstances of his life suggest that he does not have a readily identifiable home.
(2) *Every individual must have only one domicile at any given time*. Even if the reality of an individual's life would suggest that he has two homes in two different countries the law of domicile refuses to countenance the idea of concurrent domiciles.
(3) *An existing domicile is presumed to continue until a new domicile has been acquired*. The burden of proving a change of domicile lies on those who assert such a change.

Domicile of a newborn – domicile of origin

In light of the fact that no person can be without a domicile, every individual will be allocated a domicile – known as a domicile of origin – from the moment of his birth. While it will often be the case that the domicile of origin will equate with the country of birth, this is entirely coincidental as the place of birth is in no way determinative of the domicile of origin. The principles of the concept of the domicile of origin were most famously set out in a Scottish appeal to the House of Lords, *Udny* v *Udny* (1869), with the decision in *Re Fuld's Estate No. 3* (1968) offering a more

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recent discussion of the core principles of the concept. Due to the partial reform introduced by the Family Law (Scotland) Act 2006 it is necessary to consider the law both pre- and post-4 May 2006.

The common law

Attribution of a domicile of origin under the common law was built upon the concept of legitimacy in that a legitimate child would take the domicile of his father and an illegitimate child the domicile of his mother (*Udny* v *Udny* (1869)). It is important to note that the consequence of this rule is that the domicile of origin may not necessarily reflect the factual reality of a child's life and may instead allocate a domicile in a country the child had never visited. For example, a child born in France to parents domiciled in Scotland will be assigned a Scottish domicile and a child born in Scotland to parents domiciled in France will be assigned a French domicile. Rules of varying clarity also exist in reference to the less common situations of posthumous children, children legitimated *per subsequens matrimonium*, children of putative marriages, foundlings and adopted children.

Family Law (Scotland) Act 2006

One of the aims of the 2006 Act was to effect the abolition of the status of illegitimacy, and any aspect of differential treatment predicated upon the distinction between legitimate and illegitimate children, from Scots law. This was achieved via s 21 of the Act and, as this abolition made the common-law rules regarding the attribution of a domicile of origin unworkable, s 22 introduced replacement provisions. Although this section makes no explicit reference to the concept of the domicile of origin, the fact that it applies to all persons under 16 implies that the rules contained therein are intended to apply to this initial determination of domicile. Section 22 states that:

> "(1) Subsection (2) applies where—
>
> (a) the parents of a child are domiciled in the same country as each other; and
>
> (b) the child has a home with a parent or a home (or homes) with both of them.
>
> (2) The child shall be domiciled in the same country as the child's parents.
>
> (3) Where subsection (2) does not apply, the child shall be domiciled in the country with which the child has for the time being the closest connection.
>
> (4) In this section, 'child' means a person under 16 years of age."

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This section thus introduces two rules – one of dependence and one of independence – the applicability of which depend upon the circumstances of the child. First, the rule of dependence in s 22(2) states that where the parents are domiciled in the same country and the child has a home with one or both then the child shall be domiciled in the same country as the parents. It is important to note that the domicile of the parents and the place where the child has his home with at least one of them need not coincide for this rule to be applicable. For example, if a couple domiciled in the US state of Texas are posted to Aberdeen for a 2-year work placement and have a child while living in Scotland then the requirements of s 22(2) will be fulfilled and the child will take the parents' joint Texan domicile as his domicile of origin, regardless of the fact that the family home is currently in Scotland. Further, there is no precise definition of what constitutes a "home" for the purposes of this section. While the most common example would be where the child actually lives with one or both parents on a day-to-day basis, it is submitted that the child would still be considered as having a home with his parent(s) notwithstanding occasional absences.

If the rule of dependence does not apply, whether because the parents do not share a common domicile or, more unusually, the child does not have a home with either of them, then recourse must be had to the independent rule of s 22(3) which provides that the child will be domiciled in the country with which he has the closest connection for the time being. No guidance is given in relation to how the "closest connection" of the child is to be determined and while this may be a relatively straightforward test to apply to older children, difficulties arise when attempting to identify the country to which a newborn baby has the closest connection. If the test were to be applied literally, this would mandate an approach whereby all children were ascribed a domicile of origin in their country of birth. In the majority of cases the place of birth will be a country with which the child will go on to develop more meaningful ties and the rule will be uncontroversial. For example, a child who is born to an Anglo–Scottish couple who have lived together in Scotland for 10 years, and intend to remain in that country at least for the short term, will be ascribed a Scottish domicile of origin as Scotland is clearly the country of closest connection. However, there will also be instances in which the place of birth will be in a country in which the parent(s) either did not intend to remain or intended to remain only for a limited period. For example, a child could be born prematurely to the above Anglo–Scottish couple when they are on an overseas vacation. Alternatively, this couple could be living in a foreign country for the purposes of work when the child is born but always intend to return to Scotland. In both these scenarios an interpretation of

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the "closest connection" rule as a "place of birth" rule would result in the child acquiring a domicile of origin different to that of his parents and in a country with which he has only a fortuitous connection. In such circumstances an argument could be made that reference should be had to the long-term intentions of the parent(s) but this has the disadvantage that the child will then be domiciled in a country in which he has never lived, and in which he may not live for perhaps a number of years, if ever.

Transitional arrangements

Article 4 of the Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006 (SSI 2006/212) makes it clear that the rules contained in s 22 are to apply only in relation to proceedings which commence on or after 4 May 2006. This date is also the effective date from which s 1 of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that no person whose status is governed by Scots law shall be illegitimate, and the fact that a person's parents are not or have not been married to each other shall be left out of account in determining that person's legal status. It is therefore clear that any question that may arise regarding the domicile of a person under 16 who was born on or after 4 May 2006 will be determined according to s 22. There is a lack of clarity, however, regarding the law to be applied if a court is asked to determine the domicile of an individual before this date: should the common law that was then in force apply or should domicile be determined according to the now in force Family Law (Scotland) Act 2006?

This point is not addressed in the legislation and is yet to be tested by the courts but academic opinion suggests that the new domicile rules of s 22 should be applied retrospectively in any situation where it is necessary to determine such an individual's domicile on or after 4 May 2006. This approach could result in an individual being attributed a different domicile of origin to that previously identified under the common-law rules. In contrast, in circumstances where the domicile of an individual prior to the coming into force of the Act is at issue, with this determination unconnected to any finding of domicile after 4 May 2006, it has been argued that the common-law rules should continue to apply as this determination will relate exclusively to a time which precedes the abolition of illegitimacy and the introduction of s 22.

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Domicile of children

Whether under the common law or the Family Law (Scotland) Act 2006 a domicile of origin will be attributed to every person at the moment they are born. This domicile will crystallise at the date of birth and any subsequent changes in the life of the individual will have no effect on the domicile of origin (this is subject to one exception in that the subsequent adoption of a child may result in a change in a domicile of origin (Adoption and Children (Scotland) Act 2007, s 40)). While it cannot be changed, a domicile of origin can, however, be displaced via the acquisition of a different domicile. The rules governing displacement and acquisition vary on the basis of, first, whether the individual in question has reached the age of 16 and, second, if the individual is under 16, whether the rules of the common law or s 22 of the 2006 Act are to be applied. We will first consider the rules applicable to persons under 16.

The common law – domicile of dependence

Under the common-law rules, a child was treated as a dependent person who was incapable of acquiring an independent domicile through his own acts. Instead, a domicile of origin of a child would only be displaced should there be a change in the domicile of the appropriate parent – the father in the case of a legitimate child or the mother in the case of an illegitimate child. This basic rule was buttressed by the more fact-specific rules contained in the Domicile and Matrimonial Proceedings Act 1973, s 4. This section has now been repealed in Scotland but remains applicable in England and Wales and Northern Ireland.

Family Law (Scotland) Act 2006

Section 22 applies to any determination of domicile between birth and the age of 16. Accordingly, a domicile of origin will be displaced whenever the circumstances of the child's life lead to a re-evaluation of domicile under either the dependent or the independent rule. For example, a domicile of origin attributed under s 22(2) will change to a domicile of dependence if the parents acquire a new shared domicile and the child has a home with at least one of them. Alternatively, if the parents of a child cease to share the same domicile, the domicile of that child will no longer be determined by s 22(2) and reference will instead be made to s 22(3) which may result in the child acquiring a new independent domicile.

Domicile of adults – domicile of choice

From the above discussion it will be apparent that the majority of children will be allocated a domicile that is dependent on either one parent

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(if domicile is to be determined under the common law) or both parents (if s 22(2) of the 2006 Act is applicable). Once a person reaches the age of 16 this pre-existing domicile (whether a domicile of origin, a dependent domicile or an independent domicile) will continue until it is replaced by a domicile of choice. A domicile of choice has been described as "a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time" (*Udny* v *Udny* (1869), per Lord Westbury at 99). Any individual with legal capacity can thus acquire a domicile of choice in a country via a combination of:

- actual physical residence in the country of choice; and
- an intent to remain in the chosen country indefinitely.

One of these factors is insufficient to facilitate a change of domicile and both must co-exist before a domicile of choice will be acquired.

Residence

Actual physical residence in a country is fundamental to the acquisition of a domicile of choice. In the absence of residence no amount of intention will suffice and an individual cannot acquire a domicile of choice by wishful thinking alone (*Willar* v *Willar* (1954), per Lord Justice-Clerk Thomson at 147). Conversely, the fact of actual residence, even for a number of decades, will be insufficient if there is a lack of the requisite level of intent. For example, in *Ramsay* v *Liverpool Royal Infirmary* (1930) the House of Lords held, in the absence of adequate proof as regards intent, that a man who had lived in England for 37 years had not acquired a domicile of choice in that jurisdiction. Once actual residence is coupled with the requisite level of intent then the duration of the residence will not be relevant. Thus, residence for even a very short period of time will be sufficient for the acquisition of a domicile of choice if evidence of an intent to remain in the chosen country indefinitely is available.

Intention

A domicile of choice will be acquired only if an individual has the intention to reside permanently, or for an unlimited time, in a particular country. The residence must be "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), per Lord Westbury at 99). Doubts as to long-term intentions or lingering wishes in the mind of the individual to live elsewhere will also be fatal to the acquisition of

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a domicile of choice, irrespective of the length of actual residence. In contrast, residence that at its inception is "prescribed or dictated" may ultimately lead to a change of domicile if that residence later becomes voluntary. In *Mark* v *Mark* (2005) the House of Lords held that, although it is a relevant factor, the mere fact that residence in a country is unlawful does not automatically preclude the acquisition of a domicile therein.

When attempting to identify the requisite level of intent 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" (*Drevon* v *Drevon* (1864), per Kindersley VC at 133). All evidence as to intent will be considered and there is no single factor which is automatically determinative of domicile. Further, a factor which is treated as decisive in one case may be disregarded in another. Thus, while evidence that an individual has clearly made his home for a very long time in a country, as well as having his family in that country and having no home elsewhere, is a "strong starting point", it may not be conclusive (*Holliday* v *Musa* (2010), per Waller LJ at [67]). Declarations as to intent may be relevant but such evidence, if available, is to be treated with caution and viewed in light of the speaker's motives. It is important that any such declarations are consistent with the speaker's other statements and actions (*Ross* v *Ross* (1930)). The nature of an individual's residence can also provide evidence of intent, with the purchase of a house arguably providing a stronger argument in favour of permanent intent than, say, living in rental accommodation or in a hotel.

Loss of a domicile of choice

Once acquired, a domicile of choice in a country can only be abandoned when an individual both ceases to reside physically and ceases to intend to reside permanently or indefinitely in that country. If one of these elements remains, ie an individual decides that he no longer wishes to reside in a country permanently but he does not physically leave, a domicile of choice will continue. While the departure from a country with the positive intention not to return will lead to the immediate loss of a domicile of choice, it is also possible for a domicile to be lost with a less forthright mentality by which a "withering away" of intention occurs over time (*Morgan* v *Cilento* (2004)). When a domicile of choice is abandoned it is lost forever and can only be re-acquired via a fresh concurrence of physical residence and an intent to remain permanently in the country in question.

It will often be the case that a termination of both residence and the intent to remain permanently in one country will be followed immediately by the beginning of residence with an intent to remain permanently in another country. In such circumstances the previous domicile of choice

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will be replaced by a new domicile of choice. An individual may, however, leave one country with the positive intent not to return but not immediately settle elsewhere, therefore losing a previous domicile of choice without acquiring a new domicile. As a fundamental principle of the law of domicile is that an individual must never be without a domicile, in these circumstances the domicile of origin is deemed to revive. This rule was detailed in *Udny* v *Udny* (1869), where Lord Westbury explained that revival was possible because the domicile of origin was never truly lost:

> "When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil … It revives and exists wherever there is no other domicil, and it does not require to be regained or reconstituted animo et facto in the manner which is necessary for the acquisition of a new domicil of choice." (at 99)

The domicile of origin will revive even if the individual concerned has not returned to that particular country. Indeed, the domicile of origin will revive even if, as is possible under both the common law and the Family Law (Scotland) Act 2006, the individual concerned has never been to this country or had only a transient and long-forgotten connection to this place. The revival doctrine has been criticised for potentially leading to artificial and absurd results and it has been rejected in other countries in favour of a rule of continuance, ie in similar circumstances a previous domicile of choice will continue to apply until a new one is required. This approach, while perhaps superficially superior, is also open to criticism as it may still lead to the application of an inappropriate law in that it mandates a continuing connection to a country that the individual has severed all ties with. A hybrid approach was suggested in the Court of Queen's Bench of Alberta where it was held that, while the revival rule should normally be followed, if this approach produced an absurd result (such as where the revived domicile of origin had absolutely no relevance to an individual's life, home, and activities) then a common-law judge had a residual authority to instead conclude that the individual has retained his last domicile of choice (*Re Foote Estate* (2009)).

