

LECTURE THIRTEEN

Contractual Obligations and the Rome Convention

Aim:

To note the impact of legislation on contractual obligations connected with, or litigated in, a Contracting State.

Objectives.

After careful study of the following notes, and other prescribed readings for this lecture, you will be able to:

1. Discuss the scope of the Rome Convention on the Law Applicable to Contractual Obligations;
2. Discuss the provisions relating to party autonomy in making a contract under the Rome Convention;
3. Explain how the principle of closest connection applies to contracts the choice of law of which is neither expressly chosen nor demonstrated with reasonable certainty.

Choice of Law in Contract under the E.C. Convention.

The unification of all the rules of private international law within the EC was proposed even before the Brussels Convention of 1968. Although some of the proposals have been shelved (temporarily, anyway) the uniformity of the rules applicable to contractual obligations has been achieved via the **1980 Rome Convention on the Law Applicable to Contractual Obligations** which is incorporated into English law with the enactment of the **Contracts (Applicable Law) Act 1990, s.2(1)**.

Scope of the Convention.

Art. 1(1) provides that '*the rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.*'

However, the matters to which *the Convention* does **not** apply are specified in **Article 1(2) and (3)**. They include the capacity and status of natural and legal persons, contractual obligations relating to wills and succession, rights in property arising out of a matrimonial relationship, rights and duties arising out of a family relationship, obligations arising under most aspects of negotiable instruments, **arbitration agreements and agreement on the choice of courts**, questions governed by company law, agency, trusts, evidence and procedure (subject to Article 14) and insurance (but not re-insurance) of risks situated within the E.C.

Notwithstanding the exceptions, that the Convention applies to '*any situation*' means that it applies not only to contracts having a close or real connection with Contracting States of the E.C. but also to contracts which have no connection with any E.C. Contracting State but which happened to be litigated in a court of a Contracting State. The breadth of the Convention is further conveyed by **Article 2** which provides that: any law specified by the Convention is to be applied whether or not it is the law of a Contracting State.

Two points with respect to the interpretation of **Art 1(1)** now have to be addressed :

- (a) What legal system determines whether there is a contractual relationship? and
- (b) How is '*countries*' interpreted?

(a) What legal system determines whether there is a contractual relationship?

The problem here is that one Contracting State may regard a matter as a contractual obligation whereas another does not because, for example, it lacks consideration. Reasoning by analogy, it may be considered that since **Article 8(1)** provides that the *validity* of a contract '*shall be determined by the law which would govern it under this Convention if the contract ... were valid*', then the Convention may also determine whether the matter under review is a contractual relationship or not. However, **Forsyth** maintains that it would be illogical to extend this principle in order to determine what constitutes a contractual obligation: that is, it would be illogical to employ a provision of the Convention to determine whether the Convention is applicable at all. It is submitted that this comment may have some merit. Perhaps, by way of analogy, it is akin to saying that whereas the Theft Act can provide a definition of theft, it then requires

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case law to determine whether a theft has been committed in the circumstances of the case under review. In other words, the Theft Act doesn't determine whether a theft has taken place: case law does.

If this reasoning is correct, and if a 'Convention concept' of 'contractual obligation' is to be pursued, then, apart from not being able to rely on the Rome Convention, one cannot rely on the *lex fori* to determine whether a matter is a contractual obligation. Presumably, the ECJ will eventually develop a 'Convention concept' of what amounts to a 'contractual obligation' and *Forsyth* is of the opinion that "the idea of legally binding voluntary agreements will be a crucial part of whatever 'Community concept' the court develops".

(b) How is 'countries' interpreted?

Art 19(1) provides that Scotland & England are different territorial units; but **Art 19(2)** provides that states consisting of different territorial units are 'not bound to apply this convention to conflicts solely between the laws of such units.'

Thus, the U.K. had the choice of whether to apply the Conventions in the case of conflicts between the laws of different parts of the United Kingdom. That choice is set out in **s.2(3) Contracts (Applicable law) Act 1990** which provides that: 'notwithstanding **Article 19(2)** ... the Conventions shall apply in the case of conflicts between the laws of different parts of the United Kingdom' i.e. the Rome Convention is applicable to conflict between Scots law and English law.

However, it must be borne in mind that in the event of a dispute over the interpretation of an issue, the House of Lords will take judicial notice of Scots law and/or English law and will *not* require the assistance of the ECJ: the jurisdiction of the ECJ in matters relating to interpretation as provided for by the *Brussels Protocol on Interpretation 1971* will *not* apply to Scots -English cases.

Jewish and Islamic Law : The Tora and the Sharia(h).

Since neither Jewish nor Islamic law in themselves are related to countries, they cannot provide the basis of choice of substantive law for the purposes of the Convention. Where the parties wish disputes to be settled under such laws they may contract for arbitration,¹ though any award would have to comply with English public policy to be enforced. Alternatively, the parties may expressly incorporate such principles into the relevant clauses of the contract. Finally, it is possible to contract subject to the law of a state that in some way adopts or reflects the religious principles they wish to be governed by.²

Beximco v Shamil Bank of Bahrain [2004].³ A reference to the Sharia'a alluded to an intention by the parties to comply with Islamic Principles but they did not agree to be governed by Sharia Law. A contract must chose one Law alone to govern a contract.

Musawi v RE International [2007].⁴ The Inter-relationship between Sharia Law and English Law - conflicts and substantive law examined in the context of an application for the enforcement of an arbitral award. The court stated "

2. *There have been a number of unusual complicating factors. First, it was the position of all parties, in their statements of case and at the start of the trial, that all the relevant agreements were governed by Shia Sharia law. In the light of the Contracts (Applicable Law) Act 1990 and the decisions at first instance and on appeal in Halpern v Halpern* [2007] EWCA Civ 291, as well as the decision of the Court of Appeal in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784, both counsel agreed that Shia Sharia law could not be the applicable law, at least for any of the agreements made after the 1990 Act came into force on 1 April 1991. They agreed that so far as those agreements were concerned, the applicable law must be the law of a country and that on the facts of this case it had to be English Law. Mr Harbottle for the claimant nonetheless submitted that at common law an agreement could be governed by a system of law which was not the law of a country and that the agreements at issue in this case made before 1 April 1991 were governed by Shia Sharia law. Mr Sen for the defendants

¹ E.g. *Kastner v Jason* [2004] EWHC 592 (Ch) : Mr Justice Lightman.. 23rd March 2004 ; *Kastner v Jason* [2004] EWCA Civ 1599: before LCJ; Clarke LJ; Rix LJ 2nd December 2004.

² E.g. *Global Multimedia International Ltd v ARA Media Services & Anor* [2006] EWHC 3612 (Ch). Note that where a party wishes to rely on foreign law they must adduce evidence of fact as to the content of that law. The Chancellor, Sir Andrew Morritt, 21st July 2006.

³ *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2004] EWCA Civ 19. CA. before Potter LJ; Laws LJ; Lady Justice Arden. 28th January 2004.

⁴ *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) . per Mr Justice David Richards. 14th December 2007.

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submitted that this was not the correct position at common law and that all the relevant agreements were governed by English law."

Halpern v Halpern [2007].⁵ Appeal against a decision that a party cannot avoid a contract (here a settlement of a dispute submitted to arbitration) procured by duress in circumstances where he cannot offer the other party substantial restitutio in integrum. The court held that justice requires a remedy. The Inter-relationship between Rome Convention and Jewish Law examined in respect of choice of law. The matter concerned the disputed inheritance of a daughter – and a device to circumvent the Tora by declaring that the father owed the daughter monies to be paid 1 hour before his death. The question was whether or not she was pressured into waiving entitlement to the monies.

Matters to which the Convention Does NOT Apply

The matters to which the Convention does not apply are specified in **Article 1(2) and (3)**. They include the capacity and status of natural and legal persons, contractual obligations relating to wills and succession, rights in property arising out of a matrimonial relationship, rights and duties arising out of a family relationship, obligations arising under most aspects of negotiable instruments, **arbitration agreements and agreement on the choice of courts**, questions governed by company law, agency, trusts, evidence and procedure (subject to **Article 14**) and insurance (but not re-insurance) of risks situated within the E.C.

