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Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part I

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This article comments upon the broader implications of, and themes in, choice of law harmonisation and development, which can be discerned from a current example of the harmonisation genre, namely the Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”). The authors published an explanatory outline of the Proposal¹ and made submissions to the House of Lords European Union Committee chaired by Lord Scott of Foscote, which published its Report with Evidence in April 2004.² The EU Parliamentary Committee on Legal Affairs and the Internal Market subsequently produced a Draft Report recommending a number of significant amendments to the Commission Proposal. The authors now offer this more extended analysis, which appears in two parts: Part I below, and Part II in the next issue of the *Edinburgh Law Review*. Part I tends to the general or thematic, Part II to the specific: in the latter the currently proposed³ EU choice of law rules for tort, delict, unjust enrichment and agency without authority will be discussed.

A. ROME II

In furtherance of the aim of achieving an area of “freedom, security and justice”,⁴ a public debate was launched during the summer of 2002 on the subject of a preliminary draft proposal for an EU Council Regulation on the law applicable to non-contractual obligations, colloquially termed “Rome II”.⁵ In light of follow-up consultation,⁶ the European Commission published in July 2003 a Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (henceforth “the Commission Proposal”).⁷

In relation to the UK, the proposed Regulation is intended to replace the existing rules of choice of law (common law⁸ and statutory⁹) concerning non-

1 “Conflict of laws update” 2004 SLT (News) 19.

2 House of Lords European Union Committee, 8th Report of Session 2003–04. HL Paper 66, published 7 Apr 2004.

3 Changes to the Proposed Regulation continue to be considered by the European Parliament.

4 EC Treaty (as amended at Amsterdam), Arts 61 and 65 and European Council Tampere Summit, Conclusions 29–39. The European Commission has pledged itself to attain greater convergence in civil law, plans and progress whereof can be viewed on a “scoreboard”: see *Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of “Freedom, Justice and Security” in the EU* (http://europa.eu.int/comm/justice_home/doc_centre/Scoreboard_en.htm).

5 http://europa.eu.int/comm/justice_home/unit/civil/consultation/index.

6 http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions_en.htm.

7 COM (2003) 427 final (2003/0168(COD)). Press release at http://europa.eu.int/comm/justice_home/news/intro/news_220703_1_en.htm.

8 See note 34 below re common law rules of choice of law in tort and delict. Rules of choice of law in unjust enrichment exist at common law only, and their content to some extent is speculative.

9 Private International Law (Miscellaneous Provisions) Act 1995, Part III. Part III applies to tortious/

contractual obligations. The intention, originally, was that the Regulation would enter into force on 1 January 2005, but that can no longer be regarded as a possibility. Since the instrument is subject to the co-decision procedure,¹⁰ there is, of necessity, an important EU Parliamentary input. The Commission Proposal did not receive its First Reading during the 1999–2004 session of the European Parliament, and so the matter will be revisited in the new parliamentary session. The European Parliament's Committee on Legal Affairs and the Internal Market has produced a Draft Report (now in revised version)¹¹ on the Commission Proposal, which is notably critical, and recommends substantial revisions. In the UK meanwhile the House of Lords European Union Committee has published a trenchant appraisal of the Commission Proposal,¹² offering for consideration by the UK Government no fewer than twenty-one conclusions and recommendations. The situation, therefore, is volatile, not only because of mutinous disaffection at home, but also because of the divergence of view which, perhaps surprisingly, has emerged as a result of the parliamentary process at the European centre.

A combination of factors, including the proposed changes in the Constitution of the EU on the one hand, and disquiet in the regions regarding the details of the Commission Proposal on the other, may well mean that unless the proposed Regulation has an unduly swift passage into operation, the content and character of the harmonised rules ultimately agreed upon will differ to a significant extent from those in the Commission Proposal. Regional misgiving is fuelled not only by concerns about the general thrust of the Proposal and its detail, but also by widespread suspicion that the EU harmonisation programme is being extended beyond what many believe to be its proper province.¹³ According to the House of Lords EU Committee, member states have not yet given “the Union lawmakers general power to legislate to create an area of freedom, security and justice”.¹⁴ Unless or until the Constitutional Treaty comes into being, measures concerning

delictual acts and omissions which occur after 1 May 1996. Section 10 abolishes the common law rules, save in relation to those claims which arise under s 13, namely “defamation claims”.

10 COD/2003/0168. The procedure was introduced to the EC Treaty by the Treaty of Maastricht, and strengthened the European Parliament's legislative powers. The Treaty of Amsterdam made the procedure quicker and more effective. The Treaty of Nice, which entered into force on 1 Feb 2003, improved the decision-making process by extending co-decision to all judicial co-operation in civil matters with the exception of measures relating to family law; in the latter case, the Council acts unanimously and the Parliament is simply consulted.

11 Draft Report Revised Version on the proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations (“Rome II”) (COM (2003) 427-C5-0338/2003-2003/0168 (COD)) (5 Apr 2004), Rapporteur Diana Wallis MEP, (henceforth “the Wallis Report”).

12 HL Paper No 66 (7 Apr 2004) (henceforth “the Scott Report”).

13 Scott Report, paras 62–78. See also, e.g., P McElevay, “The Brussels II Regulation: how the European Community has moved into family law” (2002) 51 ICLQ 883.

14 Scott Report, para 67.

judicial co-operation in civil law must be justified by reference to the “proper functioning of the internal market”;¹⁵ there is a fundamental question of *vires*.¹⁶ Nevertheless, it is the authors’ forecast that the Commission will not be deflected from its desire to harmonise the choice of law rules of member states in this subject area of non-contractual civil liability.

B. EUROPEAN AGGRANDISEMENT AND THE INTRA-UK POSITION

(1) The UK decision to opt in

The Proposal is subject to the United Kingdom and Ireland’s Protocol on Title IV measures,¹⁷ meaning that the UK “need not participate unless a decision is made to opt in”.¹⁸ After an initial period of hesitation, the UK Government decided to opt in, seemingly on the general basis that it is better to participate in negotiations and thereby seek to influence them, and on the particular ground that participation in a choice of law harmonisation exercise is more palatable than the prospect of harmonisation of substantive law.¹⁹ The House of Lords EU Committee was not convinced by the government’s “opt-in” arguments, especially since the government itself had serious doubts about the *vires* of the Commission Proposal, and (crucially) appears to have been unclear about the legal entitlement of the UK, having once opted in, subsequently to opt out if it should form a minority dissenting view at the close of negotiations. Government advisers *now* hold the view that it is very likely that the UK *will* be bound by the Regulation unless the UK, in combination with the requisite number of other member states, constitutes a sufficient blocking minority under the qualified majority voting procedure.²⁰ One can only marvel at the ineptitude of the government in failing, from the outset, to appreciate (and to disclose) the consequences of its neglecting to clarify its negotiating position, and the repercussions of its political involvement. This apparent inattention has resulted in a situation which, we suspect, causes as much dismay within the European Commission and Parliament as within the UK itself.

15 Under the Treaty establishing a Constitution for Europe Art III-269(2), this limitation would be removed.

16 Scott Report, ch 5, Conclusions, para 184: “The Commission has not shown a convincing case of ‘necessity’ within the meaning of Art 65 TEC. Further, on any construction of Articles 61 and 65 of the EC Treaty there must be the most serious doubts that the proposal can have universal application.”

17 Treaty of Amsterdam, Protocol 4 on the position of the UK and Ireland.

18 Scott Report, Evidence: Explanatory Memorandum submitted by the Department for Constitutional Affairs (Sept 2003).

19 Scott Report, para 80.

20 Scott Report, Evidence: Supplementary Letter from Lord Filkin dated 15 Mar 2004.

(2) Universality

One of the consequences of opting in to the Regulation is the adoption of the principle of universal application, contained in Article 2 of the Commission Proposal: “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.” The Regulation would, therefore, dictate that the conflict reasoning of a UK forum in *any* case which qualifies by virtue of subject matter, be the contending law(s), that/those of a member state or otherwise.²¹ A Scottish or English court adjudicating upon an allegedly delictual/tortious scenario would be bound to apply Rome II, no matter that the scenario were devoid of connection²² with any member state, and was replete with connection to one or more non-contracting states.

In adopting a principle of universality the Commission Proposal does not differ from the equivalent rules in relation to contract, contained in the Rome Convention.²³ The difference lies rather in the gradual cutting-back of state discretion in the decision whether or not to accept the principle. Whereas the UK took the decision to ratify the Rome Convention (legislative sovereignty residing with the UK Parliament, which, in time, implemented its decision in the form of the Contracts (Applicable Law) Act 1990), the EU political and legislative process, galvanised by the Treaty of Amsterdam, has gathered momentum, bringing inevitably a reduction in state autonomy.²⁴ When we proceed by means of Regulation (as the EU Commission now deems appropriate when an entire subject area is to be harmonised), all provisions are directly applicable and there is likely to be less scope for individual state reservations, or opportunity to derogate from particular provisions.²⁵

Article 2 contains a power of direction which transcends what is required for the proper functioning of the internal market, and arguably is beyond the legitimate ambit of EU authority. In terms of conflict of laws method and practice, however, it is fair to say that the effect of universal application in contract cases does not appear to have given rise in the UK to any grievance. Indeed a signal benefit of universal application is the suppression of potential differentiation in treatment by

21 The Regulation would apply equally to the following scenarios: (i) where A, Italian, suffers injury in Scotland, due to the negligence of B, Scottish; (ii) where A, Italian, suffers injury in Italy, due to the negligence of B, Scottish; and (iii) where A, South African, suffers injury in Scotland, due to the negligence of Y, Californian.

22 E.g. *locus (delicti and damni)*, parties' personal laws, or financial/personal consequences.

23 Article 2, Rome Convention on the law applicable to contractual obligations (“Rome I”).

24 Scott Report, Evidence: Sir Peter North, Written Memorandum, paras 2 and 4. See also Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation (COM (2002) 654) (“Rome I Green Paper”), para 2.1.

25 Though see Scott Report, paras 146 and 200. See note 170 below.

the same forum of factually like cases. But the change to pan-European conflict provision in the area of *non-contractual* obligations may be of significance to the non-EU forum-shopper.