NATIONALITY

Although the United Kingdom, and many other countries, traditionally rely upon the connecting factor of domicile, other countries utilise the concept of nationality in order to connect an individual to a particular legal system. In comparison with domicile, the main advantage that the use of

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nationality as a connecting factor provides is that it is much more easily ascertained, and therefore more certain. Whereas an individual may be unsure as to his domicile, he will more than likely be aware of his nationality and have documentary evidence to prove it in the form of a passport. On the other hand, this one advantage is outweighed by a number of serious disadvantages. First, as with domicile, reliance upon nationality may identify a law with which the person in question no longer has any real connection. Second, whereas an individual may have only one domicile, the possibility of dual nationality causes difficulties when attempting to connect an individual to a single legal system. In contrast, the problem of statelessness means that a person may not be connected to any legal system if nationality were the chosen connecting factor. Third, nationality cannot be utilised as a connecting factor in composite states such as the United Kingdom which are made up of a number of separate legal systems.

HABITUAL RESIDENCE

In comparison with domicile, habitual residence is intended to be a factual concept unblemished by the artificial legal rules which have come to characterise the former. Reliance on the concept of habitual residence has developed in recent times principally as a result of its utilisation by the Hague Conference on Private International Law, most notably in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Further, its adoption by the European Union as the primary connecting factor in a number of private international law instruments has confirmed its position as the connecting factor of choice in a number of legal spheres.

There is no single accepted definition of the concept, with a policy decision taken not to provide such a definition in order to leave habitual residence free from the rigid legal rules that have so bedevilled the determination of domicile. Instead, habitual residence is intended to be a connecting factor that reflects the factual reality of an individual's life in identifying his current centre of gravity – something that will not always be possible with domicile. This very broad statement does, however, hide a number of complexities. First, while there may be no accepted definition of the concept, a significant body of case law has developed in which habitual residence has been considered and this has inevitably led to an entrenchment upon the purely factual nature of the concept. Second, the meaning of "habitual residence" may differ according to the circumstances in which it is applied, with there being two distinct interpretations of the concept – one developed domestically and the other developed through EU legislation. Moreover, within each of these two broad interpretations

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further variation is possible, as the meaning of "habitual residence" may differ depending on the precise statutory context.

General characteristics

Although there is no settled definition of habitual residence, judicial consideration of the concept has led to a number of general rules and characteristics being developed. It must be remembered, however, that these are not absolutes, and what is applicable in one specific context might be inapplicable in another. With that caveat in mind, the following characteristics may be identified:

- *Habitual residence may be equated with ordinary residence*. It has been stated in the House of Lords that habitual residence is interchangeable with the older concept of ordinary residence (*Mark* v *Mark* (2005)). Exact equivalence will, however, depend on the context in which the respective concepts are used.
- *Habitual residence may be lost in a day*. A person can cease to be habitually resident in a country in a single day if he leaves that country with a settled intention not to return (*Al Habtoor* v *Fotheringham* (2001)).
- *Habitual residence cannot be acquired in a day*. An individual cannot become habitually resident in a country in a single day. Instead, an appreciable period of time and a settled intention will be necessary for the acquisition of a habitual residence (*Re J (A Minor) (Abduction: Custody Rights)* (1990)). This may be subject to exceptions where it is necessary for an individual to have a habitual residence for the purpose of making a particular piece of legislation work, or where an individual is returning to a previous habitual residence (*Nessa* v *Chief Adjudication Officer* (1999)).
- *An individual may be without a habitual residence*. As a corollary of the previous two points, it is possible for an individual to be without a habitual residence at certain points in his life.
- *Residence may become habitual whether it is involuntary or illegal*. In comparison with domicile, habitual residence may be acquired involuntarily, as a moment will come when the length of time spent in a country will override any intention not to acquire an attachment thereto (*Cameron* v *Cameron* (1996)). In *Mark* v *Mark* (2005) the House of Lords held that residence in England need not be lawful for the purpose of establishing divorce jurisdiction.
- *An individual may have more than one habitual residence*. While there is a desire in child abduction case law to avoid a finding of multiple habitual residences, the English Court of Appeal has been prepared

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to accept the existence of dual habitual residences in the context of divorce jurisdiction (*Ikimi* v *Ikimi (Divorce: Habitual Residence)* (2001)).

Acquisition and loss

In *Re J (A Minor) (Abduction: Custody Rights)* (1990), Lord Brandon stated (at 578-579) that the acquisition of a habitual residence required both residence in a country for an appreciable period of time along with a settled intention to remain in that country. These two requirements appear ostensibly similar to those relevant to the acquisition of a domicile of choice in that there is a requirement of actual residence coupled with intent but their interpretation in relation to habitual residence differs in three fundamental ways from that applicable to domicile:

(1) Where residence has persisted for an extended period of time, evidence of a settled intent will no longer be essential for the acquisition of a habitual residence. This can be contrasted with domicile where residence for decades will not, by itself, be sufficient unless coupled with the necessary intent.
(2) In cases where the residence is short and it is therefore necessary to consider the intentions of the individual, what is required is not an intention to remain indefinitely but an intention to remain for a settled purpose with a sufficient degree of continuity (*R* v *Barnet LBC, Ex p Shah* (1983)). This requirement may be satisfied even when the intention to reside is only for a limited period (*Moran* v *Moran* (1997)).
(3) While domicile may be acquired immediately if the requisite intention exists, habitual residence requires residence for an appreciable period of time and may not be acquired in a single day. What constitutes an "appreciable period of time" will depend on the facts of the individual case and may vary from a very short period where there is clear evidence of intent, a matter of months where this is an element of doubt, to a period of years in cases where the residence is involuntary.

Habitual residence will be lost immediately if an individual leaves a country with the intention never to return. On the other hand, short-term, temporary absences will not lead to a loss of habitual residence. As the majority of cases fall somewhere between these two extremes, such as where a person moves to another country on a trial basis or for limited purposes, it will be necessary to look at the specific circumstances of the move in order to establish whether an existing habitual residence has been

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lost, and whether or not it has been replaced with a new habitual residence. Factors relevant in this determination include the maintenance of ties with the previous country of residence; the duration of residence in the new country; and the overall nature of the move. Even if there is clear evidence that an individual does intend to return to his country of habitual residence, through the passage of time there will come a point when the preservation of an existing habitual residence would contravene the factual nature of the concept.

Problems arise when considering the habitual residence of a child in that it may be difficult, if not impossible, to identify the necessary settled intent or purpose required for the acquisition of habitual residence in circumstances where the actual period of residence is relatively short. The approach of the courts in the United Kingdom has been to address this *lacuna* by looking instead to the intentions of the parents. Where a shared parental intention exists and this correlates with the factual reality of the child's life then the determination will be straightforward. However, in cases where there is no shared intent and the circumstances of a move are disputed the court will have to make a decision as to habitual residence in light of the character, purpose and duration of the move, with the latter factor of particular importance.

Habitual residence in the European Union

The connecting factor of habitual residence has been widely adopted by the EU legislator in a myriad of different contexts and while the concept is to be given an autonomous meaning across all Member States in each context in which it is utilised, this meaning will be influenced by the policy considerations underpinning the instrument in which it is employed and may therefore vary. In the context of the Brussels IIa Regulation (discussed in Chapter 8), the ECJ has held in both Proceedings Brought by A (2010) and *Mercredi* v *Chaffe* (2012) that the habitual residence of a child should reflect some degree of integration by the child in a social and family environment. Although the EU interpretation of habitual residence shares some common characteristics with the domestic interpretation considered above, two key differences are immediately apparent:

- *Habitual residence may be acquired immediately*. In *Swaddling* v *Adjudication Officer* (1999) the European Court of Justice established that for the purposes of social security law a person could acquire a habitual residence immediately, at least when moving from one Member State to another. The Family Division of the High Court of England and Wales has held that immediate acquisition of a habitual residence is

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also possible in the context of divorce jurisdiction (*Marinos* v *Marinos* (2007)).

- *An individual may have only one habitual residence*. While English domestic law recognises that an individual could be habitually resident in two different countries at the same time for the purposes of divorce jurisdiction (*Ikimi* v *Ikimi (Divorce: Habitual Residence)* (2001)), the court in *Marinos* held that the concept of habitual residence under the Brussels IIa Regulation has an autonomous meaning in Community law which required that an individual have only one habitual residence.

Essential Facts

Domicile

- An individual must always have a domicile and may have only one domicile at any given time.
- A domicile of origin will be allocated at birth and will be determined according to either the common-law rule based on legitimacy or one of the two rules contained in s 22 of the Family Law (Scotland) Act 2006.
- The domicile of an individual under the age of 16 will be determined according to either the common-law rule of dependence or one of the two rules contained in s 22 of the Family Law (Scotland) Act 2006.
- An adult will acquire a domicile of choice via a combination of actual physical residence in a country and an intent to remain in that country permanently.
- A domicile of origin will revive in circumstances where an individual abandons an existing domicile of choice without acquiring a new one.

Habitual residence

- Habitual residence is a factual concept which has been left undefined and its meaning may differ according to the context in which it is utilised.
- An individual may be without a habitual residence and in certain contexts may have more than one habitual residence.
- A habitual residence may be lost in a day but it cannot normally be acquired in a day.

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- The acquisition of habitual residence requires both residence in a country for an appreciable period of time and a settled intention to remain in that country.
- Habitual residence is subject to a different interpretation when utilised in EU legislation. This interpretation is guided by the Court of Justice of the European Union.

Essential Cases

Udny v Udny (1869): a Scottish appeal to the House of Lords which sets out the principles of domicile.
Mark v Mark (2005): although it is a relevant consideration, the fact that residence is unlawful will not preclude acquisition of either domicile or habitual residence.
Re J (A Minor) (Abduction: Custody Rights) (1990): An individual cannot become habitually resident in a country in a single day. An appreciable period of time and a settled intention will be necessary for the acquisition of a habitual residence.
Swaddling v Adjudication Officer (1999): for the purposes of European Union social security legislation it is possible for an individual moving between Member States to acquire a habitual residence immediately. Proceedings Brought by A (2010): under Brussels IIa Regulation the habitual residence of a child should reflect some degree of integration by the child in a social and family environment.

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3 JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

The rules of jurisdiction determine whether or not a court can hear a case and this chapter considers the rules of Scots law that delimit the jurisdiction of the Scottish courts to hear actions in civil and commercial matters which contain a foreign element. The principle underpinning these rules is one of appropriateness, in that a Scottish court should only exercise jurisdiction over a dispute when it can be considered to be an appropriate forum to hear the action and dispose of the case. The requirement of appropriateness may be satisfied in a number of ways including, but not limited to: a link between at least one of the parties and the forum; a link between the subject-matter of the dispute and the forum; or the fact that the parties have agreed that a particular forum should have jurisdiction over the dispute. The importance of jurisdiction cannot be underestimated as from this will flow, among other important consequences, the power to classify the nature of the problem, the right to apply the procedural law of the forum and also the power to decide the applicable substantive law.

THE FOUR LEGISLATIVE REGIMES

Four different sets of rules are in place to govern the jurisdiction of the Scottish courts regarding civil and commercial matters. These are:

(1) The Brussels I Regulation

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is the primary European legal instrument in this area. The Regulation applies in every Member State of the European Union, Denmark having accepted its terms via the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with effect from 1 July 2007. This Regulation replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 from 1 March 2002. As there was no fundamental change in structure or provisions as between the 1968 Brussels Convention and the Brussels I Regulation, case law decided under the former remains relevant in the interpretation of the latter. The Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) gave force of law within the United Kingdom to the

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1968 Brussels Convention, with this Act later amended by the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) and the Civil Jurisdiction and Judgments Regulations (SI 2007/1655) in order to accommodate the Regulation. The Brussels I Regulation will itself be replaced from 10 January 2015 by Regulation (EU) No 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 (recast) and reference will be made to the key changes to be introduced by the recast Regulation where necessary throughout this chapter. Although the provisions of the Regulation will be considered in numerical order it is important to note that there is a (non-numerical) hierarchical approach taken to jurisdiction, with the exclusive jurisdictions in Art 22 at the apex, followed by submission under Art 24, then the protective jurisdictions of Arts 8–21, then "choice of court" agreements under Art 23 and, finally, the general and special grounds of jurisdiction in Arts 2, 5 and 6. Each of these grounds will be discussed in turn below.

(2) The Lugano Convention

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was signed at Lugano on 16 September 1988. The 1988 Lugano Convention was largely modelled on the 1968 Brussels Convention, with the object being to apply the principles of the latter as between the Member States of the European Union and members of the European Free Trade Association (EFTA). Although Lugano was considered to be a "parallel" Convention, there remained some important differences between the two Conventions. The Lugano Convention was given effect in the United Kingdom by the Civil Jurisdiction and Judgments Act 1991. The transformation of the 1968 Brussels Convention into the Brussels I Regulation led to a revision of the original Lugano Convention, with a revised Convention agreed on 30 October 2007. The text of the 2007 Lugano Convention is substantially identical to that of the Brussels I Regulation and applies as between all Member States and Norway, Switzerland and Iceland. The Civil Jurisdiction and Judgment Regulations 2009 (SI 2009/3131) have amended the CJJA 1982 to reflect the entry into force of the 2007 Lugano Convention. The consideration of the provisions of the Brussels I Regulation set out below can be read as also applying to the equivalent provisions of the 2007 Lugano Convention.