Determination of the Choice of Law: The Principle of Party Autonomy; Article 3(1) provides that:-

'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract.'

Thus, just as the parties to a contract can choose the proper law at common law (**R v International Trustee For The Protection Of Bondholders** (1937)),⁶ so the Rome Convention also respects the principle of party autonomy: **Article 3(1)**. However, a problem may arise in trying to establish that the choice of law has been demonstrated with 'reasonable certainty'. In such case, recourse to **Article 18** of the Convention may be of use since, in relation to other provisions of the Convention, it provides that: *'regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application'*.

As to whether a choice of law clause is valid [cf. the common law requirements for being *bona fide and legal*], **Article 3(4)** provides that: *'The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Article 8, 9 and 11.'*⁷

Furthermore, *and in contrast with the position at common law*, **Article 3(2)** provides that the parties *'may at any time'* [including a time subsequent to the conclusion of the contract, perhaps even, to the time when litigation is pending] *'agree to subject the contract to a law other than that which previously governed it.'* This applies irrespective of whether that law was expressly chosen or demonstrated with reasonable certainty or determined via *'other provisions of this Convention.'*

However, *'any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the right of third parties.'*⁸

Note also that a party cannot engage in Choice of Law shopping to evade the primary liabilities under the governing law of an activity.

Article 3 Freedom of choice

3.3 *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".*

⁵ **Halpern v Halpern** [2007] EWCA Civ 291. CA before Waller LJ; Sedley LJ; Carnwath LJ 3rd April 2007. [2006] EWHC 603 (Comm)

⁶ **R. v. International Trustee for the Protection of Bondholders A/G**. [1936] 3 All E.R. 407 (C.A.); [1937] A.C 500 (H.L.).

⁷ **Article 8** refers to existence and material validity; **9** refers to formal validity; and **11** refers to incapacity, (see infra). **Article 8** is the **Rome Convention** equivalent of the 'putative proper law' at common law, although a party may rely on the law of his habitual residence to establish lack of consent

⁸ All extracts are from **Art.3(2) of the Rome Convention**

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The Applicable Law of the Contract in the Absence of a Chosen Law:

The Principle of Closest Connection; Article 4

In the absence of an expressed or an implied choice of law, **Art.4(1)** provides that '... *the contract shall be governed by the law of the country with which it is most closely connected.*' Whereas this provision appears similar to 'the closest and most real connection' test at common law (*Bonython v Australia* (1951)),⁹ **Art.4(1)** refers to 'the law of the country with which [the contract] is most closely connected' and not the 'legal system' with which the common law provision is associated.

To overcome the absence of an applicable law being chosen in accordance with **Art.3**, **Art.4** provides for *rebuttable presumptions* to be applied to choose the applicable law. This generates an immediate response from *Cheshire and North* (*Private International Law*, 12/e, 1992 at p490) who state (in relation to the whole of **Article 4**) that the *re-introduction* of presumptions 'turns the clock back as far as English law is concerned'.

In essence, **Art.4** consists of *three principal parts*.

- 1 **Art.4(1)** provides for a contract to be governed by the law of the country with which it is most closely connected.
- 2 Paragraphs (2) - (4) contain presumptions of which, arguably, the most important is contained in paragraph (2). This is a presumption which refers to the contract being most closely connected with the law of the country where, *inter alia*: the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a body incorporate or un-incorporate, its central administration. Other presumptions relate to where immovable property is situated (paragraph 3); and where, in the case of a contract for the carriage of goods, the country in which, at the time the contract is concluded, the carrier has his principal place of business if that is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated (para.4).
- 3 The *third* and final part of **Art.4** is contained in paragraph 5, which provides that the rebuttable presumptions shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. However, notwithstanding this attempt to combine a high degree of certainty with flexibility, suffice it to say that it remains uncertain whether a court can rebut a presumption unless it has first applied the closest connection test; the precise purpose of the presumptions given that they might be dispensed with; and the impact of paragraph 5 in relation to paragraphs 2 - 4.

In more detail: the determination of the applicable law in **Art.4(2)** revolves around two integral elements, viz; there is (i) the territorial connection of (ii) the party who is to effect the performance which is characteristic of the contract. These are integrated via a *presumption of closest connection* which provides that: '*it shall be presumed that the contract is most closely connected with the country* [it doesn't say *law* of the country in **Art.4(2)**] *where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or un-incorporate, its central administration.*'

Art.4(2) then goes on to provide that if the contract is made in the course of a '*party's trade or profession*', then the country of closest connection '*shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated*'.

Other points arising from **Art. 4** include:

1. Another presumption provides that the country of the situs of immovable property is the country with which any contract having that immovable property as its subject matter has the closest connection: **Article 4(3)**.
2. *The non-applicability of the presumption in contracts for the carriage of goods*. In such contracts, the country of closest connection will be the country in which ... 'the carrier has his principal place of

⁹ *Bonython v Commonwealth of Australia* [1951] AC 210.

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business (provided that country is also either] the place of loading or the place of discharge [of the goods] or [where] the consignor [has his] principal place of business'. **Art.4(4)**.

- 3 **Art.4(5)** provides that the presumption in Art.4(2), (3) and (4) 'shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country'. (i.e. *presumptions in (2), (3) & (4) are all rebuttable*).

The doctrine of characteristic performance.

Collier refers to this as '*... a new concept, borrowed from Swiss law (surprisingly perhaps, since Switzerland is not a member of the [E.U.].*' It is perhaps, an innovative, if criticised, aspect of the Rome Convention. The *Giuliano-Lagarde* Report (the official Report on the Rome Convention) indicates that in (say) the case of a contract for the supply of goods or services, it is the provision of the goods or services, not the payment of money for them, which is the characteristic performance. The presumption of a contract having its 'characteristic performance' most closely connected with a particular country will not apply, however, if the characteristic performance cannot be determined. Nor will it apply (as has been noted, *supra*) if it appears from the circumstances as a whole that the contract is more closely connected with another country: **Art. 4(5)**.

Forsyth notes that the major grounds of criticism of the doctrine of characteristic performance are "*that it is not straightforward to determine what the 'characteristic performance' of a particular contract may be; and that ... the trend in the common law was away from the technique of presuming what the lex causae is.*" Furthermore, 'characteristic performance' has no necessary connection with the place of performance, a contracting factor recognised by English law. That characteristic performance is linked with the habitual residence of the party who is to effect it is a point criticised by *Collins* who questions whether reference to such a personal connecting factor is appropriate in the context of commercial contracts.

Restrictions on Party Autonomy:

(1): Consumer Contracts and Contracts of Employment; Articles 5 and 6.

Articles 5 and 6 of the Rome Convention contain special provisions in relation to consumer contracts and individual contracts of employment. These have the effect of either limiting the ambit of the general choice of law provisions or excluding the presumptions. As *Kaye* notes: '*A general exceptional choice of law provision [for consumers and for employers] is not a feature of preexisting English conflict of laws rules*'.¹⁰

Article 5(1) : Consumer Contracts. provides that a consumer contract is one '*the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.*'

Where a consumer contract exists, **Art.5** provides that a choice of law by the parties 'shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence'. The difference between this provision and that of '*overriding statutes*' at common law is that **Art.5** protects the consumer with the laws of his (the consumer's) *habitual residence*; whereas, at common law, protection is via statutes of the *lex fori* or the *lex causae* (the chosen law) - neither of which is necessarily the law of the consumer's habitual residence. However, this protection is afforded to the consumer only if one of the situations provided for in **Art.5(2)** is satisfied, viz;

- (a) *in the country where the consumer has his habitual residence the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract; or*
- (b) *the other party or his agent received the consumer's order in that country; or*
- (c) *the contract is for the sale of goods and the consumer travelled from that country to another country and gave his order there, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.*

Thus, if any one of the situations in (a) - (c) apply and an express choice of law has been made, then that choice of law will apply *subject* to the protection afforded to the consumer by the mandatory rules of the law of the country in which he has his habitual residence: **Art.5(3)**.

