

LECTURE TWELVE

Choice of Law in Tort under the **Private International Law (Miscellaneous Provisions) Act 1995** as amended by **Regulation (EC) No 864/2007** on the law applicable to non-contractual obligations (Rome II)

Aim:

To focus on the choice of law in tort under the provisions of the **Private International Law (Miscellaneous Provisions) Act 1995** as amended by **Regulation (EC) No 864/2007 – Rome II**.

Objectives.

After carefully reading the following notes & other prescribed readings for this lecture you should be able to:

1. Discuss the merits of each of the theoretical models for the choice of law in tort;
2. Critically evaluate the development and interpretation of elements of the double actionability rule; &
3. Discuss the provisions of the **Private International Law (Miscellaneous Provisions) Act 1995** (*defamation excepted*) in relation to the choice of law in tort, as amended by **Regulation (EC) No 864/2007** (*defamation included*) that have replaced the common law.

Choice of Law in Tort: Theoretical Models

The three theoretical models that have been considered in respect of the choice of law in tort have been:

- (i) **the *lex loci delicti*** - the law of the place where the tort was committed - a place that might be entirely fortuitous, having no close connection with law of the injured parties, e.g., an aircraft crash in Germany involving an aircraft made in America, which is operated by an American company and has British passengers as victims;
- (ii) **the *lex fori*** - the law of the place where the tort is litigated - a model that might encourage forum shopping, i.e., seeking to litigate in the country having jurisdiction and the most favorable laws as far as the plaintiff is concerned; and
- (iii) **the *proper law of the tort***, i.e., litigating in the country having the closest and most real connection with the tort.

When the tort was committed in England, a consistent line of authority¹ established that English law, alone, applied. The focus here accordingly, is on the development of the choice of law in tort when the tort has been committed abroad.

Where the tort was committed abroad, a '*double actionability*' test evolved from *Phillips v. Eyre* (1870) LR 6 QB 1. This requirement for '*double actionability*' meant that to be actionable the act (tort) had to be unlawful both in the country where the act was committed and under English law, which unduly favoured defendants.

Choice of Law in Tort at Common Law When the Tort was Committed Abroad:

- (i) **1870-1971.** In *Phillips v. Eyre* (1870),² *Willes J* stated that: "*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.*"

However, there was no consistency in the meaning of a '*wrong*' alleged to have been committed abroad.

- (ii) **1971- April 1996** (following *Boys v. Chaplin* [1971],³ as extended in *Red Sea Insurance v Bouygues* [1995].⁴) for all torts other than Defamation.

¹ from *Szalatnay-Stacho v. Fink* [1947] 1 KB 1; through *Metall und Rohstoff AG v. Donaldson, Lufkin and Jenerette Inc.* [1990] 1 QB 391; to *Arab Monetary Fund v. Hashim* (1996) 1 LR 589

² *Phillips v Eyre*, (1870) LR 6 QB 1. First limb developed out of *The Halley* (1868) LR 2 PC 193. The second limb was for a time limited to prescription by foreign criminal law : See also *Machado v Fontes* [1897] 2 QB 231

³ *Boys v. Chaplin* [1971] AC 356.

⁴ *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190

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Summary of the Perceived Need for Reform of the Choice of Law rules in Tort

At common law, none of the theoretical models for the choice of law in tort was free of criticism. Moreover, the double actionability rule, as actually employed from the time *Phillips v Eyre* was decided up to the time of its modification by the House of Lords in *Boys v. Chaplin*, and the later interpretations of the modified rule, was the subject of far greater criticism. Central to this criticism was that an action in the English courts in respect of a tort committed abroad could fail if the defendant wasn't liable under English law (as required under the first limb of *Phillips v Eyre* as modified) even if it involved parties none of whom had any connection with England other than the fact that the case was litigated there. Nevertheless, the undue prominence of the parochial nature of the double actionability rule persisted for more than 125 years from the date of the decision in *Phillips v Eyre* until its displacement by the provisions of **Part III of the Private International Law (Miscellaneous Provisions) Act 1995** for most choice of law situations in tort, defamation being the specific exception. The 1995 Act was, in fact, the outcome of a Law Commission Working Paper dating back to 1984 and a further report in 1990. The provisions of Part III of the Act came into force on the 1st May 1996.

Purpose and Scope of Part III of the 1995 Act

The provisions of **PILA Part III** are specified in **s.9(1)** as applying to 'issues relating to tort' and **s.9(2)** relates to characterisation and provides that as to what constitutes a tort remains a matter for the courts of the forum. **S.10** then expressly abolishes the common law double actionability rule and the exception to it. The statutory replacements for the abolished common law rules commence in **s.11** which provides for the general rule being that the applicable law is the law of the country in which the events (or the most significant events) constituting the tort occurred. **Exceptions to the general rule** are then provided for by **s.12** which permits the law arising from the general rule to be displaced by the law of another country if it is substantially more appropriate to do so. Defamation was specifically excluded from the statutory regime by **ss.9(3)** and **13**; and **s.9(5)** follows the common law and excludes *renvoi* from issues relating to tort. **S.14** provides for the exclusion of matters decided by the *lex loci delicti* that conflict with principles of public policy or which are not otherwise enforceable under the law of the forum.

Issues Relating to Tort

Precisely what constitutes a tort for the purposes of the conflict of laws?

PILA Part III applies to acts which are regarded as torts in English domestic law and, quite likely, to those wrongs which are not torts under the domestic law but may be classified as such 'for the purposes of private international law', - e.g., invasion of privacy or infringement of an intellectual property right.⁵ However, it is uncertain whether acts which may be regarded as having a legal basis in equity would come within the scope of **PILA Part III**; e.g., given that confidentiality may have equity or tort or implied contract as a legal basis, it is uncertain whether a breach of confidentiality would amount to an issue relating to tort and thus come within the scope of **PILA Part III**. It isn't in doubt, however, that, just as at common law, if an act amounts to a tort a plaintiff may sue in respect of such an action even if he is in a contractual relationship with the defendant.⁶

Substance, Procedure and Issues Relating to Tort Under the 1995 Act

Clearly, the issue of central importance is the basis on which the court of the forum determines whether the issue is to be characterised as a tort 'for the purposes of private international law' with **Morse** advocating, *inter alia*, that "the issue of the standard of liability required of a defendant should be treated as an 'issue in tort'. And, probably, the question of capacity to commit a tort should, normally, be similarly regarded".

The issue will be one of substantive law given that nothing in **PILA Part III** "authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum." **S14(3)9b**.