While the Scott Report recommends that Article 2 of the Commission Proposal should be deleted, it recognises, for reasons of simplicity and certainty, that there is a “good argument that there should be one set of rules to apply to all cases”.²⁶ Fundamentally, however, the view taken is that “the decision whether to extend the rules in the Regulation to cases not having a Community element should for both legal (*vires*) and policy (external competence) reasons be one for each Member State”.²⁷ The choice is one to be exercised, *not* by the EU Commission and Parliament, but rather, in the case of the UK, by the UK and Scottish Parliaments.

Loss of state discretion is unfortunate, but that should not detract from the merits contained in the principle of universality;²⁸ to adopt any other approach would be time-consuming and would effectively be to approve and exacerbate the layering phenomenon which already affects this area of law. It is recognised that defining the (restricted) geographical scope of the Regulation would present a formidable problem: what factors would determine whether a case were intra-EU (justifying application of Rome II), as opposed to non-EU (truly “foreign”, justifying application of the national conflict rules of the contracting state forum, rather than Rome II)?²⁹ As will be explained below, it is this layering which looks set to be the most troublesome characteristic of the harmonisation process in the twenty-first century.

(3) Intra-UK scenarios: torts and delicts committed within UK, or within a single territorial unit of UK

The European Commission is determined to achieve its aim of removing disparities in the civil law of member states in order to create a European judicial area,³⁰ yet it frequently happens that the translation of this aim into the complex legal and political context of a multi-legal system, such as the UK, is not completely or

²⁶ Scott Report, para 93.

²⁷ Scott Report, para 93.

²⁸ Scott Report, Evidence: Mario Tenreiro, in response to Q21: to do otherwise would mean that, “each time, by the application of the criteria determined by the conflict rule [in Rome II] you achieve the application of the law of a third country, you stop the exercise and come back to national conflict rules to determine what law would be applicable”. But see Scott Report, para 93, which concludes that Art 2 of the Proposal should be deleted.

²⁹ Scott Report, para 94.

³⁰ Alongside two further objectives, namely better access to justice in Europe and mutual recognition of judicial decisions (see Arts 61 and 65, EC Treaty).

carefully understood, accommodated or effected. This perhaps is the fault, or oversight, not of the European centre, but of the multi-legal system state in question, it being the duty of each state to “comply”³¹ in a manner which is appropriate to its own system.³²

Particular mention ought to be made of torts and delicts committed within the UK. According to common law rules, torts/delicts committed in England/Scotland are governed, respectively, by the law of the forum:³³ “One might simply say that the *lex fori* applied, or alternatively that since there was a coincidence of the *lex fori* and *lex loci delicti*, this was another example of the operation of the double rule.”³⁴ It is an unresolved question whether the separate treatment of torts and delicts committed, respectively, within and beyond the English (or similarly, Scottish) forum survives the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”) (i.e. whether the 1995 Act applies commensurately to delicts committed *within* England or Scotland, with the effect that the forum *qua lex fori* can displace itself *qua lex causae* by means of section 12 thereof).

Despite the apparent clarity of section 9(6) of the 1995 Act,³⁵ the answer to this question must depend upon one’s interpretation of the pre-1995 rule. If one takes

31 According to the particular time or period of EU development. In the older, more leisurely programme of law reform, a Convention (e.g. 1980 Rome Convention on the law applicable to contractual obligations) would be followed by enacting UK legislation (e.g. Contracts (Applicable Law) Act 1990). In giving effect to that Convention, Parliament did not avail itself of the opportunity afforded under Art 19(2), which would have removed the obligation to apply the Convention to conflicts solely between the laws of such units. Similarly the opportunity was given to contracting states to make reservations in relation to certain Articles. *Now* the EU Commission prefers to proceed by means of Regulation.

32 In the matter of Rome II, the UK Government, in its response to the Preliminary Draft Proposal (“PDP”), expressed no view on the matter of specialities pertaining to multi-legal system contracting states (Art 22, PDP). Although international private law in Scotland is a devolved matter, there was no independent response by, or on behalf of, the Scottish Executive. It is understood that a consensus position was reached between the Scottish Executive and the UK Government, with the result that it was not appropriate for a separate Scottish response to be written (Scott Report, Evidence: Q325). If primary legislation should be required in the UK, it will take the form not only of an Act of the UK Parliament, but possibly also an Act of the Scottish Parliament (Scott Report, Evidence Q320), unless the Sewel procedure were utilised, in terms of which the UK Parliament could legislate, with the consent of the Scottish Parliament, concerning a devolved matter.

33 *Szalatnay-Stacho v Fink* [1947] 1 KB 1; *Convery v Lanarkshire Tramways Co* (1905) 8 F 117.

34 E B Crawford, *International Private Law in Scotland* (1998) (henceforth “Crawford”), para 13.12. For a full description of the common law rules of choice of law in delict, see Crawford, paras 13.11–13.18. Application, in Scots law, of the rule of double actionability, can be seen in the following cases: *McElroy v McAllister* 1949 SC 110; *Mackinnon v Iberia Shipping Co* 1955 SC 20; *Mitchell v McCulloch* 1976 SLT 2; *James Burrough Distillers plc v Speymalt Whisky Distributors Ltd* 1989 SLT 561. Significant developments in the equivalent English rule can be traced through the decisions in *Boys v Chaplin* [1971] AC 356; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; and *Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 WLR 926.

35 Section 9(6) provides: “For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.”

the view that, as regards delicts committed in Scotland before 1 May 1996,³⁶ the *lex fori* applied *qua lex fori*, and *not* as an instance of the double rule, then presumably that rule does survive the Act,³⁷ meaning that delicts committed in Scotland after 1 May 1996 still are governed solely by the *lex fori*.³⁸ If, on the other hand, one construes the pre-1995 rule as a particular instance of the double rule, conspicuous only by the quirk of coincidence of the (Scottish) *lex fori* and the (Scottish) *lex loci delicti*, then, since that rule was abolished by section 10(a) of the 1995 Act,³⁹ delicts committed in Scotland must be subject (as are delicts committed outside Scotland) to sections 11 and 12 of the Act. This is a matter of importance, since use of the forum's discretion to displace itself *qua lex loci delicti* may be entirely justified,⁴⁰ no less so in the intra-UK context than where an unarguably foreign element presents.

Such ambiguity as exists flows not from the interpretation of section 9(6) (or section 14(2)) of the 1995 Act, but rather from the vacillating characterisation of the pre-1995 rule regarding torts and delicts committed within a single territorial unit of the UK. It is submitted that a Scots or English forum *ought* to be able to displace itself *qua lex causae* by means of section 12 of the Act; and consequently that the Act applies in the same way to cross-border intra-UK conflicts as it does to conflicts involving one territorial unit of the UK and a truly foreign law.⁴¹

It appears that the Commission Proposal is intended to deal with delictual/tortious scenarios which are internal to one member state (or to one territorial unit

36 Date of entry into force of the 1995 Act.

37 Section 10, provides:

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

- (a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or
- (b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question,

are hereby abolished so far as they apply to any claim in tort or delict which is not excluded from the operation of this Part by section 13 below.”

38 Section 14(2) provides: “Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.” Although s 10(b) abolishes the rule which allows for the law of a single country to be applied as an exception to the double-barrelled rule, it is doubtful that application of the *lex fori qua lex fori* [if that interpretation of the rule is accepted] amounted to an exception as such. If anything, it is a freestanding rule. It is thought that s 10(b) is directed towards the flexible exception enunciated in *Boys v Chaplin*, and the *Red Sea* exception. One commentary on s 10(b) provides: “The intention of this provision was that other rules of private international law applying in particular classes of case (such as torts/delicts committed on the high seas) would not be affected by the Act, but this could have been specified and made clearer” (*Current Law Statutes*, 1995, vol 3, 42-19).

39 Crawford, para 13.20.

40 Compare and contrast *McElroy v McAllister* 1949 SC 110.

41 Crawford, para 13.20. As to history of discussion of this point, see note 46 below. Cf Contracts (Applicable Law) Act 1990, s 2(3).

of one member state, i.e. that it is intended to apply to delicts committed wholly within Scotland).⁴² But a question arises as to the effect which the Commission Proposal will have on the operation of the 1995 Act as regards cross-border intra-UK cases. Article 21(2)⁴³ directs that: “A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units” (for example, to a dispute in which the choice of law is between Scots and English law⁴⁴). The likely reaction to this from within the UK is not clear:

What ministers would wish to do in a purely internal UK situation would remain a policy choice for ministers ... it would be premature to make a decision on that without knowing what the final content of the regulation would be.⁴⁵

Feasibly, the 1995 Act could continue to regulate cross-border intra-UK disputes.⁴⁶ This, in turn, would necessitate preservation of the common law rule of double actionability as regards cross-border intra-UK defamation claims.⁴⁷ If the UK were to reserve its position (i.e. by restricting the scope of the Regulation to inter-member state matters—or at least by disapplying Rome II to intra-UK disputes—perhaps not only as a matter of principle, but in protest against the detail of the rules proposed), then an extremely complex and arguably undesirable result would ensue. It is a feature (though one heavily criticised) of the Commission Proposal⁴⁸

42 Article 21(1). Obviously, there are cases where it is appropriate for the forum to displace itself *qua lex causae* in favour of a more appropriate law. Contrast earlier reasoning in *Szalatney-Stacho v Fink* [1947] 1 KB 1 where the court considered that it was neither necessary nor justifiable to apply any law other than English in the case of an alleged libel printed in London by one Czech military official against another. See Crawford, para 13.12.

43 In an echo of Art 19(2) of Rome I.

44 E.g. *Emmstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059.

45 Scott Report, Evidence: Louise Miller, Scottish Executive Justice Department, Head of Private International Law, Q318. See note 32 above.

46 This would be deeply ironic, because in discussions within the UK before the enactment of the 1995 Act the concept of having special rules for intra-UK tortious/delictual situations was considered, and ultimately rejected. In 1984, the view of the Law Commission and Scottish Law Commission in their joint Working Paper, *Private International Law: Choice of Law in Tort and Delict*, (Law Com No 87, 1984, Scot Law Com Consultative Memorandum No 62, 1984), para 5.92, was that there should be no special rule for torts or delicts occurring in a single jurisdiction within the UK. By 1990 (*Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, 1990; Scot Law Com No 129, 1990)), opinion had changed, to the effect that where proceedings are brought in the UK, the law of the relevant part of the UK should apply in respect of wrongs committed in that part (para 3.23, to be found in clause 3 of *Tort and Delict (Applicable Law) Bill*; this clause did *not* appear in the legislation as enacted). See P M North, *Essays in Private International Law* (1993) (henceforth “North, *Essays*”, ch 4, 86. Thus, at the end of much discussion, the UK preferred *not* to have special treatment.

