EU-PIL

European Union
Private International Law
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Joseph Lookofsky & Ketilbjørn Hertz

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EU Brussels I Regulation (2000)
EU Rome Convention (1980, consolidated version 1998)
EU Rome I Regulation (2008)
EU Rome II Regulation (2007)

Preface to the First Edition (2009)

Experienced practitioners in Europe realise the increasing commercial significance of the discipline known as Private International Law (Conflict of Laws).

As indicated by its title, the focus of this book is on the Private International Law rules applied by courts and arbitral tribunals in the European Union, but by including numerous concrete examples, we have tried to emphasise the interdisciplinary nature of the subject and thus the many relevant 'connections' between private international law and substantive commercial law, especially as regards contractual and delictual matters (e.g.) in cases concerning contracts for the international sale of goods, cross-border claims relating to product liability, etc.

This (first) edition is based on the previous limited publication of a special student edition, which was sold only to our students at the University of Copenhagen and not marketed or sold elsewhere. We are grateful to those students who took *European and International Commercial Law* in the fall of 2008 and who, by their comments, helped us improve the book.

We also wish to express our sincere thanks to two fine colleagues, Tobias Steinø (of the *Bruun & Hjejle* law firm) and Mathias Steinø (of *Denlaw*), for agreeing to undertake an extensive 'peer review' of an earlier draft of the present work. Besides highlighting numerous ambiguities and deficiencies, these talented young practitioners – who are also experienced law teachers – have helped us write, re-write and improve numerous passages.

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As regards such ambiguities and errors which inevitably remain, the authors kindly ask all readers of this edition to help improve the book further by sending any comments, corrections, etc. to the authors, c/o joseph.lookofsky@jur.ku.dk.

January 2009
Joseph Lookofsky
Ketilbjørn Hertz

CHAPTER 1

Introduction and Overview

1.1. General Introduction

Private law + international element

The field of law which lawyers in Europe refer to as 'private international law' (PIL) comprises a collection of specialised sets of rules designed to help resolve private law disputes which involve an international (foreign) element.

Private law

When lawyers in Europe refer to 'private law' they often have in mind the kind of substantive law which governs the rights and obligations of and between private parties, including the rules covered by such law school subjects as Obligations, Contracts and Torts.

If, for example, merchant A claims that merchant B has not performed a given contractual obligation to provide certain goods or services, substantive rules of contract law will determine whether B has breached his or her promise to A and whether A is entitled to a remedy: e.g. monetary compensation (damages). Or if, to take a different private law example, A claims that B's product caused harm to A's person or property, substantive rules of product liability will determine whether B has committed a tort (breached a non-contractual obligation) and, if so, whether A is entitled to damages.

International element

But what happens when private law disputes like these involve an international (foreign) element? Suppose, for example, that the two merchants concerned (A and B) have their places of business in different countries (States X and Y). Or suppose that A (in State X) claims damages for an injury caused by a product manufactured by B (in State Y).

In situations like these, A's lawyer might need a rule of private international law (PIL) to determine whether A can bring a legal action against the foreign defendant (B) in A's home State (X). Assuming that a given court in X is competent (has jurisdiction) to adjudicate the A-B dispute, that court will then need a PIL rule to determine which State's private law (X-law or Y-law) to apply in order to determine the rights and obligations of the parties. Then, once the X-court renders its judgment, a different PIL rule will determine whether that decision will be recognised and enforced abroad (in State Y).

Private law substance, PIL procedure

So, whereas the main function of the substantive rules of private law is to determine the rights and obligations of the parties and thus the ultimate outcome of a given dispute, the PIL rules are often described as 'procedural' or 'formal', since they determine the special way in which the dispute-resolution game is played in private law disputes which involve an international element. In other words, the PIL rules do not regulate the 'substance' of the parties' legal relationship. Rather, they help determine: a) which court is competent to adjudicate their dispute; b) which substantive legal rules should be applied by the competent court to resolve that dispute; and once a judgment has been rendered c) whether that decision will be recognised and enforced abroad.

EU-PIL

The main focus in this book is upon the resolution of disputes which relate to contractual and non-contractual obligations, in particular the PIL rule-sets which courts and arbitral tribunals within the European Union apply in such cases to determine:

- *Jurisdiction:* which court (or arbitral tribunal) is competent to resolve a dispute?
- *Choice of law:* which law will a given court (or arbitral tribunal) apply?
- *Recognition and enforcement:* will a judgment (or arbitral award) be enforced abroad?

This volume is focused on PIL rules designed to help resolve disputes in private law matters relating to (commercial) *obligations.* The specialised PIL rule-sets designed to help resolve disputes involving *property law* or *family law* matters lie outside the scope of the present study.

In Common Law jurisdictions (such as England and the United States) the heading 'conflict of laws' is often used to designate the legal area which lawyers elsewhere in Europe refer to as 'private international law.' Arguably, neither label hits the nail on the head. Whereas 'conflict of laws' might (incorrectly) suggest that only choice-of-law issues are comprised, the 'private international law' heading is also misleading, not only because PIL rules often belong to the *national* law of the (forum) State, but also because PIL rules (of jurisdiction, choice-of-law, and recognition and enforcement) seem best subsumed within the 'public' (as opposed to 'private') law category. In Scandinavia, the PIL heading is expanded to 'international private and procedural law' (Lookofsky & Hertz, *International privatret,* Ch. 1), which highlights the fact that (PIL) rules of jurisdiction also belong to the legal discipline known as procedure.

The *interdisciplinary* nature of PIL is well-illustrated by the extensive case-law generated by Article 5(1) of the Brussels Convention (and Brussels I Regulation), a rule which concerns the *jurisdiction of EU national courts in contractual matters* (see Ch. 2.2.2(A) below). Under Article 5(1), a defendant domiciled in an EU Member State may be sued in another EU Member State in the court of the 'place of performance' of a given contractual obligation. But in order for a court to determine the location of the place of performance (and thus determine if it has jurisdiction or not), it must often resort to a rule of *substantive contract law*, and before it can do that, it might first need to apply a *choice-of-law rule* to find out which substantive contract law to apply.

English national law provides a similar illustration of the extent to which PIL procedural rules sometimes rely upon the content of substantive law. As described below (in Ch. 1.4.1) English PIL rules of procedure (which apply outside the Brussels I Regulation context: see Ch. 2.1.2 and 2.2.1) permit a non-EU domiciliary to be sued in an English court if the case concerns a contract 'made in England.' But in order to determine where the contract in question was made for jurisdictional purposes, the court must apply a substantive contract law rule.

Distinctions remain relevant

Due to the complexity of the subject matter, lawyers in Europe are well-advised to organise their PIL work in a systematic and logical way. This requires not only a distinction between private law rules (of substance) and PIL rules (of procedure), but also a distinction between the relevant (national, regional and international) sources of private and private international law.

As with other legal disciplines, PIL methodology requires that we identify the relevant rule(s) of law, as well as the relevant facts and issues of the concrete case, so that we then can subsume each given (relevant) fact within the relevant rule ('pigeonhole'). Some concrete examples are provided below (Ch. 1.4).

1.2. Sources of Private and of Private International Law

The complexity of private international law is to some degree attributable to the nature and origin of the relevant sources of law.

The first task is to identify the relevant rule and its source. Taking this preliminary PIL step is, however, not always as easy as one might think. Not only are the sources of PIL law themselves spread across a broad national, regional and international spectrum; the same is true of the relevant substantive private law sources (which are often also needed, so they can be applied in tandem with the PIL rules).

Private law: national sources

Anyone who has studied the law of obligations (contracts, sales, torts, etc.) in a given EU Member State will know that *most* of the substantive rules within this 'commercial' area are rules of national (domestic) law, i.e. the law (legislation and judge-made law) of that particular State.

The German Civil Code (*Bürgerliches Gesetzbuch* = BGB) for example, was enacted by the German legislature to regulate civil obligations in Germany. Although Denmark does not have a corresponding civil code, private law legislation, such as the Danish Contracts Act (*aftaleloven*) and the Danish Sale of Goods Act (*købeloven*), are sources of Danish national law. It remains appropriate to describe these sources as national (domestic), even though some of their individual provisions have been added or amended due to requirements imposed by regional (EU) law.

In all countries within the EU, most prominently in England, private law legislation is supplemented by case-law (decisions rendered by courts of the State concerned), and this case-law is also part of the national law of that State. Regarding the role of case-law in a Scandinavian legal system, see Lookofsky, *Precedent in Denmark*.

Private law: regional (EU) sources

So far, only a few selected sub-areas within the private law of obligations have been harmonised ('federalised') into regional European Union law. Most of these sub-areas relate to selected subjects within consumer contract law, as well as (parts of) product liability law.

Because neither of these substantive areas (consumer contract law, product liability law) has been fully harmonised, it is still sometimes necessary to make a choice of law in such matters: regarding the law applica-

ble in contractual matters see Ch. 3; regarding product liability see Ch. 4.4.

There are plans and dreams (in some EU minds) about the development of a more comprehensive 'European Civil Code' which ultimately might serve to harmonise *all* private law in Europe, but for the present the EU private law picture remains mainly national in nature.

Private law: international sources

Because there is no global legislator of private law, the harmonisation of substantive commercial law at the international level proceeds even more slowly, by the enactment of individual treaties and their subsequent ratification, State by State. The most significant of these is the United Nations Convention on Contracts for the International Sale of Goods (CISG), currently applicable in some 70 Contracting States worldwide.

The CISG significantly reduces the need for the application of choice-of-law rules in cases involving international sales: see Ch. 3.3 below and Lookofsky, *CISG*, Ch. 1.

Other commercially significant treaties relate to specialised private law areas such as maritime liability and liability for rail, road and inland water transport.

PIL: sources

When we change our source-of-law focus from private law to PIL, our starting point is no longer quite the same: although private international law consists of national law to a certain extent (i.e. each sovereign State has its own PIL), regional (EU) and international regulations govern many commercially significant PIL topics, such as jurisdiction (Ch. 2), choice of law in contract (Ch. 3) and tort (Ch. 4), as well as recognition and enforcement of foreign judgments (Ch. 5) and arbitral awards (Ch. 6). Nevertheless, even in this age of increasing globalisation and EU harmonisation, the individual EU Member States still retain a measure of PIL sovereignty in the commercial field, especially as regards the jurisdiction of national courts in cases involving non-EU defendants (Ch. 2.1.2 and 2.2.1) and also as regards the recognition and enforcement by EU Member States of decisions rendered by non-EU Member State courts (Ch. 5.2.1).

PIL: regional regulation

To help deal with the increasing volume of commercial activity across State boundaries within the European Union, the (once fully) 'sovereign' Member States have relinquished a significant portion of their PIL rule-making powers for the

good of the larger community. This has led to an increasing number of EU-PIL rules which are regional in character, in that they apply in all (or almost all) Member States. In the first stages of European cooperation this was often the result of an agreement (convention) between the various Member States, but the more modern trend is PIL legislation enacted by the EU legislator for direct application (regulation without national implementation) throughout the EU.

Some important examples of EU-PIL regional harmonisation concern choice of law: The Rome I Regulation (like the Rome Convention which preceded it) regulates the law to be applied in EU Member State courts in contractual matters (Ch. 3.2), whereas the Rome II Regulation deals with the law applicable in matters relating to tort, i.e. non-contractual obligations (Ch. 4). Another key example of regional harmonisation is the Brussels I Regulation on Jurisdiction and Judgments which (like the Brussels Convention which preceded it) harmonises the exercise of jurisdiction by EU Member State courts against EU domiciliaries (Ch. 2.2), as well as the recognition and enforcement by these courts of judgments emanating from other courts within the European Union (Ch. 5.2.2).

PIL: international regulation

Other commercially significant EU-PIL sub-topics are regulated by international (worldwide) treaties and instruments. To take one example, the 1955 Hague Convention on the law applicable in international sales (Ch. 3.3) is currently in force in five EU Member States.

Of great significance is the 1958 United Nations Convention which governs the recognition and enforcement of arbitral agreements and foreign arbitral awards (the New York Convention) and which is in force in virtually all countries prominently engaged in international trade, including all EU Member States. More recently, UNCITRAL (United Nations Commission on International Trade Law) promulgated the Model Arbitration Law, and the arbitration laws of many EU Member States have now been revised to better accord with that global PIL model (Ch. 6).

1.3. Overview: Jurisdiction, Choice of Law, Enforcement

Domestic paradigm

PIL rules operate in private law cases which involve an international element, but before we proceed to examine the individual PIL categories (jurisdiction, choice of law, enforcement), we might best begin with a purely domestic private law dispute:

> *Illustration 1a:* Seller A (in State X) and buyer B (also in State X) make a contract for the delivery of certain goods in State X on January 2nd. The contract specifies the nature of the goods to be delivered, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a specific forum for the resolution of disputes which might arise. When A delivers the goods on January 3rd, B refuses to take delivery or pay for them. A then sues B for damages in a court in State X.

Domestic Step 1: Jurisdiction

In this purely domestic situation we can safely assume that a court in State X will have jurisdiction (be competent, have the power) to adjudicate this dispute, because the courts in any civilised State will almost always exercise jurisdiction in a private law action brought against a party domiciled in that forum State (X) by a person also domiciled there.

Actor sequitur forum rei

This assumption follows from the universally accepted maxim which forms a part of the procedural law of all States worldwide: *Actor sequitur forum rei* (the plaintiff follows the defendant to his/her forum). Put another way, the defendant's domicile provides a general basis for the forum court to assume jurisdiction over the defendant (and thus the adjudication of the plaintiff's claim, whatever its subject matter might be), unless the parties have included a 'forum clause' in their contract, reflecting their agreement that a court or tribunal in a different State (Y) shall have the exclusive jurisdiction to decide disputes which might arise.

Domestic Step 2: Application of substantive rules to facts

If a court in State X has juridical jurisdiction, it has the power to adjudicate the merits (substance) of the case, and in a purely domestic case, the court decides the merits by applying its own national (domestic) law to the concrete facts. Indeed, in *Illustration 1a*, we can assume that the competent X-court will unhesitatingly apply the substantive sales and/or contract law of State X to determine the rights of the parties (A and B), simply because the private law of that State is the only conceivably relevant law.

So if we assume, for example, that B was not entitled to reject the goods (and refuse to pay for them), because a 1-day delivery delay is not deemed a material (significant) delay under the law of State X, the X-court would have good reason to render a judgment on the merits in favour of A.

Domestic Step 3: Recognition & enforcement

Assuming that the judgment rendered by the X-court in *Illustration 1a* is not appealed to (and reversed by) a higher court in that State (X), that judgment will be recognised and enforced throughout State X, simply because sovereign States invariably recognise and enforce (final) judgments rendered by their own courts of law.

So if, as we have just assumed in *Illustration 1a*, A wins under X law, that judgment will surely be enforced throughout State X, if necessary by State force (by the State's seizure and forced sale of B's property, wherever located in State X).

Same paradigm + foreign element

Now, to highlight the relevance of PIL rules in an analogous international scenario, we can adjust our private law illustration by injecting a single 'foreign' element:

> *Illustration 1b:* Seller A (in State X) and buyer B (in State Y) make a contract for the delivery of certain goods in State X on January 2nd. The contract specifies the nature of the goods, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a specific forum for the resolution of disputes which might arise. When A delivers the goods on January 3rd, B refuses to accept or pay for them. A then sues B for damages in a court in State X.

The only difference between this illustration and the previous one is the 'Y' (the buyer's foreign domicile: State Y), but this difference renders the legal landscape in *Illustration 1b* 'international' and, as we shall see, much more complex, since the foreign element raises a series of PIL issues, each of which might well affect the ultimate outcome of the controversy.

PIL Step 1: Jurisdiction

Because the defendant (B) in *Illustration 1b* is not domiciled in the forum where the plaintiff (A) has decided to bring this action (State X), we cannot take for granted (as we do when *actor forum sequitur forum rei* applies) that the X-court is competent to adjudicate the parties' dispute.

To resolve the competency issue in *Illustration 1b*, the X-court must first select the relevant PIL rule-set (i.e. the PIL rule-set which courts in State X apply in this kind of situation); that rule-set selection might, for example, depend on whether X and/or Y are EU Member States. Once the X-court determines the applicable rule-set, it must then locate and use the relevant rule in that rule-set (which might, for example, be the PIL rule which applies to contractual matters) to determine whether there is a basis for the assertion of jurisdiction by the X-court in a case like this. In other words, the first PIL step might really be a 2-step affair.

Competent

If the X-court determines that it is in fact competent (that it has jurisdiction) in *Illustration 1b*, B's lawyers might then advise B to travel to State X (or at least hire legal counsel there) for the purpose of appearing voluntarily before the X-court and defending B's position (i.e. to contest the merits of A's claim). Because if B does not appear and defend before the competent court, that court is likely to enter a default judgment in favour of A, which means that A wins on the merits (and recovers the damages claimed against B) by default.

A *default judgment* is a judgment rendered in favour of the claimant in a case where the defendant has not taken any procedural steps to protect its interests by responding to the claimant's written pleadings or by appearing before the court for a scheduled hearing. In a private law matter involving damages, a default judgment will typically be granted for the

amount of damages claimed by the claimant (provided that the court assumes jurisdiction).

Not competent

If, on the other hand, the relevant PIL rules lead to the conclusion that the X-court is not competent (that it does not have the power to exercise jurisdiction), the court must simply dismiss A's case. Technically, this means neither party wins since the court does not render a decision on the merits of the case, but when A's claim against the foreign defendant B gets thrown out of court, the commercial reality is that A suffers a real loss, since A (by virtue of that dismissal) is left with the risk-laden alternative of suing B in B's own forum State (Y) (or perhaps even in a third State (Z), if the PIL rules of State Z permit such an action to be brought in a Z-court). Faced with that kind of daunting and surely expensive alternative – a trial in a foreign court, with foreign rules, foreign lawyers, in a foreign language, etc. – A's lawyers might best counsel A to seek a compromise by offering B significant concessions, and, if that doesn't work, A might do best to simply abandon the claim.

These jurisdictional scenarios show how the application of a procedural PIL rule can determine the ultimate outcome of the dispute, even though the rule which determines the outcome in these scenarios does not relate to the merits (i.e. the substantive rights and obligations of the parties concerned).

PIL Step 2: Choice of law

To take the next step in our international scenario (*Illustration 1b*), let's assume that the application of the relevant jurisdictional rule (PIL step 1) leads to the conclusion that the X-court is in fact competent. Let's also assume, for present purposes, that B appears to defend.

Having determined its competence, the X-court will now need to take the next major PIL step which relates to the choice of the applicable substantive law.

German jurisdiction → German law?

At first glance, it might seem unnecessary to take this step (to make a choice between the laws of different countries), since we have already determined that the court in question has

jurisdiction. Can we not assume that (e.g.) a competent German court will apply German law?

The answer to that question is *no*: we cannot make that assumption regarding the law applicable to the merits of the dispute. When determining a dispute with an international element (such as parties from different countries) a court will always apply its own procedural rules (including its own PIL rules), but it may well apply the substantive law of a different country in order to resolve the merits of that dispute. In other words, even if a German court assumes jurisdiction, that court may find that the substance of the dispute between the parties is governed by French law. This illustrates an important concept in private international law: the issues of jurisdiction and choice of law are (basically) independent of each other and are governed by separate sets of rules.

The decision by a forum court in State X to apply foreign law (the law of State Y) often poses *practical* problems for the court concerned. Since, for example, German judges are not trained in French law, a German judge might have to rely on foreign experts (French legal scholars) to resolve a given issue. Not surprisingly, French legal scholars might disagree on a controversial legal issue. Should the German judge leave his or her decision up to a single French expert?

Which choice-of-law rule?

In order to determine which State's substantive law governs the dispute at hand, the court must first determine which choice-of-law rule applies in this kind of case. Then, on that basis, it must decide which State's private law to apply.

In order to choose which State's (substantive sales) law to apply, the X-court must, of course, select a choice-of-law rule which applies *in the forum jurisdiction*. In *Illustration 1b* the dispute requires the application of a substantive rule which concerns an international contract of sale, but because *different choice-of-law rules apply in different EU Member States in a sales contract situation*, the X-court must apply the choice-of-law rules which govern such a choice of law in that particular forum State (X). Although the courts in most of the 27 EU Member States would (in 2008) apply the 1980 Rome Convention (Ch. 3.2) to determine the applicable law in *Illustration 1b*, the courts in a few EU Member States would make the same choice by applying the 1955 Hague Convention rules (Ch. 3.3).

As emphasised later (Ch. 3), the X-court concerned will apply the choice-of-law rule-set of State X (the 1980 Rome or the 1955 Hague)

irrespective of the defendant's domicile, i.e. irrespective of whether B in *Illustration 1b* is domiciled in an EU Member State or not. As we shall see, this universal approach contrasts with the 'defendant-domicile' criterion which generally determines which *jurisdictional* rule EU Member State courts apply (the Brussels I Regulation or national law: Ch. 2).

As a general rule, the various choice-of-law rules which are applicable in EU Member States require that the forum courts make the (possibly outcome-determinative) choice of the applicable substantive law solely on the formal basis of the relevant choice-of-law rule, i.e. *without consideration of the substantive content* of the competing substantive rules concerned (see Ch. 3 and 4 below). If, however, the relevant substantive laws of States X and Y are the *same* (e.g. as regards the legal effect of a 1-day delay in delivery in *Illustration 1b*) because States X and Y are both *CISG* Contracting States, a formal choice between the substantive laws of X and Y is unnecessary (see Ch. 3.3.3).

Different substantive laws → different outcomes

After the court has selected the applicable choice-of-law rule and has made the choice between 'competing' substantive laws (the laws of States X and Y), it can then proceed to determine the substantive outcome (who wins on the merits) on the basis of the chosen law (of State X or Y) and the evidence presented by the parties.

Questions concerning the presentation of evidence (which evidence can be presented and how) are invariably governed by the procedural law of the forum (*lex fori*).

As was the case with the jurisdictional (procedural) PIL determination in *Illustration 1b*, the formal choice-of-law also has the potential to play an outcome-determinative role. Assume, for example, that the application of the private law of States X and Y would lead to different results: under the law of State X, B's refusal to accept the late delivery is a breach of contract (which means that B must pay damages to A), whereas the law of State Y supports B's position (under Y-law a 1-day delay is material, so B can rightly refuse delivery and is not obligated to pay). Given these substantive differences, the X-court's decision on the choice-of-law issue (whether to apply the substantive sales law of State X or State Y) would provide a clear indication of which party is likely to win, and that fact might even encourage the parties to compromise and settle their dispute amicably (before the court actually rules on the merits).

In other situations, where a court in an EU Member State needs to choose among competing substantive rules with respect to a *non-contractual matter* (tort/delict), the Rome II Regulation rules will come into play (Ch. 4).

In some situations, a problem of *characterisation* (classification) might arise. If, for example, a given private law dispute is seen to lie on the borderline between contract and tort, the forum court's characterisation of the case might determine which choice-of-law rule it will apply, and that choice-of-rule might well affect the outcome of the case (see Ch. 1.4.1 below).

PIL Step 3: Recognition & enforcement

Once a competent court in State X determines the outcome of a given commercial litigation with an international element, other courts (e.g. in States Y and Z) may need to apply the PIL rules which regulate the recognition and enforcement of foreign judgments.

> *Illustration 1c:* Same facts as in *Illustration 1b.* A court in State X renders a judgment against B on the basis of X-law (A is awarded damages), but B (who has substantial assets in EU Member State Y) fails to pay A the damages awarded.

Under these circumstances, A might have reason to ask a court in State Y to enforce the judgment against B (e.g.) by seizing B's assets in Y, so as to satisfy the judgment rendered in X (secure payment of the damages due).

EU Member State judgments

If the judgment-rendering court (X) is located in an EU Member State, the issue of recognition and enforcement of that judgment in another EU Member State (Y) will be regulated by the Brussels I Regulation rules, and the X-court judgment will almost surely be enforced in State Y (subject to certain narrow exceptions). The Brussels I Regulation recognition and enforcement rules are discussed in Ch. 5.2.2.

Non-EU Member State judgments

If, however, the judgment emanates from a court in a non-EU Member State (X), and there is no (bilateral) agreement between X and Y on recognition and enforcement of judgments, the possibility of enforcement in an EU Member State (Y) will depend on – and vary according to – the national (domestic) recognition and enforcement rules which apply in that particu-

lar EU Member State. Some of these national recognition and enforcement rules are outlined in Ch. 5.2.1.

International commercial arbitration

To round out this PIL overview, we should consider international commercial arbitration as an alternative means of resolving disputes, especially since an increasing number of commercial contracts contain a clause which expressly provides for arbitration. As more fully explained in Chapter 6, arbitration is a technique for the resolution of disputes outside the courts, where the parties refer their dispute to one or more privately appointed 'judges' (called arbitrators) and agree that the decision (award) made by the arbitrators shall be binding on them.

> *Illustration 1d:* Seller A (in State X) and buyer B (in State Y) make a contract for the sale and delivery of certain goods in X. The contract specifies the nature of the goods, as well as the price to be paid, and while it contains no provision designating the applicable substantive law, it provides that all contract-related disputes shall be resolved by arbitration in State Z. Later, when B refuses to accept or pay for the goods, A brings a claim for damages before an arbitral tribunal in Z.

Relying on the arbitration clause, and assuming compliance with relevant formalities (if any), A can rightly claim that this contract-related dispute can only be resolved by arbitration and that no national court is competent to decide the parties' dispute.

Assuming the arbitral tribunal declares itself to be competent (that it has jurisdiction to determine the rights of the parties), the tribunal will then need to choose between competing substantive laws, though it will not necessarily make that choice by using the same choice-of-law methods as those used by State courts.

If the arbitral tribunal in *Illustration 1d* renders an award in favour of A, that party will then be able to seek enforcement of that award in States X, Y and Z (and elsewhere).

Depending on the circumstances (including whether or not the States concerned are EU Member States), the rules in the widely ratified New York Convention which governs the enforcement of foreign *arbitral*

awards (Ch. 6.4) might even provide A with a *better* chance of obtaining enforcement in foreign jurisdictions than under the rules which apply with respect to the enforcement of foreign *judgments* (Ch. 5).

As indicated, the PIL issues which need to be addressed in situations where international cases are resolved by State courts find clear analogues within the arbitration context: an agreement to arbitrate is the functional equivalent of a clause which confers jurisdiction on a given court; arbitrators, like judges, need to determine the applicable law; arbitral awards often need to be recognised and enforced outside the award-rendering forum.

Still, it seems most convenient to collect the PIL issues and rule-sets which relate to arbitration in a separate chapter (Ch. 6). Since arbitration nearly always involves a contractual dispute (tort-related disputes are much more likely to be resolved in court), separate treatment of arbitration permits specific focus on the larger contractual context within which arbitration takes place, both as regards relevant substantive and procedural rules. Another factor which favours separate consideration is the fact that the relevant sources of PIL arbitration rules are usually national or international (as opposed to regional/EU), just as the content of those special PIL rules is likely to differ from the PIL rules which apply in respect of litigation in State courts. For example, as already indicated, the arbitral law of the forum (*lex arbitri*) might provide arbitrators with more latitude and discretion as regards their choice of the applicable substantive law than the sometimes rigid choice-of-law rules which regulate the conduct of judges in EU Member State courts.

1.4. PIL Methodology

1.4.1. Rules and Issues, Connecting Factors, Characterisation

Connecting factors

When a given PIL rule leads to the conclusion that a court in a given State (X) is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more connecting factors – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State (X) decides to choose and apply the substantive law of that State or of a different State (Y).

General PIL theory

This (very general) statement about the role played by connecting factors belongs to the 'general' (and inherently more

abstract) part of PIL theory. Although a more extensive discussion of this PIL dimension lies largely outside the scope of the present (more practically directed) work, some readers might nonetheless find it helpful at this (introductory) stage to supplement the discussion in the preceding section (Ch. 1.3) with a closer examination of the role played by connecting factors, since this aspect of PIL theory provides the underlying core for many of the concrete PIL issues and applications discussed in the chapters which follow (Ch. 2-6). To help bring this preliminary discussion a bit more down to earth, we can work with a pair of concrete illustrations, the first based on currently applicable PIL rules of English (national) law.

> *Illustration 1e:* Merchant A (in England) and merchant B (in South Korea) meet in England where they negotiate and sign an agreement regarding B's manufacture (in South Korea) of toys to be shipped to (and sold by) A. The contract specifies the nature of the toys to be delivered, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a forum for the resolution of disputes which might arise. Later, claiming that the toys delivered by B do not conform to the contract, A seeks to sue B for damages in England.

Non-EU defendant → national PIL rule

Since the defendant (B) is not domiciled in an EU Member State, the issue of whether the English court can exercise jurisdiction in this situation (PIL step 1) is governed by the national procedural law of the forum (this key point is discussed in greater detail in Ch. 2.1.2 and 2.2.1).

In cases involving claims made against non-EU domiciliaries in respect of a contract, English national law permits an English court to assume jurisdiction over a foreign defendant (like B) (*inter alia*) if the contract in question was 'made within' the jurisdiction (i.e. England).

This follows from rule 6.36 of the Civil Procedure Rules (which provides for service out of the jurisdiction in cases not governed by the Brussels I Regulation) and para. 3.1(6)(a) of Practice Direction 6B supplementing the Civil Procedure Rules (CPR PD6B), according to which the court may, in its discretion, permit service out of the jurisdiction where the claim arises from a contract made within the jurisdition.

Classification/ characterisation: contractual claim

In *Illustration 1e* there is no doubt that an English court would classify (characterise) A's claim as a claim made in respect of a contract. By virtue of that classification, the English court can find the relevant (national) procedural rule which it needs to determine whether or not it has jurisdiction over the defendant in this concrete case.

In other circumstances, however, reasonable minds might disagree as to how a given claim should be classified or (to use an equivalent PIL label) characterised. If, for example, A were to claim damages from B because the toys delivered by B caused physical injury to A's person or property, the proper classification/characterisation of that claim might seem less straightforward, in that such a *product liability claim* could possibly (depending on the applicable law) be based on both contractual and non-contractual rules of substantive law.

The classification/characterisation issue comprises many subtle distinctions and has been the subject of much debate within PIL academic circles. Within the scope of the present work, however, we can usually avoid such subtle distinctions, in that the Court of Justice of the European Communities has determined that it has the power to lay down (e.g.) the criteria for determining whether a given claim is 'contractual' under the relevant EU-PIL rules, though only as regards PIL rules emanating from the EU framework (whereas *Illustration 1e* concerns the application of a purely national law rule outside the competence of the Court of Justice).

If the English court, applying the relevant statutory rule – which in this case happens to be the rule set out in para. 3.1(6)(a) of CPR PD6B – determines that it does in fact have jurisdiction, it can then proceed to choose the applicable substantive law (PIL step 2) and then – on the basis of the law it finds applicable – proceed to decide the merits of the case.

If, on the other hand, the court determines that it does not have jurisdiction under para. 3.1(6)(a), and assuming no other relevant jurisdictional rule confers jurisdiction, the English court does not have the power to determine the rights of the parties and must dismiss the case for lack of jurisdiction, i.e. without a decision on the merits.

Contract 'made in England'

Having found para. 3.1(6)(a) of CPR PD6B to be applicable, the court then needs to apply the rule, and to do this, it must determine whether the contract in question was made within the jurisdiction (England) or not. In some circumstances (e.g. in contracts concluded by an exchange of letters or e-mails) this

might involve a difficult determination, but since the parties in *Illustration 1e* actually met in England to negotiate and then signed their agreement there, we can safely predict that the English court would find that the contract was made in England.

In order for the English court to exercise jurisdiction by allowing service out of the jurisdiction under rule 6.36 of the Civil Procedure Rules, i.e. assume the power to resolve the substantive dispute (determine whether B has in fact breached the contract, whether A is entitled to recover the damages claimed, etc.), it is also required that England is the 'proper place in which to bring the claim' (rule 6.37(3) of the Civil Procedure Rules). This requirement has been interpreted to mean that England must be the most *appropriate forum* in which to bring the claim (*forum conveniens:* see Hill, *International Commercial Disputes* at 222ff); this seems at least arguable on the facts presented by *Illustration 1e*.

Compartmentalisation

To sum up the points just made, we can divide the relevant (English) jurisdictional rule into its main component parts, so as to indicate the various 'pigeonholes' relevant for the proper subsumption of the facts in *Illustration 1e* to the relevant PIL rule:

Rule	Civil Procedure Rules, Practice Direction 6B, para. 3.1(6)(a)
Courts	Courts in England and Wales
PIL issue	Jurisdiction over non-EU domiciliary defendants
Claim/situation	Claims made 'in respect of a contract'
Connecting factor	Contract 'made within' forum country

Choice of applicable law

Assuming the English court does indeed declare itself competent, it will have determined that it has the power to apply rules of substantive contract law, so as to determine the rights and obligations of the parties in this contractual context, i.e. adjudicate the merits of A's claim against B. But should the contractual rights and obligations of the parties be determined on the basis of English or Korean law?

The English court needs to ask this question because it cannot assume that the relevant substantive laws of England and South Korea are the same. Put another way, the international elements in this contractual paradigm will lead the court to

characterise *Illustration 1e* as a situation involving a conflict of laws.

Relevant choice-of-law rule-set

Since the forum court in this case is in England, it will apply the relevant EU-PIL rule-set applicable in the United Kingdom to a conflict of laws involving a contractual obligation. As at the time of writing (January 2009), this rule-set is the Rome Convention, which will be replaced by the Rome I Regulation by December of 2009 (see Ch. 3.2.1).

The fact the (Korean) defendant is not an EU-domiciliary is *irrelevant* in this choice-of-law connection. For the sake of completeness we also note that the excepted categories in Article 1(2) of the Rome I Regulation are of no relevance here (see Ch. 3.2.2).

No choice by parties → default rule applies

Having determined that the Rome I Regulation applies (or, rather, that it will be applied in future cases like *Illustration 1e*), we need to determine which rule(s) within that rule-set might be relevant for the resolution of this particular dispute. Since the parties in *Illustration 1e* (A and B) have not themselves chosen the law applicable to their contract under Article 3, we can conclude that the default rule in Article 4 of the Rome I Regulation applies (by its own terms). In other words, we can predict that the (competent) English court will make its choice of law (between the laws of England and South Korea) by subsuming the facts of *Illustration 1e* into Article 4 of the Rome I Regulation, so as to determine the law of the country where the seller has his/her habitual residence (the rule laid down by Article 4(1)(a) of the Rome I Regulation for a conflict of laws in respect of a contract for the sale of goods).

Compartmentalisation

Once again, we can break down this choice-of-law part of our analysis into its main component parts, so as to indicate the 'pigeonholes' relevant for the proper Article 4 subsumption:

Rule	Rome I Regulation, Article 4(1)(a)
Courts	Courts in EU Member States
PIL issue	Choice of law in contractual matters
Claim/situation	Parties have not chosen law applicable /claim made in respect of a sale of goods
Connecting factor	Country of seller's habitual residence

EU-defendant

Illustration 1e (above) concerns an action brought in an English court against a non-EU domiciliary. In order to highlight the relevant EU-PIL rules and methodology which will be applied to a case involving a contractual claim against an EU-domiciliary, let's consider this variation:

> *Illustration 1f:* Merchant A (in Italy) and merchant B (in Portugal) meet in England where they sign an agreement regarding B's manufacture (in Portugal) of toys to be shipped to (and sold by) A. The contract specifies the nature of the toys to be delivered, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a forum for the resolution of disputes which might arise. Claiming that the toys delivered by B do not conform to the contract, A seeks to sue B for damages in Italy.

EU defendant → EU rules of jurisdiction

Since the defendant in this example (B) is domiciled in an EU Member State (Portugal), the issue of whether the Italian court can exercise jurisdiction in this situation is governed by the Brussels I Regulation (see Ch. 2.2).

Place of performance

Since the plaintiff A seeks to bring this action against B in A's own State (Italy), we need to consider whether that Regulation provides a basis for the exercise of jurisdiction by the forum (Italian) court against a domiciliary in a different EU Member State (Portugal). Since this claim involves a matter relating to a contract (Article 5(1) of the Regulation), the Regulation permits the Italian court to assume jurisdiction over B (*inter alia*) if the place of performance of the obligation in question is in Italy.

Compartmentalisation

Once again, we can break down the jurisdictional analysis into its key component parts:

Rule	Brussels I Regulation, Article 5(1)
Courts	Courts in EU Member States
PIL issue	Jurisdiction over EU domiciliary defendant
Claim/situation	'In matters relating to a contract'
Connecting factor	'Place of performance of the obligation in question'

Choice of applicable law

Let's assume, for present purposes, that the Italian court is in fact competent (under Article 5(1)), i.e. that the Italian court has the power to adjudicate the merits of A's claim against B. This raises the question of whether the contractual rights and obligations of the parties concerned should be determined on the basis of Italian, Portuguese or English law.

Relevant rule set

As in the previous illustration, the Italian court in *Illustration 1f* must ask this choice-of-law question because it cannot assume that the relevant substantive laws of Italy, Portugal and England are the same. But since the court in this illustration is in Italy, it must apply the relevant PIL rule applicable in Italy, in this case the 1955 Hague Convention on the Law Applicable to International Sales of Goods (see Ch. 3.3.2).

No parties' choice → default rule applies

Having determined that the 1955 Hague Convention applies, the court needs to determine which rule(s) within that rule-set seem relevant for the resolution of this particular dispute. Since the parties in *Illustration 1f* have not themselves chosen the law applicable to their contract, the main default rule (Article 3) of Hague Convention applies. In other words, the Italian court must choose between the laws of England, Italy and Portugal by subsuming the facts of the case into the default rule in Article 3, and this makes for a simple subsumption: since the seller is in Portugal, the seller's (Portuguese) law applies.

Rule	1955 Hague Convention, Article 3
Courts	Courts in 5 EU Member States (including Italy)
PIL issue	Choice of law in international sales of goods
Claim/situation	Parties have not chosen law applicable
Connecting factor	Country of seller's habitual residence

1.4.2. Dépeçage

In private international law, *dépeçage* (meaning 'cutting up') refers to the concept whereby different issues within a particular case may be governed by the laws of different States. For instance, a contract may provide that different parts of the contract shall be governed by different laws, as permitted by

Article 3(1) of the Rome I Regulation (Ch. 3.2.3). However, such contract clauses are rare indeed.

In limited circumstances the Rome Convention also permits dépeçage in the absence of such a contractual clause, in that Article 4(1) provides that a separable part of a contract which has a closer connection with another country (than the country whose law would normally apply) may, by way of exception, be governed by the law of that other country. This provision has not been carried over to the Rome I Regulation, however, nor does the Rome II Regulation permit dépeçage in this way. Contrary to judicial practice in the United States, where courts regularly apply the laws of different countries to different issues regarding the same claim (Lookofsky & Hertz, Transnational Litigation, Ch. 3.3), courts in the EU Member States are usually bound to apply the same country's law to all aspects of a given contractual or delictual cause of action, except when mandatory provisions of another country's law 'override' the otherwise applicable law in respect of a given issue (see infra Ch. 3.2 and 4.3).

1.4.3. Renvoi

In private international law, *renvoi* (meaning 'sending back') is a subset of the choice-of-law rules, and it is potentially to be applied when a forum court is directed to consider the law of another State. When a choice-of-law rule designates the law of another country (i.e. a law different from that of the forum), this is usually understood to be a reference solely to the relevant substantive provisions, and then there is no renvoi.

A *single renvoi* rule refers to the foreign forum's choice-of-law rules (exclusive of any renvoi rules applicable in the foreign forum). If the foreign forum's choice-of-law rules would refer the issue to the law of the country of the forum court, the forum court will apply its own law (i.e. even though the applicable choice-of-law rule designated a foreign law, until the (single) renvoi rule was taken into account).

A *double renvoi*, also known as the foreign courts doctrine, means that the forum court will decide the issue under the law that the foreign court would apply, taking into account also any single renvoi rule applicable in the foreign forum concerned. This approach breaks down if the foreign forum also applies a double renvoi system: X-court will apply the law that Y-court would apply, and Y-court would apply the law that X-court would apply!

Not used in commercial field

Renvoi is rarely relevant in the commercial field. It is expressly excluded under the Rome I Regulation (Ch. 3.1) and the Rome II Regulation (Ch. 4.2).

1.5. Recurring PIL Themes

Although the rule-sets and rules which fall under the PIL heading cannot always be analysed by the application of the same methodology, there are several general themes which consistently recur in this area, not least when academics and law students have reason to debate issues of legal philosophy, but also when courts and arbitrators apply PIL rules in practice.

Interpretation: national, regional, international

One such theme relates to the way in which lawyers, courts and arbitrators (should) interpret a given (applicable) PIL rule. Should that rule be interpreted solely on the basis of a national (domestic) perspective? Or should the rule concerned (also) be interpreted in a regional or international way, so as to take account of the views of other individual jurisdictions and the interests of the larger (regional or international) community?

