REMEDIES AND INTERNATIONAL PRIVATE LAW

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This thesis seeks to determine how remedies inter-relate with the European rules on international private law. The thesis is broadly separated into two Parts, the first Part discussing the relationship between remedies and the general part of European international private law, and the second Part discussing the relationship between remedies and the specific parts of European international private law.

From this analysis, three threads can be drawn. First, primary right, secondary right and the court order vindicating them are so closely related that, ideally, the same law ought to apply to all. They form a unit which should remain unbroken.

Second, the distinction between substantive and ancillary rights is of crucial importance for remedies in the context of both jurisdiction and choice of law. Ancillary rights are those which arise by virtue of the trial process itself, whereas substantive rights are, or are perceived to be, created prior to the trial. The orthodox jurisdictional and choice of law rules only apply to substantive rights. Ancillary rights have their own, separate, rules. With one exception, the only court with jurisdiction over those ancillary rights is the court with jurisdiction over the substantive right to which they are ancillary. Furthermore, the lex fori must be applied to determine the nature of the ancillary right.

Third, there exists a rule of exclusion which is of crucial importance for remedies in the context of both the enforcement of foreign judgments and choice of law. This rule of exclusion applies where the application of the foreign court order, whether applied by virtue of enforcing a foreign judgment, or applied by virtue of applying a foreign governing law under the choice of law process, would be too inconvenient for the forum court's machinery. Under such circumstances, the forum court can disapply the foreign law and substitute the closest order it can from its own legal system.

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1

Introduction

I. AIMS

1.01 The purpose of this thesis is not to challenge, question, or contradict the European rules of international private law. Its founding philosophy is that sometimes when one looks at a familiar object in a different light, or from a different angle, one might just see something that has not yet been seen. With this in mind, the thesis sharply focuses on how remedies and international private law inter-relate under European legislation with the hope that, by doing so, some sense may be made out of the area, a sense which had eluded the current incarnation of the common law. As well as benefits, there are, of course, dangers to such a project. Whenever one seeks to analyse the law pursuant to a different model, or focus, than the orthodox one, one has to be far more persuasive to convince.

II. EXCLUSIONS

1.02 It is necessary first to explain what material will not be discussed. A thesis on remedies and the conflict of laws can very easily become a thesis about the conflict of laws as a whole. Remedies are the end of the story and often only understandable if the beginning, and middle, of the story has been told as well. An order for specific performance makes little sense if one does not know the contents of the contract. Even if one manages to

successfully decapitate a cause of action so one is merely left with the remedy, the sheer number of remedies available is bewildering and it would be impossible to discuss all.

1.03 The most important of the exclusions from this thesis is that remedies in the broad field of family law or insolvency will not be discussed unless tangentially relevant to the main subject-matter of the thesis. Thus, there will be no, or little, discussion of maintenance orders, child support orders, orders invalidating a transfer on the basis of it being a preference and so on. The thesis focuses on remedies for claims falling within the following categories: contractual claims; non-contractual claims; and proprietary claims. It also discusses remedies used to support such claims, including provisional and protective measures.

1.04 The thesis also excludes from consideration any international conventions which provide conflict of laws rules, for example, the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. The purpose of the thesis is to inquire whether the European Regulations provide common rules concerning remedies. The idea that one body passing legislation at different times will speak with one voice may be optimistic. The idea that separate bodies passing legislation will speak with one voice is foolhardy.

1.05 Other exclusions are less general, applying only in specific areas. The most notable of these is the decision not to discuss how the Brussels I Regulation applies to specific substantive remedies, such as an order for specific performance. This decision is explained in the relevant chapter and is motivated by the need to avoid falling into the trap identified above. Were the issue to be thoroughly addressed it would inevitably

collapse into a demarcation of the various Articles of the Brussels I Regulation and become a general commentary on the Regulation itself.

III. STRUCTURE

1.06 The thesis can broadly be seen as separated into two parts. Part I, consisting of chapters 2-4, sets out much of what could be called the general part. That Part deals with issues common to the whole of international private law, such as characterisation and the distinction between substance and procedure. Part II, consisting of chapters 5-7, analyses remedies in the context of the European rules on jurisdiction, the enforcement of judgments and choice of law. Chapter 8 is a separate, stand-alone chapter which discusses the problem of damages in international private law. This chapter is a separate, stand-alone chapter because, whilst many people consider damages to be a remedy and therefore it would be folly to exclude it from a thesis on remedies, the concerns arising from damages in international private law are very different from the concerns stemming from remedies, in the sense of court orders. A more detailed description of these chapters will now be given.

1.07 Chapter 2 has two aims. Its first aim is to explain the terminology that will be used throughout the thesis, in particular the meaning of the word 'remedy' within the Austinian scheme of primary rights, secondary rights, court orders and tertiary rights. It will be concluded that 'remedies' refers to court orders. The chapter's second aim is to discuss the relationship between the various components of the Austinian scheme. To what extent is it possible, or desirable, to sever primary rights from secondary rights, or

primary rights from court orders, and apply different laws to each? It will be argued that primary right, secondary right and court order form a unit which ought to have only one applicable law, so far as possible. Tertiary rights, which are rights that arise by virtue of the existence of a judgment, for example, the right to an attachment of earnings order, are usually severable, those rights being unrelated to the primary right and, therefore, it matters less whether a different law is applied to determine tertiary rights than the law applied to the primary right.

1.08 Chapter 3 discusses remedies and characterisation. It seeks to demonstrate two propositions. First, characterisation, under the European legislation, is performed with respect to primary rights. Second, the remedy sought, in the sense of the court order sought, is irrelevant for the purposes of characterisation. The chapter then discusses some perceived difficulties that appear to follow from these two propositions, in particular, problems created by so-called 'proprietary remedies'.

1.09 Chapter 4 discusses remedies and the distinction between substance and procedure. The chapter starts by explaining the difference between the two methods of applying the *lex fori*. The first method is the orthodox characterisation method, whereby the *lex fori* is applied to a group of rights, rules or issues. The second method is the use of a rule of exclusion, whereby where a foreign law is *prima facie* applicable, the application of that law is excluded, in favour of the *lex fori*, due to some imperative such as public policy. Having explained these two methods of applying the *lex fori*, the chapter queries which of these methods is applicable in the context of the distinction between substance and procedure. It is concluded that both rules apply. Rights arising by virtue of the trial process are characterised as procedural and the *lex fori* is applied to them. The *lex causae*

is applied to all other rights, subject to a procedural rule of exclusion where the application of the *lex causae* is too inconvenient for the forum court's machinery.

1.10 Chapter 5 is concerned with remedies and the jurisdictional rules of the Brussels I Regulation. In particular, it is concerned with the application of the jurisdictional rules to ancillary remedies, that is, remedies vindicating rights which have arisen by virtue of the trial process. The jurisdictional scheme for such remedies is a complex one in application but a few simple rules provide guidance. First, the court seised with jurisdiction over a substantive right can grant ancillary remedies thereto, insofar as these ancillary remedies do not include measures for the execution of the judgment in another Member State. Second, auxiliary courts may grant provisional and protective measures where there is a real connecting link between the measure sought and that auxiliary court. The devil is in the detail, particularly issues such as the distinction between substantive rights and ancillary rights, the scope of measures of execution, and the definition of provisional and protective measures.

1.11 Chapter 6 is concerned with remedies and the enforcement of judgments. It discusses two distinct issues. First, which remedies, i.e. which court orders, must Member States enforce under the Brussels I Regulation? For example, must Member States enforce procedural orders of other Member State courts? Second, the issue of what it actually means to render a judgment enforceable is discussed. If a foreign court has granted a remedy unknown to the English legal system, what is the obligation on the English court when rendering the judgment enforceable? It is argued that the obligation on the court is to translate the foreign order into the closest possible English order. This can be seen as an application of the procedural rule of exclusion explained in chapter 4.

1.12 Chapter 7 discusses remedies and choice of law. The question it seeks to answer is: where the *lex causae* would grant a court order different from the *lex fori*, which of these laws will apply? The basic answer is that the *lex causae* applies subject to its application being too inconvenient for the forum court's machinery. Where the application of the *lex causae* is too inconvenient, the forum court must grant the closest convenient order it has. The basic answer must be qualified in two respects. First, the *lex fori* will determine ancillary orders, even where the substantive right is governed by a foreign law. However, references to that foreign law may be both appropriate and necessary. Second, orders for the enforcement of the judgment will also be governed by the *lex fori*. However, again, references to the law governing the primary right may be appropriate.

1.13 Chapter 8 discusses the separate issue of choice of law and damages. It seeks to demonstrate the following proposition: the *lex causae* will apply to determine the value of the damages to be awarded, subject to any questions of fact being determined by the *lex fori*. Again, the devil is in the detail. In particular, demarcating the assessment of fact and the application of other rules on damages. It is suggested that, up until very recently, the common law also made this distinction, referring to it as the distinction between heads of damages and quantification and therefore some assistance can be found in the case law of the common law.

1.14 Chapter 9 provides a conclusion for the study, the core parts of which are discussed, in advance, in the next section.

IV. ADVANCE CONCLUSIONS

1.15 It may be considered an error to explain the conclusions reached in advance. In a perfect world, the conclusions should jump out at a reader during the course of the analysis so that, by the end, the conclusion merely confirms that which the reader has already worked out for himself. This is not a perfect world. The present section provides a brief *précis* of the core conclusions of the thesis, which are in the form of a number of threads that can be seen to run through the entire thesis.

1.16 The first thread is that right and remedy are considered to be so closely related that ideally the same law should apply to both. They form a unit which should remain unbroken. Tertiary rights, ie measures for the enforcement of the judgment, do not form part of this unit. Therefore, where possible, if an English court is applying a foreign law to determine the existence of a right, that foreign law should also apply to the court order. Furthermore, where a party brings a foreign court order to England for recognition and enforcement, if possible the English court should not attempt to modify that court order.

1.17 The second thread is the importance of the distinction between substantive rights and ancillary remedies. The jurisdictional and choice of law rules apply only to substantive rights. Ancillary rights have their own, separate, rules. This is because they arise by virtue of the trial process and are, therefore, intimately connected to it. Thus, with one exception (Article 31 of the Brussels I Regulation), the only court with jurisdiction over those ancillary rights is the court with jurisdiction over the substantive right to which they are ancillary. Furthermore, the *lex fori* must be applied to determine the nature of the ancillary right as it is the forum that has created it.

1.18 The third thread is the recognition of a procedural rule of exclusion which applies where the application of the *prima facie* governing law of an obligation would be too inconvenient for the forum court's machinery. Under such circumstances, whether they have arisen through the process of enforcing a foreign court order, or directly through the choice of law process, the forum court can disapply the foreign law and substitute the closest order it can from its own legal system.

1.19 It is hoped that, by demonstrating these threads running through remedies and international private law, answers can be found to questions as diverse as does separate jurisdiction have to be established for an anti-suit injunction and does English law have to grant an order for specific performance where the foreign applicable law would do so?

2

Remedies and Rights

2.01 The present chapter discusses two separate issues: (i) what is a remedy; (ii) what is the relationship between remedies and rights? The first section explains that the word 'remedy' will be used to mean a court order in this thesis. It is also thought that one should not be too dogmatic about such definitions and thus the thesis will discuss damages, despite not strictly being considered remedies. However, the rules concerning damages are not entirely the same as the rules concerning court orders and therefore, even though they will be dealt with, they must be dealt with separately.[1] The second section discusses exactly what is meant by the words 'court order'. The third section seeks to explain the relationship between the various types of rights and different types of court orders.

2.02 The main conclusion of the chapter can be briefly stated at the outset. Primary rights, secondary rights, and the court orders vindicating them, are necessarily interdependent. The content of any one of these affects, and is affected by, the others. Therefore, it is sensible, where possible, to apply the same law to all three. They are, in other words, a unit which should not be broken. Generally, there is a Chinese wall between this unit and the methods of enforcement of the judgment used by a legal system. These methods of enforcement do not give content to the primary or secondary right and, therefore, a different law can be applied to such orders than has been applied to the unit of primary

[1] See Chapter 8.

right, secondary right and the court order vindicating them. This rule must, however, admit to some exceptions.[2]

I. WHAT IS A REMEDY?

2.03 ‘The concept of remedy has rarely been subjected to rigorous analysis.’[3] These are the opening words of one of the most popular texts on English private law remedies. Academics, particularly those involved in restitution scholarship, have in recent years begun to focus on the most appropriate definition for the word ‘remedy’.[4] The present section seeks to explain which aspect of a claim will be described as a remedy. The section is divided into three parts. The first part breaks down a claim into the elements of primary rights, secondary rights, court orders and tertiary rights. The second section explains that the word remedy is used as a description for more than one of these elements, depending on the context. The third section explains that this thesis will use the word remedy to mean court orders. However, it is also explained that, as long as one is careful, there is little reason to be too dogmatic about this definition and thus the thesis will also discuss damages.

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[2] Below, §2.29 - §2.32.

[3] A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn Oxford University Press, Oxford 2004), 1.

[4] Professor Birks, characteristically, sparked the interest: P Birks, 'The Concept of a Civil Wrong' in D Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon Press, Oxford 1995), P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 Oxford Journal of Legal Studies 1. Other academic writing on the subject includes: K Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) 57 Cambridge Law Journal 301; R Zakrzewski, *Remedies Reclassified* (Oxford University Press, Oxford 2005); S Smith, 'Rights, Remedies and Causes of Action' in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, Oxford 2008); M Tilsbury, 'Remedy as Right' in R Grantham and C Rickett (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, Oxford 2008).

1. THE ANATOMY OF A CLAIM

2.04 Prior to explaining the definition of remedy used in this thesis, a discussion of the relevant terminology is necessary. The terminology is largely taken from Blackstone and Austin. Blackstone realised that in attempting to write a textbook on the whole of English law, classification of the rules would be exceptionally important.[5] He classified the laws into rights and wrongs.[6] As Birks has explained, this can be viewed as a sequence of events.[7] A person going about his daily life has a series of rights, for example his right to bodily integrity,[8] or his contractual rights. If the correlative obligation to one of those rights is broken then this breach is a wrong.[9] A person who suffers a wrong is granted a legal action which is how he obtains a remedy.

2.05 Austin developed this terminology into the more familiar notion of primary and secondary rights.[10] Primary rights correspond to rights on Blackstone's model. Secondary rights arise from the infringement of primary rights. Thus, they correspond to wrongs on Blackstone's model. These secondary rights were also referred to as remedial rights. This concept of primary and secondary rights has been adopted in the English courts when

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[5] W Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, Chicago 1979), Volume I, 117-8.

[6] *Ibid.*.

[7] Birks, 'Rights, Wrongs, and Remedies' (n4), 5.

[8] R Stevens, *Torts and Rights* (OUP, Oxford 2007), 7.

[9] Birks, 'Rights, Wrongs, and Remedies' (n4), 5.

[10] R Campbell (ed), *Austin's Lectures on Jurisprudence or The Philosophy of Positive Law* (5th edn John Murray, London 1885), Lecture XLV.

explaining contractual damages. In *Photo Production v Securicor*,[11] Lord Diplock[12] explained that when parties contract they create primary rights and correlative primary obligations. Upon the breach of a primary obligation, a secondary obligation, and a correlative secondary right, arise. This secondary obligation is to pay compensation for the breach of the primary obligation, in other words, damages. The court then gives judgment, the judgment seeking to vindicate, or replicate,[13] the parties' primary and/or secondary rights. It is here that most analyses stop, but it should be noted that there is a third type of right in this sequence called tertiary rights. A tertiary right is 'the right born of the judgment itself.'[14]

2.06 Birks then sought to build on this categorisation. Rather than challenging the categorisation itself, he sought to explain what creates primary rights themselves. One clear example that exists is that provided by Lord Diplock in *Photo Production*. Contractual primary rights are created by the making of the contract itself. Birks described the event that creates the primary rights as the 'causative event'. Thus, the causative event of a contractual right is the meeting of offer, acceptance and consideration. Though Birks was not particularly concerned with tertiary rights, it is plain from the Austinian model that the judgment itself is the causative event which creates tertiary rights.[15] Tertiary rights include the right to obtain a writ of *fieri*

[11] [1980] AC 827, 848-9.

[12] For the (seemingly academic) argument over the origin of Lord Diplock's distinction, see B Dickson, 'The Contribution of Lord Diplock to the Law of Contract' (1989) 9 OJLS 441, and B Rudden, 'Comment' (1990) 10 OJLS 288.

[13] The term preferred in Zakrzewski (n4).

[14] Birks, 'Rights, Wrongs, and Remedies' (n4), 30.

[15] Smith (n4), 406-7.

facias,[16] or an attachment of earnings order.[17] No claimant has these rights prior to judgment being awarded. More will be said on this later.[18]

2.07 Birks settled on a four-fold categorisation: (i) manifestations of consent; (ii) wrongs; (iii) unjust enrichment; and (iv) other causative events.[19] Consent-based events include not only contracts but also, for example, express trusts. If a father declares that he holds his French holiday cottage on trust for his son then he has created rights held by the son and correlative obligations owed by the father. These rights and obligations arise from the father's declaration of trust, which is consensual. The second category is that of wrongs, and the core contents of this category are self-explanatory. The third category of causative events is called unjust enrichment. Where A mistakenly pays B €10, A has a right under some legal systems to the reimbursement of that €10. That right is said to be neither based on consent nor based on any wrong. B is under an obligation to repay the €10 because he has been unjustly enriched. The fourth category is the catch-all category of miscellaneous events. Birks cites the example of *negotiorum gestio* as being one of the members of this category.[20]

2.08 Thus, the approach from the Blackstone, Austin and Birks theories is predicated on the existence of a primary right, which is then broken giving rise to a secondary right. These primary rights and secondary rights are what the courts try to vindicate in their

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[16] RSC Order 47. To be renamed 'writ of control' when s62(4) of the Tribunals, Courts and Enforcement Act 2007 is brought into force.

[17] Attachment of Earnings Act 1971.

[18] Below, §2.26-§2.27.

[19] Most clearly seen in P Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005), 21-24.

[20] *Ibid.*, 22-24.

judgments, and those judgments, themselves, give birth to tertiary rights. Whilst the categorisation of the types of right is relied upon for expository purposes, this should not be taken as an acceptance of the exact classification of specific domestic law rights within the categories suggested by the authors.

2. THE MULTIPLE MEANINGS OF REMEDY

2.09 The word remedy has enjoyed multiple meanings in English domestic law. Birks[21] sought to isolate these various meanings and explain them. He arrived at the conclusion that there were at least five different usages of the word remedy in English law.[22] The first meaning was that of a cause of action. The example he cites is a lawyer telling his client that his remedy is in conversion. This, it is argued, is a throwback to the times of the forms of action, where the claim must be placed within one of the pigeon-holes available. Even so, it is plainly still in use.[23] The second meaning is the more often used expression of 'damages are the primary remedy for breach of contract'. A right to damages is a secondary right, that is a right born of the breach of another right.[24] The third meaning is a slightly wider variant of the second meaning: a remedy is a right born of a grievance or injustice. The fourth meaning is seen where remedy is used to mean a right born of the order of a court. The fifth, and final meaning, is a right born of a discretionary court order. The conclusion Birks came to is that remedy is not a useful term for domestic law.

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[21] Birks, 'Rights, Wrongs, and Remedies' (n4).

[22] Though possibly eight, *ibid*, 9.

[23] E.g. S Douglas, 'Torts and Rights by Robert Stevens' (2008) 124 Law Quarterly Review 715, 716: 'the claimant can have a remedy in negligence.'

[24] Barker, (n4), 319, describes secondary rights as the 'remedies to which [a person] is entitled if the primary right is violated.'

3. THE ADOPTED MEANING

2.10 The Birks thesis may be a fraction too fundamentalist for taste. To suggest that the word remedy will be excised from the law is, at best, improbable. Indeed, as already noted, restitution academics have already been suggesting various other usages for it[25] and no doubt further definitions will be provided in due course. There appears to be a consensus growing around the definition of remedy being a court order.[26]

2.11 Birks himself would disagree. He saw the word remedy as meaning something which responds to a wrong and thus describing court orders as remedies was incorrect. The court order does not respond to a wrong but novates, or transforms, parties' pre-existing rights.[27] In doing so, it becomes a source of rights itself. Professor Smith[28] takes the view that there is a qualitative difference between the pre-existing rights of the parties and the rights as encapsulated in a court order. The content of the rights may be identical, in the sense that a particular claimant may, prior to trial, have a right to the performance of a contractual obligation and, having obtained judgment, has a right under that judgment to the performance of the same contractual obligation. However, the fact that the right is encapsulated into a court order makes all the difference, largely as it triggers the ability to obtain orders of execution.[29] Because of this qualitative difference, Professor Smith argues that it is acceptable to give a separate name to court orders. As to whether

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[25] Zakrzewski (n4); Smith (n4); Tilsbury (n4).

[26] Zakrzewski (n4) and Smith (n4).

[27] Birks, 'Rights, Wrongs, and Remedies' (n4), 15.

[28] Smith, (n4).

[29] *Ibid*, 407-8.

'remedy' is the correct name for such orders, it is concluded that court orders will only be made on proof of an actual or imminent wrong, and therefore it is acceptable to use the word remedy to mean court order.[30]

2.12 However, Professor Burrows still maintains that damages are a remedy and therefore includes in his book discussion of the legal rules surrounding them.[31] This is one prominent example of many who are deemed to be using the word remedy incorrectly. Indeed, on this view, the most famous of modern English private lawyers, Professor Sir Guenter Treitel, has written two works with titles that completely misrepresent their contents.[32]

2.13 Perhaps the only proposition that one can accept with any certainty is that the word remedy is not often used precisely. Therefore, when using it one must simply clarify exactly what one means. This thesis is concerned with two separate issues: secondary rights and court orders. A secondary right is a right that arises from the breach of a primary obligation. A court order is exactly what it says: an order by the court. This includes the following: an order for specific performance; an order to pay an agreed sum; an order to pay damages; an interim payment order; an order declaring a trust; a worldwide or domestic freezing injunction; an order to disclose evidence; a search order; a writ of control; an attachment of earnings order; a third party debt order; the order of an equitable receivership. The thesis will use the word 'remedy' to mean a court order and

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[30] *Ibid*, 419-420.

[31] Burrows (n4), 2.

[32] G Treitel, *Remedies for Breach of Contract: A Comparative Account* (OUP, Oxford 1991); G Treitel, 'Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)' in K Zweigert and K Drobnig (eds), *International Encyclopedia of Comparative Law* (JCB Mohr, Tübingen 1976).

the majority of the thesis will be concerned with such orders. However, for the sake of completeness, damages will be dealt with separately as an individual chapter.[33]

II. COURT ORDERS

1. WHICH COURT ORDERS?

2.14 It has been explained that the bulk of the present thesis will be concerned with court orders. An initial question is whether any particular court orders should be excluded from consideration.[34] Dr Zakrzewski's book on remedies excludes certain types of court orders, arguing that whilst all remedies are court orders, not all court orders are remedies. In particular, he only includes orders 'which a party obtains to redress a grievance existing before an action is brought (a 'pre-suit' grievance) and which are available at trial, together with their pre-trial equivalents...'[35] Thus, orders such as worldwide freezing injunctions, search orders and disclosure orders are excluded. This was on the basis that, conventionally, such orders are not referred to as remedies and also to avoid straying into the sphere of civil procedure.[36] With respect, one must be sceptical about the first of these reasons. Such orders are often referred to as 'interim remedies', not least in the Civil Procedure Rules themselves.[37] As to the second of these reasons, this

[33] Chapter 8.

[34] In addition to those excluded, as explained in §1.03, in the broad fields of family law and insolvency.

[35] Zakrzewski (n4), 44-45.

[36] *Ibid*, 44.

[37] CPR r.25.1(1) states 'The Court may grant the following interim remedies...' and goes on to refer to both freezing injunctions (r25.1(1)(f)) and search orders (r25.1(1)(c) and (d)). Also, see CPR Practice Direction

approach has been criticised.[38] It is odd that a book solely about court orders does not want to talk about civil procedure.[39] Such orders will be discussed extensively in the present thesis.

2. WHAT IS A COURT ORDER?

2.15 Court orders can be seen to have two separate aspects: (a) the content of the order; and (b) the status of the order. The content of the order is the aspect which closely resembles the rights that it seeks to vindicate. However, as the order is usually directed towards the party subject to those rights, it is usually phrased in obligational terms. Thus, a court order may require B to perform his contractual obligations owed to A. It is the content of the order that is usually the focus of general discussion on the law of remedies. However, the status of the order is as important. A court order can be granted as a result of the default judgment procedure,[40] or the summary judgment procedure.[41] The content of the order does not change but the circumstances under which it can be set aside may change. The majority of this thesis will be concerned with the content of the order rather than the

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6B, para 3.1(5): 'a claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982',

[38] S Smith, 'Remedies Reclassified by Rafal Zakrzewski' (2006) 122 Law Quarterly Review 164, 167.

[39] N Andrews, *Principles of Civil Procedure* (Sweet and Maxwell, London 1994), 456, refers to conventional remedies as including any final or interlocutory order of the court which entitles the successful party to further recourse.

[40] Generally, see CPR r.12.

[41] Generally, see CPR r.24.

status of the order but, on occasion, it is necessary to refer to the importance of the status of the order.[42]

III. THE RELATIONSHIP BETWEEN PRIMARY RIGHT, SECONDARY RIGHT, COURT ORDER AND ORDER FOR EXECUTION

2.16 The terminology of primary right, secondary right, court order and tertiary right (or measure of enforcement) has been explained. This thesis argues that the first three of these are necessarily connected. The fourth, however, is not. Thus, the conflict of laws ought to, so far as is possible, apply the same law to the primary right, secondary right and court order. However, it need not do so in the context of a tertiary right or measure of enforcement. The current section will set out the theoretical explanation for this solution.

1. PRIMARY RIGHTS AND SECONDARY RIGHTS

2.17 Secondary rights arise from the breach of a primary right. There is a relationship of inter-dependence between the two. The nature of the primary right defines the appropriate secondary right that arises in response to a breach of the primary right. This must be true as otherwise there would be a uniform law on damages to be applied irrespective of whether a tort was committed, or an equitable wrong, or a breach of contract and so on.

[42] E.g. §7.19-§7.20

This is plainly not the case in English law.[43] Hundreds, if not thousands, of examples could be provided yet only a couple will suffice.

2.18 The first example involves the tort of deceit in English law. Whilst remoteness in the English law of tort is generally governed by the *Wagon Mound*[44] test, the Court of Appeal, upheld by the House of Lords, has formulated a much narrower concept of remoteness for the tort of deceit.[45] The harsher response has the consequence of narrowing the causative event: it is much harder to prove deceit than most other torts.[46]

2.19 The second example concerns punitive damages. Punitive damages can only exceptionally be awarded in English law. Traditionally the courts refused to award punitive damages for breach of contract.[47] There is some evidence that the approach is shifting,[48] at least to the extent of allowing disgorgement of ill-gotten gains as a punitive measure.[49] The position of punitive damages in tort is far more complex. It has been held that punitive damages would only be awarded for certain types of conduct:[50] (a)

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[43] Otherwise, the division of all books on 'remedies' into contractual remedies and tortious remedies would be pointless: Burrows (n3); H McGregor, *McGregor on Damages* (17th edn Sweet and Maxwell, London 2003); D Harris, D Campbell and R Halson, *Remedies in Contract & Tort* (Cambridge University Press, Cambridge 2005).

[44] *Overseas Tankship (UK) Ltd v The Miller SS, The Wagon Mound (No 2)* [1967] 1 AC 617.

[45] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254. In the context of another intentional tort, see *Quinn v Leathem* [1901] AC 495.

[46] *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 258, per Denning LJ 'The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case reach the very high standard required by the criminal law.'

[47] *Addis v Gramophone Co Ltd* [1909] AC 488.

[48] See *AG v Blake* [2001] 1 AC 268.

[49] See J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, Oxford 2002).

[50] *Rookes v Barnard* [1964] AC 1129.

oppressive, arbitrary or unconstitutional actions by servants of the government';[51] (b) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant;[52] (c) statutory remedy.[53] In addition to these restrictions, various other restrictions were applied. The most important of these was the 'cause of action test'. According to this test, punitive damages would only be awarded where they had previously been awarded for the same cause of action prior to *Rookes v Barnard*.[54] However, this restriction has been excised from the common law by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*.[55] Unfortunately, their Lordships decided not to explain where this leaves the law on punitive damages. Whilst two of their Lordships expressed the opinion that punitive damages should still be available (and one expressed the opposite opinion), no comprehensive answer to their availability was given. What is clear, however, from this summary, is that the availability of punitive damages depends on the primary right. Where the primary right is contractual, punitive damages will not normally be awarded. Where the primary right is tortious, punitive damages may be awarded, depending on which particular primary right has been breached.

2.20 Therefore, it cannot be disputed that there is an inter-dependence between the primary right and the secondary right.

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[51] E.g. *Wilkes v Wood* (1763) Lofft 1, 98 ER 489; *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768; *Benson v Frederick* (1766) 3 Burr 1845, 97 ER 1130.

[52] E.g. *Broome v Cassell & Co Ltd* [1972] AC 1027.

[53] E.g. the Copyright, Designs and Patents Act 1988, s97(2).

[54] n50.

[55] [2001] UKHL 29, [2002] 2 AC 122.

2.21 The necessary inter-dependence between primary right and secondary right has been demonstrated. Because there is such a necessary inter-dependence they ought to be governed by the same law. The relationship between primary rights, secondary rights and court orders is a little more difficult to explain.

2.22 On one view, court orders merely replicate primary and secondary rights.[56] If this is the case then, given that the forum will inevitably apply its own court orders to resolve any issue, the forum should simply determine the primary and secondary rights of the parties under the foreign law and then seek to replicate these using its own court orders.

2.23 However, it is submitted that the matter cannot be quite so simple. The problem is that legal systems hide limitations on rights within the availability of court orders. One has to look no further than the English law of specific performance to see this in action. Take the cases of *Walters v Morgan*[57] and *Malins v Freeman*.[58] In the first of these, the claimant pushed the defendant into accepting a mining lease renewal without giving him time to assess the real value of the property. Specific performance of this contract was refused on the ground that the claimant's conduct was reprehensible. In the second, Lord Langdale MR, in *obiter* comments, stated that where an agreement was made with the defendant in a state of intoxication, the court will not award specific performance. These

[56] *Cf* Zakrzewski (n4), Chapter 5, explaining that there is a small category of transformative remedies which do not replicate rights, e.g. Matrimonial Causes Act 1973, ss23-24.

[57] (1861) 3 DeGF&J 718, 45 ER 1056.

[58] (1837) 2 Keen 25, 48 ER 537.

are, *prima facie*, issues concerned with the availability of the order and not the existence of the contractual primary right. However, clearly there is an overlap. Thus, it is thought that the most appropriate method is to accept the type of court order granted is often a reflection on the type and nature of right that the claimant has. In which case, it is most appropriate to see the court order as part of a unit, inter-dependent with the primary and secondary rights of the claimant. Thus, if a foreign law is to govern the existence of a particular primary right, that foreign law ought to govern the secondary right and the court order. It will be explained in chapter 4 that the forum court can apply an inconvenience rule of exclusion where the foreign court order could not be applied by the English court.[59]

2.24 Viewing the court order as part of the unit alongside the primary and secondary right is also supported by the law on recognition and enforcement of foreign judgments under the Brussels I Regulation. Under that Regulation the foreign order is rendered directly enforceable in the receiving court's legal system by the *exequatur* procedure.[60] This is notably different from the common law which treated the foreign judgment as a source of obligation and therefore there was no need to directly incorporate the foreign order into the English legal system, the obligation being recognised and given effect to within the orders permissible under the English system.[61]

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[59] Below, chapter 4, Section III(4).

[60] Dealt with extensively in chapter 6.

[61] For an explanation of the obligation approach of the common law, see L Collins (ed), *Dicey, Morris and Collins: The Conflict of Laws* (14th edn Sweet and Maxwell, London 2006), §14-006 and cases cited therein.

2.25 One must be cautious, however, not to go too far. Whilst the content of the order often reflects limitations on the primary rights recognised in a particular legal systems, the status of the order does not. It can hardly be said that a default judgment is awarded because of some reason related to the type of primary right involved. A default judgment will be awarded for reasons unrelated to the type of primary right, for example, because the defendant has failed to serve his defence in sufficient time.[62] Thus, the unit of primary right, secondary right and court order only refers to the *content* of the court order and not its *status*.

3. ORDERS FOR THE ENFORCEMENT OF THE COURT ORDER

2.26 Rights whose causative event is the judgment itself, referred to in this thesis as tertiary rights or measures of enforcement, have already been briefly mentioned. In English law, the tertiary rights available depend on the type of court order that they seek to enforce. For these purposes, court orders can be divided into four: (i) court orders requiring the payment of money; (ii) court orders requiring the delivery of goods; (iii) court orders for the possession of land; (iv) other court orders requiring the judgment debtor to do, or refrain from doing, an act.

2.27 For claimants possessing a court order requiring the payment of money, there is a menu of enforcement measures: writ of control or warrant of execution[63]; administration

[62] CPR 12.3 lists the conditions to be satisfied for obtaining a default judgment.

[63] See RSC Order 47.

order[64]; third party debt order[65]; attachment of earnings order[66]; charging order[67]; and an order to obtain information from a judgment debtor[68]. For claimants possessing a court order requiring the delivery of goods, the writ (or warrant) of delivery is required. For claimants possessing a court order for the possession of land, a writ of possession is used to enforce the order. Finally, for claimants possessing a court order requiring the judgment debtor to do, or refrain from doing, an act, the mechanism for enforcement is contempt proceedings.[69]

4. RELATIONSHIP OF ENFORCEMENT ORDERS TO PRIMARY AND SECONDARY RIGHTS, AND THE COURT ORDER ITSELF

a. The General Position

2.28 There is obviously a relationship between enforcement orders and the court order they seek to enforce. This is clear from the description of the various enforcement orders given above. However, the relationship is a weak one. There is no reference to the type of

[64] County Courts Act 1984, s112.

[65] CPR r72.4.

[66] Attachment of Earnings Act 1971.

[67] Charging Orders Act 1979.

[68] CPR Part 71.

[69] Where the judgment debtor is found to be in contempt of court, the court can award three measures: (i) committal; (ii) fines; (iii) sequestration. The Contempt of Court Act 1981, s14, permits the court to commit the judgment debtor to prison for up to two years for contempt of court. Fines above £2,500 cannot be awarded by inferior courts but superior courts can seemingly choose any value. Sequestration is a writ which allows two or more (four are appointed) sequestrators to enter the judgment debtor's property and take possession of his real and personal property, to be held by the sequestrators up until the judgment debtor complies with the court order.

primary right, or secondary right involved. That is, whether it arose from a contractual obligation, or a tortious obligation and so on. The only reference is to what the court order tries to achieve. For example, if it seeks to force the judgment debtor to pay a specified sum of money then those enforcement orders which aid the recovery of money from the judgment debtor will be applied. Thus, there is a Chinese Wall between the primary and secondary rights and the enforcement order. This Chinese Wall means that there is no necessity to maintain the connection between the primary and secondary rights and the enforcement order. The primary and secondary rights are not in any sense altered by the application of different enforcement orders. Therefore, there is no need to apply the same law to determine the primary rights and the available enforcement orders.

b. Exceptional Cases?

2.29 As with all theories, there is the odd exception. This can be demonstrated by a very brief look at the German law on specific performance.

2.30 The German BGB, at §241(1), simply states that an obligee is entitled to claim performance from the obligor. There is no distinction, for the purposes of the framing of the claim, between a monetary primary obligation and a non-monetary primary obligation. Where performance of the primary obligation is impossible, such an order will not be given as the duty to perform is excluded.[70] Impossibility in this sense is much wider than the equivalent English concept.[71] Three types of impossibility are identified in the BGB. First, BGB §275(1) provides for an exclusion where there is genuine

[70] BGB §275.

[71] For which, see E Peel, *Treitel on the Law of Contract* (12th edn Sweet and Maxwell, London 2007), §21-033.

impossibility, in the sense that performance of the obligation is theoretically impossible. Second, BGB §275(2) provides for an exclusion where there is practical impossibility, in the sense that performance of the obligation takes disproportionate effort and expense in comparison to the subject-matter of the obligation. The classic example provided is a contract of sale for a ring, which is dropped to the bottom of the sea prior to execution of the contract. Third, BGB §275(3) provides for an exclusion where there is moral impossibility, in the sense that the circumstances of the obligee are such that it would be morally shocking to compel performance by him. The typical example is that of a singer, contractually obliged to perform a concert, refusing to perform as her child has been diagnosed with a life-threatening illness.

2.31 Therefore, it would appear that under German law, specific performance of a personal services contract can be granted. This is true, but it is also misleading. Whilst the judgment can be granted, the enforcement of that judgment will be restricted under German rules on the execution of judgments.[72] Such a judgment is 'excepted from the general rule that judgments for acts which cannot be vicariously performed are enforceable by fines and imprisonment'.[73] Therefore, there is a clear link between the type of primary right and the measure of execution permitted.

2.32 With respect to such exceptions, one has a choice. Either the whole theory gets thrown out with the bathwater or one accepts that in exceptional cases common-sense must prevail even if theoretically difficult to explain. Where the unavailability of an enforcement order is clearly connected to the content of the primary right then it seems

[72] ZPO, §888.

[73] Treitel, *Remedies for Breach of Contract: A Comparative Account* (n32), 55.

appropriate for the forum court to refuse to grant such an order. Obviously this will only be possible where the forum's order is discretionary, which the English orders generally are.[74]

5. CONCLUSION

2.33 The present section has sought to discuss the relationship between primary rights, secondary rights, court orders, and enforcement orders. It has been argued that the first three of these are necessarily inter-dependent. Each contributes to the content of the other. Thus, if a conflict of laws system seeks to enforce primary rights granted, or perceived to be granted, by foreign legal systems, it is appropriate to enforce the whole of that primary right including secondary rights and court orders used to give content to the primary right. However, there is a Chinese Wall between these and orders for enforcement. The content and availability of the latter is not directly[75] determined by the content of the primary or secondary right. The availability of a writ of control is not directly determined by whether the judgment creditor has a contractual or tortious right. Therefore, the conflict of laws, when applying a foreign law, should view the primary right, secondary right and court order as the unit with which it is concerned.

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[74] The notable exception being the writ of control.

[75] As explained above, §2.28, it is indirectly determined, in the sense that if the primary right gives the judgment creditor a right to the payment of money, the enforcement orders available will be those which aid the transfer of money from the judgment debtor to the judgment creditor.

IV. CONCLUSION

2.34 This chapter has sought to explain exactly how the word remedy will be used in the rest of the thesis. Remedy will be used in the sense of a court order. Court orders vindicate primary and secondary rights. The three should be seen as a unit as there is a strong degree of inter-relationship between them. However, there is a Chinese Wall between primary and secondary rights, and orders for the enforcement of judgments. Thus, there is no need to see orders for the enforcement of judgments as part of the unit.

3

Remedies and Characterisation

3.01 The present chapter is concerned with one problem: to what extent does the court order sought by the claimant affect the characterisation process? That is, can a claimant alter the result of the characterisation process by changing the remedy he seeks?

3.02 The problem of characterisation is traditionally conceived of as a choice of law problem.[76] A rule such as 'the law governing the tort is the *lex loci delicti*' requires the characterisation of the group 'tort'. However, it would be folly to suggest that this problem is confined to choice of law. The provisions of the Brussels I Regulation demonstrate that jurisdictional rules are to be applied to certain categories such as 'matters relating to contract',[77] or 'tort, delict and quasi-delict.'[78] This also requires a characterisation process to be undertaken.[79] Therefore, characterisation for the purposes of jurisdiction will also be considered.

3.03 The problem with which this chapter is concerned is best illustrated by a few examples. If A agrees to sell B his house but A reneges on the contract after B has paid, B may seek damages. No one would dispute that the claim relates to contractual obligations for the

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[76] E.g. J Fawcett and J Carruthers, *Cheshire, North and Fawcett on Private International Law* (14th edn OUP, Oxford 2008), ch3, commences by explaining that once the English court has determined it has jurisdiction it *then* must 'determine the juridical nature of the question that requires decision.'

[77] Brussels I Regulation, Article 5(1).

[78] *Ibid*, Article 5(3).

[79] A Briggs, 'The real scope of European rules for choice of law' (2003) 119 Law Quarterly Review 352, 355, refers to '...two systems of characterisation – jurisdictional, choice of law...'.

purposes of the Rome I Regulation.[80] Now suppose that B seeks specific performance of the contract, that is, an order requiring B to transfer the house to A. Does the fact that the remedy sought has been altered change the characterisation of the action from contractual to proprietary?[81]

3.04 Another example can be provided. Suppose a trustee breaches the duty he owes to a beneficiary by obtaining a renewal of a beneficially owned lease for his own benefit.[82] The beneficiary may seek an award of compensatory damages. There may be a dispute over whether this claim is contractual or non-contractual but most would argue that it relates to obligations and not property. However, what happens if the beneficiary seeks an order declaring that the trustee holds the renewed lease on constructive trust? It has been said that this remedy is 'proprietary in nature'.[83] Does this mean that by altering the remedy sought, the claimant can alter the characterisation of the claim?

3.05 The present chapter concludes that a claimant cannot, under the European Regulations, change the jurisdictional and choice of law characterisation of the claim by altering the remedy sought. The jurisdictional provisions of the Brussels I Regulation require the identification and characterisation of the primary rights pleaded by the claimant and this remains unaffected by the type of court order sought. Furthermore, the choice of law Regulations require the characterisation of 'obligations' and not issues, explicitly requiring the remedy to be governed by the same law as applied to the obligation.

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[80] Rome I Regulation, Article 1(1).

[81] It will be seen that this issue has arisen in the context of Article 22(1) of the Brussels I Regulation: §3.53-§3.60.

[82] Based on *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223.

[83] Dicey, §S34-044.

Therefore, again, the Regulations do not permit the claimant to affect the characterisation of his claim by altering the remedy sought.

3.06 The chapter is divided up into three sections. Section I seeks to demonstrate that the European conflict of laws model works by characterising the primary rights asserted by the claimant. Section II explains the irrelevance of the remedy sought when characterising the primary right. Section III deals with the perceived difficulties that this creates, in particular analysing the idea that it is possible to be granted proprietary remedies for personal rights.

3.07 It can be noted in passing that, under English law, not only does the type of remedy sought by the claimant affect the characterisation process in both jurisdiction and choice of law, but the type of secondary obligation sought does so too. In *Cooley v Ramsey*,[84] the claimant, a British citizen working in Australia, suffered a severe brain injury when his motor cycle collided with the defendant's car in New South Wales, Australia. It was not in dispute that the accident was caused by the defendant's negligence. Almost eight months after the accident, the claimant returned to England to be cared for by his parents. The claimant brought his claim in the English courts and two issues arose concerning permission to serve out: (1) did the case fall within the CPR r6.20(8)[85]; (2) was England the proper place for the claim? Tugendhat J held that the case fell within the scope of CPR r6.20(8) because some of the claimed consequential loss was suffered in England. Furthermore, when determining whether England was the proper place for the claim, the fact that the claimant had sought compensation based on living out his life in England

[84] [2008] EWHC 129 (QB), [2008] ILPR 345.

[85] Now see CPR PD6b, para 3.1(9)(a).

meant that England was the more appropriate forum. It appears that it could have been possible for the claimant to tailor his claim for damages in order to alter the application of the jurisdictional rules, for example, by only claiming general damages.

3.08 In the context of choice of law, the issue by issue approach to characterisation, which has been a hallmark of the English tort choice of law rules since *Chaplin v Boys*[86] and effectively codified in the Private International Law (Miscellaneous Provisions) Act 1995, s12, has meant that the particular remedy sought by the claimant can affect the applicable law. This is most clearly evidenced in the personal injury cases under the 1995 Act. Take, for example, the recent case of *Lauren B v Mark B*,[87] where the claimant family had been injured, whilst on holiday in Spain, due to the negligent driving of the defendant father. HHJ Platts held that Spanish law was displaced, citing the fact that the consequences of the tort would be felt for a significantly long time in England, where the claimants were recuperating.[88] Had the claim been tailored to only seek punitive damages, it would appear that this would have altered the applicable law.

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[86] [1971] AC 356.

[87] 29th July 2008 (QBD).

[88] It is interesting to note the extent to which this approach can give rise to solutions very similar to the Boskovic thesis: O Boskovic, *La Réparation du Préjudice en Droit International Privé* (LGDJ, Paris 2003). The premises of this thesis have been discussed in some English literature: A Rushworth, 'Remedies and the Rome II Regulation' in W Binchy and J Ahern (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Brill, Hague 2009), 212-215; A Briggs, 'La Réparation du Préjudice en Droit International Privé' [2004] Lloyds Maritime and Commercial Law Quarterly 415.

I. CHARACTERISATION OF PRIMARY RIGHTS

3.09 This section seeks to demonstrate that the European conflict of laws model works by characterising the rights asserted by the claimant. The process can be seen as four distinct stages: (i) identify the primary right(s) asserted by the claimant; (ii) identify the constituent elements of the primary right(s); (iii) identify the relevant autonomous definitions; (iv) characterise the primary right, in view of its constituent elements, according to the autonomous definition.

3.10 The section is in four parts. Part 1 gives a brief introduction to characterisation. Part 2 provides an explanation of the predominant English view of characterisation of 'issues'. Part 3 seeks to demonstrate that the Brussels I Regulation, and Rome I and II Regulations, characterise primary rights. Part 4 then explains that although the Regulations characterise primary rights this does not involve characterisation by the *lex causae* due to the use of autonomous definitions.

1. CHARACTERISATION GENERALLY[89]

3.11 Choice of law rules work by applying a law-selecting[90] rule to a group. For example, 'the law governing the tort is the *lex loci delicti*' or the 'law governing the contract is the proper law of the contract'. In these two examples, we have the groups 'tort' and

[89] The academic material on this subject is voluminous. See Dicey, ch2, fn1, for a selection.

[90] Sometimes a legal-system-selecting rule is terminologically more appropriate for a particular set of choice of law rules. This depends often depends on whether *renvoi* is accepted as part of the choice of law rule.

‘contract’, and the law-selecting rules ‘*lex loci delicti*’ and ‘proper law of the contract’. Characterisation is the determination of the group to which the law-selecting rule is applied. Alternatively, it has been described as the determination of the pigeon-holes into which issues are sorted.[91]

3.12 However, this brief description conceals a number of intricate difficulties. The most important of these is: what are the elements of the group? That is, what exactly is put into the pigeon-holes? The English discussion normally centres around the distinction between ‘issues’ and ‘rules’. The famous case of *Re Cohn*[92] can be used to explain this distinction. In that case, a German-domiciled mother and daughter were both killed by a bomb. If the mother had died first then the daughter would inherit property from the mother, albeit it would then be inherited by whosoever was entitled under the daughter’s will. If the mother and daughter died simultaneously then the other children of the mother would inherit all the mother’s property. Under English law, the presumption was that the eldest died first. Under German law the presumption was that the deaths were simultaneous. Did English or German law apply to determine the case? One could characterise the issue, which would be a variant of ‘who succeeded to the mother’s movable property?’, and ask whether this was procedural (therefore English law would apply) or a matter of succession to movables (therefore German law would apply as the law of the domicile). Or, one could characterise the individual rules of English and German law and ask whether those rules were procedural or not. Uthwatt J characterised the individual rules in *Re Cohn*.[93] However, the modern approach has been to frequently

[91] A Briggs, *Conflict of Laws* (2nd edn OUP, Oxford 2008), 9.

[92] [1945] Ch 5.

[93] This approach is often criticised: e.g. Dicey, §2-018 - §2-022.

refer to the characterisation of 'issues'. This derives from *Macmillan v Bishopsgate (No 3)*,[94] which will now be discussed.

2. MACMILLAN V BISHOPSGATE INVESTMENT (NO 3)[95]

3.13 In simplified form, C owned shares in a company incorporated in New York. The shares were transferred to B, to be held on trust for C. B then used the shares as security for loans granted by D. C brought a claim against D, arguing that D held the shares on constructive trust for C. Under the law of New York, as the shares were 'certificated securities' the doctrine of constructive notice did not apply and D would be *bona fide* purchasers for value therefore being fully entitled to the shares. Under the law of England, D may not have been a *bona fide* purchaser due to the doctrine of constructive notice.

3.14 The Court of Appeal expressly stated that one must characterise the issue. Auld LJ's statement of approach is particularly instructive:[96]

> 'The proper approach is to look beyond the formulation of the claim and to identify...the true issue or issues thrown up by the claim and defence.'

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[94] [1996] 1 WLR 387.

[95] For criticism of the approach of the Court of Appeal in this cases, see C Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) 114 Law Quarterly Review 141.

[96] *Ibid*, 407.

3.15 Staughton LJ held that the issue in question was one of priority and therefore the *lex situs* of the shares should govern, that being the law of New York. Auld LJ held that the issue in question was whether D could resist C's action, more specifically whether D could show that they acquired the shares without notice of C's interest. The issue was 'essentially a proprietary one, whether [D] could defeat the [C's] interest by establishing that they were *bona fide* transferees for value without notice.'[97] Thus, the *lex situs* of the shares should govern. Aldous LJ thought that the issue between the parties was whether C or D had the better title to the shares. This was an issue of priority and therefore the *lex situs* of the shares should govern.

3.16 Professor Yeo sets out three different analyses of this decision.[98] The first analysis is that the Court characterised the defence and applied a separate law to this than may have been applied to the claim itself.[99] Whilst this interpretation is arguable, it does seem doubtful. The second analysis is that the Court characterised the claim as a whole as proprietary. The third analysis, and the one preferred by Professor Yeo, is that the Court simply saw the issue that was in contest between the parties as being one concerning title to the shares and therefore the issue was proprietary in nature. Professor Yeo admits that this is 'the safest inference that one can draw from the case.'[100]

3.17 The next section seeks to argue that, even if this is the approach which is correct as a matter of English law, the European model seeks to characterise the primary rights

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[97] *Ibid*, 409.

[98] T Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, Oxford 2004), §3.17-§3.19.

[99] Also, see A Briggs, 'Decisions of the British Courts During 1996: Private International Law' (1996) 67 British Yearbook of International Law 577, 606.

[100] Yeo (n98), §3.19.

asserted by the claimant and does not focus in any sense on the core of the dispute, the defence, or the issues that arise by analysis of the claim and defence.

3. CHARACTERISATION UNDER THE EUROPEAN INSTRUMENTS

3.18 Characterisation has, as already explained, often been presented as solely an issue concerned with choice of law. However, the difficulty is not so confined. Characterisation occurs on the jurisdictional level too. Under the Brussels I Regulation, in matters relating to contract, the courts for the place of performance of the obligation in question can take jurisdiction.[101] Just as has been seen in the context of choice of law, there is a group to which a rule is applied. Instead of that rule being a law-selecting rule, it is a jurisdiction-selecting rule. Thus, in our example, to the group 'matters relating to contract' the jurisdiction-selecting rule 'the place of performance of the obligation' is applied. Therefore, in determining how characterisation works under the European instruments, the present section seeks to ask two questions: (a) how does characterisation occur under the Brussels I Regulation; (b) how does characterisation occur under the Rome I and Rome II Regulations?

a. Characterisation under the Brussels I Regulation

3.19 It is clear from the text and case law of the Regulation that one characterises the claim or cause of action, pleaded by the claimant, rather than the issue, the rule or the dispute. The

[101] Article 5(1)(a).

need to separate out the primary rights of the parties is hard-wired into the system. This will be demonstrated by three examples: (i) Article 1; (ii) Article 5(1); (iv) Article 6(1).

Article 1 – 'civil and commercial matters' and the arbitration exception

3.20 The material scope of the Regulation is defined as 'civil and commercial matters'. A claim, as formulated, either falls under this, or does not. Unlike the issue-based approach taken in *Macmillan*,[102] there is no prospect of looking at individual parts of a claim and defence that arise and querying whether those issues affect the characterisation of the claim. This can be seen most explicitly by the Court's decision in *Préservatrice Foncière TIARD v Netherlands*.[103] In that case, the claim brought in the Dutch courts was one for payment under a contractual guarantee which had been agreed between the Netherlands and TIARD (a French company), under which the latter would pay certain taxes and duties of third parties. TIARD argued that the Brussels Convention applied and therefore they ought to be sued in France under Article 2. The *Hoge Raad* referred questions to the ECJ asking whether the claim itself was a civil or commercial matter and whether, because the defendant would inevitably put forward matters regarding customs debts, the matter was not civil or commercial. The ECJ held that the matter was civil or commercial and, more importantly for present purposes, in determining that focussed only on the subject-matter of the claim.[104] It was stated:[105]

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[102] Above, §3.13-§3.17.

[103] C-266/01 *Préservatrice Foncière TIARD v Netherlands* [2003] ECR I-4867.

[104] Equally, see C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207.

[105] n103, [42].

> 'In order to determine whether an action falls within the scope of the Brussels Convention, only the subject matter of that action must be taken into account. It would be contrary to the principle of legal certainty, which is one of the objectives pursued by that convention, for its applicability to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.'

Thus, it is quite clear that an issue-based approach, like that in *Macmillan*, would not be possible. The action is characterised[106] and the actual core dispute between the parties by the time the hearing occurs is neither here nor there for this purpose.

3.21 A similar approach can be seen in the context of interpreting the arbitration exception contained in Article 1(2)(d) of the Brussels I Regulation. The case of *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*,[107] is particularly instructive. West Tankers chartered their vessel *The Front Comor* to Erg Petroli SpA ('Erg'). The charterparty included an English law clause and a London arbitration clause. The vessel collided, in Italy, with a jetty owned by Erg causing damage to the jetty. Erg recovered from their insurers, Allianz, who then sued West Tankers in the Italian courts, being statutorily subrogated to Erg's charterparty rights under the Italian Civil Code. West Tankers brought proceedings for an anti-suit injunction in the English courts and the

[106] Hence, the court in C-292/05 *Lechouritou and Others v Dimosio Tis Omospondiakis Dimokratias Tis Germanias* [2007] ECR I-1519 continually refers to 'action' or 'claim' as the unit of assessment, [30]-[41]. The controversial aspect of *Lechouritou* is that the Court appears to have taken account of the background facts required to construct the claim when characterising the right.

[107] C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* [2009] 1 Lloyd's Rep 413. Also, see *Youell v La Reunione Aerienne* [2009] EWCA Civ 175.

House of Lords referred a question to the ECJ asking whether such an injunction was compatible with the Brussels I Regulation. It was held that the injunction was not compatible with the Regulation. The subject-matter of the claim in the Italian courts was within the scope of the Brussels I Regulation, it being a simple contractual claim, and the fact that the dispute between the parties was over the applicability of the arbitration clause did not remove that claim from the Regulation. One characterises the claim made and not the 'issue' between the parties.

3.22 This approach has led to criticism of the decision on the basis of, what can be broadly termed, issue-based reasoning, as opposed to claim-based reasoning. Thus, Professor Briggs[108] relies on *Hoffmann v Krieg*[109] and *Owens Bank v Bracco*[110] to criticise the approach of the ECJ in *Allianz SpA*. However, the three cases are all reconcilable if one takes a claim-based approach.

3.23 *Hoffmann v Krieg* involved the separation of a German couple. The husband moved to the Netherlands. The wife obtained a maintenance order from the German courts and brought it to the Netherlands for enforcement. However, the husband had already obtained a Dutch divorce decree. An award of maintenance is dependent on the couple still being married.[111] Thus, the Dutch court referred questions to the ECJ asking *inter alia* whether it would have to enforce the German maintenance order under the Convention, even though this would be incompatible with its own law of status which

[108] A Briggs, 'Fear and Loathing in Syracuse and Luxembourg' [2009] Lloyd's Maritime and Commercial Law Quarterly 161.

[109] C-145/86 *Hoffmann v Krieg* [1988] ECR 645.

[110] C-129/92 *Owens Bank Ltd v Bracco* [1993] ECR I-117.

[111] *Hoffmann v Krieg* (n109), [13].

falls outside the Convention. The ECJ replied in the negative. The ECJ reasoned[112] that maintenance is an obligation dependent on the existence of a matrimonial relationship. Therefore a maintenance order necessarily presupposes a matrimonial relationship. Whether there was a matrimonial relationship was outside the scope of the Convention and a matter for the Dutch courts. Therefore, they could decide the existence of that relationship, and if they decided in the negative, this must entail rendering the German maintenance order unenforceable in the Netherlands. Professor Briggs argues that 'this pattern of analysis applies, clearly and precisely, to the inter-relationship of legal issues present by *Allianz v West Tankers*'.[113] But with respect, the pattern does not apply at all. *Hoffmann* is concerned with the enforcement of a judgment of a Member State court, and this was not in issue in *Allianz*. *Hoffmann* may apply should the Syracuse proceedings come to fruition and the judgment is brought to England for enforcement.[114] The only issue in *Allianz* was whether the English court could award the anti-suit injunction preventing the Syracuse proceedings. The English claim fell outside the Regulation and the Italian claim fell inside. Therefore, the English court may do whatever it wishes to do, its actions falling outside the Regulation, so long as it does not undermine the Regulation itself,[115] which the anti-suit injunction would have done.[116] Therefore, it was prohibited from making the order.

[112] *Ibid*, [13]-[18].

[113] n108, 164.

[114] It is arguable, even then, that *Hoffmann* will not apply on the basis that the Italian judgment will not be dependent on the arbitration clause in the same way the German maintenance order was dependent on the status of the couple. Status, in this respect, may be distinguishable from the arbitration exception.

[115] Similarly, procedural matters fall outside the scope of the Regulation, insofar as the national court's actions do not undermine the Regulation: *Hoffmann* (n109), [29].

[116] Which had been already decided in C-159/02 *Turner v Grovit* [2003] ECR I-3565.

3.24 It is also argued that the *Allianz* decision is incompatible with *Owens Bank*.[117] In that case, a judgment had been granted by the St Vincent Court holding that the second defendant owed 9m Swiss Francs to the claimant. The claimant then sought to have this judgment enforced in Italy, whereupon the second defendant alleged that the judgment had been obtained by fraud. The claimant later sought to have the St Vincent judgment enforced in England, and the House of Lords referred a set of questions asking, effectively, whether they had to stay their proceedings on the basis that the Italian court was seised first. The ECJ held that the English action did not need to be stayed under the Convention's *lis alibis pendens* rules. Professor Briggs argues that the ECJ in *Owens Bank* held *inter alia*:[118]

> '[a]lthough the precise or narrow issue before the two national courts was capable of arising in a civil or commercial matter, it arose as part of a larger issue – the enforcement of a judgment from outside the Member States – which was outside the material scope of the Convention.'

With respect, there is nothing in the judgment to suggest that the ECJ were adopting such a proposition. The ECJ held that an *exequatur* decision is not a judgment for the purposes of Title III, which was not contested by either party. The Court then held that such proceedings fell outside the scope of Title II, stating that it provides rules of jurisdiction for where the defendant can be sued.[119] Therefore, the ECJ held, Title II does not apply to proceedings for the recognition and enforcement of judgments given in non-contracting

[117] Briggs, 'Fear and Loathing in Syracuse and Luxembourg' (n108), 164.

[118] *Ibid*, 164.

[119] n110, [22].

States.[120] This conclusion looks a little odd in isolation but is a compressed form of AG Lenz's opinion. AG Lenz had determined that the proceedings in question fell outside the scope of the Brussels Convention because *inter alia*: (i) textually the Brussels Convention concerns 'claims in civil or commercial law', which excludes proceedings for a declaration of enforceability;[121] (ii) Title II provides no special jurisdictional rule for such proceedings and Article 2 is clearly an inappropriate rule in the circumstances.[122] Given AG Lenz's conclusions, and looking at the ECJ's judgment, it becomes clear that they decided that an action for a declaration of enforceability did not involve a *claim* in civil or commercial matters. Therefore, it fell outside the scope of the Brussels Convention, which is only concerned with civil and commercial claims. Therefore, Professor Briggs is incorrect to argue that the narrow or precise issue fell within the scope of the Convention, but the bigger issue did not. The narrow, precise issue fell outside the scope of the Convention itself.

Article 5(1)

3.25 Article 5(1) provides a rule of special jurisdiction in matters relating to contract. The general rule is that the courts for the place of performance of the obligation in question have jurisdiction.[123] The place of performance of the obligation in question, unless otherwise agreed, is where the goods were delivered or should have been delivered in the

[120] *Ibid*, [23].

[121] *Ibid*, [AG27].

[122] *Ibid*, [AG35].

[123] Article 5(1)(a).

case of the sale of goods, and where the services were provided or should have been provided in the case of the provision of services.[124] For all other types of contractual obligation, it is the place of performance of the primary obligation[125] upon which the claimant bases his claim.[126]

3.26 Therefore, the general rule requires that the obligation upon which the claim is based be identified and then the place of performance of that obligation be identified. Thus, under the general rule, the characterisation is done with respect to individual primary obligations.

3.27 However, this appears to be deviated from in two respects. First, Article 5(1)(b) provides for specific rules in the context of sale of goods and provision of services. This rule was introduced to prevent an unpaid seller from always being able to sue at home.[127] Secondly, in *Hassan Shenavai v Klaus Kreischer*,[128] the ECJ admitted the possibility that where there was a dispute involving a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the claimant, the court can determine, following the maxim *accessorium sequitur principale*, the principal obligation and use this for the purposes of Article 5(1).[129] However, both of these

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[124] Article 5(1)(b).

[125] C-14/76 *De Bloos Sprl v Bouyer SA* [1976] ECR 1497, holding that the secondary obligation is not the relevant obligation for the purposes of Article 5(1), [14], although it will be for the national court to determine whether an obligation to pay compensation by way of damages is a primary obligation or a secondary obligation, [17].

[126] Article 5(1)(c).