47 1995 Act, s 13.

48 However, note the difference in this important matter between the approach taken in the Commission Proposal and in the Wallis Report; in the latter the more general approach familiar to the UK lawyer is to be found.

that it contains tort-specific rules for areas of modern concern such as defamation, ecology and intellectual property; to introduce yet another layer, providing discrete rules for torts and delicts committed intra-UK seems *de trop*. If that should ensue, there would be an unfortunate difference between the (specific) Rome II and the (general) intra-UK approaches to delictual/tortious claims; a multi-layered choice of law rule would in itself be unattractive, and all the more so if the substantive content of the different layers were divergent in character.⁴⁹ The composite structure would be a very unfortunate consequence of an EU law reform programme, a central aim of which is to achieve certainty as to applicable law, and foreseeability of solution.⁵⁰

A similar predicament exists in relation to matters which are excluded from the scope of the Commission Proposal (i.e. those matters listed in Article 1, including non-contractual obligations arising out of family relationships, matrimonial property regimes, trusts and succession⁵¹). It is presumed that the 1995 Act (or domestic law substitute) will require, in any event, to remain in place for the regulation of such matters,⁵² so at the very least a double-layered choice of law rule looks inevitable.⁵³

The options for the UK, we suggest, are as follows:

(a) *The UK disapplies Rome II in intra-UK cases,⁵⁴ with the result that:*

- (i) The 1995 Act would apply to cases excluded from Rome II per Article 1.
- (ii) The 1995 Act would apply to cross-border intra-UK cases (e.g. *Ennstone* in its tortious/delictual aspect) where the contending laws, at first sight,⁵⁵ and upon possible displacement,⁵⁶ are confined to legal systems within the UK.⁵⁷

49 It is often said that it is difficult to construct a conflict rule in tort/delict given the very wide range of scenarios giving rise to civil liability. But the point we make here is quite different, namely that layering would amount to heterogeneity of choice of law solution set against homogeneity of incidents giving rise to litigation; *prima facie* like cases (of fact, if not geography) would not, under such a regime, be treated as like.

50 Commission Proposal, preamble, para 21.

51 Presenting a small window of opportunity for argument about characterisation of delictual issues which cross with family law issues, e.g. *Shilliday v Smith* 1998 SLT 976, or the rights of polygamously married spouses to sue in delict.

52 But see Scott Report, Evidence: Sir Peter North, Q103.

53 Cf choice of law in contract: matters which fall outside the scope of Rome I (per Art 1(2)-(4)) continue to be governed by the common law rule (Crawford, paras 12.21–12.31).

54 Maximising the opportunities afforded by Art 21(2) of the Commission Proposal.

55 1995 Act, s 11.

56 1995 Act, s 12.

57 *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059. The strange thing then would be that, for a future equivalent case, the harmonised European rules in choice of law in contract would apply in so far as the issues in *Ennstone* are contractual; but in so far as they are tortious/delictual, the harmonised European rules upon choice of law in tort/delict would be disregarded.

- (iii) Section 13 of the 1995 Act would preserve application of the common law rule of double actionability in relation to defamation claims. We may presume that in cases heard before an English forum, the flexible exception could (potentially) operate, but that in cases litigated in Scotland, there would be strict application of the double rule without the flexible exception.⁵⁸
- (iv) Otherwise, in an English or Scots forum, Rome II would apply where at least one of the contending laws, at first sight or upon possible displacement, were extra-UK (EU or extra-EU).⁵⁹ This would represent a substantial sacrifice of UK judicial and legislative discretion, in comparison with which the opportunity afforded by Article 21(2) of the Commission Proposal is a paltry concession.

There would exist to regulate intra-UK tort and delict cases a set of rules which, as conceived, were intended principally to apply looking *outwards* from the UK. The ambit of authority of the 1995 Act would be greatly reduced. Those few cases concerning interpretation and application of the Act which have engaged the attention of commentators would be viewed as cases of an interregnum.⁶⁰

(b) *The UK chooses to extend the operation of Rome II to intra-UK cases,*⁶¹ *with the result that:*

- (i) The 1995 Act would apply only to those cases excluded from Rome II per Article 1.
- (ii) Rome II would apply to cross-border intra-UK cases (e.g. *Ennstone* in its tortious/delictual aspect), it making no difference to the matter of choice of law that the contending laws, at first sight, or upon possible displacement, are confined to legal systems within the UK.
- (iii) It would follow from (b) above that intra-UK defamation claims would also be subject to Rome II.⁶² We should witness the final demise of the common law rule of double actionability which had been preserved by section 13 of the 1995 Act.⁶³

⁵⁸ *James Burrough Distillers plc v Speymalt Whisky Distributors Ltd* 1989 SLT 561.

⁵⁹ Although we make special mention of it, no special mention surely need be made of Denmark in this context; Treaty of Amsterdam, Protocol 5 on the position of Denmark.

⁶⁰ *Edmunds v Simmonds* [2001] 1 WLR 1003; *Roerig v Valiant Trawlers Ltd* [2002] 1 Lloyds Rep 681; *Hulse v Chambers* [2002] 1 All ER 812.

⁶¹ Waiving the opportunities afforded by Art 21(2) of the Commission Proposal.

⁶² A general rule (Art 3 of the Commission Proposal), or the tort-specific rule (Art 6), as ultimately agreed.

⁶³ Subject to very fine arguments about defamation claims arising out of matters excluded from the scope of the Proposal (e.g., a defamation claim arising out of a family relationship).

In the authors' view, the UK should *not* avail itself of the opportunity to disapply the proposed Regulation to conflicts between the laws of our own constituent jurisdictions.⁶⁴ But if that is so, close attention will have to be paid to the recasting of the 1995 Act.

In scenario (b), the period of operation of what, in the UK, have been regarded as the “new” choice of law rules in tort and delict would prove to be short, displaced in a decade or thereby by EU-harmonised rules of choice of law, and fulfilling the prophecy that these rules would disappear before the Scots courts even had an opportunity to apply them.^{64a} It is difficult to be other than cynical in the matter of the search for the “ideal” choice of law rule in tort and delict, and to accept the intrinsic merit of the latest proposals. The time and ingenuity devoted to the construction of such a rule have been, and continue to be, disproportionate to the number of occasions calling, in practice, for application of the rule.

C. DESIGNING CONFLICT RULES IN THE MODERN AGE⁶⁵

Aside from the particular concern of formulating rules which satisfy the needs and wishes of multi-legal system member states, more general drafting issues arise in relation to the structure of the proposed legislation.

The modern conflict of laws draftsman has a full pattern book at his or her disposal, and there is no shortage of opportunity for the exercise of drafting skills, to say nothing of the political, diplomatic and negotiating skills which the process of harmonisation requires. It now seems impossible to make a survey of drafting techniques without giving proper place to the European parliamentary process.

Within traditional jurisdiction-selection methodology, a choice of law rule can be single,⁶⁶ dual (i.e. cumulative⁶⁷), alternative⁶⁸ or multi-reference,⁶⁹ or split,⁷⁰ or more demanding still in its specificity.⁷¹ Domestic conflict statutes tend to concern

64 Cf the UK decision not to avail itself of the opportunity to exclude the operation of Rome I to intra-UK contractual disputes (Contracts (Applicable Law) Act 1990, s 2(3)).

64a See recently however *Kelly Banks v CGU Insurance PLC* 2004 GWD 36-729.

65 See R D Leslie, “Building blocks for choice of law structures” (1998) 19 *Statute Law Rev* 202.

66 E.g. the formal validity of marriage is governed by the *lex loci celebrationis*, subject to limited exceptions.

67 E.g. legal capacity to marry (in general and in particular) is governed by the ante-nuptial domicile of each; i.e. capacity by both personal laws (if two there be) is required.

68 E.g. a contract will be valid in form if it complies with the *lex loci contractus* or with the (putative) proper law (common law): now see Art 9, Rome I.

69 E.g. see generous list of choices of law against which to test the formal validity of a will: Wills Act 1963, ss 1 and 2.

70 That is to say, within one legal category (e.g. succession), there may be different choices of law for sub-categories: the scission principle in English and Scots conflict rules, to the effect that succession to immovables is governed by the *lex situs*, and to moveables by the last domicile; not an approach everywhere adopted, nor perhaps that favoured for the future by Europe.

71 E.g. Family Law Act 1986, s 46(2)(b)(i), (ii).

choice of law,⁷² or jurisdiction,⁷³ but may comprise both.⁷⁴ Such statutes may be concerned entirely with conflict matters (though not always with the same matter⁷⁵), or conflict rules may form a small⁷⁶ or larger⁷⁷ part of an otherwise “internal” statute. Purely domestic statutes may be the subject of close interpretation when “conflict” circumstances demand (e.g. acting outside the jurisdiction of the forum, or conduct within the jurisdiction of the forum by a foreign domiciliary/national/resident).⁷⁸ Whatever the conflict character of any given piece of legislation—entire,⁷⁹ mixed,⁸⁰ disparate-topic,⁸¹ vestigial⁸²—the incidence in the latter part of the twentieth century of domestic legislation with conflict content is remarkable.

Conflict legislation in the UK tends to come about nowadays in consequence of our duty to implement our commitments following a Convention, international or European, suggested by the “club” to which we belong.⁸³ International Conventions may be double,⁸⁴ triple,⁸⁵ quadruple, or multiple.⁸⁶ Regardless of their nature, it is essential that they set out their ranking vis-à-vis other Conventions,⁸⁷ and that problems of ranking *within* Conventions be reduced by the drafters anticipating difficulties of interpretation, and obviating such problems through rendering express that which otherwise would be unclear and the subject of debate.⁸⁸ This

72 E.g. Contracts (Applicable Law) Act 1990.

73 E.g. Civil Jurisdiction and Judgments Acts 1982 and 1991.

74 E.g. Family Law Act 1986, Part I (Child Custody (Jurisdiction and Recognition and Enforcement)); Part II (Recognition of Divorce etc).