In recent years, many have stressed the need for a regional (EU) and/or international approach to transnational legal problems; in fact, many EU and international legal instruments contain provisions which require national courts to undertake a regional or international interpretation and application.

So far, not all local jurisdictions have indicated their willingness to act accordingly. There is, however, some significant evidence of such an emerging trend. One example is the English Court of Appeal's international interpretation of Art. 4 of the Rome Convention in *Ennstone Building Products v Stranger Ltd* (see Ch. 3.2.4(A)).

Party autonomy

Another interdisciplinary issue relates to the role and limits of party autonomy in the private international field.

To be sure, contracting parties retain considerable freedom to make their own deal, and that includes the parties' ability to decide in advance which court or arbitral tribunal should have (exclusive) jurisdiction, as well as which law that court or tribunal should apply, but as Lord Denning put it (in *George Mitchell v Finney Lock Seeds* [1983] 1 All ER 111): courts need not always 'bow down to the idol of contractual freedom,' and there are examples of censorship and regulation in virtually all transnational fields.

In some jurisdictional contexts, forum agreements must meet both formal and substantive validity requirements (Ch. 2.2.2(B) and Ch. 6.3.2), just as protection of the weaker party is also a recurring theme in the choice-of-law field (Ch. 3 and Ch. 4). A related sub-issue is the extent to which courts and arbitrators need to respect a contractual choice of *lex mercatoria* (merchant's law) as the rule-set which governs a given dispute (Ch. 3.2.2 and Ch. 6.2.4).

Certainty v. justice

A final recurring PIL theme concerns the classic, yet continuing conflict between considerations of certainty (in the sense of predictability) versus considerations of justice (in the sense of achieving a reasonable substantive outcome in the concrete case).

The previously favoured approach in some jurisdictions, as reflected (e.g.) in the decisions of Danish, English and Norwegian courts, tended to opt for concrete justice and flexibility.

In today's Europe, however, the current PIL legislative emphasis is clearly on certainty. This is true across the EU-PIL board: for concrete examples as regards the exercise of extraterritorial jurisdiction in contractual matters, see Ch. 2.2.2(A); as regards the applicable law in contractual matters in the absence of a choice by the parties, see Ch. 3.2.4(B); as regards the applicable law in delictual matters (tort), see Ch. 4; as regards the enforcement of judgments rendered by courts in EU Member States, see Ch. 5.2.2 and Ch. 5.2.3.

CHAPTER 2

Jurisdiction

2.1. Introduction

2.1.1. Jurisdiction to Adjudicate

Jurisdiction to adjudicate

When a court in a given State (X) is asked to decide a given commercial dispute between two private contracting parties (A and B), the first issue to be resolved is whether that court has jurisdiction to adjudicate the dispute (Ch. 1.3). A court which has jurisdiction to adjudicate has the authority and the power to decide the case brought before it. If the court lacks jurisdiction, it has no such authority or power, and it must therefore dismiss the case without making a decision on the merits.

Jurisdiction to adjudicate is always a fundamental consideration, in both domestic and international contexts. Although the focus in this chapter concerns jurisdiction in disputes with an international element, we can begin with a domestic example (similar to *Illustration 1a* in Ch. 1.3):

> *Illustration 2a:* Seller A (in State X) and buyer B (in State X) make a contract for the delivery of certain goods in X on January 2nd. The contract specifies the nature of the goods to be delivered, as well as the price to be paid, but it does not designate a forum for the resolution of disputes which might arise. When A delivers the goods on January 3rd, B refuses to accept or pay for them. A's efforts to settle the dispute amicably fail, and A asks a lawyer to commence legal proceedings against B in a court in State X.

Commencement of proceedings

Although the technicalities involved are not the same in all States, a legal action (lawsuit) like this always involves the submission of a document (e.g. a claims form) to the court and

an official notification (called 'service of process') of the defendant. Apart from these fundamentals, the rules on commencement of proceedings differ widely between the various EU Member States.

In some Member States, the document instituting the proceedings must be submitted to the court before the defendant is served; in other Member States, service on the defendant precedes submission of the document to the court. In some Member States, a legal action is deemed to have commenced when the document is submitted to the court; in other Member States, the relevant date is determined by service on the defendant; in yet other Member States, both of these formalities have to have been complied with before the action is deemed to have commenced.

Actor sequitur forum rei

As we have seen (in Ch. 1.3) the X-court will almost certainly have jurisdiction to adjudicate an action like this, simply because the defendant (B) is *domiciled* in the *forum* State (X).

Illustration 2b: Same facts as in *Illustration 2a,* except that buyer B is domiciled in a different State (Y).

National rules apply

Although the international element (the defendant's foreign domicile) in *Illustration 2b* may well prove significant, the issue of whether the X-court has jurisdiction to adjudicate is not necessarily governed by rules different from those which apply in *Illustration 2a*. This is because the power of a State like X to give its courts the right to adjudicate a dispute involving a foreign defendant (B) is generally seen as an aspect of the fundamental right of a sovereign State to govern and rule within the confines of its own territory. After all, what goes on in an X-court goes on in State X! This is, however, only the starting point. In practice, the right of a given court to exercise jurisdiction in a case with a foreign element is likely to be limited by both national and international (or supranational) rules.

Self-restraint: basis of jurisdiction

When it comes to jurisdiction to adjudicate cases with an international element, the great majority of sovereign States show some voluntary measure of self-restraint. Most States require some concrete *basis* for the exercise of jurisdiction in such cases: some contact or connection between the State and its courts on the one hand and the nature of the litigation or the defendant's activity on the other. So, the exercise of jurisdiction

might, for example, be based on the existence of such connecting factors as the performance of a contract or the commission of a tort within the territorial borders of the forum State.

EU restraints on local law

Local (self-imposed) limitations are not the only limitations. In suits brought in an EU Member State court against a defendant *domiciled in* another EU Member State, we find very important regional (EU) limitations on the jurisdiction of national legislatures and courts. As regards such defendants, the Brussels I Regulation sets forth a list of (exclusive) criteria (connecting factors) which EU Member State courts must use as the basis for their exercise of extraterritorial jurisdiction. As regards defendants *not domiciled in* the EU, however, the Brussels I Regulation imposes few jurisdictional restraints on the individual Member States.

An important Common Law construct not found in the jurisdictional catalogues of continental Europe is the doctrine of *forum non conveniens*: this is the principle whereby a court which has jurisdiction may nonetheless elect to decline to exercise it and defer instead to another (foreign) court which will provide a more *appropriate* ('convenient') forum. The *forum non conveniens* construct is not recognised in the Brussels I Regulation context: *Owusu v Jackson* (case C-281/02), noted in Ch. 2.2.1 below.

Whereas the question of extraterritorial jurisdiction (the international competency of national courts) relates to the power of a given State (X) and thus (one or more of) its courts to pass judgment on a non-resident defendant, the issue known as *subject-matter jurisdiction* relates to the more parochial (essentially domestic) problem of whether the *particular* X-court where the plaintiff has brought suit, as opposed to another X-court, is competent to decide the dispute in question. To take a simple example, the civil – as opposed to the criminal – courts of X are likely to have jurisdiction over the commercial subject matter of the contractual dispute between A and B in *Illustration 2b*. There may even be more specialized kinds of civil courts in X having exclusive jurisdiction to decide, for example, commercial disputes. If so, only these courts would have subject-matter jurisdiction in the dispute between A and B.

Another question related to jurisdiction in the territorial sense is the issue which Common Law courts label *venue*. Like subject-matter jurisdiction, the venue issue is largely a 'local' problem: venue does not concern the collective power of X-courts to decide a given dispute, but rather, the allocation of judicial business within and among the various courts of X. Assuming that the courts in State X have jurisdiction in a given type of case, the rules of venue subdivide such cases on an internal (territorial) basis. For example, the venue rules of State X might require that disputes involving the ownership of immovable property should be

brought in a court in the particular city or other territorial subdivision of State X where that particular piece of property is situated.

2.1.2. Bases of Jurisdiction: a Survey of European Law

The Brussels I Regulation

As regards the exercise of jurisdiction over EU domiciliaries in civil and commercial matters, the right of (previously sovereign) EU Member States to determine their own rules of jurisdiction has been subjected to far-reaching restrictions by the Brussels I Regulation on Jurisdiction and Judgments. Under this regional regime, the only permissible bases of *intra-Community jurisdiction* in civil and commercial matters are those enumerated in the Regulation.

Jurisdiction beyond

The Brussels I Regulation does not, however, generally deprive the individual EU Member States of their right to legislate bases of jurisdiction which reach beyond the outer boundaries of the European Union. According to Article 4 of the Regulation, the jurisdiction of the courts in matters where the defendant is domiciled outside the European Union is determined by the *domestic* procedural law of the forum. Given this limitation, and the fact that EU merchants are actively engaged in commercial activities which extend beyond Union borders, each EU Member State's own (domestic) jurisdictional code remains highly relevant in this larger transnational context.

So, before undertaking a closer examination of the most significant intra-community rules (in Ch. 2.2), we begin with a more general survey, emphasising some of the main principles upon which the power to adjudicate is founded, including the main bases of jurisdiction under the national rules of the individual EU Member States which continue to govern (most) jurisdictional issues in cases where non-EU defendants are concerned.

General v. specific jurisdiction

In modern jurisdictional theory an initial distinction is often drawn between 'general' and 'specific' bases of jurisdiction. Bases of *general* jurisdiction provide courts with the power to adjudicate any and all matters, whereas bases of *specific* jurisdiction comprise situations where the assertion of power to adjudicate is limited to matters arising out of (or intimately related to) the affiliating circumstances on which the particular jurisdictional claim is based.

Domicile = general

A defendant's *domicile* within the State where the forum court is located is an important example of a general jurisdictional base. That means that a court in State X has the power to adjudicate any claim which a given plaintiff (A) might have against a given defendant (B), as long as B is domiciled in State X.

The precise definitions of the term domicile differ somewhat from system to system, but the basic concept of domicile denotes the connection of a natural person with a particular place: a smaller unit within a particular State.

The fact that domicile provides a general basis of jurisdiction is of great practical significance, since defendants are usually sued in the courts of the State where they are domiciled (*actor sequitur forum rei*). This is true both as regards purely national proceedings, as well as proceedings involving an international element.

One rationale which underlies domicile as a jurisdictional base is to assure the existence of a place (somewhere in the world) in which a person (including a 'legal person,' such as a corporate entity) is continuously amenable to suit. And because these rules contain no restrictions regarding the subject matter of the suit – no requirement of a connection between the defendant's domicile and the nature of the controversy – it is said that domicile provides a general jurisdictional base.

In each EU Member State, the defendant is subject to the jurisdiction of the courts of his or her domicile, and the general rule (also respected by the Brussels I Regulation: see Article 2) is that he/she shall be sued there (Ch. 2.2.1).

Domicile for legal persons

As regards legal persons (such as a company or corporation), the concept of domicile similarly defines a connection between the legal person and a given place. Under the Brussels I Regulation, three such connections are recognised (see Article 60): (a) statutory seat, (b) central administration, and (c) principal place of business.

This broad approach, which means that a legal person may have more than one domicile and thus be amenable to suit under the *actor sequitur forum rei* rule in more than one place, can be seen as a combination of the national rules on the domicile of legal persons which were applicable prior to the adoption of the Regulation.

Contract-related actions

As regards the exercise of specific jurisdiction in contract-related actions against EU domiciliaries, and as discussed more fully in Ch. 2.2.2(A) below, the Brussels I Regulation contains an important provision whereby such defendants may be sued in the *forum solutionis* (the forum of performance) – at 'the place of performance of the obligation in question' (see Article 5(1)). As regards contractual actions against non-EU domiciliaries, however, the Member States are free to maintain their own rules such as (e.g.) the English 'contract made within the jurisdiction' rule (Ch. 1.4.1).

Forum delicti

As regards the exercise of specific jurisdiction in matters relating to tort, most of the original EC Member States recognised the basis of jurisdiction known as *forum delicti commissi* (the forum of the commission of the tort), and it is therefore not surprising that the synthesized Brussels tort rule in Article 5(3) regarding EU defendants resembles the national bases still applicable as against non-EU defendants: 'the place where the harmful event occurred or may occur.' This rule is discussed more fully in Ch. 2.2.3 below.

The Brussels I Regulation provides numerous *other bases of specific jurisdiction*, e.g. in matters relating to insurance (Articles 8-14) and as regards consumer contracts (Articles 15-17). Another commercially significant basis of specific jurisdiction concerns disputes arising out of the operations of a 'branch, agency or other establishment': Article 5(5).

Jurisdiction by consent: forum agreements

It should not be surprising to find a general acceptance of consent-based jurisdiction in European law. Provided the defendant is not a typically 'weaker' party (such as a consumer or employee), there will usually be little reason to restrain or protect a defendant who voluntarily elects to comply with a plaintiff's request to appear and defend in a given foreign forum.

Consent to jurisdiction is often given in advance, and there will often be good reason to enforce such an express promise in a contractual context. A forum agreement is an agreement between parties to submit their disputes to a specific court or to the courts of a specific country. Even in a commercial context, however, the applicable statutes may require that certain formalities are observed.

The original rule adopted in the Brussels Convention required written evidence of an express forum agreement, but that has now been relaxed somewhat by an amendment which accounts for customs of international trade: Article 23 of the Brussels I Regulation (discussed in Ch. 2.2.2(B) below).

Appearance as implied consent

A non-resident defendant who voluntarily enters an 'appearance' in the foreign forum court will ordinarily be deemed to have given his/her implied consent to the jurisdiction of that court, provided that the appearance was not entered for the purpose of contesting such jurisdiction: Article 24 of the Brussels I Regulation.

Exorbitant bases of jurisdiction

The various bases of jurisdiction discussed thus far all enjoy a great degree of transnational acceptance and approval, and we find examples of all of them in nearly all procedural rule-sets. Certain other jurisdictional bases, however, reach beyond widely recognised (reasonable) limits. These bases of jurisdiction are sometimes described as 'exorbitant.'

Brussels I

According to the Brussels I Regulation, the only permissible bases of intra-Community jurisdiction in civil and commercial matters are those positively enumerated in the Regulation, just as Annex I of the Regulation specifically outlaws the application of certain exorbitant rules of national jurisdiction vis-à-vis EU domiciliary defendants.

Domestic codes

Non-EU domiciliary defendants, however, do not enjoy the same protection, and it is therefore significant for these defendants that most European domestic procedural codes provide for the use of one or more exorbitant bases of jurisdiction.

Article 14 Code Civil

Perhaps most notorious among the exorbitant bases of jurisdiction in Europe is Article 14 of the French Civil Code which authorizes French courts to exercise jurisdiction in all cases where the plaintiff is French.

> *Illustration 2c:* Seller A (in France) and buyer B (in non-EU Member State X) make a contract for the delivery of certain goods in State Z. The contract does not designate a forum for the resolution of disputes which may arise. When

A delivers the goods, B refuses to take delivery or pay for them. A then sues B for damages in a court in France.

Since the defendant B is not domiciled in an EU Member State, the forum State (France) is free to apply its national rules of jurisdiction, including the exorbitant provision of Article 14 of the French Civil Code. Unless precluded by a treaty between France and State X, the French court will have jurisdiction to adjudicate the action (A's claim against B), and – as we shall see later – any judgment rendered by the French court will be enforceable in all EU Member States (Ch. 5.2.2).

Property-based jurisdiction

Besides jurisdiction based on nationality, certain property-based provisions, such as Article 23 of the German Code of Civil Procedure, have also enjoyed a considerable measure of international ill-repute. According to these rules, the mere presence of a non-EU domiciliary defendant's property on forum soil authorizes the forum court to exercise general, unlimited jurisdiction.

Illustration 2d: Seller A (in State X) and buyer B (in non-EU Member State Y) make a contract for the delivery of certain goods in State Z. The contract does not designate a forum for the resolution of disputes which may arise. When A delivers the goods, B refuses to accept or pay for them. A then sues B for damages in a court in Denmark, a State in which B owns property.

Since the defendant B is not domiciled in an EU Member State, Denmark is free to apply its national rules of jurisdiction, including the exorbitant provision set forth in Article 246(3) of the Danish Administration of Justice Act (*retsplejeloven*), which grants jurisdiction on the basis of the presence of property within the forum. Unless precluded by a treaty between Denmark and State Y, the Danish court will have jurisdiction to adjudicate the action against B, and any judgment rendered by the Danish court will be enforceable in all EU Member States (Ch. 5.2.2).

Brussels protects EU domiciliaries

As indicated by the foregoing examples, the Brussels I Regulation expressly prohibits the application of such exorbitant rules as against EU domiciliaries (Article 3), but national rules such as Article 14 of the French Code and Article 23 of the German Code (which provides for property-based jurisdiction similar to the Danish rule just noted) continue to apply as against defendants who are not EU domiciliaries (Article 4).

2.2. The Brussels I Regulation

2.2.1. Regulation Overview

Rome Treaty

The original (1957) Treaty of Rome provided the basic organizational scheme for the economic integration of the European Community, but it did not itself provide a mechanism for the judicial resolution of private transborder claims or for the mutual recognition and enforcement of judgments of the various courts of the Member States. According to Article 220 (now Article 293) of the Treaty, however, the Member States undertook to simplify the formalities governing the recognition and enforcement of court judgments and arbitral awards. This commitment was ultimately realized by the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968 which entered into force in 1973. As its name suggests, the scope of the Brussels Convention extended well beyond the commitment laid down in the Treaty of Rome, as the Convention not only applied to recognition and enforcement, but to jurisdiction as well.

The drafters of the Brussels Convention recognised that the interpretation of such an important multilateral treaty ought not be left up to national courts. *Special jurisdiction to interpret the Convention* was therefore conferred upon the Court of Justice of the European Communities by a Protocol to the original Convention in 1971. The considerable number of cases where the Court of Justice was called upon to clarify the meaning of the Convention text confirm that the Protocol was needed to 'prevent differences of interpretation of the Convention from impairing its unifying effect' (see the joint declaration of the original Contracting States to the 1968 Convention). Depending on the circumstances, the Court of Justice has elected to interpret key Convention terms either on a 'national' or on an 'independent' basis, although showing a clear bias in favour of the latter.

A national interpretation will often require or presume the application of the relevant rules of private international law: for example, to locate the 'place of performance' of a contractual obligation pursuant to Article 5(1), one must first determine which national body of contract law applies to that particular case. In the case of an independent interpretation or classification, the Court has engaged in a more familiar kind of treaty interpretation, seeking out the Convention's meaning in furtherance of its common purpose to promote Community goals.

Brussels I Regulation

On 22 December 2000, the Council of Ministers of the European Union adopted a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation No 44/2001). The Regulation, commonly known as the Brussels I Regulation, entered into force on 1 March 2002. As of that date the Regulation replaced the Brussels Convention as between all Member States with the exception of Denmark.

Denmark: Parallel Agreement

Due to Denmark's non-participation in EU legislation concerning civil matters (see Ch. 3.2.1), the Brussels I Regulation did not enter into force in Denmark until some 5 years later, upon the implementation of a special 'Parallel Agreement' effective 1 July 2007.

On 19 October 2005, an Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was signed. This so-called *Parallel Agreement* – which entered into force on 1 July 2007 – has extended the application of the provisions of the Brussels I Regulation to the relations between the Community (meaning the 26 other Member States) and Denmark. Therefore, as of 1 July 2007, the provisions of the Brussels I Regulation apply uniformly in all EU Member States.

New guise

The Brussels I Regulation is basically the Brussels Convention in a new guise. Some important changes, however, have been made.

All Articles of the Brussels Convention beyond Article 6 have been renumbered, which complicates cross-referencing between the Regulation and the Convention (and the often still-relevant Convention case-law). For the purposes of this Chapter, the most important renumbering is that Article 17 of the Convention (on forum agreements) has become Article 23 of the Regulation (see Ch. 2.2.2(B) below).

Civil and commercial matters

The scope of the Regulation is set forth in Article 1. Pursuant to this Article, the Regulation applies to civil and commercial matters. By giving this phrase an autonomous meaning independent of national interpretations, the Court of Justice has sought to assure that – irrespective of the national forum concerned – the rules will always be applied in a uniform way. Cases falling under the 'civil and commercial' heading will often correspond with those controversies which would traditionally lie within the realm of 'private' – as opposed to 'public' – law, but the key criterion is the nature of the legal relationship between the parties to the action or of the subject matter of the action, and the involvement of a public authority does not, in and of itself, render the Regulation inapplicable.

In *TIARD v the Netherlands State* (case C-266/01), a French insurance company had bound itself *vis-à-vis* the Netherlands State, as guarantor, to pay the taxes imposed under customs legislation on the holders of TIR carnets issued by the national associations of carriers in the Netherlands. When the Netherlands State brought an action in the Netherlands to enforce the promise, the question arose whether the jurisdiction of the Netherlands courts were governed by the Brussels Convention. The Court of Justice found that the legal relationship between the Netherlands State and the insurance company under the guarantee contract was not characterised by an exercise of public powers on the part of the State, as it did not entail the exercise of powers going beyond those existing under the rules applicable to relations between private individuals. Consequently, the Brussels Convention applied.

In *Lechouritou v Federal Republic of Germany* (case C-292/05), children of victims of a massacre committed by German occupational forces in Greece in 1943 instituted legal proceedings in Greece against Germany for compensation in respect of financial loss, non-material damage and mental anguish. The Court of Justice held that the Brussels Convention did not apply to a legal action against a State for compensation for damage suffered as a consequence of acts perpetrated by armed forces in the course of warfare.

Excluded matters

The Regulation excludes certain civil and commercial matters from its scope, such as disputes within the ambit of 'family law' and bankruptcy (Article 1(2)). Arbitration is also excluded, but here the widely ratified New York Convention will usually apply (see Ch. 6.3 and 6.4; see also Hill, *International Commercial Disputes* at 61ff).

Double convention

In procedural terminology, the Brussels Convention was a double convention as it governed both (i) jurisdiction of the courts and (ii) recognition and enforcement of judgments in other Contracting States. The Regulation follows suit in that respect.

Jurisdiction

First of all, the Regulation regulates the jurisdiction of the individual EU Member States and their courts (Chapter II): Under Article 3 of the Brussels I Regulation, the courts of EU Member State X may only exercise jurisdiction over a domiciliary in EU Member State Y pursuant to a Regulation-authorized jurisdictional base.

Recognition and enforcement

Secondly, the Regulation sets forth the conditions under which each EU Member State shall recognise and enforce judgments rendered by the courts of other Member States (Chapter III). Chapter III of the Regulation lays down what (borrowing an American phrase) is often called a 'full faith and credit' regime: the simple starting point is that *all* judgments emanating from the courts of the various EU Member States shall be recognised and enforced in all other Member States, and – as we shall see later (in Chapter 5) – the relevant exceptions to this broad enforcement rule are few and far between.

As already mentioned, the original (1968) Brussels Convention was adopted in furtherance of a treaty provision concerning recognition and enforcement of foreign judgments. The inclusion also of rules of jurisdiction was based on the idea that since a traditional condition for recognition and enforcement of a foreign judgment is that the judgment-rendering court applied a reasonable basis of jurisdiction (see Ch. 5), the goal of free movement of judgments would be furthered by laying down common rules of jurisdiction for all EU Member States.

Jurisdiction over EU domiciliaries

We begin with Chapter II of the Brussels I Regulation which deals with the jurisdiction of EU national courts, and the key distinction here turns on the status of the *defendant* in the particular case. Most (though not all) of the provisions in Chapter II which lay down the jurisdictional bases for the EU Member State courts apply only to cases where the defendant is domiciled in an EU Member State. If the defendant is a non-EU domiciliary, these Chapter II bases do not apply, and such

cases continue to be regulated by the individual procedural codes of the EU Member States.

As already indicated (in Ch. 2.1.2), this key Chapter II distinction does not mean that the Brussels I Regulation is without significance for the non-EU domiciliary defendant: on the contrary, the simple (full faith and credit) execution principle of the Regulation's Chapter III applies to *enforcement of all judgments* rendered in the courts of EU Member States in civil and commercial matters, including judgments rendered against non-EU domiciliaries on the basis of exorbitant national jurisdictional rules. Enforcement of judgments is discussed in Ch. 5 below.

Actor sequitur

As regards EU domiciliary defendants, the Chapter II starting point remains the classical rule of *actor sequitur forum rei* (see Article 2). Domicile is the general jurisdictional base, in that the defendant may be sued in this forum (where he or she is domiciled) whatever the cause of action against him or her may be.

Owusu v Jackson

As noted previously (in Ch. 2.1.1), the Brussels scheme does not recognise the concept of *forum non conveniens*, e.g. as applied under English national procedural law. This was confirmed in *Owusu v Jackson* (case C-281/02) where the Court of Justice ruled that the Brussels *Convention* precludes a court of a Contracting State from declining to exercise the jurisdiction conferred on it by Article 2 of the Convention on the ground that a court of a non-Contracting State would be a 'more appropriate forum' for the trial of the action, even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State. Article 2 of the Brussels I *Regulation* is undoubtedly to be understood in the same way on this point.

Jurisdiction under Article 5

In addition to the rule of general jurisdiction set forth in Article 2, the Regulation provides a number of specific alternative bases of jurisdiction, where the jurisdictional base turns on the particular type of civil or commercial matter concerned. For example, in matters relating to a contract, suit may be brought – not only in the courts of the defendant's domicile, but also, pursuant to Article 5(1) – in the courts for 'the place of performance of the obligation in question.' Similarly, in matters of tort (delict), an alternative forum is provided at 'the place

where the harmful event occurred or may occur': Article 5(3). The rules in Articles 5(1) and 5(3) are discussed in greater detail below (in Ch. 2.2.2(A) and 2.2.3).

It is an important jurisdictional concept that if there is an alternative basis of jurisdiction pursuant to Article 5 of the Regulation, the plaintiff has a free choice between the forum provided by Article 2 and the alternative forum provided by Article 5.

According to the alternative basis of jurisdiction provided in Article 5(5), in actions arising out of the operation of a 'branch, agency or other [similar] establishment,' suit may be brought in the place where the branch, agency or other establishment is situated. See Lookofsky & Hertz, *Transnational Litigation*, Ch. 2.2.4.

The Regulation also contains a number of special rules which regulate the exercise of jurisdiction in matters relating to *insurance* (Articles 8-14), as well as a number of rules specially tailored for jurisdiction over *employment* contracts (Articles 18-21) and certain transborder *consumer* contracts (Articles 15-17).

Another special provision is Article 22(1) of the Regulation which provides the courts of the Member State where *immovable property* is situated with *exclusive* jurisdiction 'in proceedings which have as their object rights *in rem* in or tenancies of' such property. This mandatory provision applies regardless of domicile, i.e. in such proceedings the 'defendant's domicile criterion' does not apply, but since its scope is restricted to proceedings whose object are *in rem* or tenancy rights, the courts where immovable property (e.g. a house) is situated would *not* have exclusive jurisdiction as regards (e.g.) proceedings relating to other contractual rights than tenancy rights in that property (see *Illustration 2h*).

A more general Brussels I provision is the rule regarding 'ancillary jurisdiction' in Article 6: an EU domiciliary may be sued *inter alia* in the place where *another defendant in the same action is domiciled* (subsection 1) or – as regards a *related counter-claim* – in the court where the original claim is pending (subsection 3).

Place of contractual performance

Judging by the litigation which thus far has reached the Court of Justice of the European Communities, the rule on jurisdiction in contractual matters set forth in Article 5(1) is of particular commercial significance, and that 'place of performance' rule will receive special attention below (Ch. 2.2.2(A)).

Supplementary: Absent agreement

Before moving to that important topic, we do well to note that Article 5(1), like the other Chapter II bases of jurisdiction considered thus far (except for Article 22, which is mandatory), is a supplementary (default) rule, and such rules apply (by definition) only in the absence of a binding jurisdictional agreement.

> *Illustration 2e:* Seller A (in EU Member State X) and buyer B (in non-EU Member State Y) make a contract for the delivery of certain goods in X on January 2nd. The contract specifies the nature of the goods to be delivered, as well as the price to be paid; it also designates a court in EU Member State Z as the sole forum for the resolution of disputes which might arise. When A delivers the goods on January 3rd, B refuses to accept or pay for them. A then sues B for damages in a court in State X.

Forum agreements: Art. 23

According to Article 23 of the Brussels I Regulation, if the parties have agreed that a given EU national court is to have jurisdiction in the case concerned, then this agreement will take precedence over the Regulation's supplementary rules. This means that only the designated Z-court can exercise jurisdiction in *Illustration 2e*.

Consequently, the X-court must decline jurisdiction in *Illustration 2e*, even if X happens to be the 'place of performance of the obligation in question' under Article 5(1) (see Ch. 2.2.2(A)), unless B appears to defend without contesting the jurisdiction of the X-court (see Article 24, which takes priority over a (prior) forum agreement).

As explained more fully in Ch. 2.2.2(B), Article 23 confers jurisdiction on the *chosen EU Member State court* (and – unless the parties have agreed otherwise – deprives other EU Member State courts of jurisdiction that they might otherwise have had) provided that *either* the plaintiff *or* the defendant (or both) is an EU domiciliary. This contrasts with the defendant's domicile criterion which governs the applicability of other key provisions in the Regulation's Chapter II, including Article 5(1) and 5(3) (Ch. 2.2.2(A) and Ch. 2.2.3). According to Article 23, such an agreement conferring jurisdiction will bind (only) if it is either evidenced *in writing* or in a form which conforms with the practices of the parties or the custom of the trade (Ch. 2.2.2(B)).

Several fora available

When a dispute arises between two parties domiciled in different EU Member States, several bases of jurisdiction may be available depending on the circumstances (e.g. the defendant's

domicile under Article 2 and an alternative forum under Article 5). A forum agreement may give exclusive jurisdiction to a single court (or the courts of a single EU Member State), but experience shows that contracting parties sometimes disagree as to whether a valid and binding forum agreement has in fact been concluded. The up-shot of all this is that the parties to a given dispute (A & B) will sometimes seek to bring an action concerning that dispute (cause of action) before the courts of different EU Member States (X & Y).

Litis pendens

The Brussels I Regulation deals with this eventuality by provisions which give priority to the *first* action. Under Article 27, where proceedings involving the same cause of action between the same parties are brought in different EU Member States, the court seised second must of its own motion stay the proceedings until it has been determined whether the court first seised has jurisdiction. Once the jurisdiction of the court first seised has been established, the court second seised must decline jurisdiction.

Article 30 defines the point in time when a court is deemed to be seised for the purposes of the *litis pendens* rules.

2.2.2. Jurisdiction in Contract Cases

A. Place of Performance

Freedom of contract

The parties to a given contract will generally (according to the substantive law which governs that contract) enjoy considerable freedom to formulate the terms of that contract. Similary, those contracting parties also enjoy considerable freedom to determine the forum in which disputes relating to their contract can be resolved. Such parties may, for example, agree that any dispute relating to their contract must be brought before a specified court or the courts of a specified country (Ch. 2.2.2(B)). As an alternative, many contracting parties, including merchants who deal internationally, agree not to litigate in any court, but rather to resolve their disputes by arbitration (Ch. 6).

Supplementary basis

In the absence of any agreement between the parties on dispute resolution, the gap-filling procedural rules will determine the forum (national court) in which litigation may be com-

menced. Under the widely recognised principle of *actor sequitur forum rei*, the forum of the defendant's domicile enjoys *general* jurisdiction, i.e. jurisdiction over any matter, including contractual matters.

In addition to this general jurisdictional base, the Brussels I Regulation includes a provision specifically dedicated to matters *relating to a contract*: Article 5(1). Like other supplementary bases of jurisdiction in the Regulation, Article 5(1) applies only when the defendant is domiciled in another EU Member State.

Specific jurisdiction at the 'place of performance'

Article 5(1) of the Brussels I Regulation is an example of a specific basis of jurisdiction, i.e. the designated forum has jurisdiction only over the specific matters connected with the place of the forum. A plaintiff invoking Article 5(1) is therefore required to establish a link between the particular 'matter relating to a contract' in dispute and the place of the court called upon to decide the dispute. And according to Article 5(1), the only relevant link is the 'place of performance of the obligation in question.'

Within the Brussels I Regulation's field of application, Article 5(1) applies to any contract not governed by other (more 'special' contractual) provisions in the Regulation. Note in this connection that the following kinds of contracts, governed by such special provisions, fall *outside* the scope of Article 5(1): Certain transborder *consumer* contracts (as defined by Article 15), *insurance* contracts (except for *re*insurance contracts) governed by Articles 8-14, *employment* contracts (governed by Articles 18-21), as well as *tenancies of immovable property* situated in an EU Member State (Article 22(1)).

Place of performance

Assuming, for now, that Article 5(1) applies to the contractual dispute at hand, a plaintiff who invokes this provision must establish that the 'place of performance of the obligation in question' lies within the area over which the court seised has territorial jurisdiction. Judging by the wording of Article 5(1)(a), as well as the interpretation of the Court of Justice of the corresponding Brussels *Convention* rule, it is convenient to distinguish, on the one hand, between the 'place of performance,' and, on the other hand, 'the obligation in question.'

Statutory definition

Admittedly, the distinction has become somewhat blurred (and much less relevant) in the very common cases concerning contracts for the delivery of *goods* or the provision of *services,* because the Regulation contains a new statutory definition of 'the place of performance of the obligation in question' applicable in those two important case-categories. According to the express wording of Article 5(1)(b):

> unless otherwise agreed, the place of performance of the obligation in question shall 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;
> – 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.

Cumbersome

It is submitted that the most rational way to understand this provision is that it is an unnecessarily cumbersome and in some respects artificial way of prescribing (supplementary Brussels I) jurisdiction for the court located at the place of delivery of goods or provision of services in matters relating to contracts for the provision of goods or services.

Technically, this result has been obtained by *defining* the 'place of performance of the obligation in question' as 'the place [...] where [...] the goods were delivered or should have been delivered' and 'the place [...] where [...] the services were provided or should have been provided,' respectively.

In reality, however, the provision relies on a *legal fiction*: although the new rule in Article 5(1)(b) defines the 'place of performance of the obligation in question,' it is not really concerned with (finding) the obligation 'in question.' For example, in *Illustration 2f* below, although the obligation which is really (logically) 'in question' in that dispute is the *buyer's obligation to pay*, Article 5(1) of the Regulation compels courts to deem the 'place of performance of the obligation in question' to be the *place where the goods were (to be) delivered*. It is submitted that this new 'legal fiction' – which is *only* relevant for the purposes of determining jurisdiction under Article 5(1) – could have been avoided by the construction of a more logical (internally coherent) rule.

As we shall see, the new and revised (Regulation) version of Article 5(1) leaves some questions unanswered, but apart from this (and notwithstanding the 'legal fiction' just noted), the

revised version also represents a certain simplification in cases involving goods and services under Article 5(1)(b).

> *Illustration 2f:* Seller A (in England) and buyer B (in Portugal) make a contract for the delivery of certain goods in Portugal on January 2nd. The contract specifies the nature of the goods, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a forum for the resolution of disputes which might arise. When A delivers the goods (in Portugal) on January 3rd, B refuses to accept or pay for them. A then sues B for payment in an English court.

Defendant: EU-domiciliary

Since the defendant in this illustration (B) is domiciled in another EU Member State (Portugal), the English court may exercise jurisdiction only in accordance with the bases of jurisdiction laid down by the Brussels I Regulation. Article 2 does not bestow jurisdiction on the English court, because Article 2 provides that there is jurisdiction in the Member State of the defendant's domicile, which in this case is Portugal. Let's examine whether Article 5(1) provides an alternative basis of jurisdiction for the English court.

Art. 5(1)(b): Sale of goods, place of delivery

The claim concerns a contract, so Article 5(1) applies. The contract is for the sale of goods, so jurisdiction lies with the court at the place of delivery of the goods. Delivery did not take place in England (nor did the contract provide that the goods should have been delivered there), so the English court has no jurisdiction under Article 5(1). Since no other jurisdictional basis of the Brussels I Regulation appears to be relevant, the English court should dismiss the action for lack of jurisdiction (unless B appears to defend without contesting the jurisdiction of the English court: Article 24).

> *Illustration 2g:* Architect A, who is domiciled and has a drawing office in Germany, and Owner B, who is domiciled in the Netherlands and owns property in Germany, make a contract for the preparation of plans for the construction of houses in Germany. The contract does not designate the applicable substantive law, nor does it designate a forum for the resolution of disputes which might arise.

When A delivers the plans, B refuses to pay for them. A then sues B for payment in a German court.

Defendant: EU-domiciliary

Since the defendant in this illustration (B) is domiciled in another EU Member State (the Netherlands), the German court may exercise jurisdiction only in accordance with the bases of jurisdiction laid down by the Brussels I Regulation. Article 2 does not bestow jurisdiction on the German court, because Article 2 provides that there is jurisdiction in the Member State of the defendant's domicile, which in this case is the Netherlands. Let's examine whether Article 5(1) provides an alternative basis of jurisdiction for the German court.

Art. 5(1)(b): Services, place of provision

The claim concerns a contract, so Article 5(1) applies. The contract is for the provision of services (preparation of construction plans), so jurisdiction lies with the court at the place of provision of the services. Because the services were the preparation of plans, the German court has jurisdiction under Article 5(1) to rule on A's claim for payment if, under the contract, the plans were prepared in Germany.

Art. 5(1)(c): 'Other contracts'

Since the 'legal fiction' set forth in Article 5(1)(b) of Brussels I applies only to contracts for the sale of goods or the provision of services (i.e., contracts such as those in *Illustrations 2f* and *2g*), the Article 5(1)(b) method cannot be used to provide a similarly simple solution for determining the jurisdiction in cases involving other (kinds of) contracts.

Illustration 2h: Seller A (in Denmark) and Buyer B (in Sweden) make a contract for the sale of a house in France. The contract does not designate the applicable substantive law, nor does it designate a forum for the resolution of disputes which might arise. When A transfers ownership in the house to B, B refuses to pay the full price, basing the refusal on alleged defects. A then sues B for payment of the remainder in a Danish court.

Place of performance of obligation in question

As regards actions based on such 'other contracts' (such as the contract for the sale of a house in *Illustration 2h*), jurisdiction lies with the court at 'the place of performance of the obligation in question.' What this expression in subsection (a) of Article 5(1) of the *Regulation* means can be gleaned from the *case-law* decided under Article 5(1) of the Brussels *Convention*, since (apart from employment contracts, now governed by Articles 18-21) the old rule in Article 5(1) of the Convention was phrased in *exactly the same way* as the new Regulation rule in Article 5(1)(a). So, in order to determine whether the Danish court in *Illustration 2h* has jurisdiction under Article 5(1) of the Regulation, we first need to review the relevant case-law on the Convention version of that rule.

Convention: Tessili method

At a very early stage, in the famous *Tessili v Dunlop* (case 12/76), the Court of Justice of the European Communities decided that, for the purposes of Article 5(1) of the Brussels Convention, *the place of performance of the obligation in question* must be determined in accordance with 'the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought.' This reference in *Tessili v Dunlop* to 'the law which governs the obligation in question' is a reference to (the applicable) *national substantive contract law*. And because substantive contract law varies from one State to another, the decision in *Tessili v Dunlop* clearly implied that a forum court might well be required to make a 'choice of law' before determining the 'place of performance' for jurisdictional purposes.

The forum court would only need to make such a choice of law in a case where the competing (national) substantive laws differed on the sole point relevant for jurisdiction under Article 5(1), i.e., if they led to different results as to the relevant 'place of performance' (of the obligation in question).

An alternative often suggested by legal scholars and several Advocates General of the Court of Justice itself would have been to hold that the 'place of performance of the obligation in question' should be given an *independent* meaning, i.e. a meaning independent of national (substantive) contract law. The Court of Justice never acted on any of these suggestions, always holding steadfast to its *Tessili* ruling.

Regulation: Tessili remains relevant

The fact that the Regulation has now replaced the Convention in all EU Member States has not eliminated the need to apply the sometimes complex '*Tessili* method,' because the 'legal fiction' in Article 5(1)(b) concerning the 'obligation in question' does not obviate the need for a choice of law in order to determine the 'place of performance' of that obligation.

On the other hand, Article 5(1)(b) has reduced the practical significance of certain differences between the substantive laws of various States in this connection, since as regards contracts for the sale of goods and the provision of services (and unless otherwise agreed), the only differences between substantive laws that will matter for jurisdictional purposes will be differences concerning the *place of delivery* or (in rare cases) differences concerning the *place of provision of services*.

Differences between various substantive laws concerning the *place of payment* no longer matter in such contracts (except if the parties have agreed otherwise). Indeed, this could be seen as the main purpose of the amendment of Article 5(1): to do away with the 'unfair' advantage of money creditors able to invoke a substantive law providing for payment at the creditor's place of business or residence. Of course, this 'unfairness' (if unfairness it is) remains if the money creditor's claim is based on a contract other than a contract for the sale of goods or provision of services.