[127] Dicey, §11-278.

[128] C-266/85 *Shenavai v Kreischer* [1987] ECR 329.

[129] For the limits of this doctrine, see C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex* [1999] ECR I-6747.

deviations still require the initial characterisation of the obligations, or primary rights, of the parties, but then supplementary rules are applied solely to determine the place of performance.

Article 6(1)

3.28 When a claimant brings an action against a defendant (hereafter the 'anchor' defendant) he may wish to join other defendants to that action. Article 6(1) is the principal[130] method of achieving this. It permits a claimant, so long as at least one of the defendants is domiciled in the court where the action is brought, to join other defendants if 'the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

3.29 The Article explicitly refers to 'claims' as the unit with which the rule is concerned. Furthermore, any attempt to use a broader characterisation approach in the Regulation has been strongly rebutted by the court, referring to Article 6(1). Thus, in *Kalfelis*,[131] the claimant asserted multiple causes of action in contract, tort and unjust enrichment. The question arose whether the court having jurisdiction by virtue of Article 5(3) of the Regulation could take jurisdiction over similar actions, albeit non-tortious. This was referred to as 'accessory jurisdiction'. AG Darmon thought that accessory jurisdiction was possible, albeit that the claims should be channelled through Article 5(1). Thus, where multiple causes of action arose in the context of a contractual matter, the court

[130] See also Article 6(2), covering cases involving third party proceedings, such as a warranty or guarantee.

[131] C-189/87 *Kalfelis v Bankhaus Schröder Munchmeyer Hengst & Co* [1988] ECR 5565.

with jurisdiction over the contractual matter ought to have jurisdiction over the other causes of action, even though they were framed in tort or unjust enrichment. The ECJ rejected this analysis, stating that a court with jurisdiction over a tortious action does not have jurisdiction over matters not based on tort.[132] This analysis has been re-affirmed time and time again.[133]

Conclusion on the Brussels I Regulation

3.30 It should be clear from the above examples that the Regulation characterises the individual primary rights on which the claim is based.[134] Thus, when applying the jurisdictional rules of the Brussels I Regulation, the claims made on the claim form must be broken down into individual primary rights and jurisdiction is allocated to each of these primary rights separately.

3.31 If further support for this proposition is required, it can be found in the operation of Article 27 of the Regulation[135] and also the approach taken to the recognition and enforcement of judgments, where the judgment has the effect of providing a cause of action estoppel.[136]

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[132] *Ibid*, [19]-[21].

[133] C-51/97 *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV* [1998] ECR I-6511, [49]; C-98/06 *Freeport plc v Arnoldsson* [2007] ECR I-839, [46]. For commentary, see A Scott, 'Reunion revised?' [2008] Lloyd's Maritime and Commercial Law Quarterly 113.

[134] C-14/76 *Etablissements A de Bloos Sprl v Establissements Bouyer SA* [1976] ECR 1497.

[135] *Kolden Holdings Ltd v Rodette Commerce Ltd and Another* [2008] EWCA Civ 10, [2008] 1 Lloyd's Rep 434.

[136] P Barnett, *Res judicata, Estoppel and Foreign Judgments* (OUP, Oxford 2001), §7.52-§7.105.

b. Characterisation for Choice of Law Purposes

3.32 Recital 7 of the Rome I Regulation and Recital 7 of the Rome II Regulation are materially identical. They state that the substantive scope and provisions of those Regulations ought to be interpreted consistently with one another, and with the Brussels I Regulation. However, it does not necessarily follow that because the Brussels I Regulation works by characterising primary rights the Rome I and Rome II Regulations will do so too. Not all aspects of the Rome I and Rome II Regulations which share features with the Brussels I Regulation will be construed identically. However, it would seem that one starts with the presumption that the two will be construed together, but if a compelling reason can be found for not doing so, they will not be construed together.[137] It will be argued that characterisation under the Rome I and Rome II Regulations does actually involve the characterisation of a right, rather than an issue, or a rule. Furthermore, it will be demonstrated that this has already been accepted by the English courts.

3.33 It should be kept in mind that characterisation under the Regulations involves construing the provisions of those Regulations.[138] Nothing more, and nothing less, is required.

3.34 It should also be borne in mind that the present section discusses the initial level of characterisation under the Rome I and Rome II Regulations, that is, whether claim falls

[137] A Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (OUP, Oxford 2008), §3.33.

[138] A Briggs, 'Choice of Choice of Law' [2003] Lloyds Maritime and Commercial Law Quarterly 12; Dickinson, *ibid*, §3.63.

within the material scope of the Regulations, and not what happens once the claim has been determined to fall within the scope of the Regulations.[139]

Characterisation under the Rome I Regulation[140]

3.35 The Regulation applies to 'contractual obligations in civil and commercial matters'.[141] Thus, in a claim form which discloses multiple primary rights, only those with correlative contractual obligations, within the meaning of Article 1(1) of the Rome I Regulation, will fall within its scope. It is the characterisation of the obligation which is of crucial importance.

3.36 In *Sea Premium Shipping Limited v Sea Consortium Pte Limited*,[142] a dispute arose over a charterparty. The charterparty had been concluded with a previous owner of the vessel and the charterer sued the new owner, under the law of Dubai, for a breach of his obligation to honour the charterparty. This claim could either be seen as contractual, in the sense that the contractual obligations under the charterparty were transferred from the old owner to the new owner, or it could be seen as non-contractual in the sense that the new owner has an obligation not to interfere with the contractual relations between the

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[139] Dickinson, *ibid*, §3.59, refers to this distinction as the one between 'horizontal material scope' and 'vertical material scope'.

[140] On characterisation under the Rome Convention, which is no different to that under the Rome I Regulation, see: R Plender, *European Contracts Convention* (2nd edn Sweet and Maxwell, London 2001), 49-54; Dicey, §32-023-§32-026; Briggs, 'Choice of Choice of Law', (n138).

[141] Rome I Regulation, Article 1(1).

[142] 11th April 2001, QBD.

old owner and charterer.[143] David Steel J simply stated that 'for the purposes of characterisation, the claim is contractual rather than delictual in nature.'[144] There is no reference to the 'issue' or the 'dispute' but merely the correct characterisation of the *claim*.

3.37 The Court of Appeal's decision in *Raiffeisen Zentralbank Österreich AG v Five Star Trading*[145] is a little more ambiguous but this was due to the nature of the question asked of the court. The question was whether the validity of an assignment of the benefit of an insurance contract was to be governed by the *lex situs*, as the *situs* of the debt, or the *lex contractus* of the underlying debt. Mance LJ frequently used the terminology of characterising the issue. However, his conclusion was that Article 12(2) of the Rome Convention 'manifests a clear intention to embrace the issue and state the appropriate law.'[146] His Lordship implicitly works back from this to the conclusion that the claim was based on a contractual obligation for the purposes of Article 1(1).[147]

3.38 In *Base Metal Trading v Shamurin*,[148] the director of a company had engaged in speculative trading with the company's assets without authorisation. The company brought claims against him alleging: (i) the director had breached his fiduciary duties as director; (ii) the director had breached his employment contract with the claimant; (iii)

[143] A similar problem that English law has had to grapple with, albeit the distinction being between proprietary rights and tort rights: *Lord Strathcona Steamship Company Ltd v Dominion Coal Company Ltd* [1926] AC 108; *Swiss Bank Corporation v Lloyds Bank Ltd* [1979] Ch 548.

[144] n67, 21, lines 18-19.

[145] [2001] EWCA Civ 68, [2001] QB 825.

[146] *Ibid*, [43].

[147] As noted by Briggs, 'The real scope of European rules for choice of law' (n79), 353.

[148] [2004] EWCA Civ 1316, [2005] 1 WLR 1157.

the director had breached a common law duty of care owed to the claimant. It was argued by counsel for the director that for the purposes of characterisation these were all contractual obligations under the Rome Convention and therefore fell within its scope. This was rejected by the Court of Appeal on the basis that whilst the equitable duty and the tortious duty were voluntarily assumed but not voluntarily assumed by agreement.[149] Characterisation was done with reference to the obligations pleaded. The particular primary rights asserted by the claimant were analysed and these primary rights were then characterised.

Characterisation under the Rome II Regulation[150]

3.39 To determine whether the Rome II Regulation applies to a particular claim one has to determine whether the claim falls within the material scope of the Regulation. In particular, the Regulation applies to 'non-contractual obligations'.[151] Thus, similarly to how the Rome I Regulation functions, in a claim form which discloses multiple primary rights, only those with correlative non-contractual obligations, within the meaning of Article 1 of the Rome II Regulation, will fall within its scope. It is hardly surprising that

[149] Per Tuckey LJ, [28]. For criticism, see: T Yeo, 'Choice of law for director's equitable duty of care and concurrence' [2005] Lloyd's Maritime and Commercial Law Quarterly 144; A Rushworth and A Scott, 'Rome II Regulation: the law applicable to non-contractual obligations' [2008] Lloyd's Maritime and Commercial Law Quarterly 274, 300-301; A Dickinson, 'Applicable law arbitrage - an opportunity missed?' (2005) 121 Law Quarterly Review 374.

[150] For more detail, see: Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* , §3.62-3.74; Rushworth and Scott, 'Rome II Regulation: the law applicable to non-contractual obligations' , *ibid*, 296-298; A Scott, 'The Scope of Non-Contractual Obligation' in W Binchy and J Ahern (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Brill, The Hague 2009).

[151] Rome II Regulation, Article 1(1).

this mirrors the approach taken in the Rome I Regulation. It is to be expected that the approach to characterisation in these Regulations will be consistent.

c. Conclusion

3.40 The Rome I and Rome II Regulations involve the characterisation of individual obligations. They require the primary rights disclosed in the claimant's claim form to be analysed and then allocated. This is precisely what the Brussels I Regulation requires. The primary rights which are claimed must be separated out and dealt with individually. In any case, it seems very doubtful that the ECJ would take a different approach to characterising obligations under the Brussels I Regulation and under the Rome I and II Regulations. The preponderance of academic authority,[152] and the recitals in the Rome I and II Regulations, suggest that the interpretation of obligations will be the same as that in the Brussels I Regulation.

4. USE OF AUTONOMOUS DEFINITIONS IN THE CHARACTERISATION PROCESS

3.41 It has been explained that the English approach has been to characterise issues. The determination of these issues will always be heavily influenced by the *lex fori* but can be

[152] Dickinson (n137), §3.33-3.36; G Légier, 'Le règlement «Rome II» sur la loi applicable aux obligatons non contractuelles' [2007] La Semaine Juridique Edition Générale 13, [1].

internationalist in approach.[153] The approach that has been suggested in the previous section relies on characterisation of the primary rights asserted by the claimant which will be necessarily dependent on the *lex causae* of that right. Thus, it may be argued that this approach is flawed for one cannot characterise by the *lex causae* before one has determined the *lex causae*. This is the problem of *petitio principii*.[154] Furthermore, there is something unattractive about the claimant being able to control the characterisation process by choosing a favourable *lex causae* which can then be applied.[155]

3.42 However, it is submitted that neither of these criticisms hit their mark. This is due to the ECJ's use of autonomous definitions. The process of characterisation under the European instruments involves identifying the primary rights asserted by the parties, breaking those primary rights down into constituent elements, and then applying an autonomous definition to those constituent elements. A famous example can be given.

3.43 In *Jakob Handte v Societe Traitements Mecano-Chimiques des Surfaces (TMCS)*,[156] the German defendant had manufactured suction systems which were attached by a French company to metal polishers sold to the French claimant by another French company. The claimant sued the defendant on the basis that the suction systems were not of satisfactory quality and did not comply with health and safety regulations. Under French law, this claim was contractual. However, the ECJ characterised the claim as non-contractual. The

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[153] O Kahn-Freund, 'General Problems of Private International Law' [1974] Hague Recueil III 147, 366-383; *Raiffeisen Zentralbank Österreich AG v Five Star Trading* (n145); Briggs, *Conflict of Laws* (n91), 13.

[154] D McClean and K Beevers, *Morris: The Conflict of Laws* (6th edn Sweet and Maxwell, London 2005), 493-4.

[155] A similar concern, in a different context, was expressed in Briggs, 'Choice of Choice of Law' (n138).

[156] C-26/91 *Jakob Handte & Co GmbH v Societe Traitements Mecano-Chimiques des Surfaces* [1992] ECR I-3967.

Court did this first by providing an autonomous definition: there is no contractual obligation where the obligation has not been freely entered into by one party to another.[157] Then, the Court analysed how the primary right which the claimant asserted had arisen. This was, under French law, through a chain of contracts from the manufacturer down to the consumer. Whilst this right may be contractual as a matter of French law, it did not satisfy the autonomous definition and therefore was non-contractual.[158]

3.44 This approach has even crept into English law, most obviously seen in the case of *Trafigura Beheer v Kookmin Bank*.[159] There, the issuing bank of a letter of credit made a claim in the Korean courts alleging a tort committed by the beneficiary of that credit. The beneficiary had exchanged original bills of lading for a new set which stated 'null and void' thereby depriving the issuing bank of any security interest in the goods. The beneficiary sued the issuing bank in England for a declaration of non-liability. The question was whether the claim brought by the issuing bank was tortious or contractual. Aikens J analysed the requisite elements of the claim made by the issuing bank and, looking at these elements, characterised the claim as tortious. His Lordship refused to breakdown the elements of the claim into issues as they all "'relate to tort", in the sense that they all relate to [the issuing bank's] claim for a pecuniary remedy which is not based on a contract, but an allegation that [the beneficiary] has committed a civil wrong against [the issuing bank].'[160]

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[157] *Ibid*, [15].

[158] *Ibid*, [16] and [17].

[159] [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep 455.

[160] *Ibid*, [72].

3.45 The approach of Aikens J is to isolate the particular claim being made by the claimant,[161] break it down into its constitutive elements, and then ask whether this particular claim, given these particular constituent elements, is contractual or not. All issues related to that claim will be governed by the same law as that claim.

5. CONCLUSION

3.46 This section has sought to demonstrate that the European Regulations on the conflict of laws work by characterising primary rights. The primary right, asserted under a particular law, is broken down into its constituent elements and then characterised according to the relevant autonomous definition. The next section seeks to explain that the remedy, in the sense of the court order sought, is irrelevant to this characterisation process.

II. THE IRRELEVANCE OF REMEDY IN THE CHARACTERISATION PROCESS

3.47 The previous section sought to demonstrate that the European instruments depend on the characterisation of rights. A claimant argues that he has a particular right under a particular law. That right under that law is broken down into its constituent elements. Then, looking at the constituent elements, that right is characterised autonomously. The question for the present section is whether the actual court order sought by the claimant

[161] Or rather here the defendant due to the action being for a declaration of non-liability.

affects this characterisation. It will be argued that it does not. Part I explains that the Rome I and II Regulations clearly demonstrate the remedy sought does not affect the characterisation of the right. Part II argues that the ECJ jurisprudence on the Brussels I Regulation demonstrates that the choice of remedy does not alter the characterisation of the right. Part III argues that, normatively, the remedy ought not affect the characterisation of the right.

1. REMEDY IRRELEVANT UNDER THE ROME I AND ROME II REGULATIONS

3.48 The Rome I and Rome II Regulations apply where the claim is within their material scope. Article 1(1) of the Rome I Regulation states 'This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.' Thus, the rules of the Regulation will apply as soon as the right and correlative obligation have been characterised as contractual. Similarly, Article 1(1) of the Rome II Regulation states 'This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.' The rules of the Regulation will apply as soon as the right and correlative obligation have been characterised as non-contractual.

3.49 Both of the Regulations state that the remedy[162] will be governed by the law applicable to the obligation. Thus, Article 12(1)(c) of the Rome I Regulation states:

[162] For discussion of the issue that the Rome I Regulation does not explicitly refer to the word 'remedy', whereas the Rome II Regulation does, see below, §7.07-§7.20.

> '[The law applicable to a contract by virtue of this Regulation shall govern in particular:] within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;'

Articles 15(c) and (d) of the Rome II Regulation state:

> '[The law applicable to non-contractual obligations under this Regulation shall govern in particular:] the existence, the nature and the assessment of damage or the remedy claimed;
>
> '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;'

3.50 The Regulations therefore suggest that one must initially characterise the right/obligation and then, once this has been achieved, one must simply apply the governing law to the remedy. The remedy, therefore, forms no part of the characterisation process.[163]

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[163] Dicey, §S34-044; Rushworth and Scott, 'Rome II Regulation: the law applicable to non-contractual obligations' (n149), 302. This view also seems to be implicitly supported in Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (n137), §3.95, who takes the view that the main type of remedy may be an indication of whether a right is proprietary or personal. *Cf* Article 7 of the Rome II Regulation which creates the impression that the remedy sought matters but this is thought to be an erroneous impression: M Bogdan, 'The Treatment of Environmental Damage in Regulation Rome II' in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff Publishers, The Hague 2008), 221-222.

2. REMEDY IRRELEVANT UNDER THE BRUSSELS I REGULATION

3.51 The most obvious example of the ECJ focussing on the primary right in determining jurisdictional rules is the case of *De Bloos*.[164] There, Bouyer granted to De Bloos the exclusive right to distribute Bouyer products in Belgium, Luxembourg and the Congo. De Bloos brought a claim against Bouyer for (i) a declaration that the agreement should be dissolved on the ground of the grantor's wrongful conduct; (ii) the payment of damages for the unilateral revocation of the exclusive sales concessions. One of the issues for the court was where, for the purposes of Article 5(1) of the Brussels I Regulation, was the place of performance of the obligation in question. The ECJ stated:[165]

> '...[F]or the purposes of determining the place of performance within the meaning of Article 5...the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.
>
> 'In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5 (1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims.'

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[164] *De Bloos Sprl v Bouyer SA* (n125).

[165] *Ibid*, [13]-[14].

The ECJ left it to the national courts to determine whether an action for compensation by way of damages is 'an independent contractual obligation or an obligation replacing the unperformed contractual obligation is involved.'[166]

3.52 This irrelevance of the remedy sought can also be seen in how the Court approaches the *lis pendens* rule in Article 27. A useful example is provided by *Gubisch Machinenfabrik KG v Giulio Palumbo*.[167] In that case, Mr Palumbo brought proceedings in Italy for a declaration that he had not entered into a contract to purchase a machine tool from Gubisch or, alternatively, a declaration that the contract had been validly rescinded. Gubisch contested jurisdiction on the basis that they had brought proceedings in Germany for payment on the same contract and therefore the Italian court had to stay their proceedings in accordance with Article 27 of the Regulation (then Article 21 of the Convention). The ECJ held that the Italian courts had to stay the proceedings. The subject-matter of the two claims was identical, both concerning the same contractual right/obligation, even if seeking different remedies.

3.53 The earlier cases on Article 22(1) also provided support for the proposition that the remedy is not relevant to characterising the right, in particular *Reichert I*,[168] *Webb v Webb*[169] and *Gaillard v Chekili*.[170] This support has been qualified by the recent case of *Land Oberösterreich v CEZ*.[171]

[166] *Ibid*, [17].

[167] C-144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861.

[168] C-115/88 *Reichert v Dresdner Bank* [1990] ECR I-27.

[169] C-294/92 *Webb v Webb* [1994] ECR I-1717.

[170] C-518/99 *Gaillard v Chekili* [2001] ECR I-2771.

[171] C-343/04 *Land Oberösterreich v ČEZ A/S* [2006] ECR I-4557.

3.54 Article 22(1) provides a rule of exclusive jurisdiction for the courts of the Member State in which the property is situated where proceedings 'have as their object rights *in rem* in immovable property or tenancies of immovable property.' In the context of the first part of this provision, that is proceedings which have as their object rights *in rem* in immovable property, national courts have often referred questions concerning whether a right is a right *in rem* or not. The ECJ have consistently demonstrated for the purposes of characterisation, the remedy is not relevant to this determination. This is the substance of the decisions in *Reichert I*, *Webb v Webb* and *Gaillard v Chekili*. However, in *Land Oberösterreich v CEZ*, the ECJ held that even if the right is to be characterised as an *in rem* right, if the claim as a whole could have been framed as an *in personam* right, it will not fall within the scope of Article 22(1). This has the effect of restricting the application of Article 22(1) to questions concerning the validity and existence of *in rem* rights, bringing Article 22(1) into line with the other parts of Article 22, and therefore the remedy sought will be relevant.[172] However, this approach is confined to Article 22 because of its nature as a rule of exclusive jurisdiction.[173] Given this summary, the cases will now be explained.

3.55 In *Reichert I*, Mr and Mrs Reichert, both German nationals residing in Germany, owned property in France, and made a gift of this property to their son, who also resided in Germany. Mr and Mrs Reichert were debtors of the claimant bank, who sought to have

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[172] *Cf* The approach of Teare J in analysing Article 22(2) of the Regulation in *JP Morgan Chase Bank NA and Another v Berliner Verkehrsbetriebe (BVG) Anstalt des Öffentlichen Rechts* [2009] EWHC 1627 (Comm). It is difficult to see how this case is consistent with C-4/03 *Gesellschaft für Antriebstechnik mbH & Co KG v Lamellen und Kupplungsbau Beteiligungs KG* [2006] ECR I-6509, discussed below, §3.59.

[173] *Cf* Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* , §3.98, who argues Article 22 has wider application.

the gift set aside under the French civil code's *action paulienne*, which would set aside the gift but only as between creditor and third party recipient. Mr and Mrs Reichert claimed that the French courts had no jurisdiction, and the bank argued that they had such jurisdiction under Article 16(1) of the Brussels Convention. The ECJ rejected this argument, accepting submissions by the British, German and Italian Governments, and the Commission, that one has to focus on the cause of action, and not the fact that a right *in rem* is somewhere in the background of the case. The *action paulienne* seeks to safeguard a charge on property, and thus only sets aside the transaction vis-à-vis the creditor, rather than *erga omnes*.

3.56 In *Webb v Webb*, the claimant purchased a French flat but conveyed legal title to the defendant, his son. Both parties were domiciled in England. The flat was used as a holiday home by both father and son. Later, the claimant brought proceedings in England for a declaration that the defendant held legal title to the flat as a trustee, with the claimant as beneficial owner. The defendant argued that the English courts had no jurisdiction due to Article 16(1) of the Brussels Convention. The ECJ held that Article 16(1) did not apply to the claim as the claimant's cause of action was not based upon a right *in rem*, but a right *in personam*. The remedy sought may affect property, but the right itself was an *in personam* one.[174]

3.57 In *Gaillard v Chekili*, Mr Gaillard contracted to sell properties in France to Mr Chekili. Mr Gaillard then refused to execute the contract and sought rescission, and damages, in Belgium. The Belgian court referred the question of whether it had jurisdiction under Article 16(1) of the Brussels Convention to the ECJ. The ECJ held that the right in

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[174] This decision has been criticised by some English academics: e.g. P Birks, 'In rem or in personam? Webb v Webb' (1994) 8 Trusts Law International 99.

question was an *in personam* right, rather than a right *in rem*, and therefore fell outside of Article 16(1). Again, whilst the remedy could perhaps[175] be described as a proprietary one, the right is the focus of the characterisation. The following paragraph is of particular importance:[176]

> 'Even if, in some circumstances, proceedings for rescission of a contract for the sale of immovable property may have some impact on the title to the property, they are nonetheless based on the personal right that the claimant obtains under the contract entered into between the parties and consequently may only be raised against the other party to the contract. By raising these proceedings, one party to the contract seeks to be released from his contractual obligations towards the other party, by reason of the latter's failure to perform the contract. Furthermore, the decision of the court which is to decide the case is capable of having effect only as regards the party against whom the order of rescission is made. It follows that the proceedings do not have as their object rights which relate directly to immovable property and can be raised *erga omnes*.'

The right here was contractual and not *in rem*. The fact that the remedy had an effect on property does not alter the characterisation of the right.

3.58 *Land Oberösterreich v CEZ*, however, demonstrates that for the purposes of Article 22(1), the remedy sought does actually have relevance. The claimant owned several pieces of land in Austria, on which there was an agricultural college. The defendant ran a

[175] For more discussion of the exact nature of a proprietary remedy, see below, §3.68-§3.75.

[176] n170, [18].

nuclear power station in the Czech Republic. The claimant brought an action in the Austrian courts claiming that the defendants' power station was emitting ionising radiation which influenced the claimant's land and they sought an injunction to prevent the continuance of this. The defendants contested the jurisdiction of the Austrian courts. The Austrian courts referred a question to the ECJ, asking whether they had jurisdiction under Article 16(1)(a) of the Convention. The ECJ held that the proceedings did not fall within the scope of Article 16(1)(a) of the Convention. The Court accepted that the action was one for interference with a right *in rem*. However, it found that the object of the proceedings was not the right *in rem* because the fact that the right was both an *in rem* right, and related to immovable property, was of marginal significance. This was because the fact that the right was an *in rem* right, and related to immovable property:[177]

> '[did] not have a decisive influence on the issues to be determined in the dispute in the main proceedings, which would not have been raised in substantially different terms if the right whose protection is sought...were of a different type, such as, for example, the right to physical integrity or a personal right.'

3.59 Thus, the thrust of the decision is that although the right is a right *in rem*, as the same dispute could occur based on a personal right, there is no need for the exclusive jurisdictional rules to be triggered. The Article must be restrictively interpreted and this brings it into line with the other parts of Article 22, such as the interpretation of Article 22(4) in *GAT v LuK*.[178] There, GAT and LuK are two German companies, both operating in the fields of motor vehicle technology. GAT was proposing to market products which

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[177] n171, [34].

[178] *Gesellschaft für Antriebstechnik mbH & Co KG v Lamellen und Kupplungsbau Beteiligungs KG* (n172).

LuK claimed would be infringing two French patents of which it was the proprietor. GAT brought a declaratory action before the Landgericht Dusseldorf to establish that it was not in breach of any patents, maintaining that the products did not infringe the rights under the French patents, and further, those patents were invalid. On appeal, the Oberlandesgericht Düsseldorf referred the question to the ECJ over whether it could take jurisdiction. The national court asked whether the proceedings were in the scope of Article 16(4) of the Brussels Convention. The ECJ held that the exclusive jurisdiction provided for by Article 16(4) should apply whatever the form of proceedings in which the issue of a patent's validity is raised be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings.

3.60 The effect of this analysis of Article 22(1) is that the remedy sought does not alter the question of whether the right is one *in rem* or *in personam*, but it will have an effect on whether the claim falls within the scope of Article 22(1) or not. Article 22(1) applies where the proceedings have as their object rights *in rem* in immovable property, and this has been interpreted in *CEZ* as meaning, in effect, that the existence or validity of the right *in rem* is in question.

3.61 The conclusion that one can draw from the Brussels I Regulation is that the remedy sought will be irrelevant for the purposes of characterising the right asserted by the claimant. This admits to a slight qualification when applying Article 22 which still requires the characterisation of the right, irrespective of remedy, but then asks the more focussed question of whether the existence or validity of the right is in question.

3. THE REMEDY SHOULD BE IRRELEVANT TO THE CHARACTERISATION PROCESS

3.62 In the context of characterisation for the purposes of jurisdiction it ought to be obvious that the remedy sought should be irrelevant to the characterisation process. The claimant cannot change the remedy he seeks mid-trial causing a court with jurisdiction over the claim to no longer have jurisdiction over the claim. The jurisdictional rules are supposed to be certain, and the court should continue to have jurisdiction to determine a particular right regardless of whether the claimant seeks specific performance or an order for the payment of damages.[179] The one exception to this is Article 22, as discussed above,[180] which can be justified on the basis that existence and validity of the particular right in question must be determined by a particular legal system.

3.63 In the context of characterisation for the purposes of choice of law it has already been demonstrated that the Rome I and II Regulations require characterisation of the right prior to any analysis of the remedy sought. As in the context of jurisdiction, the choice of law rules are intended to promote certainty[181] and it would be unfortunate to have a rule whereby the applicable law could vary depending on whether the claimant decided to pursue specific performance, an action for agreed sum or an order for damages.

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[179] Similarly, the court should continue to have jurisdiction despite the defence pleaded by the defendant: see in the context of Article 1 of the Brussels Regulation, *Préservatrice Foncière TIARD v Netherlands* (n103), and in the context of Article 5(1), C-38/81 *Effer SpA v Kantner* [1982] ECR 825. *Cf* the alarming interpretation of the Brussels I Regulation by Lewison J in *Research in Motion v Visto* [2007] EWHC 900 (Ch), [27]. This was overruled in *Research in Motion v Visto* [2008] EWCA Civ 153, [40].

[180] §3.53-§3.61.

[181] Rome I Regulation, recital (16); Rome II Regulation, recital (14). Legal certainty as a guiding principle has attracted criticism: T Tridimas, *General Principles of EC Law* (2nd edn OUP, Oxford 2006), 243-4.

3.64 It is even possible to see this approach in the common law cases. In *Macmillan v Bishopsgate (No 3)*,[182] the facts of which have already been outlined above,[183] the claimants sought both orders for the payment of damages and 'proprietary' remedies, in the sense of orders requiring the defendants to hold the property on trust for the claimants, from the court. The court did not consider whether the characterisation may alter depending on the remedy sought but simply applied the *lex situs* to all. Equally instructive is the recent case of *OJSC Oil Company Yugraneft (in liquidation) v Abramovich, Millhouse and Berezhovsky*.[184] The facts of that case are particularly complex and only one particular part of the case will be discussed here.[185] It was alleged that Abramovich (or his agents) held property (in the form of shares) that was rightfully Yugraneft's. Yugraneft brought, *inter alia*, three claims. First, an equitable proprietary claim, stating that Yugraneft could trace its interest into the hands of Abramovich (or his agents), and therefore requested an order for declarations that the product of the tracing exercise was held on constructive trust for Yugraneft. Secondly, a claim in knowing receipt. Thirdly, a claim in unjust enrichment. Christopher Clarke J characterised all of these claims as 'receipt-based claims'[186] and applied one single choice of law rule to determine them: the proper law of the obligation.[187] The obligations were all most closely connected to Russia and therefore Russian law would apply. As the 'proprietary' and

[182] [1996] 1 WLR 387 (CA).

[183] At §3.13.

[184] [2008] EWHC 2613 (Comm).

[185] For a slightly more detailed description of the claims in *Yugraneft*, see A Rushworth and A Scott, 'International Private Law' [2009] International Maritime and Commercial Law Yearbook (forthcoming).

[186] [237]-[247].

[187] Following Dicey, Rule 230.

personal claims were lumped together as ‘knowing receipt claims’[188], and characterised as such, it demonstrates that the fact a ‘proprietary’ remedy was sought does not alter the characterisation of the right.

III. PERCEIVED DIFFICULTIES

3.65 It was stated in the introduction that an approach which characterises rights, irrespective of the remedy sought can be perceived as causing difficulties. It is quite easy to demonstrate these by looking at the most fundamental distinctions in the European choice of law Regulations. The Regulations depend on a distinction between obligations and proprietary rights, and a distinction between contractual obligations and non-contractual obligations. It has been suggested that it is possible for a right to be characterised as falling on one side of these divisions and the remedy to fall on the other side.[189] Thus, it has been thought possible to have a contractual remedy vindicating a tortious right, such as rescission of a contract for tortious misrepresentation, and a proprietary remedy vindicating a personal right, such as an order declaring that a trustee holds a lease, obtained in breach of his personal obligations to the beneficiary, on constructive trust.

3.66 In spite of these suggestions, it is submitted that the perceived difficulty is not concerned with the remedy but rather with the improper identification of the rights. This is first analysed by considering the suggestion that it is possible to obtain a proprietary remedy from a personal right.

[188] [262].

[189] E.g. Dicey, §S34-044.

1. PROPRIETARY REMEDIES VINDICATING PERSONAL RIGHTS?

a. What is an *in rem* or proprietary right?

3.67 A proprietary right, or a right *in rem*, is one which is available against the whole world.[190] A personal right, or a right *in personam*, is one which can only be claimed against a particular person.

b. What is an *in rem* or proprietary remedy?

3.68 The distinction between *in rem* remedies and *in personam* remedies is not necessarily the same as the distinction between *in rem* rights and *in personam* rights. Were it the same then a proprietary remedy would be a court order which is exigible against all the world. A declaratory order by a court that X owns a bike would be such a proprietary remedy. However, in this very strict sense, almost all court orders are not proprietary. The oft used example of an *in rem* remedy is Roman law's *rei vindicatio*. The formula of the *vindicatio* was as follows:[191]

[190] C-292/93 *Lieber v Gobel* [1994] ECR I-2535, [14]; *Webb v Webb* (n169), [15]; Schlosser report, [166]. This does not mean that the right is not sometimes defeasible: see e.g. s24 of the Sale of Goods Act 1979. Also, for the argument that this is only a necessary but not sufficient condition of a property right as otherwise it cannot be distinguished from 'the primary right to personal autonomy', see: R Chambers, 'Integrating Property and Obligations' in A Robertson (ed) *The Law of Obligations: Connections and Boundaries* (UCL Press, London 2004), 132; J Penner, *The Idea of Property Law* (Clarendon, Oxford 1997), 112.

[191] B Nicholas, *An Introduction to Roman Law* (OUP, Oxford 1975), 101, fn1.

> 'If it appears that the thing in question belongs to the plaintiff at civil law..., then, unless at the direction of the judge the defendant restores the thing, let the judge condemn the defendant to pay the value of it to the claimant. If it does not so appear, let the judge absolve the defendant.'

3.69 Thus, the court order was *prima facie* that the defendant must pay the value of the thing to the plaintiff. In practical terms, however, it was the plaintiff who valued the thing, and given the inevitable exaggerations that took place, the defendant would surrender the thing to avoid paying this exaggerated value.[192] But the order is not an *in rem* remedy in the strict sense of being directed against all the world. It is only directed against the person with possession of the object.

3.70 Thus, if a proprietary remedy is not a remedy which is exigible against all the world then what is it? There are three likely possibilities:

1. A proprietary remedy is a court order which requires the judgment debtor to transfer title in a *res* to the judgment creditor.
2. A proprietary remedy is a court order which requires the judgment debtor to transfer possession of a *res* to the judgment creditor.
3. A proprietary remedy is a court order which requires the judgment debtor to do something with respect to a *res*.

3.71 The first of these possibilities may appear to be the classic example of a proprietary remedy but were this the case then proprietary remedies could never be given for

[192] *Ibid*, 101-2.

proprietary rights. There would be no need for the court to order the transfer of title to the judgment creditor if the judgment creditor is relying on his title to bring the action. Thus, (1) can only be granted with respect to personal rights. An example of (1) may arise out of a contract. X agrees with Y that X will pay Y £100,000 if Y transfers title in his house to X. This is a contract for a conveyance. Suppose that X pays Y the £100,000, but Y does not transfer the house to X. X may bring an action requiring Y to transfer title in the house to X.[193]

3.72 An example of (2) would be the English order for delivery up.[194] If the claimant demonstrates that the defendant is tortiously interfering with his goods, and still holds those goods, he can request that the court order delivery up. The order is discretionary and is not often granted.[195]

3.73 An example of (3) could arise as follows: A holds a parcel of land. He grants an easement to B, allowing B to drive on a path that runs over the land. A then transfers the land to C, who is aware of B's easement. If B asserts his easement against C then the court order will require C to permit B to drive on the path.[196] There is no transfer of title to the *res*, but C is ordered to do something with that *res* – that is, permit B to drive over it.

3.74 As (1) is very unlikely as it would mean that proprietary remedies could never be given for proprietary rights, the choice is between (2) and (3). Dicey clearly takes the view that

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[193] See C-518/99 *Gaillard v Chekili* [2001] ECR I-2771.

[194] Torts (Interference with Goods) Act 1977, s3(2)(a).

[195] It tends to be used where the goods are specific.

[196] By use of an injunction.

orders falling within (3) are proprietary remedies. In cases such as *Keech v Sandford*,[197] where the a trustee of a lease obtained a renewal of a lease for his own benefit,[198] the trustee must hold the renewed lease on trust for the beneficiary. Dicey explains that the beneficiary's claim that the lease is held on constructive trust is a remedy which is proprietary in nature, albeit it is based on a non-contractual obligation.[199] The obligations of the trustee holding on constructive trust are personal in nature, albeit they relate to the specific *res*, which in *Keech v Sandford* is the renewed lease.

3.75 Therefore, this thesis will refer to a proprietary remedy as any court order which relates to a *res*. On occasion reference will be made to a proprietary remedy in the strict sense. This refers to a court order requiring the transfer of title in or possession of the property.

c. Remedies for Proprietary Rights

3.76 It is possible for a proprietary right to be vindicated by a proprietary remedy in the very strict sense, a proprietary remedy in the sense used by this thesis, or a personal remedy. Thus, if X owns a bike which Y removes from him, X may be able to seek: (i) a declaration that X owns the bike; (ii) an order requiring Y to deliver up the bike to X; and (iii) an order requiring Y to pay X the value of the bike.

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[197] (1726) Sel Cas t King 61, 25 ER 223.

[198] On the facts he had attempted to obtain a renewal for the benefit of the beneficiary, but the landlord had refused.

[199] Dicey, §S34-044.

d. Remedies for personal rights

3.77 Whilst a personal right cannot be vindicated by a proprietary remedy in the strict sense, it can be vindicated by a proprietary remedy in the sense used in this thesis, for example an order for specific performance of a contract to transfer a tangible. Personal remedies can clearly be used to vindicate personal rights.

e. The Perceived Difficulty: Proprietary remedies from Personal rights

3.78 Having cleared the ground, it can be seen that a proprietary remedy, in the strict sense, cannot be obtained on the basis of a personal right. The court grants an order requiring the defendant to do, or not do, something with the property. This is a personal order obtained for a personal right.

3.79 The difficulty that can arise is not from the nature of the remedy, but that the proprietary right and personal right may conflict. The claimant may have a personal right against the defendant, under English law, requiring him to do, or not do, something with a piece of property, whilst under the *lex situs* the defendant may have the right to do what he wishes with the property. The personal right appears to conflict with the proprietary right.[200] It is the recognition of this incompatibility that prompted the already quoted comment of the ECJ in *Gaillard v Chekili*.[201]

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[200] In Hohfeldian terms (for which see W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710), the *lex situs* grants the owner a privilege and the *lex causae* of the obligation imposes a duty upon him. This privilege conflicts with the duty.

[201] Above, §3.57.

3.80 The purpose of the present chapter is simply to explain that the remedy sought is not the cause of the problem. The remedy is irrelevant for the purposes of characterisation. How to resolve an incompatibility between two rights is, strictly speaking, outside the scope of the present thesis. However a few comments may be made. The type of cases that have thrown up this issue in English law are ones involving 'equitable proprietary claims', such as those in *Macmillan v Bishopsgate (No 3)*.[202] There appear to be four options that could be taken: (i) the personal right trumps[203] the proprietary right; (ii) the proprietary right trumps the personal right; (iii) the claimant must succeed under both the personal right and the proprietary right; (iv) similar to (iii), but without a militant requirement of complete overlap between the laws.[204] The decision as to which of these to take will inevitably depend on how important one views the *lex situs* rule. Options (ii) and (iii) put much emphasis on the *lex situs*, whereas option (iv) puts slightly less and option (i) puts no emphasis on it.[205]

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[202] n94.

[203] Some legal systems do not refer to the personal right as trumping the proprietary right but put forward the theory that there is no interference with the proprietary right as they operate on different planes: e.g. the German *Abstraktionsprinzip* or the English approach to the relationship between law and equity.

[204] The approach favoured by Yeo (n98), §5.44-§5.55.

[205] An interesting side-wards glance at the French academy's analysis of choice of law for the *action paulienne* may be of use in answering this question which raises very similar issues choice of law issues to 'equitable proprietary rights', particularly when applied to render ineffective a transaction which impairs the exercise of a special right of the creditor's: see *Klébert c. Grosjean* Gazette du Palais, 1975, 1, 363, note Plancqueel. The modern French approach appears to be to apply a double actionability test: H Batiffol and P Lagarde, *Traité de droit international privé (Tome 2)* (LGDJ, Paris 1993), 217, [514]; Y Loussouarn, P Bourel and Pd Vareilles-Sommières, *Droit international privé* (9ème edn Dalloz, Paris 2007), 527; and B Audit, *Droit International Privé* (Economica, Paris 2006), 626. *Cf* the older views: P Lebours-Pigeonnière, *Précis de droit international privé* (6th edn Dalloz, Paris 1954), [358]; E Bartin, *Principes de droit international privé selon la loi et la jurisprudence françaises (Tome III)* (Domat-Montchrestien, Paris 1935), 327.

2. CONTRACTUAL REMEDIES VINDICATING TORTIOUS RIGHTS?

3.81 If A enters into a contract with B pursuant to an actionable misrepresentation by B then, under English law, A can sue B for damages under the Misrepresentation Act 1967, s2(1), and can rescind the contract.[206] The misrepresentation clearly founds a tort action in damages but it does not follow that the rescission of the contract for misrepresentation is a remedy for a tort action. There are two separate obligations in play. The first obligation is a non-contractual obligation which entitles A to damages for the breach of it. The second obligation is the contractual obligation which can be extinguished on election if there has been a misrepresentation. There is again, of course, the possibility of incompatibility between the rights. If the law governing the non-contractual obligation would find that there has been a breach of that obligation entitling A to damages, but the law governing the contract would hold that the contract still subsists, then the law governing the contract will compel A to perform his contractual obligations, whilst the law governing the non-contractual obligation will award A damages for loss caused by the misrepresentation, which must include the compelled performance of the contractual obligations. The rights are incompatible with each other.[207] Fortunately, such an example cannot arise in the context of the European instruments on the conflict of laws as Article 12(1) of the Rome II Regulation, which covers *culpa in contrahendo*, which the claim under s2(1) of the Misrepresentation Act 1967 would fall into,[208] requires the law

[206] This latter remedy may be unavailable where the court has jurisdiction, and decides to exercise its discretion, to prevent rescission under the Misrepresentation Act 1967, s2(2).

[207] It could be contended that they are not strictly incompatible in the Hohfeldian sense (see fn200), but this rather shows the limits of theory. Practically they are clearly incompatible.

[208] Rushworth and Scott, 'Rome II Regulation: the law applicable to non-contractual obligations' (n149), 290; Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (n137), §3.123

governing the contract to be applied.[209] Therefore there will be no incompatibility between the rights as they will be governed by the same law.

3. CONCLUSION

3.82 The present section has sought to explain that whilst there are difficulties created by a system which characterises rights irrespective of the remedy sought, these difficulties are not created by the remedy itself but by an incompatibility of rights. The conflict of laws system must determine, under such circumstances, which of the two rights is predominant. In the context of choice of law for contractual rights and tortious rights, a decision has been made that the contractual right is predominant, albeit this choice is made through ensuring that the same law applies to both: that applied to the contractual right. No decision appears to have been made yet with respect to a conflict between a proprietary right and a personal right.

IV. CONCLUSION

3.83 This chapter sought to determine the relevance of remedy for the purposes of the characterisation process. It has been argued that the remedy sought is irrelevant for the characterisation process. It was first demonstrated that the European instruments work by characterising the primary rights of the parties. It was then demonstrated that by altering the court order sought, this characterisation of the primary rights remains unaltered.

[209] It is only where that law cannot be determined that another law can be applied under Article 12(2).

Finally, perceived difficulties that may arise from this approach were addressed, particularly the suggestion that it may be possible to obtain a proprietary remedy for a personal right.

4

Remedies and the Distinction between Substance and Procedure

4.01 The previous chapter sought to explain the role of remedies in the process of characterisation. It has been explained that the remedy sought is irrelevant to the characterisation of the right. The European rules work by characterising primary rights. There are contractual rights, non-contractual rights, property rights and so on. The current chapter will focus on the relationship between remedies and the distinction between substance and procedure. The argument in the chapter is, on the face of it, quite a simple one. In addition to there being contractual rights, non-contractual rights and property rights, there is a category of procedural rights. Procedural rights are those rights whose causative event is the trial itself, as opposed to some prior event. The bulk of the conflict of laws' category of procedure is made up of these procedural rights. However, and in addition to these, there is a rule of exclusion, whereby the forum court can, even though a foreign law applies in principle to determine the right in question, apply the *lex fori* as the application of the foreign rule would cause it too much inconvenience. Given this brief introduction to the argument, the rest of the chapter seeks to explain how its validity can be demonstrated.

I. INTRODUCTION

4.02 In many ways, the distinction between substance and procedure represents the graveyard of the analytical conflicts lawyer. Most authors seem to write as little as possible on the

theoretical aspect of the distinction and move quickly on to the decided cases. The present chapter is an attempt at explaining the theoretical distinction.

4.03 One must embark with only those things of which one can be absolutely sure. Unfortunately, in the context of the distinction between substance and procedure, the only thing of which one can be absolutely sure is that the *lex fori* will apply to anything characterised as procedural. Given this point of embarkment, there are two methods in which the conflict of laws ends up applying the *lex fori* to any particular matter. The first method involves the normal method of characterisation. As explained in the previous chapter,[210] characterisation works by applying law-selecting rules to a particular group of rights. Thus, the *lex loci delicti* is a law-selecting rule which could be applied to tortious rights. In the context of the distinction between substance and procedure, it may be the case that the reason for applying the *lex fori* is that the *lex fori* is the most appropriate law-selecting rule for the group called 'procedure'. The second method of applying the *lex fori* is very different. This method can be called a rule of exclusion. Rules of exclusion do not rear their head until later on in the conflict of laws process. Once the choice of law rule has selected a particular law to be applied to a particular group, and the rules of that law have been identified, it is sometimes the case that nevertheless, on the basis of the content of the identified law, the forum will choose not to apply it. This could, for example, be for reasons of public policy. These two methods, the characterisation method and the rule of exclusion method, are clearly very different. How characterisation works has been explained in the previous chapter. Section II below describes how rules of exclusion operate.

[210] §3.11.

4.04 Having described these two methods, the critical question is which method applies in the context of the distinction between substance and procedure. On one view, procedure could be a category to which the *lex fori* is applied as the most appropriate law under the characterisation method. On another, procedure could be a rule of exclusion in the sense that the forum court will not apply the *particular* foreign law because it is too inconvenient to do so. The answer to the question of which method is applied can only be determined by explaining the theoretical justification of the distinction between substance and procedure. This is the content of Section III. Finally, once the correct theoretical approach has been found, the consequences of this must be explained. This is the purpose of Section IV.

4.05 To avoid confusion over what is a very difficult topic, it is best to explain the conclusions of the chapter at the beginning. They are as follows. Section III demonstrates that the distinction between substance and procedure cannot be reduced into either a characterisation rule or a rule of exclusion. Procedure actually conceals the fact that both methods are used. Parties can exercise a variety of rights in the courts. Some of these rights are procedural in nature. To these, the *lex fori* is applied as a genuine choice of law. However, in certain circumstances, even when a foreign law is being applied to determine, and vindicate, a substantive right, the forum court will be unable to apply the foreign law due to the inconvenience it causes the forum's machinery. Thus, the forum court will disapply the *lex causae* and apply the *lex fori* in its place due to a rule of exclusion. Section IV explains one of the consequences of this is that the concept of procedure is a unified one in international private law, in the sense that its first limb, that procedural rights are separate from substantive rights, is common to both choice of law and jurisdiction. Decisions from one area can be moved across to the other. Furthermore,

the second limb of this concept of procedure, that is, where the otherwise applicable foreign law is too inconvenient for the forum court's machinery the forum court can refuse to apply it and apply the closest domestic law, is common to both choice of law and the enforcement of judgments. Thus, the English court should come to the same result in a situation where French law, applicable under choice of law rules, would grant specific performance, as where a French judgment granting specific performance is brought to England for enforcement.

II. RULES OF EXCLUSION

4.06 It has already been seen that the characterisation process works by applying a law-selecting rule to a group, for example, in matters of tort the law of the place where the damage occurred may be applied. Rules of exclusion operate at a later stage. Once a foreign law has been selected, the court may not wish to apply that particular foreign law due to its content. Two examples can be given.

4.07 In *Oppenheimer v Cattermole*,[211] the issue which faced the court was whether Mr Oppenheimer had dual nationality (English and German) and therefore could take the benefit of statutory orders related to Double Taxation relief. Mr Oppenheimer was a German Jew who had emigrated to England in 1939. One of the German laws put in front of the English courts was a decree from November 1941 whereby German Jews ordinarily living abroad lost their German nationality with immediate effect. On the facts, it was held that the German Basic Law, s116(2), enacted in 1949 had deprived Mr

[211] [1976] AC 249.

Oppenheimer of German citizenship. However, it was also stated that the 1941 decree would not have been applied in an English court. Thus, whilst it is accepted that *via* a (statutory) choice of law process, German law ought to apply to the issue, one particular German law will not be applied.

4.08 In *Government of Iran v Barakat*,[212] antiquities alleged to form part of Iran's cultural heritage had turned up in the hands of Barakat, a gallery in London. The Iranian government sued Barakat under the English law of conversion asserting ownership of the antiquities under Iranian legislation to establish their right to advance the claim. English law will recognise, but will not enforce, foreign public law.[213] The question that arose was whether permitting the claim would enforce, or merely recognise, the Iranian public law. The exact distinction between recognition and enforcement of foreign public law is not our current concern.[214] What is important is that the rule works by identifying the appropriate foreign law *via* the choice of law rules, that is Iranian law as the *lex situs* at the time of alleged property transfer. Once these laws have been identified, it is asked whether that particular law is a public law. Finally, it is determined whether or not it should be excluded on the basis of which side of the recognition and enforcement line it falls. Thus the rule operates as an exclusion of the selected foreign law, rather than as a choice of law mechanism.[215]

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[212] [2007] EWCA Civ 1374, [2009] QB 22.

[213] Dicey, Rule 3.

[214] On which see A Rushworth, 'Assertion of Ownership by a Foreign State over Cultural Objects Removed from its Jurisdiction' [2008] LMCLQ 123; P Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48 Cambridge Law Journal 417.

[215] Though, *quaere* whether the revenue aspect of Dicey, Rule 3, should be seen as a choice of law question: A Briggs, 'Revenue Rule in the Conflict of Laws: Time for a Makeover' [2001] Singapore Journal of Legal Studies 280.

4.09 The difference between law-selecting rules and rules of exclusion is clear. The former apply a choice of law rule to a particular group. The latter apply at a later stage, once a law has been chosen to apply, but the content of the chosen law is unacceptable to the forum court, whether for reasons of public policy or otherwise. The next section will discuss with which of these two types of rules the distinction between substance and procedure is concerned.

III. THE DISTINCTION BETWEEN SUBSTANCE AND PROCEDURE

1. INTRODUCTION

4.10 'It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the *lex fori*...regardless of the law under which the substantive rights of the parties accrued.'[216] Indeed, the author of this comment then goes on to trace back the history of the distinction to a case before the Parlement of Paris in 1265.[217]

4.11 Whilst the doctrine is well established,[218] it is equally beyond doubt that it is exceptionally problematic in application.[219] A variety of reasons have been suggested for

[216] E Ailes, 'Substance and Procedure in the Conflict of Laws' (1941) 39 Michigan Law Review 392.

[217] *Ibid*, 396. Also, see E Spiro, 'Forum Regit Processum' (1969) 18 International and Comparative Law Quarterly 949, 949-50.

[218] Dicey, §7-002; Y Loussouarn, P Bourel and Pd Vareilles-Sommières, *Droit International Privé* (Dalloz, Paris 2004), 676; B Audit, *Droit international privé* (Economica, Paris 2006), 11.

[219] Dicey, §7-004; J Fawcett and J Carruthers, *Cheshire, North and Fawcett on Private International Law* (14th edn OUP, Oxford 2008), 76.

this. Some think that it is due to the distinction being illusory, or artificial.[220] Others believe that it is sometimes used to manipulate the result of the trial.[221] Finally, it has been suggested that it is due to a lack of refinement in the academic debate.[222]

4.12 In England there has been relatively little consideration of the distinction by academics. Prior to the recent rash of writings[223] caused by the decision of the House of Lords in *Harding v Wealands*,[224] and the usual chapter in most text books, the thesis by Ailes is the main English contribution to the debate.[225] Most of the English discussion has, therefore, centred around the large amounts of material provided in the American journals in the 1920s and 30s.[226]

4.13 The present section will discuss the different theoretical approaches to the distinction between substance and procedure that have been suggested. These approaches fall

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[220] KN Llewellyn, *The Bramble Bush* (Oceana Publications, New York 1960), 84.

[221] *Chaplin v Boys* [1971] AC 356, per Lord Wilberforce, 392-3; Dicey, §7-003.

[222] J Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 International and Comparative Law Quarterly 691, 692.

[223] E.g. Carruthers, *ibid*; G Panagopoulos, 'Substance and Procedure in Private International Law' [2005] Journal of Private International Law 69; J Carruthers, 'Damages in the conflict of laws - the substance and procedure spectrum: Harding v Wealands' (2005) 1 Journal of Private International Law 323; A Scott, 'Substance and procedure and choice of law in torts' [2007] Lloyds Maritime and Commercial Law Quarterly 44; C Dougherty and L Wyles, 'Harding v Wealands' (2007) 56 International and Comparative Law Quarterly 443; P Rogerson, 'Conflict of Laws-Tort-Quantification of Damages-Substance or Procedure?' [2005] Cambridge Law Journal 305; P Rogerson, 'Quantification of Damages - Substance or Procedure' (2006) 65 CLJ 515.

[224] [2007] 2 AC 1.

[225] Deposited in the Bodleian, unpublished. The above article by Ailes (n216), is based on the first chapter of that thesis. The two notable exceptions to this are: S Szászy, 'The Basic Connecting Factor in International Cases in the Domain of Civil Procedure' (1966) 15 International and Comparative Law Quarterly 436; Spiro, (n217).

[226] For a selection see: Ailes, n216; E Lorenzen, 'The Statute of Frauds and the Conflict of Laws' (1293) 32 Yale Law Journal 311; W Cook, '"Substance" and "Procedure" in the Conflict of Laws' (1933) 42 Yale Law Journal 333; H McClintock, 'Distinguishing Substance and Procedure in the Conflict of Laws' (1930) 78 University of Pennsylvania Law Review 933; AM Bartholdy, 'Delimitation of Right and Remedy in the Cases of Conflict of Laws' (1935) 16 British Yearbook of International Law 20.

broadly into two camps: (i) those who take the view there is no inherent value in applying the procedural law of the forum and it should only be applied when absolutely necessary; and (ii) those who take the view that there is an inherent value in applying the procedural law of the forum. Even before discussing these different views, it should be apparent that the first of these approaches is more conducive to a rule of exclusion whereas the latter is not. However, it is possible to take the former view conjoined with a characterisation approach to the distinction. The views, and their impact on whether a characterisation approach or a rule of exclusion approach is adopted, will now be analysed.

2. NO INHERENT VALUE IN APPLYING THE PROCEDURAL LAW OF THE FORUM: THE INCONVENIENCE ARGUMENT

4.14 By the statement that some authors believe there is no inherent value in applying the procedural law of the forum, it is meant that those authors do not envisage the application of the *lex fori* for any positive reason, but only for a negative reason – the forum court cannot do anything else. The most enduring explanation for the distinction between substance and procedure is that of inconvenience, which is a negative reason. Most modern arguments derive from the following assertion by Cook:[227]

> 'If we admit that the "substantive" shades off by imperceptible degrees into the "procedural", and that the "line" between them does not "exist", to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our

[227] Cook, *ibid*, 343-4.

purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?'

4.15 Such an approach was always bound to be attractive for three reasons. First, the terminology is very vague and thus, to an extent, one can derive from it what one wants. Whilst explanations based on inconvenience are regularly put forward, never has there been an in-depth analysis of what it means for the forum to be inconvenienced. Secondly, such a reductionist approach to procedure supports those who see forum shopping as one of the most significant evils of the modern conflicts world.[228] If the forum court were to apply much of its procedural law then there are advantages for a claimant in selecting a forum with procedural rules beneficial to him. This is unfair to the defendant, who has made no such choice, and thus if the forum court applies as little of its procedural law as possible this should disincentivise forum shopping.[229] The third and final reason is strongly linked to the second. In the interests of certainty, wherever two parties litigate a legal relationship, the same result ought to be obtained whichever forum hears the matter. Even if every court in the world would apply the same particular law to determine the contractual or non-contractual relationship between two particular parties, differences in forum procedures may alter the actual result. The less forum procedure that is applied, the more likely the same result will be obtained wherever the litigation occurs. An approach based on only applying the forum's procedural law where it is simply too inconvenient to do anything else chimes in nicely with this view.

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[228] For discussion of this, see A Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP, Oxford 2003), *passim*.

[229] Therefore the choice of law rules supplement the jurisdictional rules in preventing forum shopping. For a similar argument applied to renvoi, see A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 International and Comparative Law Quarterly 877.

4.16 The major difficulty with the Cook theory is that it leaves as many questions unanswered as it answers. The content of what counts as sufficiently inconveniencing the forum court has already been described as vague. However, there is a more important ambiguity. It is not clear whether the Cook approach manifests itself in a rule of exclusion or an orthodox characterisation group. That is, does the inconvenience approach work by allowing the normal choice of law process to occur and then, if the particular rules selected are too inconvenient to apply, the *lex fori* will be put in their place, or does it work by stipulating that certain *types* of rules are often too inconvenient to apply and therefore the *lex fori* will apply to those rules? In the article, Cook never seems to make a decision as to which one of these methods applies.

4.17 At one part of the essay, he gives the following example.[230] There is a common law doctrine which holds that an undisclosed principal is bound by contracts made by his agent.[231] However, if the contract is made under seal, in the agent's name, this doctrine does not apply.[232] Suppose that a contract is made, between the claimant and an agent, with the defendant as the undisclosed principal. The contract is governed by the law of State X, under which a scroll made with ink is not considered a seal. Under the law of the forum, where the claimant sues the defendant, such an agreement is considered to be made under seal. Both the forum and State X still maintain the common law forms of action. As, under the law of the forum, there is a contract under seal, the action will be

[230] Cook (n226), 350.

[231] For the current English law on this rule, see F Reynolds, *Bowstead and Reynolds on Agency* (18th edn Sweet and Maxwell, London 2008), Article 76.

[232] For the current English law on this rule, see F Reynolds, *Bowstead and Reynolds on Agency*, *Ibid.*, Article 77.

one of covenant and due to the exception to common law doctrine of undisclosed principal, there can be no claim against the defendant. However, under the law of State X, the action will be in *assumpsit*,[233] and such a claim would be successful. Cook takes the view that it can be argued that the inconvenience of applying State X's forms of actions in this case is not so great as to require the application of the *lex fori*.[234] This suggests that one must look at the particular foreign rule for it cannot be argued that the manner of pleading will always be a matter for the *lex causae*. Thus, it seems, Cook is suggesting that his procedural rule of inconvenience is a rule of exclusion. Where the foreign law is too inconvenient to be applied, it need not be applied.

4.18 However, slightly earlier in the article, directly after his famous quote,[235] Cook states the following:[236]

> 'Against the inconvenience involved in learning the foreign rule is the fact that so closely are "procedure" and "substance" connected that in many cases a refusal to accept the foreign rule as to a matter falling into the doubtful class will defeat the policy involved in following the foreign substantive law.'

This sentence could suggest that the inconvenience rule works in the more orthodox characterisation fashion. Rules which are likely to be inconvenient for the forum court to master should not be applied. This approach has been taken up by others and will be

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[233] An action for the breach of an unsealed contractual obligation.

[234] Cook (n226), 351.

[235] See above, §4.14.

[236] Cook (n226), 344.

discussed later.[237] However, given Cook's later analysis, and the rather contrived interpretation one must use to argue his approach does apply the orthodox characterisation analysis, it is submitted, for what it is worth, that Cook saw his inconvenience rule as a rule of exclusion.

4.19 The following two sub-sections will discuss the prospect of the inconvenience rule applying as a rule of exclusion and as an orthodox characterisation group. However, before dealing with these two approaches, a few general criticisms of the view that there is no inherent value in applying the forum's procedure ought to be highlighted.

4.20 The first criticism is that it fails to see procedure as a protective device. The core provision of the Brussels I Regulation is founded upon this idea. Article 2 of that Regulation lays down the fundamental rule that defendants ought to be able to defend at home, unless there are special reasons why they can be sued elsewhere. The ECJ has referred to this as the 'general principle'.[238] The purpose behind the rule is to protect defendants, who will generally be better placed to conduct their defence in the place of their domicile.[239] One of the aspects of this protection has been described as the ability of the defendant to instruct local lawyers who are aware of the procedure and modus operandi of the court.[240] The validity of this effect of Article 2 is significantly dented if

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[237] See below, §4.31-§4.38.

[238] C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827, [22]. Equally, see the approach of the ECJ in: C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, [21]; C-98/06 *Freeport plc v Arnoldsson* [2007] ECR I-839, [34]; C-412/98 *Universal General Insurance Co (UGIC) v Group Josi Reinsurance SA* [2000] ECR I-5925, [35]; C-26/91 *Jakob Handte & Co GmbH v Socete Traitements Mecano-Chimiques des Surfaces* [1992] ECR I-3967, [14].

[239] C-281/02 *Owusu v Jackson* [2005] ECR I-1383, [42].

[240] *Color Drack* (n238), per AG Bot, [AG107].

one accepts the Cook approach. Rather than there being merit in the forum applying at least some of its own laws, the Cook approach suggests there is no such merit and only where the laws of the foreign court would be too inconvenient to apply should the law of the forum be applied. The more the procedures of the foreign court are replicated, the less protection Article 2 provides. It is admitted there will still be some protections for the defendant, in the sense that he will be able to instruct a lawyer with whom he can communicate and who knows the language.[241] However, if a significant amount of foreign procedural law will be applied by the English court then it cannot be said that the lawyer in question knows the 'procedure and modus operandi of the [court]'.[242]

4.21 The second criticism is that it fails to see that, in some circumstances, the procedural law of the forum is the most appropriate law to apply to a given matter. This is made clear by the ECJ's interpretation of Article 31 of the Brussels I Regulation. The Court has repeatedly explained, in this context, that:[243]

> 'The courts of the place or, in any event, of the contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered. The Convention has taken account of these requirements by providing in Article 24 that application may be made to the courts of a contracting State for

[241] *Ibid*.