¹⁰ [(1991) 3 Law for Business 194 at 195]

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Article 6: Individual Contracts of Employment

Art.6(1) provides that notwithstanding a choice of law (as provided for under Art.3) an employee shall not be deprived of the protection of the *mandatory rules* of the otherwise applicable legal system. **Art.6(2)** provides that this '*otherwise applicable legal system*' is (a) '*the law of the country in which the employee habitually carries out his work in performance of the contract,*' or, (b) if he does not habitually work in any one country, '*by the law of the country in which the place of business through which he was engaged is situated.*' Whereas, at common law, the **EP(C)A 1978** [See now the **Employment Rights Act 1996**] gave protection to an employee who ordinarily works in Great Britain, irrespective of choice of law, **Art.7(2)** of the **Rome Convention** provides that the protective legislation of other countries may be enforced in the U.K.'s courts, when applying the Convention, even though that law has not been chosen by the parties. (See *infra*).

Further restrictions on the parties' autonomy.¹¹ (2): Article 3(3) and Article 7

Art.3(3) provides that where '*... the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign [court] [and] where all the other elements relevant to the situation are connected with one country only the choice of law shall not ... prejudice the application of ... the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules"*'. So, for example, if the parties to a contract were French, the contract was to be performed in France and, indeed, all other aspects of the contract were connected with France, **Art.3(3)** provides that even if the parties choose (say) English law to govern their contract and they submit to the jurisdiction of the English courts, the English courts will, nevertheless, apply the mandatory rules of French law.

Since **Art.3(3)** provides that '*all ... elements relevant to the situation [must be] connected with one country only,*' it is inapplicable to situations where the mandatory rules are connected to a number of other countries. In such circumstances, **Art.7(1)** provides that '*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.*' This clearly discretionary provision is exercised by having regard to the '*nature and purpose*' of the mandatory rules '*and to the consequences of their application or non-application.*' The uncertainty to which this provision gives rise was sufficient reason for the United Kingdom to enter a reservation to **Art.7(1)** and, subsequently, provide in **s.2(2)** of the **C(AL)A 1990** that **Art.7(1)** '*shall not have the force of law in the United Kingdom.*'

In contrast, **Article 7(2)** has been given effect in English law. It provides that: '*Nothing in this Convention shall restrict the application of the rules of the law the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.*'

In essence, this means that '**Article 7(2)** allows English courts to continue to apply the overriding provisions of English statutes' (per **McClellan, Morris: The Conflict of Laws**, 4/e). **McClellan** continues by noting that a good example '*is furnished by the Employment Protection (Consolidation) Act 1978 which provides that "for the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the [UK], or of a part of the [UK], or not."*'¹²

Particular aspects of the Contract:

Material (or Essential) Validity

Collier notes that: '*The existence and validity of the contract or a term thereof is to be governed by the putative proper law Art.8(1), but a party may rely on the law of his habitual residence to establish lack of consent: [Art.8(2)]*' This latter provision may be relied upon where, for example, a legal system (e.g. Danish law) provides that silence can amount to consent. Thus, **Art.8(2)** ensures that a party who does not reply to an offer made to him, an offer which includes a choice of a governing law in which silence *does* amount to consent, is not bound by that term.

¹¹ **N.B. Mayss**, in **Conflict of Laws**. London: Cavendish, 1994, asserts that: '*The concept of mandatory rules is one of the key issues in the Rome Convention where it is used under at least six different provisions, namely Articles 3(3), 5(2), 6(1), 9(6), 7(1) and 7(2). Whilst the first four provisions apply in very limited circumstances, the last two are of a much wider scope. Article 7(1) is related to the mandatory rules of a foreign country, and Article 7(2) is related to the mandatory rules of the forum. Only the latter provision is given effect in English law, ...*'

¹² See now **ss.196 & 204 Employment Rights Act 1996**.

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Formal Validity.

Where the parties are in the same country when the contract is concluded, then the contract is formally valid if it is regarded as such either by the applicable law or the law of the country where it is concluded: **Art.9(1)**; whereas if it is concluded when the parties are in different countries, then either the applicable law or the law of either of those countries may apply: **Art.9(2)**. *Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2: Art.9(3)*. **Art.9(4)** provides for the possibility of using the putative proper law, and 9(5) and (6) provide for exceptions in relation to consumer contracts and immovables. In essence, **Art.9(5)** provides that the formal validity of a consumer contract is governed by the law of the country in which the consumer has his habitual residence; and **Art.9(6)** provides, inter alia, that where the subject matter of a contract is a right in immovable property 'it shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.'

Scope of the Applicable Law: Article 10.

Art.10(1) provides that 'The law applicable to a contract by virtue of **Articles 3-6 and 12** of this Convention shall govern in particular:

- a. interpretation;
- b. performance;
- c. within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;
- d. the various ways of extinguishing obligations, and prescription and limitations of actions;
- e. the consequences of nullity of the contract.

Art 10(2) *In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.'*

Incapacity.

Art.11 provides that: 'In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'.

Other Provisions of the Rome Convention include:

Art. 12 which provides for voluntary assignment, i.e.:

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Art. 14(2) provides that a contract or act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum (say English law) **or** by the applicable law **or** by the law of the country where the contract was concluded (*lex loci contractus*), **providing** that such mode of proof can be administered by the forum. So, for example, in *Leroux v. Brown* (1852),¹³ where the plaintiff failed to enforce a contract valid by French law but unenforceable in English law because it was not evidenced in writing, the fact that the French courts permit an oral contract to be proved by oral evidence now means that an English court which, of course, also permits oral evidence, would be bound to admit such testimony in an enforcement action. Furthermore, if the plaintiff succeeded in gaining a favourable judgment in France, he would find it relatively easy to enforce it in England.

Art. 15: renvoi does not apply. Thus, the position is the same under the Rome Convention as it is at common law.

¹³ *Leroux v Brown* (1852) 12 CB 801

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Art. 16: 'The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum. *Collier* is of the opinion that "The use of the word 'manifestly' signifies that the exception must be restrictively applied and that the court must then 'find special grounds for upholding an objection' based on public policy."

Art. 17 the Convention does not apply retrospectively;

Art. 18 provides for uniform interpretation; and

Art. 19 relates to States with more than one legal system.

Art.30(1) provides that the Convention shall remain in force for 10 years [from 1/4/91] and

Art. 30(2) provides that '*If there has been no denunciation it shall be renewed tacitly every five years.*'

Summary

The Rome Convention applies to contractual obligations only. The liability of one party to compensate another for a tortious act is not provided for. That **Art.1** applies to '*... contractual obligations in any situation*' means that the Rome Convention is in no way restricted to the connection which a contract, or the parties to a contract, might have with a State which is party to the Convention. With respect to the matters to which the Rome Convention applies, the common law no longer applies: i.e., the Rome Convention *replaces* and does *not* supplement the common law in these matters.

CASE LAW

***Lightning v Lightning Electrical Contractors* [1998].¹⁴** Applicable Law. England or Scotland. Art 4 Rome Convention. Per Lord Justice Millett. ".... *If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located.*

Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired, since that would give B the unilateral power to decide on the legal consequences of the transaction which he had entered into with A. Accordingly, for the reasons given by my Lord, both as to the applicable law and as to the result in the Scottish proceedings, I agree that this appeal must be dismissed."

***Bank Of Scotland Of Mound v Butcher* [1998].¹⁵** This appeal raises a short point in the application of the Rome Convention. Is the proper law of a contract of guarantee between the Bank of Scotland and Mr David Butcher and Mr Sievewright Scottish or English and Welsh law? Held on appeal : Obligations not severable. Scottish law applies.

***Centrax v Citibank* [1999].¹⁶** Meaning of the Clause "*This Agreement and all documents, agreements and instruments related to this Agreement shall be governed by...the laws of the State of New York..... any action or dispute between the parties regarding any Payment Instrument shall be governed by ...the (Drawee's) laws....*" Whether agreement severable with different laws applying. Art 3 Rome I considered. Held : New York Law applied.