75 E.g. Private International Law (Miscellaneous Provisions) Act 1995.

76 E.g. Unfair Contract Terms Act 1977, s 27(1), (2); Succession (Scotland) Act 1964; Children (Scotland) Act 1995.

77 E.g. Marriage (Scotland) Act 1977 (cf Marriage Act 1949).

78 *R v Atakpu* [1993] 4 All ER 215 (Theft Act 1968); *Fox v Lawson* [1974] AC 803 (Transport Act 1968); *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345. Cf *Krzus v Crow's Nest Pass Coal Co* [1912] AC 590 (PC).

79 E.g. Contracts (Applicable Law) Act 1990.

80 E.g. Marriage (Scotland) Act 1977.

81 E.g. Private International Law (Miscellaneous Provisions) Act 1995.

82 E.g. Unfair Contract Terms Act 1977.

83 E.g. Child Abduction and Custody Act 1985; Contracts (Applicable Law) Act 1990.

84 Jurisdiction and recognition/enforcement.

85 Jurisdiction, recognition/enforcement, and choice of law.

86 E.g. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996. See also Brussels II Council Regulation (EC) 1347/2000/EC on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; and Brussels II *Bis* (Council Regulation (EC) 2201/2003/EC).

87 Contrast Brussels II, Art 37 (but Art 36 permitting earlier pan-Nordic arrangements to continue to apply), and Brussels II *Bis*, Art 60.

88 Case C-159/02 *Turner v Grovit* [2004] All ER (EC) 485; Case C-116/02 *Erich Gasser GmbH v MISAT srl* [2004] 1 Lloyd's Rep 222.

exercise of foresight and pre-emption of problems is a counsel of perfection, but we must assume that the growing bank of experience will come to inform future legislative instruments. Resort can ultimately be made (in the EU context) to the ECJ for interpretative rulings, but much mischief can be done before an opportunity for a suitable reference presents.

The habit of proceeding by means of EU Convention⁸⁹ seems likely to cease, since the EU now prefers, for reasons of speed, consistency and control, to act by means of Regulation. Some primary legislation in the UK antedates the new wave of EU Regulations and consequently must be amended, more or less comprehensively, by secondary legislation.⁹⁰ Another seam of domestic legislation may remain, but with a limited or circumscribed geographical reach,⁹¹ a brutal example being the fate envisaged for the 1995 Act, as explained above.⁹² “UK” conflict rules increasingly are subject to change, modification or trimming to meet our international obligations; consequently, UK lawyers, academic and practitioner, increasingly frequently must anticipate, comprehend, advise and be constantly vigilant in relation to incipient changes.⁹³

Legislative devices

(a) *Replication and reiteration (across instruments)*

Cascades of rules are not uncommon as a modern drafting technique: by this is meant a rule or set of rules according to which similar scenarios, at different levels, are dealt with in a broadly similar manner, *mutatis mutandis*. The scheme of jurisdiction and enforcement in civil and commercial matters, as originally contained in the Brussels Convention,⁹⁴ is characterised by the unfolding of a scheme, step by downward step, viz: first, the European Community scheme (Schedule 1); next, the Lugano (Parallel) scheme (Schedule 3C); then the intra-UK scheme (Schedule 4); and finally, the rules regulating, for Scotland, the domestic order and residual cases not covered by the earlier Schedules (Schedule 8 and section 20). There is a pattern and a rhythm, a repetition of principles and

89 Rome I Green Paper, para 2 notes that Rome I “is the only private international law instrument still in the form of an international Treaty. Therefore the question of its conversion into a Community instrument has been raised.”

90 E.g. Domicile and Matrimonial Proceedings Act 1973; Family Law Act 1986.

91 An example which comes to mind concerns our relations with Denmark in the matter of jurisdiction and recognition and enforcement of commercial judgments, where Brussels I will continue to apply, and vis-à-vis recognition of divorces etc, where the Family Law Act 1986, ss 44–52 will continue to apply.

92 See notes 54–64 above.

93 See, e.g., S Barker and S Smith, “A response to Brussels II – a view from Scotland” [2002] IFL 44.

94 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; see now Council Regulation (EC) 44/2001/EC of 22 Dec 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (henceforth “BIR”).

phrases, though there are certain differences at the different levels.⁹⁵ At the foot, England preferred to retain the existing approach, trimming only where need be,⁹⁶ while Scotland chose to restate its rules.⁹⁷ Echoes too, or imitations, are found across and within instruments, e.g. as between Rome I rules of choice of law in relation to consumers and employees and the rules of jurisdiction in relation to such persons contained in Council Regulation (EC) 44/2001/EC.⁹⁸

(b) Formatting provisions: hierarchies, lists and categories (within instruments)

Hierarchical rules can be found in domestic law.⁹⁹ A hierarchy appears to import exclusivity: thus, when a case fits a category, the process of identifying the applicable rule or “correct” outcome is at an end: “the remaining rules are then irrelevant and must be ignored”.¹⁰⁰

In conflict terms, lists of rules sometimes are hierarchical or mutually exclusive, but not always; a list may be facilitative and permissive¹⁰¹ (as opposed to prescriptive) in that it contains options of equal standing, a positive outcome occurring if *any* of the options is satisfied.¹⁰²

A segregated category approach may be taken in order to categorise the case in hand and to rule out the application of provisions which consequently are not relevant; Article 3 of Rome I, for example, provides first for contracts which contain an express choice of law or a choice which can be clearly demonstrated, before proceeding to deal with the residue of cases in Article 4.¹⁰³ Article 4 begins with an anodyne presumption (Article 4(1)); clothes it in Swiss raiment (Article 4(2)); provides special presumptions for special cases (Article 4(3) and 4(4)); and

95 Cf Exclusive jurisdiction clauses, Brussels Convention, Art 17; Civil Jurisdiction and Judgments Act 1982, Sch 4, Art 17 (see further A E Anton and P R Beaumont, *Civil Jurisdiction in Scotland*, 2nd edn (1995) (henceforth “Anton and Beaumont”), para 9.27); and declining by ECJ of task of interpreting Sch 4: *Kleinwort Benson Ltd v City of Glasgow District Council* [1997] 4 All ER 641.

96 Anton and Beaumont, para 1.36.

97 Report of the Scottish (“Maxwell”) Committee on Jurisdiction and Enforcement (1980). See Anton and Beaumont, para 1.36.

98 Council Regulation (EC) 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See also in the matter of interpretation a relationship of mutual support. A UK court must have regard to “relevant” decisions handed down by the ECJ; but national decisions even from low in the hierarchy may cast light: see e.g. *Strathaird Farms v G A Chattaway & Co* 1993 SLT (Sh Ct) 36; and *Daniel v Foster* (Sh Ct) 1989 SCLR 378 (definition of “domicile” within UK meaning).

99 E.g. Succession (Scotland) Act 1964, s 2, wherein is found the list of intestate heirs in Scots domestic law.

100 Leslie, note 65 above, 206–207.

101 Wills Act 1963, s 1 of which is an example of horizontal presentation of optional, facilitative provisions; s 2, which provides “additional rules”, is more difficult to characterise.

102 Cf Brussels II, Art 2

103 Cf Family Law Act 1986, s 46(1), (2).

then (Article 4(5)) permits judicial discretion to every contracting state forum¹⁰⁴ to depart from application of the preceding paragraphs. Order of appearance may or may not be significant.¹⁰⁵ Even in a multi-faceted rule containing no hierarchical element (the aim thereof being to regulate different categories of case), one expects nevertheless to see the discretionary provision at the end; that which comes later may eclipse a provision which appears earlier.¹⁰⁶ Modern legislative instruments therefore can be at odds with the irrefutable law of the physical world that water cannot return uphill.¹⁰⁷

Rules such as Article 4 of Rome I and Article 9 of the Commission Proposal are the drafters' attempt to regulate a large and important area of law in small compass by the only verbal means at their disposal, i.e. by a series of provisions, the inter-relationship of which may be harder to understand than at first appears. Article 4 is an example of modern drafting where the subject matter calls for a series of provisions fitting different categories of case. For reasons of clarity, the provisions cannot be presented in continuous prose but must appear in sequential paragraph form.

(c) Framing substantive conflict provisions: rules, presumptions, displacement and discretion (within provisions)

In Rome I, the "principal" provision (Article 4(1)) is explained by means of a presumption (Article 4(2)), which itself may be disregarded (Article 4(5)).¹⁰⁸ The presumption (Article 4(2)) may be dislodged by alternative presumptions of some particularity, but of equal weight to Article 4(2), viz: Article 4(3), concerning immovable property, and Article 4(4), concerning carriage of goods. Last, numerically, is Article 4(5)¹⁰⁹ in terms of which, not only may the presumptions in Article 4(2), 4(3) and 4(4) be disregarded (if it appears from the circumstances as a whole that the contract is more closely connected with another country), but also

104 "Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country" (Art 4(5)). As has become notorious since, there has emerged a wide variation in how the relationship between Arts 4(2) and 4(5) of Rome I is interpreted. See E B Crawford and J M Carruthers, "Conflict of laws update" 2003 SLT 137 (henceforth "Crawford and Carruthers") at 138.

105 Leslie, note 65 above, 207.

106 It is observable that courts may often use Art 4(5) to displace Art 4(2) of Rome I.

107 Cf Stair, *Institutions* 1.4.9: "This right of the husband in the goods of the wife is so great, that hardly can it be avoided by the pactions of parties, whereby if anything be reserved to the wife during the marriage ... the very right of the reservation becomes the husband's *jure mariti* ... as always running back upon the husband himself; as water thrown upon an higher ground doth ever return."

108 Morison J in *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283. The Rome I Green Paper proposes some strengthening of Art 4(2), but not to the extent of conversion of the presumption to a strict rule (with or without exception).

109 Cf Rome II, Arts 3(3) and 9(5).

the non-application of Article 4(2) is authorised (on the ground that the characteristic performance of the contract cannot be determined). A consequence of the express terms of Article 4(5), therefore, is that, by inference, any forum in a member state may use its pre-existing conflict rules to ascertain the applicable law (i.e. the law of closest connection). Leslie notes that with hierarchies current or proposed, “one would expect the last rule to deal with residual matters completing the cover of the area in question”.¹¹⁰ That is evident in Article 4(5).

By contrast, the approach taken throughout Rome II is to set out the proposed choice of law provisions as *rules*, not presumptions. This is a point in respect of which the Commission Proposal and Wallis revision are in accord. The favour shown to the *rule* over the *presumption* in this type of commonly found multi-faceted, non-hierarchical, modern conflict provision is indicative of the growing confidence and zeal of European legislators.