[242] *Ibid*.

[243] First stated in C-125/79 *Denilauler v SNC Couchet Freres* [1980] ECR 1553, [16]; Then repeated in C-391/95 *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* [1998] ECR I-7091, [39].

such provisional, including protective, measures as may be available under the law of that State, even if, under the Convention, the courts of another contracting State have jurisdiction as to the substance of the matter.'

4.22 Thus, it follows from this reasoning that the *lex fori* should apply to determine provisional and protective measures, not because it is too inconvenient to do anything else, but because the forum court, along with its procedural law, is the *most appropriate* to determine the measures granted. Any approach to the distinction between substance and procedure based on inconvenience fails to recognise that sometimes it is more appropriate for the forum's procedural law to apply.

4.23 A third criticism is to challenge the approach's main advantage – the prevention of forum shopping. If this is the reason behind taking a restrictive view of the category of procedure then it is unusual that one of the key factors in forum shopping is uniformly characterised as procedural: interim remedies.[244] As Professors Bureau and Muir-Watt explain, the availability of an arsenal of rapid, flexible and effective provisional measures is one of the essential factors in the choice of a forum.[245] This provides an Achilles' heel for those who put the prevention of forum shopping at the front and centre of their view.[246]

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[244] Dicey, §32-203 states there is 'no doubt' over this. Choice of law for interim remedies is discussed extensively below, §7.63-§7.85.

[245] D Bureau and H Muir-Watt, *Droit international privé (Tome I)* (PUF, Paris 2007), 155, [150].

[246] A Briggs, 'Conflict of Laws and Commercial Remedies' in A Burrows and E Peel (eds), *Commercial Remedies* (OUP, Oxford 2003) appears to struggle with this problem, settling on the view that interim measures are too bound up in the English trial process and that the *lex causae* may not be determined at the point at which the interim measure is ordered. The former of these reasons lays the foundation for the analysis put forward later in this chapter (§4.49 - §4.56). The latter seems little reason for a blanket ban on any possible choice of law for interim measures.

a. The Inconvenience Rule as a Rule of Exclusion

4.24 Whilst there may be a slight concern over whether this was the view of Cook, this approach has certainly been taken by others.[247] This approach does seem to fit more appropriately with the view that the paramount considerations in the conflict of laws are to prevent forum shopping and to provide unanimity of result. It also enjoys some support from recent case law. In the Court of Appeal's decision in *Harding v Wealands*,[248] Arden LJ argues that when dealing with the distinction between substance and procedure, one starts from the position that a foreign law applies and any reference to the forum law must be justified by some 'imperative'.[249] Her Ladyship then gives an example of where the particular foreign rule of law would be too inconvenient to apply because of the machinery of the forum court: 'It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself in the shoes of the foreign court. This would arise where it has no power to award damages on a structured basis, even though such a power exists in the court of the jurisdiction which is the proper law.'[250] This approach is clearly based on applying the inconvenience approach as a rule of exclusion.[251] The House of Lords overruled the decision on the grounds of statutory interpretation[252] but did not question the theory.

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[247] E.g. Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' n222, 709; Note, 'Delimitation of "Procedure" in the Conflict of Laws' (1933) 47 Harvard Law Review 315, 317. Note, (1918) 18 Columbia Law Review 354, 356.

[248] [2005] 1 WLR 1539. Reversed in *Harding v Wealands* [2006] UKHL 32,, [2007] 2 AC 1.

[249] *Ibid*, [52].

[250] *Ibid*.

[251] Further, see Carruthers, 'Damages in the conflict of laws - the substance and procedure spectrum: Harding v Wealands' (n222), 333, explaining how the Court of Appeal decision has to depend on particular rules in particular cases.

4.25 However, it is submitted that it would not be possible to remove the category of procedure and replace it with a rule of exclusion based on inconvenience. The rule may work effectively enough with cases where the foreign law's rule goes further than that which would be applied in the forum. Thus, if the foreign law requires that witnesses are taken to the place of the accident before they can give evidence upon that accident, the English courts may not apply this rule on the basis of procedural inconvenience. However, it does not work effectively where the foreign legal rule is either less extensive than the forum's rule or is negative in nature. This is because the rule only prevents the application of parts of the foreign law but does not positively require the application of the forum's law. Thus, suppose that the foreign law does not permit parties to call expert witnesses not employed by the State. Will this prevent the English court from calling an expert witness who is not on the government pay roll? The answer is plainly no yet there would be no procedural inconvenience caused to the English court by the application of the foreign legal rule as the English court does not actually have to do anything to implement it.

4.26 The case of *Bristow v Sequeville*[253] provides a useful example. The claimant paid the defendant £200 for shares in a projected Company that would work mines in Westphalia. The money was to be paid in instalments and, if the Company was not constituted in six months or having been constituted it was abandoned, the purchase money was to be repaid and the stamped receipts given by the defendant to the claimant for the payment of the instalments were to be returned. The claimant sought repayment of the £200 on the

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[252] S14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995.

[253] (1850) 5 Exch 275, 155 ER 118.

basis that the receipts had been returned and the Company had not been constituted. The defendant argued that the Company had been constituted. As part of the claimant's evidence, he sought to prove payment of the purchase money by putting forward unstamped receipts. It was argued that under the law of Cologne such receipts would be inadmissible as evidence (part of the case concerned the proof of foreign law and, more particularly, whether the expert was sufficiently qualified). The judge had permitted the receipts as evidence, even if they were inadmissible in Cologne. The defendant appealed, relying on *Alves v Hodgson*[254] where the English court had refused to permit an action on a Jamaican promissory note which was not stamped as required under Jamaican law. This submission was rejected by Pollock CB and Alderson B in argument,[255] where it was explained that there is a difference between not allowing suit on an instrument which is invalid under its governing law and refusing to admit evidence as that evidence is inadmissible under the *lex causae*.

4.27 This case has never been doubted. If, under the *lex causae* of an obligation evidence is inadmissible, this will not prevent the English court from admitting it. However, were one to take a rule of exclusion approach, it is difficult to see how this result can be achieved. Supposing the expert had been sufficiently qualified for the court to accept his evidence and, therefore, it was accepted that the law of Cologne would certainly have rendered the receipts inadmissible then, under the rule of exclusion approach, the English court should not have admitted the evidence. There was no inconvenience in applying the rule. It was negative in nature. An English court cannot be inconvenienced by doing nothing.

[254] (1798) 7 TR 241, 101 ER 953.

[255] n253, 278.

4.28 Of interest is the reliance in *Bristow v Sequeville* on the decision of Abbott CJ in *James v Catherwood*.[256] There, money had been lent by the claimant to the defendant in France where both of the parties had resided. The clamant sued the defendant for the repayment of the loan, relying in evidence on receipts signed by the defendant but unstamped. The defendant's counsel argued that the receipts were inadmissible under French law and therefore should be inadmissible during trial in England. Abbott CJ rejected the submission, first on the basis that the English courts ignore foreign revenue rules, and then stating:[257]

> 'It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was in order to ascertain whether the instrument was or was not valid.'

Such an approach accords with the view of the inconvenience rule acting in an orthodox characterisation manner, which is dealt with in the next sub-section.[258]

4.29 Further evidence for the proposition that a rule of exclusion based on inconvenience could not be sufficient to explain the procedure category can be seen in the context of ancillary remedies, such as freezing injunctions or search orders. Such orders are considered procedural but the explanation for this is does not appear to be concerned with

[256] (1823) 3 Dow & Ry KB 190, [1814-1823] All ER Rep 761.

[257] *Ibid*, 762.

[258] §4.31-§4.39.

inconvenience caused to the court. For example, Professor Briggs takes the view that such remedies are too bound up in the English court's trial process for any law other than the *lex fori* to apply and this explains their categorisation as procedural.[259]

4.30 Thus, it does not seem that the contents of the procedure category can be explained solely as a rule of exclusion based on inconvenience. This is not to say that an aspect of the procedure category cannot be such a rule, but only that the category as a whole cannot be explained in this way.

b. Inconvenience as an Orthodox Characterisation Rule

4.31 It has already been argued that it is possible for the inconvenience approach to be seen as an orthodox characterisation rule.[260] This would work as follows. The forum would determine that certain types of rules are generally too inconvenient to have foreign law applied to them.[261] This characterisation process would occur prior to any other. This explains why many commentators, who accept an inconvenience-based approach to the distinction between substance and procedure, still refer to this distinction as the first order of characterisation.[262]

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[259] Briggs, 'Conflict of Laws and Commercial Remedies' (n246), 284-5.

[260] Yeo, *Choice of Law for Equitable Doctrines* (OUP, Oxford 2004), §3.21. Briggs, *Conflict of Laws* (OUP, Oxford 2008), 37, refers to the distinction between substance and procedure as the 'first level of characterization'. It seems that this is the view of Dr Panagopoulos (n222), 71-2, where he cites the famous Cook quote and then reverts to a 'manner' and 'matter' distinction between procedure and substance.

[261] E.g. see the comment of Abbott CJ in *James v Catherwood* (n256), above §4.28.

[262] Yeo, *Choice of Law for Equitable Doctrines* , (n260); Briggs, *Conflict of Laws* , (n260). Dr Panagopoulos, (n260), sees the characterisation of procedure occurring at a lower level, that is, once the *lex causae* has been chosen. This seems unhelpful once one takes the view that the inconvenience rule applies in the orthodox characterisation manner.

4.32 There are multiple difficulties with this approach. The first, and most important, of these difficulties is what exactly inconvenience means in this context. Does it mean that the application of particular types of foreign rules of law would inconvenience the forum court's machinery, or does it mean that it would be an inconvenience to the court to find out what the foreign law is? A little more explanation of the difference between these two rules would be useful.

4.33 If procedure is to be a characterisation group, to which the *lex fori* is applied, then one has to work out what are the contents of that group. One way of populating the group is to say that particular types of rules are likely to be difficult for the forum court to apply. Thus, they are procedural. The type of inconvenience with which the court is concerned is the same type that it was concerned with where a rule of exclusion was suggested: the difficulties in *applying* the foreign rule of law. However, the advantage of this approach is that it avoids the difficulties that were faced there with foreign rules of procedure which are negative in nature.

4.34 Another way of populating the group would be to suggest that there are certain types of rules which are difficult, or particularly complex, and thus the court should not apply foreign law as the foreign law on these matters will be too inconvenient to *prove*. These different approaches will be discussed in turn.

Inconvenience in Applying Certain Types of Foreign Law

4.35 This formulation of the argument is the strongest of those that reject any positive reason for applying the forum's procedural law. Obviously, the two general criticisms concerning an inconvenience-based approach to the distinction between substance and procedure will apply:[263] procedure is sometimes used as a protective device; the application of the forum's procedural law can sometimes be the most appropriate law to determine some matters; and such an approach does not seem to reflect the actual division between substance and procedure in the case law.

4.36 In terms of more specific criticisms, the main one is that it provides too blunt an instrument to do the task it seeks to perform. Take the example of an order for specific performance. It will be seen below[264] that only infrequently will the application of a foreign order for specific performance be refused on the basis of procedural inconvenience. But there are clearly times that it ought to be. Were one to take the approach presently under discussion then the granting of an order for specific performance must be characterised as procedural as it does have this potential for causing inconvenience. Thus, the *lex fori* will apply, impairing the foreign substantive right despite the fact that in the majority of cases no inconvenience will be caused. This criticism seems to have led some to argue that a rule of exclusion should be used instead.[265] The criticisms of this approach have already been dealt with.[266]

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[263] See above, §4.20-§4.23.

[264] §7.25-§7.45.

[265] A Briggs, *Commercial Remedies and the Conflict of Laws* (n246), albeit framed as a rule of public policy.

[266] Above, §4.24 - §4.30.

Inconvenience in Proving Certain Types of Foreign Law[267]

4.37 This argument is a weak one. The bald assertion that 'procedure' is more complex than substantive law seems to have no empirical foundation whatsoever. Clearly some elements of substantive law are very complex. Lord Macnaghten stated that 'no one, I am sure, by the light of nature ever understood an English mortgage'.[268] Should the contractual right to redemption thus be characterised as procedural? Plainly not. Indeed, some elements of what has been considered 'procedure' are not very complex at all. It seems that whether the defendant is entitled to counter-claim in an action is considered a matter of procedure by many[269] yet the rules do not appear to be anywhere near as complex as, say, damages in personal injury.

4.38 In any case, in view of the potential for procedure to have a practical effect on the rights and liabilities of the parties, and the only reason for not applying foreign procedural rules is their difficulty, it is not obvious why the courts should not allow parties to attempt to prove procedural rules, but if they do not prove them to a sufficient standard then the

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[267] Supported by C Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* (3rd edn Juta & Co, Kenwyn 1996), 21; *Roerig v Valiant Trawlers* [2002] EWCA Civ 21, [2002] 1 WLR 2304, [27], though the Court of Appeal by no means put their whole approach on this basis; *McKain v Miller* (1991) 174 CLR 1, per Mason CJ at 26-7.

[268] *Samuel v Jarrah Timber & Wood Paving Corporation Ltd* [1904] AC 323, 326.

[269] E.g. Dicey, §7-032. Oddly, the case used in support of this does not actually appear to provide any such support: *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487. There, a fund was controlled by two trustees, one appointed by each of the two beneficiaries. The first beneficiary's trustee died and so that beneficiary sought a court order appointing a new trustee. The second beneficiary sought to block the appointment due to allegedly libellous statements made by the first beneficiary about the second beneficiary. The second beneficiary also counter-claimed for libel. One of the questions that the Court of Appeal had to determine was whether such a counter-claim was acceptable, or whether a separate action was required. It was never suggested that any other law than English law would apply. The trust was also governed by English law.

court can choose to apply the *lex fori*. This is the exact position with respect to proof of substantive laws.[270]

c. Conclusion on the Inconvenience Approach

4.39 It follows that inconvenience cannot be the sole explanation for the content of the category known as procedure. Inconvenience can work as a rule of exclusion but this does not explain the entire category. Using inconvenience to create a characterisation group to which the *lex fori* is applied has been demonstrated not to work.

3. INHERENT VALUE IN APPLYING THE LAW OF THE FORUM

4.40 Four positive reasons have been suggested in the case law and doctrine for the application of the procedural law of the forum: (a) a party to litigation in England must take the law of procedure as he finds it; (b) it is a postulate of justice; (c) efficiency of litigation; (d) the law of the forum should apply to the rights which arise from the trial itself.

a. The Litigant Must Take the Law as He Finds It

[270] Dicey, Rule 18(2), 255, approved in *Bumper Development Corporation v Commissioner of Police* [1991] 1 WLR 1362.

4.41 Tenterden CJ stated in 1830 that 'a person suing in this country must take the law as he finds it'.[271] The High Court of Australia in *Pfeiffer v Rogerson*[272] states that 'litigants who resort to a court to obtain relief must take the court as they find it.'[273] The Scottish courts have also jumped on board. Lord President Cooper in *McElroy v McAllister* explained:[274]

> 'If a person suffers a wrong in the foreign country, the primary Court from which to seek redress is the Court of that country, which will presumably provide the remedy which the *lex loci delicti* affords and which knows how to do so... But, if a pursuer chooses to sue not in the primary Court but in some other Court of his own selection, he has only himself to thank if he finds himself encumbered by difficulties which...prove insuperable.'

4.42 Such an approach cannot be accepted. It depends on the claimant always being the party who asks the court to act. It is doubtful that this was true in the 19th century but even were it true then it is not now. In modern times,[275] the use of the action for a declaration of non-liability has the potential to upset who is the natural claimant and defendant to an action. If A sues B in a particular forum for a declaration of non-liability, the motivation behind that forum being chosen is because its available remedies are less effective than

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[271] *De la Vega v Vianna* (1830) 1 B & Ad 284, 288. In academic work, this is suggested by Fawcett and Carruthers, n219, 76.

[272] (2000) 203 CLR 503.

[273] *Ibid*, 543 (per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[274] (1949) SC 110, 139.

[275] Within the European scheme, such actions have been accepted in C-406/92 *The Tatry* [1994] ECR I-5439. In England, whilst there was historically some hostility towards these actions (e.g. *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536), recently they have gained much more acceptance: *Messier Dowty Ltd v Sabena SA* [2000] 1 WLR 2040.

the available remedies in another potential forum, it makes little sense for the court seised to argue that it applies its own remedies because B chose that court.

b. Postulate of Justice

4.43 In English academic discourse this is attributed to Wolff due to the following paragraph:[276]

> 'We have seen that justice often requires the application of foreign law in order to protect certain rights which have been acquired under a foreign law or other legal situations deserving protection. But justice does not demand that such protection be given in exactly the same way as that in which the foreign courts would grant it. On the contrary, it is a postulate of justice that the courts of a given country follow their general rules of procedure irrespective of whether the subject-matter of the litigation is governed by foreign law or by the law of the country.'

4.44 The difficulty with such a statement is that it does not aid in explaining the rule as without providing the definition of justice in this context, the explanation is vacuous. Wolff continues, giving the following example:[277]

[276] M Wolff, *Private International Law* (2nd edn Clarendon Press, Oxford 1950), 229-230. See, for example, Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (n222), 693.

[277] *Ibid*, 230, emphasis added.

> ‘If the law of country X allows evidence by hearsay or forbids the parties to give evidence, the English court will nevertheless follow its own divergent rules on this subject, though it has to adjudicate upon a contract governed by the law of X and though possibly the application of the procedural rules of X would lead to a different judgment from that reached by the English court. The contrary would not only be inconvenient for the English court; *it would also entail injustice through the unequal treatment of the parties in the suit in question on the one hand and the parties in other lawsuits on the other. Only such foreign rules – even though framed as procedural rules – should be applied by the English court as are so closely connected with the applicable substantive rules of the foreign country that otherwise the foreign substantive law would be, as it were, adulterated.*’

4.45 The first line of this argument is accepted in the present thesis and forms the main justification for rejecting an inconvenience rule of exclusion as the sole justification for the procedure category.[278] Wolff justifies this with two reasons: (i) inconvenience; and (ii) injustice. With respect to the first of these arguments, the English court will not be practically inconvenienced by a rule which does not require them to actively do anything, such as a rule whereby the parties are forbidden from giving evidence.[279] With respect to the second of these arguments, it becomes clear that the core of the Wolff injustice thesis is to reject the argument that once there is an applicable foreign law one should attempt to apply as a little of the *lex fori* as possible, and rather to apply as little of the *lex causae* as one can do without adulterating the foreign substantive law. This, and only this,

[278] See above, §4.25-§4.27.

[279] See above, §4.27.

justifies the injustice of treating different groups of litigants[280] unequally. The problem with this argument is that whilst it appears to be an argument in favour of the application of the *lex fori*, it can easily be turned on its head into a Cook-type inconvenience argument. Once it has been established that a foreign right is in play, how much of the *lex causae* does the forum have to apply to not adulterate the foreign right? As much as is possible to achieve the same result as would be achieved under the foreign law, without inconveniencing the forum court. Thus, it is submitted this approach cannot provide the foundation for an acceptable theory of procedure in the conflict of laws, for the reasons already given when responding to the Cook approach.[281]

4.46 Alternatively, it has been suggested that 'the element of justice with which we are concerned here is that of "expectation"'.[282] That is, the parties (and even, apparently, the court) have a legitimate expectation that the forum's procedural rules apply.[283] There is nothing in Wolff's explanation which suggests this approach. In any case, the problem with such an approach is that it is either untrue or vacuous. If the basis for the distinction is that the parties expect the forum's procedure to be applied then it suggests the distinction can be drawn from the parties themselves. It is simply untrue to argue that, if the parties were asked, the distinction between substance and procedure could be derived from them. Furthermore, this must result in the substance and procedure distinction being dependent on the expectations of each set of parties to each litigation. This also cannot be true. If one argues that the basis for the distinction is the *legitimate* expectations of the

[280] In the sense of litigants fighting cases based on purely domestic law and litigants fighting cases which involve foreign law.

[281] Above, Section III(2).

[282] Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (n222), 693.

[283] *Ibid*.

parties rather than the expectations of the parties, and hence the above two arguments are incorrect, then the argument becomes vacuous as the content for ‘legitimate’ must be derived from somewhere other than the parties’ expectations.

c. Efficiency of Litigation

4.47 Mason CJ in *McKain v Miller*[284] sought to explain the distinction between substance and procedure in terms of efficiency:[285]

> ‘For the purposes of private international law, an appropriate criterion may be formulated by reference to the principal reason why it is necessary to draw a distinction between matters of substance and procedure. This reason, as has been seen, is associated with the efficiency of litigation. That efficiency is achieved by the adoption and application of the rules of practice and procedure and by the judges’ practical familiarity with those rules. With this in mind, the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings.’

4.48 It is submitted that efficiency of litigation cannot provide the sole reason for the distinction between substance and procedure. It proves too much. There should never be a choice of law process under this logic because domestic law will always be more familiar to the judge and therefore no foreign law should be applied.

[284] (1991) 174 CLR 1.

[285] *Ibid*, 26-7.

d. Rights arising by virtue of the existence of trial

4.49 An explanation in favour of the *lex fori* applying to certain rights is that there are some rights which arise by virtue of the trial process itself and the *lex fori* is the most appropriate law to apply to these rights. To demonstrate this argument it will be broken down into two propositions: (i) there is a distinction between rights that exist, or are perceived to exist, prior to the commencement of the trial process, and rights which do not; (ii) the *lex fori* will be the most appropriate law to apply to such rights.

4.50 Suppose that Y promises X, for good consideration, to pay X £100 on the 1st May 2009. Y does not do so and X brings an action against Y on 1st December 2009, judgment being given that day. The court, in such circumstances, will grant X interest on the sum due from the 1st May 2009.[286] The obligation was created, or is seen to be created, independently of the court process.[287] Equally, if Y negligently kills X on the 1st May 2009, and X's widow commences the trial process on 1st November 2009, the trial itself starting on the 1st December 2009, interest on the sum due starts on the day of the death, not on the day of trial.[288] However, some rights do not exist, or are not deemed to exist, prior to the commencement of trial. It cannot be said that on the 1st May 2009, X was

[286] The Courts have a discretion to make such awards under the Supreme Court Act 1981, s35A.

[287] Also, limitation periods usually start to run from the accrual of the cause of action and, obviously, not the date of trial: see the Limitation Periods Act 1980.

[288] *Cookson v Knowles* [1979] AC 556. Interest on pre-trial pecuniary loss in personal injury cases also commences from the day of the injury: *Jefford v Gee* [1970] 2 QB 130. The one complication is interest on damages for non-pecuniary loss, which starts from the date of service of the writ: *Jefford v Gee*, 147E-H. This is because the loss is (usually) continuing and therefore it cannot be said all the damage occurs on a particular date from which interest should accrue. For prophylactic reasons, the date of service was chosen.

under a duty to disclose all relevant documents to Y. This duty only arises when the court grants the order to disclose the documents, pursuant to the commencement of the trial process. Equally, it cannot be said that, were X to be granted a worldwide freezing injunction to prevent Y from moving assets out of jurisdiction, there is any sense in which X was always entitled to this injunction, even prior to the commencement of trial. It is thought that the distinction between a substantive right and a procedural right can best be expressed by this distinction, the former being considered to arise independently of a trial process, that latter arising out of the trial of a substantive right.[289]

4.51 If the first proposition is accepted, that there exists a distinction between rights which arise by virtue of the trial process itself, and rights which arise, or are perceived to arise, prior to the commencement of the trial process, then one should not have too much difficulty accepting that rights arising by virtue of the trial process should be governed by the law of that trial process. The rights are created by the forum to deal with the substantive right. As they are created by the forum, they ought to be governed by the law of the forum.

4.52 Part of the approach in the Australian High Court decision of *Pfeiffer v Rogerson*,[290] following Mason CJ's dissenting speech in *McKain v Miller*,[291] looks similar to that taken here. The crucial paragraph reads as follows:[292]

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[289] *Cf* Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (OUP, Oxford 2008), §3.38-§3.40.

[290] (2000) 172 ALR 625, HC (Aus).

[291] (1991) 174 CLR 1.

[292] n290, [104].

> 'Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.'

4.53 The first of these argument has already been dealt with, and rejected.[293] The second of these arguments, adopted from Mason CJ's speech in *McKain* looks similar to the one propounded in the present sub-section. However, when one goes back to *McKain* to see how this test came about, it is apparent this has been achieved by a different theory. Mason CJ's view is based on efficiency of litigation, a theory which has already been discussed and rejected.[294]

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[293] Above, §4.41-§4.42.

[294] §4.47-§4.48.

4.54 It should be noted, however, that a rule which stated that only rights arising from the trial process will be governed by the *lex fori*, all other rights being governed by the *lex causae*, would be insufficient. A contractual right is not a right arising from the trial process. Yet it seems intuitively correct to say that sometimes the English court will not grant an award of specific performance where the *lex causae* would grant such an award.

4. BLENDING THE CHARACTERISATION APPROACH AND THE RULE OF EXCLUSION APPROACH TOGETHER

4.55 The conclusions from the previous sections are as follows. The distinction between substance and procedure cannot be explained purely on the grounds of inconvenience. An exclusionary rule for procedure is insufficient on its own and an orthodox characterisation rule for inconvenience is unsatisfactory. It has also been explained that some rights arise by virtue of the existence of the trial itself and the most appropriate law to apply to these rights must be the *lex fori*. But again, it was explained that this rule is insufficient as the single explanation of how the distinction between substance and procedure works.

4.56 Whilst each of these rules appears justifiable, though insufficient on its own, taken together they do appear to explain the distinction. Thus, the following theory can be derived, which is a blend of the two approaches. There is an initial, orthodox characterisation stage which separates substantive rights from procedural rights, the latter being those rights which are created by virtue of the trial itself. This is what is meant by

the distinction between substance and procedure being the first level of characterisation. Once that initial characterisation stage has been performed, the foreign applicable law ought to govern the substantive right, up until the point where its application would be too inconvenient for the forum court. In practical terms, it will be seen that the forum has a set number of potential court orders it can grant. The forum has an obligation to grant the order which most closely vindicates the foreign substantive right. Normally this will involve it granting a very similar order to the one the foreign court would have granted. However, circumstances arise where it cannot do so, due to procedural inconvenience, and therefore it must award a (slightly) less similar order.

IV. THE CONSEQUENCES OF THE ANALYSIS

4.57 If the above analysis is accepted, then it is thought that two very important conclusions can be drawn from it. These are as follows: (i) characterising a rule as procedural for choice of law purposes means that it is characterised as procedural for jurisdictional purposes, and *vice versa*; (ii) the inconvenience rule of exclusion is a rule common to both choice of law and the enforcement of foreign judgments. Both of these propositions may come as a bit of a surprise. The distinction between substance and procedure is usually referred to in the context of choice of law. However, it is argued in this thesis that the analysis proposed affects all three areas of international private law. These propositions will now be explained.

1. CHARACTERISING A RULE AS PROCEDURAL FOR CHOICE OF LAW PURPOSES MEANS THAT IT IS CHARACTERISED AS PROCEDURAL FOR JURISDICTIONAL PURPOSES

4.58 We are very familiar with the distinction between substance and procedure in the context of cases entirely on choice of law. By this it is meant cases where the forum has decided that it has jurisdiction to determine the merits of the claim. Thus, the classic cases on the distinction between substance and procedure are those such as *Chaplin v Boys*[295] and *Harding v Wealands*.[296] Both of these can be found in the tort choice of law chapter of Dicey, in addition to the substance and procedure chapter.

4.59 However, we are far less familiar with the distinction between substance and procedure in the context of jurisdiction. Take the recent case of *Munib Masri v Consolidated Contractors (Re: Anti-suit injunction)*.[297] The history of the proceedings is long and complex,[298] and for present purposes only a brief summary will be given. Judgment was given in favour of Masri ordering two companies (CCOG and CCIC) who were part of the Consolidated Contractors group of companies to pay Masri around $52m following an agreement concerning an oil concession. The judgment debtors were domiciled outside the EU but had submitted to the jurisdiction. After judgment had been handed down, the judgment debtors sought to avoid paying the judgment through a variety of tactics. One of these was to seek a declaration of non-liability from the Yemeni courts.

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[295] [1971] AC 356.

[296] [2007] 2 AC 1.

[297] [2008] EWCA Civ 625.

[298] The 2008 proceedings are summarised in A Rushworth and A Scott, 'Private International Law' [2009] International and Maritime Commercial Law Yearbook (forthcoming).

Masri requested an anti-suit injunction from the English courts to prevent the judgment debtors continuing with the Yemeni proceedings. One issue that arose was whether the English court had jurisdiction to grant such an injunction. It was argued by counsel for the judgment debtors that simply giving judgment on the contractual matter did not establish jurisdiction to grant an anti-suit injunction. This was rejected by the Court of Appeal on the basis that the anti-suit injunction in question, that is one which protects the integrity of the trial process, was not a right in the sense that it involves a separate claim or cause of action.[299] It is an 'ancillary' order, just like an order for *inter partes* disclosure.[300] Once a court has jurisdiction over the substantive merits of a case, it can grant any ancillary measures it requires: a proposition true both in English law[301] and European law.[302]

4.60 Here, we see the distinction between substantive rights and ancillary rights when determining jurisdictional issues. This distinction can also be seen in the cases of *The Ikarian Reefer (No 2)*[303] and *Masri v Consolidated Contractors (Re: Part 71 Orders)*.[304] In the former case the question was whether the court with jurisdiction on the merits could grant a third party costs order against a non-party to proceedings domiciled in another EU Member State, without establishing jurisdiction separately from the main proceedings under the Brussels Regulation. It was held that the measure was ancillary

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[299] n297, per Lawerence Collins LJ delivering the unanimous opinion of the Court, [52].

[300] *Ibid*, [52] and [59].

[301] *Ibid*, [59].

[302] Extending *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n243), [19] and [22]; C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277, [40]-[41].

[303] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2)* [2000] 1 WLR 603(CA).

[304] *Munib Masri v Consolidated Contractors International Company SAL (Re: Part 71 Orders)* [2008] EWCA Civ 876[2009] 2 WLR 699.

and therefore the court could do so. In the latter of these cases, the question was whether the court could grant orders under CPR Part 71, requiring the post-judgment attendance of officers of a company to be examined on the assets of that company for the purposes of assisting enforcement, without establishing jurisdiction separately over those officers. The Court of Appeal again held that this was perfectly proper as the orders were ancillary and therefore no separate jurisdictional ground was needed under European law.[305]

4.61 Once it has been established that there is a distinction between substance and procedure in jurisdiction, and there is a distinction between substance and procedure in choice of law, the next, and by far the hardest question, is whether the distinction is the same. The distinction for the purposes of choice of law has been presented as having two limbs: (i) rights arising from the trial process will be governed by the *lex fori*; and (ii) where the application of the *lex causae* is too inconvenient for the forum court, the *lex fori* will apply. The second of these limbs clearly does not apply in the case of jurisdiction as the determination of jurisdiction does not require the actual application of foreign law. However, the first limb may be relevant.

4.62 If one accepts that there are rights which arise by virtue of the trial process then it is clear that the forum need not establish jurisdiction for these rights. The rights have arisen because the forum has granted them for the purposes of its trial and it would be nonsensical for any other forum to have jurisdiction over those rights. Indeed, this is the only explanation that has been proffered for the jurisdictional distinction between

[305] The decision was overruled in *Masri v Consolidated Contractors International Company SAL and others* [2009] UKHL 43on the basis that the CPR gave the English courts no ability to grant the measures in question over directors resident outside of the jurisdiction, their Lordships being fortified in this conclusion by the inability of a provision in the CPR under which service out could be effected. None of this affects the European analysis.

ancillary remedies and substantive rights. In *The Ikarian Reefer (No 2)*,[306] Rix J at first instance[307] gave the following explanation for why the court did not need to establish separate jurisdiction over ancillary orders: [308]

> 'I am satisfied that it does not make sense to expect to find in the Convention a right that would enable a party domiciled elsewhere in the Convention States to assert the need for him to be sued in the country of his domicile in respect of an incidental procedural claim which could not be raised against him at all outside the Courts of the state with substantive jurisdiction.'

4.63 No other explanation of the distinction has been provided. The ECJ in *Van Uden*[309] and *Mietz*[310] simply state that the court with jurisdiction over the merits can grant whatever provisional and protective measures it wishes to without further jurisdictional conditions applying. The Court of Appeal in *Masri*[311] have extended this to include all ancillary orders, whether provisional, protective or neither. The reason for this has been deemed 'obvious'.[312] Waller LJ, upholding Rix J's judgment in *The Ikarian Reefer (No 2)*,

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[306] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2)* (n303).

[307] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer (No 2))* [1999] 2 Lloyd's Rep 621.

[308] *Ibid*, 628.

[309] n302.

[310] n302.

[311] [2008] EWCA Civ 625, [2009] 2 WLR 699, [62].

[312] *Ibid*, [65].

thought the question was whether the action was a 'substantive cause of action' or an 'ancillary' order.[313]

4.64 Therefore, insofar as the courts have given guidance on the distinction between substance and procedure in the context of jurisdiction, it conforms perfectly with the first limb of the identified rule in choice of law. Furthermore, this must be correct as a matter of common sense. Rights which arise by virtue of the trial process ought to be governed by the law of the trial process and jurisdiction over those rights can only be exercised by that trial process. In which case, if a particular right is designated 'procedural' or 'ancillary' for the purposes of jurisdiction, this means that it should also be governed by the *lex fori*. Furthermore, if a particular right is designated as 'substantive' for the purposes of jurisdiction, this means that the normal choice of law rules should be applied to it. The consequences of this can be far reaching. The decision in *Masri v Consolidated Contractors (Re: Anti-suit injunction)*[314] establishes that in single-forum cases, separate jurisdiction must be established for an anti-suit injunction. Therefore, following the reasoning of this section, there must be a choice of law question for the right which underpins the injunction. In such single forum cases, the order will be granted to vindicate an equitable right not to be vexed or oppressed by the defendant's activities in pursuing litigation abroad, or a legal right not to be sued in the forum the defendant is seeking to litigate in. The former of these is likely to be characterised as a non-contractual right under the Rome II Regulation and therefore Article 4 will apply, designating the law of the place where the damage occurs. This could be the place where the vexatious and oppressive conduct occurs and therefore the place of the single forum.

[313] [2000] 1 WLR 603, 616.

[314] n311.

One would expect that under this law the conduct would not be vexatious or oppressive and thus the anti-suit injunction would not be awarded. In the latter of these, the options are less constricted because it is arguable[315] the choice of law will likely be a matter for English law, choice of court agreements being exempted from the scope of the Rome I Regulation.[316]

2. THE INCONVENIENCE RULE OF EXCLUSION IS COMMON TO BOTH CHOICE OF LAW AND THE ENFORCEMENT OF JUDGMENTS

4.65 The public policy rule of exclusion applies to both choice of law and the enforcement of judgments. This is because foreign law is applied in both contexts and a rule of exclusion provides a limit to the extent to which the English court will apply foreign law. The public law rule of exclusion applies to both choice of law and the enforcement of judgments too for exactly the same reason. It is further submitted that the inconvenience rule of exclusion should also apply in both contexts for this reason.

4.66 That the public policy rule of exclusion applies to both choice of law and the enforcement of judgments can be seen from the cases of *Oppenheimer v Cattermole*[317] and *Vervaecke v Smith*.[318] In *Oppenheimer v Cattermole*, the House of Lords, *obiter*,

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[315] It could be argued that the notion of a choice of court agreement for the purposes of the Regulations is different from the contractual promise not to sue which gives the right to seek an anti-suit injunction: see A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, Oxford 2008), *passim*. In which case, it may follow from this that such a legal right could fall within the scope of the Rome Convention.

[316] Rome I Regulation, Article 1(2)(e).

[317] [1976] AC 249.

[318] [1983] 1 AC 145.

would not have applied a particular law of Nazi Germany to determine whether the claimant held dual-nationality or not: the rule was repugnant to modern English sensibilities. In *Vervaecke v Smith*, the Belgian claimant married a domiciled Englishman so that she could obtain a British passport in order to carry on her trade as a prostitute in England. The new husband and wife parted immediately after the ceremony. Sixteen years later the claimant married another man, in Italy, who then died the same day leaving her property of considerable value in England. The claimant sought to annul her first marriage on the grounds of want of consent. She successfully brought such proceedings in Belgium and obtained judgment rendering the first marriage null and void on the basis it was a mock marriage. This judgment was brought to England for enforcement. The House of Lords held that the Belgian judgment would not be recognisable or enforceable in England on the grounds of public policy.

4.67 The reason why rules of exclusion apply to both choice of law and the enforcement of judgments should be obvious. Both involve the application of foreign law. Rules of exclusion are used to disapply foreign law that would otherwise be applicable. Whether the foreign rule comes from a foreign judgment applying foreign rules of law, or the English court directly applying foreign rules of law, there is a need for these rules of exclusion.

4.68 It is clear that rules of exclusion apply equally in the context of choice of law and the recognition and enforcement of judgments, and the legislative provisions and case law

support this.[319] This must also be true of the inconvenience rule of exclusion. Take the following two examples:

1. A and B conclude an agreement, the governing law of which is French law. Under that agreement, A is to open up a shop on B's property in England and keep it open during business hours for the next ten years. A fails to do this so B sues A in the French courts. The French courts award, under French law, an order for specific performance requiring A to keep the shop open. This award is then brought to England for enforcement.

2. A and B conclude an agreement, the governing law of which is French law. Under that agreement, A is to open up a shop on B's property in England and keep it open during business hours for the next ten years. A fails to do this so B sues A in the English courts. The English court must apply French law as the governing law of the agreement, and under French law B is entitled to an award of specific performance.

4.69 It makes little sense to, on the one hand, refuse to award specific performance in (2) on the basis that it is too inconvenient for the English court to grant such an order and, on the other, enforce the judgment in (1). The reason for not awarding the French specific performance order is identical in both.

[319] In the context of the enforcement of foreign judgments, see below, §6.65; in the context of choice of law, see below, §7.13.

V. CONCLUSION

4.70 The present chapter lays down some of the theoretical foundations of the thesis. It suggests that there are two key rules that form the category of procedure in the conflict of laws. The first of these rules is that rights whose causative event is the trial process itself will be governed by the *lex fori*, as those rights themselves are procedural. All other rights are substantive in nature. The second of these rules is that even when the substantive right is governed by a foreign law, there is an inconvenience rule of exclusion with which the forum court can refuse to apply the otherwise applicable foreign law on the basis of inconvenience to the forum court's machinery. The first of these rules is common to questions of both choice of law and jurisdiction. The second of these rules is common to questions of both choice of law and the enforcement of judgments.

4.71 The rest of the thesis takes a far less abstract approach, and looks at the individual areas of jurisdiction,[320] enforcement of judgments[321] and choice of law,[322] asking how remedies, that is court orders, are dealt with in each of these areas. Whilst, of course, there are exceptions to the above rules, it is remarkable how consistent the European instruments are with this approach. Further, it teaches us useful lessons for the common law.[323] The Canadian courts, in *Pro Swing v Elta*,[324] have recently permitted the recognition and enforcement of non-monetary judgments – something which the English

[320] Chapter 5.

[321] Chapter 6.

[322] Chapter 7.

[323] Whilst strictly outside the scope of the thesis, some further discussion of this is provided in the concluding Chapter 9.

[324] [2006] 2 SCR 612.

courts are yet to accept under the common law. The main difference between the majority and the minority in *Pro Swing* concerned the necessary requirements for a foreign non-monetary judgment to be enforceable. Once one accepts the connection between remedies in the choice of law process and remedies in the enforcement of foreign judgments process, such requirements can start to be provided.[325]

[325] Discussed below, §9.07-§9.10.

5

Remedies and Jurisdiction

5.01 The European approach to remedies and jurisdiction is complex. The complexity arises from applying autonomous European laws to national procedural rules. In contrast to comparative substantive law, comparative procedure is not a field with many subscribers. Thus, there is much less familiarity with the similarities and differences between the various European national laws. The purpose of the present chapter is to discuss the European autonomous rules and attempt to provide some answers to how certain English remedies fit into this complex scheme including the following orders: anti-suit injunctions; domestic, worldwide and *Chabra* freezing injunctions; third party costs orders; and search orders.

5.02 It has been said that writing a thesis on remedies can lead to writing a thesis on the whole of the conflict of laws.[326] That is undoubtedly true and so lines have to be drawn to prevent this. The view of this chapter is that remedies for substantive rights[327] have never been seen to be problematic in jurisdictional terms. Such remedies do create particular problems when enforcing foreign judgments and during the choice of law process. These problems are dealt with in the proceeding two chapters.

[326] A Briggs, 'Olusoji Elias: Judicial Remedies in the Conflict of Laws' [2002] Lloyd's Maritime and Commercial Law Quarterly 443.

[327] For the distinction between substantive rights and rights which arise by virtue of the trial process, see Chapter 4, §4.49-4.54.

5.03 For the purposes of jurisdiction, the significant difficulties that have arisen are in the context of procedural rights, that is rights which arise by virtue of the trial itself.[328] There are three important rules concerning these rights: (i) the primary court, that is the court with jurisdiction over the substantive right, can grant any ancillary measures necessary so far as those measures are compatible with the European Regulations; (ii) the primary court cannot grant orders for execution which must occur abroad; and (iii) an auxiliary court, that is a court without jurisdiction over the substantive right, can grant a certain type of ancillary measure, provisional measures, in support of the primary court. Unless the court is the primary court under (i), or the auxiliary court under (iii), it cannot grant ancillary remedies to a cause of action.

5.04 These three rules create difficulties in application. The first is which rights and remedies are substantive and which are ancillary. As stated above, a court with jurisdiction over a substantive right can grant any ancillary measures necessary to determine or protect that right. However, it cannot necessarily[329] determine other, closely-related, substantive rights. Thus, the issue that arises is which remedies are ancillary to a substantive right, and which vindicate a separate substantive right. Most recently, this issue has flared up in the context of anti-suit injunctions and previously it had arisen in the context of freezing injunctions. Part I describes this distinction between substantive rights and ancillary remedies.

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[328] As explained in Chapter 4, *ibid*.

[329] It may be able to establish substantive jurisdiction separately under the provisions of the Brussels I Regulation, e.g. under Article 6(1).

5.05 Whilst the court with jurisdiction over the substantive right has jurisdiction to grant ancillary measures, including post-judgment ancillary measures,[330] Article 22(5) of the Brussels I Regulation grants exclusive jurisdiction '...in proceedings concerned with the enforcement of judgments, [to] the courts of the Member State in which the judgment has been or is to be enforced.' The question which arises is which of English law's orders for the enforcement of a judgment[331] fall within the scope of Article 22(5). The second section attempts to answer this question.

5.06 The final difficulty that has arisen is also concerned with the classification of certain ancillary measures. In particular, Article 31 of the Brussels I Regulation provides for a separate, additional ground of jurisdiction for provisional, including protective, measures, and this rule has given rise to much European case law.[332] Thus such ancillary remedies need to be defined and the jurisdictional rule explained. This is the purpose of the third section, including how the Evidence Regulation affects this definition.

I. ANCILLARY REMEDIES

5.07 The Brussels I Regulation works by allocating jurisdiction over individual substantive rights. This was discussed in chapter 3.[333] However, the court with jurisdiction over the

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[330] *Munib Masri v Consolidated Contractors International Company SAL (Re: Receivership order)* [2008] EWCA Civ 303, [2009] 2 WLR 621.

[331] In this thesis, the term 'orders for the enforcement of the judgment' includes all orders contained in Parts 70-73 of the CPR, RSC Orders 45-7, and CCR Orders 25-29.

[332] Discussed below, §5.58-§5.129.

[333] Above, §3.19-§3.31.

individual substantive right[334] also has jurisdiction to award ancillary measures.[335] This creates the need to distinguish between remedies granted to vindicate substantive rights and ancillary remedies. This is the purpose of the present section.

5.08 The first sub-section explains the source of the distinction in European law, focussing on the decisions in *Van Uden*[336] and *Mietz*,[337] and their extension in the English case law. The second sub-section discusses the parallel with the approach of the English courts prior to the enactment of the Civil Jurisdiction and Judgments Act 1982, s25, where the English court could not grant ancillary relief if it did not have jurisdiction over the substantive matter, commonly known as the rule in *The Siskina*.[338] The third and final sub-section discusses the application of the rule to various English measures, in particular, provisional and protective measures, anti-suit injunctions and orders against third parties to the proceedings.

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[334] Some controversy has arisen over whether the court has jurisdiction over an individual substantive right in circumstances where the court has stayed the proceedings under Article 27(1) of the Brussels I Regulation. In *JP Morgan Europe Ltd v Primacom AG and Others* [2005] 2 Lloyd's Rep 665, , [2005] EWHC 508 (Comm), Cooke J took the view that the court still had jurisdiction over the substantive dispute and thus could grant ancillary measures (injunction to prevent the defendant from disposing of assets). It is doubtful this view is correct.

[335] It was established in C-391/95 *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* [1998] ECR I-7091, [19], and affirmed in C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277, [40]-[41], that the court with jurisdiction over the substantive right could grant any provisional measures necessary. This was extended in *Munib Masri v Consolidated Contractors International Company SAL (Re: Receivership order)* (n330), to include all ancillary orders.

[336] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* , *ibid*.

[337] *Mietz v Intership Yachting Sneek BV* (n335).

[338] *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 210.

1. THE SOURCE OF THE DISTINCTION IN EUROPEAN LAW

5.09 It is clear that the Brussels I Regulation allocates jurisdiction over particular legal relationships, in the sense of particular substantive rights.[339] Simply because the court has jurisdiction over a tortious right alleged by one party against the other does not mean that it has jurisdiction over a contractual right between those same parties, even when the contractual right could be said to be related to the tortious right. *Kalfelis v Schröder*[340] is a case in point. Mr Kalfelis concluded with Schröder Bank Luxembourg, which was a wholly owned subsidiary of Schröder Bank Germany, various spot and futures transactions in silver bullion. These transactions were arranged through an employee of Schröder Bank Germany. The transactions caused a total loss to Mr Kalfelis and he sued both banks, and the employee, in the German courts, on the basis that they did not inform him of the risks inherent in the transactions, concealed from him the commission made by the Luxembourg bank, and failed to enter into covering transactions. One of the questions the German court referred to the ECJ was whether, if the German court had jurisdiction on the basis of Article 5(3) of the Brussels Convention, it could take jurisdiction over the breach of contract and unjust enrichment claims that were connected to the tort claim. The ECJ held that the German courts could not. Each legal relationship was treated separately[341] despite the impracticalities this may cause. Similarly, in the more recent case of *Roche v Primus*,[342] the fact that a court has jurisdiction over a claim for the breach of a patent right held in one country does not mean it has jurisdiction over

[339] §3.19-§3.31.

[340] C-189/87 *Kalfelis v Bankhaus Schröder Munchmeyer Hengst & Co* [1988] ECR 5565.

[341] *Ibid*, [19].

[342] C-539/03 *Roche Nederland BV v Primus and Goldenberg* [2006] ECR I-6535.

claims for the breach of almost identical patent rights, albeit held in other countries. Drs Primus and Goldenberg owned a European patent for 10 contracting countries over specialist medical equipment. It was alleged that Roche Nederland and eight other companies in the Roche group had infringed those patent rights. Dr Primus sued Roche Netherlands in the Netherlands and then attempted to join the other companies to the action by virtue of Article 6(1). The ECJ decided that this was not possible. Article 6(1) was to be restrictively interpreted. As the effect of the European patent was to grant ten different rights, one in each of the contracting states, it could not be said that the action between Primus and Roche Netherlands was legally the same as that between Primus and the other Roche companies, as each was being sued for a breach of a different legal obligation.[343]

5.10 Though the Brussels I Regulation allocates jurisdiction over particular substantive rights, it permits the court with jurisdiction over those substantive rights to grant ancillary measures. The ECJ explained, *obiter*, in *Van Uden Maritime v Firma Deco-Line*:[344]

> '...it is accepted that a court having jurisdiction as to the substance of a case in accordance with articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary...
>
> '...the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also has jurisdiction to order

[343] For criticism of this decision, see A Briggs, 'Jurisdiction over defences and connected claims' [2006] Lloyd's Maritime and Commercial Law Quarterly 447.

[344] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n335), [19] and [22].

provisional or protective measures, without that jurisdiction being subject to any further conditions, such as that mentioned in the national court's third question.'

The national court's third question had been whether the order granting interim relief had to be capable of execution within the territory of the state which granted the order. This approach was affirmed in *Mietz v Intership Yachting*,[345] where the ECJ substantially repeated the statements made in *Van Uden*.

5.11 Whilst the ECJ only referred to the primary court's ability to grant provisional measures without further conditions, a series of English Court of Appeal decisions has extended this to covering all ancillary measures, whether pre-judgment or post-judgment.

5.12 In *The Ikarian Reefer (No 2)*,[346] Waller LJ, delivering the unanimous opinion of the Court of Appeal, held that the jurisdictional rules of the Brussels Convention apply to determine jurisdiction over 'substantive causes of action' and not 'ancillary measures'. The ancillary measure in issue there was a costs order against a third party to the proceedings, under the Supreme Court Act 1981, s51, and it was held that separate jurisdiction against the third party need not be established under the Brussels Convention.[347]

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[345] *Mietz v Intership Yachting Sneek BV* (n335), [40]-[41].

[346] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2)* [2000] 1 WLR 603, 616B-D. An application for leave to appeal was dismissed, 617.

[347] There is a separate question of how service out can be granted under the CPR. The Court of Appeal's approach in *The Ikarian Reefer (No 2)* was significantly qualified by the House of Lords decision in *Masri v Consolidated Contractors International Company SAL and others* [2009] UKHL 43.

5.13 In *Masri v Consolidated Contractors (re: Receivership Order)*,[348] Lawrence Collins LJ, giving the unanimous opinion of the Court of Appeal, held that the court with jurisdiction over the substantive cause of action could grant post-judgment provisional measures, in that case a receivership order for equitable execution, but went further in holding that the decisions of *Van Uden* and *Mietz* apply to all ancillary orders, and not just provisional measures.[349]

5.14 This approach was confirmed in *Masri v Consolidated Contractors (re: Anti-suit injunction)*,[350] where the Court of Appeal had to determine whether a judgment creditor, seeking an anti-suit injunction against the judgment debtor who was attempting to bring proceedings in Yemen for a declaration of non-liability, had to establish jurisdiction separately for the purposes of the anti-suit injunction. Lawrence Collins LJ, giving the judgment of the Court of Appeal, held that the claimant did not. The particular anti-suit injunction in question[351] was an ancillary order and therefore no separate jurisdictional base was required.

5.15 Therefore, the European and English case law demonstrates that the court with jurisdiction over the substantive right has jurisdiction to grant any ancillary measures thereto. Whilst the rule is easy to set out, its application is particularly difficult. As Lord Steyn explained in *Canada Trust v Stolzenberg*,[352] there must be an autonomous

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[348] *Munib Masri v Consolidated Contractors International Company SAL and others* [2008] EWCA Civ 303[2009] 2 WLR 621.

[349] *Ibid*, [96]-[97].

[350] *Munib Masri v Consolidated Contractors International Company SAL and another (Re: Anti-suit injunction)* [2008] EWCA Civ 625, [2009] 2 WLR 669, [60]-[67].

[351] Discussed below, §5.24-§5.28.

[352] *Canada Trust Co and others v Stolzenberg and others (No 2)* [2002] 1 AC 1.

definition of what it means to be 'sued' for the purposes of the Brussels I Regulation, and this autonomous definition must be applied to English procedural rules. In that case, Lord Steyn held that being sued 'should be interpreted as referring to the initiation of the proceedings.'[353] Whilst it is possible to initiate proceedings simply by an application for an interim remedy prior to issuing a claim form,[354] it is thought that Lord Steyn was referring to initiating proceedings under CPR Parts 7 and 8. This approach is consistent with the paragraph which immediately follows his definition where he discusses the issue of the writ, now a claim form. This would mean that claims for which a claim form under CPR Parts 7 and 8 must be issued would be substantive and applications which fall under CPR Part 23 would be ancillary. Such a distinction represents a more fundamental approach in English law, which is the distinction between a cause of action and ancillary relief, that will now be discussed.

2. THE ANALOGY TO THE RULE IN *THE SISKINA*

5.16 The ECJ case law demonstrates that, for the purposes of the Brussels I Regulation, a line must be drawn between a substantive legal relationship between two parties and a legal relationship ancillary to another legal relationship between two parties. This approach is by no means confined to European law, it being a necessary part of the English rules on jurisdiction.

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[353] *Ibid*, 12.

[354] The White Book, Part 7, General Introduction, 268-269.

5.17 Prior to the United Kingdom's accession to the Brussels Convention, the English jurisdictional rules on ancillary relief were quite unsatisfactory.[355] A significant problem was the decision in *The Siskina*.[356] The thrust of this decision was that ancillary relief could only be granted where the court had jurisdiction over the substantive cause of action to which the ancillary relief was connected.[357] On the facts, this meant that claimant cargo-owners could not be awarded a *Mareva* injunction over certain moneys of the defendant shipowners where the court had no jurisdiction over the alleged breach of contract or tortious claims. Lord Diplock explained:[358]

> 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the [claimant] for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the [claimant] of the relief

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[355] Lord Collins of Mapesbury being their most vocal critic: L Collins, 'The legacy of the Siskina' (1992) 108 Law Quarterly Review 175; L Collins, 'The end of the Siskina?' (1993) 109 Law Quarterly Review 342; L Collins, 'The Siskina again: an opportunity missed' (1996) 112 Law Quarterly Review 8; L Collins, *Essays in International Litigation and the Conflict of Laws* (Clarendon Press, Oxford 1996), 34. Lord Denning described the House of Lords' decision in *The Siskina* as his most disappointing reversal: A Denning, *Due Process of Law* (Butterworths, London 1980), 141.

[356] *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* (n338).

[357] The decision was based on the construction of RSC Order 11(1)(i), which empowered the court to give leave for service on persons outside jurisdiction where: '[i]f in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction...'

[358] *The Siskina* (n338), 256.

to which his cause of action entitles him, which may or may not include a final injunction.'

The decision rested on the distinction between ancillary relief and substantive causes of action. Much of the case law on the distinction since *The Siskina* concerned how to classify anti-suit injunctions,[359] and this will be dealt with below.[360]

5.18 Section 25 of the Civil Jurisdiction and Judgments Act 1982 has largely[361] reversed the decision, permitting the High Court to grant interim relief where it does not have jurisdiction over the substantive cause of action.[362] However, the distinction between substantive causes of action and ancillary measures in the English conflict of laws lives on.[363] Two examples can be given.

5.19 Recently, the House of Lords held that a freezing injunction could not be granted in circumstances where no substantive proceedings had been brought or were imminent. In *Fourie v Le Roux*,[364] the liquidator of two South African companies applied for a freezing injunction against a variety of defendants. It was thought that the defendants had been

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[359] In particular, see *British Airways Board v Laker Airways Ltd* [1985] AC 58 and *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV* [1987] AC 24.

[360] §5.24-§5.28.

[361] The 1982 Act reversed the effect of the decision where proceedings had been commenced or were to be commenced in a Contracting State. S25(3) permitted the extension of the Section to proceedings commenced otherwise than in a Contracting State, which occurred on the coming into force of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997/302.

[362] *The Siskina* itself still has repercussions in other Commonwealth countries. E.g. in the context of the Hong Kong RSC, see *Mercedes Benz AG v Leiduck* [1996] AC 284, , [1995] 3 All ER 929.

[363] P Devonshire, 'Listing, not sunk: the Siskina in the House of Lords' (2007) 123 Law Quarterly Review 361.

[364] [2007] 1 WLR 320.

engaged in asset stripping, but no claim had yet been brought. Park J had granted a freezing injunction, but the House of Lords held that under such circumstances a freezing injunction could not be justified. Lord Scott stated that 'An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief.'[365] Therefore, whilst it is clear that the substantive proceedings need not have been commenced at the time of seeking the injunction, in circumstances where no substantive relief had even been formulated it would normally not be proper to grant the injunction.[366]

5.20 In *Masri v Consolidated Contractors (re: anti-suit injunction)*,[367] the Court of Appeal had to determine whether an application for an anti-suit injunction in an alternative forum case requires jurisdiction to be established separately from the basis upon which the English forum does already have jurisdiction. There, Lawrence Collins LJ giving the unanimous judgment of the court, held that no separate jurisdiction need be established as the anti-suit injunction was ancillary relief to the main proceedings, rather than being a separate cause of action. Matters would be different where the claimant was seeking an anti-suit injunction based on a contractual right, or where the English forum would not grant a remedy in respect of the substantive proceedings.[368] Of particular interest is the fact that the Court of Appeal elided[369] the distinction used in the context of *The Siskina*, with that used in the context of the Brussels I Regulation, and *Van Uden*.

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[365] *Ibid*, [32]

[366] *Ibid*, [33].

[367] n348.

[368] So called 'single-forum' cases.

[369] n348, see how paragraphs [60]-[67] appear to follow on seamlessly from the conclusion in [59].

5.21 In view of this decision of the Court of Appeal, the approach of the courts in the context of the rule in *The Siskina* may be of help when determining whether particular relief is ancillary or substantive for the purposes of the Brussels I Regulation.

3. APPLICATION TO CERTAIN ENGLISH REMEDIES

5.22 The present section seeks to apply the jurisdictional distinction between substantive and ancillary remedies to certain English remedies. In particular, the focus will be on its application to anti-suit injunctions, which has been recently discussed by the Court of Appeal. Discussion of certain third party orders, such as costs orders, and *Chabra* freezing injunctions will also be presented.

i. Provisional, including Protective, Measures

5.23 Given the judgments of the ECJ in *Van Uden*[370] and *Mietz*,[371] it cannot be doubted that provisional measures within the meaning of Article 31 of the Regulation are ancillary measures. Which English measures fall within this definition is extensively discussed below.[372]

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[370] n335.

[371] n335.

[372] Section III.

ii. Anti-suit injunctions[373]

5.24 The question to be discussed in the present section is how the English anti-suit injunction fits into this European model. One initial reaction may be to ask what the point of this is, given the judgments in *Turner v Grovit*[374] and *Allianz SpA v West Tankers*.[375] However, these judgments only go so far as to prevent the English court indirectly preventing other Member State courts from taking jurisdiction over a claim and do not prevent the English court from granting an anti-suit injunction to prevent a defendant bringing proceedings in non-Member States, e.g. India.[376] Thus, it is still possible for the English court to take jurisdiction under the Brussels I Regulation and grant an anti-suit injunction. Therefore, the question that must be asked is whether an anti-suit injunction is a remedy vindicating a substantive right or is merely ancillary relief. It is not enough, for the purposes of the European model, to shy away from the theoretical analysis.

5.25 The answer is complicated by the bewildering variety and analyses of anti-suit injunctions. It is thought that the case law suggests a distinction between anti-suit injunctions granted pursuant to private rights of the parties and anti-suit injunctions granted to prevent interference with the English trial process.[377] Some deny the existence

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[373] T Raphael, *The Anti-Suit Injunction* (OUP, Oxford 2008); Briggs, *Agreements on Jurisdiction and Choice of Law* , 201-212.

[374] C-159/02 *Turner v Grovit* [2003] ECR I-3565.

[375] C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* [2009] 1 Lloyd's Rep 413.

[376] *Shashou and Others v Sharma* [2009] EWHC 957 (Comm). Also, see how the anti-suit injunction in *Masri v Consolidated Contractors (re: Anti-suit injunction)* (n348),was tailored to avoid interfering with the courts of the Brussels and Lugano States.

[377] This can be seen in *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV* , n359, 41 (per Lord Brandon of Oakbrook), 45 (per Lord Goff of Chieveley); *Bank of Tokyo Ltd v Karoon* [1987] AC 45n, 58; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871; *Munib Masri v Consolidated Contractors International Company SAL and another (Re: Anti-suit injunction)* (n348).

of the latter, concerned that s37 of the Supreme Court Act 1981 only permits an injunction to be granted for the infringement of a legal or equitable right.[378] However, *Mareva* injunctions satisfied[379] the requirements of s37 even though they are injunctions in support of the infringement of a legal or equitable right, rather than injunctions directly vindicating a legal or equitable right. It is difficult to see how an anti-suit injunction ordered to prevent interference with the English trial process is distinguishable.

5.26 It is not the purpose of the present section to resolve the difficult issue of how English law views anti-suit injunctions.[380] Its purpose is to simply explain the effect, under the European Regulations, of the various categorisations. There seem two possibilities. First, if an anti-suit injunction is granted in order to prevent interference with the English trial process, it is plainly ancillary relief. The right arises by virtue of the trial process. The analysis is confirmed in the Court of Appeal's recent decision in *Masri v Consolidated Contractors (re: Anti-suit injunction)*.[381] This means that in 'alternative forum' cases, that is, in cases where the English court will take jurisdiction over the merits of a claim,[382] the English court can grant an anti-suit injunction without having to establish separate

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[378] See Cotton LJ in *The North London Railway Company v The Great Northern Railway Company* (1883) 11 QBD 30.

[379] s37(3) of the Supreme Court Act 1981 has now been specifically inserted to cater for *Mareva* injunctions. It is not suggested they were unlawful prior to this provision.

[380] For attempts, see: Raphael (n373); Briggs, *Agreements on Jurisdiction and Choice of Law* (n373); A Briggs, 'The unrestrained reach of an anti-suit injunction: a pause for thought' [1997] Lloyd's Maritime and Commercial Law Quarterly 90; J Harris, 'Anti-suit injunctions - a home comfort' [1997] Lloyd's Maritime and Commercial Law Quarterly 413.

[381] n348.