***GAN v Tai Ping Insurance* [1999].¹⁷** Conflicts : Applicable law in reinsurance contract : Does a follow on clause incorporate jurisdiction provisions of original contract - in this case Taiwanese Law ? Held : NO - there is an implied term in a reinsurance contract that the law of the reinsurers state applied. In this case English Law. Rome I considered.

¹⁴ *Lightning v Lightning Electrical Contractors Ltd* [1998] EWHC Admin 431 . Peter Gibson LJ; Henry LJ; Millett LJ. 23rd April 1998.

¹⁵ *Bank Of Scotland Of Mound v Butcher* [1998] EWCA Civ 1306 . Peter Gibson LJ; Aldous LJ; Potter LJ. 28th July 1998.

¹⁶ *Centrax Ltd v Citibank NA* [1999] EWCA Civ 892 . Roch LJ; Ward LJ; Waller LJ. 4th March 1999.

¹⁷ *GAN Insurance Company Ltd v Tai Ping Insurance Company Ltd* [1999] EWCA Civ 1524. Beldam LJ; Brooke LJ; Mummery LJ. 28th May 1999

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Raiffeisen v An Feng Steel [2001].¹⁸ Contractual assignment, whether English or French Law applied, the significance being that different outcomes would result that impacted upon the existence of an insurable interest, thus impacting upon the validity of the insurance claim. The court held that the contract was governed by Rome I : English Law applied. Per Lord Justice Mance : -

Principles governing identification of the appropriate law

26. Both parties accept that, at common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue: see *Macmillan Inc. v. Bishopsgate Investment Trust Plc* [1996] 1 WLR 387, 391-2 per Staughton LJ. The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.
27. While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law (cf also Dicey & Morris on *The Conflict of Laws*, 13th Ed. paragraph 2-005). That is implicit in the discussion in academic texts of the appropriate law by which to judge the validity of voluntary assignment: see e.g. Dicey at paragraph 24-049, *Cheshire and North's Private International Law* (13th Ed.) at page 957-8 and articles by P.J. Rogerson "The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading" (1990) CLJ 441 and M. Moshinsky "The Assignment of Debts in the Conflict of Laws" (1992) 109 LQR 591. So also, Professor Sir Roy Goode, while generally favouring as the appropriate law the *lex situs* of the debt assigned, prefers the law of the assignor's place of business in the context of global assignments of receivables, e.g. by factoring or discounting: cf *Commercial Law* (2nd Ed.) p.1128).
28. The three-stage process identified by Staughton LJ cannot therefore be pursued by taking each step in turn and in isolation. As Auld LJ said in *Macmillan*, at page 407: "... the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system" (emphasis added).
29. There is in effect an element of inter-play or even circularity in the three-stage process identified by Staughton L.J. But the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.
30. England, in common with France, is party to and has incorporated into its domestic law the principles of the Rome Convention. This led before us to abstract argument about whether an assignee's right or title to claim under the contract involves a question of contract or of (intangible) property. Viewing the issue of RZB's right or title to sue the insurers as involving a dispute about property, albeit intangible, the Appellants submit that all issues relating to property are subject to the *lex situs* of the relevant property; and that here that means French law, since the claim is on insurers resident in France. RZB in contrast submits that the case involves a dispute about contractual rights, the right to sue the insurers, and that the relevant law is, under article 12(2) of the Rome Convention, that governing the insurance contract.

¹⁸ *Raiffeisen Zentralbank Osterreich Ag v An Feng Steel Co. Ltd.* [2001] EWCA Civ 68 . Aldous LJ; Mance LJ; Mr Justice Charles. 26th January 2001.

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31. Article 12 provides:

"12.1 The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between assignor and assignee.

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

32. The Appellants emphasise that the Rome Convention is concerned with the law applicable to contractual obligations. The Guiliano-Lagarde report, which (under s.3(3) of the Contracts (Applicable Law) Act 1990) "may be considered in ascertaining the meaning or effect of any provision of that Convention", states in its commentary on article 1 (scope of the Convention):

"First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing between the various legal systems of the Member State of the Community."

33. National courts must clearly strive to take a single, international or "autonomous" view of the concept of contractual obligations, that is not blinkered by conceptions - such as perhaps consideration or even privity - that may be peculiar to their own countries. Further - and perhaps particularly so when the search is for an autonomous international view - the man-made concepts of contractual obligations and proprietary rights are neither so clear nor so inflexible that they may not receive shape from the subject matter and wording of the Convention itself. "

Print Concept v GEW [2001].¹⁹ If parties to what is often called a distributorship agreement do business in different countries but do not expressly agree what law is to govern their contractual relationship, it is often difficult to decide what that law should be. That is the problem which arises in this case where the parties agree that they entered into a binding contract in November 1995 for the exclusive distribution in Germany, Switzerland and Austria by the German claimants ("Print Concept") of air-cooled drying systems to be made and supplied by the defendants, G.E.W. (EC) Ltd ("GEW"), who carry on business in England. The answer to the problem is said to be of importance because the contract has now terminated and, if German law governs the contract, GEW will have to pay an indemnity assessed as a proportion of the average contractual turnover while the contract lasted, whereas no such indemnity is said to be payable if the contract is governed by English law. Held : The supply rather than the development of the German market the principle obligation. English supply - English law applied.

Aeolian Shipping v ISS [2001].²⁰ Conflicts ; English procedural law : Japanese Substantive Law. Vessel supplied with a Japanese turbo charge : This broke down : Second contract to supply a replacement – via Hong Kong distributor. Refusal to pay and claim for set off against broken down original. Held; English Law and jurisdiction – including English Conflicts of Law which resulted in Japanese substantive law applying – whereby there is no warranty of satisfactory quality beyond 6 month guarantee – and claim time barred under that law. Summary judgement ordered and confirmed on appeal.

Samcrete Egypt v Land Rover [2001].²¹ Arts 3 & 4 Rome Convention on the Law Applicable to Contractual Obligations ("the Rome Convention"). Contract of Guarantee Application for stay of proceedings.

Kenburn v Bergmann [2002].²² The appeal raises questions on Article 5 Brussels Convention / Civil Jurisdiction and Judgments Act 1982 and (as part of the inquiry called for under Article 5 Brussels Convention) on Article 4 Rome Convention as incorporated by the Contracts (Applicable Law) Act 1990.

¹⁹ *Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352*. Tuckey LJ; Longmore LJ; Sir Christopher Slade. 2nd March 2001.

²⁰ *Aeolian Shipping SA v ISS Machinery Services Ltd [2001] EWCA Civ 1162*. Potter LJ; Mance LJ; Sir Martin Nourse. 20th July 2001.

²¹ *Samcrete Egypt Engineers and Contractors S.a.e. v Land Rover Exports Ltd [2001] EWCA Civ 2019*. Thorpe LJ; Potter LJ. 21st December 2001.

²² *Kenburn Waste Management Ltd v Bergmann [2002] EWCA Civ 98*. Aldous LJ; Robert Walker LJ; Keene LJ. 30th January 2002.