In most cases, the place of provision of services will be clear from the terms of the contract itself, so that a reference to the applicable substantive law (and thus a choice of law) will rarely be necessary.

'Other contracts'

It is in cases concerning other contracts than contracts for the sale of goods or provision of services (such as the contract for the sale of a house in *Illustration 2h*) that the application of Article 5(1) of the Regulation is most complex.

Step 1: Which obligation?

The 'classic' Article 5(1) 'method' (which remains applicable in such 'other' cases) is best understood as a step-by-step process. Since we can hardly determine the 'place of performance' of a given obligation without knowing *which obligation* we are talking about, the first step must be to designate the 'obligation in question.'

When it comes to *contracts for the sale of goods or provision of services*, the determination of the obligation in question is easy: As per the express wording of Article 5(1)(b), this is the obligation to *deliver* the goods or to *provide* the services (unless the parties have agreed otherwise: see below).

Other contracts: actual basis of proceedings

When it comes to such 'other' contracts, the wording of Article 5(1) does not indicate which obligation is the 'obligation in question,' so guidance must be sought in the case-law of the Court of Justice on Article 5(1) of the Brussels *Convention*. In *De Bloos v Bouyer* (case 14/76), the Court of Justice decided that the 'obligation in question' referred to in Article 5(1) of the Convention was 'the contractual obligation forming the basis of the legal proceedings,' i.e. the obligation 'which corresponds to the contractual right on which the plaintiff's claim is based.'

In *Illustrations 2f-2h*, the plaintiff's claim for payment is based on the defendant's contractual *obligation to pay* for goods delivered, services rendered, or property transferred. Or to use the alternative formulation employed by the Court of Justice, the plaintiff alleges a right to payment, and the corresponding obligation incumbent on the defendant is the obligation to pay. (In *Illustrations 2f* and *2g*, however, *De Bloos v Bouyer* is now only relevant if the parties specifically agree to exclude the application of Article 5(1)(b): see below).

Step 2: Choice of law

Having determined the 'obligation in question,' the Danish forum court in *Illustration 2h* can then proceed to the next step, which is to determine *which national (contract) law* should be applied to determine the 'place of performance' of that obligation. According to *Tessili v Dunlop*, the Danish forum court must apply the conflict-of-laws (choice-of-law) rules applicable in the *forum* in order to determine the applicable substantive contract law.

In a contractual dispute such as the one described in *Illustration 2h*, the choice-of-law rules applicable in Denmark are those of the Rome Convention (see Ch. 3.2). Since the parties have made no agreement on the substantive law applicable to their contract, the gap-filling rule in Article 4 of the Rome Convention determines the applicable law (see Ch. 3.2.4(A)). Under that provision, the applicable law is the law of the country with which the contract is most closely connected,

and since the subject matter of the contract is a right in immovable property, it is presumed that the contract is most closely connected with the country where the immovable property is situated, viz., here, France. It follows that French law applies.

Step 3: Determine the place of performance

Under French law, debts are generally to be paid at the debtor's residence, which in *Illustration 2h* is in Sweden. This means that Sweden (not Denmark) is the 'place of performance of the obligation in question' (the buyer's obligation to pay the price of the house).

So the Danish court has no jurisdiction under Article 5(1) to determine A's claim. And since no other jurisdictional basis of the Brussels I Regulation appears to be relevant, the Danish court should dismiss the action for lack of jurisdiction (unless B appears to defend without contesting the jurisdiction of the Danish court: Article 24 of the Brussels I Regulation).

If we were to adjust the facts in *Illustration 2h*, so that the house were situated in a country such as England, then English (substantive) law would apply (to determine the place of performance for the purposes of jurisdiction under Article 5(1): see 'Step 2' above), and since under English law debts are generally to be paid at the *creditor's residence*, the Danish court would have jurisdiction to determine A's claim for payment, because the creditor – A – resides in Denmark.

Regulation amendment: assessing its effects

As already emphasised, the case-law of the Court of Justice on the 'obligation in question' part of Article 5(1) of the Brussels Convention was partially overturned by the legislature when the Brussels I Regulation was adopted. Only in the residual category of 'other contracts' is jurisdiction to be decided as before, whereas contracts for the delivery of goods or the provision of services are now specifically regulated in Article 5(1)(b).

Article 5(1)(b) is stated to be subject to the parties agreeing otherwise, but it is unclear what the parties may 'otherwise' agree (*accord*: Briggs, *Conflict of Laws* at 74). Forum agreements are governed by an entirely different part of the Regulation (Article 23: see Ch. 2.2.2(B)), and agreements on the place of performance would not appear to be an 'otherwise' agreement since Article 5(1)(b) expressly refers to the place of delivery/provision of services *under the contract* (emphasis added).

Perhaps the parties may simply agree that Article 5(1)(b) shall not apply (this is the view advocated by Takahashi in *E.L.Rev.* 2002 at 538).

Relevance of prior case-law

It should be clear by now that care must be taken when interpreting Article 5(1) of the Brussels I Regulation on the basis of case-law relating to Article 5(1) of the Brussels Convention. Nevertheless, many important precedents are still good law, either generally or within a residual area unaffected by the amendment to Article 5(1).

Tessili, De Bloos

An example of a decision which remains generally relevant is the decision by the Court of Justice in *Tessili v Dunlop,* since the Court's decision only dealt with 'place of performance' (see 'Step 2' and 'Step 3' above) and not with 'obligation in question' ('Step 1'). An example of a decision which is now only relevant for the residual ('other contracts') area is *De Bloos v Bouyer*, since the *De Bloos* ruling (concerning the actual basis of the claim) now only governs contracts other than contracts for the sale of goods or for the provision of services.

At least since *Shenavai v Kreischer* (case 266/85), it has been clear that *De Bloos v Bouyer* represented a general principle on *how to determine the obligation in question* for the purposes of Article 5(1) of the Brussels Convention. The rule contained in Article 5(1) of the Brussels I Regulation is different, but 'only' in respect of contracts for the sale of goods or for the provision of services.

In *Shenavai v Kreischer*, the Court of Justice held that for the purpose of determining the place of performance within the meaning of Article 5(1), the obligation to be taken into consideration in an action for the recovery of fees, commenced by an architect commissioned to prepare plans for the building of houses, was the contractual obligation actually forming the basis of the legal proceedings. In the case in point, that obligation consisted of a debt for a sum of money payable at the defendant's permanent address. (Today, a similar case would be treated differently in respect of jurisdiction: see *Illustration 2g* above).

Apart from affirming *De Bloos v Bouyer* as the general rule, *Shenavai v Kreischer* stated the principle of *accessorium sequitur principale* (the accessory [obligation] follows the principal). It seems quite conceivable that this principle could still play a part even in cases involving contracts of sale of goods or of provision of services, e.g. in a case where a contract provides for the delivery of some goods in one place and of other goods in another place or for the provision of some services in one place and of other services in another place. At any rate, in cases involving contracts *other than* contracts for the sale of goods or for the provision of

services, *Shenavai v Kreischer*, like *De Bloos v Bouyer*, would appear to be entirely unaffected by the amendment of Article 5(1).

Color Drack v Lexx (case C-386/05) concerned a claim by an Austrian buyer of sun glasses against its German seller for repayment of the purchase price for unsold items. The sun glasses had been delivered directly from the German seller to a number of retailers in various places in Austria. The Court of Justice held that the first indent of Article 5(1)(b) of the Brussels I *Regulation* must be interpreted as applying where there are *several places of delivery* within a *single* Member State (emphasis added). In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

Same result

Although the new Article 5(1) lays down a radically different approach for determining the obligation in question in sales and services contracts, the new Article 5(1) leads to the same result as the old Article 5(1) whenever the buyer/recipient sues the seller/provider alleging late, defective or non-performance.

In the not uncommon case of a buyer of goods or recipient of services complaining about late, defective or non-performance on the part of the seller or service-provider, *jurisdiction over the seller or provider* will depend on the place of delivery of the goods and the place of provision of the services, respectively, regardless of whether the action was commenced before or after the Brussels I Regulation entered into force.

Different result

Conversely, a different result will ensue under the new Article 5(1) only in cases which satisfy all 3 of the following requirements: (i) the contract in question is for the sale of goods or for the provision of services, (ii) the seller/provider sues the buyer/recipient for payment, and (iii) the place of payment differs from the place of delivery of the goods or of provision of the services.

Whereas *jurisdiction over the buyer of goods or recipient of services*, (e.g.) in an action for payment, will be determined on the basis of the place of delivery or of provision of services, if the action was commenced *after* the entry into force of the Regulation, jurisdiction over the buyer/recipient in actions for payment commenced *before* that date was determined by the place of payment.

Unresolved issues

The new Article 5(1) is not in all respects self-explanatory, and there are issues which can only be resolved by future case-law. One issue already alluded to is the meaning of the words 'unless otherwise agreed' in the opening sentence of subparagraph (b) of Article 5(1). Another is the function of subparagraph (c).

On its face, subparagraph (c) looks like a rule aimed at cases which do not fall within subparagraph (b) – i.e., because the contract involves neither a 'sale of goods' nor the 'provision of services.' The C*ommission proposal*, however, suggests that subparagraph (c) tells you that if the place of delivery or of the provision of services under subparagraph (b) is not in an EU Member State (but elsewhere, e.g. in New York), then subparagraph *(a)* – equivalent to the old Article 5(1) – applies even when the contract is for the sale of goods or the provision of services.

Consider an example like this: Sell-Co in Germany contracts with Buy-Co in England for the delivery of goods in New York. Sell-Co delivers, but Buy-Co does not pay, and Sell-Co consequently wants to sue for payment.

Under the interpretation advanced in the *Commission* proposal, the line of argument in the example would be as follows: It is a sale, so subparagraph (b) applies, and one looks to the place of delivery. The place of delivery, however, is not in an EU Member State, and subparagraph (c) then tells you that subparagraph (a) and not (b) applies. Now (under *De Bloos v Bouyer*), you look to the place of payment (which forms the actual basis of the proceedings), and if *that* place is in an EU Member State, Sell-Co can sue there. In short, under this interpretation, the seller/provider suing for payment has *two* shots: if *either* the place of delivery or of the provision of services *or* the place of payment is in an EU Member State, the seller/provider can sue in the State concerned. (If *both* places are in (different) EU Member States, only the place of delivery or of the provision of services provides a basis of jurisdiction under Article 5(1)).

However, it is submitted that this interpretation is unsatisfactory, and that a better line of argument goes as follows: It is a sale, so subparagraph (b) applies, and one looks to the place of delivery. The place of delivery, however, is not in an EU Member State, so Sell-Co cannot sue under Article 5(1). Sell-Co must sue in England under Article 2 of the Brussels I Regulation or, if permitted by American law, in New York. (The view advocated here is supported by Takahashi in *E.L.Rev.* 2002 at 540. For a contrary opinion, see Hill, *International Commercial Disputes* at 136).

B. Jurisdictional Clauses

Supplementary rule

The discussion in Ch. 2.2.2(A) has dealt with the important supplementary rule in Article 5(1) of the Brussels I Regulation: the specific jurisdictional base which applies alongside

the general jurisdictional rule of defendant's domicile 'in matters relating to a contract.'

Alternative base; absent agreement

The Article 5(1) rule is supplementary not only because it provides an alternative to the general defendant's domicile jurisdictional base, but also because both of those jurisdictional bases apply absent agreement, i.e. absent an agreement between the parties as to which national court should have the authority, often the exclusive authority, to decide a given dispute.

Prorogation; derogation

Article 23 of the Brussels I Regulation, which concerns forum agreements, falls within the Regulation heading 'Prorogation of jurisdiction.' Actually, Article 23 deals not only with *prorogation*, which confers jurisdiction on a given court, but also with *derogation*, whereby a court is deprived of the jurisdiction which it otherwise would have had.

Article 24

Article 23 deals with express jurisdictional agreements: choice of forum clauses in the contract between the parties. Article 24 deals with appearance: an appearance by a defendant who does not contest the jurisdiction of the court renders that court territorially competent to decide the dispute.

Contractual freedom

Generally speaking, the fact that forum agreements are entered into by contracting parties and, depending on the circumstances, respected by courts, confirms the widely applied maxim of contractual freedom. As a starting point, the parties are free to make their own agreement, and it is up to the courts to enforce the letter of their contract, their own private law.

Mandatory rules

Before proceeding with a more detailed examination of forum agreements under Article 23, it should be noted that the Regulation contains special rules (Articles 13, 17, 21 and 22) which limit the extent to which parties can contractually depart from the jurisdictional rules otherwise applicable in matters relating to insurance, consumer contracts, individual contracts of employment and tenancies of immovable property. In this way, certain jurisdictional provisions are elevated to the status of mandatory rules from which the parties cannot 'contract out.'

Article 5(1) agreement

Another preliminary point to be noted concerns the effect of an express agreement – not as to forum – but rather as to the 'place of performance' of the obligation in question. The issue here is whether such an agreement, addressed to the Article 5(1) jurisdictional base, will render the courts of that place competent to decide the dispute, thus effectively bypassing the formal requirements of Article 23. The answer to this question, according to a decision the Court of Justice in *Zelger v Salinitri (No. 1),* is yes.

In *Zelger v Salinitri (No. 1)* (case 56/79), a dispute arose between Mr. Zelger (of Munich, Germany) and Mr. Salinitri (of Mascali, Italy) concerning payment alleged to be outstanding on a loan from Mr. Zelger to Mr. Salinitri. Mr. Zelger commenced proceedings in Munich, claiming that the parties had made an express oral agreement that Munich was to be the place of performance for the repayment. The Court of Justice held that if the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the national law applicable to the contract, the court for that place has jurisdiction to take cognizance of disputes relating to that obligation under Article 5(1) of the Brussels Convention, regardless of whether the formal conditions provided for under Article 17 [Article 23 of the Brussels I Regulation] have been observed.

As the Court explained, such an agreement on the place of performance differs from an outright forum agreement in at least one important respect: while it may serve to give jurisdiction under Article 5(1) to the court of the agreed place of performance, it cannot take away the jurisdiction granted by other provisions of the Regulation, e.g. Article 2 or 6.

Choice of EU court

Article 23 applies to forum agreements conferring jurisdiction on one or more courts in one or more EU Member States. Under Article 23, the jurisdiction conferred on the court or courts chosen is *exclusive*, unless the parties have agreed otherwise.

Article 23 only serves to establish jurisdiction in the territorial sense. Subject-matter jurisdiction (which, as previously noted (Ch. 2.1.1), relates to whether the particular court where the plaintiff has brought suit, as opposed to another court in the same territory, is 'competent' to decide the dispute in question) is solely within the purview of national law.

Article 23

The core of Article 23 of the Brussels I Regulation is fairly simple:

> If the parties, one or more of whom are domiciled in an EU 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Contractual freedom

Under Article 23, parties enjoy almost unfettered contractual freedom. When three or four basic requirements are met – that the parties have agreed, that at least one party is domiciled in an EU Member State, that the court or courts chosen are in an EU Member State or States, and that the forum agreement concerns a particular legal relationship – the parties' choice of court must be given effect. In particular, there is no requirement of any connection between the parties or the dispute and the chosen forum.

Subject to the qualification of the term 'agreed' (discussed below), the only exceptions are the special rules on insurance, consumer contracts, individual contracts of employment and tenancies of immovable property which, as already indicated, limit the extent to which parties can enter an agreement which departs from the jurisdictional rules otherwise applicable under the Regulation.

Restraints on agreement

Article 23 of the Brussels I Regulation contains a catalogue of ways in which parties may validly make a forum agreement, traditionally termed requirements with respect to formal validity. If the forum clause in question does not satisfy the applicable requirements, the defendant is not bound by his or her promise, and the plaintiff cannot enforce the agreement made. To be formally valid the forum agreement in question must be either:

(a) in writing or [concluded orally and confirmed] in writing; or
(b) in a form which accords with practices which the parties have established between themselves; or
(c) 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.

Electronic means

The Regulation expressly provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing: Article 23(2).

Originally

The formal requirements contained in Article 23 of the Brussels I Regulation are the result of a long development involving both legislative and judicial intervention. The corresponding provision of the original (1968) Brussels Convention limited the parties' choice of forum to an 'agreement in writing' or an 'oral agreement confirmed in writing.'

The authoritive English text of Article 23(1)(a) of the Regulation reads 'in writing or evidenced in writing.' However, the other (equally authentic) language versions expressly refer to an agreement in writing or an oral agreement confirmed in writing (as did the (1978) English text of the original 1968 Brussels Convention), and the relevant decisions of the Court of Justice of the European Communities tacitly adopt the same approach.

Salotti

A leading case on the interpretation of the 'in writing' requirement, still relevant when other alternatives laid down by Article 23(1) are not available, is *Salotti v RÜWA* (case 24/76). In this case, the parties had concluded a written contract of sale of goods, signed by both parties. The seller's standard conditions, including a forum clause in favour of the court in Cologne (Germany), were printed on the back of the contract, which, however, did not expressly refer to those conditions. Prior to the conclusion of the contract, the seller had sent written offers which expressly referred to the standard conditions. The contract signed by the parties referred to the accompanying letter with which those offers had been sent.

Ruling

On a reference from the German court seised on the basis of the forum clause, the Court of Justice of the European Communities held that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under Article 17(1) of the Brussels Convention [Article 23(1) of the Brussels I Regulation] is fulfilled 'only if the con-

tract signed by both parties contains an express reference to those general conditions.' In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the in writing requirement is satisfied 'only if the reference is express and can therefore be checked by a party exercising reasonable care.'

> *Illustration 2i:* Danish company A makes a written offer to sell certain goods to German buyer B. B sends a written acceptance to A, referring to A's offer and to B's general conditions of trade. B's general conditions contain a forum clause in favour of the German courts. B's general conditions are not supplied with the acceptance, but can be found on B's Internet website. When a dispute concerning payment arises, A brings an action in Denmark against B.

> *Illustration 2j:* Swedish buyer A sends a written confirmation to French seller B of the parties' oral contract of sale. The written confirmation refers to A's general conditions of trade, which contain a forum clause in favour of the Swedish courts. B signs and returns A's written confirmation of the contract, thereby, according to the pre-printed text of the confirmation, accepting the order in its entirety.

In a case like *Illustration 2i*, where a reference to general conditions containing a forum clause is not signed by both parties, the 'in writing' requirement, as interpreted in *Salotti v RÜWA*, is clearly not satisfied. That requirement would, however, be satisfied in a case like *Illustration 2j*, where an express reference to general conditions containing a forum clause is signed by both parties.

Oral agreement confirmed in writing

In *F. Berghoefer GmbH & Co KG v ASA SA* (case 221/84) the Court of Justice held that where jurisdiction is conferred by an express oral agreement between the parties to a given contract, the formal requirements of Article 17 (now 23(1)(a)) are satisfied if one party (either one) sends a written confirmation of that agreement to the other (who then raises no objection).

According to *Berghoefer*, the oral agreement must address jurisdiction specifically; it is not sufficient that the parties have made an oral agreement to apply standard terms which contain a forum clause. The written confirmation must have been received by the other party. The Court of Justice expressly stated that it was not necessary to decide to what extent an objection against a confirmation could be taken into account (in *Berghoefer*, no objection had been raised as the other party denied having received any written confirmation).

Original Article 17 amended

The original Article 17 of the Brussels Convention was subsequently amended by the 1978 Convention (on the Accession of Denmark, Ireland and the United Kingdom to the 1968 Convention) and again by the 1989 Convention (on the Accession of Spain and Portugal). The 1978 version of the rule relaxed the writing requirement by permitting also an agreement:

> in international trade or commerce in a form which accords with the practices in that trade or commerce of which the parties are or ought to have been aware.

The 1989 version expanded the wording of this (international commerce) rule without, however, changing its substance. For reasons of clarity, the 1989 version also introduced the division into (a), (b) and (c), (a) ('in writing') being the original (1968) version, (c) ('international trade or commerce') the 1978 addition, and (b) ('practices' between the parties) codifying certain decisions of the Court of Justice (which, without express support in the Convention text, had recognised that way to conclude a valid forum agreement). The three alternative criteria thus created were carried over unchanged to the Brussels I Regulation.

According to the drafters of the 1978 Accession Convention, the interpretation of the original version of the rule by the Court of Justice of the European Communities did not 'cater adequately' to the customs and requirements of international trade and its heavy dependence on standard conditions which incorporate jurisdiction clauses – a dependence necessitated by the need for fast action in swiftly fluctuating markets.

According to the drafters of the 1989 Accession Convention, the wording of subparagraphs (b) and (c) was inspired by Article 9 of the Convention on Contracts for the International Sale of Goods (CISG).

Choice of non-EU court

The Brussels I Regulation does not preclude forum agreements conferring (exclusive) jurisdiction on a court or courts outside the European Union.

Naturally, the Regulation does not seek to regulate the decision of the chosen non-EU Member State court as to whether or not it (the non-EU Member State court) should give effect to a forum agreement which purports to confer jurisdiction on that court. Absent treaty arrangements with the State in question, that State's own law will govern that decision.

Perhaps surprisingly, the Regulation does not purport to regulate the decision to be taken by an EU Member State court confronted with such a forum agreement either. Consequently, it seems that a Member State whose courts would have had jurisdiction absent agreement can apply its own law to determine in which circumstances (if any) its courts should give effect to an agreement designating a non-EU forum (and dismiss an action brought in that Member State for lack of jurisdiction), just as that Member State court can apply its own law to determine in which circumstances the forum agreement should be ignored and jurisdiction accepted in accordance with the provisions of the Regulation (or in accordance with national law if the defendant is not domiciled in an EU Member State). See *Coreck v Handelsveem* (case C-387/98) at para. 19, left open in *Owusu v Jackson* (case C-281/02).

The application of these principles is illustrated by the following hypothetical example: Sell-Co in England contracts with Buy-Co in Mexico. The contract contains a jurisdiction clause in favour of the courts of New York. If a dispute arises and one of the parties brings an action in New York, the effect (if any) to be given to the contractual choice of court will be decided solely on the basis of New York law. On the other hand, if Sell-Co sues in England despite the forum agreement, English national law will determine whether or not to give effect to the contractual choice of court. Finally, and perhaps surprisingly, if Buy-Co sues in England despite the forum agreement, Article 2 of the Brussels I Regulation will probably not preclude the English court from dismissing the action for lack of jurisdiction solely with reference to English national law on the derogatory effect (if any) of a contractual choice of a non-EU court.

All parties non-EU domiciliaries

Article 23(1) lays down the requirements for the formal validity of an express forum agreement where at least one party is an EU domiciliary. According to Article 23(3), where neither party to the contract is an EU domiciliary, the question of the effect of a forum agreement is to be decided according to the law of the chosen forum State, and in such event 'the courts of other Member States shall have no jurisdiction over [the parties'] disputes unless the court or courts chosen have declined jurisdiction.'

This can be illustrated by the following hypothetical example: American Manufacturer grants a license to Russian Licensee relating to certain German patents held by Manufacturer. The contract provides for exclusive jurisdiction in England. Later, a dispute arises, and the Licensee brings an action in Germany, invoking the national German rules on property-based jurisdiction, the patents being property of the defendant Manufacturer deemed to be located in Germany. Article 23(3) of the Brussels I Regulation precludes the German courts from accepting jurisdiction unless the chosen English court declines jurisdiction. The decision of the English court whether or not to accept jurisdiction on the basis of the forum agreement, however, will be controlled solely by English national law; since neither party is domiciled in the EU, the Regulation only governs the situation in Germany (and other Member States apart from the United Kingdom). Should the Licensee sue in Russia or the Manufacturer sue in the United States, the effect (if any) to be given to the forum agreement will, of course, be determined by Russian or American law, respectively.

2.2.3. Jurisdiction in Tort

Article 5(3)

Article 5(3) of the Brussels I Regulation provides that a person domiciled in a Member State may be sued in another Member State:

> in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

Supplementary rule

As with the Article 5(1) rule which applies to obligations of a contractual nature, the Article 5(3) rule serves as a supplement to the defendant's domicile criterion set forth in Article 2: an EU domiciliary may not only be sued at the place of the tort, but also where he or she is domiciled.

Lex loci delicti

In selecting the place of the harmful occurrence, the drafters of the Brussels Convention chose a well-known factor for this delictual base, and this formulation corresponds to the national laws of many European jurisdictions. There is also a significant connection between this jurisdictional base and the widely accepted conflict-of-laws principle applicable in cases of tort: the rule of *lex loci delicti*, the law of the country in which the relevant acts and events took place (Ch. 4).

Independent interpretation

As regards the substantive scope of this jurisdictional base, the Court of Justice has ruled that an 'independent' interpretation must be used to determine which matters relate to tort, delict or quasi-delict. According to the Court of Justice, this concept covers all actions which seek to establish liability and which are not related to a contract within the meaning of Article 5(1): *Kalfelis v Schröder* (case 189/87).

This would include a claim brought against a manufacturer or other supplier of an allegedly defective product in respect of injury to a subsequent purchaser's or 'bystander's' person or property. It follows that such *product liability* claims (with the possible exception of a buyer's claim against the immediate seller) can be brought in the place where the harmful event occurred (including the place of injury: see below).

Place of harmful event

In some cases it may not be evident in which place the harmful event can be said to 'occur.' That is for instance the case if the act that causes the damage is carried out in a different country from where the damage occurs. In the famous *Bier v Mines de potasse d'Alsace* (case 21/76), a horticultural company (Bier) in the Netherlands claimed to sustain damage because of pollution of the river Rhine caused by a French mining company further up the river. Bier sued the mining company in the Netherlands. The jurisdictional question was this: Should 'the place where the harmful event occurred' in Article 5(3) be understood to be where the pollution was allegedly committed (France) or where the damage was suffered (the Netherlands)?

The Court of Justice of the European Communities ruled that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the ex-

pression 'place where the harmful event occurred' in Article 5(3) must be understood as being intended to cover *both* the place where the damage occurred *and* the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

> *Illustration 2k:* After an accident involving a merry-go-round in an amusement park in Denmark, the owner's insurer (A) pays damages to a boy who has been injured. The merry-go-round had been supplied by company B (in the Netherlands) and manufactured by company C (in Belgium). Alleging that the accident was caused by a defect in the merry-go-round, A brings an action in Denmark against B and C, seeking redress for the damages paid to the boy.

Since this is a 'matter relating to tort,' the plaintiff in *Illustration 2k* can choose to sue in Denmark, where the damage (the boy's injury) occurred.

Defamation

Defamation (libel, slander) is a special kind of tort, where the damage (to someone's reputation) is essentially intangible. It is therefore sometimes difficult to determine the 'place where the harmful event occurred' in such cases. A partial answer (covering defamation in newspaper articles) was given by the Court of Justice in *Shevill v Presse Alliance* (case C-68/93).

Ms Shevill, a United Kingdom national residing in North Yorkshire, England, and Chequepoint Sarl, France, brought an action in England against the French company Presse Alliance SA, claiming damages for harm caused by the publication of a defamatory newspaper article. Chequepoint Sarl had operated *bureaux de change* in France since 1988, and Ms Shevill was temporarily employed for three months in the summer of 1989 by its Paris office. She returned to England on 26 September 1989. The newspaper article, published on 23 September 1989 in the French newspaper *France-Soir*, was about an operation which drug squad officers of the French police had carried out at one of the *bureaux de change* operated in Paris by Chequepoint Sarl. The article, based on information provided by the AFP, mentioned the company 'Chequepoint' and 'a young woman by the name of Fiona Shevill-Avril.'

Ms Shevill and Chequepoint Sarl considered that the newspaper article was defamatory in that it suggested that they were part of a drug-trafficking network for which they had laundered money. They sued Presse Alliance SA in England, claiming damages for libel in respect of the copies of *France-Soir* distributed in France and other European

countries including those sold in England and Wales. The plaintiffs subsequently amended their pleadings, deleting all references to the copies sold outside England and Wales.

France-Soir is mainly distributed in France and has a very small circulation in the United Kingdom, effected through independent distributors. It was estimated that more than 237,000 copies of the issue of *France-Soir* in question were sold in France and approximately 15,500 copies distributed in other European countries, of which 230 were sold in England and Wales (5 in Yorkshire). The plaintiff's choice of an English forum was probably related to the fact that under English law there is a presumption of damage in libel cases, which meant that the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question.

Shevill ruling

The Court of Justice held that the victim of a libel by a newspaper article distributed in several Member States may bring an action for damages against the publisher, either (1) before the courts of the Member State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or (2) before the courts of each Member State in which the publication was distributed and where the victim claims to have suffered injury to his or her reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

The Court of Justice held that its observations in *Bier v Mines de potasse d'Alsace* in favour of giving the plaintiff a choice between the courts for the place where the damage occurred and the courts for the place of the event which gives rise to and is at the origin of that damage made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication. The Court continued (emphasis added):

> 24. In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage [...] can only be the *place where the publisher* of the newspaper in question is *established*, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.
>
> 25. The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for *all the harm caused* by the unlawful act. [...]

> 28. The *place where the damage occurred* is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim.
> 29. In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.
> 30. It follows that the *courts of each Contracting State* in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have *jurisdiction to rule on the injury caused in that State* to the victim's reputation.
> 31. In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.
> 32. Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established. [...]

Damage in several States

It should be noted that the *Shevill* ruling on the jurisdiction of the courts of each State to rule solely in respect of harm caused in that State is likely to be applied to torts generally and not just to defamation. In this way, *Shevill v Presse Alliance* constitutes an important refinement of the *Bier* ruling, making it clear that the courts for the place of the event giving rise to the damage have jurisdiction in respect of the entire damage, whereas the courts for the place where the damage occurred have jurisdiction solely in respect of harm caused in the State of the court seised. Of course, this refinement is relevant only in those cases where damage has occurred in more than one State.

Illustration 2l: Danish company A seeks to market certain music cd's in Germany and England. Swedish company B claims copyright to the music in question, thus thwarting A's attempts to enter into licensing agreements with distributors in the said countries. A commences proceedings in Denmark against B, claiming damages for the allegedly unfounded interference with A's marketing efforts.

In a case like *Illustration 2l*, there would not be a basis of jurisdiction in Denmark, but the plaintiff could choose to sue in England in respect of the damage (lost sales) in that country and in Germany as regards the damage in that country. Alternatively, the plaintiff could bring an action in Sweden (the defendant's domicile) seeking redress for the whole loss.

Threatened wrongs

The words 'or may occur' in Article 5(3) were introduced by the Brussels I Regulation, but this seems to represent a clarification and codification of the meaning of the original Convention rule.

Thus, in *Bier v Mines de potasse d'Alsace*, the plaintiff sought both redress for harmful events that had already occurred and preventive measures against future harmful events. Furthermore, in *Verein für Konsumenteninformation v Henkel* (case C-167/00), concerning the interpretation of the Brussels *Convention*, the Court of Justice held that the amendment of Article 5(3) was a 'clarification of the wording.' Referring also to the 1978 Schlosser Report (which states (at para. 134) that Article 5(3) of the Convention covers also actions whose aim is to prevent the *imminent* commission of a tort (emphasis added)), the Court held that Article 5(3) of the Convention (as well as of the Regulation) applied also to 'an action seeking to prevent the occurrence of damage,' including an action in Austria by an Austrian consumer organisation seeking an injunction against the German defendant's use of certain contract terms in contracts with Austrian consumers.

CHAPTER 3

The Applicable Law in Contract

3.1. General Introduction

First step: Jurisdiction

Since a court cannot proceed to resolve the merits of a given dispute before it determines whether it is competent to decide the case, the first major step in the adjudication of a commercial dispute with an international element is usually taken when the forum court determines whether or not it has jurisdiction to adjudicate (Ch. 2).

Second step: Choice of applicable law

As emphasised in Ch. 1.3 the fact that a given court in a given EU Member State X declares itself competent to decide a given case with an international dimension does *not* necessarily mean that the merits of that case will be decided on the basis of the substantive law of that particular forum. So, assuming the court in question declares itself to be competent (have jurisdiction), the second major step is likely to be the choice (designation) by that court of the *applicable substantive law*.

Because national courts invariably apply their own procedural rules (*lex fori*) or jurisdictional rules imposed by 'higher law' (e.g. the Brussels I Regulation), the *selection of a jurisdictional rule-set* as such does not ordinarily involve a choice of law.

Depending on the circumstances, however, the *application of a given jurisdictional rule* – such as the rule in Art. 5(1) of the Brussels I Regulation concerning 'the place of performance of the obligation in question' – may require the *application of a substantive rule* of (contract) law and therefore also a *choice* between the relevant substantive laws of different countries. The application of the so-called '*Tessili* method' in connection with Art. 5(1) is discussed in Ch. 2.2.2(A).

Conflict rules → substantive law

In a commercial context, labels such as 'conflict of laws' and 'choice of law' are most often applied to describe the rule-sets and procedures which competent courts use to choose (designate) a given body of substantive law, usually the law of a given State. To help decide the merits of (e.g.) a contractual dispute or matter, a competent court in State X will apply a choice-of-law rule-set designed to determine whether to apply the contract law of State X or the contract law of State Y. The X-court will then use the law of the chosen State to determine the outcome of the contractual dispute at hand.

3-step process

The formal choice-of-law rules may thus be seen as the second major step in a 3-step transnational judicial process. Seen in relation to the ultimate substantive goal, both jurisdiction and choice of law may be regarded as pre-judicial problems, as means to an end. Judging by its placement in relation to what comes before and after, the choice-of-law stage might be seen as a kind of 'half-way house' (between jurisdiction and substance).

> *Illustration 3a:* Danish service-provider (P) offers to provide certain services (at a low price) in England for English recipient (R), but before R manages to accept, P revokes its offer. Claiming that P remains bound, R 'accepts' P's offer. P is unwilling to perform, so R brings an action against P in a (competent) Danish court, seeking damages (compensation) for loss suffered as a consequence of P's failure to perform its (alleged) contractual obligation (the difference between P's offer and the higher price R paid P2 to do the same job).

Outcome-determinative

Illustration 3a depicts a very real conflict of (substantive) laws, since the English and Danish rules regarding the revocability of offers in a situation like this are *not the same* (under Danish law offers are generally *irrevocable*, whereas under English law, offers are generally *revocable*). For this reason, the Danish court's choice between the 'competing' contract laws of England and Denmark will probably determine the ultimate outcome of the case: If the court applies Danish law, the offer binds P, which means R is entitled to damages. If English law is applied, P is not bound, so P wins.

Situations involving a conflict

The conflict-of-laws rule-sets which EU Member State courts use to designate the law applicable to contractual and delictual obligations *apply only* 'in situations involving a conflict of laws' (see, e.g., Article 1 of the Rome I Regulation discussed in Ch. 3.2 below).

The reason for this applicability limitation seems obvious in purely *national* cases, i.e. where no international element is involved (Ch. 1.1): in such cases only one State's substantive law can be relevant. But a given conflict-of-laws rule might be deemed inapplicable even if the case concerned involves one or more *international* elements, and this is because the *substantive laws* of different States can only be said to 'conflict' if they *differ in content* (as they do in *Illustration 3a*).

But in a situation where the relevant substantive rules in State X are the *same* as the rules in State Y, it will simply *not matter* whether the forum court applies the law of State X or State Y, since the application of either State's law will lead to the *same outcome.* Quite obviously, such a situation does *not* 'involve a conflict of laws.'

> *Illustration 3b:* Merchant-seller (S) in Italy offers to sell certain machines (at a low price) to merchant-buyer (B) in Germany, but before B manages to accept, S revokes its offer. Claiming that S remains bound, B 'accepts' the offer by S. S is unwilling to deliver, so B brings an action against S in a (competent) Italian court, seeking damages (compensation) for loss suffered as a consequence of the failure by S to perform its (alleged) contractual obligation (the difference between the offer by S and the higher price B paid S2 for the same goods).

International sales harmonisation

Because this case involves an international sale of goods, and because S and B both have their principal places of business in CISG Contracting States (Italy and Germany), the revocability issue in this illustration is governed by the (default) rules of sales contract formation in Part II of the CISG Convention on Contracts for the International Sale of Goods (Lookofsky, *CISG*, Ch. 2.3). This means that the substantive rules which apply in Italy and Germany regarding the 'revocability' of the offer in this illustration *are the same*, so it would *not matter* whether the Italian court decides to apply Italian or German

(sales contract) law, since the application of either State's law leads to the *same outcome*.

Limited substantive harmonisation

Sales contract harmonisation is of great practical importance, but due to the generally limited harmonisation of substantive law in other commercial fields, there is often considerable need in international practice for the application of conflict-of-laws rules.

Consumer contracts

We have, to be sure, witnessed significant substantive harmonisation of 'consumer law' at the regional level within the European Union. But we are still a very long way from total harmonisation of European civil and commercial law, e.g. in the form of an all-encompassing 'European Civil Code.' So – apart from international sales of goods and (aspects of) EU consumer contracts – the substantive commercial law relevant for most contracts and torts remains mainly a matter of national *State* (as opposed to European Union) *law*.

As examples of partial harmonisation of civil and commercial law, see the EC Directives relating to Product Liability [1985] OJ L210/29, Door-to-Door Sales [1985] OJ L372/31, Consumer Credit [1987] OJ L42/48, Package Travel [1990] OJ L158/59, Unfair Terms [1993] OJ L95/29, Timeshare [1994] OJ L280/3, and Distance Contracts [1997] OJ L144/19. Regarding prospects for 'total harmonisation,' see, e.g., Lookofsky, *Harmonization*, and Hartkamp, *Towards a European Civil Code*.

Conflicts harmonisation

Realising early on that the harmonisation of substantive commercial (contract and tort) law would take a very long time, the EC (which preceded the EU) decided to place considerable emphasis on the harmonisation of the Member States' choice-of-law rules. The adoption of uniform choice-of-law rules seeks to ensure that a given contract or tort case will be decided on the basis of the same State's substantive law irrespective of whether that case is decided by the courts of EU Member State X or Y.

This kind of harmonisation is intended to restrict the effects of the practice known as *forum shopping* whereby plaintiff A initiates litigation against defendant B in the courts of State X because A predicts that the X-court will apply procedural or substantive rules more favourable to A. If the same dispute might be decided differently in State Y, B might rush to a Y-

court (to get it to decide the case first). In some such situations, the more resourceful party (with the means to investigate which law is more advantageous for him/her) might be seen to have an unfair legal advantage over the less resourceful party. The significance of this advantage in practice is difficult to measure, however, especially since plaintiffs are generally reluctant to commence a legal action in a foreign forum (Ch. 1.3).

The Rome Convention and the Rome Regulations

Although the need for the harmonisation of conflict-of-laws rules within the European Union was noted in early Court of Justice interpretations of the 1968 Brussels Convention, EU conflicts harmonisation proceeded rather slowly. The first major piece of EU harmonisation in this area was the 1980 (Rome) Convention on the law applicable in contractual matters. The next (delictual) step, first realised more than 25 years later, was the 2007 Rome II Regulation on the law applicable to non-contractual matters. Finally, in 2008, the Rome I Regulation was adopted to replace the 1980 Rome Convention.

Common factors

Before proceeding to consider the main aspects of contract-conflict regulation (in Ch. 3.2), to be followed by rules on conflict of laws in tort cases (in Chapter 4), we might here highlight a few common factors which tend to unite many of the individual EU conflict-of-laws rules.

Characterisation of the dispute

Since a court in an EU Member State will always apply its own (EU-PIL) conflicts rules, the first real step in the law-selection process will be to 'characterise' the dispute (the 'cause of action') which the plaintiff has brought before the court. As noted previously (in Ch. 1.4.1) a given conflict-of-laws rule is likely to be geared to a particular kind of case, so courts need to characterise (or classify) the case in question – say, as one involving a 'contract' or a 'tort' – in order to be able to identify the relevant conflicts rule (so that rule can then be used to designate a given State's substantive law of contract or its substantive law of tort).

As noted earlier (Ch. 1.4.3) European courts apply the private international (conflicts) rules of the forum in order to designate the applicable *substantive* law. Within EU-PIL commercial contexts at least, the doctrine known as *renvoi* (whereby the conflict rules of State X can lead to the application of the conflict rules of State Y) has gone out of style: see Article 15 of the Rome Convention, Article 20 of the Rome I Regulation and Article 24 of the Rome II Regulation.

Straightforward

In most situations, the characterisation process is rather straightforward. In *Illustration 3a*, for example, the dispute obviously involves a 'contractual matter,' leading to the application of the rules which all EU Member States are required to apply to resolve such contract conflicts (see Ch. 3.2.2).

Regarding the characterisation of the concept of 'contractual obligations' in the Rome I context, see Ch. 3.2.2 below; regarding the characterisation of the concept of 'non-contractual obligations' in the Rome II context, see Ch. 4.2.