(3) CJJA 1982, Sch 4: intra-United Kingdom jurisdictional rules

Schedule 4 of the CJJA 1982 contains a modified version of the Brussels I Regulation for the purpose of allocating jurisdiction as between the

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different parts of the United Kingdom. The provisions of Sch 4 generally follow those of the Regulation, although they are not absolutely identical. A brief mention is made at the end of this chapter regarding the circumstances in which the rules of Sch 4 differ from the equivalent provisions of the Brussels I Regulation.

(4) CJJA 1982, Sch 8: the residual Scottish rules

The rules in Sch 8 take effect subject to the Brussels I Regulation, the 2007 Lugano Convention and Sch 4 to the CJJA 1982. Broadly speaking, therefore, the rules of Sch 8 apply only in "non-European" cases, ie when a defender is not domiciled in an EU or EFTA Member State. The rules themselves are in some cases identical to the Regulation, in other cases similar, and in further cases remain in the form originally adopted under the 1968 Brussels Convention. Further detail regarding the rules of Sch 8 can be found in Beaumont and McEleavy, *Anton's Private International Law* (3rd edn, W Green, 2011), Chapter 8.

BRUSSELS I REGULATION

Scope

Article 1(1) provides that the Brussels I Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. The Regulation shall not, however, extend, in particular, to revenue, customs or administrative matters. Article 1(2) states specifically that the Regulation will not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; and (d) arbitration. Aside from the specific exclusions noted, the term "civil and commercial matters" is left undefined in the Regulation. The ECJ has held that this term must be given an autonomous meaning not tied to the understanding of any one legal system but interpreted primarily according to the objectives and scheme of the then Convention and, secondarily, to the general principles which emerge from the totality of the national legal systems (*LTU* v *Eurocontrol* (1976)).

The precise ambit of the arbitration exclusion under Art 1(2)(d) was considered in the *West Tankers* case (*Allianz SpA (formerly Riunione Adriatica di Sicurta SpA)* v *West Tankers Inc* (2009)). The decision of the ECJ in this case – to the effect that court proceedings incidentally related to arbitration did come within the scope of the Regulation, and could therefore oust, at least

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temporarily, the jurisdiction of the courts at the seat of arbitration – caused much controversy in the United Kingdom. The decision in *West Tankers* and the attendant dismay therewith is reflected in the terms of the recast Regulation which retains the arbitration exclusion in Art 1(2)(d) but introduces an explanatory recital (Recital (12)) with the effect that the decision in *West Tankers* is overturned at least to the extent that it required a court of one Member State to decline jurisdiction in deference to proceedings in another Member State apparently in breach of an arbitration agreement.

General jurisdiction

Article 2(1) of the Regulation states that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. This is the primary jurisdictional basis contained in the Regulation, with the underlying principle being that the defendant should normally be sued in his "home" court. A person domiciled in a Member State other than the United Kingdom may be sued in Scotland only if the Scottish courts have jurisdiction as a result of one of the alternative grounds of jurisdiction found within the Regulation (Art 3).

Individuals

The discussion of personal connecting factors in the previous chapter focused on the traditional definition of domicile that is utilised to identify a long-term and enduring link between an individual and a particular legal system in matters of status. This traditional definition of domicile is considered to be somewhat cumbersome, possibly difficult to ascertain, and also possessing the potential to produce artificial results. The 1968 Brussels Convention left the definition of domicile to individual states and the United Kingdom opted to introduce a bespoke, residence-based definition of domicile more appropriate for determining jurisdiction in civil and commercial matters. The definition was introduced for the Convention in s 41 of the CJJA 1982, with the corresponding provision for the Brussels I Regulation contained in the Civil Jurisdiction and Judgments Order 2001, Sch 1, para 9.

The rules provide that an individual will be domiciled in the United Kingdom if and only if he is resident in the United Kingdom and the nature and circumstances of this residence indicate that he has a substantial connection with the United Kingdom (Sch. 1, para 9(2)). An identical rule applies to the identification of domicile within a particular part of the United Kingdom (para 9(3)) with an individual further considered to be domiciled in a particular place of the particular part if he has a substantial connection to the latter and is resident in the former (para 9(4)). The

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term "substantial connection" is left undefined but will be presumed to be fulfilled when an individual has been resident in the United Kingdom, or part thereof, for the last 3 months or more (para 9(6)). This presumption will apply unless the contrary is proven. Paragraph 9(5) addresses the situation where an individual is considered to be domiciled in the United Kingdom but lacks a substantial connection to any particular part, by stating that he is to be treated as domiciled in the part of the United Kingdom in which he is resident. Continuous residence for the entire 3-month period is not a prerequisite for the acquisition of domicile and, in contrast to the traditional understanding of domicile, it is possible for an individual to have more than one domicile under these provisions (*Daniel* v *Foster* (1989)).

If a Scottish court has to determine whether an individual is domiciled in another Member State then Art 59(2) requires that the court must apply the law of this other state. This contrasts with the traditional approach to domicile under which a Scottish court will apply Scots law to determine the domicile of an individual anywhere in the world. The Regulation does not address the determination of the domicile of a person in a state other than a Member State. In the United Kingdom an individual will be domiciled in a third state if he is resident in that state and the nature and circumstances of his residence indicate that he has a substantial connection with that state (para 9(7)). This is an identical test to that applied to determine domicile in the United Kingdom but one which does not utilise the presumption based on 3 months' residence.

Corporations

Unlike the position for individuals, the Brussels I Regulation does provide an autonomous definition of the domicile of corporations and other legal persons. Article 60 provides that such an entity will be domiciled at the place where it has its statutory seat, central administration or principal place of business. As the concept of "statutory seat" is unknown in the United Kingdom and Ireland, Art 60(2) provides that this phrase should be construed as meaning the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. As with the position for individuals, it is possible, under the terms of Art 60, for a juristic person to have more than one domicile.

Special jurisdiction

Although primacy is given to the courts of the defender's domicile, Art 5 of the Regulation permits a claimant to pursue his claim in another forum when there is a close link between the subject-matter of the dispute and

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the alternative forum. The most important grounds of special jurisdiction relate to contract and delict.

Contract

Article 5(1)(a): Article 5(1)(a) of the Brussels I Regulation states that a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. The characterisation of a matter as one "relating to contract" is given an autonomous definition and includes cases where one party denies that a contract exists (*Boss Group Ltd* v *Boss France SA* (1997)). The House of Lords held in *Kleinwort Benson Ltd* v *Glasgow City Council (No 2)* (1999) that an action for restitution for sums paid under a contract subsequently declared void were claims based on unjustified enrichment rather than contract and therefore did not fall within the terms of Art 5(1)(a).

Article 5(1)(a) gives jurisdiction to the courts for the place of performance of the obligation in question, meaning that obligation which forms the basis of the legal proceedings. The place of performance of other independent obligations under the contract will not be relevant in identifying this place (*De Bloos SPRL* v *Bouyer SA* (1976)). It is common for a claim to relate to several distinct contractual obligations with differing places of performance and this could cause any litigation brought under Art 5(1)(a) to become fragmented across jurisdictions. Such a separation of jurisdiction can be avoided if a principal obligation can be identified, with the courts for the place of performance of that principal obligation then having jurisdiction not only over that claim but also over all other claims in relation to obligations that are considered accessory to the principal, even if the accessory obligations have a different place of performance (*Shenavai* v *Kreischer* (1987)). However, the principal obligation must form part of the basis of proceedings (*Bitwise Ltd* v *CPS Broadcast Products BV* (2003)). If a principal obligation cannot be identified because multiple obligations are considered to be of equal importance, a court will have jurisdiction only in respect of the obligation the place of performance of which is within its territory (*Leathertex Divisione Sintetici SpA* v *Bodetex BVBA* (1999)).

Where a single place of performance cannot be identified then any reliance on Art 5(1)(a) will be frustrated. Thus, in *Besix SA* v *Wassereinigungsbau Alfred Kretzschmar GmbH & Co KG* (2003) the ECJ held that Art 5(1) of the Convention, which is in identical terms to Art 5(1)(a) of the Regulation, did not apply to a dispute relating to the breach of a worldwide exclusivity clause as by its very nature this clause could not be said to be performed solely in one place and no single place of performance was therefore identifiable.

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Article 5(1)(b): Article 5(1)(b) of the Regulation was introduced in order to remedy the difficulties that had arisen under the 1968 Brussels Convention, by providing tailored rules applicable to the two most common forms of contracts, those for the sale of goods and the provision of services. Accordingly, for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question is to be, in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered and, in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided. These provisions are to apply "unless otherwise agreed", meaning that the parties are permitted to come to an agreement concerning the place of performance. Moreover, it should be noted that Art 5(1)(b) operates to locate all obligations under a contract within a single country: either the place of delivery or the place where the services were provided. Unlike the position under Art 5(1)(a), there is no specific focus on the place of performance of the precise obligation in question. If Art 5(1)(b) does not apply then Art 5(1)(c) directs that Art 5(1)(a) should be relied on.

Problems have arisen under Art 5(1)(b) concerning the identification of the place of performance when goods are to be delivered to, or services provided in, more than one place. In the case of the sale of goods, the European Court held in *Color Drack GmbH* v *Lexx International Vertriebs GmbH* (2010) that where there are several places of delivery all within the same Member State, the principal place of delivery should be identified and, if such a place was not identifiable, the claimant could bring proceedings in the place of delivery of his choice. In *Wood Floor Solutions Andreas Domberger GmbH* v *Silva Trade SA* (2010) the European Court considered a similar issue but this time in relation to a contract for the provision of services in different Member States. The court held that the place of performance should be construed as referring to the place where the main provision of services is performed. In the present case, concerned with a commercial agency contract, the European Court added that where this place could not be identified then the place of performance would be considered to be the place of the agent's domicile. In *Rehder* v *Air Baltic Corp* (2010), where a passenger wished to claim compensation from an airline for a cancelled flight from Germany to Lithuania, the European Court held that both the place of departure and the place of arrival were equally closely linked to the contract for the provision of services and the claimant could choose to sue in either place.

Difficulties have also arisen as regards the application of Art 5(1)(b) to contracts which combine obligations for both the provision of services and

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for the sale of goods, with these obligations being performed in different Member States. In *Société ND Conseil SA* v *Société Le Meridien Hotels et Resorts World Headquarters* (2007) a contract concerned with the creation of advertising and promotional material, together with the manufacturing and packaging of that material in England before its delivery to the customer in France, was held by the French Cour de Cassation to be one for the provision of services, with the consequence that the place of performance under Art 5(1)(b) was England. In *Car Trim GmbH* v *KeySafety Systems Srl* (2010) the European Court held that a contract could still be classified as a contract for the sale of goods even in circumstances where the supplier is required to produce and manufacture the goods according to the specific requirements of the customer.

Delict

Article 5(3) of the Brussels I Regulation provides that a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict in the courts for the place where the harmful event occurred or may occur. In the case of *Kalfelis* v *Bankhaus Schroder Munchmeyer Hengst & Co* (1988) the European Court declared that an autonomous meaning should be given to the phrase "matters relating to tort, delict or quasi-delict" to the effect that it covered all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Art 5(1). The court in *Kalfelis* further emphasised that any court with jurisdiction under Art 5(3) would have jurisdiction only as regards the delictual element of a claim and would not have jurisdiction with regard to any other matters not based in delict.

The European Court has also been asked to consider the meaning of the phrase "the place where the harmful event occurred or may occur" in light of multi-locality delicts, ie where elements of the delict, most obviously the place of acting and the place of effect, are located in different Member States. In *Handelswekerij GJ Bier BV* v *Mines de Potasse d'Alsace SA* (1978) the pollution of the Rhine in France harmed the plants of a market gardener in the Netherlands and the European Court held that the defender could be sued in either the courts for the place where the damage occurred (the Netherlands) or for the courts of the place of the event giving rise to this damage (France). More recently, in *Zuid-Chemie BV* v *Philippo's Mineralenfabriek NV/SA* (2009), in a case where a defective product was produced in Germany but used by the claimant in the Netherlands, the European Court held that the "place where the damage occurred" referred to the place where the damage occurred as a result of the normal use of the product for which it was intended (the Netherlands), with the place of the

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event giving rise to the damage being where the product was (defectively) produced (Germany).

The ruling in *Bier* has been applied to a claim of damage to reputation in the context of a multi-state defamation in the case of *Shevill* v *Presse Alliance SA* (1995). In this case the European Court held that the phrase "place where the harmful event occurred" should be interpreted as to give jurisdiction to both the courts of the place where a defamatory article was published (in this case, France) and, in addition, the courts of each country in which the publication was distributed and where damage to reputation was sustained. In *Shevill* this meant that the claimant was able to bring proceedings in England even though only 230 copies out of a total number of approximately 252,792 copies were sold within that jurisdiction. The European Court did, however, limit the effect of this decision by holding that only the courts of the place where the publisher was established could award damages for all harm sustained, wherever it occurred. In contrast, if the claim were brought in the courts of a place where the publication was distributed then the courts of that place could award damages only for the harm suffered within the chosen jurisdiction.