In considering the subject of displacement of rules, Leslie¹¹¹ notes, among many interesting examples, the “exception *in* a choice of law rule”¹¹² and the “exception *to* a choice of law rule”.¹¹³ The latter normally will serve as a rule of displacement, displacement being justified at whatever level, or threshold, in any given case, is set by the legislature in its choice of words¹¹⁴ (and the courts in interpretation thereof¹¹⁵).

Alternatively, with a small twist, the exception to a choice of law rule might be regarded as of the species of presumption-rebutting factor.¹¹⁶ In this way the direction to the court is itself displaced by discretion, constituting or justifying wider opportunity and autonomy for the court. One notes, for example, the power of rebuttal contained in Article 4(5) of Rome I which gives the forum discretion to depart from the rule and presumptions previously narrated.¹¹⁷ It would appear, therefore, that regardless of whether the main provision is set by rule or presumption, a discretion always is made available to the forum. Often there will be permitted free exercise of this discretion, but it is noteworthy that the incidence of

110 Leslie, note 65 above, 207.

111 Leslie, note 65 above. See also C J M Morse, “Making English private international law”, in J Fawcett (ed), *Reform and Development of Private International Law: Essays in Honours of Sir Peter North*, at 273.

112 E.g. 1995 Act, s 13.

113 E.g. 1995 Act, s 12,

114 E.g. in the tortious context, “substantially more appropriate” (1995 Act, s 12), which ultimately was preferred to “insignificant connection” (Tort and Delict (Applicable Law) Bill).

115 E.g. *Edmunds v Simmonds and Roerig v Valiant Trawlers Ltd*, note 60 above.

116 Leslie, note 65 above, 208.

117 Cf Rome II, Commission Proposal, Arts 3(3) and 9(5); these provisions do not entirely mirror the function of Art 4(5), Rome I. Whereas the latter operates to “complete the cover” *and* to provide a rule of rebuttal, the former operate *only* as a rule of rebuttal. For an example of a rule which seeks only to complete the cover, see 1995 Act, s 11(2)(c).

what one might describe as a “guided discretion” to assist the court (or perhaps subliminally to inhibit it) is to be found increasingly in late twentieth-century English legislation, domestic and conflict.¹¹⁸ The manner in which the Wallis Report approaches the drafting of the relevant discretionary provisions in Rome II is therefore familiar; in the Wallis version of the discretionary exception to the principal rule for choice of law in tort and delict (new Article 3), the provision is framed in the form of a guided discretion in terms of which the forum *may* take into account four named factors, having regard also to the expectations of the parties and to the need for certainty and uniformity of decision.

It is a banality to say that the aim always is to find a “rule” which combines certainty and predictability, with the “right” potential for flexibility;¹¹⁹ devices such as the fettered or guided discretion conferred upon a court might be seen as helpful, or alternatively as overly controlling in that what is suggested as appropriate for inclusion in the decision-making process may cause to be overlooked other potentially admissible factors, thereby nudging the court towards what is, in effect, the pre-ordained, preferred outcome. One might question whether guided discretion is a contradiction in terms.

D. PARTY AUTONOMY IN TORT AND DELICT

Section C above pertains to the framing of (conflict) “rules”, and legislative devices which permit derogations from the main rule or presumption. These derogations are open to exercise by the forum, as, of course, is the overarching power, not so far challenged, of rejection of the applicable law in the name of public policy on the ground of offensive content, with the consequence that the rule of the *lex fori* would apply by default. Another, more common, way of excluding the application of the otherwise applicable law is to permit parties to make their own arrangements.

(1) Individualism by individuals

It is notable that while member state autonomy and the freedom to enter reservations so as to retain a state’s national conflict rules are under constant threat of being eroded, *individual* party autonomy is gaining favour as a principle in EU

118 E.g. Inheritance (Provision for Family and Dependents) Act 1975; Matrimonial and Family Proceedings Act 1984, Section III.

119 The divergence between the terms of the Commission Proposal and the Wallis Report is that while the former leans to certainty and a tort-specific approach, in a manner familiar to Civilian lawyers, the latter could be said to amount to an Anglo-Saxon riposte in its more general and flexible regime, and its preference for judicial discretion. The exercise of discretion is second nature to a Common Law judge, but alien to a Civilian.

legislative instruments. Party choice in relation to choice of law increasingly is permitted, even encouraged—though generally it is reined in by the concept and imposition of “mandatory rules”; and in the case of choice of jurisdiction, by provisions designed to protect weaker and presumably ill-advised parties from making choices which are not in their best interest.¹²⁰

The principle of party autonomy has long been accepted in choice of law in contract. A laissez-faire approach to the resolution of choice of law problems is a solution which accorded with the nineteenth-century principle of sanctity of contract.¹²¹ Domestically and conflictually, the UK Parliament has intervened to ensure that persons who, potentially, may be regarded as disadvantaged are protected; over time, certain parties have ceased to be regarded as their own legislators, and state interventionist protection has become notable.¹²² Nevertheless the concept of party choice of law still retains its vigour in the context of choice of law in contract,¹²³ and it is the authors’ impression that the concept is undergoing a resurgence of popularity more generally, at least in certain influential quarters.¹²⁴

In 1984¹²⁵ the Law Commissions, when scrutinising the subject of choice of law in tort and delict, recommended that:

It should be possible (before or after a tort or delict has occurred) to agree by means of contract what law should govern the parties’ mutual liability in tort or delict. Such agreement should be effective whether or not it results in the application of the law of the forum.¹²⁶

Oddly, the issue of party autonomy was not addressed in the ensuing Report,¹²⁷ or in Part III of the 1995 Act. The 1995 Act makes no mention of the principle of party autonomy.¹²⁸ Given the uncertainty that prevailed in 1984 as to whether or

120 Cf in the matter of party choice of jurisdiction, the protective wording of Arts 13 (insured persons), 17 (consumers) and 21 (employees) in BIR.

121 Classically expressed by Sir George Jessel MR in *Printing & Numerical Registering Co v Samson* [1875] LR 19 Eq 462 at 465. See P Nygh, *Autonomy in International Contracts* (1999) (henceforth “Nygh”), ch 1.

122 Nygh, 28.

123 Nygh, ch 11, argues that from a pragmatic point of view, party autonomy is desirable for the new era of globalisation of trade and commerce, and from the idealistic standpoint, it accords with the human right to arrange one’s business as one sees fit, subject to public order restrictions and prevention of “exploitation of the weak” (a stance which surely represents a retreat from post-War state protectionism, though, as Nygh makes clear, “freedom of contract should be genuinely, and not merely formally, free”). One might say that, viewed in this light, Rome I, Arts 5 and 6, though *prima facie* restrictions on the sanctity of contract, are in fact seeking to secure “genuine” freedom of contract.

124 Scott Report, Evidence: A Briggs, paras 9 and 18; R Fentiman, paras 9.1 and 9.30; Sir Peter North, para 10; Association of British Insurers, para 2.6; and City of London Law Society, para 8.1.

125 1984 Consultation.

126 1984 Consultation 265, para 7.3.1(a).

127 1990 Report.

128 Sir Peter North described this as the “sin of omission” (“Torts in the dismal swamp: choice of law

not party autonomy was permissible under the common law rules of choice of law in tort and delict,¹²⁹ and the subsequent paucity of legislative or judicial direction in relation to the principle, the current “UK” position regarding party autonomy in tort and delict is far from clear. Sir Peter North has since remarked that it would be “prudent and practical” to legislate for party autonomy in tort and delict since it is “highly improbable that courts would feel free to develop at common law a concept of party autonomy in tort alongside a regime of statutory choice of law rules”.¹³⁰ The decision in *Morin v Bonham and Brooks Ltd*¹³¹ suggests that not only would courts feel reluctant to develop such a concept, but also that they would feel powerless so to do. *Morin* is a single judge decision which raises the matter in reported form for perhaps the first time, but it is suggested that in this period between statutory replacement in the UK of the common law rule of double actionability and assimilation of the Scots and English rules to those ultimately agreed for EU member states, the decision and tone of the case are useful guides to the current state of “UK” rules with regard to party autonomy in tort and delict.

(a) *Morin v Bonham and Brooks Ltd*

Proceedings were raised by Monsieur Morin, a French national resident in London, against the defendant auctioneers,¹³² in respect of the claimant’s purchase at auction in Monaco of a classic motorcar. The action was founded in tort, the claim being that Monsieur Morin had acted in reliance upon the defendants’ auction catalogue, which had misrepresented the kilometrage of the car; on post-purchase inspection of the car in England, it was discovered that the car’s odometer reading of 16,626km was false, and that a more accurate reading would have been in the region of 200,000km.

Significantly, the General Conditions of Sale, printed in the defendants’ auction catalogue and deemed to have been accepted by all bidders (including the claimant),¹³³ contained a choice of law clause to the effect that all sale transactions

revisited”, in North, *Essays*, 85). The issue, he writes, “disappeared without trace” (“Choice in choice of law”, in *Essays*, 190). Sir Peter considered that “the parties should be allowed to lay their own track through the swamp” (“Torts in the dismal swamp”, 86). Cf P North and J J Fawcett, *Cheshire and North’s Private International Law*, 13th edn (1999) (henceforth “Cheshire and North”), 628.

129 1984 Consultation, para 4.21.

130 North, *Essays*, 190. This form of words would seem to indicate that it is Sir Peter North’s opinion that contracting out of the Act is not incompetent.

131 [2003] 2 All ER (Comm) 36; [2003] ILPr 25, aff’d [2004] 1 All ER (Comm) 880; [2004] 1 Lloyd’s Rep 702.

132 The action was raised against B&B (London), the Bonham group’s parent company, and against B&B (Monaco), the Monegasque subsidiary through which auctions in Monaco were conducted. The reported proceedings concern an application by the claimant for service out of the jurisdiction, and a cross-application by the defendants to stay the English proceedings.