Borderline

In certain borderline situations, however, more difficult characterisation problems may arise. One example is product liability actions, which – depending on the circumstances and the traditions of the forum – sometimes can be characterised as involving contractual and/or delictual claims (see Ch. 1.4.1).

> *Illustration 3c:* Merchant A (in State X) sells cleaning fluid to merchant B (in State Y). The sales contract provides that disputes shall be settled in State Z under the law of that State. B uses the fluid (as directed) to clean certain expensive garments (mink coats), but the fluid causes extensive damage to those garments. Claiming monetary damages as compensation for this loss, B sues A in State Z.

England: contract and/or tort

Suppose now that State Z is England. According to English substantive law, B's action against A can rightly be characterised as *both* contractual and delictual in nature. This does not mean that B, if the claim is successful, will be entitled to 'double damages,' but it does mean that an English court applying English substantive contract and tort law will award B damages if the English substantive rules which govern damages for breach of contractual obligations and/or delictual obligations lead to that result.

The classification (or characterisation) of a dispute such as the one in *Illustration 3c* for the purposes of EU choice-of-law rules remains an open question. As noted below (in Ch. 3.2.1), the Court of Justice has not yet had occasion to rule on the interpreation of the Rome Convention.

Application → lex causae

Once the court has identified the relevant conflict-of-laws rule, it must then apply that rule in order to identify the applicable substantive law (sometimes also referred to as the *lex causae*).

Connecting factors

Depending on the content of the conflict-of-laws rule concerned, the identification of the *lex causae* will usually involve the identification of one or more 'contacts' or 'connecting factors' which serve to link the concrete dispute to the substantive law of a given State. As we shall see, some important conflict-of-laws rules try to establish this link by focusing on a single connecting factor; others permit consideration of various factors, so as to establish the 'closest connection' (overall).

Certainty v. concrete justice

A fundamental problem in this connection – often faced by the legislators who formulate conflict-of-laws rules, but also by the courts who are later asked to apply them – concerns the inherent tension between two competing considerations. On the one hand, the formulation of a 'single-contact' conflicts rule is likely to lead to certainty and predictability (the same choice of law, regardless of which court applies the conflicts rule concerned). On the other hand, the formulation of a 'multi-contact' conflicts rule is likely to provide courts which apply it with increased flexibility, perhaps increasing the likelihood (in some situations) of a more reasonable and just result.

> *Illustration 3d:* Merchant A (in State X) enters a contract with merchant B (in State Y) for the performance of certain services (in Y) at an agreed price. The contract is negotiated and signed in State Y, and its terms are in the language spoken in Y (but not X). Later, A performs certain services in Y, but B, who claims to have bargained for better services (more like the services usually rendered in State Y), refuses to pay. A then sues B in a (competent) court in State X, claiming payment of the contractually agreed price.

The main substantive question which underlies this dispute – the question of whether A has properly performed his/her

obligations (and whether B should be required to pay for the services rendered) – must be determined on the basis of national law, but which one? How should the X-court determine whether X or Y (contract) law should apply?

If all connecting factors are considered, the contract in this example would appear to be most closely connected with State Y, since every dispute-related 'contact' except A's place of business points to the law of State Y. However, if the relevant choice-of-law rule in State X is a single-contact type rule, which provides (e.g.) that the dispute shall be governed by the law of the country where the service-provider resides, then the X-court *must* apply the substantive law of State X, even if application of the substantive law of State Y could (in some situations) lead to a more appropriate result in this particular case. Suppose, for example, that the substantive law of State X was specially designed for State-X conditions and that the X-law is old-fashioned and inappropriate for the resolution of a dispute so strongly connected to State Y.

This example illustrates the schism between considerations of certainty and concrete justice: If the applicable conflicts rule is simple and easy to apply, that will lead to a high degree of legal certainty (and consequently predictability), in that all courts bound by that rule can be expected to apply the same law. But should certainty be the controlling consideration, if certainty can only be achieved at the expense of inappropriate results?

Earlier: single factor tests

In earlier periods, including the period between the two World Wars, the tendency of many legislators and courts in Europe in such situations was to isolate and focus on a single 'connecting factor.' In a contract case like the one just discussed, for example, some jurisdictions tended to single out the place where the contract was 'made' (*lex loci contractus*) as the key connecting factor. If so, the law of that place (State) was selected as the applicable law. Other jurisdictions made the 'place of performance' decisive, etc.

Contact aggregation: centre of gravity

Later, however, many jurisdictions in Europe came to favour the formulation of more flexible choice-of-law rules. Under this new approach, various factors were allowed to enter into the choice-of-law equation. So, rather than look to any single

element (connecting factor) to determine the applicable law, courts could take account of – and then 'weigh' – all relevant 'connections,' so as to then be able to determine which State was most closely connected to the dispute (the 'centre of gravity' of the legal relationship) and then apply the law of that State.

Reaction & revolution

The 'price' paid for this new flexibility was a reduction in certainty, and many felt that cost was too high. Now, in the 21st century, the choice-of-law winds in Europe have again changed direction, in that the new Rome I and Rome II Regulations both represent a movement 'back' (to the single contact approach).

Para. 16 of the Preamble to the Rome I Regulation makes it clear that the movement toward a single contact approach is intended: 'To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable.' Nevertheless, the EU legislator does recognise that the courts should 'retain a degree of discretion to determine the law that is most closely connected to the situation.'

Safety valves

Irrespective of whether a single or aggregate contacts test applies as a starting point, the forum court will nearly always have at its disposal certain modifying principles ('escape clauses'), so that the forum, if necessary, can depart from the usual starting point in exceptional circumstances, in order to apply mandatory rules of law, *ordre public* (public policy) and the like. This feature does not iron out the fundamental difference between single and multi-contact based rules, but it does at least provide a safety valve so that courts sometimes can escape from the kind of rule-tyranny which might otherwise lead to an undesirable result.

3.2. The Rome Convention and the Rome I Regulation

3.2.1. Introduction

Contract conflicts: 1980 Rome Convention

As of this writing (January 2009) all 27 EU Member States (and their courts) are obligated to resolve contract conflicts by applying the 1980 EC (Rome) Convention on the Law Applicable to Contractual Obligations.

The Rome Convention does not prejudice the application of (other) international conventions to which a Contracting State is, or becomes, a party: see Article 21. This means, *inter alia*, that EU Member States which have ratified the 1955 Hague Convention (on the law applicable to international sales of goods) can and must apply this convention (and not the Rome Convention) to resolve 'sales conflicts' in non-consumer sales: see Ch. 3.3 below.

The Rome Convention took effect as a treaty on 1 April 1991, following the deposit of instruments of ratification by seven of the nine original signatory EC Member States (Belgium, Denmark, France, Germany, Italy, Luxembourg and the United Kingdom). On the same date, the Convention entered into force for Greece, and it was later ratified by the remaining Member States and acceded to by the new Member States.

The choice-of-law rules set forth in the Rome Convention – as opposed to the Convention itself – were already in effect in three EC Member States prior to 1991: rather than wait for ratification by a total of seven States, *Denmark, Germany and Belgium* incorporated the Convention's rules into their national law on a unilateral basis (not by Convention obligation, but rather by national choice). In *Denmark*, the black letter law of the (then pending) Convention was described by its Danish supporters as fully (or at least largely) compatible with traditional Danish conflicts doctrine (judge-made Danish private international law). This view did not go unchallenged within academic circles, but the new legislation was nonetheless subsequently adopted by the Danish parliament without serious opposition.

The Rome Convention clearly marked a break with earlier *English* law, and there was no great enthusiasm on the part of the British Government for bringing it into force at an early date. Ultimately, the United Kingdom provided the seventh key EC State ratification required, and the Rome Convention was incorporated into UK law by the Contracts (Applicable Law) Act of 26 July 1990, which took effect on 1 April 1991. In contractual matters the Convention rules replaced the traditional English rules on the 'proper law' of the contract, and the reaction of some English commentators at that time was bitter indeed.

Protocols on interpretation

Although the Rome Convention reflects much of the European common conflicts core, certain Convention rules are amenable to varying interpretations by the courts of the individual EU Member States. As of 2004 the courts of Member States have the power to submit (and receive answers to) 'preliminary (Convention interpretation) questions' to the Court of Justice of the European Communities. The Court of Justice has not yet had the opportunity to answer any such preliminary questions.

A Joint Declaration was attached to the 1980 Convention whereby the governments of the signatory States declared themselves ready to examine the possibility of an agreement conferring jurisdiction on the Court of

Justice of the European Communities to give rulings on interpretation – that is, an arrangement similar to that in effect under the Brussels Convention Protocol (see Ch. 2.2.1). Eight years later, such an agreement was finally reached, in the form of two Protocols: one to give the courts of Member States the power to submit preliminary questions to the Court of Justice, and one to give the Court of Justice the power to answer. The 1988 Protocols took effect on 1 August 2004, after having been ratified by the 12 States which were EC Member States when the Protocols were signed.

The Interpretation Protocols are in force in all EU Member States *except Ireland*, which has availed itself of the possibility granted to the then 12 EC Member States (and only those) *not to give* its courts the possibility to submit preliminary questions to the Court of Justice on the interpretation of the Rome Convention.

Controversial main rules

Courts in EU Member States have not all interpreted the 1980 Convention in the same way. To take the most prominent example of non-uniform interpretation at the national level, two or three distinct 'lines' of interpretation have emerged with respect to the strength of the gap-filling presumption in Article 4: the rule which applies in the absence of a choice by the parties (Ch. 3.2.4(A) below).

2003: proposal for revision

While it seems possible that the Court of Justice, by means of preliminary rulings, could do much to resolve the controversy surrounding Article 4, this would surely involve a very long and difficult process, and the European Commission has not been willing to wait. In January 2003 (even before the Convention interpretation protocols took effect), the Commission presented a discussion paper on the Rome Convention and its possible replacement by a 'Rome I' *Regulation*. The Commission's proposals were further developed in a more concrete proposal set forth in 2005, including – most notably – a controversial provision for the radical revision of Article 4.

2008 Rome I Regulation

The result of these legislative efforts is the Rome I Regulation on the law applicable to contractual obligations (Regulation No 593/2008).

As of 17 December 2009, the Rome I Regulation will *replace* the Rome Convention as the applicable rule-set for the resolution of contract conflicts in all EU Member States except Denmark. The Regulation will apply to contracts concluded on or after that date. In Denmark, however, the Con-

vention will continue to apply even after 17 December 2009 when the Regulation takes effect.

Special arrangements apply to the United Kingdom, Ireland and Denmark in respect of EU legislation concerning cooperation in civil matters. According to special Protocols, one relating to the United Kingdom and Ireland and one relating to Denmark, these Member States do not participate in the adoption of legal acts concerning civil matters and are not bound by them nor subject to their application. However, the United Kingdom and Ireland (but not Denmark) may, within 3 months of the submission of the Commission's proposal, declare that they *will* participate in the adoption of the legal act in question (opt in) and consequently be bound by it.

Ireland exercised its right to participate in the adoption of the Rome I Regulation and is thus bound by it and subject to its application. The United Kingdom has also indicated its desire to be bound by the Regulation (see below). Denmark, as per the relevant Protocol, is not bound by the Rome I Regulation.

In April 2008, the UK Government launched a consultation on a possible opt in to the Rome I Regulation. The Government argued that the original Commission proposal was clearly not right for Britain, but that the Regulation then about to be adopted would help ensure a level playing field for British business in Europe. The response to the consultation was overwhelmingly in favour of the UK opting in. Accordingly, the UK sought and obtained the consent of the Commission to participate in the Regulation and will be bound by the Regulation at the same time as it becomes applicable in the other Member States.

In November 2007, the Danish Government published a general political programme, in which it was also announced that the Government felt that the time had come for Denmark to withdraw its reservation under the special Protocol. According to the Danish Constitution, this requires a referendum (or an (unlikely) 5/6 majority in Parliament) since the withdrawal of the reservation entails the transfer of legislative powers to the EU. A referendum was expected to be held before the next general election, which will take place in November 2011 at the latest, but the uncertainty concerning the fate of the EU Treaty of Lisbon (signed in December 2007) may cause a delay.

Application: contracts concluded after

As already mentioned, the Rome I Regulation will only *apply to contracts concluded on or after its effective date* (17 December 2009). For this reason, the Rome *Convention* will remain relevant throughout Europe for a long time to come.

In this as in other contractual contexts, many years are likely to pass between the time when a given (international) contract is made and the time when a dispute concerning that contract is brought before (and later resolved by) a given court or arbitral tribunal. One decision which illus-

trates the typically long gap between contract formation and (e.g.) Rome Convention application is *Ennstone Building Products v Stranger Ltd* (discussed below in Ch. 3.2.4(A) in connection with Article 4 of the Convention).

As long as the Rome I Regulation does not apply in Denmark, the Rome *Convention* will continue to be applied by Danish courts. Since the cases in question will always (by definition) involve an 'international' element, the Convention applications undertaken by Danish courts will continue to impact on commercial entities located outside Denmark.

Coverage of both rule-sets

Since the 1980 Convention will remain relevant 'alongside' the 2008 Regulation for a considerable period of time, the coverage of the present Chapter has been extended to include *both* EU contract conflicts rule-sets.

Because *many* rules in the Convention and the Regulation are very *similar* (some are even identical), several sections in this chapter provide combined coverage of both rule-sets. Such similarities are prominent with respect to the rules which define the *scope* (field of application) of the Convention and Regulation (see Ch. 3.2.2 below). The same applies, with certain significant exceptions, as regards the rules which define and regulate the ability of contracting *parties to choose* the applicable law (Ch. 3.2.3) and also the provisions which relate to the application of *mandatory* rules (Ch. 3.2.5).

The most significant *differences* between the two rule-sets relate to the *default* rules (in Article 4 of the Convention and Regulation) which govern the applicable law in situations where the parties have not themselves designated the applicable law. These differences are highlighted in Ch. 3.2.4 below.

3.2.2. Field of Application

Litigation in State courts

The Rome Convention and the Rome I Regulation regulate the choice of substantive law in the courts of the EU Member States, whether by giving effect to a (prior) contractual choice of law by the parties, or by a designation of the applicable substantive law in the absence of such contractual choice

The Rome Convention and the Rome I Regulation will not necessarily apply to a choice of substantive law (made by the parties or by an arbitral tribunal) in arbitral proceedings which take place in an EU Member State: see Ch. 6.2.4 below.

Contractual obligations

Both the Rome Convention and the Rome I Regulation apply (only) to contractual obligations (Article 1). Conflicts relating to non-contractual obligations (e.g. claims arising out of traffic

accidents) are now (as of January 2009) governed by the Rome II Regulation (Chapter 4).

Apart from the more general exclusion of delictual coverage, Article 1(2) of the Convention and the Regulation both list certain contractual problem-areas to which the Convention/Regulation rules do not apply, *inter alia*: questions of status and capacity, wills, certain rights deriving from matrimonial and family relationships, negotiable instruments, arbitration and forum agreements, company law, agency, and trusts, etc.

EU Member States which have ratified the 1955 Hague Convention (on the law applicable to international sales of goods) apply this convention (and not the Rome Convention or the Rome I Regulation) to resolve 'sales conflicts' in non-consumer sales: see Ch. 3.3.2.

Choice of the law of a country

The rules of the Rome Convention and Rome I Regulation apply to the choice of the substantive contractual law of a *country* (i.e. a State or territorial sub-unit of a State), whether by a contractual choice of law by the parties or by a designation of the applicable substantive law in the absence of such contractual choice.

The Rome Convention and Rome I Regulation do not permit contracting parties to choose *lex mercatoria* or (e.g.) 'internationally accepted principles of law governing contractual obligations' as a 'replacement' for the national law of a given country.

Under the substantive contract laws of most countries, however, the parties enjoy considerable freedom to formulate the terms of their contract. Within the limits of this freedom of contract, the parties remain free to *incorporate by reference* into their contract 'a non-State body of law or an international convention' (see para. 13 of the Preamble of the Rome I Regulation) such as *the UNIDRIOT Principles of International Commercial Contracts* or the Vienna Sales Convention (CISG). As noted by (e.g.) Lando and Arnt Nielsen in [2008] CML Rev. 1687 (1698), however, an incorporation by reference of *lex mercatoria* (or the UNIDROIT Principles) would not exclude the application of the mandatory rules of the applicable substantive law designated by (the Rome Convention or) the Rome I Regulation. Accord: Fawcett & Carruthers, *Private International Law* at 699. Nor would the parties' choice of the CISG exclude the application of such mandatory rules.

If contracting parties want their contract to be governed *solely* by *lex mercatoria* or (other) international principles, they should agree to arbitrate in a forum whose arbitral law (*lex arbitri*) permit this (see Ch. 6.2.4 below). *Accord:* Lando and Arnt Nielsen, *op.cit.*

Universal (contractual) application

If, in a given case, the Convention or the Regulation rules designate the law of a given *country* (as opposed to *lex mercatoria*), that law shall be applied by the court *whether or not* it is the law of an EU Member State (Article 2).

> *Illustration 3e:* Merchant A in Germany contracts with merchant B in China for the provision of certain services. When a dispute arises in this connection, A sues B in Germany (the court declares itself competent because B has property there).

In this situation the German court is bound to apply Chinese contract law if the relevant Convention or Regulation rules so dictate, i.e. even though China is not an EU Member State.

The universal nature of the Convention/Regulation choice-of-law rules also means that the *domicile* of the parties to the contract is *irrelevant*. This can be contrasted with the *Brussels I Regulation* on jurisdiction and the recognition and enforcement of judgments where the general rule is that the Regulation's jurisdictional rules apply only when the defendant is domiciled in an EU Member State (Ch. 2.2). It follows that the Rome Convention or Rome I Regulation will apply to any contractual dispute litigated in a court of an EU Member State, regardless of whether the court founds its jurisdiction on the Brussels I Regulation or on national law, and the Rome Convention or Rome I Regulation will apply even if none of the parties is domiciled in an EU Member State.

3.2.3. Party Autonomy

Freedom to choose & conflicts avoidance

By giving high priority to the parties' freedom to choose, both the Convention and the Regulation permit contracting parties (and their legal counsel) to avoid conflict-of-laws problems simply by including in their contracts provisions that designate the applicable law.

Art. 3 affirms party autonomy

Article 3 of the Rome Convention, as well as the similarly worded provisions in Article 3 of the Rome I Regulation, affirm the right of contracting parties to designate the substantive law which applies to their contact.

Parties' choice trumps default rules

According to Article 3(1) a contract 'shall be governed by the law chosen by the parties.' The effect of this simple rule is significant: if the parties effectively choose the law themselves under Article 3, the default rules in the Convention/Regulation

(including Article 4), discussed in Ch. 3.2.4 below, will simply not apply.

Express choice

If a given agreement – (e.g.) for the provision of goods or services – contains a provision which states that 'this contract is governed by English law,' then the court, applying the Convention or the Regulation, must recognise and respect that express choice by applying the rules of English substantive contract law to resolve the merits of the parties' dispute.

Convincing evidence required

Not all contracts are that clear, however, and the parties to a given litigation may disagree as to whether they have, in fact, chosen the applicable law. Both the Convention and the Regulation provide rules to deal with this kind of situation, rules which set uniform standards which EU Member State courts must use to determine whether the parties concerned have actually made a choice of the applicable substantive law.

Neither the Rome Convention nor the Rome I Regulation requires that the parties' choice of law be in writing. Regarding the writing requirement in the Brussels I Regulation as regards choice-of-forum clauses, see Article 23 (discussed in Ch. 2.2.2(B) above).

Convention/ Regulation: Article 3(1)

The second sentence of Article 3(1) of the Rome *Convention* provides: 'The [parties'] choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.' The corresponding rule in the Rome I *Regulation* provides: 'The [parties'] choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.'

Express choice

Though not identical, these two versions of Article 3(1) are obviously quite similar, and it is at least clear than an express contractual choice-of-law provision ('this contract is governed by English law') will pass both the Convention and the Regulation tests.

Although the official *English* text of the *Convention* is not as clear on this point as the English Regulation text, the *French* text of the Convention is (*Ce choix doit être exprès*), and so, as noted by the English High Court in *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380, the *first part* of Article 3(1) of the English version of the Convention should be read to mean: 'The choice must *be express*.'

Clearly or with reasonable certainty

Courts in EU Member States are also bound to recognise a *non-express* (implied/tacit) choice-of-law by the parties, provided that the parties' (implied/tacit) choice is *demonstrated:*

- under the Convention test: with 'reasonable certainty' (by the contract terms or the circumstances) or
- under the Regulation test: 'clearly' (by the contract terms or the circumstances).

Distinction between Convention & Regulation requirements?

The evidentiary requirement as formulated in the Regulation ('clearly demonstrated') might seem slightly stricter than the corresponding Convention formulation ('demonstrated with reasonable certainty'), but it seems difficult to discern any 'bright line' between the kinds of terms and circumstances which have proved sufficient under the Convention, but which would not now 'pass' the newer Regulation test.

See also Lando and Arnt Nielsen in [2008] CML Rev. 1687 (1698), who maintain that the threshold for an implied choice-of-law agreement is higher under the Regulation than under the Convention.

> *Illustration 3f:* In January 2010 French service-provider (A) contracts with German service-recipient B for the provision of certain services in Germany. The contract, which is written in the German language, expressly designates a German court as the only competent forum for the resolution of disputes, but it contains no express provision as to the applicable law. Later, when B claims that A has not performed its obligations, A sues B for the contract price in Germany. The parties disagree as to whether the German court should apply French or German law to resolve the merits of the dispute.

Given these facts, the issue to be resolved by the competent German court is whether the 'terms' of the contract *or* the 'circumstances' – or, as seems more appropriate: both these factors (combined) – 'clearly demonstrate' that the parties have impliedly chosen German law as the substantive contract law applicable to their contract. There is no express choice of German law, but it may be argued that by choosing a German forum and by writing the contract (for provision of services in Germany) in the German language, the parties have *impliedly*

indicated their common understanding that the contract should be governed by *German law*.

According to para. 12 of the Preamble of the Rome I Regulation, a forum agreement 'should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.' The question of whether a choice of forum and/or other factors in a given contractual context is sufficient to meet the Regulation's implied choice-of-law threshold is a determination to be made by the court seised, although it is conceivable that the Court of Justice of the European Communities might one day issue a preliminary ruling on the interpretation of this aspect of Article 3(1).

Choice of forum → choice of law?

Illustration 3f also provides an example of why it is important to distinguish between a choice of *forum* and a choice of *law*. A choice of forum does not automatically imply that the parties have chosen that the contract shall be governed by the laws of the forum State, but it may provide an *indication* of an implied choice of law.

In *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380, a Japanese company had negotiated with a German company for the charter of two bulk carriers to be built by a third (Japanese) party. The charter-party contained a clause referring any dispute arising under the charter to 'arbitration in London.' A dispute arose as to whether a binding contract had been concluded, and that matter was brought before the English High Court. The High Court held that, assuming there was a contract, the parties had made an implied choice of English law in accordance with Article 3 of the Rome *Convention*. The Court said (*inter alia*): '... having agreed English arbitration for the determination in London of disputes arising out of a well known English language form of charter-party which contains standard clauses with well known meanings in English law, it is ... to be inferred that the parties intended that law to apply. Having agreed a 'neutral' forum the reasonable inference is that they intended that forum to apply a 'neutral' law, namely English law and not either German or Japanese law.'

In *Transocean Drilling Ltd UK v Arbejdsministeriet* [2000] UfR 1099, a Scottish company sought an order against the Danish Ministry of Employment that the Danish Vacation Act did not apply to the employment of a Scottish national (David J. MacKerill) in respect of his work aboard the drilling rig Shelf Explorer from 1990 to 1995. Applying Article 3(1) of the Rome *Convention*, the Danish Supreme Court emphasised that the contract in question – which did not contain an express choice-of-law clause – in its introduction referred to a British Act of Parliament and that it was concluded between a Scottish national and a Scottish employer. On this basis, and with reference to the other 'circum-

stances' of the case, the Court held that the parties had (impliedly) chosen (designated) 'British law' (*sic*) as the law applicable to their contract.

Choice of law → choice of forum?

The parties' contractual choice of the law of a given State (X) does not indicate that the parties have also impliedly chosen that State as the forum for dispute resolution.

An *implied* forum agreement would not in itself satisfy the formal validity requirement set forth in Article 23 of the Brussels I Regulation, although that requirement can be met by evidence of a *practice* established between the parties (Brussels I Regulation Art. 23(1)(b)), or pursuant to a relevant *international trade usage* which the parties knew or ought to have known (Brussels I Regulation Art. 23(1)(c)) (see Ch. 2.2.2(B)). Presumably, it would be difficult to establish a practice or usage that a contractual choice of law impliedly indicates a choice of forum.

Mandatory rules: the Convention

Article 3(3) of the Rome Convention is designed to address the relationship between the parties' basic freedom to choose the applicable law and so-called 'mandatory' rules which restrict that very freedom. Article 3(3) of the Convention provides:

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

Narrow limit

This provision represents a very narrow limitation of the parties' ability to choose the law applicable to their contact, since a given 'mandatory rule' will only take precedence under Article 3(3) when *all* other relevant elements – i.e. all elements *except* for the fact that the parties have made a choice of law (with or without a choice of forum) – pointed (at the relevant point in time) to the law of the country to which the mandatory rule in question belongs.

2008 Regulation: Art. 3(3)-(4)

Article 3(3) and (4) of the Rome I Regulation contains an expanded version of the Convention rule:

> 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than a country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement.
> 4. 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.

Effect of the change

No substantive change is intended as compared with Article 3(3) of the Rome Convention: see para. 15 of the Regulation Preamble.

The new Article 3(4) concerns situations where the relevant contacts are not with a single State (in or outside the EU), but with two or more EU Member States with harmonised legislative provisions on a contractual matter. If all contacts are to EU Member States, the parties' choice of the law of a non-EU Member State does not prejudice the application of such harmonised legislative provisions which cannot be derogated from by agreement.

Article 5 of the Rome I Regulation limits the right of the parties to choose the applicable law to a contract for the carriage of passengers. Although the Rome Convention contains no corresponding provision, such limitation is not entirely new as specialised international conventions within the field of transport law already, by way of derogation from the Rome Convention, contain similar limitations.

Related provisions

Although a given mandatory rule can only take precedence over the parties' choice under Article 3 in highly extraordinary circumstances, it is significant that other Rome Convention and Rome I Regulation provisions can also lead to the application of certain mandatory rules (both as regards situations where the parties have chosen the applicable law, as well as in situations where they have not). These provisions are considered below (Ch. 3.2.5).

3.2.4. Supplementary Rules in the Absence of Choice

No effective choice

Many of the international contract disputes which come before the courts of EU Member States cannot be resolved on the basis of a choice of law made by the parties. In some of these cases, neither the terms of the contract nor the circumstances provide a clear (or reasonably certain) indication of the parties' choice. Indeed, the parties may never have given any thought to the matter at the time when the contract was made. In other (less common) cases a conflicting 'mandatory' rule might stand in the way of the parties' own choice. In all such situations, the forum court will need to revert to the relevant default rule in the Convention or Regulation, so as to fill the resulting contractual 'gap' and designate the substantive contract law which the court will then apply.

Main default rules: Article 4

Although the Convention and the Regulation both contain a number of special default choice-of-law rules designed for application in particular contractual contexts (e.g. employment contracts, consumer contracts), the general – and clearly most important – default provisions (in both the Convention and the Regulation) are set forth in Article 4.

Different rules, separate treatment

Because the Convention and Regulation versions of Article 4 are very different, and because of the complexity of the Convention version (and the different ways different courts have interpreted and applied that version), the Convention and Regulation versions of Article 4 require separate treatment.

The separate treatment of the Convention and Regulation which follows (under sub-heads A and B below) will also serve to reveal the 'uncertainty' generated by differing applications of the Convention rule – an uncertainty which provided the main impetus for the decision by the EU legislator to replace the (entire) Rome Convention with the Rome I Regulation.

A. 1980 Rome Convention: Article 4

Article 4(1): closest connection

Under the Rome Convention, when the applicable law has not been chosen in accordance with Article 3, Article 4(1) provides that the contract shall be governed by the 'law of the country with which it is most closely connected.'

By way of exception, a separable part of the contract which has a closer connection with another country may be governed by the law of that country. Regarding so-called dépeçage, see Ch. 1.4.2.

The closest connection test in Article 4(1) of the Rome Convention served to codify the dominant contract-conflicts rule which was applied before 1980 in many, though not all, European States. That test also represents the preferred approach elsewhere, e.g. under the law of most American States.

The closest connection test goes under various names. Savigny, the famous German 19th century scholar, was the first to propose a 'centre of gravity' model which takes account of all elements in the given contractual relationship. Regarding Savigny's influence and the essentially similar method used in Denmark and other Nordic countries, see Philip, *International privat- og procesret* at 293.

The key test under the *American* (Second) *Restatement of Conflicts* is the 'most significant relationship': see Lookofsky & Hertz, *Transnational Litigation*, Ch. 3.3.1. In *English* law, as it stood prior to the advent of the Rome Convention, the House of Lords had firmly adopted the 'most closely connected law' formula: see *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50.

Multi-factors; judicial discretion

A complex transnational case will often involve numerous concrete 'connecting' facts and factors. The decision to adopt the closest connection test in Article 4(1) as the main default rule in the Rome Convention represented a preference for flexibility, as opposed to the rigidity of the 'single-factor tests' of the past (see Ch. 3.1). Rather than set forth a mechanical formula leading to an 'automatic' designation of the applicable law, the closest connection test leaves a considerable degree of discretion to the judge. At the same time, however, the new formula makes the applicable law more difficult to predict.

Quite apart from the fact that the Article 4(1) closest connection test provides no guidance as to the relative significance of the various connections, the test further implies that the content of the various competing substantive laws is of no relevance: the Article 4(1) quest is not for the most closely connected system of *law* (as was the case in England before 1991), but rather for the most closely connected *country*.

Article 4(2) presumption

Had Article 4(1) of the Convention been allowed to stand alone, that would have led to a degree of uncertainty hardly consistent with the certainty which characterises the Brussels jurisdictional scheme (Ch. 2). For this reason and others, the closest connection criterion in Article 4(1) came to be supplemented by an important qualification – a presumption – in paragraph (2):

> [I]t 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 conclusion of the contract, his habitual residence.

Critiques

In many European countries the then (1980) new characteristic performance test was largely unknown, and considerable criticism was heaped upon it.

The characteristic performance test is said to have origins in both French and Swiss law. Given the fact that the 'characteristic performer' is meant to signify the 'supplier' of goods or services in a bilateral contract, there is also a clear precedent for this criterion in the 1955 Hague Convention on the Law Applicable to International Sales of Goods (see Ch. 3.3.2 below). Some commentators (e.g. in Denmark) criticised the decision to gear the presumption to the *residence* of the 'characteristic performer' (as opposed to the *place* of his/her performance).

Another, more fundamental criticism relates to the seemingly 'circular' structure of Article 4. If the Article 4(2) presumption proves indecisive (e.g. in contracts where there is no single 'characteristic performer'), the Convention returns to the closest connection test in Article 4(1). The same is true where another country is more closely connected with the contract than the country designated by the 4(2) characteristic presumption: see Article 4(5).

Specific contract types

It is important to note that the key criteria employed by Article 4 – i.e. the closest connection, as supplemented by the characteristic performance – do not apply to specific contract types which the Convention singles out for separate treatment: certain consumer contracts (in Article 5) and individual employment contracts (in Article 6).

Contracts involving real property rights and contracts of carriage – while subject to the Article 4(1) 'closest connection' rule – are not subject to the general presumption in Article 4(2): see Article 4(3) and (4).

Article 4, paragraphs 1 and 2

The most controversial issue relating to Article 4 of the Rome Convention is the relationship between the closest connection test (in paragraph 1) and the presumption (in paragraph 2). The key question is: just how 'strong' is the presumption? Or, to put the same question another way: What does it take to 'displace' the presumption, so that the court is justified in returning to the closest connection test in paragraph 1?

The judgments rendered by the courts in various EU Member States reveal no less than three (3) fundamentally different answers to this question. Since the Court of Justice of the European Communities has not (as of 2008) issued a preliminary ruling on this subject, all three approaches remain viable.

Tie-breaker

One view, probably the least favoured so far by national courts, is that the presumption works merely as a 'tie-breaker,' i.e. it is put to use (only) when the connecting factors linked to different countries are more or less evenly balanced. This view would accord well with pre-Convention (e.g.) English and Danish law, and some early Danish judgments on the application of the Convention can be read in this way, but both English and Danish courts seem subsequently to have abandoned it (in favour of the 'middle position' outlined below).

Win-all

Another, equally 'extreme' view is that the presumption nearly always determines which law should 'win,' in that the presumption cannot be displaced unless the characteristic performer's habitual residence has 'no real connecting value' in the case at hand. This view was first propounded by the Dutch Supreme Court in the much-discussed *BOA* case.

Société Nouvelle des Papeteries de l'Aa SA v BV Machinenfabriek BOA [1992] Nederlanse Jurisprudentie 750, commentary by van Lennep in [1995] NILR 259. In this case, the Dutch company BOA sold and delivered a paper press to a French company. When the buyer failed to pay the purchase price, BOA instituted legal proceedings in the Netherlands to obtain payment under Article 5(1) of the Brussels Convention, as the place of performance of the obligation in question. Re. this rule (now superseded by the – different – Article 5(1) of the Brussels I *Regulation*), see Ch. 2.2.2(A) above.

To establish the *place of payment of the purchase price* (the obligation in question under the *Convention* rule), the court had to determine the law applicable to the sales contract (the place of payment under

French law was the buyer's place of business; under Dutch law it was the seller's place of business).

The lower Dutch court considered a number of 'connecting' circumstances: A quotation for the press had been given by BOA's agent in France upon the buyer's request, and virtually all the negotiations relating to the contract were conducted in France in the French language. The order was given to the French agent of BOA, the contract was in French, and BOA delivered and assembled the machine in France.

The Dutch Supreme Court, however, ruled that the exception clause of Article 4(5) of the Rome Convention should be applied restrictively, a deviation from the general rule of Article 4(2) only being allowed when the place of business of the party who is to perform the characteristic obligation of the contract has 'no real connecting value' (*aanknopingswaarde*). Since this was not the case in the contract between the buyer and BOA, the Article 4(2) presumption led to Dutch law (which meant the Dutch court had jurisdiction).

(Under Article 5(1) of the now-applicable Brussels I Regulation, the *place of delivery* (not the place of payment) would be relevant for jurisdictional purposes in respect of a contract for the sale of goods, i.e. if a case such as *BOA* were to be decided today. These days a Dutch court would not need to make a choice-of-law to determine that place, as both France and the Netherlands have ratified the CISG: see Ch. 3.3.3).

Middle-position

Finally, and probably most convincingly, the 'strength' of the presumption can be placed somewhere between those extremes. The reasoning of more recent Danish decisions and at least some English decisions, for example, accord well with this 'middle' interpretation.

See, e.g., the 1996 decision by the Danish Supreme Court in *SP Massivbau-System GmbH v Malerfirmaet F. Ørbech & Søn* [1996] UfR 937. A Danish painter who claimed money owed by a German company in connection with construction work done in Germany brought an action in Denmark for payment, invoking Article 5(1) of the (then applicable) Brussels Convention as the basis of jurisdiction. To establish the place of payment (the obligation in question), the court had to determine the law applicable to the contract.

The Danish High Court (*landsretten*) held that irrespective of the presumption rule in Article 4(2) of the Rome Convention, the decision on the applicable law should be based on an overall evaluation of the legal relationship between the parties, in accordance with Articles 4(1) and 4(5) of the Rome Convention. Taking account of a long list of connecting factors, the court held that the contract was most closely connected to Denmark, so that Danish law applied. The Supreme Court (*Højesteret*) affirmed the decision by the High Court as regards the applicable law under Article 4 of the Rome Convention, but the reasoning was notably different: Although the work had been done in Germany for a developer

residing in that country, there were no grounds in this case for departing from the presumption rule in Article 4(2).

Some recent English decisions seem to accord with this view: see, e.g., *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916. In this case the English Court of Appeal acknowledged that the presumption created by Article 4(2) should only be disregarded in circumstances which clearly demonstrate the existence of connecting factors which justify such disregard. The Court of Appeal (Keene LJ) added: 'If the presumption is to be of any real effect, it must be taken to apply except where the evidence clearly shows that the contract is more closely connected with another country.'

Other recent English decisions, however, reflect a tendency to disregard the presumption in Article 4(2) in favour of law of the *place of performance*. See Clarkson & Hill, *Conflict of Laws* at 192f.

> *Illustration 3g:* Liechtenstein service-provider (P) undertakes to provide services in England for English recipient (R). The contract is negotiated and concluded in England in the English language, but makes no mention of the applicable law. Mainly for reasons relating to taxation, P has its central administration in Liechtenstein, but most of the services rendered by P are provided by local staff in the recipient's country, although the work is organised from the administrative headquarters in Liechtenstein. R is dissatisfied with the quality of the services provided by P and brings an action in England against P for damages for breach of contract.

In a case like *Illustration 3g*, the presumption in Article 4(2) of the Rome Convention points to the application of Liechtenstein law. However, the contacts with England arguably outweigh the contacts to Liechtenstein to such a degree that the presumption should be disregarded. At least under the interpretation termed 'middle-position' above, it would seem likely that an English court would apply English substantive law to resolve the dispute.

B. 2008 Rome I Regulation: Article 4

Article 4 of the 2008 Rome I Regulation 'scraps' the Rome Convention default regime just described (the closest connection test as modified by a characteristic-performer presumption) and puts in its place an entirely new scheme for deter-

mining the law applicable in cases where the parties have not themselves designated the applicable law.

Single contacts

In sharp contrast with the Convention scheme, Article 4(1) of the Regulation establishes a series of single-contact tests (one contact for each significant contract type) and makes each such test (factor) decisive for the law applicable under the contract concerned.

Goods, services, franchises, etc.

Under subparagraph (a) of Article 4(1) of the Regulation, for example, a contract for the sale of goods shall be governed by the law of the country where the seller has his/her habitual residence. In similar fashion, under subparagraph (b), a contract for the provision of services shall be governed by the law of the country where the service provider has his/her habitual residence. A franchise (or distribution) contract shall be governed by the law of the country where the franchisee (or distributor) has his/her habitual residence (subparagraphs (e) and (f)), etc.

Habitual residence

Under Article 19(1) of the Regulation, the habitual residence of companies is the place of central administration, and the habitual residence of a natural person acting in the course of a business is that person's principal place of business. However, under Article 19(2), where the contract is concluded in the course of the operations of a branch, agency or other establishement, or if, under the contract, performance is the responsibility of such body, the place where that body is located is treated as the place of habitual residence. The time for determining the habitual residence is the time of the conclusion of the contract: Article 19(3).

As is made clear by para. 17 of the Preamble, the separate treatment of franchise and distribution contracts should not be taken to mean that they are not contracts for services, but merely that they are governed by specific choice-of-law rules.

Where the contract cannot be categorised as being one of the types specified by Article 4(1) or where its elements fall within more than one of the specified types, it is governed by the law of the country where the party required to effect the performance of the contract which is characteristic of the contract has his/her habitual residence: Article 4(2). According to para. 19 of the Preamble, in the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling

within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

Only in the (quite exceptional) case where the applicable law cannot be determined pursuant to Article 4(1) or (2) will the contract henceforth be governed by the law of the country with which it is most closely connected: Article 4(4). That would, for example, be the case in *barter contracts* and (to take a modern example of a related category) so-called *swap contracts:* a common type of financial contract where two parties 'swap' interest rates or currencies or the like, and where one party's performance may be no more 'characteristic' of the contract than the other party's.

Not mere presumptions

The factors isolated for application in these contract types all serve to identify the residence of the 'characteristic performer' concerned. In contrast with the Rome Convention, however, these new Regulation rules do not merely establish presumptions with respect to the contract law applicable (for goods, services, etc.). They flatly designate the governing law.

Safety valve

There is, to be sure, a 'safety valve' or 'escape clause' (so termed in para. 20 of the Preamble) in Article 4(3), but it is a narrow one: 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.

As previously noted (in Ch. 3.1), the strengthening of the 'characteristic performer's residence rule' and the weakening of the 'closest connection rule' reflect a conscious policy choice in favour of 'legal certainty' in the European judicial area – the choice-of-law rules should be 'highly foreseeable,' the Preamble tells us (para. 16), although, according to the same source, the courts should retain 'a degree of discretion' to determine the law that is most closely connected to the situation.

In a case like *Illustration 3g* (see Ch. 3.2.4(A) above), Article 4(1)(b) of the Rome I Regulation leads to the application of Liechtenstein law, *unless* it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country (Article 4(3)). Arguably, *Illustration 3g* is a borderline case, but it is submitted that in such a case the Rome I Regulation might well lead to another result than the Rome Convention, i.e., in this case, to the application of Liechtenstein law.