Problems may arise, however, when an English court first recognises as an action relating to tort an action previously unknown to English law but one that has been recognised as such by the *lex loci*. Given that a successful substantive action may be, e.g., one relating to a claim for damages for distress or injured feelings but that the quantum of damages is a *procedural* matter and, so, one for the *lex fori*, there will be nothing in the form of a guideline in English law on which the English court can base its decision to award damages. Either a new

⁵ See, for example, (1996) 45 ICLQ 888 @ 894.

⁶ *Coupland v. Arabian Gulf Oil* [1983] 3 All ER 226.

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rule has to be devised or the procedure of the *lex loci* adopted, if practicable. The Act is silent on this point: and *what is actually a matter of substance as opposed to procedure remains to be classified at common law; Boys v. Chaplin.*

Likely Application of English Law Applying to a tort Committed in England

Whereas the relationship between **ss.9(6)** - providing that Part III of the Act '*... applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country*' - and **14** - which provides that *nothing in Part III ... affects any rules of law (including rules of private international law) except those abolished by s.10*' - is not clear, it would appear that if a tort involving a foreign element was committed in England then the principle established at common law, that, in the circumstances, English law was invariably the applicable law,⁷ would apply also under the new statutory regime.

Lack of Justification for Excluding Defamation From the 1995 Act (?)

That defamation has been excluded from the 1995 Act may be the result of an over-reaction by newspaper publishers. The fear of an English newspaper circulating abroad and publishing an article considered defamatory by the foreign law but not by English law but, nevertheless, leading to the application of a foreign law, may well have been unfounded given that the newspaper would have been produced in England and so the most significant elements of the allegedly tortious act would also have taken place in England. Moreover, given that the newspaper publishers would be able to plead justification and fair comment and that **s.14(3)(a)(i)** specifically provides for the exclusion of a foreign law that conflicts with the principles of public policy, it becomes difficult to provide a rational explanation for the exclusion of defamation from the 1995 Act.

The General Rule Under the 1995 Act.

The replacement for the common law double actionability rule is contained in **s.11** of the 1995 Act.

s.11: The Choice of Applicable Law

- (1) *The general rule is that the applicable law is the law of the country in which the events constituting the tort ... in question occur.*
- (2) *Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -*
 - (a) *for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;*
 - (b) *for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and*
 - (c) *in any other case, the law of the country in which the most significant element or elements of those events occurred.*
- (3) *In this section "personal injury" includes disease or any impairment of physical or mental condition*

Analysis of s.11

Whereas sub-section (1) provides for the events which constitute the tort when the tort occurs in one country, sub-section (2) provides for those situations where the events constituting the tort occur in two or more countries.

In essence, where the tort occurs in one country, the law of that country, the *lex loci delicti*, is the applicable law. However, where the events constituting the tort occur in two or more countries, either a rigid rule or a more flexible rule will apply, depending on the nature of the tort. A rigid rule applies in relation to **s.11(2)(a) and (b)** (personal injury and damage to property, respectively), the rule in relation to (a) being that the applicable law is '*the law of the country where the individual was when he sustained the injury*'; and, in relation to (b), being the law of the country where the property was when it was damaged.

The applicable law in any other case, however, is far more flexible and, therefore, much more likely to be problematical given that, under paragraph (c), it requires, first, the most significant element or elements of the tort to be ascertained and then, second, it involves the application of the law of the country in which the most significant element, or those elements of the events constituting the tort, occurred, subject, of course, to there being no 'conflict with principles of public policy' or the giving '*effect to such penal, revenue or other public law as would not otherwise be enforceable under the law of the forum*': **s.14(3)(a)(i) & (ii)**. Unless any new rule is formulated, presumably the locus of the tort will be ascertained by applying the common law test of '*where in substance did the cause of action arise.*'⁸

⁷ The most notorious example being the case of *Szalatnay-Stacho v Fink* [1947] KB 1

⁸ *Distillers Co v. Thompson* [1971] AC 458.

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Circumstances may dictate that the general rule be displaced, however. **S.12** provides for this. **s.12** is the statutory equivalent of the common law exception to the double actionability rule.

S.12 - Choice of Applicable Law: displacement of the General Rule

- (1) *if it appears, in all the circumstances, from a comparison of-*
 - (a) *the significance of the factors which connect a tort ... with the country whose law would be the applicable law under the general rule; and*
 - (b) *the significance of any factors connecting the tort ... with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.*
- (2) *The factors that may be taken into account as connecting a tort ... with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort ... in question or to any of the circumstances or consequences of those events.*

Morse⁹ contends that:

"The central feature of section 12 is the comparison, taking account of all the circumstances, of the significance of the factors connecting the tort with the country whose law would be the applicable law under the general rule and the significance of the factors which connect it with another country and the determination, in the light of that comparison, whether it is 'substantially more appropriate' for the applicable law to be the law of that other country. Relevant factors, for these purposes, are identified in section 12(2), but that provision does not exclude reference to other factors which are not specifically identified. ... The insertion of the expression 'substantially' is intended to establish a threshold requirement below which the rule of displacement in section 12 is not to operate; ..."

It is uncertain from sub-section (1) whether the exception would apply only to one or more of the factors in an issue relating to tort, so leaving the other factors to be governed by the general rule, or whether the application of the **s.12** exception would entirely displace the general rule. It is, however, likely that the applicable law under the general rule will, perhaps, be displaced only in two cases, viz; (i) where both parties are foreigners to the country where the tort is committed and they come from the same country - as was the case in **Boys v. Chaplin**; and (ii) whereas both parties are foreigners to the country where the tort is committed, and each is from a separate country, the laws of their countries are in agreement on the issue in question.

It is highly likely that it will be easier to displace the general rule when it is determined by **s.11(2)(a) or (b)** rather than when it is determined by reference to **s.11(1)**; and it will be much more difficult to displace when it is determined by reference to **s.11(2)(c)**.

Exclusion on the Grounds of Public Policy or by virtue of not otherwise being enforceable under the Law of the Forum: s.14.

"Sections 11 and 12 of the 1995 Act give, in contrast to the common law, a potentially more generous role to the application of foreign law so .. it [is] necessary to adopt a public policy safeguard to enable an English court to refuse to apply a foreign law which genuinely infringes the public policy of England. This is achieved by section 14(3)(a)(i) of the 1995 Act."