The decision in *Shevill* was revisited by the European Court in the context of material published online in the joined cases of *eDate Advertising GmbH* v *X and Martinez* v *MGN Ltd* (2011). In its decision the Court acknowledged that the universality of information disseminated via the internet reduces the effectiveness of distribution as a criterion for establishing jurisdiction and, consequently, the approach taken in *Shevill* required adaptation. Accordingly, the Court held that a person who considered that his personality rights had been infringed by means of content placed online on an internet website could bring an action, first, in respect of all the damage caused, before the courts of either the Member State in which the publisher of the content was established or the Member State in which the centre of his interests is based, or, second, before the courts of each Member State in the territory of which content placed online was or had been accessible, but only in respect of the damage caused in the territory of that Member State

The place where the harmful event occurred is limited to those places where direct damage is suffered and the courts of those places in which the indirect consequences of this damage are suffered, most obviously through financial losses, will not have jurisdiction under Art 5(3). Thus, in *Dumez France SA* v *Hessische Landesbank* (1990) it was held that Art 5(3) did not give the French courts jurisdiction in an action by the French parents of German subsidiary companies against German banks whose conduct had allegedly caused the German subsidiaries to become insolvent, thereby

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causing loss to the parent companies. Jurisdiction under Art 5(3) is thus limited to the place where the harmful event actually occurs, not the place where the claimant feels the adverse consequences of this event. This logic was applied by the English Court of Appeal in the case of *Henderson* v *Jaouen* (2002) in deciding that when a person who had suffered personal injuries resulting from a road accident in France experienced a deterioration of his condition in England this fact was not sufficient to clothe the English courts with jurisdiction.

Other special jurisdictions

Article 5 also provides grounds of special jurisdiction in matters relating to maintenance (Art 5(2)); as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings (Art 5(4)); as regards a dispute arising out of the operations of a branch, agency or other establishment (Art 5(5)); in claims against a person in their role as settlor, trustee or beneficiary of certain trusts (Art 5(6)); and as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight (Art 5(7)). The first of these, jurisdiction in matters relating to maintenance, has now been superseded by Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (see Chapter 10) and has been removed from the recast Regulation. Article 7 provides a special ground of jurisdiction operative in actions relating to liability from the use or operation of a ship.

Co-defendants, third parties and counterclaims

Article 6 permits a person domiciled in a Member State to be sued in another Member State if he is one of a number of co-defendants, a third party in an action on warranty or guarantee, or on a counterclaim arising from the same contracts or facts on which the original claim was based. As regards the first of these grounds, where a person is one of a number of co-defendants, the claims must be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Claims may still be considered closely connected even if they have different legal bases (*Freeport Plc* v *Arnoldsson* (2008)). Proceedings may be consolidated in the domicile of the "anchor" defendant even if this person is not the "main", or most important, defendant; once the requirement of a close connection is established there is no further need to establish separately that the claims were not brought solely for the purpose of removing the main defendant from the

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jurisdiction of the courts of the Member State in which he is domiciled. In *Stewart* v *Trafalgar House Steamship Co Ltd* (2013) Lord Uist, sitting in the Outer House of the Court of Session, ruled that jurisdiction established under Art 6(1) on the basis of an "anchor" defendant will continue even if it is discovered subsequently that an action against this defendant was incompetent. Jurisdiction will be established at the time the action is raised and, once established, could not be lost, whatever might happen to the action.

Protective jurisdiction

The Brussels I Regulation makes special provision for the determination of jurisdiction in matters relating to insurance (Section 3, Arts 8–14), consumer contracts (Section 4, Arts 15–17) and individual contracts of employment (Section 5, Arts 18–21). These bespoke provisions are considered necessary in order to protect the perceived "weaker" party of the insured, the consumer and the employee respectively.

Matters relating to insurance

Articles 8–14 provide an almost exclusive code governing jurisdiction in matters related to insurance as between the insurer and the insured. Most notably, Art 9(1)(b) states that an insurer domiciled in a Member State may be sued in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled. The geographical reach of this provision is enlarged by the "deemed domicile" provision of Art 9(2) which states that an insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. The policyholder, the insured or a beneficiary – all of whom are considered to be the weaker party in matters relating to insurance – thus has the option to sue in his own domicile: a reversal of the principle underlying the general jurisdictional provision of Art 2. Articles 10 and 11(1) provide additional provisions in respect of liability insurance and the insurance of immoveable property.

Article 12(1) provides that an insurer may bring proceedings against a policyholder, the insured or a beneficiary only in the courts of the Member State in which the defendant is domiciled, subject to the exceptions contained in Arts 11(3) and 12(2). Article 13 limits the possibility of these protective rules being circumvented by a "choice of court" agreement under Art 23 (discussed below), by providing that such an agreement will be valid only if it complies with that article. Under the terms of Arts 13(5)

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and 14 these limitations do not apply to cases of marine, aviation and "large risks" insurance. These rules of protective jurisdiction are subject to the rule of Art 24 (discussed below) granting jurisdiction to the court of the Member State before which a defendant enters an appearance. This will continue to be the case under the terms of the recast Regulation but the new Art 26 thereof will require that where the policyholder, the insured or a beneficiary does enter an appearance the court shall ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering an appearance.

Consumer contracts

Articles 15–17 contain special provisions for jurisdiction over consumer contracts in order to protect the perceived economically weaker and legally less experienced party of the consumer.

Article 15 operates as a definitional provision and provides clarity as to the meaning of "consumer" and "consumer contract". Under Art 15(1) a person will be considered to be a consumer if he concluded a contract for a purpose which can be regarded as being outside his trade or profession. If a person concludes a contract for the purchase of goods to be used for mixed purposes which are in part within and in part outside his trade or profession then these special provisions shall not apply unless it can be shown that the trade or professional purpose is so limited as to be negligible in the overall context of the supply (*Gruber* v *Bay Wa AG* (2006)).

Articles 15(1)(a), (b) and (c), in conjunction with Art 15(3), provide clarification with regard to what is, and is not, considered to be a consumer contract. Article 15(1)(c) extends these protective provisions to contracts concluded by the consumer with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State, or to several states including that Member State, and the contract falls within the scope of such activities. The meaning of "directing activities" in the context of electronic consumer transactions was considered by the European Court in the joined cases of *Pammer* v *Reederei Karl Schluter GmbH & Co KG* and *Hotel Alpenhof GmbH* v *Heller* (2011). The Court held that the mere accessibility of a trader's website in the Member State in which the consumer is domiciled does not constitute the directing of activities. Instead, it had to be ascertained whether, before the conclusion of any contract with the consumer, it was apparent from the trader's websites and overall activity that the trader envisaged doing business with consumers domiciled in the Member State of the consumer's domicile in the sense that the trader was minded to conclude a contract with those consumers.

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Once a party is considered to be a consumer who has concluded a consumer contract within the terms of Art 15 then Art 16 provides similar protection to that available in matters relating to insurance. Thus, the consumer may bring proceedings in his "home" court against a party domiciled in a different Member State (Art 16(1)), including a party with a deemed domicile (Art 15(2)), while proceedings may be brought against the consumer in the courts of his domicile only (Art 16(2)), subject to the exceptions found in Arts 15(1) and 16(3). Article 17 limits the enforceability of "choice of court" agreements in order to protect consumers by preventing businesses from inserting jurisdiction clauses that waive or alter these protective rules. Once again, these rules of protective jurisdiction are subject to Art 24, which in the future will include the protective notification requirement under Art 26 of the recast Regulation when the consumer is the defendant.

Individual contracts of employment

Section 5 of the Brussels I Regulation provides an almost comprehensive set of jurisdictional rules, subject to the exceptions found in Arts 18(1) and 20(2), for individual contracts of employment. Under Art 19 an employer domiciled in a Member State, including an employer with a deemed domicile (Art 18(2)), may be sued not only in that state but also in another Member State in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so or, if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated. In contrast, the employee may be sued only in the courts of the Member State in which he is domiciled (Art 20(1)).

As with the other grounds of protective jurisdiction, the enforceability of "choice of court" agreements is limited to circumstances in which such an agreement will not be detrimental to the weaker party, in this case the employee (Art 21). Article 24 is applicable to individual contracts of employment in the same manner as for matters relating to insurance and consumer contracts, including the caveat to be added under the new Art 26 of the recast Regulation when the employee is the defendant. The recast Regulation extends the scope of the protective jurisdiction provisions to actions against employers domiciled outside the European Union and also permits recourse to the co-defendant provisions of the current Art 6(1) (new Art 8(1)) but only in the case of proceedings brought against an employer.

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Exclusive jurisdiction

Article 22 of the Brussels I Regulation identifies a number of circumstances in which the courts of a particular Member State will be considered to have exclusive jurisdiction. Article 22 is mandatory and will prevent recourse to any other jurisdictional ground. In particular, the functioning of Art 22 remains unaffected by any agreements as to jurisdiction or by the submission of the defendant to a jurisdiction other than that identified under Art 22. Article 22 applies regardless of domicile, with the consequence that it applies even if neither party is domiciled in an EU state. Broadly speaking, exclusive jurisdiction is allocated in relation to certain proceedings concerned with immovable property, corporations, public registers, intellectual property and the enforcement of judgments.

"Choice of court" clauses

Under Art 23(1) of the Brussels I Regulation if parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. The Regulation therefore respects party autonomy by permitting the prorogation of jurisdiction in that parties may yield to the jurisdiction of a court to which they would not otherwise be subject. Parties are free to identify any Member State of their choosing, there is no requirement for any pre-existing connection to the chosen forum. Further, it is possible for a "choice of court" clause to be effective even if it does not directly state the identity of the Member State in which proceedings should be brought, as long as the Member State chosen can be identified (*Coreck Maritime GmbH* v *Handelsveem BV* (2000)).

Article 23(1) contains a rebuttable presumption that any court identified in such a clause will have exclusive jurisdiction over the dispute. As this is a rebuttable presumption, parties remain free to agree a non-exclusive jurisdiction clause. If the clause is exclusive then it will operate as to exclude any otherwise applicable ground of jurisdiction under the Regulation apart from those exclusive grounds of jurisdiction under Art 22 (Art 23(5)). As discussed above, the effectiveness of a "choice of court" agreement may also be limited in the context of matters relating to insurance, consumer contracts and individual contracts of employment. An exclusive choice of jurisdiction under Art 23 may also be superseded by Art 24.

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Formal requirements

Before a "choice of court" agreement will be effective it must satisfy certain requirements of formal validity which are detailed in Art 23(1). These are that the agreement must be in writing or evidenced in writing; or in a form which accords with practices which the parties have established between themselves; or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. These requirements are absolute and may not be augmented or abated by the provisions of national laws of Member States (*Elefanten Schuh GmbH* v *Jacqmain* (1981)). Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing" (Art 23(2)). Matters of substantive validity (principally consent) are not currently addressed by the Regulation but under the recast Regulation such matters will be referred to the law of the courts of the Member State identified in the "choice of court" clause.

Parties not domiciled in a Member State

Article 23(1) applies only when at least one of the parties is domiciled in a Member State. Jurisdiction clauses in favour of the courts of a Member State which are entered into by parties neither of whom are domiciled in a Member State are governed by Art 23(3). Under this provision a choice of a court or the courts of a Member State by such parties will be effective to prevent the courts of other Member States taking jurisdiction. However, there is an important difference between Art 23(1) and Art 23(3) in that, under the former, the court identified in such a clause *must* accept jurisdiction, whereas, under the terms of the latter, a court identified thereunder may decline jurisdiction should it so wish. This distinction will disappear under the recast Regulation with the scope of what is currently Art 23(1) being expanded to apply to all parties, regardless of domicile.

2005 Hague Convention on Choice of Court Agreements

Article 23 applies only when a "choice of court" agreement identifies a court or the courts of a Member State, and this restriction remains in the recast Regulation. Consequently, if a "choice of court" agreement is made in favour of a court or the courts of a jurisdiction outside the European Union then Art 23 will not apply. Such an agreement (and certain others) may in the future be regulated by the terms of the Hague Convention of 30 June 2005 on Choice of Court Agreements. This Convention has been acceded to by Mexico and signed by the United States and the European

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Union but is yet to come into force. After coming into force, the Hague Convention will apply in all cases where one or more parties reside in a Contracting State other than an EU Member State.

Submission

Article 24 states that, apart from jurisdiction derived from other provisions of the Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. Accordingly, if a defendant submits to the jurisdiction of the court then that court will be permitted to hear the dispute even if it would not otherwise have jurisdiction under the Regulation. There are two limits on this jurisdictional basis. First, it does not apply when the defendant enters an appearance to challenge or contest the jurisdiction of the court, even if at the same time he makes submissions in his defence on the substance. Second, the principle of submission does not apply where another court has exclusive jurisdiction by virtue of Art 22. In contrast, Art 24 can be relied upon even if a valid "choice of court" agreement exists under Art 23. In these circumstances submission under the former overrides an earlier agreement under the latter. As identified above, the recast Regulation will introduce a protective requirement of notification in matters relating to insurance, consumer contracts and individual contracts of employment when the submitting party is the perceived weaker party.