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Amico v Cellstar [2002].²³ Applicable law : Cargo Insurance. Per Mr Justice David Steel :-

Choice of Governing law

12. It is common ground that the crucial threshold issue is the question of the governing law of the insurance contract. In the absence of a choice made by the parties, questions arise either under the **Rome Convention scheduled to the Contracts (Applicable Law) Act 1990** or under the **Directive on Non-life Insurance scheduled to the Insurance Companies Act 1982**, the identification of the relevant statutory provisions depending on whether the contract covers risks situated within or without a Member State of the European Community.
13. Nonetheless, wherever the risks are situated, it is open to the parties to choose any law for the governing law of the contract: see **Insurance Companies Act, Schedule 3 (A), Paragraph 1 (1) and 1 (6)** and the **Rome Convention, Article 3 (1)**. Where, as here, no choice is actually expressed, the choice must be "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."
14. Whilst the commentary in the **Giuliano & Lagarde Report** on the Convention contains some examples of where a "real" choice might be demonstrated (e.g. the use of a standard form associated with a particular legal system, a previous course of dealing with an express choice of law, a choice of a particular forum and so on), the examples do not encompass the present case.
15. It was the defendants' submission that the parties had demonstrated a real choice of Texas law. They relied on the following matters:-
 - a) The described assured was a parent company with an address in Texas which was its principal place of business.
 - b) The assured engaged a Texas agent to broke the policy.
 - c) The policy was issued by an insurance company that was authorised to do business in Texas.
 - d) The policy was issued in Texas.
16. The claimant asserts that these factors do not demonstrate a real choice. However in my judgment, the focus on Texas being the state in which the policy was negotiated and issued, as between an assured, who employed a Texas broker, and an insurer situated in Texas, does not just identify circumstances which demonstrate a close connection with Texas. Furthermore, in my judgment, it goes well beyond merely giving rise to an inference of the choice that the parties might have made. It is only consistent with Texas Law being the chosen governing law. This conclusion receives some significant support from Clause 25:-

"25. Time for suit. No suit or action for the recovery of any claim arising out of this policy shall be maintainable in any Court unless such suit or action shall have been commenced within twelve months from the date of the happening of the loss out of which the said claim arose; provided, however, that if, by **the laws of the State within which this policy is issued** (emphasis added) such limitation is invalid, then any such claim shall be void unless action is commenced within the shortest limit of time permitted by the laws of such State."
17. Accordingly, I conclude that the terms of the contract, taken with the general circumstances of the case, demonstrate with reasonable certainty that the parties made a real choice to the effect that the insurance contract should be governed by Texas law. "

East West v DKBS [2002].²⁴ "Goods shipped by the claimants in Hong Kong in containers were carried to Chile on the defendants' liner services; they were cleared through customs and delivered to a person not entitled to the goods without presentation of the bills of lading. To such a claim, a shipowner would normally have no defence, but the circumstances in this case are said by the defendants to provide them with a defence on several cumulative and alternative grounds. The issues give rise to points on the Carriage of Goods by Sea Act 1924, the delivery obligations under bills of lading and the law of Chile, including an issue on the scope of Article 4 of the Hamburg Rules which are in force in Chile." English Law applied.

Import Export Metro v C.S.A. De Vapores [2003].²⁵ Applicants apply (1) for a declaration that the English Court should not exercise any jurisdiction which it may have over the dispute ; (2) for an order that the issue and service of the Claim Form out of the jurisdiction be set aside; (3) for an order staying the proceedings before the English Court on the grounds that Chile is the most appropriate forum for the resolution of the

²³ *American Motorists Insurance Co. (Amico) v Cellstar Corporation* [2002] EWHC 421 (Comm). Mr Justice D.Steel. 15th March 2002

²⁴ *East West Corporation v DKBS 1912* [2002] EWHC 83 (Comm). Mr Justice Thomas. 7th February 2002.

²⁵ *Import Export Metro Ltd. v Compania Sud Americana De Vapores S.A.* [2003] EWHC 11 (Comm). Mr Justice Gross. 23rd January 2003.

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dispute. Bill of lading subject to English Law & Jurisdiction. Mis-delivery on unendorsed bills of lading. Delivery on faxed documents and allegations of fraud. Significant differences as to legality of delivery under English and Chilean law. Held : English Law applied despite commencement of a Chilean action.

***Staines v Walsh* [2003].**²⁶ Applicable law in absence of choice by the parties. Rome I applied - English Law governed the dispute.

***Base Metal v Shamurin* [2003].**²⁷ Conflicts : Choice of Law : Extensive review of cases & Rome Convention. Falling out between Russian Trading Partners.

***Base Metal v Shamurin* [2004].**²⁸ "This appeal raises a number of important choice of law issues. They arise from a judgment of Tomlinson J. who dismissed a claim by Base Metal Trading Ltd. (BMTL) against Mr Shamurin. BMTL, a Guernsey company, claimed damages against Mr Shamurin, a Russian national and its former director and employee, for breach of a common law, equitable and/or implied contractual duty of care by entering into speculative trades on the London Metal Exchange on its behalf. It was common ground that such claims were not actionable under Russian law and in any event would have been time-barred in Russia. The judge held that Russian law was the proper law of each claim. He also indicated that even if Guernsey law or English law (which were taken to be the same) applied no breach of duty had been established against Mr Shamurin. BMTL now accept the judge's finding that Russian law was the proper law of Mr Shamurin's contract of employment, but challenges his other findings. The judge was right to conclude that Russian law was the proper law of the claim in tort. Guernsey law, the law of the place of BMTL's incorporation, was the proper law of the claim in equity. The judge was right to conclude that BMTL had failed to establish any breach of duty by Mr Shamurin. Accordingly I would dismiss this appeal."

***Booth v Phillips* [2004] EWHC 1437 (Admlty).**²⁹ Actions in negligence - tort : and breach of employer's duty to provide safe place of work under contract. Crew member died in an accident at sea. Widow as claimant. Vessel Liberian : Jordanian management company. 1st defendant in UK; 2nd - 4th defendants overseas. In absence of choice of law, whilst no other English connection - no connection to Jordan either. English law and jurisdiction applied. Standards of care international - applied to all states.

***Travelers v Sun Life* [2004].**³⁰ Range of claimants in EU, US & Canada. Application to stay English action to Canada. Some of the policies contained arbitration clauses in respect of US and Canada – others did not. Events all occurred in England. Most evidence to be adduced from England but significant evidence due from Canada. On a balance, England the appropriate forum, in absence of clear choice of law and forum. Stay refused.

***Ophthalmic Innovations (UK) v Ophthalmic Innovations Inc.* [2004].**³¹ Packaging caused contact lenses to cloud up after implant. Action commenced in the US but not disclosed when application to serve out of jurisdiction made and granted. Here set aside granted. Applicable law US.

***Pan Indonesia Bank v Marconi* [2005].**³² The claim of Marconi is for damages for breach of contract in respect of the failure of Panin Bank to honour its obligations as confirmer of a letter of credit, pursuant to which Marconi drew various drafts and presented them to Panin Bank under the terms of the credit and which Panin Bank failed to accept. The appeal principally concerns the proper application of Article 4 of the Rome Convention on the Law Applicable to Contractual Obligations ("The Rome Convention), incorporated into English law by the Contracts (Applicable Law) Act 1990.

²⁶ *Staines v Walsh* [2003] EWHC 458 (Ch). Mr Justice Goldring. 14th March 2003.

²⁷ *Base Metal Trading Ltd. v Shamurin* [2003] EWHC 2419 (Comm). Mr Justice Tomlinson. 22nd October 2003

²⁸ *Base Metal Trading Ltd. v Shamurin* [2004] EWCA Civ 1316 . Tuckey LJ; Arden LJ; Mr Justice Newman. 14th October 2004.

²⁹ *Booth v Phillips* [2004] EWHC 1437 (Admlty) . Nigell Teare QC. 17th June 2004.

³⁰ *Travelers Casualty & Surety Co Europe Ltd v Sun Life Ass Co Canada* [2004] EWHC 1704 (Comm). Jonathan Hirst QC. 16th July 2004.

³¹ *Ophthalmic Innovations International (UK) Ltd v Ophthalmic Innovations International Inc.* [2004] EWHC 2948 (Ch). Mr Justice Lawrence Collins. 16th December 2004.

³² *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] EWCA Civ 422. Potter LJ; Buxton LJ; Hooper LJ. 27th April 2005.

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

***Oakley v Ultra Vehicle Design* [2005].**³³ Two companies in administration - one in UK one in Germany. Disputed ownership of a valuable vehicle. Held : English jurisdiction : but in the face of uncontested oral evidence of a German choice of law, German Law applied. Rome I applied.

***O.T. Africa Line Ltd v Magic Sportswear Corporation* [2005] EWCA Civ 710.**³⁴ “The critical question in the present appeal is whether an English court, on which the parties to a contract of carriage have conferred exclusive jurisdiction to resolve their disputes, should in its discretion decline to stay proceedings in this country and grant injunctive relief to restrain one of the parties from bringing and continuing proceedings in the courts of a country whose law permits proceedings to be brought in those courts. The traditional answer to this question has in the past been that it depends on the proper law of the contract of carriage. If the proper law provides that the exclusive jurisdiction clause is unenforceable, the English court will have no regard to it; if the proper law says that it is enforceable, or enforceable in the absence of strong reason for it not to be enforced and no such strong reason exists, the question will then arise whether, as a matter of discretion, it is appropriate to support that enforceability by injunctive relief..”