Accordingly, and by contrast with the common law, a cause of action that is unknown to English law should not, *per se*, invoke the provisions of **s.14** and so exclude the foreign law.¹⁰ In essence, the provisions excluding foreign penal, revenue and other public laws that '*would not otherwise be enforceable under the law of the forum*' is a reflection of the situation at common law.

Moreover, **s.14(4)** provides for the application of mandatory rules but does not confine the application to the mandatory rules of the law of the forum - "*irrespective of the degree of connection between the claim and the country to the law of which the mandatory rule belongs. This gives an unacceptably sweeping scope to mandatory rules and supplies no clear guidance to the courts as to when such rules should be applied.*"¹¹

Proof and Exclusion of Foreign Law

In essence, foreign law is proved as '*a matter of fact*' via the evidence of expert witnesses. A foreign law may be excluded if it is a penal, revenue or other public law.

⁹ (1996) 45 ICLQ 888 @ 899

¹⁰ see, e.g., **Phrantzes v. Argenti** [1960] 2 QB 19.

¹¹ *Per Morse*, (1996) 45 ICLQ 888 @ 901

Private International Law (Miscellaneous Provisions) Act 1995 (c. 42)

An Act to make provision about interest on judgment debts and arbitral awards expressed in a currency other than sterling; to make further provision as to marriages entered into by unmarried persons under a law which permits polygamy; to make provision for choice of law rules in tort and delict; and for connected purposes. [8th November 1995]

PART I : INTEREST ON JUDGMENT DEBTS AND ARBITRAL AWARDS

1 Interest on judgment debts generally

(1) In the [1970 c. 31.] Administration of Justice Act 1970, after section 44 (interest on judgment debts) there shall be inserted the following section—

“44A Interest on judgment debts expressed in currencies other than sterling

(1) Where a judgment is given for a sum expressed in a currency other than sterling and the judgment debt is one to which section 17 of the Judgments Act 1838 applies, the court may order that the interest rate applicable to the debt shall be such rate as the court thinks fit.

(2) Where the court makes such an order, section 17 of the Judgments Act 1838 shall have effect in relation to the judgment debt as if the rate specified in the order were substituted for the rate specified in that section.”

(2) Subsection (1) above does not apply in relation to a judgment given before the commencement of this section.

2 Interest on county court judgment debts

In section 74 of the [1984 c. 28.] County Courts Act 1984 (interest on judgment debts etc.), after subsection (5) there shall be inserted the following subsection—

“(5A) The power conferred by subsection (1) includes power to make provision enabling a county court to order that the rate of interest applicable to a sum expressed in a currency other than sterling shall be such rate as the court thinks fit (instead of the rate otherwise applicable).”

3 Interest on arbitral awards

(1) In the [1950 c. 27.] Arbitration Act 1950, for section 20 (interest on awards) there shall be substituted the following section—

“20 Interest on awards

(1) A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award.

(2) The rate of interest shall be—

(a) the rate for judgment debts specified in section 17 of the Judgments Act 1838 at the date of the award; or

(b) if the power under subsection (3) below is exercised, the rate specified in the award.

(3) Where the sum is expressed in a currency other than sterling, the award may specify such rate as the arbitrator or umpire thinks fit instead of the rate mentioned in subsection (2)(a) above.”

(2) Subsection (1) above does not apply in relation to an award made before the commencement of this section.

4 Part I: consequential amendments

(1) In section 24(1) of the [1947 c. 44.] Crown Proceedings Act 1947 (interest on debts etc.), after the word “*interest*” there shall be inserted the words “*and section 44A of the Administration of Justice Act 1970 (which enables the court to order an appropriate rate for a judgment debt expressed in a currency other than sterling)*”.

(2) In Schedule 11 to the [1986 c. 5.] Agricultural Holdings Act 1986, in paragraph 22 (interest on awards), for the words “*same rate as a judgment debt*” there shall be substituted the words “*same rate as that specified in section 17 of the Judgments Act 1838 at the date of the award*”.

A corresponding amendment shall be deemed to have been made in paragraph 20B of Schedule 6 to the [1948 c. 63.] Agricultural Holdings Act 1948 in relation to any case to which it continues to apply.

(3) In section 10(3) of the [1994 c. 37.] Drug Trafficking Act 1994 (interest on sums unpaid under confiscation orders), for the words from “*that*” to the end there shall be substituted the words “*the same rate as that specified in section 17 of the Judgments Act 1838 (interest on civil judgment debts)*”.

PART II VALIDITY OF MARRIAGES UNDER A LAW WHICH PERMITS POLYGAMY

5 Validity in English law of potentially polygamous marriages

(1) A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.

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- (2) This section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law.

6 Application of section 5 to prior marriages

- (1) Section 5 above shall be deemed to apply, and always to have applied, to any marriage entered into before commencement which is not excluded by subsection (2) or (3) below.
- (2) That section does not apply to a marriage a party to which has (before commencement) entered into a later marriage which either—
- (a) is valid apart from this section but would be void if section 5 above applied to the earlier marriage; or
 - (b) is valid by virtue of this section.
- (3) That section does not apply to a marriage which has been annulled before commencement, whether by a decree granted in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales at commencement.
- (4) An annulment of a marriage resulting from legal proceedings begun before commencement shall be treated for the purposes of subsection (3) above as having taken effect before that time.
- (5) For the purposes of subsections (3) and (4) above a marriage which has been declared to be invalid by a court of competent jurisdiction in any proceedings concerning either the validity of the marriage or any right dependent on its validity shall be treated as having been annulled.
- (6) Nothing in section 5 above, in its application to marriages entered into before commencement—
- (a) gives or affects any entitlement to an interest—
 - (i) under the will or codicil of, or on the intestacy of, a person who died before commencement; or
 - (ii) under a settlement or other disposition of property made before that time (otherwise than by will or codicil);
 - (b) gives or affects any entitlement to a benefit, allowance, pension or other payment—
 - (i) payable before, or in respect of a period before, commencement; or
 - (ii) payable in respect of the death of a person before that time;
 - (c) affects tax in respect of a period or event before commencement; or
 - (d) affects the succession to any dignity or title of honour.
- (7) In this section “commencement” means the commencement of this Part.

7 Validity and effect in Scots law of potentially polygamous marriages

- (1) A person domiciled in Scotland does not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy.
- (2) For the avoidance of doubt, a marriage valid by the law of Scotland and entered into—
- (a) under a law which permits polygamy; and
 - (b) at a time when neither party to the marriage is already married,
- has, so long as neither party marries a second spouse during the subsistence of the marriage, the same effects for all purposes of the law of Scotland as a marriage entered into under a law which does not permit polygamy.