[382] The distinction between single-forum cases and alternative-forum cases is often described by reference to whether the English court will grant a remedy in favour of the applicant. The distinction is really concerned with whether there is a claim over which the English court will take jurisdiction.

jurisdiction.[383] Second, if an anti-suit injunction is granted in order to vindicate a legal or equitable right of the applicant, the injunction is not ancillary relief but a remedy for a substantive right. Therefore, jurisdiction must be established separately.[384]

5.27 There may be some overlap between the two possibilities. If the applicant can point to an exclusive jurisdiction clause for the English court, binding upon the respondent, he may formulate his application for an anti-suit injunction in one of two ways. He could argue that the English court has jurisdiction over the underlying contract by virtue of the exclusive jurisdiction clause and an anti-suit injunction ought to be granted to protect the English court's jurisdiction. Or, he could directly assert that an anti-suit injunction ought to be granted to vindicate his contractual right encapsulated in the exclusive jurisdiction clause. The former would be ancillary relief, and the latter would be a remedy for a substantive right. There will rarely be any difference in these approaches.

5.28 Equally, suppose that no exclusive jurisdiction clause exists, the English court will take jurisdiction over the merits of the dispute and the applicant can argue that the respondent's activities in bringing proceedings in front of a foreign court are vexatious or oppressive. The applicant may argue either that an anti-suit injunction ought to be granted to prevent interference with the English trial process, or he may argue that the respondent has breached his equitable right not to be vexed or oppressed. However, unlike in the example of the exclusive jurisdiction clause, there may well be great difference in these two formulations. If the analysis put forward in Chapter 4 is correct,[385] there ought to be a

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[383] *Masri v Consolidated Contractors (re: Anti-suit injunction)* (n348), [59].

[384] *Ibid*, [44].

[385] §4.58-§4.64.

choice of law process for the latter equitable right, which is unlikely to be helpful for the applicant.[386]

iii. Measures awarded against third parties

5.29 One particularly difficult issue that has arisen is whether or not the court with jurisdiction over a substantive cause of action can grant relief ancillary to that cause of action against a third party to the cause of action. Four examples of such orders can be discussed: (i) costs orders against third parties to proceedings; (ii) freezing injunctions against third parties to proceedings; (iii) evidential orders against third parties to proceedings; and (iv) enforcement orders against third parties to proceedings. It is thought that in all of these cases, the measures are ancillary, in the sense that there is no need for the English court to establish separate jurisdiction over the third party.[387]

Costs Orders

5.30 It has been held by the Court of Appeal that a costs order against a third party to proceedings over which the English court has jurisdiction is ancillary relief, and not a separate cause of action, and therefore there is no need to establish jurisdiction separately.[388] In *The Ikarian Reefer (No 2)*,[389] the claimants brought an action claiming

[386] See §4.64.

[387] There is the separate question of whether the English courts have the power to take jurisdiction as a matter of English law. This depends on whether the court has the ability to serve out under the CPR or a statutory provision. There is no inherent jurisdiction to serve out: *Masri v Consolidated Contractors International Company SAL and others* (*Re: Part 71 Orders)* (n347), [31]-[32], relying on *Union Bank of Finland Ltd v Lelakis* [1997] 1 WLR 590and disapproving of the Court of Appeal's contrary suggestion in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2)* (n346).

[388] For the separate question of how the English court can take jurisdiction under English law, see CPR PD6B, para 3.1(18).

the cost of damage to the hull and machinery of a vessel against the defendants in England under an insurance contract. The court held that the claim could not be made on the basis that the vessel had been deliberately cast away by the claimants, and awarded costs to the defendants.[390] As the claimants were a 'one-ship' company, the defendants requested that the court make an order against a Greek-domiciled third party for the costs of the litigation. The third party was alleged to be the principal behind the company and the sole owner of the holding company that owned the claimants. The court granted the order and rejected the submissions of claimants' counsel that jurisdiction had to be separately established over the third party. The costs order was an ancillary order and therefore did not involve being 'sued' which required a substantive cause of action.[391] This decision has since been followed on two occasions.[392] The recent House of Lords decision in *Masri v Consolidated Contractors* disapproved of parts of the decision but these were concerned with the English courts' ability to serve out under the CPR and not with whether separate jurisdiction needed to be established under the Brussels I Regulation.[393]

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[389] [2000] 1 WLR 603.

[390] The head note to this claim suggests otherwise. It is incorrect.

[391] Ibid, 616B-E. It was alternatively held that the order was caught by Article 6(2) of the Brussels Regulation. See also, the discussion below on third party freezing injunctions, §5.31-§5.32.

[392] *Locabail (UK) Limited v Bayfield Properties Ltd and others* [2000] 2 Costs LR 169 (Mr Lawrence Collins QC sitting as a deputy judge); *Munib Masri v Consolidated Contractors International Company SAL (Re: Part 71 Orders)* (Sir Anthony Clarke MR giving the unanimous opinion of the Court of Appeal).

[393] [2009] UKHL 43, [31]-[32].

Chabra Freezing Injunctions[394]

5.31 The English courts have the power to grant a freezing injunction against a defendant against whom no direct cause of action lies, provided the injunction is ancillary and incidental to the claimant's cause of action against another defendant.[395] Such an injunction has been called a *Chabra* freezing injunction, after the case seen to have established it.[396] Normally, a *Chabra* freezing injunction will be awarded in circumstances where it is thought that the third party to the cause of action holds assets which are beneficially[397] owned by the defendant. Thus, in *Chabra* itself, a *Mareva* injunction was granted against a company which was thought to be controlled by the judgment debtor. In *Mercantile Group (Europe) AG v Aiyela*,[398] it was thought that the judgment debtor's wife held the judgment debtor's assets and thus a *Mareva* injunction was granted against her.

5.32 It has been consistently held by the Courts, up to the level of the Court of Appeal, that as the order is ancillary to the substantive cause of action, there is no need to establish jurisdiction over the third party separately. Hoffmann LJ, in his judgment in *Aiyela*, explained Mummery J's judgment in *Chabra*[399] as follows: '[t]he plaintiff had a *Siskina*

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[394] It is unclear whether the House of Lords decision in *Masri v Consolidated Contractors International Company SAL and others* (n393), will affect the case law cited herein, none of which was cited.

[395] *Yukong Line Ltd v Rendsburg Investments Corporation and Others* [2001] 2 Lloyd's Rep 113, [37].

[396] *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231.

[397] Though not necessarily in the strict sense of held beneficially under a trust: *Dadourian Group International Inc v Azuri Ltd* [2005] EWHC 1768, [30]. *Cf C Inc plc v L* [2001] 2 Lloyd's Law Reports 459, [75].

[398] [1994] QB 366 (CA).

[399] n396.

cause of action against Mr Chabra and the injunction against the company was ancillary to that cause of action.'[400]

Evidential Orders against third parties to proceedings

5.33 The courts have wide powers under statute[401] and the Civil Procedure Rules to require a third party to proceedings to disclose documents[402] or attend a hearing to give evidence.[403] The presumption against extra-territoriality applies to these provisions and therefore not all will permit the English courts to apply them to persons not resident in the UK.[404] Such provisions are plainly ancillary, the only question on the European level is whether the granting of such measures would be incompatible with the Evidence Regulation.[405] The issue is whether the Evidence Regulation precludes the use of *in personam* orders requiring witnesses to disclose documents held abroad or, witnesses living abroad, to attend a hearing. It would seem that there is no reason to suspect that the Evidence Regulation would preclude this ability. The Regulation was intended to

[400] n398, 376.

[401] E.g. see s25(1) of the Bankruptcy Act 1914 and s133 of the Insolvency Act 1986.

[402] E.g. CPR 31.17.

[403] E.g. CPR 34.2. And, also to require a witness to attend an examination (CPR r34.10).

[404] For the application of this presumption to various evidential provisions see: *In re Tucker (RC) (A Bankrupt), Ex p Tucker* [1990] Ch 148(s25(1) of the Bankruptcy Act 1914, allowing the examination of 'any person whom the court may deem capable of giving information respecting the debtor, his dealings or property,' held not to have extraterritorial effect); *In re Seagull Manufacturing Co Ltd* [1993] Ch 345(s133 of the Insolvency Act 1986, allowing the examination of a narrow category of persons connected to an insolvent company, held to have extraterritorial effect); *Masri v Consolidated Contractors International Company SAL and others* (CPR Part 71, allowing the examination of officers of the judgment debtor, held not to have extra-territorial effect).

[405] See A Rushworth, 'Demarcating the boundary between the Brussels I Regulation and the Evidence Regulation' [2009] Lloyd's Maritime and Commercial Law Quarterly 196.

improve the parties' ability to collect evidence from other Member States,[406] and not to restrict already existing provisions.[407]

Enforcement orders against third parties to proceedings

5.34 Once judgment has been given by the court, a variety of orders can be given in order to assist in the enforcement of that judgment.[408] These include everything from control orders to orders to obtain evidence from judgment debtors. When the order is made against the judgment debtor, the order is ancillary to the judgment itself and it has been held by the Court of Appeal that this is sufficient to establish jurisdiction.[409] Such orders can also be granted against third parties. Thus, for example, an order can be made requiring an officer of the judgment debtor to attend court and give information regarding the debtor's assets.[410] Orders can be granted against third parties who owe a debt to the judgment debtor.[411] Both of these orders are ancillary to the judgment, and *prima facie* the English court has jurisdiction to grant them subject to the European provisions and any internal limits placed on the measures by English law. With regard to third party debt orders, it has been held that this involves execution of the judgment for the purposes of Article 22(5) of the Brussels I Regulation and therefore the place where the debt is situate

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[406] Recital (5).

[407] Rushworth, 'Demarcating the boundary between the Brussels I Regulation and the Evidence Regulation' (n405), 204.

[408] The classic enforcement orders are briefly explained in chapter 2.

[409] *Munib Masri v Consolidated Contractors International Company SAL and others* [2008] EWCA Civ 303.

[410] CPR Part 71(1)(2).

[411] CPR Part 72.

has exclusive jurisdiction where it is a Member State.[412] Where the debt is situated outside any Member State, the English court will almost always refuse to grant the order.[413] With respect to orders for the obtaining of information concerning the judgment debtor's assets, it has been held that this does not fall within the exclusive jurisdiction provided for in Article 22(5)[414] but, applying the presumption against extra-territoriality, the CPR does not permit the English courts to grant such an order against a non-resident person.[415]

II. MEASURES OF ENFORCEMENT

5.35 Whilst the *prima facie* rule is that the primary court can grant any ancillary measures that it wishes to, it cannot grant orders for the enforcement of a judgment where those orders will take effect outside its territory. This is the effect of the rule of exclusive jurisdiction provided in Article 22(5) of the Brussels I Regulation. The purpose of the present section is to explain the scope of Article 22(5) and determine how it applies to certain English orders.

5.36 Prior to going into the detail of the section, it is worth explaining some of the relevant terminology to avoid confusion. There is a distinction between an order for enforcement

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[412] *Kuwait Oil Tanker Co SAK v Qabazard* [2004] 1 AC 300.

[413] *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 AC 260, [2003] UKHL 30.

[414] *Munib Masri v Consolidated Contractors International Company SAL (Re: Part 71 Orders)* (n392).

[415] *Masri v Consolidated Contractors International Company SAL and others* (HL) (n347).

and an order for execution.[416] The former, in this thesis, corresponds to a tertiary right as defined in chapter 2.[417] That is, any right whose causative event is the judgment itself. Therefore, following this definition, both a writ of *fieri facias*[418] and orders to obtain information from debtors are measures of enforcement.[419] Both depend on the existence of a judgment. An order for execution has a much more restrictive definition. A order for execution is an order which involves the active participation of the State in the enforcement of the judgment.[420] Thus, it includes an order which involves the bailiffs or huissiers knocking at the door and seizing property. However, it would not include, for example, an attachment of earnings order or a third party debt order, both of which are orders for enforcement. The reason these would not be included is that they do not, by virtue of the order, involve the active participation of the State. That comes later, where the employer or third party ignores the order and then a writ of *fieri facias* is granted against them. These orders are, in this sense, declaratory, as actual execution by the State requires further orders.

5.37 The key decision that must be made with respect to Article 22(5) is whether it is confined only to measures of execution, or covers a wider field of measures for enforcement. With one very important exception, all the case law supports the view that Article 22(5) is

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[416] The two meanings have been separated in English law but different terminology has not been used. Thus, an order under CPR 71 is the first rule of those concerning ‘Enforcement of Judgments and Orders’, but for the purposes of CPR PD6, Para 3.1(10), such an order is not ‘a claim made to enforce [a] judgment...’ See *Masri*, *ibid*, [38] (discussing the old CPR 6.20(9)).

[417] See §2.05.

[418] RSC Orders 46-7.

[419] The CPR takes such a wide view of the meaning of orders of enforcement. Thus, CPR Part 70.1(1) states that CPR Parts 71-73, RSC Orders 45-47, and CCR Orders 25-29 are all ‘specific methods of enforcement’. This includes, for example, orders to obtain information from judgment debtors: CPR Part 71.

[420] H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn LGDJ, Paris 2002), [120], 86.

confined to measures of execution. The exception is the House of Lords decision in *Kuwait Oil Tanker v Qabazard*,[421] which defines the scope of Article 22(5) as including all measures of enforcement and therefore this puts pressure on where the measure of enforcement is actually taking place, that is, whether it operates *in personam* or *in rem*.

1. ARTICLE 22(5) OF THE BRUSSELS I REGULATION

5.38 Article 22(5) of the Regulation states:

> '[The following courts shall have exclusive jurisdiction, regardless of domicile:]…in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.'

5.39 Unfortunately, the Article does not provide a definition of proceedings concerned with the enforcement of judgments. One initial comment is that the reference is not to measures themselves but to proceedings concerning the enforcement of judgments. This means that applications to set aside a measure of enforcement will also be caught by Article 22(5).[422] However, the core concept of enforcement is not defined and, therefore, recourse to both the *travaux préparatoires* and the ECJ jurisprudence is required.

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[421] [2004] 1 AC 300, discussed extensively below, §5.49-§5.57.

[422] Often referred to as 'contradictory proceedings'. Such proceedings can be seen in the judgment of C-220/84 *AS-Autoteile Service GmbH v Pierre Malhé* [1985] ECR 2267.

5.40 The Jenard report[423] briefly discussed the meaning of Article 16(5) of the Brussels Convention, which has exactly the same wording as Article 22(5) of the Brussels I Regulation. The scope of the Article was clarified as meaning: 'those proceedings which can arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments".'[424]

2. THE ECJ CASE LAW

5.41 Article 22(5) has been discussed in three ECJ cases, two of which are of no assistance for the present inquiry: *AS Autoteile v Malhé*;[425] and *Owens Bank v Bracco*.[426] *AS Autoteile* only stands for the proposition that applications brought to oppose an enforcement order may fall within the scope of Article 22(5) but, in any case, opposing enforcement on the grounds of set-off by virtue of another separate substantive claim does not. *Owens Bank v Bracco* only considered Article 22(5) tangentially, holding that judgment within the meaning of Article 22(5) meant the judgment of a Member State.[427] Therefore, neither of these cases assist with the core meaning of enforcement.

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[423] Neither the Schlosser Report, nor the Evrigenis, Demetrios and Kerameus Report discuss Article 16(5) in any detail.

[424] Jenard, 36, quoting Braas, *Précis de procédure civile* (3rd edn Emile Bruylant, Brussels 1944), Tome I, 412. It has been argued that the translation of this sentence is incorrect and that 'distraint' should read 'dispossession', but the Court of Appeal did not comment on the submission: *Masri v Consolidated Contracts (re: Receivership Order)* (n330), [112].

[425]*AS-Autoteile Service GmbH v Pierre Malhé* (n422).

[426] C-129/92 *Owens Bank v Bracco* [1994] ECR I-117.

[427] *Ibid*, [24].

5.42 However, the decision of the ECJ in *Reichert v Dresdner Bank (No 2)*[428] does assist. It provides support for the argument that Article 22(5) only covers measures of execution and not measures of enforcement. The crux of that decision was that steps preparatory to enforcement were not measures of enforcement for the purposes of Article 22(5). In *Reichert II*, Mr and Mrs Reichert, debtors of the claimant bank, gave a gift of bare ownership of a house in France, to their son. The gift was challenged by the claimant in the French courts on the basis of section 1167 of the French Civil Code, which allows an *action paulienne* to render ineffective a transaction where the transaction has occurred to defraud a creditor of his rights. One of the questions for the ECJ was whether the French court could take jurisdiction under Article 16(5) of the Brussels Convention. The claimant argued that the *action paulienne* did fall under the scope of the Article on the basis that it prepared for the enforcement of the judgment. The Court stated that Article 16 should not be interpreted to be wider than its objective because it prevents the parties from choosing the forum and has the potential to force them to litigate before a court which is not the court of either of their domiciles. The main purpose of Article 16(5) was stated to be that 'the courts of the Contracting State in which enforcement is sought [will] alone apply the rules relating to the actions in that State of the authorities responsible for enforcement.'[429] Finally, the Court quoted the Jenard report, which is outlined above. All of this led to the conclusion that as the *action paulienne* did not aim to settle a dispute relating to the 'use of force or constraint, or the dispossession of movables and immovables in order to obtain the

[428] C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149.

[429] *Ibid*, [26].

physical implementation of judgments and measures,' it did not fall within the scope of Article 16(5).[430]

5.43 In order to explain why *Reichert II* supports the argument that Article 22(5) only covers measures of execution and not measures of enforcement a brief explanation of the *action paulienne* is required. The *action paulienne* is used to impair transfers entered into in order to defraud creditors. Therefore, if a debtor owes the creditor a sum of money and the debtor transfers his bank account to a third party, the creditor will seek to impair that transfer in order to prevent his judgment being mere *brutum fulmen*. Should the creditor succeed in an *action paulienne* then the transfer is rendered ineffective vis-à-vis the creditor (*l'inopposabilité au créancier agissant*). The effect of this is that the creditor can act as though the transfer never took place, for example, by executing the judgment he had obtained against the debtor, directly against the bank account now held by the transferee. The ECJ's judgment holds that this impairment of the transfer does not constitute enforcement as it is only a preparatory step to enforcement, the final step being, presumably, the actual execution performed against the transferee, for example, by seizure and sale of goods.

3. THE FRENCH CASE LAW

5.44 The French case law supports this interpretation of the ECJ's case law. Article 22(5) is only concerned with measures of execution, that is, the actual intervention of the State in enforcing the judgment.

[430] *Ibid*, [28].

5.45 In the decision of the Cour d'Appel de Douai in *Madoux v SA Crédit du Nord*,[431] it was held that not only did the French *saisie des rémunérations*[432] not fall within the scope of Article 16(5) of the Brussels Convention, the order against an employer who refuses to comply with the *saisie*, which makes him personally liable for all the money due, also did not fall within the Article. Therefore, the fact that a judgment debtor's employer is habitually resident in Belgium did not prevent the French courts from ordering such measures in enforcing the judgment against the employee.

5.46 The far more recent case of *R v SA BNP Paribas*[433] (often referred to as the '*Exsymol*' case) is also particularly instructive. In that case, Mrs R was a creditor of Exsymol. She sought, in the Parisian courts, a *saisie-attribution*[434] against BNP Paribas to obtain payment of a certain sum of money disposited by Exsymol in BNP Paribas' Monagasque branch. The Parisian Court of Appeal had refused the order on the ground that this would involve extra-territorial application of measures of execution. The Cour de Cassation overturned the decision, permitting the application of the *saisie-attribution* against the bank. The crux of the decision is that the bank was one legal personality and the fact that the funds were deposited in an overseas branch was irrelevant for the purposes of the *saisie*.

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[431] Cour d'Appel de Douai, 1st April 1999, (2000) Journal du droit international 1030, note Cuniberti.

[432] Similar to an attachment of earnings order.

[433] *R c. SA BNP Paribas* [2008] Journal du droit international 537 (Cass 2e civ, 14 févr 2008, note Bollée). Discussed in G Cuniberti, 'Le principe de territorialité des voies d'exécution' [2008] Journal du droit international 963.

[434] Similar to a third party debt order.

5.47 The approach of these cases strongly supports the view of the French academics,[435] in particular Professor Gaudemet-Tallon, who refers to the measures to which Article 22(5) applies as 'l'exécution proprement dite'.[436]

5.48 This approach of defining the measures with which Article 22(5) is concerned as only measures of execution, that is, measures which involve the direct actions of the State, can be justified with reference to the reason for Article 22(5). It is a fundamental rule of public international law that one State cannot perform acts in another State without the latter State's permission.[437] Many authors have explained that this is the purpose of Article 22(5).[438] If sovereignty is the sole factor behind Article 22(5) then it leads to a very narrow definition of a measure of enforcement. There is no invasion of sovereignty until actual force is used by the State. That is, until the bailiffs of huissiers start knocking on the door.

4. KUWAIT OIL TANKER CO V QABAZARD[439]

a. Decision

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[435] In addition to Gaudemet-Tallon, see P Gothot and D Holleaux, 'La Convention de Bruxelles du 27.9.1968' (1985, Jupiter, Paris), 90-91.

[436] n420, [120], 86. Cited in *Masri v Consolidated Contractors (re: Receivership Order)* (n330), [118].

[437] I Brownlie, *Principles of Public International Law* (OUP, Oxford 2003), 306-308.

[438] Gaudemet-Tallon (n420), 86; J Kropholler, *Europäisches Zivilprozeßrecht* (Verlag Recht und Wirtschaft, Frankfurth am Main 2005) starts with this concept in his explanation of Article 22(5), 275.

[439] [2004] 1 AC 300.

5.49 As already explained, the one fly in the ointment is the decision of the House of Lords in *Kuwait Oil Tanker v Qabazard* which takes a slightly different approach.[440] It is submitted that the judgment is wrong.[441]

5.50 In *Qabazard*, judgment creditors under an English judgment sought to have it enforced by way of a third party debt order against the judgment debtor's Swiss bank accounts. The House of Lords refused the order on the basis that they had no jurisdiction by virtue of Article 16(5) of the Lugano Convention. The third party debt order would be executed in Switzerland and therefore the Swiss courts had exclusive jurisdiction under the Lugano Convention.

b. Assessment

5.51 This judgment cannot be justified when compared to *Reichert II*. As already explained, the effect of a successful *action paulienne* is that a transaction between a defendant and third party is impaired. The effect of this impairment is that the claimant can execute the judgment granted against the defendant directly against the third party up to the value of the impaired transfer where it involves money, or over assets where such assets were transferred.[442] It is very difficult to see how this can be distinguishable, for present

[440] Interestingly, the Court of Appeal decision in *Masri* cites Gaudemet-Tallon in coming to the conclusion that Article 22(5) is only concerned with actual execution, but decides that this is consistent with the approach of their Lordships in *Qabazard*.

[441] Also critical of the decision, see Cuniberti, (n433), [45]-[50].

[442] This is because the effect of the *action paulienne* is to render the impaired transaction *inopposable* in the sense that the creditor can act as though it never happened. Therefore, where the transaction involved the transfer of a movable, the creditor can execute his judgment against the transferee by seizing the movable: F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (9th edn Dalloz, Paris 2005), 1126-7.

purposes, from a third party debt order. The *action paulienne* permits the execution of a judgment debt against a third party. The third party debt order permits the execution of a judgment debt against a third party. It is the later writ of *fieri facias* against the third party bank which would be the order for execution falling within the scope of Article 22(5).

5.52 Indeed, on close inspection of the judgments in *Qabazard*, it is clear that their Lordships took a different approach to Article 22(5) than that evident in the *Reichert II* judgment, or the Jenard report. Lords Bingham of Cornhill and Hoffmann delivered full speeches, with Lord Millett adding one paragraph. Lords Nicholls of Birkenhead and Hobhouse of Woodborough agreed with the speeches of Lords Bingham of Cornhill and Hoffmann.

5.53 Starting with the speech of Lord Bingham of Cornhill, the crucial aspect of it is that it links Article 16(5) of the Lugano Convention to Article 24 of the same Convention, that is the rule on auxiliary jurisdiction for provisional, including protective, measures. Thus, his Lordship quotes part of the ECJ's judgment in *Denilauler*.[443] There, the court had held that a Member State court availing itself of auxiliary jurisdiction under Article 24 of the Brussels Convention[444] to grant provisional measures would only have such jurisdiction where the assets subject to the provisional measure are located within its territory.[445] The reason for this decision was that those courts selected are:[446]

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[443] C-125/79 *Denilauler v Couchet Frères* [1980] ECR 1553.

[444] Identical to Article 24 of the Lugano Convention.

[445] For more discussion of the real connecting link test, see below, §5.77-§5.104.

[446] *Denilauler* (n443), 1570.

> '…best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered.'

Lord Bingham made it clear that these observations, whilst in the context of provisional measures, 'would apply with added force to execution.'[447]

5.54 The link to Article 24 is understandable: provisional measures and measures of execution are often intertangled.[448] However, the logic is flawed as it depends on the proposition that a court cannot award provisional measures which are to be enforced abroad. This is not the case and can be demonstrated by the ECJ's case law on Article 24. As French academics have pointed out,[449] the ECJ in *De Cavel*[450] and *Denilauler*[451] appeared unconcerned that the French court, in both instances, had granted a *saisie-conservatoire* over property located abroad. It could be argued that this is a misleading analysis of the decisions in those cases. In both, the ECJ declared the orders impermissible. In *De Cavel*, the ECJ held that an interim *saisie conservatoire* used to protect matrimonial proceedings fell outside the Brussels Convention as the main proceedings fell outside the Convention, and therefore no consideration of any other issue was required. In *Denilauler*, the ECJ

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[447] *Ibid*, 305.

[448] See the discussion of G Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* (LGDJ, Paris 2000), 37-44.

[449] Gaudemet-Tallon (n420), 86; H Muir-Watt, 'On the Waning Magic of Territoriality in the Conflict of Laws' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (OUP, Oxford 2009), 757.

[450] C-143/78 *De Cavel v De Cavel* [1979] ECR 1055.

[451] *Denilauler v SNC Couchet Freres* .

held that the *saisie conservatoire* had been awarded *ex parte*, and thus fell outside the concept of judgment within the context of the Convention. Therefore, again, there is no need to consider whether such an award is possible, as the order does not fall within the Regulation. However, even if the cases of *De Cavel* and *Denilauler* are insufficient to demonstrate the flaw in Lord Bingham's analysis, the cases of *Van Uden*[452] and *Mietz*[453] must be sufficient. If it was the case that where a measure operates *in rem* then, because of Article 22(5) of the Regulation, it can only be granted by the court in whose territory the *res* can be located, the restrictions in Article 31 of the Regulation that are explained in *Denilauler* would apply to all courts, primary and auxiliary. However, it is clear from the decisions in *Van Uden* and *Mietz* that the primary court can grant measures which do not fulfil the 'real connecting link' requirement. As the ECJ explain in *Van Uden* and repeat in *Mietz*, the primary court can grant any provisional measures it wishes without the restriction provided for in *Denilauler*.[454] However, if the view of Lord Bingham of Cornhill in *Qabazard* is correct, the *Denilauler* jurisdictional restriction would always apply.

5.55 Thus, it is submitted that Lord Bingham of Cornhill's judgment is fatally flawed. It elides the rule in Article 24 which is concerned with auxiliary jurisdiction, with the rule in Article 16(5). The rule in Article 24 works by ensuring that the provisional measure, should it be executed, would be executed in the territory of the auxiliary court.[455] Article

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[452] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n335).

[453] *Mietz v Intership Yachting Sneek BV* (n335).

[454] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n335), [19]; *Mietz v Intership Yachting Sneek BV* (n335), [40]-[41].

[455] J Normand, 'Van Uden c Deco-Line' (1999) 88 Revue Critique de Droit International Privé 340, 362, [30].

16(5) could not do so as otherwise the primary court would also be restricted by this requirement.

5.56 Lord Hoffmann's speech is brief. His Lordship simply explains that Longmore LJ in the Court of Appeal had thought a third party debt order was enforced in England due to it being an *in personam* order. However, following the decision in *Société Eram*,[456] which held that the order operates *in rem*, it could not be said that the enforcement would occur in England. Therefore, were an English court to grant the order over a bank account in Switzerland, it would be in breach of Article 16(5). The speech does not address the issue of whether even if the order operates *in rem*, it may not be enforcement for the purposes of Article 16(5), assuming that enforcement under Article 16(5) is identical to the English judicial self-restraint identifiable in the doctrine of subject-matter jurisdiction.[457] As this section has endeavoured to explain, this does not fit with the ECJ's decision in *Reichert II*, nor with the French case law.

5.57 The unusual post-script to the *Qabazard* decision is the Court of Appeal's judgment in *Masri*[458] where Lawrence Collins LJ cited both Professor Gaudemet-Tallon's assertion that Article 22(5) of the Regulation only applies to actual execution and *Qabazard*, treating them as standing for identical propositions. However, the Court of Appeal does not appear to have had the benefit of the French case law on the matter demonstrating the distinction between the two approaches, nor would knowledge of this have changed the

[456] n413.

[457] Equally, see Lord Millett, [21].

[458] *Munib Masri v Consolidated Contractors International Company SAL (Re: Receivership order)* (n330).

result of the case, the order being *in personam* and therefore whether it was a measure of execution or a measure of enforcement, it operated in England.

III. PROVISIONAL, INCLUDING PROTECTIVE, MEASURES

5.58 Article 31 of the Regulation provides an auxiliary jurisdiction for provisional, including protective, measures. The purpose of the present section is to discuss the operation of this Article and, in particular, the requirements of a such a provisional measure.[459] The first four sub-sections deal with the positive definition of provisional and protective measures, whilst the fifth sub-section deals with the issue of whether the Evidence Regulation has altered[460] the definition of a provisional measure.

5.59 Prior to dealing with the definition of a provisional measure itself, it is worthy of mention that the ECJ has confirmed that such measures must be ancillary to a substantive right. Therefore, for a provisional measure to fall within the scope of the Brussels I Regulation, the right that it is safeguarding must fall within the Brussels I Regulation. In *de Cavel v de Cavel*,[461] a husband had obtained a French *saisie conservatoire* over property in Germany during the course of divorce proceedings. He attempted to have this order enforced in Germany. The ECJ held that the order could not be enforced under the Brussels Convention as the right the *saisie conservatoire* aimed to protect was a right in

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[459] Also, see J Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing, Oxford 2001), 338-355.

[460] Or clarified.

[461] *De Cavel v De Cavel* , n450. Also, see C-25/81 *CHW v GJH* [1982] ECR 1189.

property arising out of a matrimonial relationship, and therefore outside of the Convention.[462]

5.60 In terms of the definition of a provisional measure, it would seem from the case law that there are between two and four requirements. These requirements are: (i) the purposive requirement; (ii) the provisionality requirement; (iii) the urgency requirement; (iv) the real connecting link requirement. It is the last two that are more controversial.

1. PURPOSIVE REQUIREMENT

5.61 The original definition of a provisional measure is derived from *Reichert v Dresdner Bank (No 2)*.[463] That case involved discussion of whether the French *action paulienne*[464] fell within the scope of Article 24 of the Brussels Convention, now Article 31 of the Regulation. The ECJ defined provisional and protective measures under Article 24 as follows:[465]

> '…[T]he 'provisional or protective measures' referred to in Article 24 should be understood as meaning measures which, in matters coming within the ambit of the Convention, are intended to maintain a legal or factual situation in order to

[462] See now Article 1(2)(a) of the Brussels Regulation.

[463] Case C261/90 *Reichert v Dresdner Bank* [1992] ECR I-2149.

[464] Discussed above, §5.42-§5.43.

[465] *Ibid*, [34].

safeguard rights an application for the recognition of which has been made to the court with jurisdiction as to the substance of the matter.'

This definition is referred to here as the 'purposive definition' because it enquires into the purpose, or intention, of the measure.[466]

5.62 The ECJ has clarified in its later case law that so long as the measure can conceivably be used to maintain a legal or factual situation in order to safeguard rights, then it will fulfil this purposive definition. The emphasis has, instead, been placed on the next requirement, that is, whether the measure is provisional.[467] Thus, in the cases of *Van Uden*[468] and *Mietz*,[469] the ECJ held that an order requiring the interim payment of a contractual debt was a provisional measure so long as repayment to the defendant could be guaranteed.[470] This decision substantially endorses the Commission's argument in *Van Uden* that the only requirement of a provisional measure is that it is provisional.[471] It only substantially endorses the Commission's argument because the ECJ appeared to take the view that it was not possible to rule out in advance that an interim payment award could not be used to ensure the practical effect of the decision,[472] and only having made this

[466] See also, AG Kokott's definition in C-175/06 *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* [2007] ECR I-7929. Discussed below, §5.105-§5.129.

[467] Many disagree with this approach of the ECJ as it can lead to upsetting the defendant's protections. In particular, see T Hartley, 'Interim measures under the Brussels Jurisdiction and Judgments Convention' (1999) 24 European Law Review 674.

[468] n335.

[469] n335.

[470] *Van Uden* , [47]; *Mietz* , [43].

[471] *Van Uden* , [44].

[472] *Van Uden*, [45].

decision did they rely on provisionality. Therefore the purposive requirement still appears to have some residual effect.

2. PROVISIONALITY REQUIREMENT

5.63 Since *Denilauler v SNC Couchet Frères*[473] it has been clear that the court granting a provisional measure must ensure that it is provisional. The ECJ stated:[474]

> 'Depending on each case and commercial practices in particular the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered.'

a. Theoretical or Actual Provisionality?

5.64 One issue that arises from this is whether the measure must be practically provisional or merely theoretically provisional. Usually,[475] English freezing injunctions will be accompanied by cross-undertakings in damages by the applicant which will compensate for any loss suffered by the respondent due to the freezing injunction should the applicant

[473] C-125/79 *Denilauler v SNC Couchet Frères* [1980] ECR 1553.

[474] *Ibid*, [15].

[475] The exception is in certain circumstances where the Crown is the claimant.

lose on the merits. This cross-undertaking is sometimes fortified by a bond or indemnity granted by a third party creditor.[476] However, there will be circumstances where the claimant is impecunious and the court will still award a freezing injunction despite the fact the cross-undertaking is practically valueless. In *RBG (Resources) Plc v Rastogi*,[477] an investigation into the claimant company had revealed a large-scale fraud with the consequence that $400m was missing. Provisional liquidators were appointed and these liquidators sought a freezing injunction against various directors and a senior employee. Originally a third party had provided the cross-undertakings for the interlocutory orders but this third party was no longer willing to back up the undertaking. The question for the court was whether a cross-undertaking could be given by the claimant company even though it was accepted by the liquidators that the company would run out of money prior to the end of the trial and therefore the cross-undertakings could not be honoured. Laddie J held that such a cross-undertaking was acceptable in principle, and on the facts there was such a high degree of likelihood that the claimant could prove his case that the fact the cross-undertaking in damages was valueless was insufficient a reason to refuse the freezing order. Equally, in *Allen v Jambo Holdings Ltd*[478] the Court of Appeal refused to discharge a freezing injunction on the basis that the claimant was on legal aid, had no assets, and therefore her cross-undertaking was of no value.

5.65 The indications from *Van Uden* are that theoretical provisionality is insufficient as a bank[479] guarantee is required for interim payment orders. The effect of this is to shut out

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[476] *In re DPR Futures Ltd* [1989] 1 WLR 778.

[477] [2002] BPIR 1028.

[478] [1980] 1 WLR 1252.

[479] The ECJ refers to bank guarantees, at [38], in a general sense, but also states that the provisionality requirement depends ‘on each case and commercial practices’. Later, referring specifically to interim payment orders, the court states that repayment must be ‘guaranteed’, [47]. It may be the case that a

impecunious applicants from such orders as bank guarantees cost money to set up, and the theoretical provisionality of a cross-undertaking is not sufficient. If the approach of *Van Uden* is to be extended to all types of interim relief, this would mean that the approach of *RBG (Resources) Plc* and *Allen v Jambo Holdings* could not be extended to an Article 31 case. The problem is alleviated, to an extent, by the fact that the primary court need not fulfil the provisionality test when granting ancillary relief, but there will still be cases where to protect a substantive right it is necessary to ask an auxiliary court to grant a provisional measure. The applicant should not be shut out due to impecuniosity.

b. Extent of Provisionality

5.66 An order can be provisional in the sense that the order is not permanent: it can be quashed. An order can also be provisional in the sense that when the order is quashed the parties are returned to the position they would have been in had the order not been granted. This difference can be demonstrated by two examples. First, suppose that an interim payment order has been made, requiring the defendant to pay £100,000 to the claimant. The claimant then loses on the merits. The court could require the claimant to pay the defendant the sum of £100,000 or it could require the claimant to compensate for the losses incurred by the defendant due to this payment, such as lost business opportunities, interest and so on. Second, suppose the court grants an interim injunction restraining the defendant from using a particular design, thought to be a breach of the

guarantee from a party other than a bank will be sufficient and it is hard to see why such a guarantee, if given by a reliable payor, should not be sufficient, but it would still appear that a guarantee by the claimant himself, where impecunious, would be insufficient as this can hardly be said to 'guarantee' payment.

claimant's intellectual property right. Suppose further that the court, two years later, decides against the claimant on the merits. The order is provisional in the first sense where the interim injunction is simply set aside. The order is provisional in the second sense if the interim injunction is set aside and the defendant is compensated for his lost ability to exploit the design over the two years until judgment.

5.67 What assistance there is from the ECJ weakly suggests that the order need only be provisional in the first sense, that is, returning the parties to the *status quo* at the time of the grant of the order.[480] In *Van Uden*, the court refers to the return of the interim payment, and also refers to the provision of bank guarantees, rather than cross-undertakings supported by indemnities. The standard bank guarantee will be for a set amount of money.[481] If the purpose of the requirement is to ensure that the measure is truly provisional then the more appropriate measure would be an indemnity. Therefore, it may be the case that the requirement is simply to ensure that the capital is retransferred rather than to truly ensure the measure is provisional in the sense of returning the parties to the position they would have been in had the order not been granted. Furthermore, the statement of the Court in *Denilauler*[482] refers to time-limits on provisional measures, without any requirement of cross-undertakings for loss.

5.68 If the ECJ were to require true provisionality then they may have to create autonomous rules for issues such as remoteness and quantification which they are loath to do. One can be quite sure that if such a question were to be referred to the ECJ, they would reply that

[480] *Cf* Briggs, *Conflict of Laws* (OUP, Oxford 2008), 96, who takes the view that the measure must be 'guaranteed to be reversible.'

[481] Though this is not to say all bank guarantees are such.

[482] See above, §5.63.

it was a matter for national courts within the guidelines provided by the *Van Uden* and *Mietz* judgments, which is no reply at all. Therefore, this may provide a solution to the impecuniosity problem that was highlighted in the previous section. Where the order is injunctive, the order is provisional if the injunction can be set aside. No cross-undertaking is required, although there is nothing preventing the English courts using such a measure.[483] Where the order is for an interim payment, however, there must be some form of guarantee of the return of the capital.

c. Remedying a non-provisional order

5.69 One issue that has arisen in the English courts is whether the absence of a bank guarantee at the time of judgment can be rectified by offering a guarantee at the time of enforcement of the interim payment order. In *Comet Group v Unika*,[484] a French domiciled defendant had been supplying computers to the English domiciled claimant. The claimant returned the goods as defective, and refused to pay any more invoices. The defendant argued that the computers had not been returned in accordance with the contract and therefore the claimant was liable under the contract. The defendant brought proceedings in the French courts to recover sums due on the invoice in spite of an English exclusive jurisdiction clause. The claimant contested the jurisdiction of the French courts but the French court issued an interim payment order of the amounts due on the invoice. The claimant sought a declaration in the English courts that this order was

[483] Whilst the issue is of little concern where the provisional remedy is English as undertakings will be used, the problem will occur when an ancillary foreign court has awarded a measure which is not truly provisional. There has been much talk of using the English common law of contract to provide remedies for parties where the Brussels I Regulation is deficient (e.g. Briggs, *Agreements on Jurisdiction and Choice of Law* , n373). An interesting question would be whether the developing law of tortious arrest (*Congentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm)) could be extended to fill the gap in the Regulation.

[484] [2004] ILPr 1.

not enforceable. McGonigal J held that the order fell outside the scope of Article 31. On the facts, the order provided no guarantee of repayment.[485] The defendants then sought to remedy the French judgment by offering a guarantee to the English court by a French bank. McGonigal J held that one only looks at the foreign judgment, and it cannot be subsequently remedied by guarantees to the receiving court.[486]

d. Where the Provisional Measure will determine the case in practical terms

5.70 It will sometimes be the case that in practical terms, the injunction will determine the case on the merits. *NWL v Woods*[487] provides a useful example. There, the International Trade Federation attempted to black a British ship unless the Federation's terms and conditions were agreed to. The vessel had flown in low-paid crew from Hong Kong. The ship owners claimed an injunction restraining any interference with the ship. Lord Diplock recognised that the granting of the injunction would determine the case[488] and thus a higher standard of proof was required than the traditional *American Cyanamid*[489] test. The question that arises here is how such an injunction would be dealt with under Article 31 of the Brussels I Regulation. AG Léger in *Van Uden*[490] was unsympathetic to the argument that a measure could not fall within the scope of Article 31 because in

[485] *Ibid*, [23]. *Cf Belbetoes Fundacoes e Betoes Especiais LDA v Société Bachy* 13 avril 1999, (2000) JDI 83 note Huet, 84. The order also did not relate to specific assets within France.

[486] n484, [23].

[487] [1979] 1 WLR 1294.

[488] *Ibid*, 1305.

[489] [1975] AC 396.

[490] n335.

practical effect it meant that no substantive proceedings would later be brought.[491] However, there is a distinction between no substantive proceedings being brought because the circumstances surrounding the infringement of the right protected have passed and no substantive proceedings being brought because the attitude of the parties is to stick with the interim proceedings. This is, indeed, what AG Léger alluded to in his opinion.[492] It is therefore submitted that where the interim injunction will effectively determine the issue, and the reason that it will effectively determine the issue is because of the temporal considerations surrounding the protection of the substantive right, then such an injunction can never be provisional and thus must fall outside of Article 31.

3. URGENCY REQUIREMENT[493]

5.71 There is no explicit textual support for an additional requirement of urgency.[494] Nor is there any suggestion of such a requirement in the ECJ case law.[495] However, both of these could have been said about the real connecting link requirement prior to *Van Uden*.[496] In fact, the same reasoning that informed the real connecting link requirement is

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[491] *Ibid*, AG [118].

[492] *Ibid*, AG [119].

[493] On protective measures and urgency more generally, see Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* (n448), 259-261.

[494] Interestingly, however, it would appear that such a requirement had been explicitly incorporated in many previous jurisdiction and enforcement Conventions: see Newton (n459), 301, fn173.

[495] AG Slynn suggested that this was matter for national law in C119/84 *Capelloni and Aquilini v Pelkmans* [1985] ECR I-3147, 3150.

[496] n335. Both the real connecting link requirement and urgency requirement were suggested by French authors seeking to circumscribe the boundaries of Article 31. See Gaudemet-Tallon (n420), 249-250 and P Gothot and D Holleaux, *La convention de Bruxelles du 27.9.1968: Compétence judiciaire et effets des jugements dans la CEE* (Jupiter, Paris 1985), 114-7. For further commentary, see Newton (n459), 300-302.

used to support an urgency requirement. Thus, Professor Gaudemet-Tallon argues that as the purpose of Article 31 is to permit an applicant to obtain faster relief from an auxiliary court rather than going through the judge with jurisdiction over the merits, and Article 31 must be restrictively interpreted, then it ought to be the case that an urgency requirement, despite the lack of textual support, is inserted.[497]

5.72 It seems to be the case, given the justification for this approach, that urgency in this context means that resort to the primary court would be too slow in comparison to what could be achieved by going immediately to the auxiliary court. This is confirmed in *Wermuth v Wermuth*,[498] which is the only English case to make explicit reference to this requirement, albeit in the context of Article 12 of Brussels II.[499] Both counsel assumed urgency as a requirement and the Court of Appeal continued on this basis. It was held that the interim payment of maintenance order in question was not a provisional measure for the purposes of the Brussels II Regulation *inter alia* because it was not urgent:[500] the wife could have gone to the primary court for the relief in question.

5.73 The only case that appears to have considered an urgency requirement in French law is *Société Krupp Widia GmbH v Société Schlumberger Industries*.[501] There, a German company supplied parts to a French company that manufactured water meters. A dispute

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[497] Gaudemet-Tallon (n420), 249-250. *Cf* Bureau and Muir-Watt, 159, [155], where the alternative view is supported. Also, Pd Vareilles-Sommières, 'La compétence internationale des tribunaux français en matière de mesures provisoires' [1996] Revue Critique de droit international privé 397, 428-9 is critical of an urgency requirement on the grounds that: (i) rapidity is not the only objective of provisional measures; and (ii) even if rapidity is the objective of provisional measures, rapidity is not the same thing as urgency.

[498] [2003] 1 WLR 942.

[499] The approach of the Court of Appeal was to use the Brussels I Regulation, Article 31 case law in interpreting Article 12 of Brussels II.

[500] *Ibid*, [31].

[501] (1993) 120 Journal du droit international 156, noted by Huet.

arose between the parties and the French company sought an *expertise*[502] under Article 145 NCP to investigate the parts supplied by the German company. The *Cour de Cassation* allowed the order under Article 24 of the Brussels Convention, holding that there was no urgency requirement in French law when using Article 145 NCP (in contrast to Article 872 NCP). Thus, at least implicitly, it was thought that Article 24 contained no urgency requirement.

5.74 There is much to be said in favour of such an urgency requirement. First, it restricts the use of Article 31 whilst preserving its function within the Regulation. Given the danger of using Article 31 to undermine the other provisions of the Regulation,[503] this is undoubtedly beneficial. Secondly, having allowed measures such as the *kort geding* and *référé-provision* through the Article 31 gateway, despite such measures often in practice pre-determining the merits of the case, the ECJ would be able to confine the use of such measures to auxiliary courts only where it could be demonstrated that the primary court could not equally protect the claimant's interest. Thirdly, the current approach requires less in terms of demonstrating the purpose of the measure, and relies on the requirement of provisionality,[504] but perhaps not even in the sense of returning the respondent to the *status quo*.[505] Given that these requirements give the applicant a significant advantage, it seems appropriate to ensure that the granting of the measure by the auxiliary court is absolutely necessary.

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[502] An order for the obtaining of evidence.

[503] Highlighted in Hartley, (n467).

[504] Above, §5.61-§5.62.

[505] Above, §5.66-§5.68.

5.75 The primary disadvantage is the lack of certainty that will be created by an autonomous concept of urgency. The ECJ is likely define it less than rigorously and largely leave it for national procedure to flesh out the bones. In addition, certain difficulties are created over how exactly to determine whether the measure the auxiliary court is being asked to grant protects the claimant's rights better than the primary court's arsenal. For example, does an English court's freezing injunction protect the claimant's rights better than a Dutch court's *kort geding*? It is not immediately obvious how one goes about answering this question.

5.76 The arguments seem finely balanced. The starting point, in terms of Article 31, is that it should only be used when necessary as it has the potential for undermining the jurisdictional scheme of the Regulation. However, the ECJ has not restrictively interpreted the Article by reference to the purposive definition of a provisional or protective measure, nor has it clarified exactly how provisional such measures must be. The prime restriction the court has installed is the territorial, real connecting link test, which is dealt with in the next sub-section. However, such a test is quite arbitrarily restrictive and can be easily avoided by the use of *in personam* measures.[506] Given this lack of restriction, an urgency requirement is probably of use. However, if the Brussels I Regulation is amended[507] to permit the primary court to discharge provisional orders of the auxiliary court,[508] then there is far less need for such a requirement.

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[506] The English practice of using *in personam* worldwide freezing injunctions being a classic example.

[507] Such a provision exists in the Brussels II bis Regulation, Article 20(2), and its addition to the Brussels I Regulation has been suggested in the recent Hess, Pfeiffer and Schlosser Report: [777], referring to the absence of such a provision as 'deplorable'.

[508] And hopefully allow successful parties to recoup the costs of such actions.

4. REAL CONNECTING LINK REQUIREMENT

a. The Source of the Requirement

5.77 The requirement of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought derives from the two cases of *Denilauler*[509] and *Van Uden*.[510] The facts of both of these cases have already been explained. In *Denilauler* the court stated:[511]

> 'An analysis of the function attributed under the general scheme of the Convention to Article 24 , which is specifically devoted to provisional and protective measures, leads, moreover, to the conclusion that, where these types of measures are concerned, special rules were contemplated. Whilst it is true that procedures of the type in question authorising provisional and protective measures may be found in the legal system of all the contracting States and may be regarded, where certain conditions are fulfilled, as not infringing the rights of the defence, it should however be emphasised that the granting of this type of measure requires particular care on the part of the court and detailed knowledge of the actual circumstances in which the measure is to take effect. Depending on each case and commercial practices in particular the court must be able to place a

[509] n473.

[510] n335.

[511] [15]-[16].

time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered.

> 'The courts of the place or, in any event, of the contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered. The Convention has taken account of these requirements by providing in Article 24 that application may be made to the courts of a contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under the Convention, the courts of another contracting State have jurisdiction as to the substance of the matter.'

5.78 In *Van Uden*, the court repeated these paragraphs[512] and added a further one:[513]

> 'It follows that the granting of provisional or protective measures on the basis of article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought.'

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[512] Almost *verbatim*: [38]-[39].

[513] [40].

b. Explaining the Requirement

5.79 To determine the exact scope of this requirement, which has been introduced into the Regulation with minimal textual support, it is necessary to go back to first principles to explain its existence. It is only by doing this that its scope can be determined.

5.80 The concept of real connecting link can be explained by five propositions, and a conclusion. It is worth outlining these prior to detailed analysis:

i. The purpose of the Brussels Regulation is to provide a harmonised code of procedure for determining which Member State courts have jurisdiction to determine a particular dispute.

ii. A cornerstone of the purpose of the Regulation is that once the Regulation has allocated jurisdiction, and the court is seised, that jurisdiction is exclusive. Irreconcilable judgments hamper the free market.

iii. Article 31 of the Regulation is the one exception to this rule.

iv. The reason for this exception is that sometimes a judge other than the judge of the merits is better placed to determine provisional and protective measures.

v. However, this Article must be restrictively interpreted as it derogates from the general scheme of the Regulation.

vi. Therefore, it follows from propositions (iv) and (v) that Article 31 can only be invoked when the court attempting to invoke it is the most

appropriate court to apply the interim measure in question. Therefore, there must a real connecting link between that court and the measure.

5.81 The first two propositions require little further commentary. Proposition (i) is the fundamental justification for the Brussels I Regulation and is outlined in recital (2). The second proposition has been repeated over and over again by the ECJ in its jurisprudence on the *lis alibis pendens* provisions. In *Gubisch Maschinenfabrik KG v Giulio Palumbo*,[514] the court stated:[515]

> 'Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result there from. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.
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> Moreover, in its judgment in Case 42/76, *De Wolf v. Cox* the Court acknowledged the importance of those objectives of the Convention even outside the narrow field of lis pendens, holding that it would be incompatible with the meaning of Article 26 et seq. on the recognition of judgments to accept the admissibility of an

[514] C-144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987[ECR 4861.

[515] *Ibid*, [8]-[9].

application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another Contracting State.'

5.82 The third proposition is again self-evident. Article 31, by its own terms, allows a Member State court to take jurisdiction for the purposes of awarding provisional and protective measures despite the fact that another court has taken, or will take,[516] jurisdiction over the merits of the case.

5.83 The fourth proposition can also be seen in the ECJ case law, and academic commentary. This proposition is explained in *Denilauler*,[517] and repeated in *Van Uden*,[518] where the ECJ stated that '[t]he courts of the place...where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought...'[519] Loussouarn, Bourel and Vareilles-Sommières explain that Article 31 is justified on the basis that the fact that a judge has been designated as the judge determining the merits by the Regulation does not necessarily mean that he is the judge best placed to determine provisional disputes.[520]

5.84 The fifth proposition flows from the first three, and is confirmed in the ECJ case law. Considering that Article 31 derogates from the general scheme of the Regulation and has

[516] Substantive proceedings should be contemplated. This is a requirement of English provisional measures, most clearly seen in the recent House of Lords decision of *Fourie v Le Roux* [2007] 1 WLR 320.

[517] n473.

[518] n335.

[519] [16]. Repeated in *Van Uden* at [39].

[520] Loussouarn, Bourel and Vareilles-Sommières, *Droit International Privé* (Dalloz, Paris 2004), 670.

the potential to undermine it through increasing the chance of irreconcilable judgements, the primary *bête noire* of the Regulation, the Article must be restrictively interpreted.

5.85 The sixth proposition is a deduced conclusion from the first five propositions and this is confirmed in *Van Uden* by the requirement of a real connecting link. Thus, the purpose of the real connecting link requirement is to restrict the use of Article 31 to the courts most appropriately placed to grant the interim measure. Naturally this depends on the nature of the measure. How the test applies to a variety of measures will now be discussed.

c. Importance of the Requirement being a 'definitional' requirement and not a 'jurisdictional' requirement

5.86 The reason that some insist on the real connecting link test being a definitional requirement rather than a jurisdictional requirement is derived from the approach of the ECJ in *Mietz*.[521] There, the ECJ decided that a court being asked to enforce a provisional measure granted by another court could review whether that other court had a real connecting link to the provisional measure. This amounts to a review of jurisdiction which an enforcing court is not permitted to do outside of the specified grounds in Article 35, which do not include the present issue. Thus, if the real connecting link requirement is a definitional requirement rather than a jurisdictional requirement, then the possibility of a review by the enforcing court does not fall foul of Article 35 .

[521] n335.

d. Application of the Requirement to English Worldwide Freezing Injunctions[522]

5.87 There is no doubt that worldwide freezing injunctions fulfil both the purposive and provisional requirements of Article 31.[523] If there is an urgency requirement, it is likely that they will fulfil this in most cases.[524] The difficult question that arises is over whether they satisfy the 'real connecting link' requirement where the assets are located abroad.

5.88 As explained above, the effect of the ECJ's case law is that one must enquire as to where the provisional measure will be executed, if necessary, to determine where is the place with a real connecting link to the measure.[525] There are three plausible places. The first is that the most appropriate place to enforce a worldwide freezing order is where the assets of the defendant being 'frozen' are located. But this is to misunderstand the nature of the freezing injunction which acts *in personam*. The place of the assets is irrelevant.

5.89 The second suggestion is that the most appropriate place to enforce a worldwide freezing order is the court with personal jurisdiction. On this approach, where the French court is the primary court, and the English court is acting in an auxiliary role, the English court is no more appropriate for the purposes of Article 31 as both have personal jurisdiction and

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[522] The literature on this is surprisingly voluminous: L Merrett, 'Worldwide freezing orders in Europe' [2008] Lloyd's Maritime and Commercial Law Quarterly 71; L Merrett, 'Worldwide Freezing Orders in Europe' (2007) 66 Cambridge Law Journal 495; Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* (n448), 57-113; H Muir-Watt, 'Extraterritorialité des mesures conservatoires *in personam*' (1998) Revue Critique de Droit International Privé 27; P Kaye, 'Extraterritorial mareva Orders and the relevance of enforceability' (1990) 9 Civil Justice Quarterly 12; L Collins, 'The territorial reach of Mareva injunctions' (1989) 105 Law Quarterly Review 262.

[523] A Briggs (n480), 96, refers to them as a 'good example' of a provisional measure within the meaning of the ECJ's case law.

[524] This is due to the requirement of a real risk of dissipation of assets.

[525] Above, §5.77-§5.85, following the commentary of Normand, (n455), [30].

therefore it cannot grant a freezing injunction. However, this cannot be correct. Simply because the French court has personal jurisdiction over the defendant does not make the execution of the interim order any more effective. Should the defendant refuse to turn up in France, the claimant will have to get judgment against the defendant in the French courts and then seek to enforce this judgment in the English courts. This is equally the case where the claimant is seeking an *in rem* interim remedy from the auxiliary court. This is exactly the sort of delay that Article 31 is aiming to prevent.

5.90 The third suggestion is that the most appropriate place to enforce a worldwide freezing order is the court of the defendant's residence. This is the court that can most effectively execute the order[526] against the defendant, and therefore is the most appropriate.[527] It follows that where the defendant is not resident in England, the court cannot award interim *in personam* remedies under Article 31. This would include not only worldwide freezing orders but also domestic freezing orders. If these injunctions are truly *in personam* then it matters not whether all the assets are in England. The key is which court can sufficiently execute the measures against the defendant. This court is the one whose jurisdiction he is most often in.

5.91 In light of this, it is probably incorrect to assert that the real connecting link in this context means a connection to the domicile of the defendant.[528] Domicile under the Brussels I Regulation is left to the internal law of the court seised of the dispute.[529] Under

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[526] *Ibid*.

[527] *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827.

[528] Merrett, 'Worldwide freezing orders in Europe' (n522), and some of the Court of Appeal decisions, e.g. *Motorola Credit Corpn v Uzan and Others (No 2)* [2004] 1 WLR 113, [2003] EWCA Civ 752, do not focus overly on residence.

[529] Article 59(1).

English law, there are two forms of domicile: (i) domicile of origin; and (ii) domicile of choice. The former is inherited. If a child is legitimate then his domicile of origin will be the domicile of his or her father; if illegitimate, his or her mother. Domicile of choice requires residence, and intention to permanently reside, in a country different to that of the domicile of origin. It is plain that whilst there are overlaps, habitual residence is not a necessary condition of domicile. Further, it is plain that the most appropriate place to execute the injunction is where the defendant can be brought in front of the court should he breach it. In which case, it is habitual residence and not domicile which is the most appropriate connecting factor.[530]

5.92 That the above arguments are correct can be tested against the current case law. Out of the five cases decided on the issue, three are consistent with this approach. The two cases which are inconsistent are both distinguishable, the first on the grounds that the case was decided prior to the real connecting link requirement, and the second on the grounds that counsel conceded the point.

5.93 *Republic of Haiti v Duvalier*[531] concerned the Duvalier family who had, for twenty-nine years been in control of Haiti. They then set up residency in France. It was alleged that they had embezzled $120m from the Republic and the Republic brought an action in the French courts to recover this money. The Republic also brought auxiliary proceedings in the English courts seeking a freezing order as there was evidence that their English solicitors held some of the assets. A 'striking feature' of the case was that the Duvalier

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[530] *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] 2 Lloyd's Rep 484, [2007] EWCA Civ 662, [29].

[531] [1990] 1 QB 202.

family had admitted that they were purposefully moving assets out of jurisdictions where they could be seized. The Court of Appeal granted an interim freezing order. Counsel for the Duvalier family conceded the argument that the court has the power to restrain a defendant not resident in England from dealing with assets out of jurisdiction.[532] The Court still addressed the issue and held that the court has such jurisdiction. It must be stressed that none of this was in reference to Article 24 of the Brussels Convention, but was in reference to the question of whether the courts had jurisdiction to make a worldwide freezing order against a non-resident defendant under English law. It was assumed that nothing in Article 24 restricted the remedies available under the law of the forum. Whilst this approach was perfectly understandable prior to *Van Uden*, it cannot withstand scrutiny now. The additional 'real connecting link' requirement will prevent such relief being given.[533]

5.94 The next case in the timeline is *Crédit Suisse Fides Trust SA v Cuoghi*.[534] In that case, the claimant brought proceedings in Switzerland against the English domiciled (and resident) defendant. The claimant brought further proceedings in England, on the basis of the Lugano Convention,[535] for a worldwide freezing injunction. The Court of Appeal granted the measure. In determining whether the court has jurisdiction to grant interim relief, whether under the Lugano provisions, or under English law, Millett LJ stated:[536]

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[532] *Ibid*, 213G.

[533] Collins, *Essays in International Litigation and the Conflict of Laws* (n355), 207, refers to it as 'going to the edge of what is permissible'. Cited in *Cuoghi* (n527), 827.

[534] *Ibid*.

[535] Article 24. This is identical to Article 24 of the Brussels Convention and Article 31 of the Brussels Regulation.

[536] n527, 827.

> 'Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined resides.'

5.95 This case strongly supports the approach outlined above, in particular the analysis of Article 24, and the stress on residence rather than domicile. The only aspect of the case which is inconsistent is the reference to *Republic of Haiti v Duvalier*. Millett LJ stated that the circumstances were very exceptional, and that it could be justified on the ground that 'otherwise no effective protection could be given to the plaintiffs anywhere.'[537]

5.96 In *Refco Inc v Eastern Trading Co*[538] the claimants brought proceedings on the merits before the courts of Northern Illinois for money owed by the defendants. The defendants were not domiciled or resident in England.[539] It appears that the defendants were resident in the Lebanon.[540] The claimants sought ancillary relief in the English courts, particularly in the form of a freezing order. The court did not award the injunction on the basis that there was no evidence of a real risk of dissipation of assets and the claimants had an

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[537] *Ibid*, 829. In any case, the Court of Appeal cannot overrule its own decisions, *cf Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407

[538] [1999] 1 Lloyd's Rep 159.

[539] Per Rix J at first instance, cited in *ibid* at 164.

[540] *Motorola v Uzan* (n528), [76].

effective security over a high-value asset.[541] However, the court went on to consider whether they would have granted an interim freezing order had there been sufficient evidence of a real risk of dissipation of assets. The majority (Millett LJ dissenting) decided that they would have done. Again, this case is consistent with the approach advocated above. As the defendants were Lebanese, the English courts were not reliant on Article 24 to take jurisdiction, but instead were relying on Article 4, which meant that the 'real connecting link' requirement could not restrain them. It is unfortunate that Rix J at first instance, explaining why *Cuoghi* was not persuasive in the case, stated:[542]

> 'The defendants are not resident or domiciled in England. Article 24 does not govern relations between England and the United States.'