It can often be difficult to ascertain the proper law of contracts of carriage whereby goods are shipped in one country for delivery in another country on board a ship whose owners may carry on business in a third country. For this reason it is common for the parties to the carriage contract to agree on the law which is to govern their relationship. In the present case the contract of carriage did contain such an agreement viz that it should be governed by English law. There can be no doubt that in the light of such agreement, the proper law of the contract was English law. It would, therefore, on any ordinary view of the principles of private international law, be English law which determines whether the exclusive jurisdiction clause applies to the dispute; it should also be a matter of English law to determine whether it is appropriate to restrain any party from acting contrary to the clause by bringing proceedings in some court other than that provided for by that clause.”

***Dornoch v Mauritius* [2005].**³⁵ Applications for (i) a declaration that the Excess Reinsurance had been validly avoided on account of non-disclosure or material misrepresentation by MUA; (ii) a declaration that the claimants (“the Reinsurers”) were not liable to MUA because the claims, even if proved, fell outside the scope of the Excess Reinsurance; (iii) damages for misrepresentation pursuant to the Misrepresentation Act 1967, as against MUA; (iv) damages for deceit, alternatively damages for negligent misstatement, as against MCB. Cross application for stay : Reinsurance - evidence of fraud in handling of original policies - subject to Mauritius Law and concurrent actions. Whether English Law applied to reinsurance.

***Tavoulareas v Tsavlis* [2005].**³⁶ Mr. George Tsavlis, the 1st defendant, has applied to set aside a judgment entered against him in default of acknowledgment of service on 17 January 2002. The defendant in the 2nd action is Alexander G Tsavlis and Sons Maritime Company, a Greek company. AGT Co have brought an application challenging the jurisdiction of this court over the proceedings.

***T&N v In the matter of the Insolvency Act 1986* [2005].**³⁷ The issues in summary are as follows. First, assuming that the relevant act or omission giving rise to a particular US Asbestos Claim occurred before 1 May 1996 but the resulting damage did not occur until after that date, will the choice of law applicable in England to the claims be governed by the common law or by the Private International Law (Miscellaneous Provisions) Act ? This turns on the construction of s14 of the Act. Secondly, assuming that the choice of law applicable to a claim would be governed by the common law, would the court apply English law to the claim, unless and to the extent that US law was applied by way of the exception confirmed by the Privy Council in ***Red Sea Insurance Ltd v Bouygues SA* [1995] 1 AC 190**. Thirdly, if by way of the exception US law was exclusively applied to the claim, would the quantification of damages be treated as a matter of procedure and therefore governed by English law as the *lex fori*? Fourthly, the same question is raised on the assumption that the choice of law applicable to the US Asbestos Claims was governed by the 1995 Act.

³³ ***Oakley v Ultra Vehicle Design Ltd.* [2005] EWHC 872 (Ch)** . Mr Justice Lloyd. 25th May 2005.

³⁴ ***O.T. Africa Line Ltd v Magic Sportswear Corporation* [2005] EWCA Civ 710.** Laws LJ; Rix LJ; Longmore LJ. 13th June 2005 : ***O.T. Africa Line Ltd. v Magic Sportswear Corporation* [2004] EWHC 2441 (Comm)** . Mr Justice Langley. 3rd November 2004

³⁵ ***Dornoch Ltd. v Mauritius Union Assurance Co Ltd.* [2005] EWHC 1887 (Comm)**. Mr Justice Aikens. 19th August 2005.

³⁶ ***Tavoulareas v Tsavlis* [2005] EWHC 2140 (Comm)**. Mr Justice Andrew Smith. 12th October 2005.

³⁷ ***T&N Ltd v In the matter of the Insolvency Act 1986* [2005] EWHC 2990 (Ch)**. Mr Justice David Richards. 21st December 2005

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Horn Linie v Panamericana [2006].³⁸ Choice of Law : Conflict : UK or Columbian Law. Whether HVR apply. Anti-suit injunction.

Habib Bank v Central Bank of Sudan [2006].³⁹ “The contracts sued on (the undertakings to honour HBL’s claim for principal and interest provided all terms and conditions were complied with) predate the coming into force of the Contracts (Applicable Law) Act 1990. The proper law of the contracts must therefore be established by reference to common law principles. There was no express choice of law. The governing law is therefore that of the country with which the contract has its closest and most real connection. In fact the position is essentially the same under the 1990 Act. Whether the contract was a unilateral or a bi-lateral contract, the contemplated performance by HBL was notification and confirmation of the letters of credit, inspection of the documents presented and negotiation of the documents. All of these steps involved action to be taken in England and I am in no doubt that England is the country with the closest and most real connection to the contracts.”

Travelers Casualty Canada v Sun Life [2006].⁴⁰ Insurance : Held : Closest connection Canada so Canadian Law to apply.

Albon v Naza [2007].⁴¹ Stay s9 : forum ; Multi-faceted dispute : car sales to Malaysia : some aspects subject to Malaysian arbitration : other aspects entirely UK based and not subject to arbitration. Permission to pursue certain claims annulled. Canvases jurisdiction, governing law and merits of action.

Tamil Nadu Electricity Board v St-Cms Electric Co [2007].⁴² Conflicts - whether English or Indian law applies. Mr Justice Cooke. 16th July 2007

Sharab v HRH Prince Al-Waleed Bin Talal Bin Abdal-Aziz Al-Saud [2008].⁴³ Whether court should decline jurisdiction or rule that Libya the most appropriate forum and if so whether English Law applied. Held : In the interests of justice issue of writ out of jurisdiction granted - case should be heard before the High Court.

74. Reliance on CPR 6.20(5)(c) entails a claimant establishing a good arguable case that (1) the claim is in respect of a contract, (2) there was a contract and (3) the contract is governed by English law. There is no question of there having been an express choice of English law. Accordingly, the default position falls to be ascertained in accordance with the choice of law rules in Article 4 of the EEC Convention on the Law Applicable to Contractual Obligations (“the Rome Convention”) which has been incorporated in the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. In its application to the present facts, the position is follows. First, the general rule is that the contract is governed by the law of the country with which it is most closely connected (Art.4(1)). Secondly, that is presumed to be the country where the party who is to effect “the performance which is characteristic of the contract” has, at the time of conclusion of the contract, “his habitual residence” if an individual (Art. 4(2)). Thirdly, that first presumption is displaced in favour of a second presumption if the contract is entered into in the course of that party’s trade or profession. Then, the relevant country is (a) the country in which the principal place of business is situated or (b) where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated (Art. 4(2)). Fourthly, neither of the two presumptions applies in two situations: (a) if the characteristic performance cannot be determined or (b) if it appears from the circumstances as a whole that the contract is more closely connected with another country (Art. 4(5)).

75. The approach adopted by English courts is that a presumption should be disapplied on the basis that it appears that the contract is more closely connected with another country only if it clearly so appears (Dicey, para. 32-126 and the cases there referred to). In principle “the presumption may most easily be rebutted in those cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract” (Dicey, para. 32-127, as approved in *Bank of Baroda v Vysya Bank Ltd.* [1994] 2 Lloyd’s Rep 87, 93.

³⁸ **Horn Linie GmbH & Co v Panamericana Formas E Impresos SA** [2006] EWHC 373 (Comm). Mr Justice Morison. 6th March 2006.