8 Part II: supplemental

- (1) Nothing in this Part affects any law or custom relating to the marriage of members of the Royal Family.
- (2) The enactments specified in the Schedule to this Act (which contains consequential amendments and amendments removing unnecessary references to potentially polygamous marriages) are amended in accordance with that Schedule.
- (3) Nothing in that Schedule affects either the generality of any enactment empowering the making of subordinate legislation or any such legislation made before the commencement of this Part.

PART III CHOICE OF LAW IN TORT AND DELICT

9 Purpose of Part III

- (1) The rules in this Part apply for choosing the law (in this Part referred to as “*the applicable law*”) to be used for determining issues relating to tort or (for the purposes of the law of Scotland) delict.
- (2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.
- (3) The rules in this Part do not apply in relation to issues arising in any claim excluded from the operation of this Part by section 13 below.

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- (4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred.
- (5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.
- (6) For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.
- (7) In this Part as it extends to any country within the United Kingdom, "the forum" means England and Wales, Scotland or Northern Ireland, as the case may be.
- (8) In this Part "delict" includes quasi-delict.

10 Abolition of certain common law rules

The rules of the common law, in so far as they—

- (a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or
 - (b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question,
- are hereby abolished so far as they apply to any claim in tort or delict which is not excluded from the operation of this Part by section 13 below.

11 Choice of applicable law: the general rule

- (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
- (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
 - (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
 - (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
 - (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
- (3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

12 Choice of applicable law: displacement of general rule

- (1) If it appears, in all the circumstances, from a comparison of—
 - (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
 - (b) the significance of any factors connecting the tort or delict with another country,that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
- (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

13 Exclusion of defamation claims from Part III

- (1) Nothing in this Part applies to affect the determination of issues arising in any defamation claim.
- (2) For the purposes of this section "defamation claim" means—
 - (a) any claim under the law of any part of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood and any claim under the law of Scotland for verbal injury; and
 - (b) any claim under the law of any other country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above.

14 Transitional provision and savings

- (1) Nothing in this Part applies to acts or omissions giving rise to a claim which occur before the commencement of this Part.
- (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.

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- (3) Without prejudice to the generality of subsection (2) above, nothing in this Part—
 - (a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—
 - (i) would conflict with principles of public policy; or
 - (ii) would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum; or
 - (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.
- (4) This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable.

15 Crown application

- (1) This Part applies in relation to claims by or against the Crown as it applies in relation to claims to which the Crown is not a party.
- (2) In subsection (1) above a reference to the Crown does not include a reference to Her Majesty in Her private capacity or to Her Majesty in right of Her Duchy of Lancaster or to the Duke of Cornwall.
- (3) Without prejudice to the generality of section 14(2) above, nothing in this section affects any rule of law as to whether proceedings of any description may be brought against the Crown.

PART IV SUPPLEMENTAL

16 Commencement

- (1) Part I shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint; and different days may be appointed for different provisions.
- (2) Part II shall come into force at the end of the period of two months beginning with the day on which this Act is passed.
- (3) Part III 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 the commencement of Part III as it extends to England and Wales, Scotland or Northern Ireland.

17 Modification of Northern Ireland Act 1974

An Order in Council under paragraph 1(1)(b) of Schedule 1 to the [1974 c. 28.] Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which contains a statement that it is only made for purposes corresponding to the purposes of any provision of Part II shall not be subject to paragraph 1(4) and (5) of that Schedule (requirement for affirmative resolution procedure) but shall be subject to annulment in pursuance of a resolution of either House of Parliament.

18 Extent

- (1) Any amendment made by this Act has the same extent as the enactment being amended.
- (2) In Part II, sections 5 and 6 extend to England and Wales only, section 7 extends to Scotland only and section 8 extends to England and Wales and Scotland.
- (3) Part III extends to England and Wales, Scotland and Northern Ireland.

19 Short title

This Act may be cited as the Private International Law (Miscellaneous Provisions) Act 1995.

SCHEDULE : CONSEQUENTIAL AND MINOR AMENDMENTS RELATING TO PART II

Matrimonial Proceedings (Polygamous Marriages) Act 1972 (c. 38)

- 1 (1) Section 2 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (matrimonial relief etc. in relation to polygamous marriages: Scotland) shall be amended as follows.
- (2) In subsection (1), for the words "*the marriage*" onwards there shall be substituted the words "*either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person*".
- (3) For subsection (3) there shall be substituted—

“(3) Provision may be made by rules of court—

 - (a) for requiring notice of proceedings brought by virtue of this section to be served on any additional spouse of a party to the marriage in question; and
 - (b) for conferring on any such additional spouse the right to be heard in the proceedings, in such cases as may be specified in the rules.”

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Matrimonial Causes Act 1973 (c. 18)

2 (1) The Matrimonial Causes Act 1973 shall be amended as follows.

(2) In section 11 (grounds on which a marriage is void), for the words “*may be polygamous although*” there shall be substituted the words “*is not polygamous if*”.

(3) In section 47 (matrimonial relief and declarations in respect of polygamous marriage)—

(a) in subsection (1), for the words “*the marriage*” onwards there shall be substituted the words “*either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person*”; and

(b) for subsection (4) there shall be substituted—

“(4) *Provision may be made by rules of court—*

(a) *for requiring notice of proceedings brought by virtue of this section to be served on any additional spouse of a party to the marriage in question; and*

(b) *for conferring on any such additional spouse the right to be heard in the proceedings, in such cases as may be specified in the rules.*”

Matrimonial Homes Act 1983 (c. 19)

3 In section 10 of the Matrimonial Homes Act 1983 (interpretation), for subsection (2) there shall be substituted—

“(2) *It is hereby declared that this Act applies as between the parties to a marriage notwithstanding that either of them is, or has at any time during the marriage’s subsistence been, married to more than one person.*”

Social Security Contributions and Benefits Act 1992 (c. 4)

4 (1) The Social Security Contributions and Benefits Act 1992 shall be amended as follows.

(2) In section 121(1)(b) (regulations as to application of provisions of Parts I to VI to polygamous marriages), for the words following “*section*” there shall be substituted the words “*applies, a marriage during the subsistence of which a party to it is at any time married to more than one person is to be treated as having, or as not having, the same consequences as any other marriage.*”

(3) In section 147(5) (regulations as to application of provisions of Part IX to polygamous marriages), for the words following “*in which*” there shall be substituted the words “*a marriage during the subsistence of which a party to it is at any time married to more than one person is to be treated for the purposes of this Part of this Act as having, or not having, the same consequences as any other marriage.*”

STATUTORY INSTRUMENTS

2008 No. 2986

PRIVATE INTERNATIONAL LAW

The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008

Coming into force

11th January 2009

The Secretary of State has been designated for the purposes of section 2(2) of the European Communities Act 1972¹² in relation to private international law.¹³

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972.