5.97 This gives the impression that the location of the primary court determines the availability, and effect, of Article 24, rather than the domicile of the defendant. The assumption that the Regulation does not apply to questions of international jurisdiction where the potential *fora* only includes one Member State court has been recently rejected.[543]

5.98 The fourth case to deal with the issue is *Motorola Credit Corpn v Uzan (No 2)*.[544] In that case, the claimant brought proceedings in New York against four defendants who were all Turkish citizens. The claimant brought auxiliary proceedings, seeking a worldwide

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[541] *Refco*, n538, 171.

[542] *Ibid*, 164.

[543] C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

[544] [2004] 1 WLR 113.

freezing injunction from the English courts. Of the four defendants, only the first defendant may have been resident in England,[545] and only the first and fourth defendants owned assets in England. The Court of Appeal granted the order against the first and fourth defendants but refused the order against the second and third defendants. Again, this case is outside the scope of Article 24 of the Brussels I Regulation and thus nothing within it is inconsistent with the above approach.

5.99 *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA*[546] is, however, authority partially inconsistent with the argument herein. In that case, the claimant entered into an agreement with the defendant guaranteeing the repayment of money given by the claimant to a third party under a loan agreement. The guarantee was governed by Italian law and was subject to the exclusive jurisdiction of the Turin courts. The Cuban government passed a decree proclaiming that guarantees given by the defendant as collateral for the third party were legally null and void. As a consequence the defendant refused to honour the guarantee. The claimant brought proceedings in the Italian courts and was awarded a judgment for $167m plus interests and costs. The Italian judgment was registered in England, and the claimant sought, and obtained a domestic and, later, worldwide freezing order against the defendant. British Telecom, intervening, sought to prevent the continuation of the order. In a rather confusing judgment, the Court of Appeal held that the worldwide freezing order would be discharged on two grounds. First, the granting of the worldwide freezing order would not be expedient because there was no connecting link to England, the defendant not

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[545] In *Motorola v Uzan (No 2)* [2002] EWHC 2187 (QB), David Steel J had said that the first defendant owned a house in England which was about to be sold.

[546] [2007] 2 Lloyd's Law Reports 484.

being resident in England.[547] Secondly, it was the policy of the Italian courts not to grant such orders and there was also a danger of disharmony and confusion.[548] Both of these grounds, on first glance, are concerned with the inexpediency test under section 25 of the Civil Jurisdiction and Judgments Act 1982, albeit with the odd comment that the lack of a connecting link means that it would be inexpedient to grant the order. However, Tuckey LJ went on to explain that the worldwide freezing injunction must be discharged, not because the English court did not have jurisdiction in the strict sense, but due to the restrictions on the court imposed by the 1982 Act, the Regulation and judicial precedent.[549] The domestic freezing injunction was not discharged, but it does not appear that the defendants applied to have it discharged, or at least conceded the issue in front of David Steel J at trial.[550] The problem with this approach is that if the real connecting link test applies in the context of post-judgment provisional measures under Article 47(1), then the English courts cannot have their cake and eat it too. If the measure is *in personam* then the real connecting link is to the person and not to the assets within jurisdiction. If the measure is *in rem* then the real connecting link is to the assets and not the person. Thus, given that the defendant was not resident in England this should have been the end of the matter.

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[547] [29].

[548] [30].

[549] [31].

[550] Referred to in the Court of Appeal at [9]. The judgment of David Steel J is reported as follows: *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba* [2007] ILPr 16, where it is stated that the domestic order was not contested, [3].

5.100 The orthodox approach[551] explained above, and largely supported by the case law, has recently been challenged on the basis that freezing orders are not 'pure' *in personam* orders.[552] The argument is, at base, a very simple one. Under the *Van Uden* requirement, there must be a real connecting link between the court awarding the interim relief and the relief itself. Whilst it has been argued that worldwide freezing orders are *in personam* relief, and therefore the court with the real connecting link is the one where the defendant is resident, apparently there are grounds for questioning this argument. Worldwide freezing orders cannot be pure *in personam* orders because of their indirect effect on third parties.[553] Thus, foreign banks served with notice of the order can be found in contempt of court if they are subject to the jurisdiction of the court. In which case, it may be said that worldwide freezing orders are not permissible under the *Van Uden* test where only the primary defendant, and not the relevant third parties, is resident in England.

5.101 However, the argument is a flawed one. The problem is that the logical consequence of the argument is that not only would it prevent all English interim injunctions, but it would also prevent all English final injunctions too. The fact that a freezing order can have indirect effects on third parties is a small example of a wider phenomenon. When the English court gives an order it expects the order to be observed. People who purposefully act contrary to the order will be held in contempt. This is derived from *Seaward v Paterson*.[554] In that case, the claimant demised to the defendant the top three

[551] This analysis was put forward as long ago as 1989: Collins, 'The territorial reach of Mareva injunctions' (n355).

[552] Merrett, 'Worldwide freezing orders in Europe' (n522), 82.

[553] Merrett, *ibid*, at 82, refers to the orthodox argument presented above as the 'robust "pure" argument' and then states: 'The fact that such orders can have an indirect effect undermines, perhaps fatally, the apparently robust "pure" argument that, as the order is *in personam* and takes effect against a defendant, all that matters is where the defendant is.'

[554] [1897] 1 Ch 545.

floors of a four storey house in London for 21 years. The lease contained a covenant stating that the defendant would not do anything which would be noisy, offensive or inconvenient to the claimant or the claimant's tenants. The bottom floor was a public house rented by another tenant. It was alleged that the defendant used the house for the purpose of displays of boxing, which caused serious nuisance to other owners. An injunction was granted by the court, and then it was alleged that the order was disobeyed, and furthermore, two third parties, Sheppard and Murray, assisted in this breach. Lindley LJ held that whilst the injunction is not made against a third party, third parties are bound, like any member of the public, not to interfere and obstruct the course of justice:

> '[T]he orders of the Court ought to be obeyed, and could not be set at nought and violated by any member of the public, either by interfering with the offices of the Court, or by assisting those who were bound by its orders.'[555]

5.102 In view of this, the only difference between an interim worldwide freezing order and any other interim injunction is the *likelihood* of someone outside the jurisdiction of the court aiding in its breach. This simply cannot be the test of whether the remedy is permissible or not. This would open up the possibility not only that each remedy would be looked at to see the likelihood of indirect third party effects but that each specific instance of the granting of a remedy would have to be looked at.

5.103 That this argument equally affects final injunctions should be plain. If a final injunction is given against an English defendant by the English courts, seised by virtue of Article 2, should a third party in Greece purposefully breach the order, the English courts can find

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[555] *Ibid*, 554.

them in contempt of court. However, the English courts only have jurisdiction over the primary defendant and not the third party defendant and thus, according to the challenge to the orthodox approach, the English order goes outside the bounds of its jurisdictional competence and thus is invalid under the Brussels I Regulation. Plainly, such an answer is incorrect.

5.104 The key to explaining all of this may be to understand that the contempt proceedings against the third party are conceptually and practically separate to the action against the primary defendant. This allows for the possibility that some injunctions are permissible and some are not. However, the permissibility of the injunction is determined on its own terms and not on the fact that it may have indirect effects on third parties through the process of contempt of court. The freezing order issued against the primary defendant is to preserve the *status quo* pending trial. The action against the third party is for interference with the trial process, and refusal to obey the orders of the court. If these are separated, then the worldwide freezing injunction, on its own, is perfectly within the scope of Article 31 of the Brussels I Regulation. It is an *in personam* order with a real connecting link to England where the defendant is resident there. The far more difficult question is the status of the action against the third party for contempt, particularly whether this falls within the material scope of the Brussels I Regulation.[556]

[556] For similar problems concerning German contempt proceedings, see C Giebel, 'Die Vollstreckung von Ordnungsmittelbeschlüssen gemäß §890 ZPO im EU-Ausland' [2009] Praxis des Internationalen Privat- und Verfahrensrechts 342.

5. EVIDENTIAL MEASURES[557]

5.105 A more difficult issue that has arisen[558] is whether evidential measures fall within the scope of Article 31 of the Brussels I Regulation, in particular whether measures such as *Anton Piller* orders[559] can be granted by courts acting in an auxiliary manner. The difficulty that arises is over the relationship between the Brussels I Regulation and the Evidence Regulation. The present sub-section seeks to explain this difficulty, in the context of Article 31 of the Brussels I Regulation, explain the ECJ case law on the issue, and explain the competing interpretations that have been suggested.

a. The Problem

5.106 Article 31 of the Brussels I Regulation permits an auxiliary court to grant provisional measures in support of substantive proceedings. The Evidence Regulation provides for procedures for the primary court to obtain evidence located in the territory of foreign courts. Under the Evidence Regulation, the primary court does this by sending a letter of request to those foreign courts, asking for the evidence to be obtained either through the requested court's procedures,[560] or through the requesting court's procedures,[561] or that it

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[557] Much of this is also discussed in Rushworth, 'Demarcating the boundary between the Brussels I Regulation and the Evidence Regulation' (n405).

[558] The issue was sparked by one paragraph in C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-3481. Since then, the English Court of Appeal has had to deal with the issue: *Munib Masri v Consolidated Contractors International Company SAL (Re: Part 71 Orders)* (n392). The decision was successfully appealed to the House of Lords ([2009] UKHL 43) but on a ground of English law, not European law.

[559] See Civil Procedure Act 1997, s7.

[560] Article 10(1).

can directly take evidence itself in the territory of the requested court.[562] The Regulation, in addition to providing these mechanisms, encourages the participation of the parties to the litigation in the obtaining of evidence so that they can follow the proceedings in the requested court's territory as though it were a part of the primary proceedings.[563]

5.107 The problem that arises is that Article 31 of the Brussels I Regulation and the Evidence Regulation can seemingly overlap. Suppose that litigation is on foot in England between two parties. Some evidence is thought to be located in France. The party seeking that evidence could seemingly ask the English court to make a request to the French court under the Evidence Regulation, or that party could ask the French court directly on the basis of Article 31 of the Brussels I Regulation.

5.108 Whether this overlap is actually a problem at all depends on the relationship between the Brussels I Regulation and the Evidence Regulation. There are three plausible possibilities: (i) the Regulations are mutually exclusive; (ii) where the Regulations overlap, the Evidence Regulation has primacy; and (iii) the Regulations overlap and neither has primacy over the other.

5.109 The only ECJ case law on the relationship between the two Regulations is the case of *St Paul Dairy*,[564] and it is to that we must turn first.

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[561] E.g. Article 10(3).

[562] Evidence Regulation, Section 4.

[563] See recital (13) and Article 11.

[564] *St Paul Dairy Industries NV v Unibel Exser BVBA* (n558).

b. St Paul Dairy

5.110 *St Paul Dairy* involved a dispute between two Belgian companies, St Paul and Unibel. Unibel successfully brought proceedings in the Dutch courts for the preliminary hearing of a Dutch witness in order to determine whether or not it would pursue proceedings in Belgium later. St Paul challenged the order of the Dutch court, asserting that they had no jurisdiction under the Brussels I Regulation. The Dutch courts referred a question to the ECJ, asking whether the measure in question fell within the scope of Article 31. The ECJ answered in the negative. It was stated that a measure which is only intended to help the claimant decide whether or not to bring proceedings falls outside the aims of Article 31.[565] Furthermore, as a secondary reason, the ECJ stated that allowing such a measure to fall within Article 31 could allow for the circumvention of the Evidence Regulation.[566]

5.111 The first of these reasons seems correct. First, it appears to fail the *De Cavel v De Cavel* test.[567] In *De Cavel v De Cavel*, the ECJ strongly linked the provisional measure with the right that was being protected. In the case itself the question was whether a provisional measure falls within the Brussels I Regulation when the right it is protecting does not. A negative answer was given. The consequence of linking the provisional measure to the protection of a right is that if the measure is aimed at not protecting a right but finding out whether any rights exist at all, the measure is not provisional in the sense of Article

565 *Ibid*, [16]-[17].

566 *Ibid*, [23].

567 *De Cavel v De Cavel (C-143/78)* [1979] ECR 1055.

31. Secondly, the test fails the *Reichert II*[568] formulation that the measure must protect or preserve the legal or factual situation pending trial. The measure in *St Paul Dairy* does not, and so the ECJ held.

5.112 The secondary reason is the one which directly concerns our present enquiry. The paragraph reads as follows:[569]

> 'Moreover, an application to hear a witness in circumstances such as those in the main proceedings could be used as a means of sidestepping the rules governing, *on the basis of the same guarantees and with the same effects for all individuals*, the transmission and handling of applications made by a court of a Member State intended to have an inquiry carried out in another Member State.'

5.113 The crucial aspect of this paragraph has been highlighted. The decision of the ECJ appears to suggest that the Evidence Regulation gives certain protections and, were one to hear a witness in circumstances such as those in front of the court, these protections would be circumvented. The ambiguity is over exactly who is given the protections. It could be one of two groups: (i) witnesses; (ii) parties to the litigation.

5.114 The argument that the Evidence Regulation protects witnesses was taken up by counsel for the defendants in *Munib Masri v Consolidated Contractors International Company SAL (re: Part 71 Orders)*.[570] In that case, Masri had obtained a judgment from the

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[568] *Reichert v Dresdner Bank AG (No 2) (C-261/90)* [1992] ECR I-2149; [1992] ILPr 404.

[569] *St Paul Dairy* (n558). Emphasis added.

[570] [2008] EWCA Civ 876, [2009] 2 WLR 699. Successfully appealed to the House of Lords on other grounds: [2009] UKHL 43.

English courts[571] ordering Consolidated Contractors International Company ('CCIC') and Consolidated Contractors (Oil and Gas) ('CCOG') to pay him around $52m for breach of contract. As CCIC and CCOG were[572] keen to avoid paying the judgment debt, Masri sought Part 71 orders against a Greek domiciled individual,[573] one Mr Toufic Said Khoury, who was said to be an officer (or former officer) of the judgment debtors, directing him to attend court and provide information to assist Masri in enforcing the judgment. It was argued by counsel for Mr Khoury that the Part 71 order was a measure for the obtaining of evidence abroad and to grant such an order would deprive the witness of his protections under the Evidence Regulation.[574] In particular, it was argued that Articles 5, 10(2), 10(4), 17(2) and 17(4) all provided protections for witnesses and it is these protections that ought not be circumvented. It may be questioned whether these Articles actually protect witnesses at all. Article 5 merely ensures that the language of the request for evidence is the language of the requested court, or a language the requested court indicates it accepts. It is plain this does not protect witnesses as there is nothing preventing a requested court indicating it accepts a request in a language with which the witness is not familiar. Article 10(2) simply ensures that a request is executed in accordance with the law of the requested State. The fact that Article 10(3) allows for a request to be executed in accordance with the law of the requesting State demonstrates that Article 10(2) does not provide any protections to the witness. Articles 10(4) and 17(4) encourage the use of communication technology in obtaining evidence and this can

[571] Gloster J gave the judgments on liability ([2006] EWHC 1931 (Comm)) and quantum ([2007] EWHC 468 (Comm)).

[572] And indeed still are, it seems: [2008] EWCA Civ 1367.

[573] The order against a further individual was set aside as he had only been a director of the holding company of the judgment debtors and not a director of the judgment debtors themselves.

[574] See the summary of the submissions at [42].

hardly be argued to necessarily protect witnesses. This only leaves Article 17(2), which prevents the direct taking of evidence by the requesting court where the witness is not acting voluntarily. Given that the requesting court can ask the requested court to take evidence, and the requested court can use its coercive measures to ensure the obtaining of evidence,[575] the only protection that Article 17(2) could give witnesses is from the coercive measures of the requesting court rather than the coercive measures of the requested court. This cannot have been the concern of the ECJ in *St Paul Dairy* because if a party uses Article 31 of the Brussels I Regulation, the coercive measures of the auxiliary court will be used to enforce the provisional or protective order. This is exactly the protection, it is argued, that Article 17(2) of the Evidence Regulation provides. Thus, there could be no contradiction. The Court of Appeal rightly rejected the argument.[576]

5.115 It is submitted that the protection of the parties to litigation is more likely to have been the concern of the ECJ in *St Paul Dairy*. Auxiliary courts seised under Article 31 of the Brussels I Regulation will apply their own provisional and protective measures. Each Member States' provisional and protective measures differ and thus there is a chance that one party is able to obtain evidence more effectively simply by virtue of that evidence being located in a Member State with more effective provisional and protective measures. However, if the parties had to use the Evidence Regulation then the parties could be treated identically[577] wherever the evidence is located: the requesting court can ask that the requested court follow the requesting court's procedures when obtaining the

[575] Article 13.

[576] [43].

[577] There is still scope for a difference as the requested court can refuse to comply with the request if the requesting court's procedure is incompatible with its law, or by reason of major practical difficulties.

evidence.[578] Furthermore, recital (13) of the Evidence Regulation explains that parties should be able to 'follow the proceedings in a comparable way as if the evidence were taken in the Member State of the requesting court.' The possibility of multiple national procedures being applied under Article 31 of the Brussels I Regulation circumvents this desire.

5.116 If this interpretation of *St Paul Dairy* is correct, the next question is to what extent does this provide an answer to the original problem concerning the relationship between the Regulations. The case strongly suggests that Article 31 should not be used where the measure falls within the scope of the Evidence Regulation.

c. The Relationship between the Regulations

5.117 The original example involved two parties litigating in England whilst the evidence sought was located in France. It was suggested that the party seeking that evidence may be able to either ask the English court to make a request to the French court under the Evidence Regulation, or ask the French court to make the order directly, *via* Article 31 of the Brussels I Regulation. It has been argued that the latter option is not possible.[579] The reasoning for this is as follows.

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[578] Article 10(3).

[579] AG Kokott's opinion in *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* , (n466); Rushworth, 'Demarcating the boundary between the Brussels I Regulation and the Evidence Regulation' (n405), 206-208.

5.118 The only way the French court could take jurisdiction is *via* Article 31 of the Brussels Regulation. Article 31 applies only to 'provisional, including protective, measures'. The Evidence Regulation excludes provisional and protective measures from its scope. Therefore, the order that B is requesting is either a provisional or protective measure, or it is a measure for the taking of evidence: it cannot be both.

5.119 Obviously, the crucial argument in this reasoning is that the Evidence Regulation excludes provisional and protective measures from its scope. This proposition is derived from the *travaux préparatoires* of the Regulation. The original Initiative stated:[580]

> 'This Regulation shall apply in civil and commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests the competent court of another Member State to obtain evidence or perform some other judicial act (hereinafter referred to as "judicial act") except the service of judicial or extrajudicial documents and *measures for the preservation of evidence or enforcement.*'

5.120 The phrase 'provisional and protective measures' is mentioned nowhere, but it is possible to get around this by arguing: the English translation is incorrect; the French and German translations are actually more accurate; and these refer to 'provisional and protective measures.'[581] This is largely[582] correct. The phrase, in the French and German texts, is

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[580] Emphasis added.

[581] AG Kokott's opinion in *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (n466), fn35.

[582] Strictly speaking the French and German texts refer to protective measures, rather than provisional measures ('mesures conservatoires' and 'Maßnahmen der Sicherung'.), whereas the English text of the Hague Convention referred to 'provisional or protective measures'. There is an argument that these are distinct: Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* (n448), 8.

directly lifted from Article 1 of the 1970 Hague Convention on the Taking of Evidence which, in English, referred to, and excluded, 'provisional or protective measures'. They were omitted because provisional and protective measures involve courts acting on a discretionary basis and thus judges should not be able to compel foreign judges to implement them by a letter of request procedure.[583]

5.121 That the phrase is omitted from the enacted Evidence Regulation does not affect reliance on the *travaux préparatoires*. As can be seen above, Article 1(1) of the Initiative referred to requests to obtain evidence or perform some other judicial act. With such a wide scope, there was a need to exclude certain 'other' judicial acts, such as provisional measures. The enacted Regulation drops the reference to 'other judicial acts' and simply states that it applies to the 'taking of evidence'. Therefore, given the omission of other judicial acts, there was no need to additionally exclude provisional and protective measures.[584]

5.122 In summary, the following conclusions can be drawn. Provisional and protective measures are excluded from the scope of the Evidence Regulation. This is because such measures require an exercise of judgement by the court being asked to perform the measure. Therefore, any particular measure can fall under Article 31 of the Brussels I

However, it would clearly be an incorrect conclusion that the exception only covered protective measures and not provisional measures and therefore this discrepancy can probably be attributed to a loose use of words.

[583] HCCH, *Actes et documents de la Onzième session (1968), Tome IV, Obtention des preuves* (HCCH Publications, Hague 1970) (hereafter referred to as 'AetD 11th, vol 4', 'Explanatory Report to the Hague Convention on the Taking of Evidence Abroad', P Amram, 203: 'Provisional and protective measures should be excluded, such as injunction, restraining orders, forced sales, receiverships or *mandamus*, since these involve the discretion of the court having jurisdiction over the persons and the property and are subject to domestic statutes and procedures. They are not subject to the mandatory order of a foreign judge (who in these cases cannot compel action merely by issuing a Letter of Request).'

[584] AG Kokott's opinion in *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (n466), [AG79].

Regulation, or Article 1 of the Evidence Regulation, or neither. No measure can fall under both.

5.123 It has been argued by Dr Heinze[585] and Professor Nuyts[586] that this mutual exclusivity between Article 31 of the Brussels I Regulation and Article 1 of the Evidence Regulation is not correct. Both arguments ignore the *travaux préparatoires* of the Hague Convention, and Evidence Regulation, but focus on the explicit wording of the latter, and its aims, in the light of the ECJ's judgment in *St Paul Dairy*. They take as their starting point the conclusion that the Evidence Regulation, where it applies, has precedence over the Brussels I Regulation.

5.124 Dr Heinze argues that the primary court cannot use methods of obtaining evidence outside the Evidence Regulation where those methods fall within its scope.[587] However, using Article 31 of the Brussels I Regulation in order to obtain evidence within the territory of an auxiliary court is not contrary to the Evidence Regulation, as the Evidence Regulation is concerned with requests by the primary court to the auxiliary court, and not the auxiliary court acting of its own accord. Equally, where the evidential measure falls outside the scope of Article 1 of the Evidence Regulation, the primary court can order such a measure by other means.

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[585] C Heinze, 'Beweissicherung im europäïschen Zivilprozessrecht' [2008] Praxis des Internationalen Privat- und Verfahrensrechts 480.

[586] A Nuyts, 'Le Règlement communautaire sur l'obtention des preuves: un instrument exclusif?' (2007) 96 Revue Critique de Droit International Privé 53.

[587] Heinze (n585), 484.

5.125 The first problem with this argument is that it does not appear to address the concerns of the ECJ in *St Paul Dairy*. Even on the most limited reading of the *St Paul Dairy* paragraph, the ECJ thought that it was possible that the protections in the Evidence Regulation could be circumvented by the use of Article 31 of the Brussels I Regulation in some cases. The second problem with this argument is that it only partially addresses the concern that if the use of the Brussels I Regulation would be more effective than the Evidence Regulation, even if the measure falls within the Evidence Regulation's scope, why should the Evidence Regulation be interpreted to restrict the use of the Brussels I Regulation where the Brussels I Regulation would be more effective for the obtaining of evidence and this is the purpose of the Evidence Regulation?

5.126 Professor Nuyts' primacy argument is a little more complex.[588] Focusing on the decision in *St Paul Dairy*, he argues that the Brussels I Regulation can be used where it would be more effective in protecting the interests of one of the parties than the Evidence Regulation. Two examples of this can be used. First, a party could seise an auxiliary court under Article 31 of the Brussels Regulation where it would be necessary to guarantee the effectiveness of the trial on the merits, and where the use of the Evidence Regulation by the primary court would not offer the same guarantees of protection. Secondly, a party can request that the primary court use a method other than the Evidence Regulation to obtain evidence where the Evidence Regulation would be ineffective or largely useless. Applying this approach, Professor Nuyts suggests that an *inter partes* disclosure order is a type of order where it is not necessary to show each time that the Evidence Regulation will be more inefficient.[589] In such cases, it appears reasonable to

[588] Nuyts, (n586).

[589] *Ibid*, 79.

presume that the *inter partes* order will be more efficient. However, an English search order will not be, nor will orders for the obtaining of medical evidence.[590] It is difficult to see how Professor Nuyts can justify this generic approach to the orders where plainly in some cases a particular order will be more effective under the Brussels I Regulation, and in others that same order will not be. The result appears to be a rather hit or miss justice, and given that additionally it cannot be reconciled with the *travaux préparatoires*, this approach cannot be looked upon favourably.

5.127 Thus, having analysed the views of Dr Heinze and Professor Nuyts, it does not appear as though they can provide a solution which is justifiable either on policy grounds, or on grounds that is more consistent with the wording and *travaux préparatoires* of the legislation. Article 31 of the Brussels I Regulation and Article 1 of the Evidence Regulation are mutually exclusive as the latter excludes provisional and protective measures. The crucial issue then becomes, what is the difference between a measure for the taking of evidence and a provisional and protective measure?

d. Measures for the taking of evidence

5.128 If, as has been concluded, it is true to say that Article 31 of the Brussels I Regulation and Article 1 of the Evidence Regulation are mutually exclusive then pressure is placed on the meaning of 'provisional and protective measures'.[591] If a particular order falls within

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[590] *Ibid*, 78-9.

[591] This means, for example, the focus of Heinze, *ibid*, on defining evidential measures *first*, and then asking whether some are provisional or protective, is incorrect. Interestingly, in view of the *travaux préparatoires*, there is nothing to suggest the definition of provisional and protective measures is the same in the context of what is excluded from the Evidence Regulation and what falls within the scope of Article

this definition, then it cannot fall within the scope of the Evidence Regulation. As already explained, the Evidence Regulation was based on the 1970 Hague Convention. The original Initiative behind the Evidence Regulation excluded provisional and protective measures, directly lifting the words from the 1970 Hague Convention. They had been omitted by the Hague Convention because provisional and protective measures require a court to exercise its discretion when determining whether to grant the order[592] and, therefore, the courts of one country should not be able to force such decisions on the courts of another by a simple letter of request. Whilst it is true that under the Brussels I Regulation provisional and protective measures are enforceable judgments,[593] further safeguards are provided. For example, for a judgment to be enforceable under this Regulation, the judgment must have followed, at least in principle, *inter partes* proceedings.[594] Under the Evidence Regulation, a letter of request could be issued following an *ex parte* application.

5.129 Thus, if we take the *travaux préparatoires* of the Hague Convention and Evidence Regulation seriously, measures which normally require the exercise of more than a *de minimis*[595] amount of judicial discretion should fall outside the scope of the Evidence Regulation. It seems then that orders such as the English search order, granted under either limb of s7 of the Civil Procedure Act 1997, should not fall within the scope of the

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31 of the Brussels I Regulation. However, it is thought unlikely that the ECJ would adopt distinct definitions.

[592] Above, n583. This has been highlighted by the ECJ in the context of provisional and protective measures under the Brussels I Regulation: *Denilauler v SNC Couchet Freres* (n443), [15]; *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n335), [38].

[593] *Mietz v Intership Yachting Sneek BV* (n335).

[594] *Denilauler v SNC Couchet Freres* (n443).

[595] If an evidential order is theoretically discretionary, but practically not, it makes little sense to exclude it from the Evidence Regulation on this basis.

Evidence Regulation.[596] Most measures which relate to the urgent securing of evidence are likely to involve a significant degree of judicial discretion, and so they should. Thus, the concerns which draw other commentators to conclude, in the face of the evidence, that the Regulations overlap, are paper tigers. Precisely those measures that one is likely to need urgent relief for, and thus one might want to avail oneself of Article 31 of the Brussels I Regulation for, are those that fall outside the scope of the Evidence Regulation: they will involve more than a *de minimis* element of judicial discretion.

IV. CONCLUSION

5.130 The present chapter has discussed the division of remedies in the jurisdictional scheme of the Brussels I Regulation. Initially, a distinction must be made between substantive rights and ancillary remedies. In the terminology of the previous chapter, this is a division between substantive rights and procedural rights, the latter being rights which arise by virtue of the trial process. The rules on jurisdiction over substantive rights are usually the focus of most works on the Brussels I Regulation, but how jurisdiction works over ancillary rights has attracted less attention. Difficulties arise in determining the extent of the primary court's jurisdiction to award post-judgment measures which are prior to actual execution of the judgment, but form a part of the enforcement of the judgment. Furthermore, difficulties arise in determining the scope of the jurisdiction under Article

[596] In this respect, it is submitted, AG Kokott may have been incorrect in *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* (n466), where she concluded that the Italian *descrizione* in question was not a provisional or protective measure: [AG80]-[AG93]. From the Opinion, it seems that the *descrizione* is similar to the English search order. It is difficult to believe there is not a strong element of discretion in determining whether such an order should be granted.

31 to grant provisional and protective measures, and the effect the Evidence Regulation has on this auxiliary jurisdiction.

6

Remedies and the Enforcement of Judgments

6.01 The definition of remedy that this thesis takes is that of a court order, both its content and status.[597] Thus, a default judgment[598] ordering X to pay Y £100 is a court order. Its content is an order for the payment of money and its status is that of a default judgment. It has been argued that the content of the court order is intimately related to the right the court order protects and therefore the forum court should always attempt to replicate the content of the court order that the applicable law to the right would award.[599] The argument is less persuasive in respect of the status of the court order.[600]

6.02 The present chapter discusses the Brussels I Regulation and the enforcement of remedies, that is, court orders. It might be thought that a discussion of the enforcement of remedies will be a discussion of the whole of Part III of the Brussels I Regulation. However, the focus of this chapter is on the effect of the type of court order on the enforcement rules. Therefore, for example, there is no need to discuss Article 35 of the Regulation, which permits Member State courts to refuse to recognise another Member State court's judgment on the basis that the court was, in specific ways, jurisdictionally incompetent. This consideration goes not to the nature of the court order but to how the foreign court took jurisdiction. Equally, Article 34 of the Regulation, which permits Member State

[597] §2.15.

[598] CPR 12.

[599] §2.21-§2.24.

[600] §2.25.

courts not to recognise nor enforce another Member State court's judgment on the basis of specific substantive considerations, such as public policy and irreconcilability with an internal judgment, is also, with one possible exception, not concerned with the nature of the court order *per se* but rather with the process of obtaining the court order. The one possible exception to this is Article 34(2) which permits a Member State court to refuse to recognise or enforce another Member State court's judgment under certain circumstances where the judgment was given in default of appearance.

6.03 Therefore, the chapter will simply discuss the nature of court orders and the enforcement of these court orders under the Brussels I Regulation. It is divided in two. The first part is concerned with the definition of judgment under Article 32 of the Regulation. Whilst the definition is broad, it has been argued that some remedies, whether due to their content or status, do not fall within its scope. Thus, it has been held that an order for the collection of evidence by an expert is not a judgment that will be recognised under the Regulation.[601] This is an example of a remedy which is not a judgment due to its content. It has also been argued that an English default judgment is not a judgment for the purposes of the Regulation.[602] This is an example of a remedy which is thought not to be a judgment due to its status. The second part is concerned with what it means to enforce a foreign judgment. The simplified view is that the foreign court order is translated into a domestic order and then domestic enforcement remedies are applied. However, this raises a number of problems. First, what exactly does the obligation to render the foreign judgment into a domestic judgment mean? Secondly, is there a danger of incompatibility between the legal system of the originating court and the legal system of the receiving

[601] *CFEM Façades SA v Bovis Construction* [1992] ILPr 561. Discussed below, §6.27-§6.39.

[602] G Cuniberti, 'Camenzuli v Désira' (2000) 89 Revue critique de droit international privé 786. Discussed below, §6.07-§6.16.

court when a divide is created between the foreign court order and the domestic enforcement remedies? The conclusions to these two questions can be briefly stated. As to the first problem, the argument will be that the English court must seek to provide the closest domestic court order it can to the foreign court order, being aware of the danger of modifying the court order in the translation, but not going so far to accommodate the foreign court order that it would severely inconvenience the machinery of the English court. As to the second problem, the answer, it is submitted, is to build into domestic enforcement remedies a requirement to refer to the law applied to reach the foreign court order. This may not be the same law as the law of the originating court as that court may have applied foreign law in reaching its judgment. This requirement can certainly be built in to discretionary enforcement remedies, such as contempt of court and appointment of an equitable receiver, but it is less clear how this can be achieved with respect to non-discretionary remedies, such as the writ of control.

I. JUDGMENT

6.04 The definition of a judgment for the purposes of the Brussels I Regulation is provided in Article 32. This states that a 'judgment':

> 'means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

6.05 The Article has been broadly drafted, and includes a much wider variety of judgments than those recognisable under the common law.[603] In particular, it includes provisional judgments.[604] However, not all court orders, in the common law understanding, will fall within its scope. There appear to be four categories of judgment which may potentially be excluded: (i) orders which are not considered to have come from a court; (ii) orders granting the enforceability of a foreign judgment; (iii) enforcement remedies; (iv) procedural orders. These categories will now be discussed.

1. NON-JUDICIAL ORDERS

6.06 The first two sections are concerned with the status of the order. The second two sections are concerned with the content of the order. There seem to be two aspects to this issue. First, the order must have come from a judicial body, and not an administrative body. This raises the question of whether an English default judgment is a judgment for the purposes of the Brussels I Regulation. Secondly, the order must have involved the court actually making a ruling. Both of these are complicated and are taken in turn.

a. Order must come from a judicial body

6.07 For an order to be an enforceable judgment under the Brussels I Regulation it must have been awarded by a judicial body, whether a court or tribunal. Of major concern for English law is the application of this rule to default judgments. Thus, it has been argued

[603] Dicey, §14-190.

[604] Schlosser Report, [184], cited with approval by AG Lenz in C-39/02 *Maersk Olie & Gas A/S v Firma M d Haan en W De Boer* [2004] ECR I-9657, [AG48].

by some continental authors that an English default judgment, awarded under CPR r12, does not qualify as a judgment for the purposes of the Regulation.[605] Even an English academic has conceded that they have a point.[606] With respect, however, they do not. Before any explanation of this conclusion, it is worth dwelling briefly on the provenance of this assertion. Professor Cuniberti made the suggestion in 2000 following the Cour de Cassation case of *Camenzuli v Désira*.[607] In that case, an English claimant had brought proceedings in London for payment of a debt by the French domiciled defendant. The French domiciled defendant ignored the English proceedings and the English claimant proceeded to obtain judgment by default. The claimant then, oddly,[608] attempted to enforce the claim form, rather than the default judgment, in France. The Cour de Cassation held that the claim form was not a judgment under the Brussels Convention, but implicitly accepted that the default judgment would have been. Professor Cuniberti argues that this decision is incorrect on the following basis. The English default judgment does not involve a judge pronouncing on the merits of the case at all.[609] The court is acting in a mechanical way, through its clerk, without exercising any control over its act.[610] These arguments will be dealt with below, but it is worth noting that even the French starting point appears to be that such default judgments are enforceable.

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[605] U Magnus and P Mankowski, *Brussels I Regulation* (Sellier, Munich 2007), 537 (Wautelet), referring to Cuniberti, 'Camenzuli v Désira' n602.

[606] A Briggs, 'Review of Magnus and Mankowski, Brussels I Regulation' [2008] Lloyd's Maritime and Commercial Law Quarterly 244.

[607] Cuniberti (n602).

[608] Cuniberti (n602), describes this decision as 'étonnamment' but does not explain it: [2].

[609] *Ibid*, [6].

[610] *Ibid*, [7].

6.08 Two propositions are required to prove that the Cuniberti view is incorrect. The first proposition is that the German *Mahnverfahren*[611] is, for the purposes of Article 32, indistinguishable from the English default judgment. The second proposition is that the German *Mahnverfahren* is a judgment for the purposes of Article 32 of the Regulation. Therefore, from these two propositions, it can be concluded that the English default judgment must fall within the scope of Article 32.

6.09 The German *Mahnverfahren* is an expedited process for obtaining an enforceable judgment. It works as follows. The claimant fills out either a paper or electronic form (*Mahnantrag*) which includes, *inter alia*, the names of the parties,[612] their representatives, the court that would have jurisdiction if full proceedings on the merits were to take place,[613] the details of the claim[614] and a statement that the claim is not dependent on any counter-performance by the claimant.[615] Either the court's clerk, or the computer itself, checks that the form complies with the requirements of the *Mahnverfahren* but only on a formal level – there is no analysis of the merits of the case at all. If it does so, a *Mahnbeschied* is issued and sent to the defendant. This includes the *Mahnantrag*[616] and, in particular, the statement that the court has not adjudicated on the merits of the case,[617] and that the defendant then has two weeks to reply to the claim.[618] If

[611] Sometimes translated as 'summary proceedings'.

[612] §690(1)(1) ZPO.

[613] §690(1)(5) ZPO.

[614] §690(1)(3) ZPO.

[615] §690(1)(4) ZPO.

[616] §692(1)(1) ZPO.

[617] §692(1)(2) ZPO.

[618] §692(1)(3) ZPO.

the defendant has not paid up, or replied to the *Mahnbeschied*, then the claimant can request a *Vollstreckungsbeschied*[619] from the court.[620] This is, again, served on the defendant, and if he does not reply within two weeks, the *Vollstreckungsbeschied* is elevated to the same effect as a *Versäumnisurteil* ('German' default judgment),[621] which means that it is provisionally enforceable, subject to being set aside under exceptional circumstances.

6.10 Having seen how the *Mahnverfahren* works, let us now look at the English default judgment. An English claimant will fill out a claim form and send it to the court requesting that the claim form be issued. Once the court issues the claim form, it can be served on the defendant. The defendant then has fourteen days[622] from the date of service to respond either by simply acknowledging that he has been served, or filing a defence. The former response gives him a total of twenty-eight days from date of service in which to file a defence.[623] If any of these periods expire, the claimant can request that judgment be given in default.[624] The acceptance of this request is performed by a court officer. Even after judgment by default has been entered, the judgment can still be set aside where the formality requirements were not satisfied[625] or at the court's discretion where

[619] Also called a *Vollstreckungsbefehl*.

[620] §699 ZPO.

[621] §700(1) ZPO.

[622] See CPR r10.3, but if the defendant is outside the jurisdiction the time period varies depending on where service is effected: see CPR r6.35.

[623] CPR r15.4.

[624] CPR r12.3.

[625] CPR r13.2.

the defendant has a real prospect of successfully defending the claim or there is a good reason why the defendant should be allowed to defend the claim.[626]

6.11 Having seen these two procedures, it is now worth seeing whether there is any material difference between them for the purposes of the Brussels I Regulation. If the objection to the English default judgment is that it does not involve the court looking at the merits of the case, and this seems to be the principal objection of Professor Cuniberti's, then it is equally clear that the *Mahnverfahren* does not involve the court looking into the merits of the case. If the objection to the English default judgment is that it is endorsed by the court's clerk rather than a judge himself, then it is equally clear that the *Mahnverfahren* is endorsed by the court's registrar and again is indistinguishable. Thus, it can be concluded that for the purposes of Article 32 of the Brussels I Regulation, the English default judgment and the German *Mahnverfahren* stand or fall together. This proves proposition one.

6.12 Proposition two was that the *Mahnverfahren* falls within the scope of the definition of judgment for the purposes of Article 32 of the Regulation. This can be demonstrated in three ways. First, it is expressly included in the text of the Brussels I Regulation. Secondly, it has been accepted by the ECJ explicitly in *Klomps v Michel*.[627] Thirdly, the Jenard report also explicitly refers to the *Vollstreckungsbefehl* as falling within the definition of a judgment.

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[626] CPR r13.3.

[627] C-166/80 *Klomps v Michel* [1981] ECR 1593.

6.13 Article 32 of the Brussels Regulation, looking at the German text, includes in the definition of judgment the 'Vollstreckungsbefehl'. The *Vollstreckungsbefehl*, as explained above, is the order obtained by a claimant after the successful use of the *Mahnverfahren* procedure in the German *Zivilprozessordnung*. Unfortunately, the English text has been mistranslated and thus this is not apparent from that text. The *Vollstreckungsbeschied* was translated into 'writs of execution'. Plainly the *Vollstreckungsbeschied* is not a writ of execution in the English sense. A writ of execution in English law concerns the forced *enforcement*, or execution, of the judgment, rather than the rendering of a judgment *enforceable*, which is the effect of the *Vollstreckungsbefehl*.

6.14 If further support were needed in support of the *Vollstreckungsbefehl* being a judgment within the meaning of Article 32 of the Brussels Regulation, resort need only to be had to *Klomps v Michel*. In that case, the claimant attempted to have both the *Mahnbeschied* and the *Vollstreckungsbefehl*, ordered by the German courts, enforced in the Netherlands. The question for the court related to the use of Article 34(2) of the Regulation, but it was clearly stated twice by the ECJ that the *Vollstreckungsbefehl* is enforceable under the Regulation.[628]

6.15 Finally, the Jenard report, explaining the concept of a judgment under Article 25 of the Brussels Convention, states that Article 25 includes the *Vollstreckungsbefehl* under §699 of the *Zivilprozessordnung*,[629] and states in a footnote that the *Vollstreckungsbefehl* is ordered by a court registrar.

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[628] *Klomps v Michel*, *ibid*, [9] and [11].

[629] Jenard, 42.

6.16 Therefore, it must be concluded that the English default judgment is a judgment for the purposes of the Brussels I Regulation.[630]

b. Order must involve a judicial ruling

i. Where the order is obtained by consent of both parties

6.17 A distinction must be made between a court settlement between the parties and a consent order. It was decided in *Solo Kleinmotoren v Emilio Boch*[631] that the former is not a judgment for the purposes of the Regulation. There, a dispute had arisen between a German company and an Italian trader. Proceedings had already commenced in Italy, but a court settlement was reached in front of a German court. The settlement included the compromise of the subject-matter of proceedings in Italy. Nevertheless, the Italian proceedings continued and judgment was handed down. This judgment was then brought by the Italian trader to Germany for enforcement. The German company argued that under Article 27(3) of the Convention, recognition was not permitted due to an irreconcilable national judgment already in existence – the court endorsed settlement. The *Bundesgerichtshof* referred a question asking whether the court endorsed settlement

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[630] The ECJ has accepted that an English default judgment granted due to debarment of the defendant from contesting the proceedings having breached various procedural orders of the court was a judgment within the meaning of Article 25 of the Brussels Convention: C-394/07 *Gambazzi (Marco) v Daimler Chrysler Canada Inc and CIBC Mellon Trust Company* [2009] ECR I-000. However, this is distinguishable from the present issue as there was clear judicial consideration of whether to grant a default judgment in that case. For different problem of the human rights issues that may arise from default judgments, particularly their lack of reasons, see G Cuniberti, 'The recognition of foreign judgments lacking reasons in Europe: access to justice, foreign court avoidance, and efficiency' (2008) 57 International and Comparative Law Quarterly 25.

[631] C414/92 *Solo Kleinmotoren v Emilio Boch* [1994] ECR I-2237.

was a judgment within the meaning of Article 25 of the Convention. The ECJ's answer was in the negative. It was stated that to qualify as a judgment 'the act must be that of a court belonging to a Contracting State and ruling on its own authority on points in dispute between the parties.'[632] Thus, a settlement agreement, which is contractual in nature, did not fall within the definition. It was influenced in its approach by the fact that under the Regulation, 'Authentic Instruments and Court Settlements' are dealt with separately,[633] laying down specific rules for their enforcement.[634]

6.18 That this does not extend to English consent orders was established by the Court of Appeal in *Landhurst Leasing v Marcq*.[635] There, the claimant brought an action against the defendant in Belgium for payment of money due under a contract. The defendant agreed not to oppose the claimant's action and judgment was handed down ordering the defendant to pay £475,000 plus interest of 14 per cent. In a later action brought by the defendant in England against the claimant, the claimant attempted to register the Belgian judgment. It was argued by the defendant that this was not a judgment given the ECJ's approach to court settlements in *Solo Kleinmotoren*. This argument was dismissed by the Court of Appeal:[636] it would be odd were it otherwise, as it would mean a defendant could prevent a European enforceable judgment being granted against him simply by admitting all the claims are true.

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[632] *Solo Kleinmotoren*, *ibid*, [17].

[633] Articles 57-58.

[634] *Solo Kleinmotoren* (n631), [22].

[635] *Landhurst Leasing v Marcq* [1998] ILPr 822.

[636] *Ibid*, [37].

6.19 It was argued in *Solo Kleinmotoren* that the distinction between these two was merely a matter of national law. Courts in the United Kingdom, Belgium and Luxembourg used consent orders, whereas other courts would use court settlements. This argument was swiftly dealt with by Advocate-General Gulmann. Court settlements do not act as *res judicata*, whereas a consent order does.[637] The Court passed no comment on this. Advocate-General Kokott revisited the issue in her opinion on *Gambazzi v Daimler Chrysler*.[638] She explained that the ECJ in *Solo Kleinmotoren* was concerned with the pure and simple transcription, by a court, of the parties' wishes not being classified as a judgment.[639] The ECJ made no comment on the issue.

ii. Where the order is obtained after uncontested proceedings

6.20 It was argued in *Maersk Olie & Gas v de Haan en De Boer*[640] that an order granted at the end of uncontested proceedings could not be a judgment within the meaning of Article 25 of the Convention. This submission was rejected by the ECJ.[641] Taking their lead from the Advocate General,[642] it was held that so long as both parties have the opportunity to

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[637] *Solo Kleinmotoren* (n631), [AG30]. It was also stated, cryptically, that 'a settlement is not backed up by exactly the same safeguards as a judgment, and a court settlement does not have the judicial authority of a judgment.'

[638] C394/07 *Gambazzi (Marco) v Daimler Chrysler Canada Inc and CIBC Mellon Trust Company* [2009] ECR I-0000.

[639] *Ibid*, [AG25]-[AG27].

[640] C39/02 *Maersk Olie & Gas A/S v Firma M de Haan en W De Boer* [2004] ECR I-9657.

[641] *Ibid*, [49]-[52].

[642] *Ibid*, [AG50].

transform the proceedings into *inter partes* proceedings, the resulting judgment will be a judgment for the purposes of Article 25 of the Convention.

6.21 This issue was addressed again in the recent case of *Gambazzi v Daimler Chrysler*.[643] There, the ECJ had to address the question of whether an English judgment given in default due to the defendant's breach of a disclosure order was a judgment under Article 32 of the Regulation. It was held that it was. The decision was capable of being the subject of an inquiry in adversarial proceedings[644] and the fact that the defendant had been barred from contesting on the merits could only be addressed under the public policy exception.[645]

2. EXEQUATUR JUDGMENTS

6.22 Whilst there is no ECJ decision that has directly decided the question, it is thought that exequatur judgments are not judgments for the purposes of the Brussels I Regulation.

6.23 In *Owens Bank Ltd v Bracco*,[646] the claimant bank had obtained a judgment from the court of St Vincent ordering the defendant to pay 9m Swiss francs. The claimant brought the judgment to Italy and then England for enforcement. The defendant sought a stay from the English court on the basis of *lis alibis pendens*. The ECJ held that the *lis alibis*

[643] n638.

[644] *Ibid*, [23], following *Denilauler v SNC Couchet Freres* , [13].

[645] *Ibid*, [25], referring to Brussels I Regulation, Article 27(1). *Cf* C-78/95 *Hendrikman v Magenta Druck & Verlag GmbH* [1996] ECR I-4943.

[646] C-129/92 *Owens Bank v Bracco* [1994] ECR I-117.

pendens rules only applied to matters which fall within the scope of Title II of the Convention and an action to have a judgment rendered enforceable did not so fall.[647] The English court was not precluded from considering whether or not to recognise and enforce the judgment from St Vincent. Thus, the ECJ did not expressly deal with the issue. However, Advocate-General Lenz found that exequatur judgments are not judgments within the meaning of the Convention.[648] It was thought that this represented the unanimous view of writers. Whilst this view has been questioned,[649] it is submitted that it represents the correct view of the law for two reasons. First, and most obviously, recognising a judgment is subject to the public policy of each national court. This forms part of the process at the *exequatur* stage. Each national system should be able to veto the recognition and enforcement of a judgment in its country on the basis of public policy. Secondly, as will be discussed below, sometimes the judgment must be, in essence, modified due to procedural concerns.[650] For example, if the originating court gives a judgment for specific performance of an obligation which the first receiving court grants *exequatur* to, this should not bind a second receiving court which has entirely different procedural concerns.

3. ENFORCEMENT REMEDIES

[647] *Ibid*, [23].

[648] [AG20]-[AG23].

[649] P Hay, 'Recognition of a Recognition Judgment under Brussels I?', presented as a Guest Editorial at http://conflictoflaws.net/2008/guest-editorial-hay-on-recognition-of-a-recognition-judgment-under-brussels-i/ (accessed 3rd July 2009).

[650] See Chapter 6, Section II.

6.24 Measures for the enforcement of a judgment have already been discussed in the context of the jurisdictional scheme of the Brussels I Regulation.[651] It will be remembered that there is a distinction between a measure for the enforcement of a judgment and a measure of execution.[652] The former is an order whose causative event is the judgment, whereas the latter is an order involving execution of the judgment by the direct actions of the State. The latter is a sub-specie of the former. The question for the present section is which of these measures are judgments for the purposes of Article 32. It is thought that all measures of enforcement are judgments for the purposes of the Article. However, measures of execution will be unenforceable under Article 35(1) as, should they require enforcing abroad, they will have been granted contrary to the exclusive jurisdiction provided in Article 22(5).[653]

6.25 Article 32 of the Brussels I Regulation gives a wide scope to the meaning of judgments, and there is nothing to suggest that measures for enforcement fall outside of this. The English case law on Article 22(5),[654] which gives a very broad interpretation of that provision, may suggest that all measures of enforcement will fall within its scope and therefore under Article 35(1) such orders will not be enforceable where they operate outside the territory of the originating Member State court. However, it has been argued that this case law is erroneous, it being incompatible with the ECJ's interpretation of Article 22(5).[655] That such measures are enforceable under the Brussels I Regulation is also confirmed by Article 49. Article 49 provides that a foreign judgment ordering a

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[651] Chapter 5, Section II.

[652] §5.36.

[653] The application of which is extensively discussed in Chapter 5, Section II.

[654] *Kuwait Oil Tanker Co SAK v Qabazard* [2004] 1 AC 300.

[655] Above, §5.49-§5.57.

periodic payment by way of a penalty is enforceable if the amount of the payment has been finally determined. This provision permits an *astreinte* or *Zwangsgeld* order to be enforceable under the Regulation, which are orders made once judgment has been granted to compel compliance with the judgment. These are clearly measures of enforcement, but not measures of execution.

6.26 Measures of execution will fall within the scope of Article 22(5). The effect of this is that for a measure of execution to require enforcement by another court, the originating court must not have had jurisdiction under Article 22(5). Therefore, under Article 35(1), which *inter alia*, requires the putative enforcing court to refuse enforcement where the originating court has acted in breach of Article 22(5), the measure of execution will not be enforced. It may be thought odd, given this, that the Brussels I Regulation specifically refers to 'writs of execution' being judgments in Article 32. However, this phrase has resulted from a mistranslation from the German text, which can be seen from the Jenard report. Jenard explains that judgments includes 'writs of execution (Vollstreckungsbefehl, Article 699 of the German Code of Civil Procedure)…'[656] Indeed, the wording used in the German text of the Brussels I Regulation is *Vollstreckungsbeschied*, which is coterminous with *Vollstreckungsbefehl*. It has been explained above[657] that the *Vollstreckungsbefehl* is merely a declaration that a judgment is *enforceable*, and therefore is not a writ of execution at all. Thus, nothing can be gained from the reference to writs of execution in Article 32. It is incompatible with the German text, and certainly not what the Jenard report thought it meant.[658] Indeed, the Hess,

[656] Jenard Report, 42.

[657] §6.09.

[658] Similarly, though in a different context, W Kennett, *The Enforcement of Judgments in Europe* (OUP, Oxford 2000), 64, explains that *titre exécutoire* is often translated as 'writ of execution' which

Pfeiffer and Schlosser report states emphatically '...writs of execution are not qualified as "judgments" in the sense of Article 32...'[659]

4. PROCEDURAL ORDERS

6.27 Despite the apparently wide-ranging scope of Article 32, there is a growing body of case law,[660] and academic commentary[661] suggesting there is a distinction between a judgment and a procedural order. Furthermore, the distinction is recognised the Schlosser report,[662] and it has been said that it was implicitly recognised in the Jenard report.[663]

6.28 This issue is another one which goes to the very heart of the distinction between ancillary measures and substantive measures, as explained in Chapter 4.[664] The Brussels I Regulation could have been set up so that a particular Member State court has jurisdiction over a substantive right and the judgment on that substantive right is enforceable in every other Member State court. Or, the Brussels I Regulation could

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'unfortunately call[s] to mind measures connected with the enforcement process itself, rather than the instrument which confers the right to proceed to enforcement.'

[659] [528].

[660] *CFEM Facades v Bovis Construction* [1992] ILPr 561; OLG Hamburg 29.9.1999, IPRax 2000, 530; OLG Hamm 14.6.1988, RIW 1989, 566.

[661] Kropholler, Article 32, para 24; Jv Hein, 'Drawing the line between the Brussels I and the Evidence Regulation' [2008] European Legal Forum I-34; Magnus and Mankowski (n605), 544 (Wautelet); Gaudemet-Tallon, 295-6; A Layton and H Mercer, *European Civil Practice* (Sweet and Maxwell, London 2004), 859-861; L Collins, *The Civil Jurisdiction and Judgments Act 1982* (Butterworths, London 1983), appears lukewarm about the suggestion, 106.

[662] Schlosser, [187].

[663] *CFEM Façades* (n660), citing Jenard, 43.

[664] §4.58-§4.65.

require more cooperation between the Member State courts so that a particular Member State court has jurisdiction over a substantive right and judgments on that substantive right and any ancillary rights thereto will be enforceable under the Regulation. The position of the courts has been to take a middle-ground which is not easy to reconcile. This position is that some ancillary measures (particularly provisional and protective measures and measures of enforcement) are enforceable, but others are not (measures for the taking of evidence). This middle-ground requires the, not necessarily unattractive, argument that some ancillary measures are more closely related to the substantive right than others.[665]

6.29 It cannot be doubted that some ancillary measures are enforceable judgments under the Regulation. In particular, provisional and protective measures appear to be enforceable judgments. This can be seen from the decision of *Mietz*[666] where the ECJ implicitly recognised that provisional and protective measures, permissibly granted under Article 31 of the Brussels I Regulation, are enforceable judgments. However, it has also been suggested that some ancillary measures are not enforceable judgments under the Regulation, in particular interlocutory decisions regulating procedural matters.

6.30 The most explicit statement of a distinction between procedural orders and other orders can be found in the Schlosser report. There, it is stated:[667]

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[665] Seen most particularly in the Schlosser report, cited below, §6.30.

[666] C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277.

[667] Schlosser, [187].

> ‘If it were desired that interlocutory decisions by courts on the further conduct of the proceedings, and particularly on the taking of evidence, should be covered by Article 25 of the 1968 Convention this would also affect decisions with which the parties would be, totally unable to comply without the court’s cooperation and the enforcement of which would concern third parties, particularly witnesses. It would therefore be impossible to ‘enforce’ such decisions under the 1968 Convention. It can only be concluded from the foregoing that interlocutory decisions which are not intended to govern the legal relationships of the parties, but to arrange the further conduct of the proceedings, should be excluded from the scope of Title III of the 1968 Convention.’

6.31 It should be noted that this argument does not derive support from the text of the Convention but takes this view as a matter of logic from its first two arguments. These arguments are that if interlocutory procedural orders were included within the scope of Title III: (i) this includes decisions with which the parties cannot comply without the cooperation of the court; and (ii) the enforcement would concern third parties, particularly witnesses.

6.32 With respect, it is thought these arguments are not sufficiently persuasive to create a new exclusion from the Regulation without any textual support. If the problem with interlocutory decisions is that they have the potential to affect third parties, this is equally true of a decision as to the ownership of an asset situated in another forum. If the problem is that the parties would be unable to comply without the court’s co-operation, it is difficult to see how this is true. An English court can make an order requiring the inspection by one party of documents held by another in France. Should this order be

brought to France for enforcement it is difficult to see why the English court's co-operation is required.

6.33 It has been said that the case of *Kongress Agentur Hagen v Zeehaghe*[668] provides further support to Schlosser's statement,[669] but this argument seems misconceived. In *Hagen*, the ECJ had to decide whether the Dutch courts, having the ability to take jurisdiction over a third party under Article 6(2) of the Convention, could refuse to take such jurisdiction on the basis of their local procedural law.[670] The ECJ held that they could do so as the Convention does not seek to unify procedural rules. This case does not impact upon the present inquiry. The Convention does not seek to unify substantive contract law, but judgments concerning contract law are still recognisable and enforceable.

6.34 Thus, the only support from the European level is the Schlosser report. The approach does have support from some national courts, in particular, the English and the German courts.

6.35 In the case of *CFEM Facades v Bovis Construction*,[671] a dispute had arisen over the construction of a building in London. Proceedings had commenced in Nanterre Commercial Court and the French judge had ordered that *une expertise* be performed. This involved the appointment of two experts who inspect the building and collect evidence regarding the work undertaken. The question for the English court was whether

[668] C365/88 *Kongress Agentur Hagen v Zeehaghe* [1990] ECR I-1845.

[669] A Briggs and P Rees, *Civil Jurisdiction and Judgments* (LLP, London 2005), §7.06, fn52.

[670] *Hagen* (n668), [17].

[671] [1992] ILPr 561.

this order was an enforceable judgment for the purposes of the Brussels Convention. Simon Goldblatt QC[672] relied heavily on the Jenard report, which states that the Brussels Convention is limited to 'property rights'.[673] This was thought to be the 'key that unlocks the door'.[674] Therefore, he decided that 'interlocutory decisions in the course of civil and commercial litigation which do no more than regulate procedural matters and which do not govern the legal relationships of the parties, nor affect their proprietary rights' are outside the scope of Article 24. On the facts, the judge thought that some aspects of the order fell within the Regulation and some did not.[675] The French order was essentially carved up, but unfortunately, the original order was not reproduced by the judge and therefore it is quite difficult to analyse exactly what fell within and what fell outside the definition provided.

6.36 The difficulty with such an approach is that, in a sense, all 'property' rights are affected by procedural decisions. The decision in *CFEM Façades* regarding the obtaining of evidence could make or break the case for the claimant. A distinction could be made between orders which presume the right to exist and seek to protect that right, and orders which are neutral as to the existence of the right. In a sense, a freezing injunction presumes the right does exist and seeks to protect it, whereas an order for the collection of evidence does not necessarily presume the existence of the right at all. If this is the distinction that *CFEM Façades* seeks to apply, it is hard to see the justification for it. In particular, it requires butchering a foreign order, as was done in *CFEM Façades*,

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[672] Sitting as a Deputy Judge in the High Court.

[673] Jenard, 43. This must mean property rights in a much wider sense than rights *in rem*. On one view, a right *in personam* can be 'owned' by a party.

[674] *CFEM Façades v Bovis Construction* (n671), [61].

[675] *Ibid*, [64].

depending on whether the enforcing court thinks the foreign order is seeking to protect putative rights or is neutral as to their existence.

6.37 The German courts have addressed the issue twice and have adopted, at least implicitly, the Schlosser approach. In the first case decided by the Oberlandesgericht in Hamm,[676] the French resident claimant brought proceedings in France against a number of defendants, claiming that the construction of a building in Essen, Germany, was pumping Ozone into the ground water. After oral proceedings, the French court ordered a measure under which an expert would be appointed to inspect the building and take evidence from some of the parties. The defendants refused the expert entry to the building in Essen and the claimant brought proceedings in the Essen courts for the recognition of the French decision. The OLG Hamm decided that a judgment such as the one in the present case was of a procedural character and, therefore, did not count as a decision for the purposes of Article 25 of the Brussels Convention.

6.38 The second case was decided by the Oberlandesgericht in Hamburg.[677] In this case, the claimant had been granted a *référé-ordonnance* by the French court in Le Havre. He was seeking to recover the costs of the carrying out of this order in the German courts. The German court held that, as a matter of German law, these costs were not recoverable either as part of the main action's costs or as a self-standing cost. Furthermore, they held that nothing in the Brussels Convention contradicted this, as interim decisions are outside

[676] 14.6.1988, (1989) 35 Recht der Internationalen Wirtschaft 566.

[677] 29.9.1999, (2000) 20 Praxis des Internationalen Privat- und Verfahrensrecht 530.

the scope of Title III of the Convention insofar as they concern the course of procedure, and do not have the aim of ruling on the legal relationship between the parties.[678]

6.39 The case law and academic commentary on the issue is overwhelmingly in favour of the recognition of a procedural category of orders which will not be recognised. However, it is submitted, with hesitation, that this may be an error. There seems little positive reason for refusing to recognise this category of orders. The one discernable reason suggested is that it may indirectly affect third parties but this is true of all orders whether procedural, protective or final. It leads one to the conclusion that the real reason for not enforcing such orders is that enforcing foreign orders is complex and these orders are somehow less important than others. It is difficult to prove or disprove either of these two statements. However, in a situation where the claimant's case is dependent on a Member State court enforcing an ancillary order of another Member State court, there seems little reason for that Member State court to enquire into whether the order is more procedural than other orders. The difficulty, one suspects, has now been alleviated somewhat by the enactment of the Evidence Regulation,[679] the measures in the cases cited above being prime candidates for the procedures therein.

II. ENFORCEMENT

[678] *Ibid*, 530. This links up with the approach of the ECJ in *De Cavel v De Cavel* , where an ancillary right only falls within the Regulation where the substantive right upon which it is dependent does so. Here the costs order dependent on the *référé* does not fall within the Regulation's scheme as the *référé* did not.

[679] Layton and Mercer (n661) 859.