Specific contract types

Like the Rome Convention, the Rome I Regulation contains specific provisions in respect of certain contract types, which are consequently not governed by the general gap-filling rule in Article 4.

Article 5 deals with contracts of carriage, which were covered by Article 4 of the Rome Convention, although also subject to a specific provision (Article 4(4)).

Articles 6 and 8 govern consumer contracts and individual employment contracts, as did Articles 5 and 6 of the Rome Convention. The Regulation rules are broadly similar, but not identical, to the Convention rules.

Article 7 governs insurance contracts, a matter largely outside the scope of the Rome Convention, since the Convention's Article 1(3) excluded from its scope insurance contracts which cover risks situated in an EU Member State. Article 7 essentially reflects the legal situation as regards applicable law as presently included in the insurance Directives.

Some consumer contracts and some insurance contracts (including all reinsurance contracts) fall outside the scope of the specific provisions in Articles 6 and 7. Such contracts, not covered by Article 6 or 7, fall *within* the ambit of Article 4.

3.2.5. Mandatory Rules and Public Policy

Two main categories

The discussion in the preceding sections has focused on the two 'main' contract conflicts categories: the first of these relating to the parties' freedom to choose the law applicable, the second relating to the general rules applicable absent such choice.

To the extent that the applicable law has been chosen by the parties in accordance with Article 3 of the Rome Convention or Rome I Regulation, that choice will usually be respected by the competent court (Ch. 3.2.3). Where the parties have not made such an effective choice, the general supplementary rules in Article 4 of the Convention or the Regulation will then be applied (Ch. 3.2.4).

Mandatory rules & special provisions

But both of these main rule-categories must be read in light of a third category of conflict-of-laws provisions designed to deal with so-called 'mandatory' rules of law and/or with specific types of contracts.

Starting point

Mandatory rules are (by definition) rules which cannot be derogated from by contract, whether for reasons of protecting (e.g.) a presumptively 'weaker' party (such as a consumer) or

for reasons of public policy. Under the Rome Convention and Rome I Regulation, mandatory rules of the contract law of a given country are generally treated on a par with other rules of the contract law of that country. The starting point, in other words, is that such mandatory rules of the countract law of a given country apply if and only if *the law of that country is the applicable law* under Articles 3 or 4 of the Rome Convention or Rome I Regulation.

By definition, a given mandatory rule of a given country X cannot be derogated from by a contract to which the law of X is applicable by virtue of Article 3 or 4 of the Rome Convention or Rome I Regulation. However, the parties to that contract may derogate from that mandatory (country X) rule by a *contractual choice* of the law of another country Y, *provided* that not all relevant contacts point to X (see Ch. 3.2.3 above), that the contract is not subject to the special Convention/Regulation provisions on consumer contracts etc., and that the mandatory rule in question is not given effect as an 'overriding' mandatory provision (see heads A & B below).

Exceptions

In some situations, the Convention/Regulation rules permit the application of mandatory rules of the contract law of *another country*. This is, for example, the case in a situation when *all relevant contacts* are to one country only (and the parties make a contractual choice of the law of another country), in respect of some *types of contracts* (e.g. transborder consumer contracts), and in respect of *some* mandatory rules ('overriding' mandatory provisions).

Article 3(3)

As noted previously, Article 3(3) places a very narrow 'mandatory' limit on the parties' freedom to choose the applicable law: the fact that the parties have chosen a foreign law shall not prejudice the application of another country's mandatory rules, provided that all the relevant elements point to the country concerned (see Ch. 3.2.3).

Consumer and employment contracts

A further limit on the parties' freedom of choice is laid down by Articles 5 and 6 of the Convention (Articles 6 and 8 of the Regulation) on consumer contracts and individual employment contracts, respectively. These provisions not only displace the general default rule in Article 4 (with 'special' gap-filling rules); they also provide that the contracting parties' choice of a given foreign law shall not deprive the consumer

or employee of the protection afforded by provisions of the law applicable in the absence of choice which cannot be derogated from by contract. This means that, as regards consumer and individual employment contracts, the 'special' gap-filling rule can also function as a kind of 'mandatory' rule.

Article 5 of the Convention designates the law of the country of the *consumer's habitual residence*, provided that certain requirements with respect to the other party's marketing in that country are fulfilled. Article 6 of the Convention designates the law of the country in which the *employee habitually carries out work,* unless it appears from the circumstances as a whole that the contract is more closely connected with another country.

Articles 6 and 8 of the Regulation are broadly similar, though not identical, to Articles 5 and 6 of the Convention.

Overriding provisions

Finally, the Convention and the Regulation each contain a more general provision regarding a species of mandatory rules which may 'trump' or 'override' the rules of the law applicable by virtue of the other provisions of the Convention or Regulation. Those mandatory rules have been referred to as 'internationally mandatory rules' or (to use the term adopted by the Regulation) 'overriding mandatory provisions.' It is convenient to discuss the relevant provisions of the Convention and the Regulation separately: see A and B below.

A. Article 7 of the 1980 Convention: Internationally Mandatory Rules

Article 7

Article 7 of the Rome Convention provides, *inter alia:*

> 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract [...]
> 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Express choice & supplementary rule

Unlike mandatory-rule limitations in Articles 3, 5 and 6 of the Rome Convention, Article 7 affects not only the law chosen by the parties, but also the application of the Convention's own supplementary rules which apply in the absence of choice.

Discretion & mandatory rules

Article 7(1) provides that a court 'may' give effect to another country's mandatory rules. Even this measure of discretion is only authorised (a) where the given contractual situation is *closely connected* to that country and (b) where that country would apply the mandatory rule in question *whatever the applicable law*. This second qualification has been described as referring to 'internationally mandatory' rules.

Optional provision

Interestingly, Article 7(1) is – itself – not a 'mandatory' rule, in that Article 22 of the Convention gives Rome Contracting States the option of not (ever) applying this provision.

Fearing commercial and legal uncertainty, the United Kingdom has made such an Article 22 reservation, as have Germany, Ireland, Latvia, Luxembourg, Portugal and Slovenia.

> *Illustration 3h:* Irish company (E) employs a French doctor (D) on board an oil rig located over the Danish continental shelf in the North Sea. According to the employment contract, the employee has no right to vacation, but the work is organised in 21-day periods in such a way that the doctor works continuously for 21 days, then has 21 days off (with pay), and so on. The doctor spends the time off in Scotland. Under Danish law, an employee cannot validly forego the right to vacation, even if working periods alternate with off-periods, and it is a criminal offence for an employer not to pay vacation benefits owed on demand. After the termination of the employment, D sues E for payment of vacation benefits payable under mandatory provisions of Danish law, but not under Irish law.

If this action is brought in Denmark, the Danish court *may*, under Article 7(2) of the Rome Convention, apply the mandatory (vacation-with-pay) provisions of Danish law, irrespective of the otherwise applicable law, and award vacation benefits to D. However, if D and E have no other contacts to Den-

mark apart from the operations of the oil rig (located above the Danish continental shelf in the North Sea), Danish courts cannot be expected to award D such benefits: see *Transocean Drilling Ltd UK v Arbejdsministeriet* [2000] UfR 1099.

If the action is brought in *Ireland*, the Irish court *cannot* give effect to the Danish mandatory rules, since Ireland has made a reservation with respect to Article 7(1) of the Rome Convention.

If the action is brought in *France*, the French court *may*, under Article 7(1) of the Rome Convention, give effect to the Danish mandatory rules and award vacation benefits to D. However, if a Danish court would not make such an award under Article 7(2) (see above), the French court should also abstain from doing so under Article 7(1).

Narrow exception

Article 7 on internationally mandatory rules constitutes a narrow exception to the main rule of application of the applicable law. The mere fact that a provision is mandatory under national law does not make it internationally mandatory.

B. Article 9 of the 2008 Regulation: Overriding Mandatory Provisions

Like its Convention counterpart (Article 7 of the Convention), Article 9 of the Rome I Regulation – headed 'Overriding mandatory provisions' – lays down a general provision on *certain* mandatory rules which, by virtue of their special nature, may serve to 'trump' the otherwise applicable law.

Overriding mandatory provisions

Unlike its Convention predecessor, Article 9 *defines* the mandatory provisions to which it applies (Article 9(1)): 'Overriding mandatory provisions' are provisions the respect for which is regarded as *crucial* by a country for safeguarding its public interests, such as 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.

As made clear by para. 37 of the Preamble, the concept of 'overriding mandatory provisions' should be construed more restrictively than the expression 'provisions which cannot be derogated from by agreement.' This latter expression, used in several places in the Regulation, corresponds to what the Convention refers to as 'mandatory rules.'

Two kinds of mandatory rules

Like Article 7 of the Convention, Article 9 of the Regulation distinguishes between mandatory rules of the forum and mandatory rules of other countries.

Mandatory rules of the forum

According to Article 9(2), nothing in the Rome I Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

Other mandatory rules

According to Article 9(3), the forum court may (also) give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions *render the performance of the contract unlawful*. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

In a case like *Illustration 3h*, Article 9(2) of the Rome II Regulation would apply in a Danish forum, were it not for the fact that Denmark is not bound by the Regulation (see Ch. 3.2.1 above). Article 9(3) will apply in other fora, including Ireland, which is no longer covered by a reservation in this respect. It would be relevant to consider the application of Article 9(3) in this situation because Danish law provides that it is a criminal offence not to pay vacation benefits owed on demand. However, in a case like *Illustration 3h*, if D and E have no other contacts to Denmark apart from the operations of the oil rig over the Danish continental shelf in the North Sea, the non-payment of vacation benefits would not be unlawful under Danish law as interpreted in the *Transocean Drilling* case cited in Ch. 3.2.5(A) above.

C. Public Policy

Article 16/21: ordre public

A Convention/Regulation provision of general applicability is the *ordre public* rule of Article 16/Article 21:

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

Narrow exception

Ordre public constitutes a narrow exception. The 'manifestly incompatible' requirement underlines the fact that a mere showing of 'incompatibility' will not suffice to displace the otherwise applicable rule. Indeed, even a State Y rule which

runs contrary to a mandatory rule in State X is not necessarily incompatible with the *ordre public* of State X.

Regarding the application of the *ordre public* safety valve in connection with the execution of foreign judgments, see Ch. 5 below. Regarding the corresponding defences to the execution of foreign arbitral awards, see Ch. 6.4 below.

3.3. Sales Law Conflicts and Harmonisation: the 1955 Hague Convention and the 1980 Vienna Convention (CISG)

3.3.1. Introduction

Sales contracts = contracts

A contract for the sale of goods is a common contract type. Indeed, sales contracts are the most common and financially significant of all contracts, by far.

Special conflicts regulation

Although courts in many EU Member States will often have occasion to use the rules in the Rome Convention or the Rome I Regulation to determine the substantive law applicable to contracts for the international sale of goods, the sales conflicts picture is more complex, in that other, more specialised rule-sets are sometimes also applicable in situations like these.

International sales: businesses in different States

To facilitate a more concrete description of the factors involved, we can begin with a generally accepted definition: an 'international sale' is usually characterised by the fact that the seller and buyer have their respective places of business in different States (X and Y).

Forum PIL

If a dispute arises which a national court in State X or Y (or even a third State Z) is asked to resolve, that forum court will apply its own rules of private international law – either to determine the viability of the parties' own choice of law or to determine the applicable law by using supplementary formal rules so as to resolve any existing 'conflict' between the competing substantive sales laws of State X and State Y.

If conflict exists

The need to choose between sales laws assumes, of course, that a substantive conflict exists. For if States X and Y both have the same law of sales on their statutory books – laws

providing (e.g.) for identical remedies for a given sales contract breach – there is no need to choose between those States' sales laws.

1980 CISG

Although most States continue to maintain individual solutions as regards domestic sales contracts, a uniform substantive solution has emerged with respect to international sales, in that more than 70 States have ratified the 1980 Vienna Convention on Contracts for the International Sales of Goods (CISG). Since (e.g.) China and Germany now have the same (CISG) law as regards international sales contracts, neither Chinese nor German courts need resolve a sales law conflict in order to reach a decision in respect of a dispute between a Chinese seller and a German buyer, at least not in a typical kind of sales contract case.

Conflicts remain

This important substantive development has not, however, completely eliminated sales conflicts from the realm of private international law. There are two main reasons for this.

One reason for the continuing relevance of sales conflicts is that we still find some States, in Europe and elsewhere, which have not (yet) adopted the CISG. To the extent that the action is brought in – or the buyer or seller has his or her place of business in – such a State, the need for a choice of law persists.

Moreover – as more fully described in Ch. 3.3.3 below – some States have not adopted the whole of the CISG or have restricted its application in certain situations. To that extent the need for a choice of law persists even if the buyer and seller have their places of business in CISG Contracting States.

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3.3.2. The 1955 Hague Convention on the Law Applicable to International Sales

Scope

The Hague Sales Convention applies (in those States which have ratified it) to 'international contracts' of sale, (e.g.) as in a case where a seller in France contracts to sell goods to a buyer in Norway.

See Article 1(1). Without defining 'international' in full, the Convention provides that the submission of a contract to a foreign court or law does not itself render it 'international': Article 1(3).

Notably, however, 'consumer sales' lie outside the Hague Convention's scope.

5 EU Member States

The 1955 Hague Convention is currently in force in five EU Member States: Denmark, Finland, France, Italy, and Sweden.

Hague takes priority

Although the five EU Member States in question have also ratified the 1980 Rome Convention, and although four of them are bound by the Rome I Regulation (Denmark is not), the Rome Convention and Rome I Regulation do not prejudice the application of international conventions to which an EU Member State was a party when the Regulation was adopted: Article 21 of the Convention; Article 25 of the Regulation. In this way, the Rome Convention and Rome I Regulation ensure that the more 'specialised' sales conflicts rules in Hague Convention (*lex specialis*) take priority over the otherwise applicable conflicts rules of the Rome Convention and Rome I Regulation.

According to its Article 25(2), the Rome I *Regulation* (but not the Rome Convention) takes precedence over conventions concluded *exclusively* between two or more EU Member States in so far as such conventions concern matters governed by the Regulation. Since the 1955 Hague Convention has also been ratified by some non-EU Member States (e.g. Norway and Switzerland), the Rome I Regulation does *not* take precedence over the 1955 Hague Convention as between EU Member States which have ratified that convention.

To make the rules which derogate from the Rome I Regulation more accessible, Member States must notify the Commission of the relevant international conventions, and the Commission must publish a list of the conventions in the Official Journal of the European Union: Article 26.

Reduced need

When the Hague Convention was signed in 1955, the need for its conflicts rules was greater than now, and that statement also applies to the five EU Member States in which the Hague Convention applies. These days, when a seller in France sells goods to a buyer in Italy, there is usually no need for a court or arbitral tribunal to choose between the French and Italian sales laws, because the international sales laws of France and Italy are now the *same, viz.*, the CISG. When the buyer and the seller have their places of business in different CISG Contract-

ing States, the CISG applies (unless the parties have agreed otherwise).

This follows from CISG Article 1(1)(a). As illustrated by the examples in Ch. 3.3.3 below, the situation is more complex if only one of the parties has his or her place of business in a CISG Contracting State.

Although the CISG eliminates the need to choose between (e.g.) French and Italian sales laws, a court or arbitral tribunal might nonethess need to choose between other (non-harmonised) provisions of Italian and French law, e.g. the Italian and French rules which govern (sales contract) validity, because that is a 'matter' which lies outside the scope of the CISG: see Lookofsky, *CISG*, Ch. 2A.

Main Hague rules

The two main conflicts rules of the 1955 Hague Convention concern (1) the parties' freedom to choose the applicable law and (2) the supplementary rule applicable where no such choice has been made.

Party autonomy

The Hague Convention recognises party autonomy to an extent which seems – as a starting point, at least – to go even beyond that of the general conflicts rules in the Rome Convention and Rome I Regulation, since the parties' freedom to choose the applicable law under the Hague Convention is left wholly unrestricted by the letter of Article 2.

On the other hand, the forum court need not apply the law chosen by the parties if the result would be to give effect to a substantive rule contrary to the public policy of the forum (Article 6). This rule on public policy is of the same nature as the reservations on *ordre public* in the Rome Convention Article 16 and the Rome I Regulation Article 21 and, like them, should be applied narrowly.

Unambiguous choice

As regards the formal requirements for a contractual choice of law, the Hague Convention is more restrictive than the corresponding Rome Convention and Rome I Regulation rules: the Hague rules require that the parties' choice of law is either (a) express or (b) unambiguously results from the provisions of the contract: Article 2(2).

As regards the latter requirement, the fact that a given contract contains an express choice of forum clause would hardly

provide sufficient (unambiguous) evidence of an implied choice of the law of that forum.

Seller's law

As regards the supplementary provisions applicable in the absence of a valid choice by the parties, the general Hague Convention rule is to apply the law of the country where the seller resides when the buyer's order is received (Article 3). In other words, the law applicable to the contract is usually the 'seller's law.'

One modification of the general rule applies if the order is received by seller's place of business in another State: in such case, the law of that State will apply. If, however, the seller or his/her representative receives the order in the State where the buyer resides, or where he/she has a place of business which placed the order, then the law of that State applies.

Another more general modification applies as regards the procedures applicable to the inspection of goods and certain related rules: the law applicable to such questions is the law where the inspection shall take place (Article 4). However, as regards the extent of the inspection, its significance, and the parties' remedies for breach, the general rule (seller's law) once again applies.

3.3.3. The 1980 Vienna Convention: Article 1 of the CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force on 1 January 1988. Given the commercial significance and large number of CISG Contracting States, the Convention must surely be regarded as the most significant piece of substantive contract legislation thus far in the international arena.

Supplementary rules

The CISG plays a role comparable to that of the various national substantive laws of sales which apply to domestic sales between merchants: it contains supplementary substantive rules of sales law which serve to fill contractual gaps left open by the parties. Because it is concerned with *substantive* sales contract law, the Convention largely obviates the need for the application of choice-of-law rules.

Regarding the role of the Convention see Lookofsky, *CISG*, § 1.1 and § 1.2; regarding the Convention's scope (Field of Application) see id., Ch. 2A.

Domestic sales laws

Before the advent of the Convention, national courts were obliged to apply domestic sales laws to transactions both domestic and international in character. In international sales, the applicable national sales rules were chosen by the application of the conflicts rules of the forum concerned, e.g. those of the Rome Convention or the 1955 Hague Convention.

Article 1(1)

Now, however, CISG Contracting States are obligated to apply the CISG substantive sales rules when the Convention applies. According to Article 1(1), and absent contrary agreement (Article 6), the Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application of the law of a Contracting State.

Different States

The general requirement – applicable to both subsections (a) and (b) – is thus that the contracting parties have their respective *places of business in different States*.

The fact that the parties have such different places of business is to be disregarded, however, whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract (Article 1(2)). Of course, if this fact is 'disregarded,' then the Convention will not apply.

Article 1(1)(a)

The application of the main rule in Article 1(1)(a) is easily illustrated. On 1 January 1988, France and Italy both attained status as CISG Contracting States. Therefore, international sales contracts concluded on or after this date between parties in France and Italy are automatically subject to the Convention. As regards these contracts, there is simply *no conflict* of laws.

Article 1(1)(b)

In some situations, the CISG will apply to an international sale even when only one of the contracting parties has his or her place of business in a Contracting State. According to the rule in Article 1(1)(b), the Convention applies to sales contracts between parties in different States when 'the rules of private

international law' (i.e., the choice-in-law rules of the forum) lead to the application of the law of a Contracting State.

Hague rule

Suppose, for example, a seller in a CISG State like France sells goods to a buyer in England – a country which has not ratified the CISG. If a dispute between these parties is later brought before a French court, then that court is bound by the rule in Article 1(1)(b) to apply the CISG substantive rules if French private international law points (e.g.) to the law of France. And that is, in our example, generally the case: according to the main rule of the 1955 Hague Convention, the French 'seller's law' applies (Ch. 3.3.2).

Article 95

At least some of the Convention's founding fathers, most notably the American delegates to the Vienna accord, doubted the wisdom of this subsection (b), and a compromise was reached to account for this view: the CISG provides that a Contracting State may elect not to be bound by the Article 1(1)(b) rule. And, since (e.g.) the United States and China each made such an Article 95 declaration at the time of ratification, American and Chinese courts will only apply the Convention pursuant to the general rule in subsection (a): where the parties have places of business in different Contracting States.

Article 92

Four Nordic countries (Denmark, Norway, Sweden and Finland) have made more extensive Article 92 reservation as regards the Convention's Part II rules on Formation of Contract in order to escape the application of these Part II rules. And yet, Article 1(1)(b) may lead to the application of Part II against a party residing in one of those countries, since in cases where the seller resides in another CISG Contracting State, that seller's international sales contract formation law – Part II of the CISG – may be applied as a result of the relevant choice-in-law rule. See Lookofsky, *CISG*, § 8.4.

Article 94

Five Nordic countries (Denmark, Norway, Sweden, Finland and Iceland) have made an Article 94 declaration to the effect that the CISG shall not apply if the buyer and the seller have their places of business in those countries.

3.3.4. The Revised (1986) Hague Convention on the Law Applicable to Sales

Proposed revision

Because of the limited adherence to the 1955 Hague Convention, a revised Hague Convention on the Law Applicable to the International Sale of Goods was signed in 1986.

Success unlikely

As of this writing (2008), however, it seems unlikely that the 1986 Convention (which is not in force) will be more successful than its 1955 predecessor, and a detailed account of its provisions lies beyond the scope of this book.

Article 7(1) of the 1986 Convention provides that the *parties' choice* of law 'must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety.' Presumably, this represents a step in the direction of Article 3(1) of the Rome Convention (and the Rome I Regulation).

As regards the supplementary rules in the *absence of choice*, the new Hague rules are much more complex than those of 1955, especially due to the addition of several new exceptions to the old 'seller's law' rule. One such exception provides that the buyer's law shall apply if the contract provides expressly that the seller is to deliver the goods in the buyer's State. Another more general – yet optional – exception introduces a 'closest connection' kind of test (Article 8).

The application of the CISG is not to be 'prejudiced by' the 1986 Convention: see Articles 23(a) and 8(5).

CHAPTER 4

The Applicable Law in Tort

4.1. Introduction

If a party takes steps to commence civil litigation in a *non-contractual* matter, a two-step process similar to that in international contractual disputes is likely to be involved. First, the court must determine whether it has jurisdiction to adjudicate (Ch. 2). Then, assuming the court is competent, it must choose the substantive law to be applied in the dispute (see as regards contractual matters Ch. 3).

This chapter is devoted to the choice of law in non-contractual (tort) matters and in particular the Rome II Regulation which sets forth an EU-wide regime for the choice of law in such disputes.

4.1.1. From National Law to the Rome II Regulation

National rules

In Europe, the law applicable to tort (delictual) conflicts has traditionally been determined by national choice-of-law rules. In some European States, these national choice-of-law rules have been judge-made. In other jurisdictions, the applicable conflicts rules have been laid down by statute.

Some EU Member States are parties to specialized conventions regarding the law applicable in traffic accidents and product liability. The Convention on the law applicable to *traffic accidents* was concluded on 4 May 1971 and entered into force on 3 June 1975. 12 EU Member States are parties to this convention. The Convention on the law applicable to *products liability* was concluded on 2 October 1973 and entered into force on 1 October 1977. 6 EU Member States are parties to this convention: see Ch. 4.4.

Tort conflicts harmonisation: Rome II

The EU Regulation on the law applicable to non-contractual obligations (Rome II) was adopted in 2007. The purpose of the Rome II Regulation is to harmonise (and thus replace) the national conflict-of-laws rules previously applied by the courts of the individual EU Member States.

Entry into force; application

The Rome II Regulation entered into force in all EU Member States except Denmark on 11 January 2009, and the Regulation applies to *events* giving rise to damage which *occur on or after* that date.

The Rome II Regulation will remain inapplicable in Denmark, unless and until Denmark withdraws its reservation to the EU treaty as regards legal and home affairs. The Danish situation as regards the Rome II Regulation is thus the same as Denmark's position vis-à-vis the Rome *I* Regulation (see Ch. 3.2.1).

Rome I development compared

As previously discussed (in Chapter 3.2.1) the Regulation on the law applicable to contractual obligations (Rome I) was preceded by the 1980 Rome Convention. The Rome II Regulation, however, was not preceded by a corresponding (tort-conflicts) convention, because the European law of tort-conflicts had proved far more difficult to harmonise than did the corresponding contract-conflict rules.

In 1972 the European Community completed and made available for comment a 'Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations.' This ambitious project (a convention on conflict of laws in both contract and tort) ultimately resulted in the more narrowly drawn 1980 Rome Convention, which (as explained in Ch. 3.2.2) deals only with conflict of laws regarding contractual obligations.

Work on the more controversial problems generated by delictual conflicts was later resumed within the European Union, and in July 2003 the Commission submitted a proposed regulation to the European Parliament and the Council (COM(2003) 427 final). That proposal, with substantial amendments, was adopted by the European Parliament and the Council on 11 August 2007 as Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II).

Need for tort conflicts rules

If the substantive laws governing liability and damages in tort were identical in all EU Member States, there would be no need for delictual choice-of-law rules in intra-Community situations. In such case the result of a given dispute should be

the same regardless of where that dispute was resolved. However, to the extent that substantive tort law differs from State to State, the need for conflict-of-laws rules is essentially similar to the need for such rules in contractual contexts (Chapter 3), just as the need for such conflicts rules in delictual contexts will be reduced to the extent that efforts to harmonise EU civil and commercial law progress.

Substantive tort law differs

So far very little substantive tort law has been harmonised within the European Union, and major divergences between the tort laws of Member States still exist, (e.g.) as regards the boundary between strict liability and fault-based liability; compensation for indirect damage and third-party damage; compensation for non-material damage, including third-party damage; compensation in excess of actual damage sustained (punitive and exemplary damages); the liability of minors; assessment ('amount') of damages, particularly in respect of personal injury; and limitation periods.

Indeed, even the Product Liability Directive (the EU's main substantive tort harmonisation achievement thus far) does not harmonise all aspects of EU product liability law (see Ch. 4.4 below).

For these reasons courts in EU Member States will, for many years to come, need choice-of-law rules to help resolve non-contractual disputes like these:

Illustration 4a: German girl (V) is injured on a merry-go-round (MGR) owned and operated by O (in Germany). The MGR was manufactured by M (in Finland) and supplied to O by S (in the Netherlands). When V demands damages from O, O's insurer (A) satisfies V's claim and then brings an action against S and M in Germany, claiming the accident was caused by a defect in the MGR. Assuming the German court has jurisdiction, should it apply German, Finnish or Dutch law to resolve the dispute?

Illustration 4b: French company A seeks to market the rights to certain music (for which it claims to hold the copyright) in England. When Danish company B asserts conflicting claims to the same music, A commences proceedings in France against B, claiming damages for B's al-

legedly wrongful interference with A's marketing efforts. Assuming the French court has jurisdiction, should it apply French, Danish or English tort law to resolve the dispute?

Rome II aims: standardisation & certainty

As indicated, the courts in all EU Member States (except Denmark) will apply the Rome II rules to resolve 'tort conflicts' like these. By ensuring that the competent courts in these illustrations will apply the same substantive (national) tort law as would be applied by any other competent (non-Danish) EU Member State court, the Rome II regime will lead to increased certainty and predictability: if the parties to a given dispute know which substantive law will be applied in a given situation, they can better predict the outcome of that dispute.

Following a consultation on a preliminary Rome II draft proposal set forth in 2002, numerous contributions were made by academics, governments, business and practitioners' representations. See http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm. Some contributors, arguing that merchants do not have many practical legal problems in this area, expressed doubts as to whether an EU-wide set of tort conflict rules was necessary. Others argued it would be preferable to harmonise substantive tort laws. But since harmonisation of substantive private (tort) law was viewed as unlikely anytime soon, still others (who agreed with the EU drafters) felt that Rome II would at least represent a desirable first step towards increased certainty in the tort law field.

Certainty v. reasonableness

As we shall see, the Rome II regime is designed to function on the basis of a certain and predictable ('single-contact') test, as opposed to more flexible (and also less certain) choice-of-law criteria (such as the 'closest connection'). Since the Rome II Regulation does not allow the competent court to take the content of competing substantive laws into account, a judge cannot simply apply the law which he or she might consider to be the 'best' (most suitable, modern, fair and/or reasonable). For these reasons, the Rome II Regulation will serve to reduce the range of discretion previously enjoyed by courts in some EU Member States.

According to the Preamble of the Rome II Regulation (para. 6), the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for conflict-of-law rules in the

Member States to designate the same national law irrespective of the country of the court in which an action is brought. The Preamble adds that uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants (para. 13).

As emphasised by Professor Symeonides, however, increased certainty is not the only important consideration: 'Every PIL system encounters the perennial tension between the need for certainty and predictability on the one hand, and the need for flexibility and equity on the other. Each system responds differently, striking a different equilibrium between the two needs. [T]he EU Commission moved sharply in the ... direction of adopting a system of tightly written black-letter rules with relatively few escapes and little room for judicial discretion. ... This was a plausible, though not necessarily the best, conclusion. The argument that a codification intended for application by the courts of different countries cannot afford to be flexible, is highly overrated. For example, whatever its other faults, the Rome Convention [on the law applicable in contractual matters] did not fail for being too flexible. Moreover, while no one would question the desirability of uniformity and certainty, one can question the extent to which these values should displace all other values of the choice-of-law process, such as the need for sensible, rational, and fair decisions in individual cases.' (Symeonides, *Rome II and Tort Conflicts* at 180)

In *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, after an extensive summary of solutions adopted or proposed in Australia, the United States and England, the Privy Council stated: 'Their Lordships, having considered all of these opinions, recognise the conflict which exists between, on the one hand, the desirability of a rule which is certain and clear on the basis of which people can act and lawyers advise and, on the other, the desirability of the courts having the power to avoid injustice by introducing an element of flexibility into the rule.'

National rules remain significant

The main focus of this Chapter is on the Rome II Regulation, but some initial attention will also be given (in Ch. 4.1.2) to the national (pre-Rome II) tort conflicts rules. Quite apart from the fact that these national conflicts rules remain applicble to events which occurred before 11 January 2009, the sampling of national rules which follows will help to explain the nature of the harmonisation compromise which the Rome II Regulation represents.

Experience shows that litigation may sometimes take place several years after the events giving rise to the claim.

Danish national choice-of-law rules will continue to be applied by *Danish courts* until such time as the relevant Danish reservation is withdrawn – a point which will remain relevant even for non-Danish parties

as regards tort claims with an international element adjudicated by Danish courts of law.

4.1.2. Torts Conflicts under European National Law

Main lex loci rule

The traditional (national) choice-of-law approach in tort conflicts in most EU Member States has been to apply the law of the place of the commission of the tort – also known as the principle of *lex loci delicti commissi*.

Lex loci in France

Lex loci delicti has, for example, long been the main rule in France. In the famous *Latour v Guiraud* [1948] D. 357, dating back to the Spanish Civil War, a truck driven by an employee of the defendant, a French firm, collided with a Spanish railway engine in Spain. In the resulting fire, plaintiff's husband – driving for another firm in the same truck convoy – died. Both drivers were French residents. If French law had applied, the defendant company would have been strictly liable under the French Civil Code. The *Cour de Cassation*, however, chose to apply the Spanish *lex loci delicti* which (at that time) required proof of fault. For this reason, and since the widow could not prove that the defendant had acted negligently, the widow's claim failed.

Reaffirmed in Kieger

Kieger v Amigues 56 Rev.crit.dr.int.priv. 728 (1967) confirmed the applicability of *lex loci delicti* in France. In that case a Frenchman (A) driving on a German road attempted to overtake a truck in heavy traffic. This caused another French driver (B) coming from the other direction to brake suddenly and collide with the truck. As a result B was injured and his brother (B's passenger) died. Their father then sued in France to recover damages from A, *inter alia*, for mental suffering. Such damages were recoverable under French tort law, but not German tort law. Because the *Cour de Cassation* applied the *lex loci delicti*, no such damages could be awarded in this case.

For a more extensive discussion of *Latour*, *Kieger* and other related French cases see Delaume, 'Recent French Decisions,' 19 *AmJ.Comp.L.* 7 (1971).

Variations & exceptions

In many EU jurisdictions, the traditional *lex loci delicti* solution has been subject to certain variations and exceptions.

Germany: victim's choice

Lex loci delicti has, for example, been the dominant German delictual test under Article 40(1) of the EGBGB (Introductory Law to the Civil Code). According to this provision non-contractual claims are governed by the law of the country in which the *tortfeasor acted*. However, the injured person may demand that the law of the country *where the damage occurred* apply instead.

In pratice, these two versions of the *lex loci delicti* rule (where the tortfeasor acted and where the injury occurred) often lead to the application of the same State's law.

As emphasised by Professor Symeonides, some countries (such as Austria and Poland) have opted for the *place of conduct*, others (such as the Netherlands and the United Kingdom) have opted for the *place of injury*, others (such as Portugal) have applied the law of the place of conduct in some specified cases and the law of the place of injury in other cases, others (such as Spain and Greece) have left the question unanswered, while others (such as Germany, Italy and Denmark) have allowed the victim (or the court) to *choose* between the two laws (Symeonides, *Rome II and Tort Conflicts* at 187f).

As noted in the Preamble (para. 11) to Rome II Regulation, there have also been differing national conceptions as to the fundamental notion of what constitutes a *non-contractual obligation* (delict/tort).

Germany: lex communis

In Germany both the rule and the exception in Article 40(1) of the EGBGB have been subject to the common domicile (*lex communis*) rule in Article 40(2) which provides that if the *parties had their habitual residence in the same country*, the law of that country shall apply regardless of the place of the tort.

Germany: substantially closer connection

A more general provision is found in Article 41 of the EGBGB, which provides that if there is a *substantially* closer connection to the law of another country than with the law applicable by virtue of Articles 40(1) and 40(2), that other law shall apply.

A similar provision applies in the United Kingdom if a comparison of the connecting factors to the country of the *locus delicti* and to another country make it 'substantially more appropriate' to apply the law of that other country instead of the *lex loci delicti*: s. 12 of the Private International Law (Miscellaneous Provisions) Act.

In *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, the dependants (DS) of a Dutch seaman, killed while working on an English-registered trawler, sought damages from the owner of the trawler (O). O admitted liability, but submitted that benefits accruing to DS under various Dutch social security schemes should be deducted from the claim. Such deduction was prescribed by Dutch law, but not by English law.

The English court identified the following connecting factors: 'The factors that connect with England seem to me to be that the events occurred on a boat registered in England and that the defendants are an English company. What then are the factors that connect with Holland? The deceased was a Dutchman and his death would lead to damage being suffered by his dependants, who are Dutch, in Holland, where they live. The incident occurred when the deceased was under the supervision of the Dutch fishing master albeit the skipper of the boat was English. In real terms the vessel was on a Dutch fishing expedition in that the boat set off from a Dutch port and would return with its catch to a Dutch port. The defendants were a subsidiary of a Dutch company, and the deceased was on board the trawler as an employee of a Dutch company, also a member of the same group.'

The court then compared the connecting factors in question: '[O] submits that it is the fact that the deceased was Dutch, employed by a Dutch company, paying Dutch taxes and making contributions to obtaining Dutch security benefits and the fact that the dependants will suffer their loss of dependency in Holland as Dutch citizens which are the most significant factors. That, [O] submits, makes it logical to assess this aspect of the damages by Dutch law. But it seems to me that the logic of that argument leads almost inevitably to the consequence that, where a claimant injured in England is a foreigner living and employed in that foreign country, any head of damages should be assessed in accordance with the law of his or her country. Indeed in one sense I suppose it could be said to be 'appropriate' that that should be so since the injured party or the dependants thereof are likely to feel their loss only in that foreign country. But it seems to me that it was not intended that the general rule should be dislodged so easily. Where the defendant is English and the tort took place in England it cannot surely be said that that it is *substantially* more appropriate for damages to be assessed by Dutch law simply because the claimant or deceased is Dutch.'

Denmark: judge-made PIL

In Denmark no statutes have been enacted in respect of choice of law in tort matters, so the choice-of-law rules applicable to tort conflicts situations are based solely on judge-made rules of law (precedents, case-law).

The flexible rules (principles) which are reflected in these precedents have been discussed extensively in scholarly writing, but they remain difficult to summarise, not only because the relatively few Danish decisions on point do not all seem to rely on a single conflicts theory (see Lookofsky & Hertz, *International privatret*, Ch. 5) but also because Danish judges, who focus mainly on the *outcome* (a just resolution) of the concrete dispute between the parties, usually provide no more than a very brief and non-detailed explanation of the *ratio* underlying a given decision (Lookofsky, *Precedent in Denmark*).

Lex loci delicti

There are several significant Danish precedents which reflect judicial acceptance of the *lex loci delicti* principle.

In *Langford v Kartoffelmelcentralen Amba* [2003] UfR 1593, a Danish producer of potato flour had brought an action against an English company and its managing director. The English company had acted as agent for the plaintiff, which claimed that the English company had fraudulently withheld money paid by the plaintiff's English customers. The Danish court noted that the acts on which the plaintiff's claim was based had been undertaken in England and that the effects of those acts were manifest when the money was not deposited in the plaintiff's bank account in England. It followed that English law applied.

Irma/Mignon

In some situations, however, Danish and other Scandinavian courts have resisted mechanical *lex loci delicti* solutions, (e.g.) in cases where that traditional PIL approach would not lead to the application of a (substantive) tort law rule which the forum court itself considers to be the 'better rule' – the substantive rule which, in that court's opinion, leads to a better solution (outcome). The decision by the Norwegian Supreme Court in the *Irma/Mignon* case provides a notable illustration of this more flexible (centre-of-gravity) tort conflicts technique.

The Norwegian *Irma/Mignon* case [1923] NRt II.58 is often cited as an example of the 'individualizing' (centre-of-gravity) method which has long influenced Scandinavian conflicts thinking in general. The case involved a collision between two Norwegian ships on the English river Tyne. The question presented was whether a Norwegian shipowner was liable for an error committed by an English compulsory pilot: under the then-applicable English (*lex loci*) law, the owner was not liable; under Norwegian (*lex fori*) law, he was. Given these circumstances, the Supreme Court of Norway opted for *lex fori*. Though the Court explained

its result using a modernized version of Savigny's centre-of-gravity approach, a Danish commentator has emphasized that the English (no liability) law in question had already been repealed at the time of the accident. And though the new (liability) law first took effect at a later date, there was little reason to follow an 'anachronistic' English rule. Seen in this light, *Irma/Mignon* provides at least one piece of evidence of judicial pragmatism: the Norwegian Court may well have started with what it considered to be the most desirable result, and then reasoned 'backwards,' away from *lex loci* and towards the newer and *better (lex fori)* legal rule.

Centre of gravity: Krægpøth

As already indicated, the principle of *lex loci delicti* is important in Danish case-law, but a centre of gravity approach has also been employed, in particular in car accident cases such as *Krægpøth v Rasmussen* [1982] UfR 886.

The facts of the case were as follows: Two Danes met through an advertisement and embarked on a hunting trip to Scotland. Once there, they rented a car, obtained insurance and drove off to the woods. Returning to Glasgow on the last day of the trip, Krægpøth's negligence at the wheel led to an accident and Rasmussen died. His widow sought damages, but by the time her lawyer finally asserted a claim in a Danish court against Krægpøth, the claim was time-barred according to Scots – but not Danish – law.

The Danish High Court ruled (as translated by the authors): 'The accident occurred in Scotland while Krægpøth and Rasmussen used a car registered in that country, which was covered by compulsory liability insurance according to Scots law. Therefore, the dispute should be governed by Scots law. The respondents are debarred from starting legal proceedings in Scotland pursuant to section 17 of the Prescription and Limitation (Scotland) Act 1973, as the statutory 3-year period has elapsed. The High Court finds that this provision cannot be disregarded in proceedings commenced in a Danish court even though it is [i.e. when *Krægpøth* was decided] a procedural rule under Scots law. Consequently, the High Court finds for Krægpøth.'

Note that although the Danish court's *ratio* reflects a centre-of-gravity approach, the *result* in *Krægpøth v Rasmussen* is also compatible with *lex loci delicti.* The same is true of the more recent decision in *Aros Forsikring v Århus Kommune* [2006] UfR 2142, where a recourse claim by a Danish local authority, which had disbursed sickness benefits to a person who had been injured in a car accident in Tunisia, against the Danish insurer of the car, was to be decided under Tunisian law.

4.2. Rome II Regulation: Scope and General Introduction

Scope

Article 1 of the Rome II Regulation defines its scope (general field of application). According to paragraph (1), the Regulation applies, in situations involving a conflict of laws, to *non-contractual obligations in civil and commercial matters*.