The Secretary of State makes these Regulations under the powers conferred by section 2(2) of the European Communities Act 1972.¹⁴

Citation, commencement and extent

- 1.(1) These Regulations may be cited as the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, and shall come into force on 11th January 2009.
- (2) Regulation 3 extends to England and Wales only.
- (3) Regulation 4 extends to Northern Ireland only.
- (4) Otherwise, these Regulations extend to England and Wales and Northern Ireland.

¹² 1972 c.68. Under section 57(1) of the Scotland Act 1998 (c. 46), despite the transfer to Scottish Ministers of functions in relation to implementing obligations under Community law in relation to devolved matters, the function of the Secretary of State in relation to implementing those obligations continues to be exercisable by him as regards Scotland.

¹³ The European Communities (Designation) (No.2) Order 2008 (S.I. 2008/1792).

¹⁴ 1972 c. 68.

LECTURE TWELVE

Restriction on the application of existing choice of law rules in tort cases

2. After section 15 of the Private International Law (Miscellaneous Provisions) Act 1995¹⁵ insert—
“Disapplication of Part III where the rules in the Rome II Regulation apply.
15A. (1) *Nothing in this Part applies to affect the determination of issues relating to tort which fall to be determined under the Rome II Regulation.*
(2) *In subsection (1) the “Rome II Regulation” means Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations,¹⁶ including that Regulation as applied by regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (conflicts solely between the laws of different parts of the United Kingdom or between one or more parts of the United Kingdom and Gibraltar).*
(3) *This section extends to England and Wales and Northern Ireland only.”.*
3. The following shall be inserted at the beginning of section 18(3) of the Private International Law (Miscellaneous Provisions) Act 1995— *“Except where otherwise provided,”.*
4. After section 7 of the Foreign Limitation Periods Act 1984¹⁷ insert—
“Disapplication of sections 1, 2 and 4 where the rules in the Rome II Regulation apply
8.(1) *Where in proceedings in England and Wales the law of a country other than England and Wales falls to be taken into account by virtue of any choice of law rule contained in the Rome II Regulation, sections 1, 2 and 4 above shall not apply in respect of that matter.*
(2) *In subsection (1) the “Rome II Regulation” means Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations, including that Regulation as applied by regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (conflicts solely between the laws of different parts of the United Kingdom or between one or more parts of the United Kingdom and Gibraltar).”.*
5. After Article 8 of the Foreign Limitation Periods (Northern Ireland) Order 1985 (7)¹⁸ insert—
“Disapplication where the rules in the Rome II Regulation apply
9.(1) *Where in proceedings in Northern Ireland the law of a country other than Northern Ireland falls to be taken into account in the determination of any matter by virtue of any choice of law rule contained in the Rome II Regulation, Article 2 (3), (4) and (5) and Articles 3 and 4 above shall not apply in respect of that matter.*
(2) *In paragraph (1) the “Rome II Regulation” means Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations, including that Regulation as applied by regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (conflicts solely between the laws of different parts of the United Kingdom or between one or more parts of the United Kingdom and Gibraltar).”.*

Application of the Regulation (EC) No. 864/2007: conflicts falling within Article 25(2)

6. Notwithstanding Article 25(2) of Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”), that Regulation shall apply in the case of conflicts between—
 - (a) the laws of different parts of the United Kingdom, or
 - (b) between the laws of one or more parts of the United Kingdom and Gibraltar,as it applies in the case of conflicts between the laws of other countries.

¹⁵ 1995 c.42.

¹⁶ OJ No. L 199, 31.7.2007, at p.40.

¹⁷ 1984 c. 16

¹⁸ SI 1985/754 (N.I. 5).

CASE LAW

The Halley (1868). Due to the negligence of a compulsory pilot under Belgian law the vessel was damaged in a collision. At that time, whilst Belgian law recognised vicarious liability English law did not. Since the cause of action did not exist under English law the action failed.

Phillips v. Eyre (1870). Eyre had been the governor of Jamaica. Before leaving the post he passed a law that prevented any legal action being taken against him for any act committed by him whilst governor. He was sued in tort in England by Jamaican citizens. By determining that the relevant act had to be actionable both in England and in Jamaica, the court effectively allowed Eyre to evade responsibility for his conduct.

Machado v Fontes [1897]. An action for libel was brought in England in respect of a pamphlet published in Brazil. The defendant filed a defence denying the libel but later applied for leave to amend his defence by adding a plea that publication of the pamphlet did not give rise to any civil liability for damages under Brazilian law. The Court of Appeal held that the plea was bad. The publication of the libellous pamphlet was a criminal offence in Brazil and, accordingly, unjustifiable under Brazilian law. That was enough to sustain the civil action for damages in England. The libel did not need to be actionable in a civil suit in Brazil.

Boys v Chaplin [1971]. B & C were posted to Malta as members of the armed forces. B, whilst off-duty, was injured in a road accident due to C's negligent driving. Under the law of Malta damages were restricted to expenses & loss of earning, whereas under English Law a claimant could also recover for pain & suffering. The court applied English Law. Lords Hodson & Wilberforce (Pearson concurring) applied the law of the forum on the basis that the general rule should apply with flexibility. Lords Guest & Donovan however were of the view that assessment of damages is a procedural issue governed by the law of the forum.

Red Sea Insurance v Bouygues [1995]. Contractors building a University in Saudi Arabia claimed on their insurance for loss and expense due to the supply of defective building materials in Hong Kong, against the HK based underwriters. The underwriters claimed the risk was not covered by the policy and claimed in the alternative against the suppliers in subrogation. Under HK Law subrogation was only permitted after an underwriter had paid out, and the action had to be in the underwriter's name. This was not the case under Saudi law. Overturning the high court and CA, the Privy Council applied the "flexibility" test and allowed the subrogation action to proceed subject to Saudi law alone.

Base Metal v Shamurin [2001].¹⁹ English or Russian law - tort claim. Application for summary enforcement failed since at this stage applicant had failed to establish that English Law applied.