Conflicts of jurisdiction

It is possible under the Brussels I Regulation that the courts in two or more Member States will be allocated jurisdiction. For example, the courts of one state may have jurisdiction under the Art 2 ground of the defendant's domicile while the courts in another state may be able to take jurisdiction under one of the Art 5 grounds of special jurisdiction. Indeed, a multiplicity of jurisdictions may even be possible within the same article. If a choice of jurisdiction is apparent then the claimant may choose the Member State in which to initiate his action but the risk remains that proceedings in relation to what is essentially the same dispute and between the same parties may be commenced in two or more jurisdictions. If these proceedings are allowed to complete this could potentially lead to different courts giving conflicting and irreconcilable judgments, not to mention the increased litigation costs of the parties.

Article 27 of the Regulation attempts to limit potential conflicts of jurisdiction by adopting the *lis pendens* system of jurisdiction allocation which places a significant emphasis on the priority of process. This article states that where proceedings involving the same cause of action and between the

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same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. If the jurisdiction of the court first seised is established then any court other than the court first seised must decline jurisdiction in favour of that court. Article 30 provides clarity as regards when a court shall be deemed to be seised. This article applies regardless of the domicile of the parties.

The "first come, first served" rule of Art 27 is one of strict priority and it is important to note its mandatory nature in that the court first seised, once its jurisdiction is established, must accept jurisdiction. Similarly, a court seised later must stay it proceedings until the court first seised has determined whether or not it has jurisdiction. The European Court has held that Art 27 will apply even if there is an exclusive "choice of court" agreement in favour of a court seised later (*Erich Gasser GmbH* v *MISAT Srl* (2005)). The court identified in such a clause will consequently be required to stay its own proceedings until the court first seised has declared that is has no jurisdiction. This decision has been criticised for encouraging a party to adopt delaying tactics by commencing proceedings, often of a negative nature, before a court other than that identified in a jurisdiction clause, in order to delay the determination of the dispute in the previously chosen forum. This problem is exacerbated by the subsequent decision of the European Court in *Turner* v *Grovit* (2005) in which the court held that the use of anti-suit injunctions to prevent vexatious litigation constituted an interference with the jurisdiction of a foreign court and was therefore incompatible with the Regulation.

These criticisms have been addressed in the recast Regulation with the new instrument reversing the decision in *Erich Gasser GmbH* v *MISAT Srl* by giving priority to the court specified in a jurisdiction clause, regardless of whether or not it is the court first seised. Accordingly, the new Art 31(2) states that where an agreement confers exclusive jurisdiction on the court of a Member State then, once this court is seised, any court of another Member State shall stay its proceedings until such time as the chosen court declares that it has no jurisdiction. The recast Regulation thus reverses the priority of process so that, in the future, a "choice of court" agreement will take precedence over the "first in time" rule.

Article 28 applies to actions that are considered to be related to one another even if they do not involve the same cause of action and may be between different parties. In these circumstances any court other than the court first seised may stay its proceedings and possibly decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. Actions are deemed to be related

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where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In contrast to Art 27, under Art 28 a notable amount of discretion is conferred on the later court to decide whether the actions are related and, if so, whether proceedings should be stayed.

Forum non conveniens

In contrast to the strict system of *lis pendens* enforced in the Brussels I Regulation, under the common law of Scotland the doctrine of *forum non conveniens* permits a defender to request that a court should decline to exercise jurisdiction because there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice (*Sim* v *Robinow* (1892)). A plea of *forum non conveniens* may be made whether or not proceedings have already been initiated abroad. The burden of proof is on the defender to show that there is a competent and more appropriate forum available elsewhere. The appropriateness of the alternative forum will be considered in order to determine whether it is the natural forum with the most real and substantial connection to the dispute in terms of the convenience of the parties, the availability of witnesses, the applicable law, whether proceedings have already been initiated in the identified court, or if related proceedings are under way in either court. The existence of an exclusive jurisdiction clause in favour of a particular court is considered to be a very strong factor in this determination. If the existence of a clearly more appropriate forum is established then a plea of *forum non conveniens* will be accepted unless the pursuer can show that requiring him to litigate in this forum would be unjust. The pursuer could thus argue that he would be denied justice in the clearly more appropriate forum because of issues such as the cost of litigation, procedural delays, or concerns over the competence or fairness of the identified courts. The mere fact that this alternative forum may not be as advantageous to the pursuer is not enough to constitute a denial of justice.

Reliance on the doctrine of *forum non conveniens* will be competent only where to do so is not inconsistent with what is now the Brussels I Regulation or the Lugano Convention (CJJA 1982, s 49). A plea of *forum non conveniens* can therefore be made in cases falling within Sch 4 to the 1982 Act (intra-UK cases) and s 22(1) of the 1982 Act states that nothing in Sch 8 (the residual Scottish rules) shall prevent the court from declining jurisdiction on the ground of *forum non conveniens*. However, the European Court has held that a court of a Member State is precluded from declining the jurisdiction conferred on it by Art 2 on the ground that a court of a

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non-Member State would be a more appropriate forum, even if the jurisdiction of no other Member State is in issue and the proceedings have no connection to any other Member State (*Owusu* v *Jackson* (2005)).

Under the recast Regulation the effects of the decision in *Owusu* will be ameliorated partially by the introduction of elements of the doctrine of *forum non conveniens* into the Brussels regime when an action is pending before the court of a (non-EU) third state at the time when a court in a Member State is seised of an action which is related to the action in the court of the third state. The new Art 34 thus gives a Member State court a limited discretion to stay its proceedings when proceedings have been initiated first in a third state but only when the requirements of that article are met in that it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; it is expected that the court of the third state will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. Recital (24) provides guidance concerning the circumstances relevant to the proper administration of justice.

INTRA-UNITED KINGDOM CASES

Section 16 of the CJJA 1982 applies a modified form of the jurisdictional provisions of the Brussels I Regulation as between the different parts of the United Kingdom. These modified rules are set out in Sch 4 (as amended by the Civil Jurisdiction and Judgments Order 2001, Sch 2) and apply when the subject-matter of the proceedings is within the scope of the Regulation and the defendant is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Art 22 of the Regulation (exclusive jurisdiction regardless of domicile). Schedule 4 has two main functions in that it will provide identification of a specific territorial unit when the Brussels I Regulation allocates jurisdiction to the United Kingdom generally and it also applies in cases which are internal to the United Kingdom but are related to more than one territorial unit thereof. Although Sch 4 appears very similar to the terms of the Regulation, there are four key differences between the provisions of Sch 4 and the corresponding provisions of the Regulation, as discussed earlier in this chapter:

(1) The rules of special jurisdiction in matters relating to contract refer to the courts for the place of performance of the obligation in question and do not include the bespoke provisions under the

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Regulation relating to contracts for the sale of goods or the provision of services (Sch 4, r 3(a)).

(2) The articles in the Regulation regulating jurisdiction in matters relating to insurance are not replicated in Sch 4.

(3) In relation to "choice of court" agreements, Sch 4, unlike Art 23 of the Regulation, contains no presumption of exclusivity, nor requirements as to writing (Sch 4, r 12).

(4) As identified above, the provisions in the Regulation relating to *lis pendens* are excluded from Sch 4.

Essential Facts

- There are four regimes governing the jurisdiction of the Scottish courts: the Brussels I Regulation; the 2007 Lugano Convention; the Civil Jurisdiction and Judgments Act 1982, Sch 4; and the Civil Jurisdiction and Judgments Act 1982, Sch 8.
- Article 2 of the Brussels I Regulation provides that the general ground of jurisdiction is the domicile of the defendant. Domicile is given a specific definition for both individuals (CJJA 1982, s 41 as amended by the Civil Jurisdiction and Judgments Order 2001, Sch 1, para 9) and companies (Art 60).
- Article 5 provides alternative grounds of special jurisdiction when there is a close link between the subject-matter of the dispute and the forum – most notably in matters relating to contract and delict.
- Grounds of protective jurisdiction apply in matters relating to insurance (Arts 8–14), consumer contracts (Arts 15–17) and individual contracts of employment (Arts 18–21).
- Article 22 identifies a number of circumstances in which the courts of a particular Member State will be considered to have exclusive jurisdiction.
- Article 23 permits the prorogation of jurisdiction of a court or courts of a Member State by parties. They is no requirement for any pre-existing connection to the chosen forum.
- Article 24 will clothe the court of a Member State with jurisdiction should the defendant enter an appearance, provided that such appearance was not solely or primarily made in order to challenge or contest that jurisdiction.
- The Regulation attempts to limit potential conflicts of jurisdiction by adopting a "first come, first served" rule under Art 27.

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- In cases falling outside the ambit of the Brussels I Regulation and the Lugano Convention, the Scottish courts may utilise the doctrine of *forum non conveniens* in order to identify a more appropriate forum.

Essential Cases

De Bloos SPRL v Bouyer SA (1976): the "place of performance of the obligation in question" in Art 5(1)(a) refers to the obligation which forms the basis of the legal proceedings.

Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA (1978): the "place where the harmful event occurred or may occur" in Art 5(3) refers to both the place where the damage occurred and the place of the event which gives rise to this damage.

Shevill v Presse Alliance SA (1995): in a claim of damage to reputation in the context of a multi-state defamation the claimant has the option under Art 5(3) of bringing his action in either the courts of the place of publication or in the courts of any place in which the publication was distributed and where damage to reputation is sustained.

Dumez France SA v Hessische Landesbank (1990): Art 5(3) is limited to the place where the harmful event actually occurs, not the place where the claimant feels the adverse consequences of this event.

Pammer v Reederei Karl Schluter GmbH & Co KG (2011): the mere accessibility of a trader's website in a Member State does not, by itself, constitute a directing of activities for the purposes of Art 15.

Erich Gasser GmbH v MISAT Srl (2005): Art 27 (priority of process) will apply even if the court seised first was seised in violation of an exclusive "choice of court" agreement.

Owusu v Jackson (2005): if a court assumes jurisdiction under the Regulation then it is precluded from utilising the doctrine of *forum non conveniens*.

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4 RECOGNITION AND ENFORCEMENT OF FOREIGN DECREES

The precise rules for the recognition and enforcement in the United Kingdom of judgments emanating from the courts of another country are determined by the geographical location of what is referred to as the court of origin. If that court is situated in the territory of an EU or EFTA Member State then the recognition and enforcement provisions of the Brussels I Regulation or the 2007 Lugano Convention are applicable respectively. If the court of origin is situated in a jurisdiction to which the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies then judgments therefrom will be subject to the enforcement procedure contained in the relevant Act. The recognition and enforcement of the judgments of a court of origin which is situated in a jurisdiction that is neither an EU/EFTA Member State, nor subject to the terms of the 1920 Act or 1933 Act, will be determined under the common law. Provision also exists under the Civil Jurisdiction and Judgments Act 1982 for the recognition and enforcement of a judgment granted in one part of the United Kingdom in the other parts thereof. This chapter will consider each of these regimes.

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AT COMMON LAW

Enforcement via the common law will be necessary when a judgment originates from a foreign country which is not bound by the Brussels I Regulation/the 2007 Lugano Convention, nor linked by reciprocal arrangements with the United Kingdom under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Before a foreign decree *in personam* will be enforced in Scotland the foreign court of origin must have had jurisdiction to grant the decree. Once jurisdiction is established then the judgment will be recognised unless one of the limited number of defences to recognition can be established.

Jurisdiction

It is fundamental to the recognition and enforcement in Scotland of a foreign judgment that the court of origin is regarded by Scots law as having had jurisdiction over the action to which the judgment relates. This question will be determined not with reference to the domestic understanding

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of jurisdiction (whether of the court of origin or the Scottish courts) but according to the classification of jurisdiction in an international context. By this standard, certain grounds of jurisdiction will be considered acceptable while others will be considered exorbitant and thus unacceptable. The former category includes jurisdiction on the basis of the residence or presence of the defender, with temporary physical presence considered sufficient (*Adams* v *Cape Industries Plc* (1990)). Jurisdiction will be granted over a corporate defender if the corporation carries on business within the territory of the court, although the mere fact that a company has a website accessible in a particular country does not automatically mean that it is carrying on business there (*Lucasfilm Ltd* v *Ainsworth* (2009)). Jurisdiction will also be accepted if taken on grounds of prorogation, submission or reconvention (counterclaims). In contrast, jurisdiction exercised on the basis of domicile (in its traditional form), nationality, the ownership of immoveable property (in actions unrelated to that property) or the arrestment of moveables would not be recognised under the common law of Scotland.

Defences

Even if a foreign court has taken jurisdiction on an acceptable basis, the subsequent decree may still be refused recognition under the common law on some other ground. First, a foreign decree resulting from a penal or revenue action will not be enforced in Scotland. The Protection of Trading Interests Act 1980 also prohibits the enforcement under the common law of those judgments identified within that Act. Second, a foreign judgment may also be challenged on the ground of fraud. Such challenge may allege that the fraudulent behaviour was attributable to the court, the other party to the proceedings, or both. Third, enforcement could be resisted where the decree is contrary to natural justice because of some form of procedural irregularity, although a mere difference to the procedural rules applicable in Scotland will not be sufficient. Fourthly, a foreign judgment could be challenged on the ground of public policy.