³⁹ **Habib Bank Ltd v Central Bank of Sudan** [2006] EWHC 1767 (Comm) . Mr Justice Field. 19th July 2006

⁴⁰ **Travelers Casualty & Surety Co Canada v Sun Life Assurance Co Canada (UK) Ltd** [2006] EWHC 2716 (Comm) Mr Justice Christopher Clarke. 1st November 2006

⁴¹ **Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD** [2007] EWHC 9 (Ch). Mr Justice Lightman. 23rd January 2007

⁴² **Tamil Nadu Electricity Board v St-Cms Electric Company Private Ltd** [2007] EWHC 1713 (Comm). Mr Justice Cooke. 16th July 2007

⁴³ **Sharab v HRH Prince Al-Waleed Bin Talal Bin Abdal-Aziz Al-Saud** [2008] EWHC 1893 (Ch). John L. Powell Q.C. 31st July 2008

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76. The Rome Convention does not define what is meant by characteristic performance of a contract (Dicey, para. 32-116). The concept is derived from Continental jurisprudence. In accordance with that jurisprudence, in the case of a bilateral contract where the performance of one party takes the form of payment of money, that is not the characteristic performance. Rather it is the service for which the payment is due which is characteristic of the contract. Thus in the case of an agency contract, the characteristic performance is that of the agent.

FURTHER READING

Clarkson & Hill. Jaffey on the Conflict of Laws. London: Butterworths, 1997, Ch.5

Collier, Conflict of Laws. Cambridge: C.U.P., 2/e 1994, Ch.12

North & Fawcett, Cheshire and North's Private International Law. London: Butterworths, 13/e 1999, Ch.18

O'Brien. Smith's Conflict of Laws, 2/e. London: Cavendish, 1999, pp314-369.

Short-Answer Workshop Questions

1. In what circumstances may a contract be severable, and if so, to what extent do you consider it to be appropriate that different laws might govern different aspects of a dispute?
2. How do the courts approach a situation where there are concurrent actions in contract and tort in relation to disputes about the applicable law?
3. Is there any distinction at all between the substantive applicable law and procedural rules regarding the award of damages and interest?

LECTURE THIRTEEN

Contracts (Applicable Law) Act 1990 (c. 36)

An Act to make provision as to the law applicable to contractual obligations in the case of conflict of laws.

1 Meaning of “the Conventions”

In this Act—

- (a) “these Conventions and this Protocol” means the Convention on the law applicable to contractual obligations opened for signature in Rome on 19th June 1980 and signed by the United Kingdom on 7th December 1981;
- (b) “these Conventions and this Protocol” means the Convention on the accession of the Hellenic Republic to the Rome Convention signed by the United Kingdom in Luxembourg on 10th April 1984; and
- (c) “these Conventions and this Protocol” means the first Protocol on the interpretation of the Rome Convention by the European Court signed by the United Kingdom in Brussels on 19th December 1988;
- (d) “the Funchal Convention” means the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Rome Convention and the Brussels Protocol, with adjustments made to the Rome Convention by the Luxembourg Convention, signed by the United Kingdom in Funchal on 18th May 1992;]
- (e) “the 1996 Accession Convention” means the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention and the Brussels Protocol, with the adjustments made to the Rome Convention by the Luxembourg Convention and the Funchal Convention, signed by the United Kingdom in Brussels on 29th November 1996;]

and the Rome Convention, the Luxembourg Convention and the Brussels Protocol are together referred to as “the Conventions”.

2 Conventions to have force of law

- (1) Subject to subsections (2) and (3) below, the Conventions shall have the force of law in the United Kingdom.
- (1A) The internal law for the purposes of Article 1(3) of the Rome Convention is the provisions of the regulations for the time being in force under section 424(3) of the Financial Services and Markets Act 2000
- (2) Articles 7(1) and 10(1)(e) of the Rome Convention shall not have the force of law in the United Kingdom.
- (3) Notwithstanding Article 19(2) of the Rome Convention, the Conventions shall apply in the case of conflicts between the laws of different parts of the United Kingdom.
- (4) For ease of reference there are set out in Schedules 1, 2 and 3, 3A and 3B to this Act respectively the English texts of—
 - (a) the Rome Convention;
 - (b) the Luxembourg Convention; and
 - (c) the Brussels Protocol. And
 - (d) the Funchal Convention; and
 - (e) the 1996 Accession Convention

3 Interpretation of Conventions

- (1) Any question as to the meaning or effect of any provision of the Conventions shall, if not referred to the European Court in accordance with the Brussels Protocol, be determined in accordance with the principles laid down by, and any relevant decision of, the European Court.
- (2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question.
- (3) Without prejudice to any practice of the courts as to the matters which may be considered apart from this subsection—
 - (a) the report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde which is reproduced in the Official Journal of the [O.J.1980 No.C282/1.] Communities of 31st October 1980 may be considered in ascertaining the meaning or effect of any provision of that Convention; and
 - (b) any report on the Brussels Protocol which is reproduced in the Official Journal of the Communities may be considered in ascertaining the meaning or effect of any provision of that Protocol.

4 Revision of Conventions etc

- (1) If at any time it appears to Her Majesty in Council that Her Majesty’s Government in the United Kingdom—
 - (a) have agreed to a revision of any of the Conventions (including, in particular, any revision connected with the accession to the Rome Convention of any state); or
 - (b) have given notification in accordance with Article 22(3) of the Rome Convention that either or both of the provisions mentioned in section 2(2) above shall have the force of law in the United Kingdom,Her Majesty may by Order in Council make such consequential modifications of this Act or any other statutory provision, whenever passed or made, as Her Majesty considers appropriate.

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(2) An Order in Council under subsection (1) above shall not be made unless a draft of the Order has been laid before Parliament and approved by a resolution of each House.

(3) In subsection (1) above—

“modifications” includes additions, omissions and alterations;

“revision” means an omission from, addition to or alteration of any of the Conventions and includes replacement of any of the Conventions to any extent by another convention, protocol or other description of international agreement; and

“statutory provision” means any provision contained in an Act, or in any Northern Ireland legislation, or in—

(a) subordinate legislation (as defined in section 21(1) of the [1978 c. 30.] Interpretation Act 1978); or

(b) any instrument of a legislative character made under any Northern Ireland legislation.

5 **Consequential amendments**

The enactments specified in Schedule 4 to this Act shall have effect subject to the amendments specified in that Schedule.

6 **Application to Crown**

This Act binds the Crown.

7 **Commencement**

This Act shall come into force on such day as the Lord Chancellor and the Lord Advocate may by order made by statutory instrument appoint; and different days may be appointed for different provisions or different purposes.

8 **Extent**

(1) This Act extends to Northern Ireland.

(2) Her Majesty may by Order in Council direct that all or any of the provisions of this Act shall extend to any of the following territories, namely—

(a) the Isle of Man; (b) any of the Channel Islands; (c) Gibraltar;

(d) the Sovereign Base Areas of Akrotiri and Dhekelia (that is to say, the areas mentioned in section 2(1) of the [1960 c. 52.] Cyprus Act 1960).

(3) An Order in Council under subsection (2) above may modify this Act in its application to any of the territories mentioned in that subsection and may contain such supplementary provisions as Her Majesty considers appropriate; and in this subsection “modify” shall be construed in accordance with section 4 above.

9 **Short title**

This Act may be cited as the Contracts (Applicable Law) Act 1990.

SCHEDULES

Section 2.

SCHEDULE 1 THE ROME CONVENTION

The High Contracting Parties to the Treaty establishing the European Economic Community,
Anxious to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,
Wishing to establish uniform rules concerning the law applicable to contractual obligations,
Have agreed as follows:

TITLE I SCOPE OF THE CONVENTION

Article 1 *Scope of the Convention*

1 The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2 They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

-wills and succession,

-rights in property arising out of a matrimonial relationship,

-rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

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- (c) 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;
 - (d) arbitration agreements and agreements on the choice of court;
 - (e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
 - (f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;
 - (g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
 - (h) evidence and procedure, without prejudice to Article 14.
- 3 The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.
 - 4 The preceding paragraph does not apply to contracts of re-insurance.

Article 2 Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II UNIFORM RULES

Article 3 Freedom of choice

- 1 A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
- 2 The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
- 3 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*".
- 4 The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

- 1 To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
- 2 Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
- 3 Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.
- 4 A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

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- 5 Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5 Certain consumer contracts

- 1 This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
- 2 Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
 - if the other party or his agent received the consumer's order in that country, or
 - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.
- 3 Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.
- 4 This Article shall not apply to:
- (a) a contract of carriage;
 - (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.
- 5 Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6 Individual employment contracts

- 1 Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
- 2 Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
- (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
 - (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
- unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7 Mandatory rules

- 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. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
- 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.