Base Metal v Shamurin [2003].²⁰ Conflicts : Choice of Law : Extensive review of cases & Rome Convention. Falling out between Russian Trading Partners.

Kuwait Airways Corp v Iraqi Airways Co [2002] HL.²¹ When the Iraqi forces took over the airport at Kuwait they seized ten commercial aircraft belonging to Kuwait Airways Corporation (KAC): two Boeing 767s, three A300 Airbuses, and five A310 Airbuses. They lost no time in removing these aircraft to Iraq. By 9 August nine of the aircraft had been flown back to Basra, in Iraq. The tenth aircraft, undergoing repair at the time of the invasion, was flown direct to Baghdad a fortnight later. On 9 September the Revolutionary Command Council of Iraq adopted a resolution dissolving KAC and transferring all its property worldwide, including the ten aircraft, to the state-owned Iraqi Airways Co (IAC). This resolution, resolution 369, came into force upon publication in the official gazette on 17 September. On the same day IAC's board passed resolutions implementing RCC resolution 369. KAC commenced proceedings against the Republic of Iraq and IAC, claiming the return of its ten aircraft or payment of their value, and damages. The aircraft were valued by KAC at US\$630 million. The damages claimed at the trial exceeded \$800 million. Because the cause of action arose in 1990 the Private International Law Act 1995 did not apply – so this case represents the last hurrah of the old double actionability rule.

¹⁹ *Base Metal Trading Ltd v Shamurin* [2001] EWHC 512 (Comm) . Mr Justice Moore-Bick. 21st November 2001.

²⁰ *Base Metal Trading Ltd. v Shamurin* [2003] EWHC 2419 (Comm). Mr Justice Tomlinson. 22nd October 2003

²¹ *Kuwait Airways Corp v Iraqi Airways Co & Anor* [2002] UKHL 19. Lord Nicholls of Birkenhead Lord Steyn Lord Hoffmann Lord Hope of Craighead Lord Scott of Foscote. 16th May 2002.

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Lord Nichols asserted a public policy test in relation to the application of foreign law – here in relation to the Law of Iraq which as might be expected, regarded ownership of the planes by IAC as perfectly lawful.

15. *Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no 'conflict' of laws.*
16. *This, overwhelmingly, is the normal position. But, as noted by Scarman J in **In the Estate of Fuld, decd (No 3)** [1968] P 675, 698, blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.*
17. *This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal': see **Loucks v Standard Oil Co of New York** (1918) 120 NE 198, 202*
18. *Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: **Oppenheimer v Cattermole** [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations.*
19. *The question raised in the present proceedings is whether resolution 369 of the Revolutionary Command Council of Iraq is of this character."*

The court applied this test to displace resolution 369, but otherwise applied Iraqi law and the double actionability test.

A claim in respect of four planes destroyed by allied air strikes failed. The Court of Appeal held that in principle the following claims made by KAC in respect of the Iran six succeeded: the amount paid to the Iranian government for the return of the Iran six (US \$20 million); the cost of repairing the Iran six (\$11 million); loss of profits (\$66 million); the cost of hiring substitute aircraft capacity for carrying cargo (\$46 million); and the cost of hiring substitute aircraft capacity for carrying passengers (\$99 million). The court entered judgment for KAC for \$20 million and otherwise remitted the claims to the High Court for assessment. Both appeals failed.

WORKSHOP QUESTION

If a similar situation were to arise today, which law would an English court apply?

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Roerig v Valiant Trawlers Ltd. [2002] EWCA Civ 21 :²² Conflicts : Applicable law for assessment of damages. The Dutch claimant's husband died in a trawler accident on board an English owned vessel. Held : English Law applied. per Waller LJ : -

Issue 1 Proper Law of the Tort

12. (i) At first sight Section 12 seems less than clear when the question is whether some other law should be applied in relation to an issue such as damages or a head of damage. It requires comparison of the significance of the factors which connect a tort (not the issue) with the country whose law would be the applicable law under the general law, and the significance of any factors connecting the tort (not the issue) with another country, and from that comparison to decide in all the circumstances whether it is substantially more appropriate for the law of that other country to be the law to determine the issue. It may be that the words "or any of those issues" were inserted in the section as an amendment without further amendment of (a) or (b) of the subsection [that seems possible since those words were apparently not in the Bill originally put forward by the Law Commission and not in the Bill originally placed before Parliament (see paragraph 35-095 of Dicey and Morris)]. It may also be that it was a deliberate decision to draft the section in a way which forced concentration primarily on factors which connected the tort generally to a particular country, even in considering whether there should be an exception for a particular issue. For our purposes it matters not how it happened, the section requires an approach by reference to factors that connect the tort generally to a particular country, and an assessment by reference to those factors as to whether it is substantially more appropriate that an issue be tried by some law other than the law which governs the tort generally.
- (ii) The first exercise is to identify the issue in relation to which it might be suggested that the general rule should not be applicable. It is not I think seriously argued that in relation to issues giving rise to liability the general rule should not have applied. The argument relates to the assessment of damages, and in particular to the assessment of a particular head of damage accepted as recoverable under both Dutch and English law "dependency", and ultimately to the question whether benefits accruing from the death of the deceased should be deducted when making that assessment. The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum (see Section 9(2)). This will be relevant again when considering issue 3 (procedural or substantive). The question is whether the issue in the instant case should be defined as damages generally, or that head of damage "dependency" or even more refined to the issue whether benefits should be deducted. In **Chaplin v Boys** the House of Lords wrestled with the question whether damages for pain and suffering which were irrecoverable under Maltese law, Malta being the country where the motor accident took place, but recoverable under English law, the law of the country of both parties, and of the forum, should be decided under English law or Maltese law. That points the way as it seems to me to defining and refining the issue in this case at least to that relating to recoverability of damages for loss of dependency. I would however limit the refinement of the issue to "loss of dependency" as opposed to further refining the issue as to whether "benefits should be deducted in assessing loss of dependency". This may not be so important when considering this issue, but it is at this stage that there seems to me to be an overlap between issue 3 and issue 1. The question whether a head of damage is recoverable is clearly a matter of substantive law which could be decided by reference to a law other than the law of the forum. An issue of what should be deducted in calculating the damages under a specific head should be for the law of the forum. For reasons which I shall develop when considering issue 3, the deduction of benefits seems to me a matter of calculation and thus for the forum. Under Section 12 the law of the forum is not an option unless that law is also a law of a country with which the tort has significant connecting factors. Thus an issue which is for the law of the forum cannot be a relevant issue under Section 12. I accept that at this stage in the context of this case in any event that distinction may be unimportant.
- (iii) The next task is to identify the factors that connect the tort with England and those that connect the tort with Holland. The factors that connect with England seem to me to be that the events occurred on a boat registered in England, and that the defendant is an English company. What then are the factors that connect with Holland? The deceased was a Dutchman, and his death would lead to damage being suffered by his dependants, who are Dutch, in Holland where they live. The incident occurred when the deceased was under the supervision of the Dutch Fishing Master albeit the skipper of the boat was English. In real terms the vessel was on a Dutch fishing

²² **Roerig v Valiant Trawlers Ltd. [2002] EWCA Civ 21**. Vice President of CA Simon Brown LJ; Waller LJ; Sedley LJ. 28th January 2002.