A foreign decree will be enforced in Scotland only if it is considered to be "final". A decree which is interlocutory and liable to variation or alteration will not be enforced. However, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher court in the country of origin but it must be final and unalterable in the court which pronounced it (*Nouvion* v *Freeman* (1889)). It is important to note that it is not a relevant objection to a foreign judgment that the court came to a mistaken conclusion, either on the facts or on the law. The merits of a foreign decree will not normally be examined, except in cases where fraud

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is alleged. If a party believes that a foreign case was decided incorrectly then this should be challenged under the foreign legal system, not as a means by which to resist enforcement in Scotland.

Enforcement

At common law, a foreign decree is enforced in Scotland by raising an action for decree conform in the Court of Session. Decree conform may be granted only against a person who was a party to the foreign proceedings and who is personally liable under that judgment by the law of the foreign court. An action for decree conform is incompetent when the judgment which it is sought to enforce may be enforced under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Brussels I Regulation, the 2007 Lugano Convention, or the intra-UK scheme under the Civil Jurisdiction and Judgments Act 1982. A decree conform may be sought even if the foreign judgment comes within the terms of the Administration of Justice Act 1920, but the pursuer may not be able to recover the expenses of the action (s 9(5)). A foreign decree may also be founded upon for purposes of *res judicata* as a defence to an action on the same ground in Scotland.

STATUTORY SCHEMES FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Apart from the common-law method of obtaining a decree conform, a foreign judgment may be enforced in Scotland by compliance with those statutory procedures which facilitate the registration and subsequent enforcement of a foreign judgment as though it were a Scottish judgment. The two most important statutes are the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The former applies only to Commonwealth countries whereas the latter applies also to judgments of courts in politically foreign countries. Both Acts are dependent upon reciprocity.

Administration of Justice Act 1920

Part II of the Administration of Justice Act 1920 provides for the enforcement within Scotland, and other parts of the United Kingdom, of certain judgments of the superior courts of Commonwealth countries which make reciprocal provisions for the enforcement of the judgments emanating from the corresponding courts of the United Kingdom. The Act applies only to countries specified by Orders in Council and, while no new countries may now be specified, the extant provisions remain in force (ss 13 and 14). The

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1920 Act applies only to judgments or orders made by a superior court in civil proceedings whereby a sum of money is made payable (s 12(1)). Such a judgment may be enforced in Scotland on application to the Court of Session, with the Scottish court retaining a discretion to register and enforce the foreign judgment only if it thinks it just and convenient to do so (s 9(1)).

A foreign judgment may not be registered if the original court acted without jurisdiction (s 9(2)(a)); the defender, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court (s 9(2)(b)); or the defender was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court (s 9(2)(c)). An external judgment that otherwise comes within the terms of the 1920 Act may also be refused recognition and enforcement if it was obtained by fraud (s 9(2)(d)); if an appeal is pending, or the defender is entitled and intends to appeal (s 9(2)(e)); or if it is contrary to public policy (s 9(2)(f)).

When the foreign judgment is registered it will then be enforced as a decree of the Court of Session, with the same force and effect as if it had been a judgment originally obtained in that court (s 9(3)(a)). The court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but only in so far as relates to execution (s 9(3)(b)).

Foreign Judgments (Reciprocal Enforcement) Act 1933

The 1933 Act provides further provision for the enforcement within the United Kingdom of the judgments of the courts of foreign countries, including, but not limited to, those of the Commonwealth. Whereas the 1920 Act applies only to the judgments of superior courts, the 1933 Act makes reciprocal enforcement of the judgments of any recognised court within a foreign country, with both the country and the recognised court, or courts, specified by Orders in Council. Such an Order will be made only after the Crown is satisfied that substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom (s 1). The 1933 Act remains applicable to states party to the Brussels I Regulation and the 2007 Lugano Convention in relation to matters to which the Regulation and Convention do not apply.

Following registration under the 1933 Act, a foreign judgment will be enforced in Scotland as if it were a Court of Session decree. Before registra-

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tion will be permitted the judgment must be either final and conclusive or require the judgment debtor to make an interim payment to the judgment creditor. A judgment is considered final and conclusive notwithstanding that it may be subject to appeal or that an appeal is pending against it (s 1(3)). In addition, the judgment must require the payment of a sum of money, not being a sum payable in respect of taxes or other charges of a like nature, or in respect of a fine or other penalty (s 1(2)). A judgment from a recognised court will not be enforced where it is given on appeal from a court which is not a recognised court or if its purpose was for the enforcement of a judgment given in a third country (s 1(2A)).

Section 4(1)(a) contains grounds upon which a registration shall be set aside, including: where the court of origin had no jurisdiction; the defender did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; the judgment was obtained by fraud; or the enforcement of the judgment would be contrary to public policy in the country of the registering court. As regards jurisdiction, s 4(2) and s 4(3) detail when a foreign court will, and will not, be deemed to have had jurisdiction. A foreign judgment to which the 1933 Act applies may not be enforced except by way of registration under the Act (s 6). Unlike the position under the 1920 Act, where registration is discretionary, registration under the 1933 Act is a matter of right, provided that the judgment has not been wholly satisfied or it could not be enforced by execution in the country of the original court (s 2(1)).

RECOGNITION AND ENFORCEMENT OF JUDGMENTS UNDER THE BRUSSELS I REGULATION AND THE 2007 LUGANO CONVENTION

The jurisdictional provisions of the Brussels I Regulation were discussed in Chapter 3. The requirement of all Member States to adopt uniform grounds of jurisdiction under the Regulation is reflected in the permissiveness of the rules of recognition and enforcement contained in Arts 32–56 which are designed to ensure that a judgment given in one Member State will move freely throughout the European Union. The principle on which the Regulation is based is the desire to minimise the obstacles to the recognition and enforcement of judgments issued from the courts of Member States, notably by restricting the ability of the court of a Member State in which enforcement is sought to review the jurisdiction of the court of origin. The same principle underpins the 2007 Lugano Convention, the text of which is aligned with that of the Brussels I Regulation, meaning that what is said below regarding the latter instrument applies *mutatis mutandis* to the former.

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The recognition and enforcement rules of the Regulation apply only to judgments of Member States within the scope of the Regulation as defined in Art 1. The Regulation applies to any species of judgment, not only money judgments, including interim orders as well as final orders. Unlike the position under the Acts of 1920 and 1933, there is no restriction of the provisions to the judgments of certain courts and Art 1(1) states that the Regulation applies whatever the nature of the court or tribunal. The enforcement procedure under the Regulation applies to all judgments within its scope, whether or not they are against persons domiciled in a Member State and whether or not the court of origin assumed jurisdiction on a ground set out in the Regulation or on a residual ground of jurisdiction found in its national law. In light of this, Art 59 of the 1968 Brussels Convention permitted Contracting States to enter a binding agreement with a non-Contracting State to the effect that it would not recognise judgments given in other Contracting States against defendants domiciled or habitually resident in that non-Contracting State when the court of origin based its jurisdiction on a residual ground. The effect of such agreements is preserved under the Regulation, but no new agreements may be made (Art 72).

Recognition

Article 33(1) of the Regulation provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. Articles 34 and 35 provide limited grounds for the refusal of recognition. Article 34(1) provides that a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. Recourse to public policy will be permitted only in exceptional circumstances where recognition would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought in as much as it infringes a fundamental principle of that state (*Bamberski* v *Krombach* (2001)). The world "manifestly" did not appear in the 1968 Brussels Convention but was included in the Regulation to emphasise the exceptional nature of the circumstances justifying refusal under this ground. The court in which recognition is sought may not review the merits of the judgment (Art 36), nor apply the test of public policy to the grounds of jurisdiction relied on by the court of origin (Art 35(3)).

Article 34(2) provides that a judgment shall not be recognised where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for

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his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so. Article 34(3) and (4) permit non-recognition of a judgment when it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought or when it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35(1) requires Member States to refuse to recognise a judgment which conflicts with the mandatory provisions applicable in matters relating to insurance consumer contracts, or the grounds of exclusive jurisdiction discussed in the previous chapter. However, even in these circumstances, the court in which recognition is sought will still be bound by the findings of fact on which the court of origin based its jurisdiction.

Enforcement

A judgment given in a Member State and enforceable in that state shall be enforced in Scotland when, on the application of any interested party, it has been registered for enforcement (Art 38). This terminology differs slightly from the general requirement applicable to all other Member States that a judgment will be enforceable once it has been "declared enforceable" (known as the *exequatur* procedure). There is no equivalent of a declaration of enforceability in the United Kingdom, so reference is made instead to the judgment being "registered for enforcement".

Registration of the judgment is a prerequisite to enforcement but the procedure of registration is essentially of an administrative nature, with the party against whom enforcement is sought not being entitled to be heard at this stage of the proceedings (Art 41). This party does not even have the right to be informed of the application for registration, with such absence of notice being deliberate in order to preserve the element of surprise and prevent the removal of assets from the Member State in which enforcement is sought. Once registered, the judgment will have the same force and effect as if it had originally been given by the registering court, with enforcement powers and proceedings available on that basis. Articles 43–46 detail the circumstances in which an appeal can be made against a declaration of enforceability, with Art 45 providing that a court considering an appeal may set aside registration only on one of the grounds specified in Arts 34 and 35 (discussed above in the context of recognition).

One of the key changes to be introduced under the recast Regulation is the abolition of *exequatur* as a necessary prior step to enforcement. Accordingly,

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under the recast Regulation a judgment given in one Member State will be recognised in all other Member States without any specific procedure and, if enforceable in the Member State of origin, will be enforceable in the other Member States without any declaration of enforceability (registration for enforcement in the United Kingdom) being required. This move follows similar developments in other areas in which the European Union has passed specialist measures to facilitate enforcement without *exequatur* in relation to uncontested claims (Regulation 805/2004); a special European order for payment procedure (Regulation 1896/2006); and a European small claims procedure (Regulation 861/2007).

RECIPROCAL ENFORCEMENT WITHIN THE UNITED KINGDOM

Sections 18 and 19 of and Schs 6 and 7 to the Civil Jurisdiction and Judgments Act 1982 provide for the enforcement in one part of the United Kingdom of a judgment emanating from another part thereof where that judgment falls within the ambit of ss 18 and 19. Schedule 6 applies to money provisions while Sch 7 applies to non-money provisions. Enforcement is by means of registration, in the court in which enforcement is sought, of a certificate granted by the court of origin. Registration is in the Court of Session only, even if the court of origin was an inferior court. Registration under either Schedule shall be set aside if the registration was contrary to the provisions of the applicable Schedule, and may be set aside if the registering court is satisfied that the matter in dispute had previously been the subject of a judgment by another court having jurisdiction in the matter (Sch 6, para 10; Sch 7, para 9).

Essential Facts

- The rules applicable to the recognition and enforcement of foreign decrees are determined by the geographical location of the court of origin.
- Enforcement via the common law will occur only if the foreign court is considered to have had jurisdiction over the action to which the judgment relates. Jurisdiction is determined on an international, rather than a domestic, basis.
- A statutory scheme for the reciprocal recognition and enforcement of foreign judgments exists under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

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- The Brussels I Regulation provides permissive rules of recognition and enforcement in order to facilitate the free movement of judgments between Member States. Equivalent provisions are included in the 2007 Lugano Convention.
- The reciprocal enforcement of judgments between the different parts of the United Kingdom is governed by the Civil Jurisdiction and Judgments Act 1982, ss 18 and 19 and Schs 6 and 7.

Essential Cases

Adams v Cape Industries Plc (1990): temporary physical presence is considered an acceptable basis of jurisdiction under the common law.

Nouvion v Freeman (1889): before a foreign judgment will be recognised and enforced under the common law it must be final and unalterable in the court of origin.

Bamberski v Krombach (2001): recourse to the public policy exception of the Brussels I Regulation is permitted only when recognition would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought in as much as it infringes a fundamental principle of that state.

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5 CHOICE OF LAW IN CONTRACT

The rules applicable to choice of law in contract are now found in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, commonly referred to as the "Rome I Regulation". This Regulation completely replaces the earlier Rome Convention on the Law Applicable to Contractual Obligations 1980, commonly referred to as the "1980 Rome Convention" and brought into force in the United Kingdom by the Contracts (Applicable Law) Act 1990. The 1980 Rome Convention came into effect in the United Kingdom on 1 April 1991 and applied to contracts concluded between that date and 16 December 2009. The Rome I Regulation applies to contracts concluded as from 17 December 2009. Thus, although replaced as from 17 December 2009, the 1980 Rome Convention will continue to be relevant for the foreseeable future, as its provisions remain applicable to disputes relating to contracts concluded before that date. This chapter will primarily consider the provisions of the Regulation but reference will be made to the terms of the Convention as and when appropriate. The common law remains applicable to contracts concluded before 1 April 1991 and to contracts concluded after that date but which fall outside the scope of the Convention or the Regulation. The limited relevance of these common-law rules means that they will not be considered in this chapter.

SCOPE

The scope of the Rome I Regulation is stated positively in Art 1(1) in that it shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. Although the equivalent article of the 1980 Rome Convention uses a slightly different formulation, there would appear to be no material difference in the two provisions. In order to ensure consistency, the term "civil and commercial matters" is to be interpreted in the same way as under the Brussels I Regulation. The term "contractual obligations" is left undefined and the question as to whether or not an obligation is considered to be a contractual one will be regarded as a matter to be decided by the European Court as a matter of EU law. Article 1(1) also limits the scope of the Regulation by stating that it shall not apply to revenue, customs or administrative matters. Again, this phrase

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is to be interpreted consistently with the identical wording found in the Brussels I Regulation. The scope of the Regulation is also narrowed by the express exclusion of certain matters as detailed in Art 1(2) and (3). Article 2 states that the law specified by the Regulation shall be applied whether or not it is the law of a Member State. Under this principle of universal application the Regulation, and the Convention before it, does not discriminate in its selection of the applicable law and the law of a non-EU Member State will be treated identically to the law of an EU Member State.