Article 8 Material validity

- 1 The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
- 2 Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

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Article 9 Formal validity

- 1 A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
- 2 A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
- 3 Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
- 4 An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.
- 5 The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.
- 6 Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 Scope of the applicable law

- 1 The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
 - (a) interpretation;
 - (b) performance;
 - (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;
 - (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
 - (e) the consequences of nullity of the contract.
- 2 In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11 Incapacity

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

Article 12 Voluntary assignment

- 1 The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
- 2 The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13 Subrogation

- 1 Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.
- 2 The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14 Burden of proof, etc.

- 1 The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.
- 2 A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

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Article 15 Exclusion of renvoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 Ordre public

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

Article 17 No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19 States with more than one legal system

- 1 Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.
- 2 A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20 Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.

Article 21 Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22 Reservations

- 1 Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:
(a) the provisions of Article 7(1); (b) the provisions of Article 10(1)(e).
- 2 Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 27(2), make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.
- 3 Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III FINAL PROVISIONS

Article 23

- 1 If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.
- 2 Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.
- 3 If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

- 1 If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out

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in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

- 2 The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24(1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27

- 1 This Convention shall apply to the European territories of the Contracting States, including Greenland, and to the entire territory of the French Republic.
- 2 Notwithstanding paragraph 1:
 - (a) this Convention shall not apply to the Faroe Islands, unless the Kingdom of Denmark makes a declaration to the contrary;
 - (b) this Convention shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory;
 - (c) this Convention shall apply to the Netherlands Antilles, if the Kingdom of the Netherlands makes a declaration to that effect.
- 3 Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities.
- 4 Proceedings brought in the United Kingdom on appeal from courts in one of the territories referred to in paragraph 2(b) shall be deemed to be proceedings taking place in those courts.

Article 28

- 1 This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.
- 2 This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities.

Article 29

- 1 This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.
- 2 This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

- 1 This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29(1), even for States for which it enters into force at a later date.
- 2 If there has been no denunciation it shall be renewed tacitly every five years.
- 3 A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27(2).
- 4 The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

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- (a) the signatures;
- (b) the deposit of each instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Convention;
- (d) communications made in pursuance of Articles 23, 24, 25, 26, 27 and 30;
- (e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

PROTOCOL

The High Contracting Parties have agreed upon the following provision which shall be annexed to the Convention:

Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:

- in Denmark, paragraphs 252 and 321(3) and (4) of the “Sølov”(maritime law);
- in Sweden, Chapter 13, Article 2(1) and (2), and Chapter 14, Article 1(3), of “sjölagen”(maritime law);
- in Finland, Chapter 13, Article 2(1) and (2), and Chapter 14, Article 1(3) of “merilaki”/ “sjölagen”(maritime law).]

SCHEDULE 2 THE LUXEMBOURG CONVENTION

The High Contracting Parties to the Treaty establishing the European Economic Community, Considering that the Hellenic Republic, in becoming a Member of the Community, undertook to accede to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, Have decided to conclude this Convention, and to this end have designated as their plenipotentiaries:
(Designation of plenipotentiaries)
Who, meeting within the Council, having exchanged their full powers, found in good and due form, Have agreed as follows:

Article 1

The Hellenic Republic hereby accedes to the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980.

Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.

Article 3

This Convention shall be ratified by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.

Article 5

The Secretary-General of the Council of the European Communities shall notify the Signatory States of:

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- (a) the deposit of each instrument of ratification;
- (b) the dates of entry into force of this Convention for the Contracting States.

Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

SCHEDULE 3 THE BRUSSELS PROTOCOL

The High Contracting Parties to the Treaty establishing the European Economic Community,
Having regard to the Joint Declaration annexed to the Convention on the law applicable to contractual obligations,
opened for signature in Rome on 19 June 1980,

Have decided to conclude a Protocol conferring jurisdiction on the Court of Justice of the European Communities to interpret that Convention, and to this end have designated as their Plenipotentiaries:

(Designation of plenipotentiaries)

Who, meeting within the Council of the European Communities, having exchanged their full powers, found in good and due form,

Have agreed as follows:

Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of—

- (a) the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, hereinafter referred to as “the Rome Convention”;
- (b) the Convention on accession to the Rome Convention by the States which have become Members of the European Communities since the date on which it was opened for signature;
- (c) this Protocol.

Article 2

Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:

- (a) in Belgium: la Cour de cassation (het Hof van Cassatie) and le Conseil d'Etat (de Raad van State),
in Denmark: Højesteret,
in the Federal Republic of Germany: die obersten Gerichtschöfe des Bundes,
in Greece: τα ανωτάτα Αικαστήρια,
in Spain: el Tribunal Supremo,
in France: la Cour de cassation and le Conseil d'Etat,
in Ireland: the Supreme Court,
in Italy: la Corte suprema di cassazione and il Consiglio di Stato,
in Luxembourg: la Cour supérieure de Justice, when sitting as Cour de cassation,
in the Netherlands: de Hoge Raad,
in Portugal: o Supremo Tribunal de Justiça and o Supremo Tribunal Administrativo,
in the United Kingdom: the House of Lords and other courts from which no further appeal is possible;
- (b) the courts of the Contracting States when acting as appeal courts.

Article 3

- 1 The competent authority of a Contracting State may request the Court of Justice to give a ruling on a question of interpretation of the provisions contained in the instruments referred to in Article 1 if judgments given by courts of that State conflict with the interpretation given either by the Court of Justice or in a judgment of one of the courts of another Contracting State referred to in Article 2. The provisions of this paragraph shall apply only to Judgments which have become res judicata.
- 2 The interpretation given by the Court of Justice in response to such a request shall not affect the Judgments which gave rise to the request for interpretation.

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- 3 The Procurators-General of the Supreme Courts of Appeal of the Contracting States, or any other authority designated by a Contracting State, shall be entitled to request the Court of Justice for a ruling on interpretation in accordance with paragraph 1.
- 4 The Registrar of the Court of Justice shall give notice of the request to the Contracting States, to the Commission and to the Council of the European Communities; they shall then be entitled within two months of the notification to submit statements of case or written observations to the Court.
- 5 No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.

Article 4

- 1 Except where this Protocol otherwise provides, the provisions of the Treaty establishing the European Economic Community and those of the Protocol on the Statute of the Court of Justice annexed thereto, which are applicable when the Court is requested to give a preliminary ruling, shall also apply to any proceedings for the interpretation of the instruments referred to in Article 1.
- 2 The Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 188 of the Treaty establishing the European Economic Community.

Article 5

This Protocol shall be subject to ratification by the Signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 6

- 1 To enter into force, this Protocol must be ratified by seven States in respect of which the Rome Convention is in force. This Protocol shall enter into force on the first day of the third month following the deposit of the instrument of ratification by the last such State to take this step. If, however, the [O.J.1989 NO.148/17.] Second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, concluded in Brussels on 19 December 1988, enters into force on a later date, this Protocol shall enter into force on the date of entry into force of the Second Protocol.
- 2 Any ratification subsequent to the entry into force of this Protocol shall take effect on the first day of the third month following the deposit of the instrument of ratification provided that the ratification, acceptance or approval of the Rome Convention by the State in question has become effective.

Article 7

The Secretary-General of the Council of the European Communities shall notify the Signatory States of:

- (a) the deposit of each instrument of ratification;
- (b) the date of entry into force of this Protocol;
- (c) any designation communicated pursuant to Article 3(3);
- (d) any communication made pursuant to Article 8.

Article 8

The Contracting States shall communicate to the Secretary-General of the Council of the European Communities the texts of any provisions of their laws which necessitate an amendment to the list of courts in Article 2(a).

Article 9

This Protocol shall have effect for as long as the Rome Convention remains in force under the conditions laid down in Article 30 of that Convention.

Article 10

Any Contracting State may request the revision of this Protocol. In this event, a revision conference shall be convened by the President of the Council of the European Communities.

Article 11

This Protocol, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.