Autonomous concept

Referring to the fact that the concept of a non-contractual obligation varies from Member State to Member State, the Rome II Preamble states that 'non-contractual obligation' should be understood as an autonomous (uniform) concept. So, to the extent that disputes arise as to the meaning of this (key) phrase, the Court of Justice of the European Communities may be asked to issue preliminary rulings in that regard, i.e. to establish the proper interpretation of the phrase 'non-contractual obligation.'

Since the *Rome I* Regulation applies, in situations involving a conflict of laws, to *contractual obligations* in civil and commercial matters (see Ch. 3.2.2), the Rome I and Rome II Regulations, taken together, cover *all* 'obligations,' although with certain express exclusions (see immediately below).

Specific matters excluded

Article 1 also contains additional provisions which further define and limit the concept of 'civil and commercial matters' and which exclude from the scope of the Regulation certain family law matters, torts relating to bills of exchange, etc.

Paragraph (1) of Article 1 also states that the Regulation does not apply, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). According to para. 9 of the Preamble, claims arising out of *acta iure imperii* include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders.

Paragraph (2) of Article 1 expressly excludes certain '*family law*' matters from the scope of the Regulation. Excluded are non-contractual obligations arising out of family relationships, relationships deemed by the law applicable to such relationships as having comparable effects, matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships as having comparable effects to marriage, and successions. According to para. 10 of the Preamble, family relationships cover parentage, marriage, affinity and collateral

relatives. The reference to relationships having comparable effects to marriage and other family relationships is to be interpreted in accordance with the law of the Member State where the court is seised and would include, *inter alia*, registered partnerships between persons of the same sex.

Also excluded from the scope of the Regulation are non-contractual obligations arising under bills of exchange, cheques and promissory notes and other *negotiable instruments* to the extent that the obligations under such other negotiable instruments arise out of their negotiable character, as well as non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporate, including the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or its members in the statutory audits of accounting documents. Furthermore, non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily are also excluded from the scope of the Regulation.

Non-contractual obligations arising out of *nuclear damage* are excluded from the scope of the Regulation since international instruments dealing with such damage already exist.

Defamation, etc.

Last, but certainly not least in terms of practical importance, non-contractual obligations arising out of violations of privacy and rights relating to personality, including – in particular – defamation, are excluded from the scope of the Regulation. The exclusion of this item is due to its controversial nature. Views differed so widely as to what would constitute a reasonable conflicts rule in this area that it was thought expedient to exclude it from the scope of the Regulation so as not to halt progress for an indefinite time. Of course, the consequence of the exclusion is that each EU Member State will continue to apply its own conflicts provisions to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Out of concern for the protection of free speech, defamation was also excluded from the application of the pre-Rome II United Kingdom tort conflicts provisions contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995, which took effect on 1 May 1996 and will remain applicable in England, Scotland and Northern Ireland to torts which occurred before the entry into force of the Rome II Regulation. The concern was that an English publisher might be held liable under the law of a foreign country where the publication was circulated if the publication was defamatory under that law. Professor Hill commented: 'This concern, though superficially alarmist, gains some credence from the fact that some regimes are not averse to employing defa-

mation laws as a means of stifling press criticism' (Hill, *International Commercial Disputes* at 558).

In England, conflicts relating to the tort of defamation are (and will continue to be) resolved by the (judge-made) conflicts rules of English common law, including as regards foreign torts the complex 'double-actionability' rule. This rule requires claims brought in an English court to be 'actionable' (i.e. well-founded) under *both* English law and the law of the country where the tort occurred, i.e. under both *lex loci delicti* and *lex fori:* See *Phillips v Eyre* (1870) LR 6 QB 1 as applied in *Boys v Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. The latter decisions introduced a flexible exception, so the court may, in appropriate circumstances, dispense with either the *lex loci delicti* or the *lex fori* branch of the rule, e.g. in respect of a particular issue.

Universal application

Like the Rome I Regulation (see Ch. 3.2), the Rome II Regulation expressly provides that any law specified by the Regulation is to be applied *whether or not* it is the *law of an EU Member State* (Article 3). This is the so-called principle of 'universal application.'

As a logical consequence, the law specified by the Regulation will also be applied *whether or not* that (tort) law is the law of an EU Member State where the *Regulation applies*. For this reason, all Member State courts (except Danish courts) will apply *Danish law* if that is the tort law specified by the Regulation rules.

Freedom of choice

As a starting point, the Rome II Regulation recognises that the parties to a tort-related dispute enjoy the freedom to conclude an agreement on the applicable law. However, the freedom to agree on the law applicable in tort is far less extensive than the corresponding freedom enjoyed by contracting parties under the Rome I Regulation. Under the Rome II Regulation, agreements on the applicable law can only be made *after* the tort has been committed, unless the agreement in question is concluded between merchants.

Article 14 provides as follows:

1. The parties may agree to submit non-contractual obligations to the law of their choice:
   a) by an agreement entered into after the event giving rise to the damage occurred; or

b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of provisions of the law of that country which cannot be derogated from by agreement.
3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

The special conflicts provisions dealing with unfair competition and acts restricting free competition and infringement of intellectual property rights (described in Ch. 4.3 below) cannot be derogated from by agreement (Articles 6(4) and 8(3)).

Scope of applicable law

The law applicable to non-contractual obligations under the Rome II Regulation governs a broad range of substantive tort issues, including (as specified in Article 15):

- the *basis and extent of liability*, including the determination of persons who can be held liable [e.g. whether the basis of liability is fault or no-fault and which persons can be held liable];
- the *grounds for exemption* from liability, any limitation of liability and any division of liability [e.g. whether a person can escape liability due to his or her age and how the liability between two liable persons shall be split];
- the existence, the nature and the *assessment of damages* or the remedy claimed [e.g. the amount of damages to be awarded], and
- the manner in which an obligation may be extinguished and rules of *prescription and limitation* [e.g. whether a claim has become time-barred].

Within the limits of powers conferred on the court by its procedural law, the law applicable also governs measures which a court can take to

prevent or terminate injury or damage or to ensure the provision of compensation. Furthermore, the applicable law governs the question whether a right to claim damages or remedy may be transferred, including by inheritance; persons entitled to compensation for damage sustained personally; liability for the acts of another person (Article 15). The law governing a non-contractual obligation applies also in respect of rules which, in matters of non-contractual obligations, raise presumptions of law or determine the burden of proof (Article 22).

The application of the law of any country specified by the Rome II Regulation means the application of the rules of law in force in that country *other than* its rules of *private international law* (Article 24). This exclusion of the traditional '*renvoi*' conception (Ch. 1.4.3) is in accord with the corresponding exclusion in the Rome I Regulation (Ch. 3.1).

Assessment of damages

Thus, under the Rome II Regulation, not only the existence and nature of damage, but also the *assessment* of damages is governed by the applicable law.

> *Illustration 4c:* Two friends (A and B), who live in England, go on holiday in Spain. They rent a car and take turns driving. They have an accident due to A's negligence, and B is seriously injured. B sues in England and seeks to invoke English law in support of a claim for damages, since the amount recoverable for the injuries in question is substantially higher under English law than under Spanish law.

Analysis

In *Illustration 4c*, the assessment of damages under the Rome II Regulation will be governed by the same law as the law which governs other substantive issues, such as basis of liability etc. That law, as we shall see (in Ch. 4.3), is English law.

In England, under the pre-Rome II national PIL rule (which remains applicable to torts which occurred before the entry into force of the Rome II Regulation: see Ch. 4.1.1), the measure of damages is a *procedural issue* governed by the law of the (English) *forum* (*lex fori*): see e.g. *Edmunds v Simmonds* [2001] 1 WLR 1003 and *Hulse v Chambers* [2001] 1 WLR 2386, both cases involving plaintiffs (defendant's friend and stepson, respectively) injured in a car accident abroad due to the defendants' negligence, and where the application of foreign law (Spanish and Greek law, respectively) to the quantum of damages would have resulted in a much lower award than the application of English law.

(It should be emphasised, however, that, under the Rome II Regulation, the measure of damages in a case like *Edmunds v Simmonds* or *Hulse v Chambers* would still be governed by *English* law, since *both*

plaintiff and defendant were *resident* in England: see Ch. 4.3 below re. *lex communis*).

Internationally mandatory rules etc.

The Rome II Regulation contains a seemingly far-reaching provision stating that nothing in the Regulation restricts the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation (Article 16). However, if the overall aim of achieving uniform conflicts provisions is not to be defeated, the forum law rules referred to in this provision should be applied only in exceptional circumstances.

Regarding the correspondingly narrow application of Article 9 of the *Rome I* Regulation, see Ch. 3.2.5(B).

Ordre public

It may also be noted that another Rome II provision indicates that the application of a provision of the law of any country specified by the Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 26). This too represents a very narrow exception.

Under the laws of some countries, an award of non-compensatory exemplary or punitive damages (i.e. damages in excess of actual damage) is authorised in certain circumstances. In some EU Member States, such an award might be deemed manifestly incompatible with the public policy of the forum. See para. 32 of the Preamble.

4.3. General Regulation Rule – *Lex Loci Damni*

Legal certainty and individual justice

In most tort-related contexts, the Rome II Regulation lays down rules which function on the basis of 'single' connecting factors (single-contact tests) with the main rule rule being that the law of the country in which the *damage* occurs shall apply. Single-contact tests govern both the general Regulation rule as well as most of its specific rules, although a (narrowly formulated) 'escape clause' allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

In the view of the EU legislature, the Rome II Regulation creates a 'flexible' framework of conflict-of-laws rules which enables the court seised to treat individual cases in an appropriate manner. Referring to the fact that the requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice, para. 14 of the Preamble states that the Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. According to para. 16 of the Preamble, uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.

Some observers have been quite critical of the Rome II framework, although the same observers concede that the 'concrete reasonableness' sometimes achieved by more flexible conflicts regimes (e.g., in many States in the United States) is achieved at the expense of reduced certainty and predictability (see Symeonides, *Rome II and Tort Conflicts*).

Lex loci delicti

As noted previously (in Ch. 4.1.2), as well as in para. 15 of the Regulation Preamble, the principle of the *lex loci delicti commissi* has long been the basic solution for non-contractual obligations in virtually all EU Member States.

Multi-state torts

Where the component factors of a given case are spread over several countries, however, the practical application of the *lex loci delicti* principle has been handled differently in different EU Member States (Ch. 4.1.2). Since differing applications might engender uncertainty as to the applicable law, and since the attainment of conflicts 'certainty' was a very important concern for the EU legislature, a uniform solution was designed to deal with all torts, including 'multi-state' torts.

Lex loci damni: general rule

Reflecting these considerations, the Rome II Regulation lays down *lex loci damni* (the law of the place where the damage occurs) as its general rule (the conflicts provision which applies absent any specific indication to the contrary).

2 general exceptions

The general *lex loci damni* rule, which is set forth in Article 4(1), is, however, itself modified by two generally applicable exceptions. The result is a 3-tiered general provision (Article 4):

> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be *the law of the country in which the dam-*

> *age occurs* irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
> 2. However, where the person claimed to be liable and the person sustaining damage *both have their habitual residence* in the same country at the time when the damage occurs, the law of that country shall apply.
> 3. Where it is clear from all the circumstances of the case that the tort/delict is *manifestly more closely connected* with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

First tier

The Regulation starting point in Article 4(1) is *lex loci damni*. The application of this first-tier criterion is illustrated by the following example:

> *Illustration 4d:* Blasting operations by a Swiss mining company in the Swiss Alps cause a snow avalanche in the French Alps, injuring a group of English tourists.

Analysis

Article 4(1) views Switzerland as the country of the 'event giving rise to the damage,' France as the country in which 'the damage occurs,' and England (the domicile of the injured tourists) as the country in which 'the indirect consequences of that event occur.' In other words, Article 4(1) provides that the applicable law is the law of the country in which the *injury* – i.e. the harmful physical *impact* – occurs (France), *irrespective* of the country in which the injurious *conduct* occurred (Switzerland), and *irrespective* of the country in which the *indirect consequences* of the injury are felt (England).

Illustration 4d is based on an illustration provided by Professor Symeonides. In his view the general rule of Rome II is, in effect, a restatement of the traditional *lex loci delicti* rule, with the addition of a 'last event' subrule (Symeonides, *Rome II and Tort Conflicts* at 187).

According to para. 16 of the Preamble, a connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance

between the interests of the person causing the damage and the person sustaining the damage and also reflects the modern approach to civil liability and the development of systems of strict liability. Para. 17 adds that the law applicable should be determined on the basis of where the damage occurs regardless of the country or countries in which the indirect consequences could occur.

Second tier: lex communis

Article 4(2) should be seen as an exception to the general (*lex loci damni*) principle, creating a special connection where the parties have their habitual residence in the same country.

> *Illustration 4e:* Two friends (A and B), who live in England, go on holiday in Spain. They rent a car and take turns driving. They have an accident due to A's negligence, and the passenger (B) is seriously injured. B sues A.

Analysis

Since the person claimed to be liable (A) and the person sustaining damage (B) both reside in England at the time when the damage occurs, English law applies.

Habitual residence of companies

For the purposes of the Rome II Regulation, the *habitual residence* of companies and other bodies, corporate or unincorporated, is the place of central administration (Article 23).

However, where the event giving rise to the damage occurs, or the damage arises, *in the course of operation of a branch, agency or any other establishment*, the place where the branch, agency or any other establishment is located is to be treated as the place of habitual residence. Furthermore, the habitual residence of a natural person acting in the course of his or her business activity is his or her principal place of business.

Third tier: manifestly closer connection

Article 4(3) should be understood as a *narrowly formulated* 'escape clause' from Article 4(1) and (2), to be applied only where it is clear from *all* the circumstances of the case that the tort/delict is *manifestly* more closely connected with another country.

> *Illustration 4f:* Freelance journalist (FJ) lives in Malmö (Sweden), but works from an office in Copenhagen (Denmark). While researching a story in Kosovo for a Swedish news magazine, FJ is accidentally killed by Swedish sol-

diers of KFOR (the NATO Kosovo Force). FJ's spouse claims damages from the Swedish army.

If this tort is governed by the law indicated by Article 4(1) of the Regulation, it will be subject to the law of Kosovo as the damage occurred in Kosovo. However, it can reasonably be argued that the tort is manifestly more closely connected with Sweden than with Kosovo. Note that Article 4(2) would not lead to the application of Swedish law, since FJ is acting in the course of his/her business when killed (and the business is headquartered in Denmark). Note also that claims in respect of the use of force by a country's armed forces are excluded from the scope of the Regulation (*acta iure imperii*).

Compromise: certainty & flexibility

The 3-tiered 'General Rule' in Article 4 reflects the kind of countervailing pulls typically at work within the conflict of laws. Using techniques comparable to those laid down in the rules for contract conflicts, the delictual conflicts provisions of the Rome II Regulation attempt to strike a balance between the certainty inherent in a single-connecting-factor test and the flexibility only obtained by a multi-factored approach.

Narrow third tier

Experience shows that when conflict-of-laws rules combine *lex loci damni* with a 'substantially closer connection' escape clause, the escape clause is applied most often when the person claimed to be liable and the injured person reside in the same country. Since that eventuality is dealt with separately in the Rome II Regulation (Article 4(2): *lex communis*), the room left for the application of the Rome II escape clause seems very narrow indeed.

The combination of *lex loci damni* with a flexible, albeit narrow, exception already existed in the national laws of several EU Member States prior to the adoption of the Rome II Regulation, including the United Kingdom and Germany (see Ch. 4.1.2 above).

To be sure, those national exceptions are not identical to the Rome II Regulation's 'manifestly more closely connected with another country.' Nevertheless, in the absence of case-law regarding the interpretation and application of that provision, the English decision in *Roerig v Valiant Trawlers Ltd* (summarized in Ch. 4.1.2) seems at least illustrative of the mechanisms used to identify and weigh various connecting factors in order to determine whether there are sufficiently 'strong' reasons for derogation from the general *lex loci damni* rule.

Rules of safety and conduct

The Rome II Regulation expressly provides that in assessing the conduct of the person claimed to be liable, *account shall be taken*, as a matter of *fact* and in so far as is appropriate, *of the rules of safety and conduct* which were in force at the place and time of the event giving rise to the liability (Article 17). According to para. 34 of the Preamble, the term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including for example road safety rules in the case of an accident.

> *Illustration 4g:* A (from Poland) goes skiing in Norway. In breach of Norwegian safety regulations, A skis on a piste open only to persons in possession of a certain certificate, which A has not acquired. A bumps into B (also from Poland), and B is seriously injured. B sues A in Poland.

Under Article 4(2), *lex communis*, the Polish court should determine A's liability in accordance with Polish law. However, under Article 17, the Polish court should take A's breach of local (Norwegian) safety regulations into account as a *fact* relevant when evaluating A's liability under *Polish* law.

Special torts

The Rome II Regulation contains a number of special conflicts provisions addressing specific torts, derogating to some extent from the 'General Rule' in Article 4. The special conflicts provisions of the Rome II Regulation govern product liability (discussed in Ch. 4.4 below), unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights and industrial action, respectively.

According to para. 19 of the Preamble, specific rules should be laid down for special torts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

However, according to para. 21 of the Preamble, the special rule regarding *unfair competition* – which refers to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected (Article 6(1)) – is not an exception to the general rule but rather a clarification thereof. The aim pursued is to protect competitors, consumers and the general public and ensure that the market economy functions properly.

As regards *restriction of competition*, the applicable law is the law of the country where the market is, or is likely to be, affected (Article 6(3)).

In cases where the marked is, or is likely to be, affected in more than one country, the claimant can, when certain requirements are met (see Article 6(3)(b)), choose to base his or her claim on the law of the court seised (*lex fori*). Paras. 22 and 23 of the Preamble specify that this provision covers infringements of both national and EU competition law.

Environmental damage

The provision dealing with environmental damage allows the injured person a choice of laws: he or she can choose between the law of the place of the *damage* or the law of the place of the *event giving rise to the damage* (Article 7).

'Environmental damage' means adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms (para. 24 of the Preamble).

According to para. 25 of the Preamble, Article 174 of the EC Treaty – which provides that there must be a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays – fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the applicable law is to be determined in accordance with the (procedural) law of the Member State of the court seised.

Regarding *infringements of intellectual property rights*, the Rome II Regulation has adopted the universally acknowledged principle of the *lex loci protectionis*, i.e. the applicable law is the law of country for which protection is claimed (Article 8). According to para. 26 of the Preamble, the term 'intellectual property rights' means, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights (e.g. patents).

Laws and traditions concerning *industrial action*, such as strike action or lock-out, vary greatly from one Member State to another, and industrial action is governed exclusively by each Member State's internal rules, it never having been possible to agree to any EU harmonisation. Therefore, the Regulation adopts the principle that the law of the country where the industrial action was taken applies (Article 9).

4.4. Product Liability

Before considering the content of the special choice of rules for product liability laid down in Rome II, we should explain why the EU Member States still need conflict-of-laws rules of this particular kind.

Substantive harmonisation: EU Directive

The EU Product Liability Directive currently in effect harmonises certain *substantive* rules of product liability (Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended).

Directive supplements national liability rules

Although the Court of Justice of the European Communities has described the Product Liability Directive as effecting a 'complete harmonisation' (within its scope) (see case C-52/00 *Commission v France*, para. 24, case C-154/00 *Commission v Greece*, para. 20, and case C-402/03 *Skov Æg v Bilka Lavprisvarehus A/S*, para. 23), the Directive liability regime does not supplant (displace) all national rules on product liability.

In particular, the 'no-fault' delictual liability regime of the Directive serves to *supplement* (not supplant) national rules founded on another basis of liability: liability for breach of a contractual obligation (e.g. to deliver conforming goods) or delictual liability based on fault (e.g. national rules of liability based on a manufacturer's negligence).

Furthermore, the Directive does not even fully harmonise its own (no-fault) basis of liability: each EU Member State is left to decide whether a manufacturer is liable even if he or she proves 'that the state of scientific and technical knowledge at the time when [he or she] put the product into circulation was not such as to enable the existence of the defect to be discovered' (the so-called *state-of-the-art* defence). Nor does the directive harmonise the *quantification* of damages, and the national rules on this important question differ widely, in particular regarding personal injury.

1973 Hague Convention: relation to Rome II

Six EU Member States currently resolve product liability conflicts by applying the rules in the 1973 Hague Convention on the Law Applicable to Products Liability. To the extent that these Member States remain Hague Convention Contracting States, the Rome II rules which apply to product liability conflicts will *not* supplant the Hague regime.

The EU Member States parties to this Hague Convention are: Finland, France, Luxembourg, Netherlands, Slovenia and Spain. The continued application by those Member States of choice-of-law rules which are different from those of the Rome II Regulation is authorised by Article 28 of the Regulation, which provides that the Regulation does not preju-

dice the application of international conventions to which a Member State was a party when the Regulation was adopted. (According to its Article 28(2), the Regulation takes precedence over conventions concluded *exclusively* between two or more EU Member States in so far as such conventions concern matters governed by the Regulation. Since the 1973 Hague Convention is also ratified by non-EU Member States (e.g. Norway), the Regulation does *not* take precedence over the 1973 Hague Convention as between EU Member States which have ratified that convention).

Rome II: product damage, connecting/ cascading factors

Under the new Rome II Regulation, the *law applicable* to a non-contractual obligation arising out of *damage caused by a product* is determined by the 'cascading' conflicts provision set forth in Article 5. The four levels (stages) in this 'cascade' of relevant connecting factors are as follows:

a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the applicable law shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

Para. 20 of the Preamble explains that the conflict-of-laws rule should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a 'cascade system' of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage has his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country. As explained below, however, the whole cascade is subject to the 'common habitual residence' provision and to the possibility of a 'manifestly closer connection' to another country.

The operation of this new cascade system is illustrated by the following examples:

> *Illustration 4h:* While participating in a short course of study in Nice, Danish student A receives a complimentary (promotional) pen manufactured by Swiss company B. Later, while flying from Nice to Paris, A carries the pen in the pocket of his new (and very expensive) designer shirt. The pen suddenly leaks, the ink ruins the shirt, and A sues B for damages.
>
> *Illustration 4i:* Same as *Illustration 4h*, except that A bought the pen while on vacation to Italy.

Analysis

In *Illustrations 4h* and *4i*, Article 5(1)(a) will lead to the application of Danish law if the pen is marketed in Denmark (and provided that such marketing is reasonably foreseeable for the manufacturer). If the pen is *not* marketed in Denmark, Article 5(1)(b) will lead to the application of French law in *Illustration 4h* and Italian law in *Illustration 4i.*

Exceptions

The various connecting (and cascading) factors set forth in Article 5 are (all) subject to both the 'common habitual residence' provision (*lex communis*) and the 'escape clause' described in Ch. 4.3 above.

CHAPTER 5

Recognition and Enforcement of Foreign Judgments

5.1. General Introduction

Once a court has assumed jurisdiction in a given dispute and then rendered a judgment on the merits, issues of recognition and enforcement may arise. If, for example, the losing party (the defendant) is not willing to comply with the judgment voluntarily, the successful party (the plaintiff) may need judicial assistance in order to obtain satisfaction of the judgment (to actually receive the sum of money which the court has awarded as damages, etc.). In international disputes this raises the question of whether a judgment rendered by a court in one State (e.g. the country where the plaintiff resides) can be enforced in another State (e.g. the defendant's country).

Res judicata

Litigation ends when a final judgment is rendered. Recognition of a judgment under the general principle of *res judicata* (a matter already judged) establishes certain legal barriers against re-litigation, thus avoiding the trouble and expense of resolving the same dispute more than once (and by more than one court). In essence, *res judicata* means that a judgment rendered on the merits of a given claim precludes a subsequent action proceeding on all or part of the same claim. Respect for the *res judicata* principle prevents injustice to the parties. It also avoids unnecessary waste of resources in the courts.

Res judicata is a complex subject. The key aspect of the doctrine noted above (that a judgment on the merits precludes a subsequent action on the same claim) is often referred to as *claim-preclusion*, and this aspect of *res judicata* is recognised (in one form or another) in all legal systems,

at least as regards the effects of judgments rendered within the forum State.

Enforcement of money judgments

Another universal concept is that a judgment can be enforced by means of public coercive force, if necessary. In the case of a money judgment (e.g.) in a civil or commercial matter, the winning party can initiate procedures for execution of the judgment through the offices of a bailiff, sheriff or similar official – once again, within the territory of the forum State, at least. In international litigation, this rule is of particular practical significance, *inter alia*, as regards (multi-national) corporate judgment debtors, which are often likely to have assets present in the particular judgment-rendering State.

Extraterritorial effects

When it comes to the extraterritorial effects of judgments, however, these same recognition and enforcement principles do not enjoy a similarly universal degree of applicability. Absent the dictates of some higher law, each individual sovereign State (Y) determines whether it will recognise and enforce judgments rendered in another State (X).

Recognition at the regional level

Within the context of the European Union, the Brussels I Regulation requires each Member State to recognise and enforce judgments rendered in the courts of another Member State (see Ch. 5.2.2 below). But when it comes to judgments emanating from States outside the borders of the European Union, each Member State generally still makes a sovereign determination as to whether such foreign (outside-the-region) judgments may be enforced (see Ch. 5.2.1 below).

Prior to the advent of the Brussels I Regulation, certain EU Member States had concluded a number of *bilateral* conventions on the recognition and enforcement of foreign judgments. Bilateral conventions between the EU Member States have been superseded by the Brussels I Regulation (see Article 69, which lists more than 80 such conventions). Other bilateral conventions, between EU Member States and non-EU Member States, remain in force.

Recognition rationale

Any attempt to weigh the rules governing the recognition of foreign judgments should begin with an exploration of the reasons why such judgments are recognised at all. Any existing duty to recognise and enforce a foreign judgment must

stem from an acknowledgement that the society of nations will work better if at least some foreign judgments may be enforced in countries where the defendant or his/her assets are to be found.

Efficiency v. ethnocentricity

In a well-known comparative report, collecting and synthesizing the observations of European and other scholars, Professor Friedrich Juenger noted great disparities in national attitudes on recognition and enforcement. Juenger emphasized that those jurisdictions which recognise and enforce foreign money judgments in commercial disputes help promote efficiency and economy in international business, whereas those which do not display 'juridical ethnocentricity, distrust, ingrained dogma [and/or] inexperience' (Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters,' 36 *Am.J.Comp.L.* 1, 4 (1988)).

Certain defences always available

As regards substantive standards, it is axiomatic that the doctrine of *res judicata* precludes a reconsideration of the merits in a judgment-enforcing State, (i.e.) even where it appears that the foreign judgment is clearly 'wrong.'

Then again, even 'pro-enforcement' States make certain (statutory or judge-made) defences available to a party who resists an action to recognise or enforce a foreign judgment. For example, a judgment rendered in State X will not be entitled to *res judicata* recognition in State Y if it conflicts with a prior judgment rendered in State Y. Beyond such obvious cases, however, the range of defences available is usually quite limited, as illustrated by the narrow interpretation usually given to the well-known public policy (*ordre public*) exception.

Due process of law

The most important defences generally available in pro-enforcement States are sub-categories of the procedural notion known to American jurists as 'due process of law.' Thus, no State will enforce a foreign judgment, particularly a default judgment, unless the defendant has been notified of the action in a matter reasonably calculated to give him or her an opportunity to be heard and thus be able protect his or her interests. Though the precise content of the national and supranational rules vary somewhat, the underlying basic principle is well-

expressed by the latin maxim *audiatur et altera pars* (hear also the other side).

Jurisdictional base

Another important defence concerns the base upon which the judgment-rendering court exercised its jurisdiction. Even those jurisdictions with the most liberal enforcement attitudes find it eminently reasonable to ask whether or not the judgment-rendering court had some good reason to concern itself with the case at all. In other words, even pro-enforcement States pose certain requirements with respect to their approval of the basis upon which the court in the judgment-rendering State (X) purported to exercise jurisdiction.

Indirect jurisdiction

This defence to recognition and enforcement – the absence of a basis of jurisdiction in State X which seems fair and reasonable in the eyes of State Y – is sometimes discussed in terms of *indirect jurisdiction* (to distinguish it from *direct jurisdiction*, which involves the exercise of jurisdiction when viewed from the X-court's own perspective).

Whatever the terminology, the important thing to understand is that the jurisdictional issue raised when a foreign judgment is sought to be enforced is different from the determination by the judgment-rendering court of its own jurisdiction. Even if the judgment-rendering court in State X correctly held that it had jurisdiction (under whatever rules applied to that issue; see Ch. 2 above), it is a separate question whether a court in State Y will approve the basis upon which the X-court exercised its jurisdiction, so as to make enforcement in State Y possible.

As indicated in the following, some States apply *double standards* in this respect, providing for a wider range of jurisdictional bases for their own courts than the jurisdictional bases considered acceptable for the enforcement of a foreign judgment. Other States apply what has been termed the *mirror-image principle*, i.e., for the purposes of enforcement of foreign judgments, those States regard the exercise of jurisdiction by the (foreign) judgment-rendering court reasonable if their own courts would have had jurisdiction in similar factual circumstances under the applicable rules of direct jurisdiction in those States. See also Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions,' available at http://ssrn.com/abstract=927484.

5.2. Enforcement under European Law

5.2.1. Enforcement under National Law

No uniform national practice

Outside the important context of the Brussels I Regulation, which regulates recognition and enforcement as between EU Member States (see Ch. 5.2.2 below), there is no uniformity of practice among European States in regard to the recognition and enforcement of judgments rendered by non-EU Member States.

In case C-129/92 *Owens Bank Ltd v Bracco*, the Court of Justice of the European Communities held that since the Brussels *Convention* did not apply to the recognition and enforcement of judgments rendered in a non-Member State, the Convention was also inapplicable with respect to the recognition of a decision by the courts of a Member State to enforce a judgment rendered in a non-Member State. No doubt, the same is true of the Brussels I *Regulation*.

Nordic countries at one extreme

At one extreme end of the spectrum, the Nordic Countries (Denmark, Sweden and Finland) generally do not enforce any foreign judgment in the absence of a treaty obligation to do so. Plaintiffs successful in a (non-EU) foreign forum are thus obliged to start afresh by commencing a new action (based on the same original claim) in the Nordic State where enforcement is sought.

Forum agreements

Judgments from a foreign court having jurisdiction by virtue of a forum agreement, however, are less prone to review on the merits than other foreign judgments when proceedings are brought afresh in a given Nordic State.

In Sweden, for example, this no-review rule (in cases where the parties have agreed to the judgment-rendering court's jurisdiction) was adopted by the Supreme Court in the *Vakis* case ([1973] NJA 628) and is firmly established.

Denmark can also now point to a judicial application of the no-review rule, though this decision by the Eastern High Court in *Taster Wine A/S v Gargantini* [2001] UfR 1949 hardly amounts to 'settled' case-law. In this case, a forum agreement on suit in Argentina was held to constitute an implied choice of Argentine law. The court, without giving any particular reason, held that in these circumstances the Danish party was 'normally obliged to comply with' decisions rendered in accordance with Argentine law by Argentine courts concerning the con-

tract. As the defendant had shown no grounds for refusing recognition and enforcement of the Argentine decision, this was also the final result.

Austria: reciprocity

Austria enforces judgments on a reciprocity basis, but since the Austrian rules require reciprocity to be established either by treaty or by a proclamation by the Austrian government, and since only a few treaties or government proclamations exist, Austria is in fact only slightly more pro-enforcement than the Nordic Countries.

The Dutch advance

While the Netherlands, like Austria, has a statute on the books requiring reciprocity in the form of a treaty (Articles 985-992 of the Dutch Code of Civil Procedure), Dutch courts have made a significant retreat from the letter of the law. The Supreme Court of the Netherlands has not only recognised the binding effect of a judgment rendered abroad pursuant to a forum-selection clause, but also of any judgment where the foreign court had jurisdiction under internationally accepted standards. These developments have helped to qualify the Netherlands as a truly pro-enforcement State.

Germany, Italy and Greece: mirror image

Clearly at home at the enforcement-minded end of the scale are countries like Germany, Italy and Greece where recognition and enforcement of foreign judgments is regarded as the general rule. In these countries, foreign judgments are generally enforced if the foreign court would have had jurisdiction under the *enforcement State's* rules of jurisdiction. This means that (e.g.) German courts measure *indirect jurisdiction* by the *mirror-image principle*: for enforcement purposes Germany 'projects' its own rules of jurisdiction on the judgment-rendering court, which is treated as having had an acceptable jurisdictional base if a German court would have been competent in the reverse situation. This implies that foreign judgments are generally enforced in Germany so long as they were given in *factual* circumstances where German courts could have assumed jurisdiction if the tables were turned.

The actual jurisdictional base used by the foreign court is irrelevant. Only the factual situation matters. If (e.g.) an American court has assumed jurisdiction over a defendant on the basis of a jurisdictional rule unknown to German law, the resulting judgment will nevertheless be en-

forced in Germany if there is a German jurisdictional rule which would give a viable basis of jurisdiction in the factual situation concerned.

By way of illustration, if an American court has assumed general jurisdiction over (e.g.) a German defendant on the basis that the defendant is 'doing business' in the United States in a situation where equivalent business activities conducted by an American defendant in Germany would not in itself give a German court general jurisdiction over the American defendant, the judgment rendered by the American court will nevertheless be enforced in Germany if (e.g.) the defendant owned property in the United States and equivalent property located in Germany and owned by (e.g.) an American defendant would give a German court general jurisdiction over that defendant.

England: double standard

Enforcement is also said to be the general rule in England, but English courts pose a significant barrier to enforcement not generally characteristic of pro-enforcement States. English courts apply stricter standards with respect to *indirect jurisdiction* (the jurisdiction upon which foreign non-EU Member State courts base their judgments) than the standards which obtain when English courts exercise jurisdiction over non-EU Member State defendants. If, for example, a New York court were to exercise specific jurisdiction over an English defendant on the basis of a contract made and breached in New York, the resulting judgment would not be enforced in England, even though an English court would have jurisdiction if the tables were turned.

The only *bases of indirect jurisdiction* which the English courts will acknowledge are (1) defendant's presence or residence in the foreign country and (2) an express or implied submission to jurisdiction: see Hill, *International Commercial Disputes* at 371ff. This contrasts with the *mirror-image* rule applicable (e.g.) in German, Italian and Greek law.

In a case before the English Court of Appeal, American judgment creditors failed to establish that an English company (the judgment debtor, by virtue of an American default judgment) was 'present' in the United States when the proceedings in the judgment-rendering court were instituted: see *Adams v Cape Industries plc* [1991] 1 All ER 929.

Révision au fond

In France, until 1964, the basic rule was that foreign judgments were subject to *révision au fond*, i.e. a foreign judgment

would be examined as to the *merits* as a condition of being granted (or denied) enforcement.

Munzer

In *Munzer v Munzer-Jacoby* [1964] J.C.P. II 13590, the highest French court – the *Cour de Cassation* – reversed that rule in France, but until recently France continued to refuse enforcement of a foreign judgment unless the foreign court had reached its decision by applying the *same substantive law* which *French choice-of-law rules* would point to in a similar situation (or at least a law leading to the same outcome as that law). Since this conflict-of-laws control provision retained elements of substantive (*de novo*) review, *Munzer* did not make France a full-fledged member of the pro-enforcement school.

Avianca

In *André X v Avianca Inc* (judgment of 20 February 2007 in case 05-14.082), however, the *Cour de Cassation* finally abandoned all vestiges of review of the merits of the foreign judgment.

According to the judgment in *Avianca*, in the absence of treaty commitments, a foreign judgment can be enforced in France if the following conditions are met: (1) acceptable jurisdictional base in the judgment-rendering court, based on the connection between the dispute and the foreign court; (2) conformity with international *ordre public* in respect of the procedure and the merits; (3) absence of *fraude à la loi* (i.e. the foreign judgment must not have been obtained for the sole purpose of avoiding the application of the (otherwise) applicable law).

The notion of *indirect jurisdiction* developed by the French courts does not comprise all bases of direct jurisdiction under French national law. The foreign court must at least have a 'characteristic link' with the dispute. However, since 2006, French courts no longer interpret the French Civil Code as conferring exclusive jurisdiction on French courts in all cases where the defendant is French: see *Jean-Michel X v Anne Danielle Y* (judgment of 23 May 2006 in case 04-12.777).

The case of *Portugal* illustrates that it is a complicated affair to place States on a scale going from non- to pro-enforcement States. Portugal enforces foreign judgments on a general basis and, like (e.g.) Germany, Italy and Greece, accepts the jurisdiction of the foreign court on the basis of the mirror-image principle, i.e. on the basis of whether a Portuguese court would have had jurisdiction in a similar situation. However, like France prior to the 2007 decision in *Avianca*, Portugal will in certain circumstances review the law applied by the foreign court. Thus, if, under Portuguese choice-of-law rules, Portuguese law would be applied

to the dispute in question, a foreign judgment against a Portuguese national will only be enforced if it is in conformity with Portuguese law.

Other defences

Apart from the question of the jurisdiction of the judgmentt-rendering court, the defences available (i.e. the grounds for refusing enforcement) are usually quite limited in pro-enforcement States. In Germany, for example, a judgment given by a foreign court will not be recognised:

- in the case of a default judgment, where the document was not duly served or was not served in time for the defendant to arrange his/her defence;
- where the judgment is irreconcilable with a German judgment or an earlier (recognisable) foreign judgment or a German proceeding instituted prior to the foreign proceeding leading to judgment;
- where recognition of the judgment would be manifestly incompatible with fundamental principles of German law, especially basic constitutional rights.

German public policy

Similar defences are generally available in other pro-enforcement jurisdictions, although their precise contours vary from State to State. Illustrating the narrow range of the German public policy exception, a foreign tort judgment holding a German national liable for damages in excess of domestic standards has been held enforceable in Germany.

See the decision of the *Bundesgerichtshof* of 4 June 1992, reported by Hay in 40 *Am.J.Comp.L.* 729 (1992): A 14-year old American plaintiff P had brought an action in a California court seeking damages for sexual abuse against a German defendant who (in a separate criminal action) had been sentenced to prison and had since fled to Germany where he owned property. The California court entered a default judgment awarding P $750,260, hereunder $100,000 for future medical expenses (psychological treatment), $200,000 for 'anxiety, pain, suffering and general damages of that nature,' and $400,000 in exemplary and punitive damages. The German Supreme Court held that the California judgment was enforceable in Germany for the *entire amount except* for that part of the award representing *punitive* damages.

German commentators have also argued that courts should enforce American product liability judgments – at least exclusive of punitive damages.

5.2.2. Enforcement under the Brussels I Regulation

Double convention

The Brussels Convention – now superseded by the Brussels I Regulation – was called a 'double' convention because it dealt not only with enforcement, but with jurisdiction as well. The same is true of the Brussels I Regulation.

The Brussels I Regulation entered into force on 1 March 2002 and has as of that date replaced the Brussels Convention as between EU Member States bound by the Regulation, i.e. all Member States with the exception of Denmark. A (Parallel) Agreement between the European Community and the Kingdom of Denmark – which entered into force on 1 July 2007 – has extended the application of the provisions of the Brussels I Regulation to the relations between the Community (meaning the 26 other Member States) and Denmark. Therefore, as of 1 July 2007, the provisions of the Brussels I Regulation apply uniformly in all EU Member States.

As regards the history and scope of the Brussels Convention and Brussels I Regulation, see Ch. 2.2.1 above.

Not only in respect of jurisdiction, but also with regards to enforcement, the Regulation is basically the Brussels Convention in a new guise.

Chapter II: distinction between EU and non-EU domiciliaries

As regards jurisdiction, the Regulation makes a fundamental (general) distinction between two kinds of rules: whereas only those bases of jurisdiction set forth in Chapter II are acceptable for use against *defendants domiciled in EU* Member States, jurisdiction over *non*-EU domiciliaries is still regulated by *national* law (see Ch. 2.1.2 and Ch. 2.2.1 above).

Chapter III: no distinction between EU and non-EU domiciliaries

Compared with this dualistic jurisdictional system, the recognition and enforcement rules laid down in the Regulation's Chapter III are a model of simplicity. *All* judgments emanating from EU Member State courts are entitled to recognition and enforcement by the courts of other EU Member States, regardless of whether the defendant is domiciled within the European Union or not.

Res judicata effect

According to the main rule in Article 33, any judgment given in the court of an EU Member State is automatically entitled to recognition in the other EU Member States, (i.e.) without any special procedure being required. Recognition of a foreign

judgment under Chapter III clearly establishes certain legal barriers against re-litigation within the European Union.

It would seem that a judgment rendered on the merits in one EU Member State must at least preclude a subsequent action between the same parties proceeding on all or part of the same claim (case 42/76 *Wolf v Harry Cox BV*). But Chapter III does not define recognition, and the extraterritorial *res judicata* effect of judgments rendered within the EU was left for resolution by the Court of Justice of the European Communities. Although the Court of Justice has only barely had occasion to touch upon this question, it would seem that the recognising State should give the foreign judgment the same *res judicata* effect as that pertaining under the rendering State's law (case 145/86 *Hoffmann v Krieg*).