133 *Morin v Bonham and Brooks Ltd*, [2004] 1 Lloyd’s Rep 702, para 8.

conducted by B&B (Monaco) in Monaco, and “all matters connected therewith” would be governed by Monegasque law.¹³⁴ The litigants agreed that the torts (misrepresentation and breach of duty of care) allegedly committed by B&B (London) were governed by English law,¹³⁵ but they disagreed as to the law governing the tort allegedly committed by B&B (Monaco). The parties agreed that, as regards B&B (Monaco), the events constituting the alleged torts occurred in different countries, so that section 11(2)(c) of the 1995 Act was the applicable rule; they disagreed, however, as to the country in which the most significant elements of the alleged tort occurred.¹³⁶ The claimant asserted that the governing law was English law (the misrepresentation having occurred in London, where it was received and acted upon, and significant loss having occurred there¹³⁷), whereas the defendants argued that the governing law was Monegasque law (the principal act of reliance on the alleged misrepresentation having occurred in Monaco when the claimant made the successful bid, and all, or at least most, of the damage having occurred in Monaco¹³⁸). Critically, the defendants also averred that since the claim in tort was a “matter connected with the sale”, it was subject to the express choice of law clause (in favour of Monegasque law) contained in the General Conditions of Sale. So far as concerned all contractual issues in the case, it was agreed that the Monegasque choice of law was valid and effective.

This argument brought directly into issue the question whether, under the 1995 Act, it is competent for parties to choose the applicable law in tort.¹³⁹ Though the judicial spirit may have been willing, the power (at first instance at least) to allow the general exercise of party autonomy in tort was thought to be lacking:

If it were possible, I would conclude that representations made which induced the making of the contract were matters connected with the contract and that the parties had chosen to apply [i.e. to the tort] Monegasque law. However in my judgment the general rule [in s 11] requires the Court to look to the country where the most significant element of the *events constituting the tort* occurred. A choice of law clause has nothing to do with the events constituting a tort.¹⁴⁰

Hence, in the opinion of Jonathan Hirst QC there seemed to be no place for the exercise of party autonomy where the events constituting the tort or delict in

134 *Morin v Bonham and Brooks*, para 9.

135 Jonathan Hirst QC, sitting as deputy judge of the High Court, considered this to be correct (para 38), [2003]; though see comments of Mance LJ at para 20 [2004].

136 *Morin v Bonham and Brooks*, paras 14–15.

137 *Morin v Bonham and Brooks*, paras 14–15. Cf *Diamond v Bank of London* [1979] QB 333; *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059 at 3070–3072; and *Base Metal Trading Ltd v Shamurin* [2002] CLC 322.

138 *Morin v Bonham and Brooks*, para 15.

139 *Morin v Bonham and Brooks*, paras 22–23.

140 *Morin v Bonham and Brooks*, para 33 [2003].

question occur in *one* country (i.e. party autonomy cannot override the general *locus delicti* rule).¹⁴¹ Nor did party autonomy rank as a factor relevant to the ascertainment of the applicable law where elements of those events occur in *different* countries.¹⁴² But Hirst QC considered that the parties' choice *was* a relevant factor as regards the comparison exercise to be performed under section 12: "It may be that at the s 12 stage a choice of law by the parties might make it substantially more appropriate for the applicable law to be that chosen by the parties."¹⁴³

The Court of Appeal, upholding the view of Hirst QC, considered that although elements constituting the alleged tort occurred both in England and in Monaco, the most significant elements occurred in Monaco,¹⁴⁴ and accordingly, by virtue of section 11(2)(c), the law applicable to the torts allegedly committed by B&B (Monaco) was Monegasque law. The claimant did not attempt to argue that the general rule should be displaced in terms of section 12. The defendants, in contrast, submitted that even if the court had decided that the general rule under section 11 pointed to the application of English law, section 12 could have been invoked to displace that law, arguing that it would have been substantially more appropriate for Monegasque law to determine the issues in the case "in the light of the choice of law clause".¹⁴⁵ It is apparent that individual raw factors do not carry equal weight in the section 12 comparison exercise.¹⁴⁶ *Morin*, unfortunately, does not assist in estimating the weight which attaches (in general, or in the particular context of this case) to the raw factor of party choice of law. Obviously, under a *laissez-faire* choice of law scheme, party choice would be an overriding factor. Although the defendants' position seems (naturally) to have been that the choice of law clause, *per se*, should carry substantial weight, as a result of the court's findings in relation to section 11, the issue was not relevant and Hirst QC thought the better of making *obiter* remarks in relation to what was, in his view, a "novel and difficult point"; likewise, the Court of Appeal declined to give a concluded view.¹⁴⁷

(b) *Party autonomy in Rome II*

It is proposed that Rome II will confer freedom of choice of applicable law in a manner which, where appropriate, echoes the wording of Article 3(1) of Rome I.

141 1995 Act, s 11(1).

142 1995 Act, s 11(2).

143 *Morin v Bonham and Brooks*, para 33, [2003]. The Court of Appeal seemed to be more supportive of the contractual choice of law clause being held to given claims in tort, especially where s 12 was in play. See Mance LJ at paras 12 and 22, and at 23: "In general terms, it would seem odd if an express choice of law were not at least relevant to the governing law of a tort".

144 *Morin v Bonham and Brooks*, paras 19, 22, 27, and musings at 21.

145 *Morin v Bonham and Brooks*, para 37 [2003]; [2004] para 22.

146 Cf *Edmunds v Simmonds*; *Roerig v Valiant Trawlers Ltd*; and *Hulse v Chambers*, note 60 above.

147 *Morin v Bonham and Brooks*, para 37 [2003]; cf Mance LJ at paras 23 and 27.

Article 10(1) of the Commission Proposal provides that parties may choose the law applicable to a non-contractual obligation (except in relation to obligations which concern intellectual property rights¹⁴⁸), so long as the choice is made expressly, or is demonstrated with reasonable certainty by the circumstances of the case,¹⁴⁹ and it does not affect the rights of third parties (e.g. insurers). Notably, in order (ostensibly) to protect weaker parties, the choice may be exercised only *after* the dispute in question has arisen.¹⁵⁰ The Commission Proposal, which does not make provision for choice of law in advance of the event,¹⁵¹ is to be contrasted with the Wallis Report which, in new Article 2a, proposes that the parties may agree, *before* or after their dispute arose, to submit non-contractual obligations to the law of their choice.¹⁵²

(c) *Time and choice*

Whether in general across the conflicts spectrum, and, in principle, sufficient (in whose view?) protection is afforded to weaker parties when party autonomy in choice of law is permitted, is a large question. Choice *before* the event is dangerous: would it be wise, for example, for competitors at an international sporting event such as the Olympic Games to be held at Olympia to agree in advance that all tortious disputes arising between competitors, or between a claimant competitor and the organising committee, be governed by, say, the law of Olympia? It can easily be imagined that the scope of potential litigation could be wide, ranging from questions of *volenti non fit injuria*, through contributory negligence or disputes about drug-testing, recording of results, and evidence of performance, to alleged breaches of security on a small, or large, scale. Parties might often regret their antecedent choice of law. Moreover, in the Olympic example, the choice would be likely to suffer “moderation” in the light of other relevant rules, public as well as private, including special regulatory rules of, for example, a particular

148 Freedom of will tends to be encouraged these days in the conflict of laws; but is not deemed appropriate, and is not accepted in intellectual property problems: Commission Proposal Explanatory Memorandum, 22.

149 Cf Rome I, Art 3(1).

150 Commission Proposal, preamble, para 16. Cf BIR, Arts 13, 17 and 21.

151 The Explanatory Memorandum states that, “Since the proposed Regulation does not allow an *ex ante* choice, there is no need for special provisions to protect a weaker party” (at 22).

152 North, in *Essays*, ch 7, “Choice in choice of law”, 191, argues that the role and purpose of party choice differs according to whether it is made before or after the event: before the event, the choice has a “prophylactic or prospective planning role to play”, but after the event, that planning function might be all the more significant since parties then are in possession of all the facts. Various commentators would countenance freedom of choice in non-contractual obligations and see no need to restrict it to post-dispute agreements (Scott Report, Evidence: Sir Peter North, para 14; R Fentiman, para 10.1; City of London Law Society, para 8.1).

sporting or professional body; the problems presented are likely to include the ranking and sphere of application of potentially relevant bodies of rules.¹⁵³

But it must be appreciated that choice *ex post facto* is not necessarily *informed* choice; permission to choose the applicable law *after* the event is no guarantee that advantage will not be taken of the weaker party. Nevertheless, the theory behind the limitation of parties to choice *ex post facto* seems to be that they will thereby be protected from inadvertently waiving their rights or yielding to the will of the other party in advance of the dispute (by virtue perhaps of a standard form contract). Hence, in Council Regulation (EC) 44/2001/EC, parties deemed to be weak (where there is obvious inequality in bargaining power) are restricted in their exercise of free will to the making of choices after the event and within certain safeguards.¹⁵⁴ In our hypothetical sporting example, could (or should) competitors be regarded as persons requiring special protection along the lines of consumers, employees and insured persons, both as to jurisdiction and choice of law?

Greater freedom of choice (albeit freedom restricted by provisions concerning mandatory rules and public policy) may be a welcome development in this area; and of particular benefit in cases where there exist parallel claims in contract and in tort, and where application of a common applicable law to the contractual and non-contractual aspects of a claim would be desirable.¹⁵⁵

(d) *What's on offer?*

Leaving aside the question of *when* parties can exercise choice, we must ask *what* it is that parties may choose. This subject last came to the forefront of discussion in relation to Rome I in its early days of operation. It was clear that parties are not permitted to choose, for example, a body of non-state law, or “the principles of right reason” or the “laws of the Medes and the Persians”,¹⁵⁶ though it is noteworthy

153 By which we mean the situation where a problem attracts regulation by a set or sets of rules, possibly including conflict rules, over and above conflict rules.

154 See note 150 above.

155 Especially in linked contract/delict cases, lying on the cusp, where the parties were known to each other before the event as, e.g., employer/employee disputes: *Brodin v Seljan* 1973 SC 213; *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226; and *Sayers v International Drilling Co NV* [1971] 1 WLR 1176. Cf the “proper law of the issue”, as Lord Denning, alone among his peers, sought to get to the heart of the matter in the mixed contract/tort case of *Sayers v International Drilling Co NV*. It may even transpire that we shall have ultimately (as originally envisaged, but abandoned in the 1970s as too ambitious an aim), a harmonisation instrument which assimilates the choice of law rules in relation to contractual *and* non-contractual obligations; in this case, one would suppose that the rule on party choice would be the same across the spectrum of obligations.