A composite state, such as the United Kingdom, is not required to apply the Regulation to internal conflicts between the laws of different territorial units within that state (Art 22(2)). However, in the interests of simplicity and uniformity of application, the United Kingdom has opted to extend the rules of the Regulation to intra-UK conflicts (for Scotland, see the Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (SSI 2009/410)).

APPLICABLE LAW BY CHOICE

Recital (11) of the Rome I Regulation states that "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations". The priority of party autonomy is embodied in Art 3(1) which states that "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case". It is important to note that, whether a governing law is chosen by express provision or by implication, parties are completely free to choose this law and there is no requirement that the law have some extant connection to the parties or the contract, ie parties are free to choose a wholly neutral law, otherwise entirely unconnected to their circumstances.

Express choice

Parties can choose expressly the law to govern their contract via the inclusion of a clause in the contract stating that the contract is to be governed by the law of a particular country. Choice of the governing law is limited to the law of a country. In the context of composite states, each territorial unit thereof will be considered as a country for purposes of identifying the applicable law (Art 22(1)). Parties may not choose a religious law, such as Sharia law, to govern their contract (*Beximco Pharmaceuticals Ltd* v *Shamil Bank of Bahrain EC* (2003)).

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Implied choice

In many cases a contract may not include an express choice of law but it is nevertheless clear that the parties assumed or intended that the law of a particular country would govern their contract. Such an implied choice will be respected if the choice can be "clearly demonstrated by the terms of the contract or the circumstances of the case". Under the equivalent provision of the Convention it is stated that the choice must be "demonstrated with reasonable certainty". Although not express, a choice of a particular law must be just that – a choice – and a court is not permitted to infer a choice of law that it believes the parties would have chosen, had they applied their minds to the question.

Guidance as to the factors relevant in determining whether the parties have made an implied choice of law is given in the Report on the Convention on the Law Applicable to Contractual Obligations by Professors Mario Giuliano and Paul Lagarde, commonly referred to as the Giuliano–Lagarde Report. This guidance is non-exhaustive but refers to issues such as reliance on a standard form governed by a particular system of law, a previous course of dealing between the parties under contracts that were governed by an express choice of law, an express choice of law made in related transactions between the parties, or the choice of a place where disputes are to be settled by arbitration (p 16). For example, in the case of *Egon Oldendorff* v *Libera Corp (No 2)* (1996) it was held, relying on the terms of the Giuliano–Lagarde Report, that where an international contract between a German company and a Japanese company expressly provided for arbitration in London and was governed by a well-known English standard form of charterparty that, in the absence of an express choice of law, the parties had impliedly chosen English law.

In its identification of those factors relevant in determining an implied choice of law, the Giuliano–Lagarde Report also states that the choice of a particular forum may show in no uncertain manner that the parties intended the contract to be governed by the law of that forum, subject to the other terms of the contract and all the circumstances of the case. During the drafting of the Rome I Regulation it was proposed by the Commission that a presumption should be introduced to the effect that if the parties had chosen the courts of a Member State to govern any disputes arising out of the contract they would be presumed to have chosen the law of that Member State as the governing law. This proposal was not accepted but in Recital (12) to the Regulation it is stated that "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated".

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Division of or change in the governing law

The last sentence of Art 3(1) provides that "By their choice the parties can select the law applicable to the whole or to part only of the contract". This allows *dépeçage* – a splitting of the applicable law. This choice is limited by the fact that it must be logically consistent in that each separate choice of law must relate to a part of a contract which is capable of being governed by a different law without giving rise to contradictions. If inconsistency does occur then there is no effective choice by the parties and reference must be made to the terms of Art 4 in order to identify the applicable law. Parties may at any time change the governing law of the contract, either by altering a previously agreed choice or by making a choice where previously they had not done so (Art 3(2)). Any change in the applicable law that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties.

Freedom of choice and mandatory rules

The freedom of choice given to parties under Art 3(1) to choose the law applicable to their contract is not absolute and, instead, Art 3(3) operates to prevent parties from evading the mandatory rules of the system of law with which the contract and the parties are otherwise wholly connected. Article 3(3) thus states that "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement". For example, if all elements relevant to the situation are located in Scotland, the parties will be unable to avoid the mandatory rules of Scots law by agreeing that the law of France is to govern the contract. While this choice will be respected and French law will indeed be the governing law it will be applied subject to the mandatory rules of Scots law. Article 3(3) applies only when all elements relevant to the situation are located in a single country other than the country chosen. If an element can be located elsewhere then Art 3(3) has no application. For the purposes of Art 3(3), the choice of law clause itself and, if present, a "choice of court" clause, are not elements relevant to the situation. In *Emeraldian Ltd Partnership* v *Wellmix Shipping Ltd* (2010), a case decided under Art 3(3) of the 1980 Rome Convention which contains slightly different wording but is ultimately of the same effect, a choice of English law under a contract with very strong connections to China was not subject to the mandatory rules of the latter, as the beneficiary of the contract in issue was a Liberian company.

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Similar to Art 3(3), Art 3(4) operates to prevent parties avoiding an otherwise applicable mandatory rule of Union law through choosing the law of a third state by providing that "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement". It is important to note the wider scope of Art 3(4) in that it applies even when the elements may be located in different countries, as long as those countries are all Member States and the choice is of the law of a third state.

APPLICABLE LAW IN THE ABSENCE OF CHOICE

The Convention

Article 4 of both the Convention and the Regulation determines the law applicable to a contract in the absence of a choice by the parties. Unlike the position with Art 3, there is a significant divergence between Art 4 of the Convention and its counterpart in the Regulation, meaning that the provisions of each instrument must be considered separately. Article 4(1) of the Convention states that "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected". A second sentence provides for the application of *dépeçage*.

Characteristic performance

Article 4(2) attempts to make the identification of the law of the country to which the contract is most closely connected more certain by providing that

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

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Article 4(3) provides a special presumption applicable when the subject-matter of the contract is a right in immovable property or a right to use immovable property; while Art 4(4) supplies a special presumption applicable when the contract is for the carriage of goods.

The "performance which is characteristic of the contract" presents little difficulty in the case of unilateral contracts under which the characteristic performance should be clear. In bilateral contracts whereby the parties undertake mutual reciprocal performance, with the counter-performance of one of the parties usually being in the form of a payment of money, it is the performance for which this payment is due, and not the payment itself, which usually constitutes the characteristic performance (for examples of which, see the Giuliano–Lagarde Report, p 20). Thus, in the most common examples of a contract for the sale of goods or the provision of services, the characteristic performance will be the provision of these goods or services. The identification of the characteristic performance will be more difficult, if not impossible, when a complex contract is at issue and recourse may have to be made to Art 4(5), under which the presumption of Art 4(2) will not apply and attention will return to Art 4(1) and the identification of the country with which the contract is most closely connected

The party who is to effect the characteristic performance

Once the characteristic performance is identified this performance must be connected to a particular country. The Convention achieves this by anchoring the characteristic performance in the country to which the party who is to effect this performance is connected. Thus, in a contract for the sale of goods this party will be the seller and in a contract for the provision of services this party will be the service provider. If this party was acting in the course of his trade or profession then it is to be presumed that the country with which the contract is most closely connected is the country in which the principal place of business is situated or, where, under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. If the party to effect the characteristic performance was not acting in the course of his trade or profession then it is to be presumed that the country with which the contract is most closely connected is that in which, at the time of the conclusion of the contract, he had his habitual residence or, where that party is a body corporate or unincorporate, its central administration.

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Disregarding the presumption

Article 4(2) of the Convention applies subject to Art 4(5) which states that "Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country". Accordingly, the Art 4(2) presumption of closest connection will not apply where either the characteristic performance cannot be determined or, even if the characteristic performance can be determined, the law thereby identified shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country (this ability to disregard the identified law also applies to the presumptions contained in Art 4(3) and (4)).

Difficulties have arisen as to the identification of the circumstances in which it is appropriate to depart from the law identified under the presumption in favour of the law that is considered to be more closely connected to the contract. The leading Scots case on this issue is *Caledonia Subsea Ltd* v *Micoperi Srl* (2003), a case in which the business of the characteristic performer was situated in Scotland but the contract was to be performed in Egypt. It was held that Art 4(2) intended to accord a special significance to the place of business of the principal performer as the indicator of the country with which the contract had the closest connection, moving away from emphasising the place of performance, and that the presumption should not be disregarded unless, exceptionally, there was a clear preponderance of factors showing a closer connection with another country. Such a "clear preponderance of factors" did not exist in the present case and the presumption remained operative in order to identify Scots law as the applicable law.

In the English case of *Definitely Maybe (Touring) Ltd* v *Marek Lieberberg Konzertagentur GmbH (No 2)* (2001), the party effecting the characteristic performance of the contract had its principal place of business in England, with that performance being the provision of the English pop group, Oasis, to play two concerts in Germany. Thus, under the Art 4(2) presumption, the applicable law was identified as the law of England. However, it was held that the obligations of the other party to arrange and market the concerts had arisen in Germany, the country in which the concerts had taken place, and, in light of these facts, the country with which the contract was most closely connected for the purpose of Art 4(5) was actually Germany. In *Intercontainer Interfrigo SC (ICF)* v *Balkenende Oosthuizen BV* (2010), the Grand Chamber of the European Court held, when considering the operation of Art 4(5) to displace the presumption applicable to

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a contract for the carriage of goods under Art 4(4), that when it was clear from the circumstances as a whole that the contract was "more closely connected" with a country other than that determined on the basis one of the Art 4 presumptions, it was for the court to disregard that presumption and apply the law of the country with which the contract was most closely connected.

The Regulation

Article 4(1) of the Rome I Regulation contains much more precise and detailed rules in cases where the parties have not chosen the applicable law. In the two most common types of contracts, for the sale of goods and the provision of services, Art 4(1) takes the presumption under Art 4(2) of the Convention that the country most closely connected thereto will be that of the seller/service provider and turns this into a fixed rule. Thus, under the Regulation, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence (Art 4(1)(a)) and a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence (Art 4(1)(b)). Article 19 provides clarity as to what is considered to be the habitual residence of both natural persons and companies and other bodies, corporate or incorporated. Articles 4(1)(c)–(h) provide rules for other specific types of contract.

Article 4(2) provides guidance as to the applicable law in circumstances where the contract is not covered by any of the Art 4(1) rules or, alternatively, the contract has elements that fall within more than one limb of Art 4(1). In such cases the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. It is essential to the operation of Art 4(2) that, regardless of the fact that the contract either is not covered by any of the Art 4(1) rules, or is covered by more than one of these rules, the characteristic performance of the contract must be identifiable. If the characteristic performance cannot be identified then Art 4(2) will not apply and recourse must be had to Art 4(4).

Article 4(3) is the equivalent of Art 4(5) of the Convention in stating that "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply". The addition of the word "manifestly" would seem to be an attempt to ensure that the Art 4(3) exception will only be applicable in exceptional circumstances where a country other than that indicated under Art 4(1) or (2) is significantly more closely connected to the contract. The mere fact that

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the contract is to be performed in a place other than that identified under Art 4(1) or (2) will not, by itself, be sufficient to satisfy the"manifestly more closely connected" test. Recital (20) of the Regulation indicates that in deciding whether a contract is manifestly more closely connected with a country other than that indicated, account should be taken of, *inter alia*, whether the contract in question has a very close relationship with another contract or contracts.

Article 4(4) provides that where the law applicable cannot be determined under Art 4(1) or (2), the contract shall be governed by the law of the country with which it is most closely connected. This provision will apply only when the contract does not fall within one of the specific rules of Art 4(1), or falls within more than one of these rules with there being a lack of harmony as to the law identified under each separate rule, and no characteristic performance can be identified for the purposes of Art 4(2). As with Art 4(3), Recital (21) of the Regulation indicates that one relevant factor in determining the country with which the contract is most closely connected is whether the contract in question has a very close relationship with another contract or contracts.

SPECIFIC CONTRACTS

The Rome I Regulation provides bespoke provisions for the identification of the applicable law in relation to contracts of carriage (Art 5); consumer contracts (Art 6); insurance contracts (Art 7); and individual employment contracts (Art 8). The justification for these specific provisions is to be found in Recital (23) in which it is explained that where contracts are concluded with parties regarded as being weaker, those parties should be protected by conflict of law rules that are more favourable to their interests than the general rules.

Contracts of carriage

Article 4(4) of the 1980 Rome Convention provides a specific presumption applicable to contracts for the carriage of goods. A similar provision is to be found in Art 5 of the Regulation, which also regulates contracts for the carriage of passengers. As regards contracts for the carriage of goods, Art 5(1) of the Regulation provides that, in the absence of choice, the law applicable to such contracts shall be the law of the carrier's habitual residence, provided that the place of receipt, place of delivery, or the habitual residence of the consignor is also situated in that country. Failing this, the applicable law will be the law of the agreed place of delivery.