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expedition in that the boat set off from a Dutch port and would return with its catch to a Dutch port. The defendant was a subsidiary of a Dutch company, and the deceased was on board the trawler as an employee of a Dutch company also a member of the same Group.

- (iv) *What then is the significance of the Dutch factors when compared to the significance of the English factors which might make it substantially more appropriate for Dutch law to determine the loss of dependency issue? Mr Leonard submits that it is the fact that the deceased was Dutch, employed by a Dutch company paying Dutch taxes and making contributions to obtain Dutch security benefits, and the fact that the dependants will suffer their loss of dependency in Holland as Dutch citizens, which are the most significant factors. That, he submits, makes it logical to assess this aspect of the damages by Dutch law. But it seems to me that the logic of that argument leads almost inevitably to the consequence that where a claimant, injured in England, is a foreigner living and employed in that foreign country, any head of damage should be assessed in accordance with the law of his or her country. Indeed in one sense I suppose it could be said to be "appropriate" that that should be so since the injured party or the dependants thereof are likely to feel their loss only in that foreign country. But it seems to me that it was not intended that the general rule should be dislodged so easily. Where the defendant is English, and the tort took place in England, it cannot surely be said that it is substantially more appropriate for damages to be assessed by Dutch law simply because the claimant or the deceased is Dutch. One can entirely understand that if fortuitously two English persons are in a foreign country on holiday and one tortiously injures the other, the significant factors in favour of England being the place by reference to which the damages should be assessed may make it substantially more appropriate that damages should be assessed by English law. But say the position were that an English defendant under English principles relevant to assessment of damage would have to pay aggravated damages to a claimant, and would thus have to pay English plaintiffs such damages, why should a foreigner not be entitled to have such damages awarded in his or her favour simply because by the law of where they reside those damages would be unavailable?*

- (v) *In my view the word "substantially" is the key word. The general rule is not to be dislodged easily. I thus think the judge was right in the view he formed that the defendants had failed in their attempt to do so.*

Trafigura v Kookmin Bank [2006].²³ Trafigura has countered Korean proceedings by starting the present action, in which it claims against Kookmin a declaration of non – liability. Trafigura also claims an anti – suit injunction to prevent Kookmin carrying on the Korean proceedings. Kookmin challenged the jurisdiction of the court and Trafigura unsuccessfully attempted to obtain an interim anti – suit injunction Here the question was what law governs tort actions. Held : English Law.

²³ *Trafigura Beheer BV v Kookmin Bank Co [2006] EWHC 1450 (Comm)* Mr Justice Aikens. 16th June 2006.

REGULATION (EC) No 864/2007

OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)²⁴

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Economic and Social Committee,²⁵ Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007,²⁶ Whereas:

- (1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.
- (2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.
- (3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.
- (4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.²⁷ The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.
- (5) The Hague Programme,²⁸ adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).
- (6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.
- (7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁹ (Brussels I) and the instruments dealing with the law applicable to contractual obligations.
- (8) This Regulation should apply irrespective of the nature of the court or tribunal seised.
- (9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.
- (10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.
- (11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict of law rules set out in this Regulation should also cover noncontractual obligations arising out of strict liability.
- (12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.
- (13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.
- (14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain

²⁴ L 199/40 EN Official Journal of the European Union 31.7.2007

²⁵ OJ C 241, 28.9.2004, p. 1.

²⁶ Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

²⁷ OJ C 12, 15.1.2001, p. 1.

²⁸ OJ C 53, 3.3.2005, p. 1.

²⁹ OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

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provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

- (15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.
- (16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.
- (17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.
- (18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.
- (19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.
- (20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.
- (21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.
- (22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.
- (23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.
- (24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.
- (25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.
- (26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be

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interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.

- (27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.
- (28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.
- (29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, negotiorum gestio and culpa in contrahendo.
- (30) Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.
- (31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.
- (32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.
- (33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.
- (34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term '*rules of safety and conduct*' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.
- (35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to noncontractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).³⁰
- (36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.
- (37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

³⁰ OJ L 178, 17.7.2000, p. 1.

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- (38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.
- (39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.
- (40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I : SCOPE

Article 1 : Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).
2. The following shall be excluded from the scope of this Regulation:
 - (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
 - (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
 - (c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
 - (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;
 - (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
 - (f) non-contractual obligations arising out of nuclear damage;
 - (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.
4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

Article 2 Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.
2. This Regulation shall apply also to non-contractual obligations that are likely to arise.
3. Any reference in this Regulation to:
 - (a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and
 - (b) damage shall include damage that is likely to occur.

Article 3 Universal application

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

CHAPTER II TORTS/DELICTS

Article 4 General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

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3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 5 : Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:
 - (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
 - (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
 - (c) the law of the country in which the damage occurred, if the product was marketed in that country. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).
2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 6 : Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.
3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.
4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 7 : Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 8 : Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9 : Industrial action

Without prejudice to Article 4(2), the law applicable to a noncontractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER III : UNJUST ENRICHMENT, NEGOTIORUM GESTIO AND CULPA IN CONTRAHENDO

Article 10 : Unjust enrichment

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

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2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11 : Negotiorum gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12 : Culpa in contrahendo

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
 - (a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or
 - (b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
 - (c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Article 13 : Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to noncontractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV : FREEDOM OF CHOICE

Article 14 : Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:
 - (a) by an agreement entered into after the event giving rise to the damage occurred; or
 - (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

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

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V : COMMON RULES

Article 15 : Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;

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- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16 : Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 17 : Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

Article 18 : Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Article 19 : Subrogation

Where a person (the creditor) has a non-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, and the extent to which, 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.

Article 20 : Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

Article 21 : Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the noncontractual obligation in question or the law of the country in which the act is performed.