156 Cheshire and North, 559–560; Crawford and Carruthers; Rome I Green Paper, para 3.2.3; and see European Economic and Social Committee Opinion on Rome I Green Paper (COM (2002) 654 final) OJ C108/1 30.3.2004, para 4.5.

that the Green Paper which now suggests amendments to Rome I proposes that parties may reasonably wish to adopt a body of non-state law, such as the UNIDROIT Principles of International Commercial Contracts, or the rules of the Vienna Convention 1980; that is probably as bespoke as it gets.¹⁵⁷ It is not to say that parties cannot craft as applicable to their contract highly specific substantive terms and conditions, having the appearance of a personalised code, but approaching this matter theoretically, the essential validity of such a “code” must itself have an applicable law, which (subject to Articles 1 and 10 of Rome I) perforce would be determined in accordance with Rome I (or its successor). A distinction has always been drawn between choosing an applicable law, on the one hand, and adopting by incorporation the substantive provisions of a particular legal system as part of the contract terms, on the other. Thus a contract of carriage in which the parties made no express choice of law, but adopted *in toto* the provisions of a Betan Code of Carriage, would still be subject, as to choice of law, to Article 4(4) of Rome I, which might indicate that Alphan law applies (subject perhaps to displacement by Betan law in terms of Article 4(5)). Moreover, the concomitant provisions of Rome I concerning public policy, mandatory provisions, exclusion of *renvoi* etc would still apply (assuming a contracting state forum).

Even though wide powers of choice are granted under the Commission Proposal, it will seemingly be the case that the choice would be limited to the domestic, internal rules of the chosen law, European legislators having reached, as is now to be expected, for the off-the-shelf, anti-*renvoi* clause.¹⁵⁸ While the various Proposals allow choice of internal, substantive law, none confers upon the parties choice of *choice of law*; there will be no getting away from regulation by the Regulation. Exclusion of *renvoi* is a necessary handmaid to effective choice of law where the law selected by parties is that of a member state; were it otherwise, there would be circularity.¹⁵⁹ It is not possible to scramble out from under the net. There would not appear to be the same methodological objection to *renvoi* if the law chosen were that of a non-member state, but no doubt the standard anti-*renvoi* arguments would still apply, compounded in this context by the undesirability of a member state forum treating cases differently, according to the status (EU or other) of the “law” chosen.¹⁶⁰

157 It is likely that choice in Rome II will extend only to a body of state law.

158 Art 20, Commission Proposal. See A Briggs, “In praise and defence of *renvoi*” (1998) 47 ICLQ 877.

159 E B Crawford, “Putativity, circularity, negativity and contingency: problems of method and topics of topicality in the conflict of laws problems of circularity” (forthcoming).

160 Cf the difficulties currently experienced in the UK in relation to the propriety of admission by our courts of the plea of *forum non conveniens* where the alternative forum is that of a non-member state (*Re Harrods (Buenos Aires) Ltd* [1992] Ch 72; *Lubbe v Cape plc (No 2)* [2000] 1 WLR 1545, [2000] 4 All ER 268, per Lord Bingham). But see 1995 Act, s 9(5).

(2) Restrictions on party autonomy

Turning to other drafting tools and control mechanisms, we shall consider, first, the concept and use of mandatory rules and, secondly, public policy. Party autonomy has to be understood nowadays against the background of mandatory rules. Mandatory rules serve to give shape to an instrument as a harmonisation tool (from a methodological perspective, as it were), and also (from the perspective of the individual) they operate as a mechanism to limit party freedom. In the first place, it is clear that contracting parties cannot use a Convention term or indulgence to exclude the operation of the said Convention.¹⁶¹ In the second place, the law chosen by parties will not necessarily be determinative of the particular issue arising, because the parties' choice will be limited or circumscribed by the construct now known as mandatory provisions. Freedom of choice, under the Commission Proposal, would be curtailed by the complex operation of Articles 10(2), 12 and 22.¹⁶² Member states now are familiar, generally, with the *concept* and *purpose* of mandatory rules, if not always with the *definition* thereof,¹⁶³ but the "anti-avoidance" provisions contained in Articles 10(2) and 12 of the Commission Proposal are notably complex and their intended interaction must be clarified if the provisions are to be of practical use. There is a risk of such provisions, in such terms, becoming almost formulaic in EU conflict of laws instruments, and so it is important to keep watch for minor differences or creeping extension of EU central influence, and concomitant diminution of actual party autonomy.

In Rome II it is proposed that the scheme will work like this:

(a) Article 10(2)

This concerns non-contractual obligation situations internal to country A, where the parties choose to subject their dispute to the law of country B. Under Article 10(2) if all other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the parties' choice cannot circumvent the application of the mandatory rules of the former (the anti-avoidance provision). According to the Explanatory Memorandum, Article 10(2) is intended to deal with a situation which is "purely internal" to one member state, and which falls within the scope of the Regulation only because the

161 E.g. contracting parties cannot utilise Rome I, in order to disapply all or part of Rome I, by selecting, under Art 3(1), as applicable to the situation, the law of England *including* its conflict rules at common law.

162 Cf Rome I by Arts 3(3), [7(1)], 7(2) and 16.

163 Giving evidence to the House of Lords EU Committee, Professor Beaumont admitted "the truth of the matter is there is very little jurisprudence on mandatory rules in any country in Europe" (Scott Report, Evidence, Q372 and 373).

parties have agreed on a choice of foreign law.¹⁶⁴ It deals with a country's rules of *internal* public policy, i.e. rules which are mandatory in the domestic sense, but not necessarily in the international context:

[I]nternal public policy rules are not necessarily mandatory in an international context. Such rules must be distinguished from the rules of international public policy of the forum (Article 22) and overriding mandatory rules (Article 12).¹⁶⁵

(b) Article 10(3)

Neither shall the parties' choice debar the application of provisions of Community law¹⁶⁶ where *the other elements of the situation* were located in one of the member states at the time when the loss was sustained.¹⁶⁷ This at least makes clear what is to happen where the choice of law made by the parties is the only external factor.

If doubt exists in relation to the definition of the mandatory rules of a particular country, more doubtful still must be the definition of the "mandatory rules" of Community law. Article 10(3) has been inserted, presumably, to establish an order of precedence of application where, as must increasingly happen in the EU context, an issue potentially is regulated by a number of relevant instruments.¹⁶⁸ But Article 10(3) seems to go beyond the scope of harmonisation of rules of choice of law, hinting perhaps at a supranational substantive law; the consequences of this provision could be significant.

(c) Article 12: overriding rules

Article 12 refers to the "overriding" mandatory rules, not only of the forum (Article 12(2)), but also of any country with which the situation is closely connected (Article 12(1)).

The wording of Rome II follows that set in Rome I, where the latter has not attracted criticism. Thus we find (Article 12(2), echoing Article 7(2) of Rome I) that nothing in the proposed Regulation shall restrict the application of the rules of the forum where they are mandatory irrespective of the law otherwise applicable

164 Explanatory Memorandum, 22.

165 Cf Rome I, Art 3(3).

166 Presumably a reference to the web of intersecting "Community law" of all types, e.g. "sectoral" provision by Directive in a particular area such as insurance or agency. The Explanatory Memorandum, e.g., at 23, does not take the opportunity to define/explain the meaning of "Community law". See also Art 23 and Explanatory Memorandum, 29.

167 It appears from the Explanatory Memorandum that Art 10(3) is to apply in situations covered by Art 10(2), and therefore that omission of the word "all" in Art 10(3) is not to be regarded as significant.

168 In the European context, this problem arises because of overlapping sectoral regulation. One might term this "horizontal overlap".

to the non-contractual obligation.¹⁶⁹ Similarly, Article 12(1) mirrors Article 7(1) of Rome I (to which the UK did not accede¹⁷⁰), as follows:

Where the law of a specific third country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Essentially the difference between the two types of mandatory provision (internal and overriding) is that Rome I, Article 3(3) and Rome II, Article 10(2) represent “*dispositions imperatives*” (rules which cannot be derogated from by contract, i.e. “domestically”), whereas the mandatory rules referred to in Rome I, Article 7, which presumably are the same type as referred to in Rome II, Article 12, are “*lois de police*” (rules which must be applied whatever the law applicable to the contract, i.e. cutting across or countermanding the normal application of the forum’s conflict rules). The latter, it has been said “are obviously a subset of the mandatory rules which fall within the scope of Article 3(3)”.¹⁷¹

(d) *The Wallis Report*

The Wallis Report advocates a simpler approach to mandatory rules. It is there proposed that Article 10 of the Commission Proposal should be deleted in its entirety, and that party autonomy be treated in the new Article 2a (appearing earlier in the scheme of rules, as a matter of logic). Article 2a(1) would subject the parties’ choice of law (*ex ante* or *ex post*)¹⁷² to the application of mandatory rules within the meaning of (existing) Article 12. Article 2a(2) encapsulates (with minor amendment) Article 10(3) of the Commission Proposal, to the effect that the parties’ choice of applicable law shall not debar the application of provisions of

169 Article 12(2). Cf Rome I, Art 7(2). Presumably here as before the forum must characterise the nature of its own rule; C M V Clarkson and J Hill, *Jaffey on the Conflict of Laws*, 2nd edn (2002) (henceforth “Clarkson”), 225.

170 The Giuliano Lagarde Report on Rome I (available at http://www.rome-convention.org/instruments/i-rep_lagarde_en.htm) explains, at 27, that some delegations had misgivings about the delicacy of the operation of the judicial discretion which Art 7(1) necessitated (“effect may be given”; when, and to what extent, would the mandatory rules of a country other than the *lex fori* or the *lex causae* be applied?). One might add that vagueness resides also in the phrase “the mandatory rules of the law of another country with which the situation has a close connection”: the comment has been made that had the UK not made a reservation in relation to Art 7(1), the manner in which we might deal with illegal contracts or contracts containing an illegal term would be clearer (Cheshire and North, 600).

171 See Clarkson, 225. Possibly the converse is more accurate, i.e. the domestic rule (cf Scottish hire purchase legislation: *English v Donnelly* 1959 SLT 2) might more naturally be regarded as a subset of the overriding international mandatory rule. But see Cheshire and North, 578.

172 See section D.(1)(c) above.

Community law if all the other elements of the situation at the time when the loss is sustained are located in one or more of the member states.