In the absence of choice, the law applicable to a contract for the carriage

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of passengers shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. Failing this, the law of the country where the carrier has his habitual residence shall apply. While this provision applies only in the absence of choice, it is important to note that parties do not have complete freedom of choice, with any choice of applicable law limited to those laws specified in Art 5(2).

Article 5(3) provides that, where no choice has been made by the parties and it is clear from the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in Art 5(1) or (2), the law of that other country shall apply.

Consumer contracts

Article 5 of the Convention applies to certain consumer contracts (Art 5(1)) when such a contract is entered into in any of the circumstances described in Art 5(2). In such circumstances the consumer would be protected in one of two ways. First, where the parties have agreed an applicable law, that choice would remain as the underlying law of the contract but this choice would not deprive the consumer of the protection of the mandatory rules of the law of the country in which he has his habitual residence (Art 5(2)). Second, where the parties do not agree an applicable law, the presumptions and rules of Art 4 will be displaced in favour of the law of the country in which the consumer has his habitual residence.

These special protective rules were revised in the Rome I Regulation and are now found in Art 6. Article 6(1) defines the type of consumer contracts to which its provisions apply, namely contracts concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional). As with the protective jurisdictional provisions of the Brussels I Regulation, if the contract has a dual purpose in that it is entered into partly for private purposes and partly for professional or trade purposes then it will not be a consumer contract unless the business use element is negligible (*Gruber* v *Bay Wa AG* (2006)). If a contract does come within the terms of Art 6(1) it will be governed by the law of the country where the consumer has his habitual residence, provided that the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence or, by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities. The meaning of "directs such activities" is to be interpreted consistently with the Brussels I Regulation so that the mere accessibility

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of the professional's website in the country where the consumer has his habitual residence does not, by itself, constitute the directing of activities.

Article 6(2) preserves party autonomy by allowing parties to choose the law applicable to a contract which fulfils the requirements of Art 6(1) but this choice is limited in that it may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the consumer's habitual residence. In other words, a choice of law will be effective but it will be subject to the non-derogable provisions of the law of the habitual residence of the consumer. Article 6(4) specifies a number of contracts to which Art 6(1) and (2) do not apply.

Insurance contracts

Insurance contracts were not the subject of special coverage under the Rome Convention, with the rules thereof only applicable to contracts of insurance where the risk is situated outside the Member States of the EU (Art 1(3)). The Convention did, however, apply to all contracts of reinsurance (Art 1(4)). In contrast, Art 7 of the Rome I Regulation does provide specific treatment of insurance contracts.

Article 7 applies to insurance contracts covering a "large risk" (as defined in Art 7(2)), whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks inside the territory of a Member State. Contracts of reinsurance do not come within the terms of these bespoke provisions. An insurance contract covering a large risk is governed by the law chosen by the parties in accordance with Art 3. If the parties have not chosen the applicable law then the insurance contract will be governed by the law of the country where the insurer has his habitual residence. However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply (Art 7(2)). This is the same result as would be achieved if the general rules in Arts 3 and 4 were applicable.

In the case of an insurance contract other than a contract covering a large risk, in order to provide protection for the policy holder the ability of the parties to choose the applicable law is restricted to only those laws identified in Art 7(3). However, where the law chosen is either the law of any Member State where the risk is situated at the time of conclusion of the contract (Art 7(3)(a)); or the law of the country where the policy holder has his habitual residence (Art 7(3)(b)); or in a business-to-business insurance contract, where the risks insured against relates to activities in more than one Member State, the law of any of those States (Art 7(3)(e)), if the law

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of that Member State permits wider part autonomy then the parties may take advantage of that greater freedom in order to choose an applicable law permitted by that law. In the absence of choice, an insurance contract other than a contract covering a large risk shall be governed by the law of the Member State in which the risk is situated at the time of the conclusion of the contract, as defined by Art 7(6). For example, the risk under a contract for vehicle insurance is situated in the Member State in which the vehicle is registered. Article 7(4) applies where, under the law of a Member State, the insurance of a risk is compulsory, while Art 7(5) provides a rule applicable when a contract covers risks situated in more than one Member State.

Individual employment contracts

Article 6 of the Convention and Art 8 of the Regulation provide specific rules applicable to individual employment contracts. Although the provisions are not identical, they are very similar and will be interpreted in the same way (*Koelzsch* v *Luxembourg* (2012)). Under Art 8(1), the default rule is that an individual employment contract will be governed by the law chosen by the parties. This choice is restrained, however, by the fact that such a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable elsewhere under Art 8. In other words, while the choice of law will be effective, it will be applied subject to the mandatory rules of the law which would have been identified under Art 8 in the absence of choice.

Where the law applicable to the individual employment contract has not been chosen by the parties, Art 8(2) provides that the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country. If, for whatever reason, the law applicable cannot be determined under Art 8(2) then Art 8(3) states that the contract shall be governed by the law of the country where the place of business through which the employee is engaged is situated. Article 8(4) permits the application of the law of a country other than that identified under Art 8(2) or (3) when it appears from the circumstances as a whole that the contract is more closely connected with that other country.

CONSENT AND MATERIAL VALIDITY

Article 8(1) of the Convention and Art 10(1) of the Regulation provide

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that the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under the applicable instrument if the contract or term were valid. This is sometimes called the "putative applicable law". According to the Giuliano–Lagarde Report, this provision was intended to cover all aspects of the formation of the contract "other than general validity" (p 28). This phrase is understood to mean that the respective article of each instrument is intended to cover any matter relating to formation of the contract which is not governed by the other provisions of the relevant instrument, ie those issues referred to as matters of essential validity under the common law.

Article 10(2) of the Regulation goes on to provide that a party, in order to establish that he did not consent, may 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 Art 10(1). A similar provision appears in Art 8(2) of the Convention but with slightly different wording. The reason for the inclusion of this discretionary power is to solve the problem that in certain legal systems the silence on the part of the offeree implies acceptance (Giuliano–Lagarde Report, p 28). In *Egon Oldendorff* v *Libera Corp* (1995) Mance J, as he then was, stated that application of Art 8(2) of the Convention should adopt a "dispassionate, internationally minded approach" (at 70).

FORMAL VALIDITY

Issues of formal validity are governed by Art 11 of the Regulation which is in similar terms to Art 9 of the Convention. "Form" is defined in the Giuliano–Lagarde Report as including "every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective" (p 29). Article 11 favours formal validity by identifying a number of different laws by which formal validity may be tested, compliance with the requirements of any of which will ensure formal validity. The principal rule of Art 11(1) is that a contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regulation, or of the law of the country where it is concluded. Article 11(2) provides that a contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regula-

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tion, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time. Article 11(3) applies to "unilateral acts" intended to have legal effect relating to an existing or contemplated contract. Article 11(4) provides that the formal validity of consumer contracts shall be governed by the law of the country where the consumer has his habitual residence, while Art 11(5) supplies a special rule relating to the formal validity of contracts relating to immoveable property.

CAPACITY

Article 1(2)(a) excludes questions of legal capacity of natural persons from the scope of the Regulation but this is stated as being without prejudice to Art 13. This article, which is in almost identical terms to the earlier Art 11 of the Convention, states that "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence". This provision is very limited in its terms, in particular the fact that it only applies to natural persons and only when those persons are contracting in the same country. Less specific is the reference simply to an incapacity resulting from the law of "another country", with no further guidance being given as to how this other law should be identified.

SCOPE OF THE LAW APPLICABLE

Article 12(1) provides that the applicable law identified by the Regulation shall govern, in particular, matters of interpretation (Art 12(1)(a)); performance (Art 12(1)(b)); the consequences of a total or partial breach of obligations (Art 12(1)(c)); the various ways of extinguishing obligations, and prescription and limitation of actions (Art 12(1)(d)); and the consequences of nullity of contract (Art 12(1)(e)). The terms of Art 12(1) are almost identical to the equivalent Art 10(1) of the Convention. Article 12(2) (Art 10(2) of the Convention) goes on to state that in relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

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RESTRICTIONS ON THE APPLICABLE LAW

Overriding mandatory provisions

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation (Art 9(1)). This definition did not appear in the Convention but the concept of overriding mandatory provisions is the same in both instruments in that they are provisions that a legal system considers so important that they should be applied regardless of what the applicable law is under its private international law rules. Unlike the mandatory provisions considered earlier under Art 3(3) and (4), overriding mandatory provisions will apply both when the parties have made a choice as to the applicable law and also when the applicable law has been determined under the Regulation in the absence of choice.

Article 9(2) of the Regulation provides that "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". The same effect, although worded differently, is achieved by Art 7(2) of the Convention. This means that the forum is free to apply the overriding mandatory provisions of its own law no matter what law is otherwise applicable to the contract. Examples of such overriding mandatory provisions in the United Kingdom can be found in the Employment Rights Act 1996, s 204(1), and the Unfair Contract Terms Act 1977, s 27(2).

Article 9(3) provides that 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, insofar as those overriding mandatory provisions render the performance of the contract unlawful. The equivalent provision of the Convention, Art 7(1), was worded differently in that it was much broader in its scope in referring to the law of "another country" with which the situation has a "close connection". It was not given effect to in the United Kingdom and a number of other Member States. The provision of the Regulation is much more specific than its predecessor in that it is limited to the rules of the country of performance and only to those rules which make performance illegal. Further, even if these requirements are met, the decision to apply Art 9(3) remains a discretionary one ("effect *may* be given"). In deciding whether to exercise this discretion, Art 9(3) provides some guidance in instructing that regard shall be had to the nature and purpose of the overriding mandatory provisions of the place of performance and to the consequences of their application or non-application in the case before the court.

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Public policy of the forum

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". This is practically identical to the wording of its predecessor in Art 16 of the Convention. For Art 21 to apply it is not the foreign provision in general which is opposed but its application in the particular case before the court. In *Duarte* v *Black & Decker Corp* (2007), Art 16 of the Convention was relied on to disregard a restrictive covenant governed by the law of Maryland in circumstances where the employee was working in England when he entered into the covenant, the job he wished to take up was based in England, and the covenant would be unenforceable under English law.

Essential Facts

- The rules applicable to choice of law in contract are governed by either the 1980 Rome Convention or the Rome I Regulation. The former applies to contracts concluded between 1 April 1991 and 16 December 2009; the latter to contracts concluded as from 17 December 2009.
- Article 3 of the Convention permits parties to choose the law applicable to their contract, subject to the mandatory provisions of Art 3(3) and (4). This choice may be express or implied.
- Article 4(1) of the Convention determines the applicable law in the absence of choice by providing that a contract will be governed by the law of the country with which it is most closely connected.
- Article 4(1) of the Regulation provides specific rules to identify the applicable law in the absence of choice in relation to different types of contracts.
- The applicable law identified under Art 4 of the Convention may be disregarded if the contract is more closely connected with another country (Art 4(5)). The Regulation requires that the contract be *manifestly* more closely connected with another country (Art 4(3)).
- Special provision is made under the Regulation for contracts of carriage (Art 5); consumer contracts (Art 6); insurance contracts (Art 7); and individual employment contracts (Art 8).
- Article 9 of the Regulation (Art 7 of the Convention) permits the application of the overriding mandatory provisions of both the forum and the place of performance notwithstanding the law otherwise applicable under the Regulation.

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Essential Cases

Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC (2004): choice of the governing law is limited to the law of a country.
Emeraldian Ltd Partnership v Wellmix Shipping Ltd (2010): Art 3(3) of the Convention applies only when all elements relevant to the situation are located in a single country.
Caledonia Subsea Ltd v Micoperi Srl (2003): the Art 4(2) presumption of the Convention should only be displaced under Art 4(5) when there is a clear preponderance of factors showing a closer connection with another country.

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6 CHOICE OF LAW IN NON-CONTRACTUAL OBLIGATIONS

The rules applicable to choice of law in non-contractual obligations are now found in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, commonly referred to as the "Rome II Regulation". This Regulation largely, but not entirely, replaces both the traditional common-law rules and the statutory regime introduced by the Private International Law (Miscellaneous Provisions) Act 1995. Accordingly, the majority of this chapter will consider the provisions of the Rome II Regulation but some mention will be made at the end of the chapter of both the common-law rules and the provisions of the 1995 Act.

ROME II REGULATION

Scope

The Rome II Regulation applies to events giving rise to damage occurring from 11 January 2009 (Arts 31 and 32, as interpreted by the ECJ in *Homawoo* v *GMF Assurances SA* (2012)). The Regulation applies in all Member States other than Denmark and the use of the term "Member State" in the Regulation means any Member State other than Denmark (Art 1(4)).

The material scope of the Regulation is stated positively in Art 1(1) in that it shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. The phrase "civil and commercial matters" is to be given the same meaning as under the Brussels I Regulation and the Rome I Regulation. Whether an obligation is considered to be "non-contractual" is to be understood as an autonomous concept (Recital (11)). The Regulation only covers certain non-contractual obligations, with Art 2(1) stating that, for the purposes of the Regulation, "damage" shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. The Regulation extends to anticipated events in that it applies to non-contractual obligations that are likely to arise (Art 2(2)), with any reference to an event giving rise to damage including events giving rise to damage that are likely to occur and references to damage including damage that is likely to occur (Art 2(3)).

The material scope of the Regulation is also stated negatively in Art 1(1) in that it expressly does not apply to revenue, customs or administrative

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