6.40 Once it has been accepted that the foreign judgment is a judgment for the purposes of the Regulation and therefore *prima facie*[680] enforceable, a question arises of what it means to enforce a foreign judgment. If a French judgment ordering specific performance arrives in England for enforcement, must the English courts always enforce it *in specie* even if they would not have granted such an order?

6.41 The text of the Regulation is silent on the issue but three guiding principles can be found in the ECJ case law. First, the Brussels I Regulation only seeks to make a judgment enforceable and does not address the separate issue of execution (the *Deutsche Genossenschaftsbank* principle[681]). Secondly, the foreign judgment cannot be given greater effects than it is given in the State of Origin (the *Hoffmann* principle[682]). Thirdly, the foreign judgment cannot be given greater effects than a similar judgment given directly in the Member State in which enforcement is sought would have (the *Orams* principle[683]).

1. THE *DEUTSCHE GENOSSENSCHAFTSBANK* PRINCIPLE

6.42 In *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur*,[684] the ECJ had to deal with the question of whether the Brussels Convention regulated the ability of a third party

[680] The jurisdictional (Article 35) and substantive objections (Article 34) to recognition may apply. These are not discussed here.

[681] C-148/84 *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur* [1985] ECR 1981.

[682] C-145/86 *Hoffmann v Krieg* [1988] ECR 645.

[683] C-420/07 *Apostolides v Orams* [2009] ECR I-000.

[684] [1985] ECR 1981.

creditor to contest enforcement mechanisms in the receiving court. A debtor had created a land charge which was subsequently enforced in the Federal Republic of Germany's courts. The beneficiary of the charge sought to enforce this judgment in the French courts and another of the debtor's creditors sought to prevent the enforcement of the order under French national law. The ECJ held that whilst the Convention provides an autonomous enforcement procedure, 'article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.'[685] The Court went on to state that:[686]

> 'The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought...'

6.43 The case thus relies on a distinction between rendering a judgment enforceable and executing a judgment. Suppose a French court orders the defendant to pay the claimant £10,000. The defendant has no assets in France and so the claimant brings the judgment to England for recognition and enforcement. The English judge, by the Brussels I Regulation *exequatur* procedure, grants an order declaring the French order enforceable in England.[687] The claimant can then request that the English court use its enforcement mechanisms to ensure the satisfaction of the judgment. This description can be broken

[685] *Ibid*, [17].

[686] *Ibid*, [18]. See also the opinion of AG Lenz, 1986. The Court's paragraph has been subsequently endorsed in: C-119/84 *Capelloni and Aquilini v Pelkmans* [1985] ECR 3147, [16]; *Hoffmann* (n682), [28]; C-267/97 *Coursier v Fortis Bank SA* [1999] ECR I-2543, [28]; *Apostolides v Orams* (n683), [69].

[687] Brussels I Regulation, Article 38 *et seq.*.

down into three stages: (i) granting of foreign judgment; (ii) granting of *exequatur*; (iii) execution of judgment. The third of these categories can be broken down further into two sub-categories: (i) forced execution and (ii) execution under menace of forced execution.[688] This third category is a matter for national law.

6.44 However, this approach may be problematic. Two examples can be provided.[689] First, suppose that a Dutch judgment is granted against a debtor. Further, suppose that under Dutch law that judgment is not enforceable against the debtor's guarantor. If the judgment is brought to France, where such a judgment would be enforceable against the debtor's guarantor, it would be inappropriate for the French court to so enforce the Dutch judgment as this would give that judgment a greater effect than it has in the State of Origin.

6.45 Second, suppose that a German judgment has been handed down against a defendant ordering specific performance of a personal obligation which would be unenforceable in Germany.[690] Should that judgment be brought to England for enforcement, it would be inappropriate to grant *exequatur* to the judgment and then proceed to apply English measures of execution for a similar judgment which would be contempt of court proceedings.

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[688] D Foussard, 'Entre Exequatur et Exécution Forcée' [1996-1999] Travaux du Comité Français de Droit International Privé 175, 177 who also distinguishes voluntary execution, that is, the satisfaction of the judgment by the debtor.

[689] The first of these can be seen in G Droz, *Compétence judiciare et effets des jugements dans le marché commun* (Dalloz, Paris 1976), 281.

[690] See the discussion of German law and such orders at §2.29-§2.32.

6.46 Therefore, despite measures of execution being a matter for the national court, further restrictions have been added to the basic *Deutsche Genossenschaftsbank* principle.

2. THE *HOFFMANN* PRINCIPLE

6.47 In *Hoffmann v Krieg*,[691] one of the questions referred to the ECJ was what it meant to recognise and enforce a foreign judgment. The ECJ explained:[692]

> '...a foreign judgment which has been recognised by virtue of Article 26 of the Convention must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given.'

This was consistent with the view expressed in the Jenard report which stated that '...there is no reason for granting to a foreign judgment rights which it does not have in the country in which it was given.'[693]

6.48 This approach provides solutions to the two examples cited above.[694] The Dutch judgment will not be enforced by the French courts against the guarantor as that would give the judgment creditor greater rights than he had under Dutch law.[695] Similarly, the

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[691] n682. The facts of the case are discussed at §3.23.

[692] *Ibid*, [11].

[693] Jenard Report, 48.

[694] §6.44-§6.45.

[695] The view of Droz (n689).

German judgment will not be enforced by the English courts by contempt proceedings as that would give the judgment creditor greater rights than he had under German law.

6.49 However, there must also be constraints on this limitation. Suppose a French judgment ordering the judgment debtor to pay the judgment creditor £500 was brought to England for enforcement. Suppose that under French law the judgment could be executed against certain of the judgment debtor's assets, but not others, for example his work tools. Suppose that English law was similar but the definition of work tools was narrower and therefore the judgment creditor can enforce against more assets. It cannot be the case that the English court, under such circumstances, must make a thorough investigation of the limits of the French law of execution of judgments to determine against which tools it can execute against.

6.50 The case of *Coursier v Fortis Bank*[696] is instructive in dealing with this issue. The Coursiers were ordered by the French courts to pay LUF 563,282 with statutory interest and costs to Fortis bank. A court-supervised liquidation was then ordered which was finally terminated for lack of sufficient assets by the French courts a year and a half later. Subsequently, Mr Coursier found paid employment in Luxembourg whilst continuing to reside in France. Fortis applied to the Luxembourg Magistrate's court for an attachment of Coursier's wages in Luxembourg. In order to achieve this, Fortis obtained an order for enforcement of the French judgment under Articles 31 and 32 of the Convention. Mr Coursier argued that the French judgment was void due to the termination on the basis of lack of sufficient assets. The French law that allowed this termination did not apply to creditors' substantive rights but to their ability to take legal action against the debtor to

[696] [1999] ECR I-2543.

obtain satisfaction of those rights. The ECJ held that 'the question whether a decision is, in formal terms, enforceable in character must be distinguished from the question whether that decision can any longer be enforced by reason of payment of the debt or some other cause.'[697] As the Brussels Convention does not regulate the execution of judgments, Article 31 solely refers to the enforceability of judgments in formal terms, and not to the circumstances in which such decisions may be executed in the State of origin.

6.51 The ECJ in this case is drawing an exceptionally similar distinction to that in the common law case of *Huber v Steiner*,[698] where a distinction is made between limitation periods which extinguish the cause of action and limitation periods which merely prevent the cause of action being claimed on at trial.

6.52 Indeed, the approach of the common law in the early 19th Century is particularly helpful in solving the problem. The answer one gets from this case law is that measures of execution are a matter for the *lex fori*. However, in certain circumstances, the measures of execution available indicate the scope of the claimant's rights in which case the English court should attempt to tailor its measures of execution to replicate these rights. This can be seen in the arrest cases in the late 18th and early 19th Century. The cases are concerned with choice of law and their fate is more thoroughly discussed in Chapter 7,[699] but *Melan v Duke of Fitzmaurice*[700] is particularly helpful for our present difficulty. In

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[697] *Ibid*, [24].

[698] *Huber v Steiner* (1835) 2 Bing NC 205, 132 ER 80.

[699] Below, §7.91 - §7.99.

[700] *Melan v Duke of Fitzjames* (1797) 1 Bos & P 138, 126 ER 822.

Melan, the defendant owed the claimant a debt due to an instrument executed in France. The question for the court was whether the claimant could have the defendant arrested on the debt. French law was put into evidence, stating that unless a bill of exchange was used the only measures of execution possible were against property and not against the person. The majority, Heath J dissenting,[701] decided that they had to determine what the content of the obligation was under French law and, on the basis that French law did not permit arrest, held that the English law should not permit arrest of the defendant. Eyre CJ explained:

> 'If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it.'

Thus, whilst accepting that measures of execution are a matter for the *lex fori*, the Court took account of the foreign measures of execution in order to determine the content of the obligation and acted accordingly.

6.53 The approach of the Court in *Coursier v Fortis* seems a sensible one. Measures of execution are a matter for the *lex fori*. Where, however, limitations exist on the measures of execution which would be available in the State of Origin for the particular judgment at hand for reasons related to the substantive rights of the parties, the receiving court should tailor its measures of execution to accommodate this. It will often be problematic to determine whether the limitation does relate to the substantive right or not and thus

[701] Heath J's dissent was preferred in the later case law, starting with the judgment of Lord Tenterden CJ in *De la Vega v Vianna* (1830) 1 B & Ad 284, 109 ER 792.

there will be an inevitable element of unintended discretion when applying this rule but it appears preferable to a blunt rule that measures of execution will always be governed by the *lex fori*.[702]

3. THE *ORAMS* PRINCIPLE

6.54 Much of the above is, or should be, uncontroversial in broad outline even though many will disagree over the finer details. The present principle, however, is more controversial. Three suggestions had been put forward for what it means to recognise and enforce a judgment under the Regulation.[703] First, the judgment could be given the same effects as it has in the State of Origin. Second, the judgment could be given the same effects as a similar order granted in the Receiving State. Third, the judgment could be given the same effects as it has in the State of Origin but no greater effects than a similar order in the Receiving State. The ECJ in *Hoffmann*, as cited above,[704] had seemingly taken the first of these views,[705] in conformity with the Jenard Report.[706] This was in contrast to the approach of AG Darmon[707] who had endorsed the view of Droz[708] that the third of these solutions was the most appropriate. AG Darmon explained:[709]

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[702] Later adopted by the common law, see §7.98-§7.99.

[703] Kropholler (n661), 398.

[704] §6.47.

[705] This was certainly the view of Kropholler (n661), 398.

[706] Also cited above, §6.47.

[707] [AG20]

[708] Droz (n689), 278.

[709] [AG20].

> '...a dual limit should be imposed: the judgment cannot have greater effects in the state in which enforcement is sought than it would have in the State in which it was delivered, nor can it produce greater effects than similar local judgments would. That second limitation is founded on the need to harmonise interpretations and the desirability of preventing excessive recourse to the public policy exception.'

In the paragraph cited above,[710] it is clear that the ECJ only endorsed the first of these limitations.

6.55 However, the ECJ in *Apostolides v Orams*[711] appears to have altered its view and sided with the Droz approach. AG Kokott made no reference to this aspect of the *Hoffmann* decision,[712] but the ECJ stated in the course of their judgment:[713]

> '...although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given (see *Hoffmann*, paragraphs 10 and 11), there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin (see the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

[710] §6.47.

[711] *Apostolides v Orams* (n683).

[712] AG Kokott refers, in fn50, to the paragraph in *Hoffmann* concerning public policy: [AG21].

[713] *Ibid*, [66].

(OJ 1979 C 59, p48) or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have.'

The final aspect of this paragraph adds to the original approach in *Hoffmann* and the Jenard report. Unfortunately, the ECJ provides no reasoning for why it has changed its view, or why it was even necessary to alter its view on the facts of *Apostolides*, the issue being whether the Cypriot judgment was sufficiently enforceable to be enforced in England, and not how a similar English judgment would be enforced.

6.56 Despite the ECJ's alteration of its previously adopted approach, it is submitted that the present approach, which involves some form of cumulation of the two laws, is preferable so long as it is kept within proper boundaries. The danger is that it can cause confusion and is open to abuse.

6.57 The first point of importance is that the *exequatur* process always requires some form of rendering of the foreign judgment into the minimum procedural standards, and form, of the receiving court despite its perception as being a mere rubber stamping exercise. Suppose the French court orders the defendant to pay the claimant £10,000 plus interest from 1st January 2009. The English court cannot simply approve this judgment. The rate of interest is not quantified. The bailiff cannot know the value of goods up to which he can seize. The English court therefore has to partake in a little gap filling exercise.[714] Equally, suppose an Italian court orders that the defendant must pay the claimant £10,000 in periodical payments, but fails to specify which amounts over what period. This may be because in the foreign court's legal system such questions are left to the enforcement

[714] For the argument that this must be done according to the law applicable to the obligation, see Foussard, (n688), 186.

officer.[715] Again, should this judgment come to England, a gap filling exercise must occur. Thus, it can be seen that the *exequatur* involves, to some extent, and certainly without reviewing the substance of the claim, the receiving court ensuring that the foreign judgment is sufficiently certain for the purposes of the domestic legal system. It should be noted that the receiving court's amendments cannot be characterised as concerning measures of execution. They concern the content of the enforceable judgment.

6.58 It is not simply where the receiving court must fill in the gaps of the foreign judgment where some modification of the foreign judgment occurs when rendering it enforceable in the receiving court's legal system. Suppose that the French courts have granted the claimant an order for *execution forcée en nature*[716] of a contractual obligation by the defendant. This order is then brought to an English court and the English court renders the judgment enforceable in England. When executing this judgment the English courts will undoubtedly treat it as an order for specific performance. This order will inevitably be slightly different from the French order of *execution forcée en nature*. In effect, the English court will render the French order into the closest English order.

6.59 This is the well-known doctrine of transposition,[717] but applied to turning foreign orders into domestic orders, as opposed to foreign rights or concepts into domestic ones in the context of choice of law. This doctrine is triggered where the legal consequences of one

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[715] Discussed in the new Schlosser Report, [509].

[716] Similar to an order for specific performance.

[717] This doctrine is much less well-known in England than it is on the Continent. It was first discussed by H Lewald in his Hague Lectures of 1939: H Lewald, 'Règles Générales des Conflits de Lois' (1939) 69 Académie de Droit International Recueils des Cours 5, 127-130.

law must be translated into the legal consequences of another. A useful example[718] is that of a German will relating to English land. Whilst English law will govern the disposal of immovables within England, the testator's intentions are expressed in terms of German law. If the will contains the appointment of a *Vorerbe* and a *Nacherbe*, English law knows of no such institution. It must attempt to find an institution which bears the closest resemblance to the German institution. A further example[719] can be seen in the context of movable property. If the claimant holds movable property in England, his rights are determined by English law as the *lex situs*. Should the claimant then travel with his movable property to France, French law will then apply as the *lex situs*. However, his right has changed. His right to the property in England will not be identical to his right to the property in France. French law will of course take as its starting point the right that the claimant had before he entered the jurisdiction, but this right will be used to inform the right the claimant has under French law. The rights are not going to be exactly the same, and thus a transposition is required. The English right is translated into the closest French right.

6.60 Thus far, it has been demonstrated that *exequatur* is not simply a question of rubber stamping the foreign judgment. It involves at least some tinkering with the judgment so that it fits within the receiving court's legal system. The examples given, that of gap-filling to fulfil minimum procedural requirements of the receiving court, and simple transposition from the foreign remedy into an exceptionally similar, albeit slightly different, domestic remedy, are quite obvious. The much more difficult issue arises where the receiving court would not award a similar remedy to the foreign court, whether on the

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[718] Taken from K Lipstein, *Principles of the Conflict of Laws, National and International* (Martin Nijhoff Publishers, The Hague 1981), 102.

[719] Based on the example given by Lewald (n717), 129.

facts of the case, or because it has no such similar order. The former could arise where a foreign court has awarded specific performance of a contractual obligation in circumstances where the obligation is too vague to enforce, or where a foreign court has granted a periodical payment order outside the very limited circumstances where English law would do so. There are three situations in which this may occur. First, the English court would not make such an order for reasons related to the merits of the individual claim. Secondly, the English court would not make such an order because it has no similar order at all. Thirdly, the English court would not make such an order because of procedural inconvenience. These three situations will be dealt with in turn.

6.61 The first of these is by far the easiest. Suppose the foreign court has granted specific performance of a contract. The English court would not have done so on the grounds that damages would have been an adequate remedy.[720] If the judgment is brought to England for enforcement, it should be clear that the English court cannot substitute an English remedy for the foreign one. This would amount to a review of the substance of the claim, which is precluded by Article 36 of the Regulation.

6.62 The second situation arises where the English court has no such order. This is more difficult, but only marginally so. It has been said that the obligation on the receiving court is two-fold: the foreign judgment cannot have greater effects in the receiving state than it has in the state of origin, nor can it produce greater effects than similar local judgments would.[721] Clearly, where there could never be a local judgment in the terms of the foreign order, to render this enforceable would be to go further than is required under the

[720] See §7.27.

[721] *Apostolides v Orams* (n683), [66], cited above §6.55. Droz (n689), 276.

Regulation. Furthermore, if the *exequatur* procedure is seen as converting the foreign order into a domestic order,[722] rather than simply rubber stamping the foreign order,[723] it becomes clear that the English court must render the foreign judgment enforceable by finding the closest domestic order it can. This is exactly the approach taken by the German courts in their (continuing)[724] struggles to enforce English freezing injunctions.[725] The German courts do not have an equivalent order. Therefore when the English courts grant such an order, and the party benefiting from the injunction seeks to have it enforced in Germany, the German courts must attempt to translate the order into an equivalent, or almost equivalent German order. It is useful to explain how the German courts have dealt with this problem.

6.63 In *European Consulting Unternehmensberatung*,[726] the claimant had obtained a freezing injunction from the English court and sought to enforce it in Germany. The Court held that such a judgment was a judgment for the purposes of Article 31 of the Convention and therefore the German courts were obliged to enforce it. However, there was a difficulty in enforcing the order in the German courts as the *Zivilprozeßordnung* has no similar order. Thus, the court canvassed three potential options: (i) an arrest order; (ii) a temporary injunction; and (iii) an injunctive title. The court settled on the third of these options as most closely representing the English freezing injunction. The first, an arrest

[722] This is the view of AG La Pergola in *Coursier v Fortis Bank SA* , n696, [AG13].

[723] AG La Pergola refers to this as the French law approach, in footnote 38 of his opinion in *Coursier v Fortis Bank SA*, *ibid*.

[724] The later cases have been more concerned with the public policy implications of freezing injunctions: OLG Frankfurt 27.3.1998, OLGR 1998, 213; OLG Frankfurt 2.12.1998, OLGR 1999, 74; OLG Karlsruhe 14.3.2001, FamRZ 2001, 1623.

[725] OLG Karlsruhe, 19.12.1994, commented on by A Zuckerman and J Grunert '*European Consulting Unternehmensberatung AG v Refco Overseas Limited*: Zur Anerkennung und Vollstreckbarerklärung einer Mareva-Injunction in Deutschland' (1996) Zeitschrift für Zivilprozeß International 89.

[726] *Ibid*.

order, operates *in rem* and paves the way for an attachment of the property subject to the order. This is clearly not the same as the freezing injunction, which operates *in personam*, and thus is not directed at particular assets. The second, a temporary injunction, is similar to a *quia timet* injunction in English law. The *Oberlandesgericht* held that such an order was concerned with the protection of substantive rights and was therefore inappropriate. Therefore, it was held that s890 ZPO provided the closest remedy to the English freezing injunction. This has been criticised as it does not bind third parties to the order.[727] Thus, it is suggested that s829 ZPO should apply instead, which acts similarly to a third party debt order in English law.[728] This is on the basis that the freezing injunction is a '*quasi in rem* remedy' in any case, and therefore the fact that an actual attachment occurs under s829 ZPO should not be too troubling. This is not the concern of the present chapter, but the *quasi in rem* analysis has been recently, and strongly, rejected by the Court of Appeal.[729]

6.64 This approach of translating the foreign order into the closest domestic order also has support from AG Kokott in her opinion on the *Tedesco* case.[730] The Italian court had made a request of the English court under the Evidence Regulation to perform a *descrizione*, the English court rejecting the request. In reply to the objection that the English court had no method of taking evidence itself but left it to the parties, AG Kokott explained that the requested court 'must...make all possible efforts, as far as the available

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[727] *Ibid*.

[728] *Ibid*, 101-2.

[729] *Munib Masri v Consolidated Contractors International Company SAL (Re: Receivership order)* [2008] EWCA Civ 303, [2009] 2 WLR 621.

[730] C-175/06 *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* [2007] ECR I-7929.

means permit, to put into practice the measure governed by the law of the requesting State.'[731]

6.65 The third situation is the most difficult. This is where the foreign court awards an order which is known to the English legal system but an English court would not award that order on the facts on the basis of actual or perceived procedural difficulties. A useful example of this would be the periodical payment order. Periodical payment orders, in English law, will only be awarded under specified circumstances.[732] If a French judgment grants a periodical payment award outside these circumstances then the question arises whether the English court must enforce this judgment. It cannot be said that the English legal system does not contain a similar foreign order as periodical payment orders can be made. Furthermore, it cannot be said that the English court is concerned with reviewing the substantive merits of the foreign decision. To enforce the foreign decision would simply be too procedurally inconvenient for the receiving court. It is thought that where the concern is simply for reasons of procedural inconvenience, the English court can substitute the foreign order for the closest English order which it is procedurally convenient to award. This ties in with the analysis on foreign remedies and choice of law which does allow for differing procedures between Member States at the court order stage.[733] Consider the following example under the Rome I Regulation. X, an Englishman, and Y, a Frenchman, conclude a contract under which they agree to negotiate a subsequent contract in good faith. The first contract contains a French choice of law clause and an English choice of court clause. After a dispute, the English courts

[731] *Ibid*, [AG108].

[732] Either under an order for specific performance of a contract (*Beswick v Beswick* [1968] AC 58), or under the Damages Act 1996, s2B, for future pecuniary loss in respect of personal injury or death.

[733] Discussed extensively in Chapter 7.

take jurisdiction and it is argued by counsel for Y that French law would specifically enforce the contract. The English court, under Article 12(1)(c),[734] can escape this application of French law on the basis that it is not within its procedural powers to award such a remedy. However, suppose instead that rather than having proceeded in the English courts, X and Y agreed to submit to the French courts, thereby varying their original agreement, allowing the French courts to take jurisdiction.[735] The French court, applying French law, awards specific performance as expected. Y then takes the judgment to England to have it enforced under Chapter III of the Brussels Regulation. Is it the case that the English court is now stymied? Must it enforce the French court order to such an extent that it orders specific performance of the contract? The answer is surely no: if it could plead limitations of its procedural power in the context of choice of law it must be able to do so in the context of the enforcement of judgments. A similar example can be constructed out of the Rome II Regulation, and the application of Articles 15(c) and (d).

6.66 It is interesting, at this point, to sneak a sidewards glance at the approach of the common law to enforcing foreign judgments. The common law is bound to have far less trouble with incompatibilities between the foreign order and the available English orders because the common law is perceived[736] only to permit the recognition and enforcement of judgments for a debt or definite sum of money.[737] However, the House of Lords decision

[734] This is the same text as Article 10(1)(c) of the Rome Convention.

[735] Under Brussels I Regulation, Article 24.

[736] This has been questioned by R White, 'Enforcement of Foreign Judgments in Equity' (1982) 9 Sydney Law Review 630.

[737] Dicey, Rule 35, §14R-018.

in *Miliangos v George Frank (Textiles) Ltd*,[738] reversing the previous practice of the English courts,[739] allowed judgments to be given in a foreign currency. This opens up the possibility that a foreign judgment for a definite sum of money, expressed in a foreign currency, can be brought to England for recognition and enforcement. It is thought,[740] in such circumstances, the English court should recognise and enforce the judgment but also translate the foreign currency into sterling equivalent so that it can be executed if necessary.[741] This is a neat example of exactly what is suggested above. The foreign order is rendered enforceable, but for procedural purposes it is translated into the closest English orders to aid execution.

4. FURTHER RESTRICTIONS ON MEASURES OF EXECUTION

6.67 The previous sub-section sought to explain how foreign court orders are brought into the receiving court's legal system. This involves a superficially simple process which actually turns out to be very complex. The result is that the foreign court order must be translated into the closest similar domestic order, without giving the foreign order greater effects than it has in the State of Origin, nor creating severe procedural inconvenience to the receiving court's legal system. Even once this has been achieved, there is a further issue over the ability of the receiving court to suspend or terminate the execution of the

[738] [1976] AC 443.

[739] *Manners v Pearson & Son* [1898] 1 Ch 581; *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007.

[740] Dicey, §36-087.

[741] Dicey, Rule 242(2), §36R-081. Also, see *Batavia Times Publishing v Davis* (1978) 88 DLR (3d) 144, affirmed in *Batavia Times Publishing v Davis* (1979) 102 DLR (3d) 192, where Carruthers J, at [3], endorses the view of Montgomery JA in *Baumgartner v Carsley Silk Co* (1971) 23 DLR (3d) 255, that a judgment which only states the debt in a foreign currency is not susceptible to execution.

judgment, even where it can still be executed in the State of Origin. A few examples of this can be posited.

6.68 The first concerns a stay of execution.[742] Suppose a judgment is given by a Belgian court ordering the defendant to pay a certain sum to the claimant. This judgment is brought for registration in England. The judgment is recognised, and enforced, under the proceedings of the Brussels I Regulation, but when the claimant seeks to execute the judgment against assets of the defendant's, the defendant seeks a stay of execution, which the court grants.[743] The issue has arisen outside the context of the Brussels I Regulation in the French *Cour de Cassation*. In *Bidermann Zylberberg v RHI Holdings*,[744] a New York judgment requiring the defendant to pay the claimant $12m plus interest was brought for enforcement in France. The defendant asked the court to exercise its discretion to postpone the execution of the judgment for two years under article 1244(1) of the French Civil Code so he could restructure his companies and negotiate with those companies' shareholders with a view to paying off the debt. The French court decided that the period of grace was a measure of enforcement and this was a matter for the *lex fori*. However, as this was only an application for authorisation to enforce the foreign judgment the matter was not properly brought up and should have been argued at the execution stage. The question arises whether, had the judgment been from a Member State court, and the submission for a stay of execution been made at the execution stage of proceedings, the French court would have been permitted to grant such a stay for two years.

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[742] E.g., the power to stay execution by a writ of control in special circumstances: RSC Order 47, r1.

[743] This example is based on *Noirhomme v Walklate* [1992] 1 Lloyd's Law Reports 427, where English law was applied to the issue, but on the facts no stay was granted.

[744] [1996] ILPr 189 (Cour de Cassation).

6.69 The second example involves the termination, rather than suspension, of all execution procedures. This occurred in the case of *Duer v Frazer*.[745] A judgment was granted by a German court ordering the payment of a certain sum of money by Frazer to Duer. Four months later, the German judgment was brought to England for enforcement. Duer attempted to find Frazer and execute the judgment against him. Thirteen years after Duer had registered the judgment in England, he attempted to execute it in England against Frazer.[746] As required under English procedural rules, Duer had to apply to the court for permission to execute the judgment as the judgment had been granted over six years prior to the current proceedings.[747] Evans-Lombe J refused permission, despite counsel for Duer submitting that the German judgment was enforceable as of right for thirty years after it was granted.

6.70 Thus, the courts seem to have little difficulty in applying national law to determine whether to suspend or terminate execution of a foreign judgment. However, the court in *Hoffmann v Krieg*,[748] whilst admitting that measures of execution were a matter for the receiving court, stated:[749]

> 'the application, for the purposes of the execution of a judgment, of the procedural rules of the State in which enforcement is sought may not impair the effectiveness of the scheme of the Convention as regards enforcement orders.'

[745] [2001] 1 All ER 249.

[746] Frazer, it turned out, was in St Nevis, and the reason for getting an order for execution in England was so that the judgment could be brought to St Nevis for a more efficient enforcement process there.

[747] See RSC Order 46 rule 2(1)(a).

[748] n682.

[749] *Ibid*, [29].

The difficult question is at what point the receiving court is impairing the effectiveness of the Convention. Clearly if the receiving court suspends execution for a week as it needs to make further inquiries over the assets of the judgment debtor this will not fall foul of the rule. However, if the receiving court refuses to execute the judgment because of a matter relating to the substantive claim then this will fall foul of the rule. Unfortunately, as in other areas of the Brussels I Regulation,[750] no hard and fast line can be drawn, it being better to leave determination to individual cases.[751]

III. CONCLUSION

6.71 The enforcement of foreign remedies is far from simple. The more obvious questions that have come up in the case law concern whether the foreign court order is the type of order that is enforceable. That is, is it a judgment within the meaning of Article 32 of the Brussels I Regulation. In particular, the status of default judgments has arisen most recently. The harder questions, it seems, are the less obvious questions. National legal systems are built on the basis that there is an seamless move through right, trial, court order and execution. The enforcement of foreign court orders jumps in half-way through. This can cause two main problems. The first of these is where there is an incompatibility between the foreign court order and the domestic legal system. It has been argued that the

[750] An interesting analogy can be drawn between this difficulty and that of the extent to which an English court can stay a claim when that court has jurisdiction under Article 2. *Owusu v Jackson* states that a quasi-permanent stay is impermissible, but the courts seem happy to grant stays on case management grounds: *Prifti v Musini* [2005] EWHC 832 (Comm). A line has to be drawn somewhere between the two and it is not evident where the line is to be drawn other than merely stating that the procedural decisions of the English court should not impair the effectiveness of the Convention.

[751] Though one does suspect that *Duer v Frazer* was wrongly decided.

obligation to enforce the foreign judgment only extends to rendering it into the closest legal order that the domestic legal system contains. Even where the domestic legal system has a similar order, where it is not awarded on similar facts due to the procedural inconvenience that is caused to the domestic legal system, the receiving court can award a domestic order which most closely replicates the foreign court order without causing procedural inconvenience. The second of these problems centres around the relationship between court orders and the execution of them. The Brussels I Regulation is only concerned with the former, and not the latter. However, there is a clear relationship between the two types of orders and this relationship has been explored.

7

Remedies and Choice of Law

7.01 The present chapter seeks to answer one question: if the *lex causae* would grant a court order different from that of the *lex fori*, which of these laws will apply?

7.02 The basic answer is that the *lex causae* applies subject to its application being too inconvenient for the forum court's machinery. Where the application of the *lex causae* is too inconvenient the forum court must grant the closest convenient order it has.

7.03 This basic answer must be qualified in two important respects. First, the *lex fori* will determine ancillary orders, despite the substantive right being governed by a foreign law. However, references to that foreign law, and in some circumstances a third law, may be both appropriate and necessary. Second, orders for the enforcement of the judgment will be governed by the *lex fori*. However, again, it is sensible for the *lex fori* to refer to the *lex causae* of the substantive right to prevent the seam between the two laws altering this substantive right.

7.04 The chapter is set out in five parts. The slightly easier issues concerning contractual remedies (I) and non-contractual remedies (II) are dealt with first, followed by more complex issues concerning the role of measures of execution in the choice of law process (III) and whether there exists a choice of law for ancillary orders, such as provisional or protective measures (IV). The final part discusses whether the position under the Regulations is actually any different to the position under the common law (V).

I. CONTRACTUAL REMEDIES AND CHOICE OF LAW

1. WHAT ARE CONTRACTUAL REMEDIES?

7.05 Contractual remedies are court orders which vindicate rights arising from a contract. In English law, there are three main contractual remedies: (i) an order for the payment of an agreed sum; (ii) an order for the payment of damages; and (iii) an order for specific performance. Traditionally, orders (i) and (iii) are treated together, both being orders enforcing the primary rights of the contracting parties.[752] Order (ii) enforces the secondary rights of the contracting parties.

2. LEGISLATIVE PROVISIONS AND APPLICATION

7.06 Article 12(1)(c) of the Rome I Regulation, which is materially identical to Article 10(1)(c) of the Rome Convention, provides the crucial rule for choice of law and contractual remedies. This states that the 'law applicable to a contract by virtue of this Regulation shall govern in particular':

[752] E.g. see Peel, *Treitel on the Law of Contract* (12th edn Sweet and Maxwell, London 2007) chs 20 and 21.

'(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

Issues regarding the assessment of damages are dealt with in the next chapter. The present focus is on two separate issues. First, does this provision mean that the type of court order which would be awarded by the governing law must be awarded by the forum court? Second, if the answer to this is yes, what restrictions exist? A variety of sub-issues arise in the context of these questions.

a. Does Article 12(1)(c) require the forum court, *prima facie*, to award the same court order as the law governing the contract?

7.07 The text of the Regulation does not assist. In English law, in one sense an order for specific performance is not a consequence of breach: 'it is not an essential pre-requisite of specific performance that the defendant is in breach of contract.'[753] However, practically, there will have been either anticipatory breach or actual breach and thus, in this sense, the claimant requesting an order for specific performance will be a consequence of breach.

7.08 Even if one accepts that an order for specific performance is a 'consequence of breach', in the sense that it follows a breach, not all that follows a breach can be a consequence of breach for the purposes of the Article. A writ of *fieri facias* may causally follow from the

[753] Burrows, *Remedies for Torts and Breach of Contract* (OUP, Oxford 2004), 456.

breach of a contractual obligation, but it can hardly be described as a consequence of breach. The Article provides no explanation of where one stops in the continuing line from breach to eventual execution.[754] Therefore, one must look elsewhere for an answer.

7.09 The *travaux préparatoires* of both the Rome Convention and Rome I Regulation are unhelpful in attempting to answer this question. The Giuliano and Lagarde Report simply states:[755]

> 'The expression "consequences of breach" refers to the consequences which the law or the contract attaches to the breach of a contractual obligation, whether it is a matter of the liability of the party to whom the breach is attributable or of a claim to terminate the contract for breach. Any requirement of service of notice on the party to assume his liability also comes within this context.'

7.10 This may suggest that Article 12(1)(c) applies to the exclusive list of: (i) termination; and (ii) the assessment of damages. Termination is concerned with whether or not a party must still perform his obligations and it is difficult to see why this is not covered by Article 12(1)(b) which states that the law applicable to the contract shall govern 'performance'.

7.11 This leaves the 'assessment of damages'. The assessment of damages is the determination of the content of the secondary obligation, in much the same way as 'performance' determines the content of the primary obligation. It can thus be argued that

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[754] Discussed in Fawcett and Carruthers, *Cheshire, North and Fawcett on Private International Law* (14th edn OUP, Oxford 2009), 756.

[755] Giuliano and Lagarde Report, 33.

the Report suggests that only the content of these obligations is determined by the governing law but the court orders used to vindicate them are not. However, were this to be the correct interpretation of the Report and the text, the reference to 'within the limits of the powers conferred on the court by its procedural law' looks rather odd. The determination of the content of the primary and secondary obligations will rarely cause procedural difficulty. Of course, the law may be difficult,[756] but this is not a problem created by procedural law of the forum. It is the *type of order* which creates difficulties for the forum's procedural law. Let us suppose that the governing law of the contract stipulates that the claimant is owed a secondary obligation to be paid by the defendant £5 per week for two years, but the forum court is unable to grant anything other than lump sum awards. This may be thought of as the classical example of the operation of the 'limits of...procedural law' exception.[757] However, if one takes the view that the secondary obligation is governed by the law applicable to the contract, but the court order is not, then a forum that can only grant lump sum awards is never asked to grant a periodical payment award, and thus the exception does not apply. The forum can liquidate the sum, allowing for early payment, and award the payment of a lump sum. However, if one takes the view that the court order is also governed by the law applicable to the contract this will create procedural difficulties for the forum court as it is expected to grant a periodical payment award. Article 12(1)(c) permits the forum court to pray in aid its procedural limitations and therefore grant a lump sum award.

[756] E.g. see the comments of Waller LJ on the Dutch law of social security deductions in *Roerig v Valiant Trawlers* [2002] EWCA Civ 21, [2002] 1 WLR 2304, [23]-[27].

[757] See P Lagarde, 'The Scope of the Applicable Law in the EEC Convention' in P North (ed) *Contract Conflicts: The EEC Convention on the Law Applicable to Contractual Obligations* (North-Holland, Amsterdam 1982), 36.

7.12 There is a further, and even more compelling, argument in favour of interpreting Article 12(1)(c) as extending to the court order that would be awarded under the foreign law. The following example is useful to demonstrate this argument:

> X, an Englishman, contracts with Y, a Frenchman, to sell Y a ticket to the first day of the Ashes Test Match at Lords for £500. The contract is governed by French law. Y pays the money but X fails to deliver the ticket. Under French law, Y is entitled to enforced performance of the delivery obligation. Under English law, Y would not be entitled to specific performance of the delivery obligation.

Y decides to litigate the issue in France and is awarded an order for specific performance. Y then brings the judgment to England for enforcement. The English courts cannot review the judgment on substantive grounds and must enforce the order for specific performance. Suppose, instead, that Y decides to litigate in England. It would be odd if the rules of the Rome I Regulation were to be interpreted as stipulating that the English court can apply its own court order and simply grant damages, given what would occur if Y decided to litigate in France.

7.13 Thus, it is thought that Article 12(1)(c) requires the forum court to apply the same court order that the law applicable to the contract would, but of course this can only be done within the limits of the forum court's procedural powers. The English academic authority displays considerable unease for this position whilst on the whole accepting it.[758] Dicey 'with hesitation' comes to the conclusion that specific performance is caught by the

[758] D Lasok and P Stone, *Conflict of Laws in the European Community* (Professional Books Ltd, Abingdon 1987), 370; Dicey, §32-203; Yeo, *Choice of Law for Equitable Doctrines* (OUP, Oxford 2004), §4.28.

Article.[759] However, no argument is provided for what causes the hesitation, other than this was not the position of English law,[760] and that it turns on what is meant by the 'consequences of breach'. Professor Briggs states that the matter is 'unclear' in the case of specific performance, but seems to take the view that all other contractual 'remedies' are caught by the law applicable to the contract.[761] Unfortunately, it is not clear what is meant by the word 'remedies' in this context. If it means simply the assessment of damages, in the sense of the determination of the content of the secondary obligation, it is undoubtedly correct. However, if it extends to, for example, orders for the periodical payment of damages, it is difficult to see on what basis one can distinguish specific performance and such orders in terms of whether or not they result from the consequences of breach. McClean and Beevers take the view that contractual remedies such as 'damages, injunctions or orders for specific performance, will be determined by reference to the applicable law.'[762]

7.14 The view of French academics is certainly more supportive of interpreting Article 12(1)(c) as covering orders granted by the court.[763] This is not unlikely to be the case given that much of the complication in the French law of enforced performance of contractual obligations occurs post-judgment, when applying measures of execution.[764]

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[759] §32-203.

[760] Relying on *obiter* comments in *Chaplin v Boys* [1971] AC 356 and the first instance case of *Baschet v London Illustrated Standard* [1900] 1 Ch 73. For analysis, see §7.86-§7.90.

[761] Briggs, *Conflict of Laws* (2nd edn OUP, Oxford 2008), 175, fn102.

[762] McClean and Beevers (6th edn Sweet and Maxwell, London 2005), 353.

[763] T Vignal, *Droit International Privé* (Armand Colin, Paris 2005), 240; P Mayer and V Heuzé, *Droit international privé* (9ème edn Montchrestien, Paris 2007), 557-8; P Lagarde 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 Juin 1980' Revue critique de droit international privé 287, 334.

[764] See Terré, Simler and Lequette, *Droit civil: les obligations* (9th edn Dalloz, Paris 2005), 1059-1086.

7.15 Therefore, it is submitted that whilst the text of the Regulation is ambiguous, the most sensible conclusion is that court orders vindicating contractual rights, that is orders requiring the payment of an agreed sum, or damages, and orders for specific performance, are governed by the law applicable to the contract. This has the guarded support of the English academy, the support of the French academy, and can be supported on principle.

7.16 However, this answer raises a few ambiguities that have not yet been addressed. First, it is assumed that if the foreign law would grant an order specifically enforcing the primary obligations of the parties then the English court will be applying this foreign law by granting an order of specific performance. But this is not necessarily true. An English order of specific performance will not be quite the same as a French order of *exécution forcée en nature*. An initial reaction to this suggestion will probably be that it would be ludicrous to expect an English court to grant a foreign order. Yet one may question whether this is entirely ludicrous in light of the direction the European legislature appears to be taking with the suggested abolition of *exequatur*.[765] If *exequatur* can be abolished, and therefore a French order of *exécution forcée en nature* will be directly enforceable in the English legal system, albeit the English court will apply English measures of execution to enforce the order, it seems less unusual for an English court to grant an order of *exécution forcée en nature* and then enforce it using English measures of execution.

[765] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (21.4.2009), 4.

7.17 If one can get beyond the apparent oddity of such a conclusion, it does have some advantages. First, it accords more closely with the text than looking at the foreign law remedy and attempting to translate it into an English remedy. Second, if one simply adopts the foreign order and then enforces it, there is less chance of translating the order incorrectly. Third, as already mentioned, it would dovetail with the approach the European legislatures appear to be taking in the context of the Brussels I Regulation and the proposed abolition of *exequatur*: the foreign court determines the order and this order is enforced through domestic measures.

7.18 However, despite these arguments, it is submitted that the forum court should translate the foreign order into the closest forum order. To take any other approach would be impractical as when it comes to enforcing the order the forum's legal system will inevitably have to translate the order into a domestic order to determine how to enforce it. Furthermore, it is thought that the forum court will be complying with the underlying purpose of the Rome I Regulation if the court grants an order with the same effect as the order that would be granted under the foreign law.[766]

7.19 The second ambiguity is whether the forum court must apply the *status* of the foreign remedy as well as its *content*. This distinction between the status of the award and the content of the award has already been discussed.[767] Therefore, if the foreign court would grant a provisional order, as opposed to a final order, must the forum court also grant

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[766] On similar reasoning as seen in C145/86 *Hoffmann v Krieg* [1998] ECR 645; C-148/84 *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur* [1985] ECR 1981; and C420/07 *Apostolides v Orams* [2009] ECR I-0000. Discussed above, §6.40-§6.66.

[767] §2.15.

such an order, if it is within its procedural powers?[768] The present chapter has already linked the appropriate approach in applying foreign court orders in the choice of law process with the approach taken when enforcing foreign judgments. Given it seems accepted that should a provisional French court order be brought to England for enforcement then the English court will enforce it as a provisional order,[769] it appears appropriate that should a primary trial be taking place in England concerning an obligation governed by a foreign law, and that governing law would grant a provisional order, the English court should also grant such an order.

7.20 However, the forum court must be careful not to import aspects related to the status of the judgment which cannot be said to relate to the obligation itself. To give a simple example, the fact that the foreign court would award a default judgment due to what it would consider a defect in service but the forum court does not, would not mean that the forum court has to give a default judgment. This would be to import issues concerning the status of the order unrelated to the substantive obligation into the order.

b. If Article 12(1)(c) does require the forum court to apply the court orders of the law applicable to the contract, what restrictions exist and how are they to be applied?

[768] For more discussion of the procedural powers limitation, particularly its application to specific performance, see below, §7.21-§7.46.

[769] Dicey, §14-190.

7.21 A rule which required the forum court to award foreign remedies could not operate without some form of limitation. Sometimes the forum court will simply not have a remedy similar to the one that the applicable law to the contract would award.[770] This concern appears to be behind the restriction in Article 12(1)(c) which states that it only applies 'within the limits of the powers conferred on the court by its procedural law...'

7.22 This provision could be a lot more complex than many have supposed. The example of the operation of this limitation that is often given is the constant supervision bar on specific performance.[771] However, the text of the Regulation refers to the forum's procedural law. In what sense is the constant supervision bar part of English procedural law? It is not found in the text books on English Civil Procedure. Nor can it be found in the White Book. Simply put, what makes the constant supervision bar a matter of procedural law as opposed to substantive contract law?

7.23 It is thought that the simplest explanation for the provision can be provided by remembering the two aspects of the distinction between substance and procedure that were outlined in chapter four. One aspect of the distinction is that rights arising from the trial process will be governed by the *lex fori*.[772] This is not our present concern: an order for specific performance clearly vindicates contractual rights 'created' prior to the existence of the trial. The second aspect of the distinction is that where the forum court must apply the *lex causae*, but the application of the specific *lex causae* is too inconvenient for the forum court's machinery, the forum court can disapply that *lex*

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[770] E.g. see, at common law, the case of *Phrantzes v Argenti* [1960] 2 QB 19.

[771] E.g. Dicey, §32-203; Yeo, *Choice of Law for Equitable Doctrines* (n758), §4.28.

[772] §4.49-§4.54.

causae.[773] It is this aspect with which the limitation in Article 12(1)(c) is concerned. This not only explains the provision but also provides a tangible rule that the courts can apply. The burning issue then becomes how much inconvenience must the forum court put up with in order to fulfil its obligations under the Regulation? The forum court will be slightly inconvenienced whenever it has to apply a remedy different to the one it would have awarded had the *lex fori* applied. However, it is thought this will be insufficient inconvenience to attract the operation of the Article 12(1)(c) limitation. The framers of the Regulation would not have intended a double actionability rule for contractual remedies.[774] On the other side of the line, where the forum court considers the obligation too vague to be specifically enforced, but the foreign court would award an order of specific performance, it seems correct for the forum court to disapply the foreign law on grounds of inconvenience to the forum court's machinery. The court will not specifically enforce obligations whose enforcement it is unable to supervise. In such circumstances, the obligation on the forum court must be to apply to closest remedy it can, much like it should in the context of the enforcement of judgments,[775] or evidential requests.[776]

7.24 Beyond these examples, matters get far more difficult. The purpose of the next section is to look at the ten limitations on specific performance and discuss the potential operation of the caveat with respect to those limitations.

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[773] §4.24-§4.30. In particular, see Cook, .

[774] This argument is rejected, in the context of the similarly worded Article 15(d) of the Rome II Regulation, by O Boskovic, 'Le Domaine de la Loi Applicable' in S Corneloup and N Joubert (eds), *Le Reglement Communautaire 'Rome II' Sur La Loi Applicable Aux Obligations Non Contractuelles* (LexisNexis Litec, Paris 2008), 192-3.

[775] See §6.54-§6.65.

[776] See the opinion of AG Kokott in C-175/06 *Tedesco (Alessandro) v Tomasoni Fittings Srl and RWO Marine Equipment Ltd* [2007] ECR I-7929, [AG111]. The case was taken off the register before the ECJ could give judgment.

c. Practical Application to Specific Performance

7.25 Outside orders for the specific enforcement of a non-monetary obligation, there is little likelihood of a contractual remedy being too inconvenient to be awarded. The one exception to this may be a periodical payment award.[777] However, the House of Lords has granted a periodical payment award to vindicate a contractual obligation by using an order for specific performance[778] and it must be the case that the same considerations that apply to specific performance will apply to such an order. Therefore, the rest of this section will discuss potential procedural limitations on an order for specific performance in the English courts.

7.26 Taking the most comprehensive approach, there would appear to be ten potential limits on the award of specific performance in English law. These are: (i) adequacy of damages; (ii) severe hardship to the promisor; (iii) contract obtained by unfair means; (iv) inadequacy of consideration; (v) conduct of the claimant reprehensible; (vi) impossibility of performance; (vii) contracts involving personal service; (viii) performance would require constant supervision; (ix) obligation is too vague to specifically enforce; (x) promisee could not be made to specifically perform his obligations. The question is which of these can be used to disapply a foreign law that would grant an order of specific enforcement.

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[777] C Morse, *Current Law Statutes Annotated 1990* (Sweet and Maxwell, London 1991), commentary to Article 10(1)(c).

[778] *Beswick v Beswick* [1968] AC 58.

i. Adequacy of Damages

7.27 Specific performance is not considered the primary remedy upon breach of contract. The claimant must first demonstrate that damages are an inadequate remedy.[779] This would appear to be a clear-cut example of a non-procedural limitation. The reason for the limitation has nothing to do with the inconvenience of the court and everything to do with our conception of contract law.[780] Therefore, it would be improper for the English court to refuse an award of specific performance on this basis where the applicable foreign law would grant such an award.

ii. Severe Hardship to the Promisee

7.28 Where severe hardship would be caused to the defendant[781] if specific performance were to be awarded, the court will refuse to make such an award.[782] This limitation is a factor to be considered in the discretion and is not concerned with the inability of the court to

[779] Peel (n752), 1101-8; J Beatson, *Anson's Law of Contract* (28th edn OUP, Oxford 2002), 633.

[780] Potentially influenced by (subconscious) economic theory. For discussion of the economic theory behind specific performance see A Kronman, 'Specific Performance' (1978) 45 University of Chicago Law Review 351 and A Schwartz, 'A Case for Specific Performance' (1979) 89 Yale Law Journal 271.

[781] Sometimes the court will consider the hardship caused to a third party. In *Thames Guaranty Ltd v Campbell* [1985] QB 210 the court, relying on the speeches of Goff and Shaw LJJ *Cedar Holdings Ltd v Green* [1981] Ch 129, considered the hardship caused to a third party, joint owner of a house, when determining whether partial performance should be awarded of a charge that the other joint owner had agreed with the claimants.

[782] *Denne v Light* (1857) 8 DM & G 774; *Patel v Ali* [1984] 1 Ch 283. For a similar case involving a mandatory injunction, see *Jaggard v Sawyer* [1995] 1 WLR 269.

award specific performance in such a case.[783] Thus, the Article 12(1)(c) caveat will not be engaged.

7.29 However, there is a possibility of the public policy exception[784] being applied by a court where it thinks that an award of specific performance would be manifestly incompatible with the public policy of the forum due to the severe hardship caused to a party. If the ECJ's restrictive interpretation of the public policy exception in the context of the Brussels I Regulation is used here, there would have to be very unusual circumstances for it to apply.[785]

iii. Contract obtained by unfair means

7.30 The court may refuse to award specific performance where it considers that the contract has been obtained by unfair means, even if those unfair means are not sufficient to render the contract voidable.[786]

7.31 This cannot be considered a limit on the procedural powers of the court for two reasons. First, it is a mere factor in the discretion. Second, it is based on considerations of fairness, rather than practical convenience. The court could easily enforce an award of specific

[783] See *Patel v Ali*, *ibid*, 286-7.

[784] Article 21.

[785] See *Hoffmann v Krieg* (n766); C-78/95 *Hendrikman v Magenta Druck & Verlag GmbH* [1996] ECR I-4943.

[786] *Walters v Morgan* (1861) 3 DeGF&J 718(where P pushed D into accepting a mining lease renewal without giving him time to assess the real value of the property); *Malins v Freeman* (1837) 2 Keen 25(where, in *obiter* comments, Lord Langdale MR stated that where an agreement was made with the defendant in a state of intoxication, the court would not award specific performance).

performance against a duped defendant but it chooses not to. Thus, there is only a possibility of the public policy exception being applied in such circumstances and, again, this would be unlikely.

iv. Inadequacy of consideration

7.32 Whether specific performance can be refused due to inadequacy of consideration is a contentious issue.[787] Supposing the bar to exist, it must be founded on the equitable maxim 'equity will not assist a volunteer'. This bar is clearly not concerned with inconvenience to the courts' machinery and thus there is no scope for applying this rule if it exists.[788]

v. Conduct of the claimant reprehensible

7.33 There is authority for the proposition that, where the claimant's acts are particularly reprehensible, the court will not award him specific performance.[789] This would appear to be based on the maxim, 'he who comes to equity must do equity.'[790] It should be plain that this is not a procedural restriction on the court but a consideration of fairness and thus one that would not engage the Article 12(1)(c) caveat. Where the *lex contractus*

[787] See Burrows (n753), 495-6; Peel (n752), 1109-1110.

[788] Any suggestion based on equity transcending all choice of law (eg in *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156) is simply unarguable in the context of the Rome I Regulation.

[789] *Lamare v Dixon* (1873) LR 6 HL 414; *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187.

[790] Quoted by Lord Denning MR as the basis of the rule in *Shell v Lostock*, *ibid*, 1199.

would award a claimant specific performance it cannot be appropriate for the forum court to reject this on the basis that the claimant's actions are inequitable.

vi. Impossibility of Performance

7.34 Where performance of the obligation in question is physically impossible the court will not grant an award of specific performance.[791] It would be an exceptionally unusual situation for the applicable law and the *lex fori* to have different responses as to whether performance is *physically* impossible. However, were such a case to arise, the use of the Article 12(1)(c) caveat would be permissible. It is manifestly too inconvenient for the forum courts' machinery to attempt to enforce an order that, on its own view, cannot be enforced.[792]

7.35 Where performance of the obligation in question would require the promisor to breach some of his other legal obligations an English court will not grant an award of specific performance. Thus, where D, the lessee of certain premises, is prohibited from underletting part only of the premises, and he contracts with C to grant such a prohibited underlease, C will not be awarded specific performance.[793] Such a rule can conceivably cause problems within the conflict of laws. Take the following example. D contracts with X to sell him a Ming Vase under a contract governed by English law. D then contracts with C to sell him the same Ming vase under a contract governed by French law. C brings

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[791] *Ferguson v Wilson* (1866) LR 2 Ch App 77; *Castle v Wilkinson* (1870) LR 5 Ch App 534.

[792] Further, it must be the case that the public policy exception can be engaged here as the application of the foreign law requires that the breach of contract is remedied by quasi-criminal sanctions. This is manifestly contrary to English law's public policy.

[793] *Warmington v Miller* [1973] 1 QB 877.

an action, in an English court, for specific performance which would be available to him under French law. Will the action be successful? It is submitted that it would be.[794] French law is the governing law of the contract and the governing law of the contract applies to determine whether specific performance is to be awarded, subject to the Article 12(1)(c) caveat. There is nothing in the rule under consideration to suggest it is based on court inconvenience, and unless the Article 21 public policy rule can be applied, specific performance should be awarded.[795]

vii. Contracts involving personal service

7.36 Where a contract involves a significant degree of personal service, it will not be specifically enforced. Thus, a contract of employment cannot be specifically enforced.[796] Nor can other contracts involving a significant degree of personal service be specifically enforced; for example, a school cannot be forced to re-admit a pupil that it had already expelled for a series of thefts.[797]

7.37 The difficulty with such a bar on specific performance when looked at on the conflicts level is that it is constituted of various objections. Contracts of employment are not

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[794] However, if, by the *lex situs* of the Ming vase at the time of the last transfer, property would have passed in the vase to X, and this was unaltered by the contract between C and D, then X will have a claim in conversion against C, once D has specifically performed.

[795] A further, and more difficult example, would be where *Warmington v Miller* (n793), represented both French and English law, but the contract between D and X was regarded by French law as invalid, and English law as valid. The solution to this must lie in solving the problem of the incidental question in the context of the Rome I Regulation and not in a discussion of the effect of Article 12(1)(c) on specific remedies.

[796] Trade Union and Labour Relations (Consolidation) Act 1992, s236.

[797] *R v Incorporated Froebel Educational Institute, Ex p L* [1999] ELR 488.

enforceable because such an award would seriously interfere with the employee's liberty.[798] Of course, this is not a concern about practical inconvenience but about unfair impositions on the employee. Therefore, the bar is unlikely to be considered a restriction created by procedural inconvenience but, rather, should be considered an issue concerning public policy.

viii. Performance would require constant supervision[799]

7.38 Where an award of specific performance would require excessive court supervision, it will not be ordered.[800] The reason for this limitation on the award can be seen as an accumulation of factors.[801] In particular, the court can only enforce the order for specific performance through the 'heavy-handed' contempt of court procedure.[802] Thus, if it is likely that the promisee will continuously apply to the court for enforcement of the award the court does not have sufficient mechanisms to address this. Secondly, due to the nature of contempt of court proceedings each application would be particularly expensive and time-consuming where there is a likelihood of multiple applications.[803]

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[798] H Beale (ed), *Chitty on Contracts* (Sweet and Maxwell, London 2008), §27-022.

[799] At the domestic law level there is considerable academic support for the removal of this bar. This is particularly the case in the light of the ability of the court, when the defendant is particularly disobedient, to appoint a receiver to ensure performance, or investigate allegations of non-performance. See G Treitel, 'Specific Performance in the Sale of Goods' (1966) Journal of Business Law 211, 228 and A Burrows, 'Specific Performance at the Crossroads' (1984) Legal Studies 102, 107-110. Further, see *Patrick Stevedores Operations No 2 Ptd Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 47.

[800] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

[801] *Ibid,* 16.

[802] *Ibid*, 12.

[803] *Ibid*, 13.

7.39 These factors have led to a distinction[804] between court orders that require a defendant to carry on an activity,[805] and orders requiring the defendant to achieve a particular result.[806] The former are more likely to require multiple applications to determine compliance with the order whereas the latter is far more likely to result in one application, subsequent to the alleged completion of performance. Clearly, some cases are hard to categorise in this scheme. In *Luganda v Service Hotels Ltd*,[807] the claimant hired a 'hotel' room from the defendant on a long-term basis. When the claimant refused to pay a rent increase, the defendant changed the lock on his room whilst he was at work. Supposing that the claimant was entitled to the protection of statutory legislation, and thus the defendant had breached its obligations under the agreement, the question for the court was whether those obligations could be specifically enforced, that is, whether the claimant could require the defendant not to lock him out of the room. The court awarded a mandatory injunction preventing the defendant from locking him out. It is conceivable that this case could be categorised as either an obligation to achieve a result, or a continuous obligation.[808]

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[804] *Ibid*, 13.

[805] Examples include: *Wolverhampton Corp v Emmons* [1901] 1 QB 515(erection of eight buildings); *Jeune v Queens Cross Properties Ltd* [1974] 1 Ch 97 (reconstruction of a balcony); *Posner v Scott-Lewis* [1987] Ch 25 (requiring the defendant to employ a porter); *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670(delivery of specific materials to the claimant).

[806] Examples include: *Blackett v Bates* (1865) LR 1 Ch 117(repairing a railway for the duration of a lease); *Powell Duffryn Steam Coal Company v Taff Vale Railway Company* (1874) LR 9 Ch 331(specific relief would have required the continuous employment of people to work the points on a railway line); *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116(the employment of a satisfactory porter to act as the tenants' servant for the duration of a lease); *Dominion Coal Company Ltd v Dominion Iron and Steel Company Ltd* [1909] AC 293(continuous supply of steel to the amount requested by the claimant); *JC Williamson v Lukey* (1931) 45 CLR 282(right to sell sweets in a theatre for the duration of a lease).

[807] [1969] 2 Ch 209.

[808] Equally, see *Kennard v Cory Brothers and Company Ltd* [1922] 2 Ch 1.

7.40 This restriction on specific performance is significant,[809] largely because it is not followed in some civilian systems. In *Co-operative Insurance*,[810] Lord Hoffmann stated that he expected civilian systems to take the same matters into account when awarding specific performance, whereas Lord Clyde specifically reserved his position on the issue. Lord Clyde's reservation has proved sensible as there is civilian case law where specific performance has been awarded to maintain a business.[811] Thus, the divergence between the two systems of law puts more importance on the choice of law process.

7.41 It has been frequently assumed that this limit on specific performance is the paradigm example of where the Article 12(1)(c) caveat will apply.[812] However, there are difficulties with such a suggestion. First, the case law suggests that where the defendant has acted particularly reprehensibly the court is more willing to overlook such difficulties of supervision.[813] It is difficult to argue that the granting of an award under the circumstances is outside the procedural powers of the court for the purposes of Article 12(1)(c) if, had the defendant's conduct been more reprehensible, specific performance would have been granted.[814] Second, insofar as the bar is concerned with the court

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[809] And, hence, has been outlined more thoroughly.

[810] n800.

[811] *Highland and Universal Properties Ltd v Safeway Properties Ltd* (2000) SC 297; OLG Celle NJW-RR 1996, 585 (German) but *cf* OLG Naumburg NJW-RR 1998, 873.

[812] Lasok and Stone (n758), 370; J Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press, Oxford 2005), 736; Dicey, §32-203; Yeo, *Choice of Law for Equitable Doctrines* (n758), §4.28.

[813] See for example *Luganda v Service Hotels Ltd* [1969] 2 Ch 209where it would seem that the court would have done almost anything to grant specific performance.

[814] This view of the constant supervision bar is mirrored, although not in a conflicts sense, in I Spry, *The principles of equitable remedies: specific performance, injunctions, rectification and equitable damages* (Law Book Co, Pyrmont 2001), 104-6. There, Spry argues that the constant supervision objection is a question of degree and issues such as hardship and prejudice to the parties is taken into account. However, there must be a minimum requirement that the court can be in a position to decide with reasonable certainty whether the order has been broken. This latter minimum requirement is a procedural requirement and is thus susceptible to the Article 12(1)(c) procedural caveat.

evaluating how wasteful to court resources such an award would be in comparison to the full vindication of the claimant's right, then one starts off on a very slippery slope. It can be argued that the 'inadequacy of damages' bar is similarly economically motivated.[815] Therefore, it is submitted that whilst there will be extreme cases where the Article 12(1)(c) caveat will be engaged due to the problem of constant supervision, the bar is by no means the paradigm example of its operation as has been suggested.

ix. Obligation is too vague to specifically enforce

7.42 A contractual obligation can be sufficiently clear to form part of a valid contract but insufficiently clear for the court to enforce it with an award of specific performance.[816] The court must be able to formulate an award with sufficient precision as otherwise the defendant will not know whether he has complied with it. This is particularly important in view of the quasi-criminal consequences of such a breach. For example, if C agrees to write an article for D's magazine, and D provides consideration, it will be an implied term of the contract that D has some, but not complete, discretion over the editing of the article. If D excessively edits the article he will be in breach of contract, but C cannot be awarded specific performance as a court cannot give D precise instructions as to how much editing is permitted.[817]

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[815] Above, §7.27, fn780.

[816] *Tito v Waddell (No 2)* [1977] Ch 106, 322-323.