Free movement of judgments

The primary aim of Chapter III – and of the Brussels I Regulation altogether – is to promote the free movement of judgments. According to the main rule in Article 38, a judgment rendered in one EU Member State – if enforceable there – is enforceable, upon application, in all the other EU Member States as well.

Final judgment not required

To be recognised and enforced under Chapter III, a judgment need not be final. However, where an ordinary appeal is pending or permissible in the judgment-rendering country, the court in a Member State asked to recognise or enforce the judgment may either stay the enforcement proceedings or make enforcement conditional on the provision of security by the judgment creditor (Articles 37 and 46).

Uniform procedures

Articles 38-56 of Chapter III set forth uniform and exclusive procedures for obtaining an enforcement order in a Member State. Any interested party may apply for enforcement, and the Regulation specifies the court or competent authority in each Member State to which such application is made.

See Annex II of the Regulation. The Regulation also specifies the enforcement-State courts which will hear an appeal of the decision regarding enforcement: see Annexes III and IV of the Regulation.

Exequatur retained

However, in order for a judgment from one Member State to be enforced in another Member State, the judgment must first be declared enforceable in the Member State where enforcement is sought. This is the so-called *exequatur* which has not

been abolished by the Brussels I Regulation (see Ch. 5.2.3 below as regards EU Regulations which *do* abolish the *ex-equatur*).

Two-step procedure

Once a judgment from one EU Member State has been declared enforceable in another Member State, the judgment can be enforced in the latter Member State in the same way as that Member State's own judgments. It is thus a two-step procedure: first, a declaration of enforceability, and second, enforcement. The procedure for obtaining a declaration of enforceability is determined by the Brussels I Regulation, whereas the procedure for enforcement as such is determined by national law.

Simplification

The Regulation brought about a simplification of the procedure for obtaining a declaration of enforceability. Although such a declaration is still required, the formalities for obtaining it have been alleviated, the purpose being to speed up the procedure.

Under the Brussels Convention, the judgment creditor was required to present a certified copy of the judgment, proof that the judgment was enforceable in the State of origin, and that the defendant had been notified of the proceedings. At first instance, the judgment debtor was not heard. Either party could appeal against the decision at first instance, and on appeal, both parties would be heard. In certain circumstances, there would be a possibility of a second appeal. On all levels, the court was required to determine whether the judgment was within the scope of the Convention and enforceable in the State of origin, and whether grounds existed for refusing enforcement.

Under the Brussels I Regulation, at first instance, the court is only required to determine whether the judgment is within the scope of the Regulation and enforceable in the State of origin. The grounds for refusing enforcement do not apply at this (first instance) level. On *appeal*, however, the court is also required to determine whether grounds exist for refusing enforcement. A further simplification for the judgment creditor is the introduction of a certificate to be issued by a competent authority in the State of origin. The certificate certifies that the judgment is enforceable in the State of origin.

No review of merits

A judgment given in one Member State is to be enforced without any review of the merits of the judgment rendered by the recognition State. Chapter III sets forth only a limited range of defences to recognition and enforcement. An en-

forcement application may be refused only for one of the reasons specified in Articles 34 and 35.

No review of jurisdiction

Of central importance is the general prohibition on review of the jurisdiction of judgment-rendering courts (see Article 35(3)). This rule, which goes far beyond any recognition-analogues in national law, was made acceptable to the EU Member States by the enumeration of general and specific jurisdictional bases in the Regulation's Chapter II. With limited exceptions, a Chapter II determination made by the judgment-rendering court is binding on the courts in the judgment-executing State.

In *S.E.S. Busrejser v Hotel International* [1990] UfR 479 (Western High Court), a German judgment was enforced in Denmark notwithstanding the fact that the German court had mistakenly based its jurisdiction on national law instead of on the clearly applicable Brussels rule: Article 5(1).

Since no exception is made for default judgments, a defendant who has an objection to the jurisdiction of the original court must appear and defend or forever hold his peace. So, if the effectiveness of an enforcement system is best tested by its treatment of default judgments (as suggested by Lowenfeld, *Conflict of Laws* (2nd ed. 1998) at 721), the Brussels I Regulation is deserving of high marks.

No 'due process' review

Unfortunately, effectiveness and fairness need not go hand in hand, and the prohibition on jurisdictional review applies, *inter alia*, to judgments rendered by an EU Member State court against a non-EU domiciliary pursuant to national law. So if a French plaintiff obtains a default judgment against a Japanese defendant in a French court, simply because the plaintiff is French (regarding nationality-based jurisdiction, see Ch. 2.1.2 above), the judgment is enforceable against that defendant's assets anywhere in the European Union, and no enforcing court may challenge the jurisdictional determination – not even by characterising the matter as one of 'public policy' (case C-7/98 *Krombach v Bamberski* and Article 35(3)).

This Chapter III feature – which rubs salt in the discriminatory wounds cut by Chapter II – has been said to evidence a 'parochial and self-

serving attitude [which] violates the most elementary canons of even-handedness.' (Von Mehren, 'Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States,' 81 *Columbia Law Review* 1044, 1058-59 (1981)).

Convention safety valve

The cumbersome 'safety valve' created to redress this deplorable feature of the Brussels scheme was found in Article 59 of the Brussels Convention.

This provision permitted an EU Member State (such as the United Kingdom) to promise a non-EU state (such as Canada) that it (the United Kingdom) would not enforce a judgment rendered by a court in another EU Member State (such as France) against a non-EU (Canadian) domiciliary if the judgment was founded on an exorbitant jurisdictional base (e.g. Article 14 of the French Civil Code). Only a handful of Article 59 commitments were made during the many years in which the Brussels Convention was in effect.

No safety valve in Regulation

The Brussels I Regulation does not even contain a 'safety valve' like Article 59 of the Brussels Convention (Article 72 of the Regulation merely allows the Member States to continue to apply those Article 59 commitments entered into *prior* to the entry force of the Regulation). Nowadays, regardless of the basis of jurisdiction applied by the judgment-rendering court, an EU Member State may not grant any exception to enforcement of a judgment from another EU Member State.

Only the EU legislature has the power to make such exceptions. Each Member State remains free, however, not to apply exorbitant bases of jurisdiction against non-EU domiciliaries in the first place (i.e. when regulating the circumstances in which national courts in the Member State concerned may assume jurisdiction over non-EU domiciliaries).

Limited exceptions

Although the principles of Chapter III thus apply broadly to all judgments emanating from EU Member State courts, the general prohibition against recognition-court review does admit of a few limited exceptions. As already mentioned, those exceptions only apply if the judgment debtor enters an appeal against a decision of enforceability. At first instance, no review of any kind is permitted, except to establish that the judgment is within the scope of the Regulation and enforceable in the State of origin.

No substantive review

The general prohibition against second-guessing is not limited to procedural issues. Under no circumstances may a foreign judgment be reviewed as to its substance (see Articles 36 and 45(2)). This rule applies not only where the enforcing jurisdiction views the case as having been decided pursuant to the wrong law, but also to cases where the enforcing jurisdiction takes the view that the right law has been wrongly applied.

Public policy

According to Article 34(1) of the Brussels I Regulation, a Member State's judgment shall not be recognised if such recognition is manifestly contrary to public policy in the State in which recognition is sought. This is a narrow exception, applicable only in extreme situations, and certainly not just because the enforcement State's courts would have applied a different law or reached a different result, (e.g.) because an Italian court set aside a disclaimer clause which a German court would not. As already indicated, the public policy exception may not be used to resist enforcement of a judgment secured on the basis of an exorbitant jurisdictional rule: According to Article 35(3), the test of public policy may not be applied to jurisdictional rules.

In case C-7/98 *Krombach v Bamberski*, the Court of Justice of the European Communities held that the court of the State in which enforcement is sought may not take account, for the purposes of the public-policy clause in Article 27(1) of the Brussels Convention (Article 34(1) of the Brussels I Regulation), of the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

Illustration 5a: A, whose parents are divorced, visits her mother in Germany. One morning, A is found dead in her bed. An investigation by the German police does not lead to any charges. A's father (F) files a complaint in France, where criminal charges are brought against A's mother's new husband (B). B retains counsel, but does not appear in person at the trial in France, for which reason the French court refuses to hear his counsel. The court finds B guilty of violence resulting in involuntary manslaughter and sentences him to imprisonment and, ruling on a civil claim brought by F, also orders B to pay damages to F, who subsequently seeks to enforce that order in Germany.

Analysis

The general rule is that the German courts must enforce the French judgment/court order on the civil claim without any review of the merits of the claim. It is irrelevant that the civil claim was decided in conjunction with criminal proceedings, which as such are outside the scope of the Brussels I Regulation. However, in a case similar to *Illustration 5a*, the Court of Justice of the European Communities held that a Member State is justified in refusing recognition and enforcement under the public policy proviso if the judgment-rendering court refused to hear counsel retained by the defendant for the sole reason that the defendant did not appear in person (case C-7/98 *Krombach v Bamberski*).

Prior inconsistent judgment

A judgment emanating from one EU Member State court shall not be recognised in another if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought (Article 34(3)). Nor shall a Member State's judgment be recognised if it is irreconcilable with an earlier judgment given in a Member State or non-Member State, and otherwise entitled to recognition in the State where recognition is sought, involving the same cause of action and between the same parties (Article 34(4)).

> *Illustration 5b:* Italian manufacturer (M) supplies furniture to German distributor (D) under a contract of exclusivity, which, *inter alia*, contains a clause whereby D undertakes not to use the trademark 'LongLife' in its own marketing without written permission from M. D is dissatisfied with M's performance and informs M that D will not be a party to any joint sales message at certain forthcoming trade fairs in Germany. M applies to the courts in Germany and Italy for an injunction against D's use of the trademark 'LongLife' in Germany. The application is rejected by the German courts but granted by the Italian courts. M seeks to enforce the Italian court order in Germany.

Analysis

The general rule is that the German courts must enforce the Italian judgment/court order without any substantive review. It is irrelevant that the order is a preliminary injunction and not a final decision on the merits of M's claim that D should not use the trademark 'LongLife' in Germany (as long as the claim on

the merits – here an alleged infringement of trademark rights – is within the scope of the Brussels I Regulation). However, under Article 34(3), a judgment from another EU Member State cannot be recognised if it conflicts with a judgment in a dispute between the same parties in the State in which recognition is sought. Since the German decision *not* to grant an injunction conflicts with the Italian decision to do so, the Italian decision cannot be enforced in Germany.

For a case similar to *Illustration 5b* see case C-80/00 *Italian Leather v WECO Polstermöbel*.

Default judgment: service of process

Article 34(2) of the Brussels I Regulation concerns one specific issue relating to the recognition of a judgment obtained by default – an issue which led to considerable litigation in the Court of Justice of the European Communities in respect of the original Article 27(2) of the Brussels Convention. According to the now applicable Article 34(2) of the Regulation, a default judgment shall not be recognised:

> if the defendant was not served with the document which instituted the proceedings [...] in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

Double protection

It should be noted that Article 26 of the Brussels I Regulation also contains service provisions which – in cases brought against EU domiciliaries – usually require that the document instituting proceedings should be served in accordance with the EU Service Regulation. Defendants domiciled in the EU are thus provided with double protection in this respect, in that (the Brussels Convention equivalent of) Article 34(2) has been held to require an examination independent of that conducted in the original proceedings under (the Brussels Convention equivalent of) Article 26 (case 166/80 *Klomps v Michel*; see also case 228/81 *Pendy Plastic Products v Pluspunkt*).

The operation of Article 34(2) can be illustrated by the following examples:

Illustration 5c: German supplier (S) sues Danish businessman (B) in Germany for payment for goods supplied. Counsel for B is retained by B's agent (A), and the court grants S's claim. When S seeks to enforce the judgment in Denmark, B claims that A had no power of attorney to act on B's behalf in legal proceedings, and that B had no knowledge of the German proceedings.

Illustration 5d: Danish tourist (T) is involved in a bar brawl in Italy. Released after a night in the local jail, T signs a document (in Italian) to acknowledge receipt of his passport. The document also contains a clause whereby T accepts that service of process in connection with the case may be served on the Italian Lawyer L. The owner (O) of the bar brings proceedings in Italy for damages, and the writ is served on L. O wins and seeks to enforce the judgment in Denmark.

Illustration 5e: Danish student (S) signs a contract which makes him an underwriting member of The Society of Lloyd's (L). Under a contract term which binds S to the provisions of the Lloyd's Acts 1871 to 1982 and related byelaws, AUA (an Additional Underwriting Agency) is appointed 'substitute managing agent' for S. Ten years later, L sues S in England for the payment of £250,000 due under the underwriting contract, of which S is informed by AUA. L wins and seeks to enforce the judgment in Denmark.

Analysis

The general rule is that the Danish courts must enforce judgments rendered in other EU Member States without any review of the merits. However, according to Article 34(2), a default judgment cannot be recognised if the defendant was not served with the document which instituted the proceedings. In *Illustration 5c*, the outcome depends on whether or not A had the authority (power of attorney) to act on B's behalf in legal proceedings; if not, and if the writ was not served on B, the judgment cannot be enforced in Denmark. In *Illustration 5d*, the outcome depends on whether T understood (or ought to have understood) that he signed a power of attorney; if not, and if the writ was not served on T, the judgment can-

not be enforced in Denmark. In *Illustration 5e*, it would appear that A has validly been appointed as S's agent for the purposes of service of process; if so, the judgment must be enforced in Denmark.

Illustration 5c is similar to case C-78/95 *Hendrikman and Feyen v Magenta Druck* where the Court of Justice of the European Communities made clear that judgment 'given in default of appearance' within the meaning of the Brussels Convention (now the Brussels I Regulation) includes a situation where counsel appeared for the defendant and argued the case, but in fact had no power of attorney to act on the defendant's behalf in the proceedings. (Whether such was indeed the case in *Hendrikman* was left to be decided by the national court.)

Illustration 5d is similar to a decision of the Danish Supreme Court of 18 December 1997 (reported in *Procesbevillingsnævnets årsberetning* at 38). The Supreme Court refused enforcement of an Italian judgment because the Danish defendants had not validly appointed an Italian lawyer to receive service of process on their behalf.

Illustration 5e is similar to *Feuk v The Society of Lloyd's* [1999] UfR 1967, where enforcement of a £250,000 judgment was granted. (The student in question had, *inter alia*, made the following comments: 'As a student I was urged to join as a member at Lloyd's by my uncle [...] A contract was drawn up specifying that I should receive 20% of the net profit at Lloyd's on my name [...] I signed a power of attorney to [...] who made all arrangements. Not until later I realized what this was all about [...] and too late discovered the full magnitude of the contract on my behalf not only in terms of potential losses/liabilities but also taxwise if the trend of high profit would have continued. To my knowledge I have not made any profits on any contract [...] except for £1,717.58 for 1986. I have not gained any profits during my membership at Lloyd's.')

Relaxation

On two counts, Article 34(2) of the Brussels I Regulation relaxed the stringent requirements of the corresponding provision in Article 27(2) of the Brussels Convention.

For one thing, it is no longer required that service was 'duly' effected; it suffices that service was effected 'in such a way as to enable the defendant to arrange for his defence.' For another, even if service was not timely or was not effected 'in such a way ...,' enforcement is not to be refused if the defendant 'failed to commence proceedings to challenge the judgment when it was possible for him to do so.' Each of those relaxations – adopted with a view to facilitate enforcement – was prompted by decisions of the Court of Justice of the European Communities on the interpretation of the original Article 27(2) rule, thought by the EU legislature to hamper enforcement in an unreasonable way.

The facts in *Lancray v Peters* (case C-305/88) were as follows: Lancray (in France) and Peters (in Germany) had agreed that any disputes

concerning their business relationship would be brought before the commercial court in Nanterre (France). When difficulties did arise, Lancray sued, and a summons – drawn up in French – was served by the German authorities on a secretary in Peters' office. The court in Nanterre was informed by the defendant that the summons had not been served in due form (i.e. with a German translation), but the defendant's letter was returned with an invitation to submit a letter in French if the defendant considered it expedient to do so, and when Peters did not appear, the court found for Lancray.

The Court of Justice ruled, *inter alia*, that Article 27(2) was to be interpreted to mean that a default judgment may not be recognised where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to arrange for his/her defence.

In *Minalmet v Brandeis* (case C-123/91), Brandeis sought the enforcement in Germany of an English default judgment ordering Minalmet to pay Brandeis a sum of money, and Minalmet objected to enforcement on the ground that the summons had not been duly served in accordance with German law. The Court of Justice emphasized that, as was apparent from Article 27(2), the relevant time for the defendant to be able to arrange for his or her defence was the time when proceedings were instituted. The possibility of subsequent recourse to a legal remedy against a default judgment, which had already been rendered enforceable, could not constitute a remedy equivalent to a defence prior to the judgment. Consequently, Article 27(2) precluded a judgment given in default of appearance in one Contracting State from being recognised in another Contracting State, where the document instituting the proceedings had not been duly served on the defendant in default, even though he/she subsequently became aware of the judgment but did not avail him/herself of any of the legal remedies available under the procedural code of the State in which the judgment was delivered.

Service required

The new provision in Article 34(2) has been interpreted by the Court of Justice in *ASML v SEMIS* (case C-283/05), where the Dutch company ASML sought to enforce a Dutch default judgment against the Austrian company SEMIS in Austria. The Court of Justice ruled that it is 'possible' (within the meaning of Article 34(2)) for a defendant to bring proceedings to challenge a default judgment against him/her only if he/she 'was in fact acquainted with its contents, because it was served on him[/her] in sufficient time to enable him[/her] to arrange for his[/her] defence before the courts of the State in which the judgment was given.' The Court of Justice stressed that the defendant should know of the *content* of the default judgment (and not just of the fact *that* a default judgment had been rendered) and that the defendant was under no obligation

to seek out that information him/herself (paras. 34-36 and 39 of the judgment).

In *ASML v SEMIS*, a summons to a court hearing on 19 May had been served on SEMIS on 25 May (i.e. *after* the court hearing had taken place), and the resulting default judgment, handed down on 16 June, had not been served on SEMIS.

Summing up

The workings of Article 34(2) can be summed up as follows: The general rule is that a judgment, including a default judgment, rendered by a court in an EU Member State must be enforced in the other EU Member States. If the defendant appeals against a declaration of enforceability, certain defences (grounds for refusing enforcement) apply, one of which is Article 34(2).

Article 34(2) applies if the judgment was rendered 'in default of appearance' (see *Illustrations 5c-5e* above and the cases cited in that connection). When the defendant has passed the first hurdle (demonstrating that the judgment was given in default of appearance), the defendant must further demonstrate that the document instituting the proceedings was not served in sufficient time and in such a way as to enable the defendant to arrange for a defence.

If the defendant also manages to pass this second hurdle, the general rule is that the judgment cannot be enforced against the defendant. However, if the *plaintiff* then shows that the defendant was served with the default judgment in sufficient time and in such a way as to enable the defendant to commence proceedings to *challenge* the default judgment (but the defendant did not do so), the default judgment *will* be enforced, even though the defendant had no chance of defending him/herself before the judgment was made.

5.2.3. Enforcement under other EU Regulations

Abolition of exequatur

It is the long-term aim of the European Union to abolish the so-called *exequatur* by which a judgment from one EU Member State to be enforced in another Member State must first be declared enforceable in the latter State (see Ch. 5.2.2 above). If the *exequatur* is abolished, a judgment from another Member State would be fully assimilated to a national judgment and directly enforceable as such.

Gradual process

The European Union, however, is not yet ready to take that step on a general basis. Instead, the European Union has commenced a cumbersome procedure which aims to abolish the *exequatur* on a piecemeal basis. The ultimate goal is a general revision of the Brussels I Regulation, but so far the gradual abolition of the *exequatur* has taken a separate track, which leaves the Brussels I Regulation unchanged.

European Enforcement Order

The first step was taken with Regulation No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims, which applies from 21 October 2005 in all Member States except Denmark. This Regulation creates an alternative enforcement regime for certain judgments, which are granted the 'European Enforcement Order' seal. The Brussels I Regulation remains available alongside the EEO procedure, and it is anybody's guess which will be the most popular – Brussels I or EEO – in those cases where they overlap.

In order to be certified as a 'European Enforcement Order,' a judgment must fulfil a number of requirements, including, in particular: (i) the judgment must be for an uncontested money claim, (ii) it must be a final decision, (iii) it must comply with consumer, insurance and exclusive Brussels I jurisdictional rules, (iv) service of process must have been effected in a prescribed manner, and (v) the writ must be drawn up in a prescribed manner.

The idea is that the court of origin issues a certificate if the requirements have been met, and that the judgment can then be enforced without further formalities in all other EU Member States, the sole defence being another irreconcilable judgment.

The whole system is optional in the sense that no Member State is required to ensure that any of its judgments can or will fulfil the requirements necessary for obtaining the EEO certificate. *If* a judgment fulfils the requirements, however, the Member State of origin must (on application) issue an EEO certificate, and all other Member States must (on application) enforce the judgment on that basis alone.

Uniform procedures

The European Enforcement Order did not change the existing procedural rules in the Member States nor did it create any new procedures in the Member State where the judgment is made. More recent developments are similar to the extent that they also do not change existing (national) procedures in the Member States. However, the more recent developments do create new (European-wide) procedures, namely an 'Order for Payment Procedure' and a 'Small Claims Procedure.' Like the

EEO, the new procedures are *optional*, and the claimant remains free to bring his/her uncontested and/or small claim under national procedural rules and invoke the Brussels I Regulation in any subsequent cross-border enforcement proceedings.

European Order for Payment

All EU Member States are trying to tackle the issue of mass recovery of uncontested claims, in the majority of States by means of a simplified order for payment procedure, but both the content of national legislation and the performance of domestic procedures vary substantially. Furthermore, the procedures currently in existence are frequently either inadmissible or impracticable in cross-border cases. The European Parliament and the Council have therefore deemed it necessary to establish a European Order for Payment Procedure: see Regulation No 1896/2006 of 12 December 2006, which applies from 12 December 2008 in all Member States except Denmark.

The purpose of the Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which *renders unnecessary* any intermediate proceedings in the Member State of enforcement prior to *recognition and enforcement*. The procedure established by the Regulation serves as an additional and *optional* means for the claimant, who remains free to resort to a procedure provided for by national law.

A European order for payment issued in one Member State which has become enforceable is regarded for the purposes of enforcement as if it had been issued in the Member State in which enforcement is sought. Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions for issuing a European order for payment are fulfilled to enable the order to be enforced in all other Member States *without judicial review* of the proper application of minimum procedural standards in the Member State where the order is to be enforced.

Upon application by the person against whom enforcement is sought, enforcement must be refused if (and only if) the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third country, provided that: (a) the earlier decision or order involved the same cause of action between the same parties; (b) the earlier decision or order fulfils the conditions necessary for its recognition in the Member State of enforcement; and (c) the

irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.

Small Claims Procedure

Many EU Member States have introduced simplified civil procedures for small claims, since costs, delays and complexities connected with litigation do not necessarily decrease proportionally with the value of the claim. The obstacles to obtaining a fast and inexpensive judgment are exacerbated in cross-border cases. The European Parliament and the Council have therefore deemed it necessary to establish a European Small Claims Procedure: see Regulation No 861/2007 of 11 July 2007, which applies from 11 January 2009 in all Member States except Denmark.

The objective of the European Small Claims Procedure is to facilitate access to justice by simplifying and speeding up litigation concerning small claims in cross-border cases, whilst reducing costs, by offering an *optional* tool in addition to the possibilities existing under the laws of the Member States, which will *remain unaffected*. A further objective is to make it simpler to obtain the *recognition and enforcement* of a judgment given in the European Small Claims Procedure in another Member State.

In order to facilitate the commencement of the European Small Claims Procedure, the claimant makes an application by filling in a standard claim form and lodging it with the court or tribunal. The claim form must be submitted to a court or tribunal that has jurisdiction (i.e. under the existing rules, which are unchanged: see Ch. 2).

The Small Claims Procedure can be employed where the value of a claim does not exceed €2,000 at the time when the claim form is received by the court or tribunal having jurisdiction, excluding all interest, expenses and disbursements.

In order to facilitate recognition and enforcement, a judgment given in a Member State in the European Small Claims Procedure is to be recognised and enforceable in another Member State *without the need for a declaration of enforceability* and without any possibility of opposing its recognition. Any judgment given in the European Small Claims Procedure is to be enforced under the same conditions as a judgment given in the Member State of enforcement.

Upon application by the person against whom enforcement is sought, enforcement must be refused if (and only if) the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that: (a) the earlier judgment involved the same cause of action and was between the same parties; (b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal

proceedings in the Member State where the judgment in the European Small Claims Procedure was given.

5.3. Hague Convention on Choice of Court Agreements

A new Hague Convention on Choice of Court Agreements was concluded on 30 June 2005.

If signed and ratified by a significant number of States, the new treaty will place choice-of-court clauses on an equal footing with arbitration clauses, both as regards recognition and enforcement of the agreements which choice-of-court clauses represent (compare Ch. 6.3) and as regards recognition and enforcement of decisions rendered by the courts designated in those agreements (compare Ch. 6.4).

As of the time of writing (January 2009), the 2005 Hague Convention is not in force.

Two ratifications are required for the Convention to enter into force, and the only country to have ratified so far is Mexico. The United States signed the Convention on 19 January 2009.

CHAPTER 6

International Commercial Arbitration

6.1. Introduction

As noted previously (Ch. 1.3) arbitration is a technique for the resolution of disputes outside the courts, where the parties refer their dispute to one or more privately appointed 'judges' (called arbitrators) and agree that the decision (award) made by the arbitrators shall be binding on them.

Popularity

Arbitration is an extremely popular form of alternative dispute resolution (ADR), especially in commercial circles. Because most arbitration proceedings are confidential, statistics are difficult to obtain, but it is widely acknowledged that a very large percentage of contracts between merchants – including the most significant contracts between the largest commercial enterprises in Europe (and elsewhere) – provide for dispute resolution by arbitral tribunals.

A 2006 study based on University of London research and interviews with experienced in-house counsel at 143 multinational corporations with revenues topping $500 million showed that 73% prefer arbitration to litigation. See http://www.allbusiness.com/legal/4107959-1.html.

Contract out

By agreeing to arbitrate merchants contract out of their right to litigate disputes in those national courts which would otherwise have jurisdiction to adjudicate (see Chapter 2). This means that ordinary courts do not have jurisdiction to adjudicate disputes comprised by an arbitration clause.

Illustration 6a: Seller A in State X contracts to sell goods to Buyer B in State Y. The sales contract contains a clause

which provides that 'any contract-related disputes shall be settled by arbitration in State Z.'

Binding & enforceable

Because merchants A and B have agreed to arbitrate disputes related to their contract, and because virtually all civilized States generally respect such agreements, the courts of States X, Y and Z will not only refuse to exercise jurisdiction in a contract-related dispute which might subsequently arise between these parties (Ch. 6.3); the courts of these States will also authorize the use of State compulsion to help enforce the award rendered by the tribunal concerned. Indeed, it is often easier to obtain enforcement of a foreign arbitral award (Ch. 6.4) than of a corresponding foreign court judgment (Ch. 5). This is one reason why most merchants prefer arbitration to litigation.

Cost, confidentiality, efficiency, flexibility

Most merchants (and their lawyers) also consider arbitration to be more efficient, more confidential and relatively less expensive than litigation. They also see arbitration as a more flexible, relationship-preserving alternative to dispute resolution in court.

Whereas national court proceedings are usually open to the public and national court decisions often publicly available, the parties to an arbitration can (and often do) agree that arbitral proceedings will remain confidential. Whereas court proceedings are governed by the mandatory rules of civil procedure of the forum concerned, arbitral proceedings are more flexible, since the parties enjoy considerable freedom to determine the procedural rules which shall apply.

A 1997 survey of 1,000 of the largest U.S. corporations showed that 90% viewed ADR as a critical cost-control technique, 79% used arbitration to resolve commercial disputes in the last three years, 13% saved more than $1 million annually by using ADR, 80% considered ADR more satisfactory than litigation, 66% said ADR provides 'satisfactory settlements,' and 59% said ADR 'preserves good relationships.' See http://www. adrforum.com/users/naf/resources/GeneralCommercial WP.pdf.

The less-than-unanimous statistics reflect the fact that international arbitrations sometimes move slowly (especially when one of the parties has reason to drag its feet), and that complex arbitration proceedings (involving prominent arbitrators, high-powered attorneys, expert witnesses etc.) can be highly contentious and very expensive. Moreover, while arbitral awards do not automatically become matters of public record (as court judgments usually do), it is not possible to fully insulate arbitration from the public eye, because arbitral agreements and arbitral awards may themselves become the subject of litigation in court (see Ch. 6.3 and 6.4).

No single law

Arbitration law is an important part of commercial law. But the law of international commercial arbitration is a complex subject, involving interaction of private, national and international rules.

Arbitral process

Although an arbitration proceeding which takes place in State Z between merchants from States X and Y is rightly defined as an *international* arbitration, the law governing the conduct of the arbitral *process* – is nonetheless likely to be the *national* law of Z (Ch. 6.2.1).

Agreed procedures

But because there can be no arbitration without private agreement, most national arbitration laws provide the parties with considerable freedom to choose their own procedures, and that includes the freedom to choose between *ad hoc* and *institutional* arbitration (Ch. 6.2.3).

Applicable substantive law

A separate significant question is how arbitrators determine the applicable *substantive law*. To exercise their powers as private judges, arbitrators need to resolve choice-of-law questions before they can resolve the merits (substance) of a given contractual dispute, but the rules and procedures used by arbitrators to choose the applicable substantive rules (Ch. 6.2.4) are not always the same as the rules used by national courts (Ch. 3).

Law applicable to enforcement

Another complication relates to the enforcement of international arbitral agreements and foreign arbitral awards, in that the national law (*lex arbitri*) of a given State can sometimes serve to supplement – and thus add a non-uniform element – to the enforcement mechanisms provided by the highly successful 1958 New York Convention (Ch. 6.3 and 6.4).

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a majority of the States participating in the United Nations Conference on Commercial Arbitration held in New York in 1958. By 2008, the number of Contracting States had grown to 142. The global acceptance of the New York Convention clearly represents a tremendous success for the United Nations in its efforts to help harmonise the laws of greatest significance for international commerce.

6.2. Applicable Laws

6.2.1. *Lex Arbitri* and the UNCITRAL Model Law

Lawyers use the term *lex arbitri* (law of arbitration) to refer to the rule-set which regulates the arbitral *process* within a given State (X). If a given arbitration takes place in State X, the procedural law which applies to that arbitration will usually be the national arbitration law of that State. Put another way, the *lex arbitri* is usually the *lex loci arbitri* (the law of the place of the arbitration).

Absent treaty obligation to the contrary, the question of whether a given court in a given State has jurisdiction to adjudicate a given dispute depends on the law of the State concerned (Ch. 2). By virtue of similar logic, an arbitration which takes place in State X is subject to the arbitration law of the State where the arbitration takes (or is to take) place.

Agreement validity, arbitrability, judicial review

Besides supplying a gap-filling procedural regime (rules relating, e.g., to the composition and powers of the tribunal, the conduct of hearings, the tribunal's obligation to render a reasoned award, etc.), the *lex arbitri* can also be applied to determine the validity of the arbitration agreement, whether the dispute in question is arbitrable (capable of being settled by arbitration), as well as the extent to which an arbitral award is subject to substantive review by the courts of the State in which the award was made.

Competition among States

Merchants and lawyers prefer to arbitrate in States with a *lex arbitri* which provide private parties and arbitrators with maximum freedom (and minimum State interference). If State X provides a better arbitration climate than State Y, that fact is likely to generate business and revenue for State X, and this has led to some degree of *lex arbitri* competiton among national legislatures.

England

Previously, the *lex arbitri* in England permitted English courts to scrutinise and review English arbitral awards for possible errors of law, but as contracting parties fled to more liberal arbitral climates (with a 'hands off' approach to arbitration), the English modified their more intrusive approach. Not to be outdone, States like France and Switzerland passed even more permissive *lex arbitri*.

UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration, adopted in 1985 (and revised in 2006), has helped level the international playing field by establishing an essentially liberal paradigm for voluntary harmonisation. Using this model as a starting point, States like Canada, Denmark, England, Germany and Mexico have built modern *lex arbitri* which provide parties and arbitrators with considerable freedom to regulate arbitral procedures (Ch. 6.2.2) and narrow the grounds for judicial review in the country of origin (Ch. 6.4.2).

Unlike a treaty, a model law is a template for a law, which States are encouraged to follow when drafting their national (e.g.) arbitration laws. States may vary more or less on the model law provisions.

UNCITRAL lists more than 50 countries as *Model Law States* – i.e., States which have adopted the most significant features of the Model Arbitration Law: see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.htm.

6.2.2. From Procedure to Substance: Conflicts, *Lex Mercatoria*, etc.

Court: national procedure

If a given national court is asked to resolve a given dispute, all parties who come before that court must abide by the rules of judicial procedure which apply in the forum concerned. If, for example, a Russian plaintiff asks a court in Rome to determine its rights vis-à-vis an Italian defendant, then the Russian plaintiff must abide by Italian procedural rules.

Arbitration: procedural freedom

The same parochial principle does not, however, apply to international commercial arbitration. On the contrary, the application of such a national procedural regime is one of the things parties who agree to arbitrate an international dispute usually *agree to avoid*. For this reason, most *lex arbitri* permit the contracting parties – and/or the tribunal they have empowered – to exercise procedural freedom, so that the parties and/or the arbitrators themselves can determine the procedures which govern the resolution of the parties' dispute.

Mandatory rules

Because all States set certain limits to contractual freedom, parties who arbitrate in State Z cannot expect State Z to recognise arbitral procedures which run counter to mandatory rules of law.

If, for example, a contracting party B unwittingly agrees to a clause designed to set up a one-sided arbitral procedure highly favourable to party A (the party who drafted the contract and clause), that clause might be held invalid under the mandatory rules of the State where the arbitration takes place (Z), just as a court in State Z might declare that an arbitral award rendered in that State in those circumstances to be null and void (without legal effect).

Suppose, for example, that the *lex arbitri* of State Z is modelled on the UNCITRAL Model Arbitration Law, including Article 18, which requires that the parties be treated with equality. Since the courts of State Z are likely to regard Article 18 as a mandatory rule, an arbitral award rendered in State Z in contravention of that provision could be set aside by a Z-court pursuant to (the national equivalent of) Article 34(2)(a)(iv) of the UNCITRAL Model Law (see Ch. 6.4.2).

As with other aspects of private law regulation, the most intensive interference with contractual freedom relates to *consumer contracts* (between merchants with superior bargaining power and non-merchants with inferior bargaining power). It should be recognised, however, that the balance of bargaining power in agreements *between merchants* is often nearly as lopsided as in consumer contracts (of adhesion). Even as between merchants, the inclusion of an arbitration clause may, in reality, represent the will of one party/merchant only: *take it or leave it!*

The enforceability of arbitration agreements in a given country depends on the general attitude towards consumer (or other weaker-party) protection in the country concerned. In EU Member States, the Unfair Terms Directive ([1993] OJ L95/29) 'grey list' of *presumptively unfair* terms includes (g) terms 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.' In England, a compulsory arbitration clause is *automatically unfair* if it relates to claims of £5,000 or less. In Denmark, an arbitration agreement concluded before the dispute arose does not bind the consumer. Taking a more liberalistic (less paternalistic) approach, most American courts find arbitration clauses in consumer contracts enforceable.

Fair procedures

Arbitration does not necessarily imply an advantage for one party or the other. On the contrary: most agreements which provide for international commercial arbitration entail procedures which are fair and reasonable for both parties.

Illustration 6b: Seller A in State X contracts to sell goods to buyer B in State Y. The sales contract contains a clause which provides that: 'All disputes arising in connection with the present contract shall be settled by arbitration in State Z under the UNCITRAL Rules.'

The procedures set forth in the UNCITRAL Rules were designed by the United Nations to provide a fair and balanced solution for the conduct of non-institutional (*ad hoc*) international arbitrations.

For this reason, the rules agreed to by the parties in *Illustration 6b* are very likely to accord (or be compatible) with the gap-filling *lex arbitri* rules otherwise applicable under the national law of Z, and that will most certainly be the case if the *lex arbitri* of State Z is patterned upon the UNCITRAL Model Law.

The UNCITRAL Rules (which have been recommended by the United Nations General Assembly for inclusion in international commercial contracts) address such specific issues as how to determine which arbitrators should be on the tribunal, where and when the arbitration should be held, in what language(s), etc. By incorporating these rules (by reference), the parties in *Illustration 6b* have saved considerable space in their contract (the same result could also be achieved by literally 'spelling out' each of the 41 individual UNCITRAL Rules within the text of the sales contract itself).

The UNCITRAL Arbitration *Rules* should not be confused with the UNCITRAL Model Arbitration Law. Whereas the Model Law is a template for a law, which UNCITRAL recommends that *States* use when drafting their national arbitration laws (*lex arbitri*), the UNCITRAL Arbitration Rules are rules of arbitral procedure, which UNCITRAL recommends that *private parties* use as rules of procedure for their arbitration, but which only apply when the parties concerned agree to their use.

Commencement

Arbitration proceedings usually begin when one party (the *claimant*) – perhaps acknowledging the parties' failure to resolve a given dispute by negotiation or other informal means – provides the other party (the *respondent*) with a notice of arbitration and a statement of claim.

Illustration 6c: Service provider A in State X contracts to provide certain services to recipient B in State Y. Later, B claims that the services rendered by A do not conform to

contract, but A disputes that claim. In accordance with an arbitration clause in the contract, B demands that the claim be arbitrated in State Z under the UNCITRAL Rules.

Appointment of arbitrators

Once B sets the wheels of arbitration in motion, the next step is likely to be the appointment of the arbitral tribunal: in this case in accordance with the procedures set forth in the UNCITRAL Rules.

As regards the *selection of arbitrators*, the UNCITRAL Rules (agreed to by the parties in *Illustration 6c*) accord with the gap-filling solution in Articles 10 and 11 of the UNCITRAL Model Law:

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

(3) If necessary (e.g. if a party fails to cooperate) an 'appointing authority' will make the necessary appointment(s).

In the case of 3 arbitrators, each party will usually have the right to make one appointment; the two party-appointed arbitrators then choose the third arbitrator (the chairman of the tribunal): see Article 11 of the Model Law. In the case of *institutional arbitration* (Ch. 6.2.3) a single arbitrator is often appointed (by the institution). In the case of a 3-member tribunal, the panel is likely to consist of experts trained in three different systems of national law.

Law professors and retired judges are often selected as arbitrators. (Danish law permits active judges to arbitrate in their spare time, provided their arbitration income does not exceed 50% of their regular salary. Special arrangements exist for the appointment of active judges as arbitrators, which basically exclude direct party appointment by making such appointments subject to a decision by the president of the court).

Discretion: parties/arbitrators

Most countries permit a wide range of discretion with respect to the procedures which apply to the conduct of arbitral proceedings. Since the parties in *Illustration 6c* have agreed to arbitrate under the UNCITRAL Rules, the procedural framework set forth in that rule-set will apply. That means that absent agreement between the parties on any given procedural issue, the arbitrators have the power to decide.

If the parties in *Illustration 6c* had not agreed on specific rules of arbitral procedure (or a specific arbitral institution: Ch. 6.2.3 below), the *lex arbitri* would provide the gap-filling procedural rules. According to the *lex arbitri* of most States, the arbitral tribunal has the power to determine the relevant procedures, including, e.g., the procedures used to determine

the language(s) to be used in an international commercial arbitration, the hearing of witnesses, the admissibility of evidence, etc.

Location

The place of arbitration may be of considerable significance. As already indicated, the *lex arbitri* – the 'umbrella' of procedural rules held over the arbitral process – will generally be the law of the country where the arbitration takes place. The *lex arbitri* may also be significant as regards questions of validity, if the parties disagree as to whether they have made a binding agreement to arbitrate. The place of arbitration can also be significant at a later stage, especially if the unsuccessful party decides to challenge the validity of the award made by the arbitrators (Ch. 6.4.2).

If the parties in *Illustration 6c* had not exercised their freedom to determine the location (arbitral situs), and if the *arbitrators* had then decided to arbitrate in State Z, that exercise of discretion would almost surely be recognised under the *lex arbitri* of that State. See (e.g.) Article 20 of the UNCITRAL Model Law.

Applicable substantive law

The *lex arbitri,* which serves mainly as a procedural rule-set, should not be confused with the applicable substantive law.