Article 22 : Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of noncontractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
2. Acts 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 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER VI : OTHER PROVISIONS

Article 23 : Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

Article 24 : Exclusion of renvoi

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

Article 25 : 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 non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

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2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 26 : Public policy of the forum

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

Article 27 : Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

Article 28 : Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

CHAPTER VII : FINAL PROVISIONS

Article 29 : List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. The Commission shall publish in the Official Journal of the European Union within six months of receipt:
 - (i) a list of the conventions referred to in paragraph 1;
 - (ii) the denunciations referred to in paragraph 1.

Article 30 : Review clause

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:
 - (i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;
 - (ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.
2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1).

Article 31 : Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32 : Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community. (1) OJ L 281, 23.11.1995, p. 31

Done at Strasbourg, 11 July 2007.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These regulations concern Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"). This instrument establishes uniform choice of law rules in the field of non-contractual obligations, that is principally in the context of proceedings in tort, but also proceedings for unjust enrichment and some other non-contractual obligations. These rules enable courts throughout the EU to select the national laws appropriate for the determination of these proceedings where the case has a cross-border dimension, for example a case where the parties live in different countries and the tort takes place in a third country. The aim of these uniform rules of Community law is that, in

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relation to a case falling within the Regulation's scope of application, the same national law will generally be applied by courts in all the Member States.

The purpose of these regulations is two-fold. The first is to modify the relevant current inconsistent national law in England and Wales and Northern Ireland. Regulations 2 and 3 restrict the application of the general statutory choice of law rules in this area. These are contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Regulation 4 restricts the application of certain provisions in the Foreign Limitation Periods Act 1984 and regulation 5 restricts the application of analogous provisions in the Foreign Limitation Periods (Northern Ireland) Order 1985.

The second purpose involves extending the application of the Regulation to certain cases that would otherwise not be regulated by it. These are cases where in principle the choice of applicable law is confined to the law of one of the United Kingdom's three jurisdictions, that is England and Wales, Scotland and Northern Ireland, and to the law of Gibraltar. These cases therefore lack the international dimension which is otherwise characteristic of cases falling under the Regulation. Under Article 25(2) of the Regulation Member States are not obliged to apply the Regulation to such cases. To maximise consistency between the rules that apply to determine the law applicable to non-contractual obligations, regulation 6 of these regulations extends, in relation to England and Wales and Northern Ireland, the scope of the Regulation to conflicts solely between the laws of England and Wales, Scotland, Northern Ireland and Gibraltar.

PURPOSE: to harmonise the rules on law applicable to non-contractual obligations (Rome II).

LEGISLATIVE ACT: Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).

BACKGROUND: within the context of establishing an area of freedom, security and justice the Community has adopted a number of judicial measures concerning co-operation in civil matters that affect cross-border transactions or that distort the good functioning of the internal market. The Treaty on European Union specifies that measures to create an internal area of freedom, security and justice should include making Member States' rules on the conflict of laws and jurisdiction compatible. This is because the EU's internal market requires predictable litigation, certainty as to the law applicable, the free movement of judgments and for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought. Prior to the adoption of this Regulation the Member States had no common rules to designate the applicable law in non-contractual matters, and each court observed its national rules. Accordingly, legal solutions varied widely from one Member State to another, and parties were tempted to refer disputes to the court which applied the most favourable law to them (a practice known as forum shopping). Indeed, the Member States have been trying to harmonise the rules concerning conflicts of laws in matters of tort/delict since 1972.

CONTENT: the purpose of this Regulation, therefore, is to lay down a uniform set of rules of law applicable to non-contractual obligations, irrespective of the country of the court in which an action is brought. This should increase certainty as to the applicable law and improve the predictability of legal disputes and the free movement of judgements. As a general rule, the draft Regulation states that the law applicable to a tort/delict is the law of the country where damage occurred. Only in certain limited, duly justified circumstances, the general rule will be derogated from and special rules applied.

The Regulation contains special rules on product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action. The initiative more particularly concerns questions related to civil liability for damage caused to others, particularly in the event of an accident. It applies, for example, to road accidents, defective products and environmental pollution. Expanding trade and travel in the EU will mean that disputes of this nature are bound to become more frequent.

The Regulation, does not deal with the violation of personal privacy or rights. However, under the terms of the conciliation Agreement, the Commission has been asked to review this matter not later than 31 December 2008 and to commission a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into

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account rules relating to freedom of the press and freedom of expression in the media. Violations of privacy resulting from the handling of personal data will be also dealt with in the Commission's study.

The Rome II rules aim to strike a reasonable balance between the interests of the alleged perpetrator of the damage and the victim. With Rome II, the Community harmonisation of the rules of private international law of civil and commercial obligations is complete. The international jurisdiction of courts and the recognition and enforcement of judgments given in another Member State are already governed by Council Regulation (EC) No 44/2001 of 22 December 2000, which applies to both contractual and non-contractual obligations. The rules concerning the law applicable to contracts have already been harmonised by the Rome Convention of 1980 on the law applicable to contractual obligations.

APPLY: 11 January 2009. The Regulation will apply only to events giving rise to damage which occurs after its entry into force.

Commission Statement on the review clause (Article 30)

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

Commission Statement on road accidents

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

Commission Statement on the treatment of foreign law

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.

FURTHER READING

Clarkson & Hill, Jaffey on the Conflict of Laws. London: Butterworths, 1997, Ch.6 (esp. pp256-270); and Ch.12;
Briggs, Choice of law in tort and delict. [1995] LMCLQ 519;
Morse, Torts in Private International Law: A New Statutory Framework. (1996) 45 ICLQ 888;
O'Brien, J. Smith's Conflict of Laws, 2/e. London: Cavendish, 1999, Ch.17;
Rodger, Ascertaining the Statutory Lex Loci Delicti: Certain Difficulties Under the Private International Law (Miscellaneous Provisions) Act 1995. (1998) 47 ICLQ 205.
Stone, The Conflict of Laws. London: Longman, 1995, Ch.s 13 and 16.

WORKSHOP QUESTION

An article in a local newspaper in Paris accused Peter, an English athletics coach of inappropriate behaviour with young athletes in his charge during a team visit to Paris. Hearing about the report, he is suspended from duties, without pay, pending the outcome of an inquiry into the allegations. The inquiry finds that there is insufficient evidence to substantiate the claim, but in the absence of clear vindication, he is not allowed to return to work. Advise Peter as to whether he can claim against the newspaper's owners for defamation.

What difference, if any, would it make to your answer if the allegations were made in a New York newspaper in respect of a team visit to the USA ?