[817] This example is based on *Joseph v National Magazine* [1959] 1 Ch 14, where Harman J refused specific performance on this ground. *Cf Barrow v Chappell* [1976] RPC 355, 361-2 where Danckwerts J ordered specific performance of an obligation to publish the claimant's musical work in a journal.

7.43 Where the foreign law would order specific performance but the English court considers the terms of the contract too uncertain to specifically enforce it would be permissible for the court to use the Article 12(1)(c) caveat. In such circumstances, the court should award damages. It must be considered too inconvenient for the forum courts' machinery to make such an award where it cannot sensibly enforce it. Failing this, it is possible to argue that the Article 21 public policy exception would apply considering that quasi-criminal sanctions will be applied to a defendant when the court itself considers that the defendant could not know prior to trial whether he had breached the court order.

x. Promisee cannot be made to perform his obligations

7.44 If the claimant has not performed some of his obligations under the contract, and these obligations are not specifically enforceable,[818] then the court may refuse to grant an award of specific performance on the basis that it would be unfair to leave the defendant to just a remedy in damages.[819]

7.45 It should be plain that this consideration has nothing to do with the practical inconvenience caused by the court should it award specific performance under these circumstances. It is simply an issue of the balance of fairness between the parties. Thus, the Article 12(1)(c) caveat is not engaged.

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[818] E.g. *Flight v Bolland* (1828) 4 Russ 298(where the claimant was a minor); *Ogden v Fossick* (1862) DF&J 426(where the claimant was contractually obliged to employ the defendant); *Blackett v Bates*, n806, (where the claimant had to perform a variety of daily duties on a railway line).

[819] *Price v Strange* [1978] 1 Ch 337. The defendant is left with an unsecured claim whilst he himself must perform under the threat of quasi-criminal sanctions should be breach the court order.

3. CONCLUSION

7.46 The conclusion that one draws from this analysis of contractual remedies and choice of law is on the face of it quite a simple one. The forum court must award the court order that would have been awarded under the foreign law unless it is too inconvenient for the forum court's machinery. Beyond this simple conclusion, the devil lies in the details, and what a devil it is. In particular, difficult issues arise as to exactly what reasons concern court inconvenience as opposed to other motives. An analysis of the bars to specific performance has been provided to give some demonstration of its likely application. Furthermore, it is not exactly clear whether applying the foreign remedy means the forum court must turn itself into the foreign court and grant the foreign order in its language and so on. It has been suggested that this is probably going too far, and so long as the forum court gives practical effect to the rights in the same way the foreign court would, this will be sufficient. Another difficult issue that was addressed is the extent to which the forum court must give effect to the status of the order that would be granted by the foreign court as well as the content of it. It has been suggested that the forum court must give effect to the status insofar as this reflects the foreign law's approach to the content of the obligation.

II. NON-CONTRACTUAL REMEDIES AND CHOICE OF LAW

1. WHAT ARE NON-CONTRACTUAL REMEDIES?

7.47 The two main[820] types of remedy for non-contractual obligations, in English law, are an order for the payment of damages and an injunction. It is controversial whether delivery up is a non-contractual remedy because it is controversial whether conversion is properly characterised as an obligational claim or a proprietary claim for the purposes of the European Regulations.[821] It will be assumed that conversion can be characterised as an obligational claim[822] and therefore the remedy of delivery up will be discussed.

a. Order for the Payment of Damages

7.48 Similarly to an order for the payment of damages owed pursuant to the breach of a contractual obligation, an order for damages as a non-contractual remedy does not create much difficulty. The quantification of damages, rather than the order itself, may create difficulties and these are addressed in the next chapter.

b. Injunctions

[820] In addition to these there are, of course, declaratory remedies (such as the order that the defendant holds a property on constructive trust for the claimant), the order for account and the order for the payment of equitable compensation.

[821] Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (OUP, Oxford 2008) argues that it is: §3.94.

[822] This is not admitted.

7.49 There are three types of final injunctions available in English law: (i) prohibitory injunction; (ii) mandatory injunction; (iii) *quia timet* injunction. A prohibitory injunction is an injunction that orders the defendant not to do something. A mandatory injunction is an injunction that orders the defendant to do something. A *quia timet* injunction is an anticipatory injunction to prevent the breach of an obligation.

c. Delivery Up

7.50 If the defendant has tortiously interfered[823] with the claimants goods, the court has the power to order the defendant to deliver the goods to the claimant.[824] This power is discretionary.[825] There is very little authority on the application of this discretion,[826] but it is generally thought that the discretion will be exercised in a similar fashion to the way it was prior to the Torts (Interference with Goods) Act 1977.[827] The most important factor is the uniqueness[828] of the good. Where the good is not unique, the court will not, generally, award delivery up.[829]

2. THE ROME II REGULATION

[823] That is, by converting them as defined in the Torts (Interference with Goods) Act 1977, s2(2), or trespassing to the goods.

[824] Torts (Interference with Goods) Act 1977, s3.

[825] *Ibid*, s3(3)(b).

[826] The most recent decision is *Pendragon Plc v Walon* [2005] EWHC 1082, which does not refer to any other authorities on the exercise of the discretion.

[827] Applying either the equitable award of delivery up, or the award granted under the Common Law Procedure Act 1854, s78.

[828] Whether physical or commercial uniqueness.

[829] E.g. *Cohen v Roche* [1927] 1 KB 169.

7.51 Articles 15(c) and (d) provide the crucial rules on remedies for non-contractual obligations. These provide as follows:

> '[The law applicable to non-contractual obligations under this Regulation shall govern in particular:]
>
> (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;'

7.52 The two provisions appear to overlap. An injunction can be seen as both a 'remedy claimed' and a measure 'which a court may take to prevent or terminate injury or damage'. One approach is to presume that Article 15(d) has priority, and any remedies which fall outside it are covered by Article 15(c).[830] Therefore, Article 15(c) would cover 'declaratory relief or approval of a statement in open court.'[831] This solution is a little difficult to support textually as there is no suggestion that the definition of 'remedy' in Article 15(c) defers to Article 15(d). However, it is thought that it provides the most workable solution, particularly as there is no procedural restriction to Article 15(c).

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[830] This is the approach taken by Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (n821), §14.25

[831] *Ibid*.

7.53 Article 15(d) therefore becomes the focus of the analysis. Clearly Article 10(1)(c) of the Rome Convention was the basis for the phrase 'within the limits of powers conferred on the court by its procedural law'. This provision in the Rome Convention, and also the Rome I Regulation, has already been discussed.[832] The conclusion drawn was that this limitation is best seen as the procedural rule of exclusion.[833] Where the application of the foreign law's remedy will be too inconvenient for the forum court, that remedy will not be awarded, but the forum court must translate the remedy into its closest equivalent.

3. APPLICATION

a. Prohibitory Injunction

7.54 The nature of a final prohibitory injunction makes it difficult to see how there ought to be any procedural restrictions on the award, with the exception of the vagueness objection.[834] The injunction will prevent D from continuing, or re-committing, a tort. In English law, the discussion over final prohibitory injunctions centres on whether or not they should be the primary remedy upon some or all tortious breaches.[835] This does not appear to be concerned with court inconvenience but the balance of fairness between the parties. Thus, it is not to be expected that the Article 15(d) caveat will have much effect on these injunctions.

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[832] Above, §7.06-§7.46.

[833] Discussed extensively in Chapter 4.

[834] Especially considering the difference between a prohibitory injunction and a mandatory injunction is a matter of substance and not form: Burrows (n753), 512.

[835] Burrows, *ibid*, 522-527.

b. Mandatory Injunction

7.55 The parallels between a final mandatory injunction and an award of specific performance are clear. Both require the defendant, whether tortfeasor or promisor, to do something. As a consequence, the procedural limitations that exist within specific performance ought to be applied by analogy. For example, where the order cannot be specified with sufficient precision so the defendant knows exactly what he must do, such an order will not be made.[836]

7.56 In the context of the conflict of laws, the only legitimate use of the Article 15(d) exception will be where the foreign law would award a final mandatory injunction to enforce an obligation that the English courts perceive as too vague, or impossible to perform. However, there is still scope for the application of the *ordre public* exception where awarding a final mandatory injunction would be manifestly contrary to the forum's public policy.[837]

c. *Quia Timet* Injunctions

7.57 A *quia timet* injunction is an injunction awarded to prevent the breach of an obligation before any breach has occurred. For example, in *Torquay Hotel Co Ltd v Cousins*,[838] the

[836] *Kennard v Cory Brothers and Company Ltd* (n808); *Redland Bricks Ltd v Morris* [1970] AC 652.

[837] Rome II Regulation, Article 26.

[838] [1969] 2 Ch 106.

defendant union workers were attempting to prevent delivery of fuel oil to a hotel. However, they were not being particularly successful and thus the picketing did not yet amount to a nuisance. Stamp J awarded a *quia timet* injunction on the basis that further picketing would result in interference with the delivery of fuel oil.[839] *Quia timet* injunctions can be both prohibitory[840] and mandatory.[841] Those comments already made as regards prohibitory and mandatory injunctions in the conflict of laws will apply in equal force to *quia timet* injunctions and reference should be had to those sections.[842] The question to be addressed here is whether there are specific considerations to *quia timet* injunctions in the conflict of laws.

7.58 The two extra requirements in English law before a *quia timet* injunction can be awarded are that the claimant makes a strong case that the breach is likely to occur,[843] and that it is likely to occur imminently.[844] Do either of these requirements affect the case where the applicable foreign law would give such an award but English law would not due to the failure of the case to meet one of these requirements? The answer must be no. The first requirement is an issue of standard of proof, relevant to the particular remedy, and given that under Article 22(1) of the Rome II Regulation the burden of proof is a matter for the applicable law and not the *lex fori*, it seems appropriate that the applicable law will govern this. The second requirement is not concerned with any practical inconvenience

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[839] *Ibid*, 120.

[840] E.g *Torquay Hotel Co Ltd v Cousins* (n838).

[841] The Court of Appeal accepted that a mandatory injunction could have been awarded in *Hooper v Rogers* [1975] 1 Ch 43, but the county court judge had awarded damages in lieu of an injunction.

[842] Above, §7.54-§7.56.

[843] *Attorney-General v Corporation of Manchester* [1893] 2 Ch 87.

[844] *Fletcher v Bealey* (1885) LR 28 Ch D 688.

caused to the court but is an issue of fairness between the parties. One's liberties should not be unduly restricted prior to another's right actually being broken. Obviously, a situation can arise where those liberties are restricted to such an extent that to order a *quia timet* injunction on the facts of the case would be contrary to the forum court's public policy.

7.59 This argument is fortified by the exact wording of the Rome II Regulation. The applicable law governs 'the measures which a court may take to prevent...injury or damage...'[845] As the meaning of damage also includes damage that is likely to occur,[846] it must be the case that the applicable law, within the limits of the procedural powers of the forum court, will govern *quia timet* injunctions for the potential breach of non-contractual obligations.

III. MEASURES OF EXECUTION

7.60 No one could think that measures of execution ought to be governed by any other law than the *lex fori*. However, this creates a seam between the applicable law determining the court order and the *lex fori* determining the execution of that order. This does not particularly matter for common law systems as measures of execution are conceptually

[845] Rome II Regulation, Article 15(d).

[846] *Ibid*, Article 2(3)(b).

separate from the court order.[847] However, this is not necessarily the case in all legal systems.[848] An example is necessary to demonstrate this.

> X is employed by Y to paint a picture under a contract governed by German law. X reneges on his promise, and Y brings a claim in the German courts. Y is entitled, under German law, to an order requiring X to paint the picture.[849] However, under German procedural law, this award cannot be executed.[850]

7.61 There is a danger that, should the case be litigated in England, the English court, following the Rome I Regulation, will apply German law to determine the remedy, and therefore grant an award of specific performance, but then apply English measures of execution to enforce the award, including contempt proceedings. Equally, a French court could award a judgment stating that a defendant is obliged to perform an obligation owed to the claimant, but this judgment cannot be enforced otherwise than through damages in the French courts.[851] Should the case be litigated in England, there is a danger that the English court will only enquire into the judgment that the French court would award and not the effect of this judgment.

7.62 It seems in such circumstances the most appropriate solution is to grant the foreign remedy, as required under the Regulations, but alter the available measures of execution

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[847] §2.26-§2.28.

[848] §2.29-§2.32.

[849] BGB, §241(1).

[850] ZPO, §888.

[851] This is the effect in some cases of Article 1142 of the French Civil Code. For more discussion, see B Nicholas, *The French Law of Contract* (2nd edn OUP, Oxford 1992), 216-220; Treitel, *Remedies for Breach of Contract: A Comparative Account* (OUP, Oxford 1988), 55-60.

under the *lex fori* to attempt to give the same effect to the award as it would have in the legal system of the applicable law. This is the same solution that has been achieved under the Brussels I Regulation when determining the extent to which a Member State court must enforce other Member State courts' judgments.[852]

IV. ANCILLARY REMEDIES[853]

7.63 The prevailing English view seems to be that there is no choice of law for ancillary measures,[854] but there is a degree of difficulty in explaining why this is the case. The purpose of the present section is to enquire whether there is[855] a choice of law rule for ancillary measures. Such a choice of law rule would be one of three: (i) the *lex causae* of the 'substantive right'; (ii) the *lex fori*; (iii) the law of the primary court. The first of these two rules are self-explanatory but the third is not. It is a rule in favour of the *lex fori* but caters for the possibility that the court granting the ancillary measure is operating in an auxiliary fashion, for example, by exercising jurisdiction permitted under Article 31 of the Brussels I Regulation.

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[852] Discussed extensively above, §6.40-§6.70.

[853] Partial discussions of this issue can be found in: Boskovic, 'Le Domaine de la Loi Applicable' (n774), 192 and 199-200; A Rushworth, 'Remedies and the Rome II Regulation' in W Binchy and J Ahern (eds), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (Brill, Hague 2009), 202-203; Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* , 237-266; Boskovic, *La Réparation du Préjudice en Droit International Privé* , 103-108; A Briggs, 'Conflict of Laws and Commercial Remedies' in A Burrows and E Peel (eds), Commercial Remedies (OUP, Oxford 2003), 284-285.

[854] E.g. Briggs, 'Conflict of Laws and Commercial Remedies' , *ibid*.

[855] Or ought to be.

1. *LEX CAUSAE* OF THE SUBSTANTIVE RIGHT

7.64 For the majority of ancillary measures the *lex causae* of the substantive right is an inappropriate choice of law rule. This is because most ancillary measures do not actually seek to vindicate the substantive right and thus it cannot be argued, as it can be with final remedies, that the remedy is intimately connected to the right and therefore the same law ought to apply to both.[856] Two examples may be given. Suppose a German buyer contracts under German law with a Panamanian seller for the purchase of a large asset. The buyer pays the price but the seller fails to deliver. The buyer brings ancillary proceedings in the English courts seeking a freezing injunction to prevent the seller dissipating his English assets. Whilst the underlying right to the delivery of the asset is governed by German law under the contract, the freezing injunction does not seek to replicate this right. It is a remedy used to preserve the position of the parties rather than to directly vindicate the buyer's right to performance.[857] Thus, there is an insufficient connection between the applicable law of the contractual right and the provisional and protective measure.

7.65 Further, suppose that the buyer went to the French courts seeking *une expertise* which allows for the gathering of evidence prior to the final trial. Again, it must be clear that there is no necessary connection between German law, as the law governing the contract, and the provisional and protective measure of the gathering of evidence in the French courts. The remedy of *une expertise* is not vindicating the buyer's right to performance of

[856] For the argument on why this is the case for final remedies, see above, Chapter 2, Section III.

[857] *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* [1979] AC 210, 256.

the contract but is vindicating a quite separate right to the gathering of evidence. There is no compelling reason for this separate right to also be governed by German law merely because that is the law governing the contractual right.

7.66 Thus, the arguments in favour of this approach cannot be justified on a theoretical basis. However, it may be that the current law requires such an approach. This is on the basis that under current European legislation[858] remedies are generally a matter for the applicable law of the obligation. For example, the Rome II Regulation provides that the law governing the non-contractual obligation applies to determine 'the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation.'[859] The question thus arises whether ancillary measures are caught by this provision.[860] Ancillary measures, such as freezing injunctions or some types of anti-suit injunction, can certainly be intended to ensure the provision of compensation, or to prevent or terminate injury. Equally, under the Rome Convention and Rome I Regulation, there is a sense in which ancillary measures, particularly provisional measures, are consequences of breach.[861]

7.67 Furthermore, the *travaux préparatoires* of the Rome II Regulation do suggest that the law applicable to the non-contractual obligation will apply to determine interlocutory relief. The Commission's initial proposal stated that Article 15(d) covered: 'forms of compensation, such as the question whether the damage can be repaired by payment of

[858] Rome I Regulation, Article 12(1)(c); Rome II Regulation, Article 15(d).

[859] Article 15(d).

[860] Suggested in Boskovic, 'Le Domaine de la Loi Applicable' (n774), 192.

[861] Also noted by Cuniberti, *Les Mesures Conservatoires Portant Sur Des Biens Situés à L'Étranger* (n853), [330].

damages, and ways of preventing or halting the damage, such as an interlocutory injunction...'[862]

7.68 However, it is submitted that this will not always be the case. Insofar as ancillary measures vindicate rights arising from the trial process, they are not remedies for the breach of contractual or non-contractual obligations and are therefore not covered by the provisions in the Rome I or Rome II Regulations. 'Insofar' because there are some ancillary measures it is more difficult to see as not vindicating the substantive right, such as the Dutch *kort geding*, the French *référé-provision* and an English interlocutory injunction preventing the continuing breach of a tortious obligation.[863] It is thought that the comment of the Commission in its initial proposal was referring to these remedies, where the *lex causae* will apply, and this appears to be the position under the Rome II Regulation.[864]

7.69 It may be questioned whether this solution is a little too blunt. First, it requires the distinguishing of interlocutory relief which provisionally vindicates the parties

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[862] Commission original proposal, 24.

[863] See AG Leger in C-291/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091, [109] *et seq.*. This distinction between ancillary measures which seek to give partial judgment on the merits from other types of ancillary measures is certainly not new. In fact, the Permanent Court of International Justice referred to it as early as 1927. In the famous *Case Concerning the Factory at Chorzów* PCIJ Series A, No 9, after the PCIJ determined that they had jurisdiction over the merits of the case, Germany sought a provisional payment of thirty million Reichmarks under Article 41 of the Statute of the Permanent Court of International Justice. Article 41 stated:

'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.'

The PCIJ held that such a measure 'cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned:'

[864] See Dickinson (n821), §14.35, though with apparent hesitation.

substantive rights from interlocutory relief which vindicates rights arising from the trial process. This will not always be easy to achieve. Second, it may be the case that interim payment awards, such as the *kort geding* or the *référé-provision*, are more often awarded in legal systems with a significant delay before judgment. Thus, the availability of the award is not entirely to do with the substantive right but at least partially concerned with the trial process. In which case, it may be inappropriate to subject the whole determination to the *lex causae*. Certainly, where the interlocutory remedy does provisionally vindicate the substantive right of a party there is more reason to look closely at the answers the *lex causae* provides, insofar as it is known.[865] Yet the *lex fori* also ought to have a role to play in determining whether the final remedy of the *lex causae* ought to be available on an interlocutory basis. Therefore, it is thought that the most appropriate rule in the case of ancillary remedies which provisionally vindicate the substantive right is to first ask whether the provisional remedy sought would be awarded as a final remedy by the *lex causae*. If this is the case then whether it can be sought provisionally should be a matter for the *lex fori*, taking account of the circumstances of the case including the views of the *lex causae*. It is submitted that this provides an appropriate balance between the claims of both laws on what is a difficult issue.

2. LAW OF THE PRIMARY COURT

7.70 In view of the argument above that the *lex causae* of the substantive right is an inappropriate choice of law rule for the majority of ancillary measures, the *lex fori* should be applied. However, sometimes there may be a question of which *lex fori* to apply in the

[865] *Cf* Briggs, 'Conflict of Laws and Commercial Remedies', 284.

context of provisional and protective relief. Thus, where a court takes jurisdiction to grant provisional or protective relief under Article 31 of the Brussels I Regulation, should that court apply its own law or the law of the primary court?

7.71 The justification for the latter rule would proceed on the following basis. Under the Brussels I Regulation, the primary court can award any provisional and protective measures it sees fit.[866] However, this jurisdiction is supplemented by Article 31, which allows ancillary courts to order provisional and protective measures. The justification for such ancillary jurisdiction is to speed up the process of protection.[867] Thus, if the claimant wants to freeze the defendant's assets pending adjudication in a country other than the country with jurisdiction on the merits, it is quicker for the claimant to ask the ancillary court for a provisional and protective measure directly, than it is for the claimant to ask the primary court to award a provisional and protective order, and then for the claimant to take that order to be enforced in the ancillary court. If this is the correct view of Article 31 then it follows that the ancillary court is simply being used to speed up the process of what the primary court would have done in any case. Therefore, the ancillary court should restrict itself to awarding remedies that the primary court would have done.

7.72 However, the justification for Article 31 seems subtler than simply speed. The ECJ has stated the article is justified on the basis that the judge in the primary court is not necessarily the best placed to award provisional measures. The court ordering the

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[866] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* , [19].

[867] C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-3481, [12]. This is also emphasised, but not given as the exclusive purpose, in Audit, *Droit international privé* (Economica, Paris 2006), 415.

measures ought to have 'detailed knowledge of the actual circumstances in which the measures sought are to take effect'.[868] In which case, the premise of the ancillary jurisdiction seems to be that the ancillary court and primary court may differ as to provisional and protective measures and, further, that the ancillary court should be considered the most appropriate court to determine whether such remedies ought to be granted. In any case, even were speed the main purpose of Article 31, if the court has to determine the available provisional and protective measures of another jurisdiction this will certainly hamper the swiftness of the application. It follows from this that the law of the primary court cannot be the correct law to apply.[869]

3. THE *LEX FORI*

7.73 With the possible exception of ancillary measures that seek directly to vindicate the claimant's right,[870] the *lex fori* is the appropriate law to apply to ancillary measures. Where the court is the primary court, that is, it has not been seised under Article 31 of the Brussels I Regulation, once the *lex causae* of the substantive right is rejected no other law could apply. Where the court is seised under Article 31, a choice for the *lex fori* rather than the law of the primary court has much to commend it.[871] Importantly, it is the overwhelmingly dominant approach at the moment in the case law.[872] The law applied to

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[868] *Van Uden Maritime v Kommanditgesellschaft In Firma Deco-Line* (n866), [38].

[869] Yeo, *Choice of Law for Equitable Doctrines* (n758), 108, stating that the area is too complex for a simple choice of law rule.

[870] Discussed above, §7.68-§7.69.

[871] Criticism of an approach based on applying the law of the primary court can be seen above, §7.70-§7.72.

[872] Briggs, 'Conflict of Laws and Commercial Remedies' (n865), 284-5.

determine the availability of provisional and protective relief has always been English law *qua lex fori*. in *Crédit Suisse Fides Trust SA v Cuoghi*,[873] the Court of Appeal granted a worldwide freezing order in support of Swiss proceedings, despite the fact that Swiss law would not have given such a remedy.[874] Millett LJ went out of his way to explain that the English courts were not confined to those remedies available in the primary court:[875]

> '...I do not accept that interim relief should be limited to that which would be available in the court trying the substantive dispute; or that by going further we would be seeking to remedy defects in the laws of other countries. The principle which underlies article 24 is that each contracting state should be willing to assist the courts of another contracting state by providing such interim relief as would be available if its own courts were seised of the substantive proceedings: see *Alltrans Inc. v. Interdom Holdings Ltd.* [1991] 4 All E.R. 458, 468, per Leggatt L.J. By going further than the Swiss courts would be prepared to go in relation to a defendant resident outside Switzerland, we would not be seeking to remedy any perceived deficiency in Swiss law, but rather to supplement the jurisdiction of the Swiss courts in accordance with article 24 and principles which are internationally accepted.'

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[873] [1998] QB 818.

[874] Similarly, see the opinions of the Court of Appeal in *Refco Inc and another v Eastern Trading Co and Others* [1999] 1 Lloyd's Law Reports 159.

[875] n873, 827.

7.74 In *Alltrans Inc v Interdom Holdings*,[876] Leggatt LJ stated that the purpose of Article 24 of the Brussels Convention was 'for each contracting state to provide in aid of another contracting state such remedies as would be available if its court was trying the substance of the case: that is not to say that the court is to provide no wider remedy than the court of the other contracting state would provide.'

7.75 In addition to being the dominant approach in the case law, it appears to be the most satisfactory solution for four reasons. First, it complies with the justification for Article 31.[877] The ancillary court is chosen because it is the most appropriate court to determine which provisional measures should be awarded. This justification disappears if the ancillary court must simply apply a foreign law. Thus, the purpose of Article 31 appears dependent upon the *lex fori* applying. The second reason for the application of the *lex fori* to such measures is that, as the jurisdictional solution is predicated upon the notion that the court awarding the provisional and protective measure will be the one executing that measure,[878] and execution of judgments is a matter for the *lex fori*,[879] it makes sense that the *lex fori* should apply from the start. The third reason for the application of the *lex fori* is that there may be more than one primary court and thus there is no ascertainable law of the primary court.[880] Suppose that the English defendant, a trust manager, is being sued by two beneficiaries, one Italian and the other Greek. Pursuant to jurisdiction agreements valid under Article 23 of the Brussels I Regulation, the beneficiaries are each suing in the courts of their domicile. Both beneficiaries seise the English courts on the same day,

[876] [1991] 4 All ER 458, 468.

[877] See §7.72.

[878] This appears to be the basis of the 'real connecting link' test: Normand, , 362, [30].

[879] Brussels I Regulation, Article 22(5); Brussels Convention, Article 16(5).

[880] *Cf* the fourth consideration in the inexpediency test, referred to below, §7.84.

under Article 31 of the Brussels Regulation, claiming interim third party debt orders against the defendant's English bank. Which law should apply to determine whether the interim third party debt order is awarded? There is a strong possibility of an incompatibility where both Italian law and Greek law would award the measure. The fourth and final reason in favour of the *lex fori* is simply that no other law appears appropriate, and where this occurs, the default position is to apply the *lex fori*.

7.76 Whilst it is plain that the *lex fori* ought to apply, it is also plain that reference must be made to other laws, namely the law governing the underlying right and the law of the primary court.

7.77 As regards the first of these references, this has not yet explicitly come up in the English courts. However, it has done so in the Cour de Cassation. In *Société Vandel v Société ZF France et Société ZF Passau Gmbh*,[881] the claimant was supplied gear boxes and axles by the first defendant (ZF France) having been made in Germany by the second defendant (ZF Passau). The claimant sued the defendants in the French courts, alleging *inter alia* unlawful termination of the contract. The claimant sought an interim expert's report (*une expertise*) under Article 145 of the *Nouveau Code de Procédure Civile* (NCPC). The defendants contended that under the governing law, alleged to be German law, such an interim report would not be permissible. The Cour d'Appel had held that as German law would be the applicable law, the claimant had to furnish the court with the relevant information on the applicable German legal texts. The Cour de Cassation overruled the Cour d'Appel, holding that the application of Article 145 of the NCPC was purely a matter for French law and no reference to the law applicable to the substantive right was

[881] (2007) 96 Revue critique de droit international privé 840 (note Muir Watt).

permissible. Professor Muir-Watt persuasively argues that the approach of the Cour de Cassation is flawed, as at least some reference to the applicable law is required.[882] In order to be awarded an interim expert's report under Article 145 the claimant must be able to prove that he has a sufficiently plausible case on the merits, in addition to demonstrating that such an award is both pertinent and useful. This is to prevent abusive evidential fishing expeditions. In evaluating the plausibility of the claimant's case, and attempting to prevent such abusive fishing expeditions, the court must have reference to the eventual applicable law. This does not mean that the applicable law of the underlying right will determine these provisional measures. It simply means that the applicable law is being fed into the forum's evaluation of whether it will deploy its provisional measures.

7.78 As regards the second of these references, the justification behind this is even more obvious. The court, acting in an auxiliary capacity, by awarding provisional measures can disrupt the trial in the primary court. It can affect the careful balance between the trial rights of the defendant and the trial rights of the claimant, with the potential of an imbalance sufficient to affect the practical result of the litigation.[883] Thus, when the *lex fori* acts in this auxiliary fashion, it must refer to the law of the primary court to determine whether or not it is upsetting the balance of trial.

7.79 The approach of applying the *lex fori*, albeit with references to the *lex causae* of the substantive right and, where applicable, the law of the primary court, is reflected in the English case law. There are two general rules for the granting of provisional and

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[882] *Ibid*.

[883] Briggs, 'Conflict of Laws and Commercial Remedies' (n853), 285.

protective measures in English law, and then specific ones for each type of remedy. The general rules are that the claimant has a good arguable case on the merits,[884] and, where the English court is acting as an auxiliary court, it must not be inexpedient to grant the relief.[885] In addition to these general rules, there exist more specific rules depending on the type of remedy. Most importantly, for a freezing order, the claimant must demonstrate that there is a real risk that a judgment would be unsatisfied if the injunction were not granted.[886] Some cases refer to a seemingly broader test of the need to prove a 'real risk of dissipation of assets',[887] but the former test appears preferable because even if there is a real risk of dissipation of some assets, this is nothing to the point where there remains sufficient assets to satisfy the potential judgment debt.

7.80 It has been argued that the most appropriate choice of law rule for provisional and protective measures is for a *lex fori* rule but with reference both to the law of the underlying right and the law of the primary court. The first of these references is achieved through the good arguable case test, and the second is achieved through the expediency test.

a. Good, arguable case

[884] Dicey, §8-007 citing *Rasu Maritima SA v Perushahaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] QB 644; *Ninemia Maritime Corp v Trave Schiffahrtgesellescha ft mbH* [1983] 1 WLR 1412; *Derby & Co Ltd v Weldon* [1990] Ch 48.

[885] Civil Jurisdiction and Judgments Act 1982, s25.

[886] Dicey, §8-007.

[887] E.g. *Motorola Credit Corpn v Uzan and Others (No 2)* .

7.81 Within the confines of the expedited procedure of obtaining interim relief,[888] when the claimant is called upon to demonstrate that he has a good arguable case on the merits, if his case is dependent on the application of a particular foreign law, he should be required to satisfy the court that he has an arguable case under that law.

b. Inexpediency

7.82 In English law, references to the law of the place of the primary trial are achieved through the 'inexpediency' test.

7.83 Simply because the English court has jurisdiction to grant interim relief does not automatically mean that it will. The Brussels I Regulation gives no power to grant interim relief but only provides the courts of the Member States with jurisdiction to grant such relief. Under English law, interim relief in favour of a trial in a foreign country will be granted where the requirements provided in the Civil Jurisdiction and Judgments Act 1982, s25(2) have been fulfilled. The crucial requirement is that where the court is satisfied that it would be inexpedient to grant such relief, it will not do so.[889] The evaluation of inexpediency is made with reference to each and every defendant, rather than as a group.[890] There has recently been a flurry of litigation over the meaning of 'inexpediency'.

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[888] See the concerns of Sir Nicholas Browne-Wilkinson VC (as he then was), on a different but similar issue (leave to start overseas proceedings), in *Tate Access Floors Inc and Another v Boswell and Others* [1991] Ch 512, 534. His Lordship thought that in the emergency circumstances of the case it was unrealistic to expect research of foreign law to have taken place prior to the application.

[889] For a similar requirement in the context of supporting arbitration, see Arbitration Act 1996, s2(3) but using the terminology of 'inappropriate'.

[890] *Motorola v Uzan (No 2)* (n887), [116].

7.84 The seminal case of *Motorola Credit Corporation v Uzan (No 2)*[891] must now be considered the starting point of any analysis of inexpediency.[892] Proceedings had been brought in New York alleging fraud and conspiracy against four defendants, one of which was resident in England and had assets there, another of which simply had assets there. The New York court made a preliminary ruling that the claimant was substantially likely to succeed on the merits. The claimant then obtained from the English courts a worldwide freezing order against the defendants containing ancillary disclosure orders. The defendants sought to discharge the orders on the grounds of inexpediency. The freezing orders against the defendants who were neither resident, nor had any assets, in England were discharged. The court explained the five considerations[893] that the court will bear in mind when ordering interim relief under the Civil Jurisdiction and Judgments Act, s25(2):[894]

> 'First, whether the making of the order will interfere with the management of the case in the primary court eg where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting

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[891] *Ibid*.

[892] See *JP Morgan Europe Ltd v Primacom AG and Others* [2005] 2 Lloyd's Rep 665; *Amedeo Hotels Limited Partnership and others v Faith Zaman and others* [2007] EWHC 295 (Comm).

[893] *Cf Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, per Bingham CJ, 831H, suggesting it would be unwise to attempt a complete list of considerations.

[894] *Ibid*, [115].

inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.'

7.85 Whilst these five reasons are directed towards when it would be inexpedient to award interim relief, and are thus negative in nature, it would be wrong to conclude that only negative reasons are taken into account. Thus, in *Republic of Haiti v Duvalier*,[895] the fact that the defendants were fully intending on moving their assets outside the reach of the courts of law weighed heavily against any negative reasons for not granting interim relief, particularly, and controversially, where the defendant was not resident in England. It should be quite clear that the first and second of the reasons provided by *Motorola v Uzan* require references to the law of the primary court, despite the *lex fori* applying to determine whether interim relief will be granted.

[895] [1990] 1 QB 202, 217.

V. COMPARISON TO THE POSITION UNDER THE COMMON LAW

7.86 It is often assumed that the position of the common law was much different to the position just outlined under the European Regulations. However, on close inspection it is doubtful that this is true. It is often said that if the *lex causae* would give a certain remedy but the *lex fori* would not, then the remedy will not be granted.[896] The authorities relied upon for this proposition are *Baschet v London Illustrated Standard Co*[897] and comments in *Chaplin v Boys*.[898]

7.87 *Baschet v London Illustrated Standard Co*, quite simply, is a case that does not involve the conflict of laws but merely the construction of an English statute. There, Baschet owned the French copyright to some pictures which the London Illustrated Standard printed in England without permission. The claimant brought an action in England on the basis of section 2 of the International Copyright Act 1886, which permitted a claimant to bring an action in the English courts on the basis of a foreign copyright, and asked for a variety of remedies including an injunction and certain penalties. A question arose as to whether French law determined the available remedies, or English law. Kekewich J interpreted the English statute, holding that it only permitted holders of foreign copyrights to bring actions in England and did not go so far as to grant them the same remedies as they had in the legal system of the copyright. Therefore, the case concerned

[896] E.g. Dicey, §7-006.

[897] [1900] 1 Ch 73.

[898] [1971] AC 356, 394.

the interpretation of s2 of the International Copyright Act 1886. Kekewich J's concern[899] that it would be difficult to apply foreign remedies is at most persuasive authority.

7.88 The comments in *Chaplin v Boys* were those made by Lord Pearson, who stated:

> 'English law is the *lex fori*. The *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the *lex fori* must regulate remedies, because the court can only give its own remedies, having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court. On the other hand, an English court may sometimes be able to give in respect of a tort committed in a foreign country a remedy which the courts of that country would be unable to give. For instance, the foreign courts might have no power to grant an injunction or to make an order for specific performance or for an account of profits.'

7.89 The final two sentences of this paragraph suggest a solution different from that achieved under the European Regulations. However, the rest of the paragraph could be a commentary on how Articles 12(1)(c) of the Rome I Regulation and 15(d) of the Rome II Regulation function. Unfortunately, the decision in *Phrantzes v Argenti*[900] was not cited to the court. This decision concerned an action brought by a Greek national against her

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[899] n897, 78.

[900] [1960] 2 QB 19.

father for failure to provide a dowry. The remedy under Greek law was to force the father into a contract with his daughter's husband, at a price to be calculated on the basis of various social factors. Lord Parker CJ explained:[901]

> 'It is true, of course, that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognised by English law, and that the claim will not be defeated merely because those remedies are greater or less than those in the courts of the foreign country: cf. Dicey's Conflict of Laws, 7th ed., p. 1089, and *Baschet v. London Illustrated Standard*. **But the remedies available must harmonise with the right according to its nature and extent as fixed by the foreign law**: cf. Cheshire, Private International Law, 5th ed. (1957), pp. 667 and 668.'

On the facts, the court could not award the Greek remedy, and refused to award damages on the basis that, as a remedy, they were too removed from the right under Greek law that the daughter was trying to enforce.

7.90 Therefore, the initial position of the common law was that the *lex fori* would only award its own remedies but the remedy granted would be harmonised with the right as fixed by the foreign law. In practical terms, it is difficult to see a difference between this approach and an approach which requires the application of the foreign remedy unless it is too procedurally inconvenient for the forum court, whereupon the closest forum remedy will be awarded.

[901] *Ibid*, 35. Emphasis added.

7.91 Furthermore, the suggestion made above, that whilst the *lex fori* will determine the measures of execution granted, regard must be had to the *lex causae* to prevent any unwarranted extension of the right,[902] accords closely with the approach of the common law in the early-mid 1800s. It can be clearly seen from the early 'arrest cases': *Talleyrand v Boulanger*;[903] *Melan v Duke of Fitzjames*;[904] and *Flack v Holm*.[905] The issue in these cases was whether a creditor could have the debtor arrested in England when under the governing law of the debt an arrest for this particular type of debt could not be made.

7.92 In *Talleyrand v Boulanger*, the claimants' brother had borrowed money from the defendant on his appointment as Bishop of Autun,[906] with the first claimant, the *Compte de Périgord*, guaranteeing the debt. All of these events occurred in France. As a consequence of the French revolution, all the parties, with the exception of the claimants' brother, moved to England, whereupon the defendant had the Count arrested for non-payment of the debt. The Count made various promises in order to be released from arrest and entered into a second contract with the defendant, the Count's obligations guaranteed by the second claimant. The two claimants then applied for an injunction preventing the defendant from enforcing the second contract. Lord Chancellor Loughborough allowed the injunction on the basis that the second contract had been entered into under duress. His Lordship commented that the common law should not have granted an arrest under the first contract as such a measure was not available under

[902] Section III.

[903] (1797) 3 Vesey Junior 447, 30 ER 1099.

[904] (1797) 1 Bos & P 138, 126 ER 822.

[905] (1820) 1 Jac & W 405, 37 ER 430.

[906] This was Charles Maurice de Talleyrand-Périgord, one of the most famous diplomats in history.

French law and by doing so had given greater effect to the contract than it had under that law.

7.93 In *Melan v Duke of Fitzjames*, the defendant owed a debt to the claimant on the basis of an instrument executed in France. French law was put into evidence, stating that unless a bill of exchange was used the only measures of execution possible were against property and not against the person. The majority, Heath J dissenting, decided that they had to determine what the content of the obligation was under French law and, on the basis that French law did not permit arrest, held that the English law should not permit arrest of the defendant. Eyre CJ explained:

> 'If it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it.'

Thus, whilst accepting that measures of execution are a matter for the *lex fori*, the Court took account of the foreign measures of execution in order to determine the content of the obligation and acted accordingly.

7.94 *Flack v Holm* was a slightly more difficult case concerning a writ of *ne exeat regno*[907] brought against one Mr Ludert by Mr Flack. Flack, an Englishman, allegedly had agreed with two St Petersburgers, Holm and Ludert, to supply them with cotton for the purpose of it being sold on commission. He had consigned considerable quantities to St

[907] A writ ordering the defendant not to leave the country. Lord Eldon referred to this as equitable bail.

Petersburg but becoming suspicious travelled to Russia and discovered he had been defrauded. Ludert was briefly in England at which point Flack brought the present writ. Ludert defended, *inter alia*, on the basis that he was not liable for the sums owed, the action lying against Holm and under Russian law Ludert would not be considered Holm's partner as they were not members of the same guild or class of merchants. Lord Eldon decided that even if Russian law were to apply to the issue, it had not been demonstrated. More importantly, his Lordship went on to suggest an alternative view of the case, citing *Talleyrand v Boulanger*:

> 'There is another view of this case, as to which I have not yet heard any thing; and I shall, therefore, give the parties an opportunity of considering it. In *Talleyrand v. Boulanger* Lord Loughborough , if I am not mistaken, was strongly inclined to hold, that if two persons, living in France at the time the debt was contracted, afterwards come here, and the law of France does not in such cases allow of arrest, the law of England will not permit one party to arrest the other. If, therefore, you can make out that Ludert would be exempted from arrest by the laws of Russia , though it is to be observed that in this instance the Plaintiff was residing in England , that is another view of the case.'[908]

7.95 Therefore, up until 1820 the approach of the courts was to hold that the measure of execution was a matter for the *lex fori*, but account would be taken of the approach of the *lex causae* as it may affect the forum's understanding of the obligation entered into. This intricate and entirely appropriate method was then destroyed by a couple of judgments

[908] n905, 417.

from Lord Tenterden CJ: *British Linen Company v Drummond*;[909] and *De La Vega v Vianna*.[910]

7.96 In *British Linen Company v Drummond*, the claimant alleged the defendant (and a third party) owed him a debt. Under English law, the claim was time-barred but it was not as a matter of Scots law, where the debt had been agreed. Lord Tenterden CJ gave judgment for the defendant, holding that the claimant, if suing in England, must take the law as he finds it.

7.97 This decision was then expanded on in *De La Vega v Vianna*. The claimant, a Spaniard, alleged the defendant, a Portuguese, owed him a debt incurred in Portugal, 1816. Both parties had later come to England and the claimant had the defendant arrested. Counsel for the defendant submitted that the defendant could not have been arrested in Portugal, relying on *Melan v Duke of Fitzjames*. Lord Tenterden CJ preferred the view of Heath J in the minority, holding that the applicable law only covered the interpretation of the contract and not the remedy sought. His Lordship then gave his famous statement:[911]

> 'A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.'

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[909] (1830) 10 Barnewall & Cresswell 903, 109 ER 683.

[910] (1830) 1 Barnewall & Adolphus 284, 109 ER 792.

[911] *Ibid*, 288. Criticised above, §4.41-§4.42.

7.98 The House of Lords decision of *Don v Lippmann*[912] then endorsed these decisions as stating the general rule,[913] but then later endorsed the cases of *Talleyrand v Boulanger* and *Melan v Fitzjames*.[914] The cases did not sit well together and Lord Chelmsford LC in *Liverpool Marine Credit v Hunter*[915] decided that Lord Loughborough's comments in *Talleyrand* were incorrect and the decisions of *De La Vega* and *Don v Lippmann* were correct. It may be possible to distinguish the cases on the basis that some involved restrictions on measures of execution which did pertain to the right, and some did not,[916] but this is probably an optimistic interpretation and does not reflect the hardening of the courts' approach from 1830 onwards.

7.99 Therefore, whilst the common law originally accepted that the permissible measures of execution would be governed by the *lex fori*, albeit with reference to the *lex causae*, this rule became corrupted into a different type of rule, most obviously expressed as the rule from *Huber v Steiner*,[917] that if the foreign rule extinguishes the right it will be substantive, but if it only extinguishes the remedy it will be procedural. This new rule, derived from cases concerning prescription, was abolished in that context by the Foreign Limitation Periods Act 1984. The '*Huber*' rule lives on in the common law, most

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[912] (1837) 5 Clark & Finnelly 1, 7 ER 303.

[913] *Ibid*, 13.

[914] *Ibid*, 18.

[915] (1867-68) LR 3 Ch App 479.

[916] Dicey, §7-008, fn29.

[917] (1835) 2 Bing NC 202, 132 ER 80.

recently applied by the House of Lords in *Harding v Wealands*,[918] a decision with which most are unhappy.[919]

VI. CONCLUSION

7.100 The present chapter discussed under what circumstances the forum court must apply foreign law in determining the remedy. The position is a little more complex than one would expect, but can be summarised into the following rules:

a. The *lex causae* applies subject to its application being too inconvenient for the forum court's machinery. Where the application of the *lex causae* is too inconvenient the forum court must grant the closest convenient order it has.

b. This basic answer must be qualified in two important respects.

c. First, the *lex fori* will determine ancillary orders, except those which provisionally vindicate the substantive right, even if the substantive right is governed by a foreign law. However, references to that foreign law, and in some circumstances a third law, may be both appropriate and necessary.

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[918] [2007] 2 AC 1.

[919] E.g. Scott, 'Substance and procedure and choice of law in torts' [2007] LMCLQ 44; Dougherty and Wyles, 'Harding v Wealands' (2007) 56 ICLQ 443; Rogerson, 'Quantification of Damages - Substance or Procedure' [2005] CLJ 305; A Briggs, 'Decisions of the British Courts During 2006: Private International Law' (2006) 77 British Yearbook of International Law 554, 565-572.

d. Second, orders for the enforcement of the judgment will be governed by the *lex fori*. However, again, it is sensible for the *lex fori* to refer to the *lex causae* of the substantive right to prevent the seam between the two laws altering this substantive right.

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Damages

8.01 The present chapter discusses how choice of law rules work in the context of damages. It will be argued that *prima facie* the *lex causae* applies to determine the value of the damages to be awarded, subject to questions of fact being determined by the *lex fori*.

8.02 A few preliminary comments must be made prior to analysing the issue in any detail. First, 'damages', as already explained,[920] only includes the content of the secondary obligation and not the order which the court grants to vindicate that secondary obligation. Thus, a periodical payment order is not 'damages' in this sense. It is a court order.

8.03 The second preliminary comment is that only issues concerning choice of law will be discussed. Secondary obligations do not create difficulties in the jurisdictional scheme. The ECJ has made it clear beyond doubt that the jurisdictional scheme responds to primary obligations, and not secondary obligations, albeit national courts are to decide if a particular obligation is primary or secondary.[921] Nor do they create difficulties for the enforcement of other Member States' judgments. The foreign judgment will already have determined the primary and secondary obligations of the parties and granted what it considers to be an appropriate court order. The enforcing court must enforce the court

[920] §2.10-§2.13.

[921] C-14/76 *De Bloos Sprl v Bouyer SA* [1976] ECR I-1497.

order and cannot review the secondary obligation as this would be to review the substance of the case.[922]

8.04 Therefore, the focus of this chapter is solely on damages and the choice of law process. This issue has arisen relatively frequently in the context of the traditional English conflict of laws rules and it has been said that the solutions English law has achieved are unsatisfactory.[923]

8.05 The chapter is arranged in three parts. The first part deals with the current approach under the European Choice of Law Regulations. The second part compares this approach with the approach of the English courts and legislature prior to the Regulations. The third part discusses the application of the European rules to discrete areas such as non-pecuniary loss and interest.

I. THE EUROPEAN REGULATIONS

8.06 The provisions of the Rome I and Rome II Regulation are slightly different and thus will be treated separately.

1. THE ROME I REGULATION

[922] Prevented by virtue of Article 36 of the Brussels I Regulation.

[923] Briggs, 'Decisions of the British Courts During 2006: Private International Law' (2006) 77 BYBIL 554 , 565-572.

8.07 The crucial provision in the Rome I Regulation is Article 12(1)(c) which provides as follows:

> '[the law applicable to a contract by virtue of this Regulation shall govern in particular:] within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;'

8.08 This provision is materially identical to Article 10(1)(c) of the Rome Convention, the Article being insufficiently interesting to be worthy of any comment during the whole legislative process of turning the Rome Convention into the Rome I Regulation.

8.09 It is clear that the law applicable to the contract will *prima facie* apply to determine the assessment of damages, that is, to determine the content of the secondary obligation. The more difficult issue is what the final ten words of the provision mean: 'in so far as it is governed by rules of law;'

8.10 The Giuliano and Lagarde report explains the purpose behind these words in Article 10(1)(c). Some nations had expressed the view that under their law the assessment of damages was a question of fact. Thus, the *lex causae* should not apply to it. However, some nations had countered this by pointing to various international conventions which have caps on damages and that sometimes the valuation of damages is prescribed in the contract. In these cases, it could not be said that the assessment was a factual one, and thus the applicable law should govern. Giuliano and Lagarde state:[924]

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[924] Giuliano and Lagarde Report, 33.

> 'By way of compromise the Group finally decided to refer in subparagraph (c) solely to rules of law in matters of assessment of damages, given that questions of fact will always be a matter for the court hearing the action.'

That questions of fact are a matter for the *lex fori* should be obvious. Matters of evidence are for the *lex fori* to determine[925] and nothing can be more evidential than the determination of the facts of the case.

8.11 The difficulty that arises is over what counts as a matter of law as opposed to a matter of fact. The most appropriate test seems to be to ask the question whether the foreign provision is a genuine attempt at assessing the factual loss caused to the claimant or whether it pursues any other agenda. Thus, for example, the English contractual rules on remoteness cannot be considered as rules which genuinely attempt to assess the factual loss caused to the claimant and thus the law applicable to the contract ought to apply to determine issues concerning remoteness.[926] Whether they concern the scope of the parties' agreement,[927] or some external policy factor,[928] or both,[929] it is quite clear that the rule does something other than work out the factual loss caused to the claimant. The

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[925] Rome I Regulation, Article 1(3).

[926] *Cf*, at common law, *D'Almeida Aragu Lda v Sir Frederick Becker* [1953] 2 QB 329 where foreign rules of remoteness were held to be 'substantive'.

[927] E.g. the interpretation strongly taken by Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61. In support of this view, see A Kramer, 'The new test of remoteness in contract' (2009) 125 Law Quarterly Review 408.

[928] E.g. prevention of unfairness to the defendant or promotion of economic efficiency: Burrows, *Remedies for Torts and Breach of Contract* (OUP, Oxford 2004), 76-77.

[929] E Peel, 'Remoteness revisited' (2009) 125 Law Quarterly Review 6.

difference between factual assessments and other assessments will be discussed more extensively below.

2. THE ROME II REGULATION

8.12 The provision on choice of law and damages in the Rome II Regulation appears markedly different from that in Rome I. There is a recital[930] which specifically refers to the quantification of damages in traffic accidents. This rather odd provision will be dealt with at the end of the present section.[931] In terms of the main body of the Regulation, Article 15(c) of the Rome II Regulation states as follows:

> '(c) [The law applicable to non-contractual obligations under this Regulation shall govern in particular:] the existence, the nature and the assessment of damage or the remedy claimed;'

8.13 The Commission's original proposal stated that the applicable law would govern '[t]he existence and kinds of damage for which compensation may be due'.[932] Furthermore, it was stated that the applicable law would govern 'the measure of damages in so far as prescribed by law'.[933] The latter of these disappeared during the amalgamation of the two

[930] Recital (33).

[931] Below, §8.18-§8.26.

[932] Commission's Initial Proposal (COM/2003/0427 final with explanatory memorandum), 23.

[933] *Ibid*, 24.

provisions in the Council Common Position,[934] the text of which is identical to the present Article 15(c).

8.14 One question that arises is what effect the omission of the 'rules of law' caveat will have. Some clearly think that it does have an effect. Professor Boskovic applauds the omission on the basis that 'the interpretation of this limitation was far from obvious.'[935] Mr Dickinson does not comment on whether this results in any material change from the Rome Convention but argues that '[p]roof of the underlying facts will, however, remain a matter for the law of the forum, in accordance with Art 1(3) of the Regulation.'[936]

8.15 It is thought that there will be no material change from the provisions of the Rome Convention or Rome I Regulation. As Giuliano and Lagarde state,[937] the purpose of the 'rules of law' caveat was to make clear that questions of fact will always be a matter for the *lex fori*. The provision was merely clarifying this issue and its omission does not alter that the *lex fori* will apply to determine questions of fact.

8.16 Again, the difficulty that will arise is in determining which rules are rules of law and which are attempts at factually determining loss. Let us take a particularly problematic example to demonstrate this difficulty.

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[934] [2006] OJ C289/68.

[935] O Boskovic, 'Le Domaine de la Loi Applicable' in S Corneloup and N Joubert (eds), Le Reglement Communautaire 'Rome II' Sur La Loi Applicable Aux Obligations Non Contractuelles (LexisNexis Litec, Paris 2008), 188.

[936] Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (OUP, Oxford 2008), §14.19.

[937] Above, §8.10.

X, an Englishman, travels to Italy for his holiday whereupon he is involved in a car crash with Y, an Italian citizen. X breaks his leg as a consequence. Y admits negligence and the only issue in the case is quantification. Suppose that the Italian court will award £2,000 for non-pecuniary loss, following its loss tables. Suppose that an English court will award £22,650, following the upper limit of the Judicial Studies Board Guidelines.

8.17 Mr Dickinson takes the view that, if this trial occurs in England, the English court applying the Rome II Regulation should grant X £2,000 of damages. This is on the basis that judicial conventions and practices are rules of law in a 'broad sense'.[938] But this may overlook the question of whether these are the foreign courts' attempts at determining the factual loss caused to the claimant. If this is the case then the issue will be a matter for the *lex fori*. Much more will be said on this later.[939]

a. Recital (33)

8.18 The issue to be addressed here is the exact meaning of recital (33). It states as follows:

'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

[938] Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (n936), §14.19.

[939] Below, §8.53 *et seq*.

circumstances of the specific victim, including in particular to actual losses and costs of after-care and medical attention.'

Plainly it is not an easy provision to understand, most likely because it is the product of an attempted compromise between the Parliament and the Council and Commission. A little history is required.

8.19 The Commission's first proposal contained no specific reference to damages in traffic accidents. The only two provisions relevant to remedies were Articles 11(c) and (d) which are more or less the same provisions as those now in Articles 15(c) and (d).

8.20 The Parliament's first draft report[940] included two particular rules which altered the position of damages under the Regulation. Under Recital (18b), the 'quantum of damages' was to be governed by the *lex fori* and, in cases of traffic accidents, there was a choice of law rule for the victim's place of habitual residence unless it would be inequitable to apply this law. This second of these rules was also covered by the substituted Article 6b(2). In the finished first report,[941] Parliament kept article 6b(2), which asserted that in the case of personal injuries arising from traffic accidents the forum court shall apply, in determining the quantum of damages, the law of the victim's habitual residence unless it would be inequitable to do so. Article 3(1a) was also inserted which covered personal injuries arising out of traffic accidents. This provision substantially overlapped with Article 6b(2) except, as well as calculating the quantum of

[940] EP PE349.977, hereafter referred to as 'Parliament's First Draft Report'.

[941] EP A6-0211/2005, hereafter referred to as 'Parliament's First Report'.

damage, the law of the place of the victim's habitual residence would also apply to determining the type of claim for damages.

8.21 The Commission's opinion on the Parliament's first report rejected these proposals on the basis that it would diverge sharply from the law in force in the Member States and required more in depth analysis.[942] It was stated that the problem of traffic accidents should be dealt with in a report subsequent to the enactment of the Regulation. The Council's later opinion adopts the Commission's opinion on these matters.[943]

8.22 After having its amendments roundly rejected, the Parliament recognised that it had been criticised for limiting the solution to traffic accidents. In their second draft report[944] they inserted Recital (29a), which sought to clarify that the forum court, when quantifying damages in person injury cases, should apply the 'principle of *restitutio in integrum* having regard to the victim's actual circumstances in his country of habitual residence'.[945] This recital was repeated in the new Article 21a. This solution was 'designed to enable agreement to be reached with Council'.[946] Both of these provisions survived into the Parliament's second report.[947]

8.23 The Commission's opinion on this proposed solution was that it constituted 'harmonisation of the Member States' substantive civil law which is out of place in an

[942] EC COM(2006)0083, hereafter referred to as 'Commission's modified legislative proposal, 4.

[943] CSL 09751/7/2006, ADD1,8

[944] EP PE378.852, hereafter referred to as 'Parliament's Second Draft Report'.

[945] *Ibid*, 11.

[946] *Ibid*, 22.

[947] EP A6-0481/2006, hereafter referred to as 'Parliament's Second Report'.

instrument harmonising the rules of private international law.'[948] The Regulation then went to through the conciliation procedure which resulted in the rather difficult Recital (33).

8.24 Let us start with what it is not. It is not a choice of law rule.[949] First, the history of the provision does not support such a reading. The recital is the product of a compromise between the Parliament and the Council and Commission. Parliament had proposed a choice of law rule which required the law of the victim's habitual residence to apply to the type of damage claim and the quantum of damage unless it would be inequitable to do so. The Council and Commission rejected the proposal. Recital (33) is the product of this compromise. Plainly, if it were a choice of law rule then the result of the compromise would be to go even further towards the Parliament's position than their first proposal, as there is no 'inequitable' escape clause. Secondly, and more importantly, on its wording it asserts that this is the present position under current national laws rather than providing any choice of law rule from the Regulation.

8.25 If it is not a choice of law rule, the question is then what exactly is it? Professor Symeonides argues that Recital (33) requires the forum court to have regard to both the facts regarding the victim's rehabilitation in the place of his habitual residence and also the laws of that place. Thus, he argues that if the law of the place of the victim's habitual residence would not award damages for medical costs then the victim cannot recover them even if the (separate) applicable law to the non-contractual obligation would allow

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[948] EC COM(2007)0126, hereafter referred to as 'the Commission's Opinion on the Parliament's Second Report', 5

[949] S Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 American Journal of Comparative Law 173, 205. *Cf* C Brière, 'Le règlement (CE) No 864/2007 du 11 Juillet 2007 sur la loi applicable aux obligations non-contractuelles (Rome II)' (2008) 135 Journal du Droit International 31, [21].

for their recovery.[950] It is difficult to see how this is not a choice of law rule by another name. Later, however, Professor Symeonides states that the recital is merely an 'invitation' to the forum court to take account of facts,[951] which appears to be a more satisfactory reading of the recital.

8.26 This final interpretation appears to be the most satisfactory and re-affirms that which has been discussed above with regard to Article 15(c).[952] Recital (33) is simply a 'wish' on the part of the drafters that national laws take all losses into account.[953] Obviously, where the applicable law caps the loss at a certain value, the fact that the victim will suffer more extensive loss than the capped value is irrelevant.[954] However, when applying a discount rate to lump sum damages, the discount rate should be varied depending on where the victim will retain his damages. Thus, the recital merely emphasises to the forum court that losses differ from country to country. It has been argued that if this interpretation is the correct one then the Parliament did not get much from its compromise.[955] However, this is not a reason to ignore the express wording of the Recital. Furthermore, the Parliament did get something from the compromise. It got a promise from the Commission to investigate other solutions.[956]

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[950] Symeonides, *ibid*, 183.

[951] Symeonides, *ibid*, 205.

[952] §8.12-§8.17.

[953] G Légier, 'Le règlement «Rome II» sur la loi applicable aux obligatons non contractuelles' [2007] La Semaine Juridique Edition Générale 13, 31. Also, see P Stone, 'The Rome II Regulation on Choice of Law in Tort' (2007) 4 Ankara Law Review 95, 128, admitting 'It is not clear what effect, if any, [recital 33] will have.'

[954] Thus, Recital (33) will not provide a back door for results such as that in *Harding v Wealands* .

[955] Symeonides, (n949), 206.

[956] The fruits of this promise can be seen in the publication of the report by Demolin, Brulard, Barthelemy posted on the EU Parliament website at:

II. ENGLISH LAW PRIOR TO THE REGULATIONS

8.27 It has been said many times that the European Regulations represent a dramatic change in the approach taken to choice of law and damages from English law.[957] The purpose of the present section is to investigate whether this claim is actually true. It will be submitted that, in fact, the English position, until its misinterpretation in *Harding v Wealands*,[958] was very similar to the European position. Questions of fact were a matter for the *lex fori* and questions of law were a matter for the *lex causae*. This distinction will be demonstrated to be the source of the unusual distinction between 'heads of damage' and 'quantification'.

8.28 The English position, prior to *Harding v Wealands*, was often described as being based on a distinction between 'heads of damages' and 'quantification'. Issues pertaining to the former were for the *lex causae* to determine and issues pertaining to the latter were for the *lex fori* to determine. The key question is why this distinction exists at all. How can it be explained? It will be argued that the distinction originated in a series of Scottish cases, and was adopted into the English case law by Diplock LJ in *Boys v Chaplin*,[959] and then

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http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj_2008_3004_etude_romeii_/JURI_OJ_2008_3004_etude_romeII_en.pdf (accessed 1st July 2009).

[957] E.g. Dicey, §S35-257, fn53; P Beaumont and Z Tang, 'Classification of delictual damages: Harding v Wealands and the Rome II Regulation' (2008) 12 Edinburgh Law Review 131; Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (n936), §14.19.

[958] [2006] UKHL 32, [2007] 2 AC 1.

[959] [1968] 2 QB 1.

the House of Lords in *Chaplin v Boys*.[960] However, it was then misinterpreted by the House of Lords in *Harding v Wealands*, which explains some of the hostility expressed towards that decision.[961]

1. BOYS V CHAPLIN AND THE SCOTTISH CASES

8.29 The distinction between 'heads of damages' and 'quantification' entered English law in the judgment of Diplock LJ, in *Boys v Chaplin*.[962] The judgment refers to the difference between the 'particular kind or kinds' of loss which are actionable, and the 'estimate [of] what is the appropriate monetary equivalent of the loss'.[963] Diplock LJ goes on to state that this rule 'has been applied in Scotland in a number of cases of which it is only necessary to cite *Naftalin v London Midland & Scottish Railway Co*.'[964] These comments of Diplock LJ in the Court of Appeal were relied on by counsel for Chaplin in the House of Lords,[965] submitting that Lord Denning MR and Diplock LJ in the Court of Appeal were correct in distinguishing between heads of damage and quantification of damages

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[960] [1971] AC 356.

[961] Briggs, 'Decisions of the British Courts During 2006: Private International Law' (n923), 572; C Dougherty and L Wyles, 'Harding v Wealands' (2007) 56 International and Comparative Law Quarterly 443.

[962] n959, 41-43. This approach was adopted by their Lordships in *Chaplin v Boys* (n960).

[963] *Ibid*.

[964] (1933) SC 259.