> *Illustration 6d:* Seller A in State X contracts to sell goods to buyer B in State Y. The sales contract provides for the arbitration of disputes in State Z under the UNCITRAL Rules. Later, B claims that the goods delivered by A do not conform to the contract and that this has caused B substantial monetary loss. When A disputes B's claim, B demands arbitration.

The applicable substantive law is the law which the arbitrators need to apply to resolve the merits (the substantive, as opposed to the procedural, aspects) of this case: Has A breached an obligation to supply the claimant with goods of a designated (or reasonable) quality? If so, has A's breach caused a monetary loss, for which B entitled to damages? If so, what damages are due (how many dollars/euros/yen)? Should the award include interest? If so, at what rate? Etc.

It is highly unlikely that the sales contract between A and B will provide all the answers to questions like these. For this reason, the arbitrators will need to fill in the contractual gaps,

but before they do that, they must decide which substantive (sales and/or general contract) law to apply. That decision might involve a choice between the national sales laws of States X and Y, but it might also lead to an international rule-set (the CISG) or even to the application of *lex mercatoria* (Ch. 6.2.4).

The arbitrators may also need to determine the applicable law for other reasons, e.g. to determine whether the (fine print) standard terms of one party have become 'part' of the contract and (if so) whether those terms are valid under the applicable substantive law (or invalid, because they are unreasonable or unconscionable), etc. Since the CISG, which governs the parties' rights and obligations, does not address questions of validity (see Article 4), the arbitrators in an international sales dispute sometimes need to choose a national rule-set as a CISG-supplement.

Choice-of-law clause

Many international contracts – though not as many as some might suppose – contain an express choice-of-law clause which designates the applicable substantive law.

If the parties choose the applicable law (in their contract), that choice will bind the arbitrators, provided that the arbitrators determine that the parties concerned were indeed free to choose the law in question and that the law chosen does not contravene applicable mandatory rules. To determine whether the parties validly chose the substantive law, the arbitrators will usually apply a given set of conflict-of-laws rules (Ch. 6.2.4).

Absent choice

When the contract does not (expressly or impliedly) determine the applicable law, the arbitrators must themselves decide which substantive law to apply, and to help them make that decision, they might apply the kind of choice-of-law rules which national judges apply in similar situations (Ch. 3).

On the other hand, most *lex arbitri* do not require arbitrators to follow the same conflict-of-laws rules which are followed by courts in the country concerned. Indeed, in some countries, the arbitrators are permitted to decide which substantive law to apply without applying *any* conflict-of-laws rule, just as the *lex arbitri* of some countries authorise arbitratators to apply *lex mercatoria*, i.e. substantive rules which do not belong to any particular national law, even though the parties have not themselves chosen *lex mercatoria* as the applicable law (Ch. 6.2.4).

6.2.3. Institutional Arbitration

Most of the procedural rules and principles described in the preceding section (Ch. 6.2.2) apply to all international commercial arbitrations.

Ad hoc

Certain arbitral procedures and rules, however, are designed mainly for use in *ad hoc* arbitrations, organised for the particular purpose of resolving a given commercial dispute. The procedures set forth in the UNCITRAL Rules, for example, were designed by the United Nations to provide a fair and balanced solution for the conduct of *ad hoc* arbitrations.

Institutional arbitrations

Not all arbitrations fall within the *ad hoc* category. On the contrary, a large number of commercial organisations (institutions) provide an established framework for the conduct of commercial arbitration. These organisations include the International Chamber of Commerce (ICC) in Paris, the American Arbitration Association (AAA) in New York, the London Court of Arbitration (LCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Danish Arbitration (*'Voldgiftsinstituttet'*) as well as many similar associations with headquarters around the world.

The services provided by these institutions include the appointment of qualified arbitrators (and the determination of their fees), the administration of arbitral proceedings within the institution concerned, such as secretarial services to process the parties' written pleadings, etc.

Institution only by agreement

Just as there can be no arbitration without an agreement to arbitrate, there can be no institutional arbitration unless the agreement in question provides for the intervention of a particular institution.

> *Illustration 6e:* Service provider A in State X contracts to provide certain services to recipient B in State Y. The contract contains the following clause: 'All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

Incorporation by reference

By virtue of this simple reference, all the procedures contained in the ICC Rules become part of the parties' deal. Should a contract-related dispute later arise, an arbitral panel will be constituted in accordance with ICC procedures and with ICC assistance. Beyond this, the incorporation of the ICC Rules by reference will provide specific mechanisms for determining the place of arbitration, the language of the proceedings, the applicable law, etc.

Similarities, differences

Ad hoc and (ICC or other) institutional arbitration are not worlds apart. There are, however, some potentially significant distinctions.

Terms of reference

A key feature which sets (e.g.) the ICC institutional model apart is the requirement that an ICC arbitratal tribunal before proceeding further with the conduct of the proceedings, must prepare a set of Terms of Reference. These Terms serve not only to identify the main issues to be arbitrated, but also (by implication) those which are not.

Watchdog

Another relevant distinction is the 'watchdog' role played by an arbitral institution. This can, for example, involve institutional control during the phase when the tribunal determines the scope of the proceedings (in the ICC context: prepares Terms of Reference), as well as the subsequent scrutiny which the institution may give to the tribunal's draft award.

A significant feature of the ICC institutional model is the ICC 'Court of Arbitration' (which is neither an arbitrator nor a court in the usual sense) which oversees the entire arbitral process. Although the ICC Court does not itself settle disputes, it does scrutinize the arbitrator's draft award. The watchdog role of the ICC may become relevant if one party to the arbitration decides to drag its feet and/or take actions which the arbitrators find counterproductive to an expeditious resolution of the dispute. In such a situation, a tribunal which functions within an institutional framework may find it easier to simply ask the watchdog to bring the uncooperative party into line.

Although the ICC and other institutions demand payment for their services, many merchants and lawyers are convinced that they receive good value for the added cost. Those who favour institutional arbitration cite the large percentage of (e.g. ICC) awards voluntarily complied with, as well as the good track record with respect to the recognition and enforcement of ICC awards in national courts (Ch. 6.4).

For obvious reasons, it is more difficult to assess the extent of voluntary compliance with decisions rendered by *ad hoc* tribunals than it is to evaluate evidence regarding a set of awards monitored by a particular arbitral institution.

6.2.4. Choosing the Applicable Substantive Law

In the absence of a valid choice of substantive law by the parties, the arbitrators must themselves determine the applicable law.

Traditional approach

Given the fact that national courts apply national or regional choice-of-law rules to determine the law applicable in contractual matters (regarding the European regime see Ch. 3), we might expect arbitrators to select and apply choice-of-law rules in a similar way.

The traditional assumption is that conflict-of-laws rules which apply in an international commercial arbitration derive from the law of the arbitral *situs*. According to this theory, the decision to arbitrate in a particular place (e.g. Copenhagen) indicates the parties' (implied) intention that the choice-of-law rules applicable in the courts of that forum should (a) determine the validity of an express choice-of-law by the parties or (b) determine the applicable substantive law in the absence of choice.

Model Law approach

The more modern approach, however, is a more liberal one. Failing any designation by the parties of the applicable law, the UNCITRAL Model Law provides that the tribunal shall apply the law determined by the conflict-of-laws rules which it (the tribunal) considers applicable. This is the approach now followed in arbitrations which take place in Canada, Denmark, Germany, etc.

More radical approach

A more radical approach, which was expressly rejected by the drafters of the UNCITRAL Model Law, permits the tribunal simply to apply 'the [substantive] rules of law it considers appropriate.'

France, Switzerland

According to the *lex arbitri* applicable to international commercial arbitration in France and Switzerland, for example, arbitrators are (completely) free to determine the applicable law (in the absence of a choice by the parties). This leaves

arbitrators in French and Swiss arbitrations free to designate the substantive law directly (*méthode directe*), without resort to any conflict-of-laws rule.

The ICC approach is the same. In the absence of a choice by the parties who agree to the ICC Rules, the arbitrators can apply those rules of law on the merits which they determine to be appropriate, and that determination need not be made by the application of conflict-of-laws rules.

Lex mercatoria

The freedom enjoyed by arbitrators to determine the applicable substantive law is particularly significant when it comes to the possible application of *lex mercatoria*: the international 'law merchant,' sometimes identified as 'generally accepted principles' of commercial law or international trade.

The Law Merchant, or *Lex Mercatoria*, was originally (in medieval times) a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with certain local differences. It originated because the civil law was not responsive enough to the growing demands of commerce: there was a need for quick and effective dispute resolution, administered by specialised courts. The guiding spirit of the Law Merchant was that it ought to evolve from commercial practice, respond to the needs of merchants generally, and be comprehensible and acceptable to the merchants who submitted to it. International commercial law today owes some of its fundamental principles to the Law Merchant as it was developed in the medieval ages.

Although *lex mercatoria* is a fluid concept, it has been solidified in recent years by several non-legislated 'restatements' of European and transnational commercial practice, most prominently by the UNIDROIT Principles of International Commercial Contracts.

Express choice

In some commercial contexts, parties with relatively equal bargaining power expressly choose *lex mercatoria*, either because they cannot agree on the national law of a given State and/or because they believe *lex mercatoria* represents a balanced international solution to the choice-of-law problem.

This was the case in an arbitration deriving from the Anglo-French 'Chunnel' project. In the course of its decision declining to issue an injunction pending a foreign (Brussels) arbitration, the English Court of Appeal noted that 'the proper law of the contract' – as specified by the parties – was 'the principles common to both English law and French law, and in the absence of such common principles [...] such *general principles of international trade law* as have been applied by national

and international tribunals.' *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] QB 656.

Model Law

In the many States which follow the UNCITRAL Model Law, the arbitrators shall apply *lex mercatoria* as the 'rules of law' applicable to the dispute, *provided* that the contracting parties themselves have expressly identified *lex mercatoria* (or its equivalent) as the applicable law.

See the UNCITRAL Secretariat Explanatory Note to Article 28(1) of the Model Law: '[B]y referring to the choice of 'rules of law' instead of 'law,' the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system.'

Absent agreement: rules of law

According to the traditional view, the situation is fundamentally different when the parties have not themselves specified *lex mercatoria*. The arbitrators do not enjoy the freedom to select and apply *lex mercatoria*, and this traditional view has been codified in States which have adopted Article 28(2) of the UNCITRAL Model Law: 'Failing any designation by the parties, the arbitral tribunal shall apply the *law* determined by the conflict of laws rules which it considers applicable' (emphasis added).

See the UNCITRAL Explanatory Notes to Article 28(2): 'The power of the arbitral tribunal [...] follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules that it considers applicable.'

According to Article 28(3) of the Model Law, an express authorisation by the parties is also required if the arbitral tribunal is to decide the dispute in question on the basis of principles it believes to be 'fair and just': *ex aequo et bono* or as *amiable compositeur*, i.e. without having to refer to *any* particular body of law or rules of law.

The *lex mercatoria* should not be confused with *international trade usages*. Article 28 of the Model Law (which determines how arbitrators designate the law when the parties have not) does not exclude the application of usages of trade. On the contrary: Article 28(4) *requires* the tribunal to decide *all cases* in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. This is easily understandable, because trade usages are usually

'ranked' as a higher source of authority than supplementary (default) substantive rules.

French & Swiss more liberal

The French and Swiss *lex arbitri*, as well as the ICC Rules, permit the arbitrators to choose *lex mercatoria* themselves, i.e. without an express authorisation from the parties. So on this point, France and Switzerland provide a more liberal arbitral climate than States which follow the UNCITRAL Model Law.

6.3. Enforcement of Arbitral Agreements

6.3.1. Introduction and Overview

The remainder of the present chapter is concerned with issues relating to the recognition and enforcement of arbitral agreements and arbitral awards. Under what circumstances might a national court in State X refuse to recognise and enforce an *agreement* to arbitrate an international dispute? When might a court in State X refuse to recognise and enforce an arbitral *award* rendered in that State (X)? When might a court in State Y recognise and enforce an arbitral award rendered in State X? Etc.

Legal mix

Once again, the legal landscape is complicated by the fact that the subject (international commercial arbitration) is governed by a mixture of national and international law.

Lex arbitri

As regards national law, the various *lex arbitri* serve, *inter alia*, to determine whether the international arbitration agreement is valid, whether a given dispute is arbitrable, and whether an award rendered by a tribunal is valid and/or otherwise subject to substantive review by the courts of the State where the arbitration is held.

N.Y. Convention

As regards certain questions relating to the recognition and enforcement of arbitral agreements, however, national law has been supplemented by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the 'New York Convention').

Agreement enforcement

Under Article II of the Convention each Contracting State must 'recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship,' and the courts of a Contracting State, when seized of an action in a matter in respect of which the parties have made such an agreement, shall, at the request of one of the parties, refer the parties to arbitration.

Not until the final days of the 1958 Conference in New York did the Convention draftsmen decide that the effectiveness of the new treaty's provisions on the recognition and enforcement of foreign arbitral *awards* required rules regarding the formal validity and the enforcement of the arbitration *agreement* itself. The title of the treaty, however, remained unchanged.

The interpretation and application of the Convention's rules on agreement-enforcement are examined below in Ch. 6.3.2.

6.3.2. Contract Formation, Interpretation and Validity

Most of the problems which fall under the heading of pre-award enforcement relate to the recognition and enforcement of the arbitration agreement itself. A related enforcement issue concerns the availability of so-called interim measures (Ch. 6.3.3).

Promise binds

As regards recognition and enforcement of the parties' agreement to arbitrate, the main idea is not difficult to grasp: Just as courts generally respect and enforce agreements to litigate in a given court (Ch. 2.2.2(B)), merchants who agree to arbitrate should also be bound by their word.

Formation, interpretation, validity

To determine whether the parties concerned are bound to arbitrate (and not litigate) a given dispute, we may need to apply rules which regulate the contract *formation* process to see if an agreement has really been formed (e.g. by one party's acceptance of the other party's offer). If we pass that hurdle, we might need to *interpret* the arbitration agreement (or clause) in question (e.g.) to make sure it is actually designed to cover the kind of concrete dispute at hand.

Parts I and II of the 1980 Convention on Contracts for the International Sale of Goods (CISG) contain provisions which regulate both the *formation* and the *interpretation* of international contracts of *sale*. Since such

contracts often contain *arbitration clauses*, the question of whether the parties concerned have agreed to arbitrate – and (if so) how that agreement (clause) should be interpreted – might be held to depend on the application of the same CISG rules.

Finally, we might need to apply rules of *validity* (e.g.) to determine whether a party who seeks to avoid arbitration has a viable defence to enforcement of the agreement concerned.

Validity: applicable law

A national court might, for example, set aside an agreement made under the influence of fraud, duress or misrepresentation. Such validity questions must usually be resolved on the basis of a given national law, and the general *lex arbitri* rule in most States is that the validity of the arbitration agreement is governed either by the law *designated by the parties* or (absent agreement) by the law of the place where the *validity challenge is made*.

As regards international sales contracts, the CISG does not regulate issues which relate to substantive validity (see Article 4), so the question of whether an arbitration agreement is invalid (e.g. by reason of alleged fraud or misrepresentation) must usually be resolved by supplementary rules of *domestic* law.

Both the New York Convention and the UNCITRAL Model Law are silent as to which law should govern the validity of the arbitration agreement in the pre-award stage, but many commentators recommend the application Art. V(1)(a) of the Convention (see Ch. 6.4.3) by analogy. See, e.g. Haas in Weigand, *Arbitration* at 450f and compare Art. 34(2)(a)(i) of the UNCITRAL Model Law (see Ch. 6.4.2).

Scope of agreement

Even assuming the arbitration agreement in question has been made (formed) and declared valid, the parties to that agreement can only be bound to arbitrate a given concrete dispute if their agreement to arbitrate is interpreted as covering the particular problem or issue in dispute. If the agreement to arbitrate is interpreted narrowly, such that the dispute in question is deemed outside its scope, the parties have not given the tribunal the power to arbitrate, so the tribunal is simply not competent to resolve that dispute.

Where one party challenges the validity of the agreement and/or the scope of the arbitration clause, the *tribunal* (once appointed) may be considered competent to make a ruling – or at least a provisional ruling, subject to possible subsequent judicial review – on its *own jurisdiction*

(so-called *Kompetenz-Kompetenz*). See (e.g.) Article 16(1) of the UNCITRAL Model Law.

Of related significance is the bootstrapping doctrine of *separability* (or severability) which treats the arbitration clause as an autonomous agreement independent of the larger contract; see Article 16(1) of the UNCITRAL Model Law. So even if the larger contract (e.g. for the provision of goods or services) is declared invalid (e.g. by virtue of fraud or duress), the arbitration clause in that contract might continue to live a life of its own, a bit like 'a dead dog with an active tail that survives its demise' (Shalakany in 41 *Harvard Int'l L.J.* 419, 439 (2000)).

Arbitrability

The arbitrability issue, which is closely related to the topic of substantive validity, arises when one party claims that the kind of dispute in question is not capable of being settled by arbitration, i.e. irrespective of the purported scope of the particular arbitration agreement in question.

The answer to the arbitrability question may depend not only on the applicable law, but also on whether the court (and country) concerned has adopted a generally 'pro' or an 'anti' arbitration point of view.

The liberalistic position is well-illustrated by the decision of the U.S. Supreme Court in the famous *Mitsubishi v Soler Chrysler-Plymouth* 473 U.S. 614 (1985) where a Japanese manufacturer (M) sold automobiles to a Puerto Rican distributor (D). The sales agreement contained a clause providing for arbitration of disputes by the Japan Commercial Arbitration Association. Later, a dispute arose due to slackening sales and D's efforts to re-sell the cars supplied by M outside Puerto Rico. As a result, M ceased delivery of cars to D and then brought an action in a U.S. Federal Court, seeking an order to compel D to arbitrate the parties' dispute. D resisted, claiming M's failure to deliver entitled D to pursue antitrust (competition law) claims against M which were *not arbitrable*, but the U.S. Supreme Court disagreed, holding that respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes required enforcement of the arbitration clause in question, and that included D's obligation to arbitrate its antitrust claims against M.

Formal validity

In contrast with issues relating to substantive validity (fraud, duress, misrepresentation), formal validity issues relate to the *form* of the arbitration agreement in question.

In writing

An important rule in this connection is Article II of the New York Convention which requires all Contracting States to recognise an agreement to arbitrate, provided that agreement is in writing, and according to Article II(2):

> The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Majority view

Though Article II(2) might seem simple, there is, as yet, no transnational consensus as to its proper interpretation. In the opinion of most national courts and commentators, the kinds of agreement in writing listed in Article II(2) are not exhaustive. According to this view, Article II should be applied to other agreements in writing than signed contracts or clauses and exchanges of letters or telegrams.

Regarding this 'prevailing view,' see Haas in Weigand, *Arbitration* at 438f. The interpretation of Article II(2) as non-exhaustive has also been officially recommended by UNCITRAL (recommendation adopted on 7 July 2006) and the United Nations General Assembly (resolution 61/33 adopted on 4 December 2006).

Minority view

Other courts and commentators, however, interpret Article II(2) to mean that an arbitration agreement can only qualify as an (enforcable) 'agreement in writing' if it is 'signed by the parties or contained in an exchange of letters or telegrams.'

Quite apart from the issue of the proper interpretation of Article II(2), the national courts in *some* New York Convention Contracting States interpret Article II of the New York Convention as providing only 'minimum' enforcement rules. Under this view, which was officially recommended by UNCITRAL and the United Nations General Assembly in 2006 (see references above), a Contracting State asked to recognise and enforce a given arbitral agreement may permit its national *lex arbitri* to supplement the Convention, e.g. on the formal validity issue, with the result that a more lenient, pro-arbitration *lex arbitri* version of the rule will render the Convention minimum rule (whatever *it* means) irrelevant in the concrete case.

The view that Article II constitutes a 'minimum' requirement is the position traditionally taken by courts in England, e.g. by the House of Lords in *Zambia Steel and Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225. This is also consistent (e.g.) with the traditional Danish position, as well as the revised Danish Arbitration Act (2005) which provides that an agreement to arbitrate must be recognised and enforced (by Danish courts) regardless of its (oral or written) form.

Differing interpretations

Depending on the facts of the concrete case, and the preferences of the court concerned, the differing interpretations of the rule in Article II(2) can lead to different results.

> *Illustration 6f:* Merchant B (in State X) buys business management software from merchant S (in State Y). In order to install the software, B is required to 'click through' and acknowledge the 'Standard Business Terms' provided by S which provide that 'all disputes between S and B will be referred to binding arbitration in State Y.' Later, a dispute arises as to the quality of the software and B commences a lawsuit in a national court in State X, but S demands that the court should refer the parties to arbitration.

Analysis

The arbitral clause in the click-through Standard Terms has not been 'signed by the parties' (an electronic signature was not used), and a narrow interpretion of the words 'an exchange of letters or telegrams' would arguably not include the exchange of electronic messages. On the other hand, a more flexible interpretation of the word 'letter' would arguably include electronic written messages, emails, etc. So if the X-court adheres to a narrow interpretation of Article II(2), S and B have not concluded a formally valid arbitration agreement under Article II of the New York Convention. But if the X-court follows a more flexible interpretation of Article II(2), or if an arbitral agreement like the one in *Illustration 6f* is formally valid under the *lex arbitri* of State X, then the X-court should dismiss B's action and refer the parties to arbitration.

Illustration 6f is inspired by *Jordans Rugs Ltd v C. Pavey & Associates Inc,* decided on 15 September 2006 by the Supreme Court of British Columbia (Canada). Although the agreement-in-writing issue was not argued by the parties, the court had the relevant legislation before it and was apparently satisfied that the requirements of the Canadian *lex arbitri* were met.

This may be in contrasted with *Kahn Lucas Lancaster v Lark International* 186 F.3rd 210 (1999) where S and B concluded an international sales contract on the basis of B's written 'purchase order' which included an arbitral clause. S's acceptance was by conduct, i.e. S signed no contract and sent no letter or telegram. The U.S. Federal Court of Appeals hearing the case held that the writing requirement of Article II of the New York Convention was not satisfied.

6.3.3. Interim Measures

Assuming a given arbitration agreement is enforceable, a separate (pre-award) enforcement issue might arise concerning the availability of 'interim measures' to help ensure the effectiveness of the arbitral process. Such interim (provisional) measures include the attachment or 'freezing' of certain assets, so they cannot be removed from the country concerned. If, for example, the respondent in an arbitral proceeding were allowed to remove its assets to a foreign territory, a subsequent award in favour of the claimant might not be capable of being enforced.

The question of interim measures is not governed by the New York Convention and must consequently be dealt with solely by the *lex arbitri* of the country concerned. This is true in respect of whether and to what extent an arbitral tribunal may order interim measures, whether and to what extent such orders are enforceable, and whether and to what extent State courts may order interim measures when the dispute is subject to arbitration.

Arbitral tribunal

As regards the first issue – interim orders by the arbitral tribunal – the UNCITRAL Model Law originally (in 1985) contained only a brief provision (Article 17) which authorised the arbitral tribunal (unless otherwise agreed by the parties) to take 'such interim measures … as the arbitral tribunal may consider necessary.' The revised (2006) Model Law contains much more detailed provisions (Articles 17-17 G).

Article 17 of the UNCITRAL Model Law (2006) defines an interim measure as any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A lists the conditions for granting interim measures, and Articles 17 B and 17 C govern 'preliminary orders,' i.e. orders made without hearing the other party in advance. Articles 17 D to 17 G deal

with certain issues common to interim measures and preliminary orders, e.g., security, costs and damages.

For obvious reasons, it is too early to tell how popular the new (2006) provisions will be as a model for domestic *lex arbitri*.

Enforcement of interim measures

The original (1985) UNCITRAL Model Law contained no provisions on the enforcement of interim orders made by an arbitral tribunal. The 2006 revision saw the introduction of specific provisions addressing this issue in a manner similar to the recognition and enforcement of arbitral awards (Articles 17 H and 17 I).

In this respect also it is too early to say to what extent States will follow suit and adopt similar provisions in their domestic *lex arbitri*.

Interim measures in State courts

State courts generally have various interim measures at their disposal in support of litigation in State courts, such as attachment of a party's assets. Whether such interim orders are also available when the parties have agreed to arbitrate their dispute is a question to be determined by the *lex arbitri* of the place where an interim order is sought (which may be in one or more other countries than the one in which the arbitral proceedings take place).

Under Article 17 J of the revised (2006) UNCITRAL Model Law, a State court has the same power to issue an interim measure in relation to arbitral proceedings as it has in relation to proceedings in courts. Contrary to the Model Law provisions on interim measures by the arbitral tribunal, which are subject to the parties agreeing otherwise, Article 17 J is mandatory and cannot be derogated from by agreement.

In England, for example, so-called *Mareva* injunctions are available to freeze a party's assets, if required to satisfy a judgment or expected judgment in order to prevent their dissipation within or removal from the jurisdiction (i.e. England), and English courts have also issued *Mareva* injunctions in connection with international commercial arbitrations.

In its 1998 decision in *Van Uden Maritime BV v Deco-Line* (case C-391/95), the Court of Justice of the European Communities, in answer to questions referred by the Dutch Supreme Court (Hoge Raad) regarding the jurisdiction of EU Member State courts to order interim measures under the Brussels Convention (now superseded by the Brussels I Regulation: see Ch. 2.2.1), ruled (*inter alia*): 1. A national court which has jurisdiction by virtue Article 5(1) also has jurisdiction to order provisional or protective measures. 2. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective

measures may be ordered on the basis of Article 5(1). 3. Where the subject-matter of an application for provisional measures relates to a question falling within the scope the Convention, Article 24 of the Convention [Article 31 of the Brussels I Regulation] may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators. 4. The granting of provisional or protective measures on the basis of Article 24 [Article 31] is, however, conditional on the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

6.4. Post-Award Enforcement

6.4.1. Introduction

Turning to enforcement of an international arbitral award (as opposed to the arbitral agreement), the (successful and unsuccessful) parties are likely to be faced with various courses of action, often depending on the place where the award in question was rendered (made).

Place of proceedings

In general an arbitral award will be deemed to have been 'made in' State X if X is the State where the arbitral proceedings took place, and the *lex arbitri* of that State is likely to permit the *successful* party to commence enforcement proceedings in that State.

Conversely, the *unsuccessful* party may decide to commence legal proceedings in State X to set aside (vacate) the award – an action which, if successful will have the effect of nullifying it (depriring it of effect), at least in State X, and probably elsewhere as well.

Enforcement elsewhere

When it comes to recognition and enforcement of an award outside the award-rendering State, the New York Convention is likely to come into play. In fact, the primary area of New York Convention application involves awards 'made outside the State where recognition and enforcement is sought.'

The Convention's *main* field of application relates to the recognition and enforcement of *foreign* awards, defined in Article I(1) as 'arbitral awards made outside the State where recognition and enforcement is sought.'

The New York Convention also applies to arbitral awards *not considered as domestic* awards in the State where recognition and enforcement are sought. This provision (in Article I(1), second sentence), which has been the subject of some controversy, extends the applicability of the Convention to certain awards made in the enforcing State itself. Certain countries allow parties to agree that arbitration proceedings shall be governed by a *lex arbitri* which is *not* the *lex loci arbitri*. So if, for example, the parties provide for 'arbitration in State X under the arbitral law of State Y,' a court in X might subsequently view the resulting award as a New York Convention award, namely as an award not considered as domestic in X (the country where recognition and enforcement is sought). Under these circumstances the award, though rendered in State X, could *not* be set aside under the *lex arbitri* of that State.

A literal reading of the non-domestic rule permits the applicability of the New York Convention to be extended to other kinds of cases as well – i.e., not just to awards made (rendered) pursuant to a foreign *lex arbitri*, but also to cases involving some other *significant foreign element*, and American case-law confirms that the enforcement provisions of the Convention are applicable in situations involving such an element. In other words, under American law, such awards are 'not considered as domestic.'

Recognition, enforcement, defences

Under the New York Convention each Contracting State must recognise foreign arbitral awards as binding. Each Contracting State must also enforce foreign awards using procedures comparable with those applicable to domestic awards. A Contracting State asked to recognise and enforce a foreign award can refuse to do so only on the basis of the limited criteria enumerated by the Convention (Ch. 6.4.3).

6.4.2. Judicial Review in the Country of Origin

Absent treaty commitment to the contrary, what goes on in State X is the sovereign 'business' of that State.

Lex arbitri → validity

For this reason, and since the New York Convention does not regulate the validity of arbitral awards, any challenges to the validity of an award made in State X, i.e. any attempt to nullify that award (set it aside), must be determined in the courts of State X in accordance with local law, i.e. the *lex arbitri*, the law of arbitration of that particular State.

No appeal

According to the modern *lex arbitri* applicable by virtue of the domestic legislation in the great majority of States, an arbitral award rendered in accordance with a valid arbitral agreement

is *not subject to appeal* in the courts of the rendering State. This means that national courts are *not authorised to reconsider the merits* of a dispute which has been resolved by an arbitral tribunal. On the contrary, an agreement to arbitrate a given dispute in a given State (X) serves to deprive that State's courts of the jurisdiction which they might otherwise have had to resolve the dispute concerned.

Set aside: limited grounds

This does not mean that arbitral awards are completely insulated from scrutiny in the State where the arbitration is held. Although most *lex arbitri* do not provide for a right to appeal the award of an arbitral tribunal to a national court, the courts in the State of arbitration will always possess the power to set aside (invalidate) an award made in that State in certain, usually quite limited, circumstances.

French Code

Under the modern *lex arbitri* view adhered to by a steadily increasing number of States, an *international* arbitral award may be set aside only on the basis of very limited grounds. In France, for example, Article 1502 of the Code of Civil Procedure lists the following grounds for challenging an international award rendered in France:

- award based on an invalid arbitration agreement
- irregular designation of arbitrator(s)
- award incompatible with the arbitrator's mission (competence)
- procedures incompatible with due process (fair/reasonable procedures)
- award contrary to *ordre public international* (international public policy).

Model Law

The grounds set forth in Article 34(2) of the UNCITRAL Model Law reflect a similarly modern view. And this is significant, since the Model Law has become the model upon which numerous commercially significant States now base their *lex arbitri* rules.

To summarize briefly the content of the Model Law on this issue, a party making an application to set an award aside under Article 34(2)(a) must furnish proof of:

(i) the arbitration agreement's invalidity,
(ii) insufficient notice of the arbitral proceedings,
(iii) an award beyond the agreement's scope, or
(iv) unauthorized or illegal arbitral procedures.

Article 34(2)(b) provides two further ex-officio grounds which complete the list:

(i) a non-arbitrable subject matter or
(ii) an award [otherwise] contrary to public policy.

Merits not reviewed

Like the French Code, the UNCITRAL Model Law (and the corresponding legislation in Canada, Denmark, Germany and elsewhere) requires the State where an arbitral award is made to recognise and enforce it, unless the award is not rendered on an arbitrable subject and on the basis of a binding agreement and fair procedures.

> *Illustration 6g:* Seller S (in State X) contracts to sell and ship 112 containers of chicken parts to buyer B (in State Y), all shipments to take place on or before 29 May. The contract, which is governed by the CISG, provides for the arbitration of disputes in State X by a sole arbitrator (A). On 2 June – when only half the containers have been shipped – State Y officials, concerned about the spread of avian flu virus, announce a ban on all chicken-imports not government-certified by 7 June. S does its best to ship the remaining containers, but only half are certified in time. B then demands compensation (damages for lost profits), but S claims it is exempt from liability by reason of *force majeure*.
>
> B then demands arbitration. Using State X domestic sales law and precedents to interpret the CISG rules, A denies S an exemption and awards damages to B. S then asks an X-court to vacate the award, alleging that A clearly misapplied the applicable law.

Analysis (1)

Because Article 7(1) of the CISG demands an *international* interpretation, most CISG commentators would agree that A clearly misapplied the applicable substantive law by using domestic law to interpret the CISG. Indeed, some commenta-

tors might even say that A's mistake in CISG interpretation led him to reach the 'wrong result.'

Illustration 6g is based on the 2008 decision rendered by a U.S. Federal District Court (S.D.N.Y.) in *Macromex SRL v Globex International, Inc.* 2008 WL 1752530, also available at http://cisgw3.law.pace.edu/cases/080416u1.html.

Ironically, the arbitrator who rendered the underlying award in *Macromex* based his decision on the extremely unpersuasive precedent set in 2004 by another U.S. District Court (N.D.Ill.) in *Raw Materials Inc v Manfred Forberech GmbH* – a decision which itself was based on the same mistake (using American domestic law to interpret the CISG *force majeure* rule): See J. Lookofsky & H. Flechtner, 'Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?' in 9 *Vindobona Journal of International Commercial Law and Arbitation* 199 (2005), also available at http://www.cisg.law.pace.edu/cisg/biblio/lookofsky13.html.

Analysis (2)

So the reasoning and/or result by the arbitrator in *Illustration 6g* may well be wrong. But assuming the *lex arbitri* in State X follows the modern approach reflected in the UNCITRAL Model Law, A's award cannot be second-guessed by national courts in the award-rendering State. So even if the X-court disagrees with A on the merits (the result reached and/or the reasoning), the X-court simply does not have the authority to set the award in *Illustration 6g* aside.

The decision in *Macromex SRL v Globex International, Inc.* is in full accord: 'The [American] Federal Arbitration Act (FAA) lists specific instances where an award may be vacated. In addition [under American Federal law] a court may vacate an arbitration award that was rendered in 'manifest disregard of the law.' However, review for manifest error is severely limited. A [U.S.] federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'

The UNCITRAL Model Law list is based on the nearly identical defences to enforcement set forth in the Article V of the New York Convention (Ch. 6.4.3), and 'manifest disregard' is not on the list. This is, of course, no accident. The key motivating factor underlying the modern *lex arbitri* trend – as typified by the French Code and the UNCITRAL Model Law – has been to free international commercial arbitration from national restraints.

The liberalistic, hands-off attitude of the French Code and States which have adopted the UNCITRAL Model Law position runs contrary

to some older, more provincial *lex arbitri* rukes whereby a court could correct or invalidate an arbitral award in cases where the tribunal is shown to have committed a significant 'mistake.' Prior to 1979 the English High Court had jurisdiction to set aside or remit an award on the ground of *errors of fact or law* on the face of the award, but the English assumption – that parties who agree to arbitrate in England 'want' judicial review by English courts – turned out to be wrong. Indeed, large numbers of parties began to turn away from arbitration in England altogether, preferring to arbitrate in States with a more modern legislative and judicial climate. For this reason, the Arbitration Act 1979 was drafted in an attempt to draw back some of arbitration business which the case stated procedure had scared away. In 1996 England took another significant step in the direction of States whose *lex arbitri* are more in line with the UNCITRAL Model Law (although the 1996 Act continues to allow a limited right of appeal to the English courts if not excluded by the parties' agreement).

Rarely vacated

Given the narrow grounds available for a validity attack in most States, it is very rare for an international award rendered in State X to be set aside (vacated) by a court in State X.

Cease to exist?

In those (rare) instances where a given international arbitral award is set aside (vacated) by a court in the country of origin, both logic and conventional wisdom would seem to lead to that conclusion that such an award, having been declared a 'nullity,' simply ceases to exist. Should this same logic not preclude subsequent recognition and enforcement of the award in other countries (States Y, Z etc.). How could a court (anywhere) enforce an award which had ceased to exist?

Complication: US & France

The conventional wisdom has, however, been challenged in recent years, both in American and French courts. In 1996 a U.S. Federal Court elected to recognise an arbitral award which had been made (rendered) in Egypt, notwithstanding the fact that an Egyptian court had previously set that same award aside. Although this (*Chromalloy v Egypt* 939 F. Supp. 907 (D.D.C, 1996)) decision has not been followed in subsequent American cases, there are a number of French decisions, including *OTV v Hilmarton* (Cour de cassation, 10 June 1997), which follow a similar path. Indeed, the prevailing French opinion is that French courts are free to enforce arbitral awards, whether or not they have been set aside in the country of origin.

See E. Schwartz at http://www.kluwerevents.ru/file/070921/erik_shvarc_v1.pdf: 'The question of whether an award that has been set aside should nevertheless be capable of enforcement has been widely debated ever since the well-known cases of *Hilmarton* in France and *Chromalloy* in the United States. In France, the statute on international arbitration, unlike most such statutes [*lex arbitri*], is more liberal than the New York Convention and, hence, does not recognise the annulment of a foreign arbitration award as a ground for refusing to enforce a foreign award. The *Hilmarton* decision was, thus, consistent with the French international arbitration statute and has been subsequently followed in other cases. Elsewhere, however, including in the United States, where subsequent court decisions have been reluctant to follow *Chromolloy,* courts are reluctant to accept to enforce an award set aside in its country of origin.'

6.4.3. Recognition and Enforcement of Foreign Awards

Convention core

As indicated previously, the main thrust of the New York Convention is directed at recognition and enforcement of arbitral awards, particularly awards rendered in the territory of a foreign State.

Under the Geneva Arbitration Convention of 1927, the burden of proving the conditions necessary for enforcement was on the party seeking enforcement of a foreign arbitral award. The 1958 New York Convention not only shifted the burden of proof to the party defending against enforcement. It also limited that party's defences to the seven categories set forth in Article V.

Defences

In a nutshell, the defending party can only resist enforcement under Article V(1) by proving:

(a) the arbitration agreement's invalidity,
(b) insufficient notice of the arbitral proceedings,
(c) an award beyond the agreement's scope,
(d) unauthorized or illegal arbitral procedures, or
(e) a non-binding award.

Article V(2) provides for two additional ex-officio defences:

(a) non-arbitrable subject matter or
(b) award [otherwise] contrary to public policy.

Merits not reviewed

Simply stated, the Convention requires recognition and enforcement of virtually any award, unless the award was not rendered on the basis of fair arbitral proceedings and a binding

agreement to arbitrate an arbitrable dispute. The Convention does *not* authorize judicial review of the merits: not in the guise of 'public policy' or otherwise.

Perhaps the most frequently litigated New York Convention issue concerns the enforcement of awards which, in the opinion of the losing party, resolve matters 'beyond the scope' of the arbitration agreement concerned.

> *Illustration 6h:* Supplier S (in State X) contracts to build a paper processing plant for recipient R (in State Y). The contract between the parties contains a clause which obligates S and R to arbitrate 'all disputes arising in the course of performance' in State Z. The contract also contains a *force majeure* clause, as well as a clause which provides that 'neither party shall have any liability for loss of production.'
>
> When S postpones its performance by reason of *force majeure*, R demands arbitration and damages for breach. The award rendered by the tribunal, which is in favour of R, includes damages for loss of production. Later, S resists enforcement of the award in State X on the ground that the award deals with a matter 'beyond the scope' of the arbitration agreement.

Analysis

Most New York Convention Contracting States share the opinion that the list of defences to enforcement of a foreign arbitral award should be construed (interpreted) *narrowly*, in that only such a narrow construction would comport with the enforcement-facilitating thrust of the Convention.

Under this view, S must overcome a powerful presumption that the arbitral body acted within its powers. Although the contract in *Illustration 6h* states that '[n]either party shall have any liability for loss of production,' we can hardly assume that the tribunal simply ignored this contractual clause. On the contrary, we must (in the absence of evidence to the contrary) presume that the arbitration court interpreted this contractual provision as not precluding its jurisdiction to decide whether damages for loss of production should be awarded in the concrete case, especially since the arbitration clause gives the tribunal jurisdiction to decide 'all disputes arising in the

course of performance.' Acting within this framework, the tribunal might well have determined (e.g.) that strict enforcement of the damages limitation in the contract would be 'unreasonable' in the circumstances.

So although the Convention recognises that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing of the arbitrator's construction of the parties' agreement.

Illustration 6h is based on the widely cited 1974 decision by a United States Court of Appeal in *Parsons & Whittemore Overseas Co v Société Génerale de l'Industrie du Papier* 508 F.2nd 969. The opinion by the court, which rejected the challenge to enforcement made in the United States by S, is in harmony with the pro-arbitration stance reflected in the analysis above.

The great success of the New York Convention is in large measure attributable to the narrow (pro-enforcement) interpretation usually given to Article V by most national courts in Contracting States around the world.

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AC	Law Reports. House of Lords
All ER	All England Law Reports
Am.J.Comp.L.	American Journal of Comparative Law
CML Rev.	Common Market Law Review
D.	Recueil Dalloz
E.L.Rev.	European Law Review
F.	Federal Reporter
F.Supp.	Federal Supplement
Harvard Int'l L.J.	Harvard International Law Journal
J.C.P.	Juris-Classeur Périodique
Lloyd's Rep	Lloyd's Law Reports
NILR	Netherlands International Law Review
NJA	Nytt Juridisk Arkiv
NRt	Norsk Retstidende
QB	Law Reports. Queen's Bench
Rev.crit.dr.int.priv.	Revue critique du droit international privé
UfR	Ugeskrift for Retsvæsen
U.S.	United States Reports
WLR	Weekly Law Reports

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