[965] *Chaplin v Boys* (n960), 361-2.

based on the line of cases starting with *Kendrick v Burnett*,[966] including *Naftalin*. It is this submission that was accepted by the majority of their Lordships in *Chaplin v Boys*.[967]

8.30 In *Naftalin*,[968] the claimant father brought an action against the defendant railway company for *solatium*. The claimant's son was negligently killed whilst travelling on the defendant's train in England. The defendant argued that as heads of damage are substantive, and the *lex loci delicti* did not allow a claim for *solatium*, the action must fail. The claimant submitted that this was all a matter of remedy. The Lord Ordinary (Lord Moncrieff) confessed:[969]

> '…I entirely fail to grasp the suggested distinction. The elements of damage which enter into an award are a principal means of determining its measure, and the measure is merely the resultant of the sum of the elements. Both questions, in my opinion, moreover, relate, and relate equally, to the remedy rather than the right.'

8.31 He then derived support from the English case of *Baschet v London Illustrated Standard*,[970] as well as other Scottish authorities which he felt bound him.[971] The Second

[966] (1897) 25 R 82.

[967] Most explicitly by Lord Hodson, 379, and Lord Wilberforce, 389, though *cf* Lord Wilberforce's cryptic comment about the 'Scottish cases', 392G. Lord Pearson is less explicit, but appears to be supporting the same proposition, 394-5.

[968] n964.

[969] *Ibid*, 261.

[970] [1900] 1 Ch 73. For discussion of which, see §7.87.

[971] Especially the decision in *Horn v North British Railway Co* (1878) 5 R 1055.

Division overruled Lord Moncrieff relying[972] on the distinction drawn in *Kendrick v Burnett*.[973] There, an action was brought before the Scottish courts by the claimant relatives of persons who had drowned after a collision in English waters between the vessel which the deceased were on and the defendant owner's vessel. *Solatium* was not available under English law and so the claimants pleaded that *solatium* was an issue of damages, and thus it pertained to the remedy and not to the right, and fell to be determined by the *lex fori*. Their Lordships rejected this analysis. The Lord President stated:[974]

> 'No authority was cited to us shewing that there is any rule that the measure of damages is to be determined by the *lex fori*. In many instances, and especially in details, it must be practically impossible to apply any other rule, and the avowal of this is less a conclusion of international law than the expression of practical necessity. But, as a matter of doctrine, I do not think it can be asserted as a principle that the measure of damages is for the *lex fori*. And where in the inception of a cause notice is taken of a palpable and separable head of claim which is bad in the law which would determine the existence or non-existence of the right sued on, I think that the Court is bound to give effect to the distinction.'

8.32 Lord M'Laren, in response to the same argument, stated:[975]

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[972] Particularly Lord Hunter, 267-268.

[973] (1897) 25 R 82.

[974] *Ibid*, 87.

[975] *Ibid*, 88.

> 'It is worth considering whether this is a good plea, supposing the facts were such as to raise it. For example, if this were a case of destruction of cargo, and the law of one country prescribed as the measure of compensation the price at which the consignee could supply himself in the nearest market, while the law of the other country would give, for example, the cost price of the goods *plus* fair mercantile profit. Without wishing to express a definite opinion, I think that the Judge trying the case supposed would take the measure of damage given by the law which he administers, which might possibly be different from that in which the parties to the cause were subject *ratione domicilii*. Measure of damages is, I think part of the law of evidence, and such would seem to pertain to the *lex fori.*'

He goes on to state that one cannot treat the difference between the English claim and the Scottish claim for *solatium* as 'involving a mere variation in the mode of computation.'[976]

8.33 Lord Kinnear referred to the distinction between the 'mode of ascertaining damage' and the constitution of the obligation.[977]

8.34 It should be quite apparent from the decision in *Kendrick v Burnett* that quantification refers to the attempt to determine the factual loss of the claimant.[978] Lord M'Laren's reference to damages being a question of evidence can only be understood in this light.

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[976] *Ibid*, 88.

[977] *Ibid*, 90.

[978] Also, see Lord Anderson's comments in *Naftalin* (n964), 272, where he uses a test of whether the element to be categorised is 'an element in an estimate of damages.' In terms of the English cases, support for this approach to the concept of quantification can be drawn from the judgment of Arden LJ in *Harding v Wealands* [2005] 1 WLR 1539 , [50]. Even stronger support for this can be found in *Hulse v Chambers* [2001] 1 WLR 2386 where Holland J explicitly links the concept of quantification with those matters that used to be left to the jury.

This is the rule later adopted by Diplock LJ, and then by the House of Lords in *Chaplin v Boys*.

8.35 Even in recent authority on the distinction between heads of damages and quantification, the judiciary has harked back to this original distinction of questions of fact and questions of law. The case of *Hulse v Chambers*[979] is a useful example. The three claimants were passengers in a vehicle driven by the defendant. They were an English family on holiday in Greece. One of the claimants suffered such severe injuries that he was rendered paraplegic. It was conceded that Greek law would govern the tort and the issue of damages arose. Under English law, an award of £125,000 for non-pecuniary loss would be available. Under Greek law, an award of between £56,000-£94,000 would be available. Holland J applied the English value as quantification was procedural and thus was governed by the *lex fori*. He derived this conclusion from quantification being a matter for jury trial, or a matter for the judge acting as jury.[980] This reasoning clearly supports the view that the distinction was concerned with factual determination.

2. THE HARDING ERROR

8.36 The reasoning behind the distinction was lost sight of in *Harding v Wealands*[981] and their Lordships consequently fell into error. Mr Harding, the English claimant, was rendered quadriplegic in a car accident in New South Wales. He was the passenger in a vehicle

[979] [2001] 1 WLR 2386.

[980] *Ibid*, 2392.

[981] [2006] UKHL 32, [2007] 2 AC 1.

negligently driven by the defendant, Ms Wealands, his Australian girlfriend. The case was brought to trial in England and, liability being admitted, the question of quantification arose. Under the law of New South Wales, six provisions in the Motor Accidents Compensation Act 1999 restricted the level of damages that could be recovered. The provisions were as follows:[982]

1. The maximum amount that may be awarded to the claimant for non-economic loss is presently Aus $309,000.[983]
2. In assessing loss of earnings, the court must disregard the amount by which the claimant's net weekly earnings exceed Aus $2,500.[984]
3. There is no award for the first five days' loss of earning capacity.[985]
4. No award may be made in respect of gratuitous care if such care does not exceed six hours a week and is for less than six months. Insofar as the gratuitous care exceeds this amount, the amount that can be recovered is limited to certain sums identified in s128.
5. The discount rate in respect of future economic loss is prescribed at 5%, or as stipulated in regulations (none have been enacted).[986]
6. No interest is payable on damages for gratuitous care or non economic loss. Interest payable on other heads of damage is only payable under certain conditions as prescribed in s137.

[982] *Ibid*, 11-12.

[983] S134.

[984] S125.

[985] S124.

[986] S127.

8.37 It was not contested that the law of New South Wales was the *prima facie* applicable law under the Private International Law (Miscellaneous Provisions) Act 1995, s11(2)(a). However, the defendant contended that either: (i) the flexible exception, under s12, should be applied in favour of English law; or (ii) that the quantification of damages should be considered procedural under s14(3)(b), and thus English law should apply *qua lex fori*. The unanimous view of their Lordships was that the provisions in MACA were procedural and therefore English law should apply *qua lex fori*. Lords Hoffmann and Rodger delivered the substantial speeches of the House, those speeches being agreed with by Lords Bingham and Woolf, and largely agreed with by Lord Carswell, who gave a partial dissent on a ground not relevant here.[987]

8.38 This decision appears to fly in the face of the explanation of the source of the distinction between heads of damages and quantification. If quantification is concerned with the factual assessment of loss, and questions of fact are a matter for the *lex fori*, then the only question that must be addressed in *Harding v Wealands* is whether the restrictions on damages were an attempt at factually assessing the loss caused to Mr Harding. There is nothing complex about this. Plainly the provisions were not. Indeed, they were enacted in order to keep insurance premiums down in New South Wales. The only question is, therefore, what went wrong in the House of Lords?

8.39 Lord Hoffmann's speech can be broken down into four stages:

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[987] On the application of *Pepper v Hart* [1993] AC 593 in the case. This partial dissent was addressed in a short speech by Lord Woolf.

1. The cases of *Huber v Steiner*,[988] *Don v Lippmann*[989] and *De la Vega v Vianna*[990] stand for the proposition that right is a matter for the *lex causae* and remedy a matter for the *lex fori*.
2. In the context of damages, this rule has been applied by way of a distinction between heads of damages and quantification: *Boys v Chaplin*.[991]
3. The legislative intervention of the Private International Law (Miscellaneous Provisions) Act 1995 did not alter the position.
4. Applying this law to the provisions in the case, Lord Hoffmann held that the MACA sections were procedural, on the basis that the High Court of Australia in *Stevens v Head*[992] had analysed the predecessor provisions in the Motor Accidents Act 1988 as concerned with quantification, and decided that they were therefore procedural.

8.40 Lord Rodger's speech can also be broken down into four stages:

1. The statute has not altered the state of the law as it existed prior to 1995.
2. The law prior to 1995 contained a distinction between heads of damage and measure of damages, the latter being a matter of procedure for the *lex fori*: *Boys v Chaplin* and *Mitchell v M'Culloch*.[993]

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[988] (1835) 2 Bing NC 205, 132 ER 80.

[989] (1837) 5 Cl & Fin 1, 7 ER 303.

[990] (1830) 1 B & Ad 284.

[991] [1971] AC 356.

[992] (1993) 176 CLR 433.

[993] (1976) SC 1.

3. The relevant provisions of MACA were *prima facie* procedural as Chapter 5 referred to 'damages'.
4. The relevant provisions of MACA were also in the nature of direction to the court, and therefore were procedural.

8.41 The interesting comparison between the two speeches is the attempt at applying the distinction between heads of damage and measure of damages to the provisions in MACA. Lord Hoffmann refrained from doing so, happy in the knowledge that the High Court of Australia had found them to be procedural in *Stevens v Head*[994] on the basis that the provisions altered the value of the damages awarded, and thus could not be distinguished from, for example, discount rates.[995]

8.42 Lord Rodger attempted to apply the distinction to the provisions himself. With the greatest respect, the mess into which his Lordship got rather demonstrates the error their Lordships committed when interpreting the test. First, Lord Rodger explained that Chapter 5 of MACA referred to 'damages'. Unfortunately this could not be conclusive as both mitigation of damages and contributory negligence were also found in that Chapter and these have been held to be substantive. Thus, Lord Rodger decided that because the provisions were in the nature of a direction to the court they were procedural. So, for example, s125(2) states:

[994] *Ibid*, 459.

[995] Referring to *Todorovic v Waller* (1981) 150 CLR 402.

> 'In the case of any [award of damages], the court is to disregard the amount (if any) by which the injured or deceased person's net weekly earnings would (but for the injury or death) have exceeded $2,500.'

It must follow from this that if the provisions concerning mitigation had been directed to the court then they would also be procedural. However, s136(2) and (3) of the Act state as follows, yet were determined to be substantive:

> '(2)...in assessing damages in respect of a claim, the court is to give consideration to the steps taken by the injured person to mitigate those damages and to the reasonable steps that could have been or could be taken by the injured person to mitigate those damages.'

> '(3) Those steps include the following:
>
> > (a) undergoing medical treatment,
> >
> > (b) undertaking rehabilitation (including the formulation and undertaking of an appropriate rehabilitation program),
> >
> > (c) pursuing alternative employment opportunities,
> >
> > (d) giving the earliest practicable notice of the claim in order to enable the assessment and implementation of the above matters.'

Furthermore, the test becomes absurd if the question one asks is whether the statutory provision is directed at the court or at the parties in a broader sense. Why should a provision which states 'the court shall find the defendant liable under the following

circumstances' be procedural and a provision which states 'the defendant will be liable under the following circumstances' be substantive?

8.43 Thus, it is submitted that the reasoning of their Lordships is flawed. Four further reasons can be adduced to demonstrate that the case was incorrectly decided.

a. *Cope v Doherty* not distinguishable

8.44 Counsel for Ms Wealands submitted that caps on damages must be substantive, having been so decided in *Cope v Doherty*.[996] A similar argument had been made in *Stevens v Head*,[997] although not relying on *Cope* but on *Allan J Panozza v Allied State*.[998] *Panozza* involved a contract of carriage with a statutory limitation on the liability of the carrier.[999] The clause was held to be substantive. The case was distinguished in *Stevens* on the basis that it involved a contractual cap on damages. The problem for the House of Lords in *Harding* is that the cap in *Cope v Doherty* was much harder to pigeon-hole as a contractual cap in any meaningful sense. Two American ships were involved in a collision and the negligent shipowner tried to limit its liability by using the Merchant Shipping Act 1854. This Act limited liability to the value of the negligent shipowner's ship and cargo. One of the submissions made in front of Page-Wood VC was that the

[996] (1858) 4 K&J 367.

[997] n992.

[998] [1976] 2 NSWLR 192.

[999] Thus, similar in effect to Article IV(5) of the Hague-Visby Rules.

limitation was procedural and therefore ought to apply *qua lex fori*. Page-Wood VC rejected the argument, stating:[1000]

> '…although the *lex fori* has application to everything concerning the form of the procedure, with regard to the substance of the proceeding it has no application whatever. And clearly an Act, which limits the damage to which the shipowner is to be liable under circumstances like the present, deals with the substance and not the form of the procedure. It in effect forms a contract that, whereas by the natural law the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss he has sustained, all those persons upon whom the Legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law – the common law, as we should call it in England – would given them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted, and of the freight due or to grow due in respect of such ship during the voyage.'

When the case went to the Court of Appeal,[1001] the only comment on this ground was as follows:[1002]

[1000] n996, 384-5.

[1001] (1858) 2 De G&J 614.

[1002] *Ibid*, 626.

> 'An attempt was made on the part of the Appellants to bring this case within *Don v Lippmann* and cases of that class, but I think those cases have no bearing upon the point. This is a question of liability, and not of procedure.'

8.45 Lord Hoffmann distinguished the case on the following basis:[1003]

> '*Cope v Doherty* is authority for the proposition that a contractual term which limits the obligation to pay damages for breach of contract or a tort, or a statutory provision which is deemed to operate as such a term, qualifies the substantive obligation.'

His Lordship goes on to explain that the Merchant Shipping Amendment Act 1862 'extended the right to limit liability to all ships of whatever nation and therefore it could not be considered a contractual term imposed on British subjects.'[1004]

8.46 With respect, this reasoning is flawed. Page Wood V-C explained that s504 of the Merchant Shipping Act 1854 was substantive and used the description of a contract as an analogy, hence his use of the words '[i]t *in effect forms a contract*...[on] all those persons upon whom the legislature can impose such a contract, that is to say, all its own subjects...' The world has moved on since 1854 and the British legislature is now content, on occasion, to impose statutory obligations on non-resident, non-citizens. These obligations are clearly no less 'contractual' than the Merchant Shipping Act 1854.

[1003] *Harding v Wealands* (n954), [46].

[1004] *Ibid*, [47].

8.47 Lord Hoffmann also drew support from two further cases, *Caltex Singapore v BP Shipping*[1005] and *Seismic Shipping Inc v Total E&P UK*,[1006] which appear to contradict *Cope v Doherty*. However, they are distinguishable. Both involved shipping limitation funds, and if one looks at Clarke J's judgment in *Caltex* it is concerned with the impracticalities of applying different substantive laws to the question of the fund limit. There is a distinct analogy with choice of law for insolvency claims (see *The Halcyon Isle*[1007] in English law and Article 4 of the Insolvency Regulation in European law), where one fund needs to be distributed amongst claimants with a variety of claims brought under a variety of laws. On the grounds of both fairness and practicality, one law must apply to what constitutes the fund and which claimants have priority. Furthermore, it would appear that the Merchant Shipping Act 1995 gives the 1976 Convention on the Limitation of Liability for Maritime Claims 'the force of law'.[1008] This may suggest that it is an overriding statute.[1009]

8.48 Therefore, it is submitted that *Cope v Doherty* was not distinguishable. Indeed, because their Lordships did try to distinguish it, one must now ask whether or not the statutory provision is contractual or quasi-contractual in nature. Quasi-contractual includes statutes that provide for liability limitations on all persons performing a certain activity even if they have never had actual contact before, as in *Cope*. However, this apparently only extends to piloting ships and not driving cars.

[1005] [1996] 1 Lloyd's Rep 286.

[1006] [2005] 2 Lloyd's Rep 359.

[1007] [1981] AC 221.

[1008] Merchant Shipping Act 1995, s185(1).

[1009] See Lord Diplock in *The Hollandia* [1983] 1 AC 565, 577.

b. The Fixed-Value Damages problem

8.49 Suppose that the foreign law would always award £50 for the breach of a particular obligation. This is not a cap on damages, as it does not provide an upper limit, but a set value award. Lord Hoffmann did not propose 'to explore this or other hypothetical cases because they do not arise in this case and, so far as I know, have not arisen in the past.'[1010] If one takes the *Harding* approach then this becomes a particularly knotty problem. Having taken the view that quantification of damages is concerned with the numerical calculation of damages under each head of damage, the problem is that the fixed-value award concerns both. On one view there is liability of £50. On another there is liability for the breach of the obligation, the quantification of damages being £50. The *Harding* solution does not allow one to solve this issue. However, if one takes the view advocated here, that only factual assessments of loss will be governed by the *lex fori*, this is the only question one asks. If, however grave the breach of an obligation is, an award of £50 is granted, clearly this is not an attempt at factually assessing the loss caused to the claimant. In which case, the *lex causae* ought to apply.

c. Procedure ought to be obligation-blind

[1010] *Harding*, [51].

8.50 Procedure ought to be obligation-blind. Whichever view[1011] of the explanation one takes for the distinction between substantive and procedure, they all suggest that procedure should be obligation-blind. By this it is meant that procedure should not have a broader remit in the context of tort than it does in contract. The consequence of *Harding v Wealands* is that procedure is not obligation-blind. The case of *Maher v Groupama Grand Est*[1012] usefully demonstrates this. There, an English claimant was involved in a car crash in France when a van driven by a Frenchman collided with his Range Rover. The tortfeasor was insured by a French company under an insurance policy governed by French law. The claimant brought a direct action[1013] against the French insurer in the English courts.[1014] The two issues in contention were whether French or English law governed: (i) the assessment of damages; and (ii) the pre-judgment interest. The claimant argued: (a) the claim was one in tort; and (b) the assessment of damages and pre-judgment interest with respect to a claim in tort are procedural. The defendant argued: (a) the claim is contractual because the insurer becomes involved only on the basis that it is contractually obliged to indemnify the policy holder against the claim which the injured parties have against him; and (b) with respect to such claims the assessment of damage and pre-judgment interest are substantive and therefore French law applies. The focus of the case, therefore, was on the characterisation of the action as contractual or tortious, for no other reason than whether the *lex fori* would apply to calculate damages. Blair J held that characterisation is to be performed with respect to issues and the two issues in the

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[1011] The views are extensively canvassed in Chapter 4.

[1012] [2009] EWHC 38 (QB). Also, see *Knight (Tim) v Axa Insurance* [2009] EWHC 1900 (QB).

[1013] Permissible under EC (Rights against Insurers) Regulations 2002, enacting the Fourth Motor Insurance Directive, 2000/26/EC.

[1014] Under the Brussels I Regulation, such an action can be brought in the courts of the claimant's domicile, irrespective of the domicile of the defendant insurer C-463/06 *FBTO Schadeverzekeringen NV v Jack Odenbreit* [2007] ECR I-11321.

case were, first, the liability of the tortfeasor and second, whether the insurer had to indemnify for that liability. The assessment of damages concerns the first of these issues, and this should be characterised as tortious. Therefore, bound by the decision in *Harding v Wealands*,[1015] damages were to be assessed by reference to English law.

d. £1 damages cap

8.51 Suppose that a particular legal system wishes to maintain liability for the breach of an obligation, but only wishes to award nominal damages for that breach. Therefore, it caps the damages for the breach of that obligation at £1. Under the *Harding* analysis, the *lex causae* would determine whether the head of damage exists, and in this case it does, and the *lex fori* would determine the quantification irrespective of the cap. Therefore, substantial damages would be awarded if the *lex fori* does not cap the damages. No doubt, Lord Hoffmann would criticise the example as being both hypothetical and faintly ludicrous. It is arguably both of those. However, it does demonstrate that there is a fallacy in the approach of the court in *Harding* as the logic of their analysis requires a solution which is patently incorrect. Again, if one applies the actual test that was adopted in *Chaplin v Boys*, a much more palatable solution is achieved. The £1 damages cap cannot be considered an attempt at assessing the factual loss caused to the claimant. Therefore it is to be applied.

[1015] [2007] 2 AC 1.

3. CONCLUSION

8.52 It has been demonstrated that, prior to the decision in *Harding v Wealands*, the approach of the English common law was to subject quantification of damages, in the sense of the factual determination of loss, to the *lex fori*, and all other issues concerning damages to the *lex causae*. The decision of the House of Lords in *Harding* has been explained, and criticised, for being both an incorrect application of the previous case law, and for leading to unpalatable results.

III. APPLICATION TO DISCRETE AREAS

8.53 If this thesis is correct in its argument that the position under the common law, prior to *Harding v Wealands*, is similar to that under the European Regulations, then the English case law may be of minor assistance in interpreting those Regulations. This is not to say, of course, that the English rules are being applied. Therefore, when discussing how the European Regulations will apply to discrete areas, the English case law is discussed.

1. NON-PECUNIARY LOSS

8.54 Non-pecuniary loss will usually arise out of the breach of non-contractual obligations, but on occasion it may arise in the context of contractual obligations.[1016]

8.55 When an English court is faced with a purely domestic claim for non-pecuniary loss it will primarily refer to the Judicial Studies Board Guidelines for the Assessment of General Damages.[1017] This provides a monetary value for the specific injury that has been suffered. The court can then tailor the award by reference to various subjective factors, that is, factors particular to the individual claimant. Is the court attempting to assess the factual loss of the claimant? The answer, it is thought, is yes. Of course it is true to say that the traditional method of analysing loss, with reference to the market, is unavailable because there is no market value for arms or legs.[1018] However, just because there is a difficulty in assessing the factual loss does not mean that the courts are not trying to assess it. Whilst no accurate value can be given for pain, suffering and loss of amenity, the economic conditions of the domestic market provide at least a setting within which one can attempt to value this. This leads to the (perhaps uneasy) conclusion that the less wealthy a country is, the less money should be awarded to those living within that

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[1016] E.g. *Summers v Salford Corporation* [1943] AC 283, where the landlord's breach of a covenant to repair a window sash cord caused the claimant to suffer injury to her hand.

[1017] C Mackay and others, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford University Press, Oxford 2006).

[1018] Or certainly not one that ought to be cited in court. See PS Atiyah, *The Damages Lottery* (Hart Publishing, Oxford 1997), p14 *et seq.*.

country claiming compensation for pain and suffering.[1019] Simply put, ten thousand pounds means far more in Malawi[1020] than it does in England.

8.56 This proposition derives support from *Hulse v Chambers*,[1021] the facts of which have already been explained.[1022] Holland J held that the damages awarded for non-pecuniary loss were procedural as they were a matter for jury trial or judge acting as jury. This can only be explained on the basis that the valuation of non-pecuniary loss is a factual issue.

8.57 *Kohnke v Karger*[1023] is also consistent with this approach. The claimant was involved in a car accident in France. She was the passenger in a car driven by the defendant which had crashed into a lorry. She, and the defendant, brought a claim, grafted onto criminal proceedings against the lorry driver, in the French courts. The court[1024] held that the lorry driver was two-thirds responsible and the defendant one-third responsible. The claimant and defendant were awarded damages, with the defendant's award reduced on the ground of contributory negligence. A procedural rule of the French courts prevented the claimant

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[1019] For a domestic version of this argument, regarding changing the non-pecuniary loss values according to inflation, see Burrows, *Remedies for Torts and Breach of Contract* (n928), 187. This argument was accepted by the Tokyo High Court in *X1, X2 and X3 v Y* (2002) 45 Japanese Annual of International Law 155.

[1020] Which according to the CIA World Factbook is the poorest country in the world: see https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html, accessed 1st June 2007.

[1021] [2001] 1 WLR 2386. *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783, [85]-[86], is equally supportive but in the context of defamation.

[1022] §8.35.

[1023] [1951] 2 KB 670. The case can also be explained on the basis that the common law double actionability rule did not refer to the *lex loci delicti* beyond whether the conduct of the defendant was actionable. This would mean that the foreign rules regarding quantification would never be caught by the choice of law rule.

[1024] On appeal.

recovering for damage to her property[1025] because the claim was grafted onto criminal proceedings. The claimant then brought a claim against the defendant in the English courts. Lynskey J did not feel bound by the French assessment of damages and assessed the damage under English principles, including the property damage, increasing the award from £1,400 to £2,200.[1026] A factual assessment of the damage was required and the English court applied its own valuation.

8.58 Further support for this approach can be derived from Diplock LJ in *Boys v Chaplin*.[1027] He states that '[t]he assessment of the monetary equivalent of a loss not directly sustained in money must necessarily be made by the court before which the remedy is sought and is in this sense decided by the *lex fori*.'[1028]

8.59 However, it should be noted that just because this is an attempt to assess factual damage, and therefore a matter for the *lex fori*, this does not mean that the forum's domestic rules on damages should be insensitive to the claimant's country of residence. Considering that, as we have argued, the values for non-pecuniary loss aim to give a factual assessment of loss in the context of the economic market the claimant lives within, the domestic rules on damages should be sensitive to the fact that a foreign claimant lives within a different economic market. It is likely that the best attempt at assessing the loss is to be derived from the law of the place where the claimant resides, but it must be

[1025] Her dress and wristwatch.

[1026] n1023, p677-678.

[1027] n959.

[1028] *Ibid*, 40.

stressed that it is the domestic law of the forum that is using this figure to make its own assessment.

8.60 The Tokyo High Court has made this position plain in *X1, X2, and X3 v Y*[1029] where it refused to give Japanese levels of bereavement damages to Sri Lankan claimants on the basis that 'The real value of a consolation payment depends on where it is used.'[1030]

2. PECUNIARY LOSS

8.61 Damages for pecuniary loss are simple to deal with. If the foreign rule is purely concerned with the factual assessment of what is loss, then the forum court is in a better position to assess this and the *lex fori* applies. Where the foreign rule has elements to it unconcerned with factual loss, the *lex causae* must apply to the extent of those elements.[1031]

3. CLAIMS ARISING FROM DEATH

8.62 Strictly speaking, issues of transmissibility of claims on death are not within the scope of the thesis title.[1032] However, once it is admitted that a foreign *lex causae* (howsoever

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[1029] *X1, X2 and X3 v Y* , n1019.

[1030] *Ibid*, p156.

[1031] E.g. a statutory cap on damages, see §8.84-§8.86.

[1032] See Rome II Regulation, Article 15(e).

determined) can provide a cause of action, the issue of quantification of damages arises. Generally speaking, and following the English law model, there are three likely causes of action that may accrue upon the death of a person. The first is an action on behalf of the deceased for his injury and, perhaps, death. The second is an action by third parties for some form of bereavement. The third is an action by third parties for dependency due to the deceased no longer financially supporting those third parties. These will be dealt with in turn.

8.63 Where a foreign *lex causae* allows an action on behalf of the deceased for his injury there ought to be no difference between this action and a simple action for non-fatal personal injury which would have been brought by the claimant had he not died.[1033]

8.64 Where a foreign *lex causae* allows an action by third parties for some form of bereavement, the *lex fori* should determine the value of this bereavement. Bereavement is akin to the value attributed to the loss of a finger, or the loss of a leg. It is an attempt at factually assessing the loss to the claimant; an admittedly rough figure, related to the market within which the claimant functions, which the court hopes will provide a sufficient element of satisfaction for the claimant.[1034]

8.65 Where a foreign *lex causae* allows an action by third parties for dependence, this is likely to involve a factual determination of loss. The question that is being answered is: to what extent was the claimant financially dependent on the deceased? This can be answered by looking at the micro-economics of the household or arrangement. Where there are

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[1033] For the issues surrounding non-pecuniary loss claims, see above, §8.54-§8.60.

[1034] See *X1, X2 and X3 v Y* (n1019).

restrictions on what is allowed to be taken into account, these restrictions must be considered legal as restrictions imply deviations from the true facts and thus are not aids to factual determination.

8.66 The English case law on claims arising from death could be viewed as inconsistent with the above statements, but there are persuasive reasons for not following it under the European rules, or even under the older English rules. In *Roerig v Valiant Trawlers Ltd*,[1035] the Dutch claimant brought an action under the Fatal Accidents Act 1976 against the defendant trawler owners. The claimant's husband had died whilst working on the defendants' English-registered trawler. The question of assessment of damages arose as Dutch law made deductions to the overall damages payment if any benefits had been received by the claimant, whilst English law had less restrictive provisions. Waller LJ found that under the Private International Law (Miscellaneous Provisions) Act 1995, s11(1), English law should apply and there should be no displacement of the general rule under s12 despite the strong connections with the Netherlands. Furthermore, if that was incorrect, Waller LJ also held that the assessment of damages is procedural, and deductions fall within this category. Finally, Waller LJ thought that the Fatal Accidents Act 1976 was an overriding statute.

8.67 It can simply be asserted that because of the first decision of Waller LJ, the final parts of *Roerig* that are inconsistent with the advocated approach are *obiter*. However, there are stronger arguments against the judgment. As to the decision that deductions were part of the assessment of damages and the assessment of damages is procedural, Waller LJ displayed one particular concern which manifested itself in two areas. There was an

[1035] [2002] 1 WLR 2304.

uneasiness over the segregation of right and remedy. The defendant was not contending that the *whole* action should be determined by Dutch law, but merely that the assessment of damages ought to be. The availability of the cause of action was determined by English law. Thus, Waller LJ was concerned that by applying Dutch law to only part of the action, that is, the assessment of damages, an odd hybrid law might be applied.[1036] Secondly, Waller LJ made an attempt to demonstrate that it would be too inconvenient to determine the Dutch law on damages because to only look at an isolated area of damages would be inadequate, and to look at all of the Dutch law on dependency would be too inconvenient. This is certainly questionable and, as has been argued previously, this argument applies equally well to areas of law other than the law of damages. The idea that only the law of damages is completely coherent and one cannot analyse one area in the absence of another is implausible. Further, if there were aspects of damages that might alter the application of the Dutch rules on deduction, the nature of the English trial process means that the defendant should have pleaded these aspects of Dutch law.

8.68 The final argument made by Waller LJ would appear to have coloured the whole judgment. He first states that the Fatal Accidents Act 1976 applies as a set of mandatory rules. He then states that as the liability has been pleaded on the basis of the Fatal Accidents Act, the assessment of damages ought to be too, under the provisions in s4. The first of these propositions is simply incorrect, and can be shown to be so by the case law. The second of these propositions is rejecting a depeçage approach in the context of the Fatal Accidents Act.

[1036] [21]. This argument against separating primary right and secondary right has been made above, §2.17-§2.20.

8.69 In respect of the argument that the Fatal Accidents Act 1976 is an overriding statute, Waller LJ states:

> 'The Act is available for the benefit of foreigners (see *The Esso Malaysia* [1975] QB 198), provided proceedings can be properly issued and served. Surely then, simply as a matter of statutory construction, once an action is brought in reliance on the provisions of that Act then the sections which refer to assessments "under the Act" or refer to assessments of damages "in the action" (clearly referring to actions brought "under the Act") simply apply.'

8.70 The authority that Waller LJ relies on does not support such a reading of the Fatal Accidents Act. In *The Esso Malaysia*,[1037] it was submitted that the Fatal Accidents Act 1976 did not apply to foreigners living abroad. Brandon J rejected this submission, endorsing the decision in *Davidsson v Hill*[1038] which he stated was binding on him. In *Davidsson v Hill* the Divisional Court had to deal with the submission that as there was a presumption that Parliament only legislated for its own citizens, the Fatal Accidents Act would not apply for the benefit of foreigners. This submission was rejected. Under the context of the double actionability rule, this submission is understandable. If there was no claim under the *lex fori* then there could be no claim whatsoever. The comments of Phillimore J[1039] demonstrate that if the foreign law did not give a cause of action then the case would have proceeded differently:

[1037] [1975] QB 198.

[1038] [1901] 2 KB 606.

[1039] *Ibid*, 617.

> ‘I have hitherto not considered one possible lex loci, the law of the foreign ship--in this instance that of Norway. If such a tort were not actionable by the law of Norway, it would be necessary to consider which was the law applicable, whether that of the British ship on which the act of negligence was committed, or that of the foreign ship on which the act was felt, or whether, as his death was in the sea by drowning, general maritime law or maritime law as administered in the English Courts should apply…But till it is otherwise pleaded and proved, I take the law of Norway to be the same as our own.’

8.71 If the Fatal Accidents Act had been considered an overriding statute then there would be no need for this *dicta*, as the foreign law would be irrelevant.

8.72 As to the second argument, that there ought to be no depeçage between liability and damages once liability has arisen on the basis of Fatal Accidents Act 1976, s1, this is again an assertion that whilst the Act as a whole is not mandatory, once s1 has been invoked, s4 is mandatory. There is nothing to support such a reading of the Act, and this would be tantamount to stating that depeçage is barred under English law for splitting right and remedy, using remedy in a wider sense than both *Chaplin v Boys* and *Harding v Wealands*.

8.73 It has been held, under the English common law, that a contractual cap on the level of damages recoverable by dependents is substantive, and therefore applicable.[1040]

[1040] *Holmes v Bangladesh Biman Corporation* [1989] AC 1113.

4. PURE ECONOMIC LOSS

8.74 Quantification for claims based on pure economic loss, unless the applicable law has restrictions on what is recoverable, is likely to involve an attempt at a factual determination of loss and is therefore determined by the forum court. There are different methods of assessing quite what loss is according to varying market values and the time at which one assesses it. In so far as the foreign rules do not contain substantive legal policy, rather than just an attempt at the determination of a fact, the *lex fori* will apply.

5. REMOTENESS

8.75 Neither the Rome I Regulation nor the Rome II Regulation specifically refer to remoteness of damage. At common law, the decision of Pilcher J in *D'Almeida Araujo Lda v Sir Frederick Becker & Co*[1041] stands as authority for the proposition that remoteness is to be governed by the *lex causae*. In that case, the claimants agreed to sell palm-oil to the defendants, payment to be made by letter of credit. The claimants agreed to purchase the palm-oil from a third party, also by letter of credit, in order to make the sale to the defendants. The contract between the third party and the claimants had a clause requiring the payment of 5% of the contract price by way of indemnity should one of the parties fail to fulfil their obligations. The defendants failed to open the letter of credit with the consequence that the claimants could not open theirs for the purposes of the third party purchase. The court had to determine whether the Portuguese contract law rules on remoteness applied, which were more generous than the English rules and would

[1041] [1953] 2 QB 329.

allow the claimant to recover the loss from the defendant. Pilcher J, encouraged by a passage in Cheshire[1042] and the Canadian decision of *Livesley v Horst*,[1043] found that remoteness was substantive.[1044] This is not the strongest of authorities; part of the decision is technically *obiter* as Pilcher J went on to decide that the claimants failed to mitigate and thus only nominal damages were awarded.[1045]

8.76 This decision received support, without specific citation, from *Harding v Wealands*.[1046] Lord Hoffmann stated that '…the rules which…require that the damages should have been reasonably foreseeable are…rules which determine whether there is liability for the damage in question.' He goes on to find that these types of rules are to be determined by the *lex causae*.[1047]

8.77 It is more or less accepted that the question of remoteness cannot be considered as attempting a factual determination. It is strongly influenced by considerations that go to the root of the contractual or tortious duty.[1048] The variation of what the remoteness test is according to the cause of action in English law makes this quite clear. Thus, it is submitted that issues of remoteness will be governed by the *lex causae* under the two Regulations.

[1042] *Ibid*, 335.

[1043] [1925] 1 DLR 159 (Supreme Court of Canada).

[1044] n1041, 338.

[1045] n1041, 340.

[1046] [2007] 2 AC 1.

[1047] Finding that this was the dicta of *Chaplin v Boys* [1971] AC 356 at paragraphs [25]-[30] and then finding that this has not been changed by the Private International Law (Miscellaneous Provisions) Act 1995, paragraphs [31]-[34].

[1048] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48; *Kuwait Airways Corporation v Iraqi Airways Corporation (Nos 4 and 5)* [2002] UKHL 19 [2002] 2 AC 883, paragraphs [70]-[71].

6. MITIGATION OF LOSS

8.78 The two European Regulations do not specifically refer to mitigation of loss. At common law, without significant consideration of the issue, Pilcher J in *D'Almeida*[1049] appears to have thought that mitigation is substantive.[1050]

8.79 Lord Rodger in *Harding v Wealands* lends further support to the argument that mitigation is a matter for the *lex causae* where, when referring to the provisions of the Motor Accidents Compensation Act 1999 he states[1051] 'Chapter 5 contains provisions on matters which would traditionally fall on the substantive side of the line for purposes of private international law. This is the case, for example, with mitigation of damages…'

8.80 This seems correct. The requirement of mitigation must be considered as a legal issue, rather than an attempt to determine anything factual. Whilst it may be the case that determining whether mitigation was possible is factual,[1052] the actual requirement, and lengths to which one must go to mitigate, cannot be factual.

7. CONTRIBUTORY NEGLIGENCE

[1049] [1953] 2 QB 329.

[1050] *Ibid*, 340.

[1051] n958, [74].

[1052] *Cf* Article 17 of the Rome II Regulation.

8.81 The availability of the defence of contributory negligence should be a matter for the *lex causae*. The Rome II Regulation does not specifically refer to contributory negligence but it has been argued that Article 15(b) of the Rome II Regulation provides that contributory negligence is to be governed by the law applicable to the non-contractual obligation.[1053] Insofar as the Rome II Regulation subjects the defence to the law applicable to the non-contractual obligation it ought to be the case that under the Rome I Regulation the defence should be subjected to the law applicable to the contractual obligation. Whilst the defence is not mentioned in the Article 12(1) list, that list is not meant to be exhaustive.

8.82 The quantification of the reduction of damages following a successfully pleaded defence of contributory negligence should also be a matter for the law applicable to the obligation. The evaluation of which factors are taken into account when determining relative culpability, and the actual percentage assessment of relative culpability cannot be considered as an attempt at determining a fact. Furthermore, just how culpable the victim is will inevitably be affected by the foreign legal system's assessment of the culpability of the tortfeasor. Essentially, comparative culpability is exactly that: comparative. Considering the tortfeasor's culpability is determined by the *lex causae*, it would be odd for the victim's comparative culpability to be determined by the *lex fori*.

8. *LEX CAUSAE* FIXES THE DAMAGES VALUE

[1053] Dickinson (n936), §14.14, relying on the European Commission's Proposal, 23. This also appears to be the position at common law: *Dawson v Broughton* (2007) 151 SJLB 1167.

8.83 There are two issues that arise for discussion. First, the *lex causae* could fix the ceiling on damages, otherwise known as a cap. Secondly, the *lex causae* could have a fixed value for damages. That is, where the defendant causes the claimant some form of loss he must pay the claimant the fixed value.

i. Caps on Damages

8.84 Caps on damages cannot be considered an attempt at factually determining the loss of the claimant. Therefore, the governing law of the obligation ought to apply to such caps under the Rome I and Rome II Regulations.

8.85 This differs from decision of the House of Lords in *Harding v Wealands*,[1054] which has been discussed extensively above.[1055] It has been submitted that the House of Lords in *Harding* erred in their decision. Under the *Chaplin v Boys*[1056] concept of quantification, caps on damages must be considered substantive and therefore governed by the *lex causae*. They cannot be considered an attempt at factually assessing the loss of the claimant. The case law before *Harding v Wealands* supports this approach and has already been discussed:[1057] *Cope v Doherty*,[1058] *Allan J Panozza v Allied State*,[1059] *Caltex*

[1054] [2006] UKHL 32; [2007] 2 AC 1.

[1055] §8.36 - §8.51.

[1056] n960.

[1057] §8.29-§8.35.

[1058] (1858) 4 K&J 367.

[1059] [1976] 2 NSWLR 192.

Singapore v BP Shipping[1060] and *Seismic Shipping Inc v Total E&P UK*.[1061] The Law Commission also supports this approach.[1062]

8.86 In spite of this case law, their Lordships in *Harding v Wealands* changed the approach to caps on damages. Under the *Harding* approach there are four types of caps. The first three are considered substantive, and the final type is procedural. The first type of cap is a contractual cap on damages.[1063] The second type of cap is a quasi-contractual statutory cap. This category was introduced by *Harding v Wealands* and *Cope v Doherty* is used as an example of this.[1064] The third type of cap is a cap on the primary right. That is, a cap on the liability of the defendant. An example of this would be a statutory provision which created liability for defendants who drive negligently, but this liability can only extend to, say, £5,000. The fourth type of cap is a cap on the secondary right, that is, a cap on the damages recoverable. *Caltex Singapore* and *Seismic Shipping* are considered as examples of this type of cap. These results clearly demonstrate the merit of the European approach.

ii. Fixed Value Damages

8.87 Fixed value damages cannot be considered factual attempts at calculating the loss caused to the claimant. Therefore the governing law of the obligation ought to apply where it

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[1060] [1996] 1 Lloyd's Rep 286.

[1061] [2005] 2 Lloyd's Rep 359.

[1062] Law Commission, *Private International Law Choice of Law in Tort and Delict* (Law Com No 193, 1990) at paragraph 3.38.

[1063] *Holmes v Bangladesh Biman Corporation* (n1040).

[1064] *Harding v Wealands* [2006] UKHL 32, [2006] 3 WLR 83, [46].

provides for fixed-value damages. In English law, Lord Hoffmann expressly stated that he would not decide this issue in *Harding v Wealands*.[1065] There would be a significant difficulty in applying the heads of damage and quantification distinction as elucidated in *Harding* to this issue as it is almost impossible to determine whether this is a limitation on the right or the remedy. It makes little sense to ask this question in relation to such a foreign law. The fact and law distinction, as used by the Rome I and II Regulations and the case law previous to *Harding*, solves the issue neatly. Any fixed award does not attempt to factually determine loss but merely replace loss with a fixed value. Thus, the fixed award should be applied as part of the *lex causae*.

9. INTEREST[1066]

a. Interest Payable Under a Contractual Term

8.88 A claim for interest under a contractual term is not a claim for damages. It is a claim for the enforced performance of a primary obligation.

8.89 Article 12(1)(b) of the Rome I Regulation subjects performance of the contract to the applicable law of the contract and it follows from this that interest payable under a contractual term ought to be governed by that law. In English law, if a contractual term gives a party the right to interest then, so long as the term is valid according to the law

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[1065] *ibid*, [50].

[1066] The effect of the Late Payment of Commercial Debts (Interest) Act 1998 is not analysed herein as the focus is on the Regulations' approach to interest. The Act contains some overriding mandatory rules. Analysis of its effect can be seen in Dicey, §33-384 - §33-391.

governing the contractual obligation, the English court will allow interest to be recovered.[1067] In so far as the rate of interest is specified in a contractual term, that rate will also be applied.[1068]

b. Availability of Interest in the Absence of a Contractual Term

Contractual Obligations

8.90 The Rome I Regulation states that the applicable law to the contract governs 'within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law.'[1069] The availability of interest clearly falls within the scope of this article and thus the *lex contractus* will govern. At common law, there was some controversy in the case law,[1070] but recent decisions have made it clear that the precedent supporting the idea that the availability of interest was governed by the *lex fori* has been usurped by the Rome I Regulation.[1071]

[1067] *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2003] 1 All ER (Comm) 22, at paragraph [25]; upheld by *Lesotho Highlands Development Authority v Impregilo SpA* [2003] 2 Lloyds Rep 497, at paragraphs [48]-[49]. Both of these were overruled by the House of Lords, but on grounds specific to the interpretation of the Arbitration Act 1996 in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 WLR 129. See also, for the common law position, *Mount Albert Borough Council v Australasia Temperance and General Mutual Life Assurance Society* [1938] AC 224.

[1068] *Ibid*.

[1069] Article 12(1)(c).

[1070] See *Miliangos v George Frank (Textiles) Ltd (No 2)* [1976] 3 WLR 477 supporting the application of the *lex contractus* and *Midland International Trade v Al-Sudairy* Financial Times (11th April 1990) supporting the application of the *lex fori*.

[1071] *Lesotho Highlands Development Authority v Impregilo SpA and Others* (QBD) (n1067), at paragraph [25], supported by *Lesotho Highlands Development Authority v Impregilo SpA* (CA) (n1067).

Non-contractual obligations

8.91 The Rome II Regulation makes no specific reference to the availability of interest but it is difficult to see how it will not fall under the phrase 'existence, nature and assessment of damage or remedy claimed.'[1072] Therefore, the law applicable to the non-contractual obligation should govern the availability of interest. The approach of the common law was not quite so clear.

8.92 As in many areas of the conflict of laws and interest, the case law is scattered and contradictory. In *Ekins v East India Company*,[1073] the claimant's ship, and the cargo aboard, was fraudulently sold by the master to an agent of the defendant. The claimant brought an action for account of the ship and cargo, claiming Indian interest rather than English interest. The court agreed on the basis that the ship had been sold in the Indies and the defendants must be presumed to have 'the common advantage that money yields there.' It is possible to distinguish the case on the basis that it is a restitutionary claim, and full restitution would include any interest that the defendant would be likely to have achieved in India. Thus, domestic English law applied rather than the law of the Indies.

8.93 Moore-Bick J addressed the issue in *Kuwait Oil Tanker Co SAK v Al Bader*[1074] preferring simple interest under Supreme Court Act 1981, s35A, and equitable compound interest, to be considered as procedural. Moore-Bick J found the views of Hobhouse J in *Midland*

[1072] Article 15(c), discussed above, §8.12-§8.17.

[1073] (1717) 1 P Wms 395.

[1074] 17th December 1998.

International Trade Services v Sudairy[1075] persuasive. The judgment of the Court of Appeal in *Kuwait Oil Tanker SAK v Al Bader*[1076] appeared to doubt the approach of both Hobhouse J and Moore-Bick J, noting that despite the origins of s35A the power clearly creates 'a right in the claimant to claim interest, which right is recognised and consistently given effect on the basis that it represents compensation to the claimant for having been kept out of money to which he has been held entitled.'[1077] However, they went on to say that as the issue was not argued before the court and, as it was not necessary to decide it, no view needed to be expressed. The Court of Appeal did reject the suggestion by Moore-Bick J that equitable compound interest could be considered procedural, but again, in view of the findings on Kuwaiti law, the court was not required to decide the issue.[1078]

8.94 Morison J, in *Lesotho Highlands Development Authority*,[1079] expressed the view that the right to interest cannot be considered procedural for the purposes of the Private International Law (Miscellaneous Provisions) Act 1995. The subsequent appeals to the Court of Appeal and the House of Lords made no comment on the matter.[1080]

[1075] 11th April 1990.

[1076] [2000] 2 All ER (Comm) 271.

[1077] *Ibid*, [207]. This is supported by the Law Commission Working Paper No 80: Private International Law Foreign Money Liabilities, 125-6.

[1078] *Ibid*, [211].

[1079] n1067.

[1080] n1067.

8.95 The issue was recently addressed in *Maher and Maher v Groupama*,[1081] where Blair J, again classifying the availability of interest on damages under the Private International Law (Miscellaneous Provisions) Act 1995, thought there was no clear appellate authority, and held that the availability of interest was substantive.[1082] Sharp J, on almost identical facts in *Knight (Tim) v Axa Insurance*,[1083] gave a judgment agreeing with *Maher v Groupama*.

c. Rate of Interest on Damages in the Absence of a Contractual Term[1084]

Contractual Obligations

8.96 The Rome I Regulation makes no specific reference to the rate of interest on damages for breach of a contractual obligation. Following the analysis above, it should be the case that where interest is part of the factual assessment of loss, the *lex fori* ought to be applied though it would be appropriate to refer to the claimant's factual circumstances

[1081] [2009] EWHC 38, [2009] 1 All ER 1116, [32]. It is understood that leave to appeal this decision has been granted.

[1082] It has been understood that *Harding v Wealands* [2007] 2 AC 1 had held the distinction between substance and procedure in the context of the Private International Law (Miscellaneous Provisions) Act 1995, s14(1)(b) was frozen at its state in 1995. How the case law on the availability of interest, which appears to have shifted between 1990 and 2009, is compatible with this approach is difficult to understand.

[1083] [2009] EWHC 1900 (QB).

[1084] *Cf* the Law Commission Working Paper 'Private International Law Foreign Money Liabilities' (Law Com No 80, 1981), at p134-139 who tentatively suggest the *lex fori* should apply on the basis of one example. Suppose there is a French contract for the sale of goods between a French buyer, and an English seller. The seller fails to deliver and the buyer has to get replacement goods from Germany. The case is brought before the English courts. The judge applies French law to determine the currency of judgment which is, under French law, the currency of expenditure: German marks. If French law is then applied to govern interest rates, their rules on interest rates are based on French francs and not German marks. Therefore the rate would be incorrect. This is to take a rather arrogant view of non-English law. The assumption would appear to be that only the English can cope with different interest rates being used for different currencies. Furthermore, this appears to suggest that we do not apply foreign laws because there is a presumption that English law does it better. Hopefully in the 21st century such forum-centric stubbornness is on the wane. However, this view persisted in Law Commission, 'Private International Law Foreign Money Liabilities' (Law Com No 124, Cmnd 9064), at paragraph 3.56.

which may include elements of foreign law. The common law has moved close to such an approach without quite expressing the reasoning behind it.

8.97 In *Miliangos v George Frank (Textiles) Ltd (No 2)*,[1085] Bristow J found that the rate of interest was procedural and must be decided in accordance with the *lex fori*, following *J D'Almeida Araujo Lda v Sir Frederick Becker & Co*[1086] and *The Funabashi*.[1087] It is odd that the former of these cases was considered to support the approach of Bristow J, as *D'Almeida* makes no mention of the availability of interest, or the rate of interest, whatsoever. It was purely a case which had to determine whether remoteness was subject to the *lex contractus* or *lex fori*. In *The Funabashi*, the Funabashi collided with the White Mountain causing both damage to the ships and the loss of the cargo aboard the White Mountain. A limitation fund was set up by the owners of the Funabashi, and the Admiralty registrar set the interest rate on the fund at 5.5%. The owners of the White Mountain, and the cargo owners, appealed on the basis that the interest rate should be 6.5%. One of the reasons put forward by the owners of the Funabashi for in fact lowering the interest rate was that as all the parties were foreign the English interest rates should not be used. Dunn J rejected this stating that 'interest is governed by the *lex fori* and it is in any event impracticable for the court to consider different rates in the countries of the domicile of the parties.' Three aspects of this statement should be noted. This was a tort action, and English law applied under the double actionability rule. Thus, it is not surprising that English law was considered to apply.[1088] Secondly, 'interest' is not

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[1085] [1977] QB 489.

[1086] [1953] 2 QB 329.

[1087] [1972] 1 WLR 666.

[1088] The only requirement to refer to the *lex loci delicti* would be to determine that the claimant's conduct was actionable *inter partes*. See A Briggs, 'What did Boys v Chaplin decide?' (12) 1983 Anglo-American Law Review 237.

governed by the *lex fori*. Prior to this case, there was case law suggesting that the availability of interest was a matter for the *lex causae*,[1089] and no precedent had been laid down on the law governing the rate of interest. Thirdly, the final part of Dunn J's comment can be doubted, and indeed it has been doubted by Kerr J in *Helmsing Schiffahrts GMBH v Malta Drydocks Corporation*.[1090] He stated that 'The inconvenience of it being occasionally necessary to adduce evidence on interest rates in another country appears to me of little weight and difficulty, as shown by the present case.'[1091] The discount rate provision in *Harding v Wealands*[1092] is another example of the proof of foreign interest rates not causing difficulties. Indeed, it is not clear whether Dunn J was actually addressing the submission put forward by counsel. It appears that counsel argued that as a matter of *domestic* English law, the interest rate should be lowered, taking account of the foreign parties. To answer that 'interest is governed by the *lex fori*' is to miss the point entirely.

8.98 In *Helmsing Schiffahrts*, Kerr J expressed the view that both the right to interest, and the rate of interest should be governed by the proper law of the contract. However, in both the first instance decision of Morison J, and the Court of Appeal decision of Brooke LJ in *Lesotho Highlands Development Authority*, the view of Bristow J, that the rate of interest is determined by the forum court was approved, but in neither case was *Helmsing Schiffahrts* cited, and the comments were *obiter*. It would appear that Morison J and Brooke LJ simply followed the lead in Dicey, which states that the arguments are finely

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[1089] *Manners v Pearson & Son* [1898] 1 Ch 581; *Société des Hôtels Le Touquet Paris-Plage v Cummings* [1922] 1 KB 451. Neither of which were cited to Dunn J.

[1090] [1977] 2 Lloyd's Rep 444.

[1091] *Ibid*, 450.

[1092] [2006] UKHL 32, [2007] 2 AC 1.

balanced but prefers the view expressed in *Miliangos (No 2)*.[1093] Generally, the correct answer will be that the *lex fori* ought to apply though the court, in exercising its discretion under s35A of the Supreme Court Act 1981, ought to take into account facts relevant to the claimant, some of which may involve aspects of foreign law.

Non-contractual obligations

8.99 Again, the Rome II Regulation makes no direct reference to the rate of interest. Applying the analysis above,[1094] where the rate of interest is an attempt at factually assessing the loss caused to the claimant, the forum court should be able to determine this, albeit with references to the claimant's factual circumstances which may involve some aspects of foreign law. However, if the governing law of the non-contractual obligation sets a rate of interest for reasons other than the factual determination of loss, this rate of interest ought to be applied.

8.100 There is little common law authority on this issue, save for *Ekins*,[1095] which can be explained as a restitutionary claim based on English domestic law.[1096] Dicey supports the view that the rate of interest should be determined by the *lex fori*,[1097] which was recently

[1093] n1087.

[1094] §8.12 *et seq*.

[1095] n1073.

[1096] See §8.92.

[1097] Dicey, §33-397-§33-400.

followed in *Maher and Maher v Groupama*.[1098] Blair J explained that the rate will not necessarily be the domestic rate, even though the *lex fori* applies, the rate being altered to fit the circumstances.

IV. CONCLUSION

8.101 The conclusion that one draws from this analysis can be expressed in two propositions. First, under the European Regulations, the determination of the secondary obligation will be *prima facie* a matter for the *lex causae*. However, questions concerning the factual assessment of loss will be a matter for the *lex fori*. Secondly, this approach was also the approach of the common law prior to the decision of *Harding v Wealands* and therefore the English cases can be of assistance in determining whether a particular rule is concerned with the factual assessment of loss.

[1098] n1012, [33]. Currently the subject of an appeal. Also, see *Knight (Tim) v Axa Insurance* [2009] EWHC 1900 (QB).

9

Conclusion

9.01 The purpose of the thesis was to analyse the inter-play between remedies and European international private law. The issue is a complex one for multiple reasons. First, the breadth of the subject is enormous. Second, it involves complex interactions with rules of civil procedure. Third, it assumes that the European instruments speak with one voice. Fourth, it assumes that the European legislators have given consideration to what appears an overly practical and slightly mundane issue in comparison to, for example, consumer or employee protection.

9.02 The approach of the thesis was to analyse this interplay between remedies and the key areas of European international private law, seeking for common threads that run through the subject. Three particular threads have been found. First, primary right, secondary right and court order form a unit which, insofar as possible, should remain unbroken. This can be seen in the approach to the enforcement of judgments where the enforcing court must attempt to enforce the foreign court order and not simply the recognised primary and secondary rights as perceived to be the case under the common law's obligation theory of recognition and enforcement. It can also be seen in the approach to choice of law and remedies where, under the Rome I and II Regulations, the forum court is expected, insofar as possible, to grant the same court order that the applicable law would do.

9.03 The second thread connects with the first. Whilst primary right, secondary right and court order form a unit which should generally remain unbroken, it may be broken for reasons

of procedural inconvenience. Thus, where a foreign judgment is brought to England for enforcement, the English court should enforce the foreign court order unless it is too procedurally inconvenient for it to do so, whereupon it may substitute, or transpose, the closest English order for the foreign order. Equally, where the English court, dealing with a choice of law question, cannot grant the court order which the applicable law would grant for reasons of procedural inconvenience, it must substitute, or transpose, the closest English order for the foreign order.

9.04 The third thread is of a different nature. It concerns the distinction between substantive remedies and ancillary remedies or, more properly, substantive rights and ancillary rights. European international private law depends upon a distinction between rights which it perceives to have arisen prior to the trial process and rights which arise out of the trial process. It is essentially a formalistic rights-based system and has been since its conception. It is noticeable that the European Commission representative at the first meeting of experts brought together to discuss Conventions on the conflict of laws in 1969 explained that such Conventions would protect the '...rights acquired over the whole field of private law...'[1099]

9.05 This distinction between substantive and ancillary rights is important for both jurisdiction and choice of law. The rules apply differently depending on the classification of the right. A court, with the one exception of Article 31 of the Brussels I Regulation, will only have jurisdiction to grant ancillary rights when it has jurisdiction over the connected substantive right. Unlike substantive rights, ancillary rights normally have no choice of law process. The forum, when applying its own law to determine the nature of the

[1099] Giuliano and Lagarde report, 4.

ancillary rights, should refer to foreign laws, but at the end of the day the *lex fori* will be the final determiner.[1100]

9.06 These three threads have been repeatedly seen throughout the thesis. Of interest for future research is how these conclusions on the European scheme may impact upon the common law. For example, the Canadian courts have recently accepted that non-monetary judgments can be enforceable[1101] but the Supreme Court differed over what limits to place on their enforceability. The European approach may be of some assistance.

9.07 In *Pro Swing*,[1102] the claimant owned the trade-mark TRIDENT which had been registered and used in the US for certain golf clubs. It commenced a trade-mark infringement action against the Ontarian defendant in Ohio. The action was settled, and this settlement was endorsed by a consent decree of the US District Court. The decree included a prohibitory injunction against the defendant from marketing golf clubs with the TRIDENT mark or similar variations. The decree also required delivery up of offending items. An investigator then managed to purchase TRIDENT clubs from the defendant in Ohio, thus demonstrating that the defendant had breached the terms of the settlement agreement. The claimant brought a motion for contempt and the Ohio court issued such an order. The claimant then filed a motion in the Ontarian courts requesting enforcement of both the consent order and the contempt order. Deschamps J, delivering the majority judgment,[1103] declared that foreign non-monetary judgments were

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[1100] *Cf* the position of ancillary rights which provisionally vindicate the substantive right: §7.68-§7.69.

[1101] *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612, (2006) 273 DLR (4th) 663.

[1102] *Ibid*.

[1103] With LeBel, Fish and Abella JJ concurring.

enforceable in Canada, on four general conditions: (i) the foreign court must have competent jurisdiction;[1104] (ii) the judgment must be final; (iii) the judgment must be of the nature that the principle of comity required the domestic court to enforce it; (iv) as the judgment will require equitable relief to enforce it, the forum's notions of equity must be complied with.

9.08 The fourth condition is the one that requires most discussion. The process that led Deschamps J to this conclusion was a simple one. Equitable orders are restricted in the forum, and the Canadian courts should not be awarding orders which the Canadian justice system would not award in domestic litigation. Deschamps J explicitly reserved the criteria the court should take into account in determining the extent to which the granting of equitable orders to enforce foreign judgments was restricted.[1105] However, he did list various pertinent questions:[1106]

> 'Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? Is the order limited in its scope and did the originating court retain the power to issue further orders? Is the enforcement the least burdensome remedy for the Canadian justice system? Is the Canadian litigant exposed to unforeseen obligations? Are any third parties affected by the order? Will the use of judicial resources be consistent with what would be allowed for domestic litigants?'

[1104] *Cf* the Canadian judgments revolution: *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077; *Beals v Saldanha* (2004) 234 DLR (4th) 1, [2003] 3 SCR 416.

[1105] He does, however, refer to laches as an example of an extra defence to equitable orders, [28], and at [29] refers to finality as requiring more discussion.

[1106] [30].

9.09 The dissent of McLachlin CJC, with Bastarache and Charron JJ concurring, was an attempt at providing a more certain scope to the enforcement of non-monetary judgments. On this view, there are three requirements for the enforcement of non-monetary judgments: (i) jurisdiction was properly taken by the issuing court; (ii) the foreign order is both final and clear; (iii) the foreign order is not penal in nature. It is this second category which requires most elucidation. These twin considerations are equally reflected in the common law's approach to the enforcement of monetary judgments.[1107] McLachlin CJC stated that the first requires 'completeness' and the second requires 'lack of ambiguity'. It was further stated that these 'concerns had to be apparent on the face of the order or arising from the factual or legal context...mere speculation would not suffice.'[1108]

9.10 It can be seen that the difference between the majority and minority largely reflects the discussion that occurred in Chapter 7 of this thesis on when the procedural inconvenience caveat can be applied. Many of Deschamps J's questions concern the question of how inconvenienced the forum court can be?

9.11 Another area that English law may be able to learn from is the distinction between substantive rights and ancillary rights under the European scheme. Some parts of English law have not made this distinction clear, particularly in the field of anti-suit injunctions. The topic has been briefly touched on in this thesis.[1109] By re-ordering such injunctions according to this scheme, the jurisdictional ability of the court would be much clearer.

[1107] See Dicey, Rule 35 and Commentary.

[1108] [99].

[1109] §5.24-§5.28.

9.12 One final comment is necessary. The European rules are often presented as an enormous leap forward from the common law in the area of remedies and damages. Yet, when one takes the occasional side-wards glance at the common law it is often the case that, save for a few exceptions, it achieves the same result. Those exceptions that do exist can often be put down to a misinterpretation of the law that came before. Thus, whilst the European scheme may be more academically satisfying, whether it really will involve a dramatic change in the results of cases in the areas under consideration remains to be seen.

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