Article 10(2) of the Commission Proposal is deleted and not reinstated in any form in the new Article 2a, for it would seem to be covered by the Wallis-revised version of Article 12 which has been reordered and simplified. The new Article 12(1) would protect the mandatory rules of the *forum*, while Article 12(2) would safeguard those of *another country* with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation.¹⁷³

Under both the Commission and Wallis Proposals, it appears likely that member states which entered a reservation in relation to Article 7(1) of Rome I, and which still entertain doubts about the desirability of such a provision,¹⁷⁴ on this occasion will be swept along into compliance (although under the Wallis Proposal, they may not realise that this has happened).

(e) Mandatory rules and public policy in operation

It is perhaps rather more difficult to suggest examples of the various types of mandatory rule in tort and delict or unjust enrichment, than it is in contract. Is the removal of the defence of common employment in a delictual action by an injured worker,¹⁷⁵ a legislative provision which clearly embodies a policy of Scots law, to be classified as a mandatory rule (purely internal, Article 10(2)); an overriding mandatory rule

173 Cf Art 7, Rome I. Wallis collapses the two types of mandatory rule (internal and overriding) and directs that they be governed by her reordered Art 12. This accords with Sir Peter North's recommendation: Scott Report, Evidence, para 14. With respect, it may be thought clearer to retain a separate treatment of the two types of rule.

174 Scott Report, Evidence, Sir Peter North, para 16: "There would appear to be no good legal justification for the UK adopting a different approach now to non-contractual obligations"; L Collins, para 11.6: "Article 12(1) is objectionable for reasons similar to Article 7(1) of the Rome Convention, to which the UK (and some other Contracting States including Germany) has entered a reservation. The draft Regulation contains no provision for an opt-out"; A Dickinson, para 10: "Article 12.1 is no more satisfactory in its formulation or implications than Article 7.1 of the Rome Convention. ... The vague drafting of this provision ... seems likely to promote uncertainty and undermine the purported objective of the proposed Regulation"; A Briggs, para 14: "Article 12.1 is very difficult. I do not understand the reference to a 'specific third country': is *third* meant simply to mean *foreign*? Which law was second? And if it does mean this, there needs to be provision for a state to opt out of this Article, just as was done in relation to Article 7.1 of the Rome Convention ... the arguments about uncertainty are as strong here as they were there. Is there any difficulty which prevents a Regulation making express provision for a Member State to opt out of a single provision? I hope not"; and R Fentiman, para 9.31: "The familiar objections to Article 7(1) apply equally here".

175 Contained in Law Reform (Personal Injuries) Act 1948, s 1(3): any provision in a contract of service or apprenticeship shall be void in so far as it excludes or limits any liability of the employer in respect of personal injuries to his employee by the negligence of persons in common employment with him. This is a provision from the law of contract, which clearly has the potential to affect an employer's defence in an action of delict.

(Article 12); or an expression of policy (Article 22) which will emerge only in the face of proof of a foreign rule which conflicts with it?¹⁷⁶ Similarly, does the Law Reform (Contributory Negligence) Act 1945 express a *policy*, namely that the contributory negligence of the injured party should not debar his suit? One might say that *all* legislative change or common law development represents or embodies a policy.

Then again, if upon the occurrence of a motor accident in Illyria, a country, for the sake of argument, newly received into the list of EU member states, the injured Illyrian (passenger) wife wishes to sue her Illyrian (driver) husband in Illyria (where, let us say, there is inter-spousal immunity from suit), and the would-be litigants, after the event, expressly choose Scots law to govern (on the basis that there is no inter-spousal immunity under Scots law), we pose the question whether the Illyrian court would rely upon Article 10(2) to insist upon application of the Illyrian domestic rule (having characterised it as a mandatory provision); or would the Illyrian rule, in the Illyrian view, qualify as an overriding mandatory rule (Article 12(1) and/or 12(2)); or would the application of the Scots rule be refused as falling within the general category of manifest incompatibility with the public policy of Illyria (under Article 22)? If in the circumstances the Illyrian wife could sue the Illyrian husband in Scotland under BIR, Article 2 (“domicile” of defender), would the Scots court uphold the choice of Scots law? In such circumstances, the Scots court in its approach to the case would be required to classify (from its own standpoint?¹⁷⁷) the Illyrian rule as mandatory-internal (leading to application of Article 10(2)), or as mandatory-overriding (Article 12(1)). On a simple view,¹⁷⁸ if the case should fall within Article 10(2), the Scots forum must respect the Illyrian rule. But what if it were argued for the wife that it is against Scots public policy under Article 22 to give effect to such a restrictive, mandatory rule of Illyrian law? What is the relationship between the restrictive structure built up by Articles 10 and 12 vis-à-vis Article 22? We suspect that it is not intended that the wide-ranging discretion provided by Article 22 should be used to undermine the limits upon party autonomy so carefully crafted by Articles 10 and 12.

(f) *Article 22: public policy*

Article 22 of the Commission Proposal contains the customarily found public policy clause, to the effect that application of a foreign law may be refused if it

176 See generally *Brodin v A/R Seljan* 1973 SC 213.

177 Cf 1995 Act, s 9(2)

178 A more sophisticated view is that if suit has been taken in Scotland, as a result of the defender's “domicile” in Scotland, it can no longer be said that *all* the other elements of the situation apart from choice of law are connected with another country (other than the country whose law has been chosen).

would be manifestly incompatible with the public policy of the forum.¹⁷⁹ According to the Explanatory Memorandum, Article 22 public policy can be distinguished from Article 12 overriding mandatory rules as follows: “in the latter case [overriding mandatory rules] the courts apply the law of the forum automatically, without first looking at the content of the foreign law.”¹⁸⁰ Public policy, on the other hand, may be invoked only *after* the content of the foreign law (and the result of its application) has been considered by the forum. Article 12(2) of the Commission Proposal represents, in effect, a “positive” exercise of the forum’s policy: policy operating as a sword (i.e. the strength of the forum’s policy is such that it precludes the operation of a contradictory rule of any potentially applicable foreign law). Article 22, in contrast, represents a “negative” exercise of the forum’s public policy: policy operating as a shield (i.e. the strength of the forum’s policy prevents application of the *prima facie* relevant foreign law).

Under the Wallis Report there is no change to the basic wording, but two additions are proposed. First, the application of a rule of law of any country specified by the Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions and international humanitarian law. The second addition has interesting technical implications in relation to “Community public policy” and Article 24 of the Commission Proposal, as explained below.

(g) “*Community public policy*”

Reference to “Community public policy” is itself surprising. Article 24 of the Commission Proposal is accessory to Article 23, and together they are intended to protect and preserve the law and policy of the Community.¹⁸¹ The presence and tenor of these Articles evidence anxiety at the European centre to control, and add a new substantive quality, to the Europeanisation of the conflict of laws.¹⁸² What is the nature of this new control, which requires specific identification, in advance, of that which is to be deemed objectionable (to the Community)?³ The fettering of individual member states’ discretion in this matter is notable; there is visible in this proposed Regulation a strong tendency towards particularisation.

179 Cf Rome I, Art 16.

180 Explanatory Memorandum, 28.

181 Explanatory Memorandum, 28.

182 Scott Report, Evidence, A Briggs, para 16: “I do not see what ‘Community Public Policy’ is. Public policies are national, not Community, and it strikes me as very undesirable indeed that there should be any encouragement for a ‘Community Public Policy’ to put down roots. If the Commission wants a special rule, let it make it in clear and precise terms, without any reference to Public Policy.”

The final paragraph of Article 22 of the Wallis Report is worded as follows:

Furthermore, the application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy (“*ordre public*”) of the forum.

In the Commission Proposal, the same rule, but expressed in *mandatory* form, is to be found in Article 24. It expresses one particular Community policy, namely that application of a law which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded, shall be contrary to Community public policy. As a matter of detail, why single out this particular example? Why, in effect, should litigant X be denied a sum of damages to which he is entitled under the substantive law of, say, Texas, the *lex causae* identified under Article 3(1) of the Commission Proposal, on the ground that the award, either on its face, or by characterisation (presumably by the forum) falls within Article 24, as being exemplary or punitive? Sometimes it will not be clear in a jury award whether the jury “has abandoned *restitutio in integrum* in favour of a penalty, as must be suspected in some cases”.¹⁸³ The forum may reasonably begrudge loss of its decision-making powers in this matter, for it is perfectly clear that such damages may seek merely to compensate a litigant for outrageous or vexatious behaviour by the other party. In Scots law, where “[t]here is no adequate warrant for punitive, vindictive or exemplary damages”,¹⁸⁴ the court might still wish to make an award of “aggravated damages” in certain circumstances. Such damages are legitimate at least in England and in France,¹⁸⁵ and surely will remain competent in English and French domestic law. Can it be that such awards for *résistance abusive* will remain competent in a French domestic case arising in tort, but will not be available if the role of French law is as *lex causae* in a conflict case arising in another member state? When we consider that it appears competent in England in certain cases to award exemplary damages,¹⁸⁶ the same question will arise in England, with the

183 R White and M Fletcher, *Delictual Damages* (2000), 59.

184 D M Walker, *Delict*, 2nd edn (1981), 461. Scott Report, Evidence, Briggs, at para 17, makes two thoughtful points. First, he points out that even if there is a need for the rule contained in Art 24, which is doubtful, “it should be limited to exemplary or punitive damages, and not applied to all non-compensatory damages, whatever this means ... It would be quite wrong for Article 24 to preclude an account of profits.” Second, there is no reason to provoke debate about the nature of orders as compensatory or not.

185 Cf *SA Consortium v Sun & Sand* [1978] 2 All ER 339, per Lord Denning MR at 355: “Likewise I see nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considered to be in accord with public policy in the United States and many of the great countries of the Commonwealth.”

186 The matter was recently considered by the Law Commission: *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997), (HC Paper 346, 1997–1998).

added complexity that it is not yet clear whether Rome II, in its entirety or partially, will apply in cross-border intra-UK tortious/delictual cases.¹⁸⁷

It is presumed that Article 24 of the Commission Proposal (Wallis, Article 22) is intended to operate as a safeguard against what may be seen as potentially adverse consequences of the rule of universal application (Article 2), and also as a disincentive to forum-shopping. The same result, however, might have been achieved in individual cases by individual member state forums on appropriate occasions, and on their own initiative using Article 22 of the Commission Proposal. According to one's point of view, the Wallis wording may be regarded as a softer means of achieving the end required, or a source of irritation such as to justify a reservation by a member state¹⁸⁸ on the ground that it is productive merely of uncertainty. The dictatorial nature of Article 24 of the Commission Proposal, however, is disturbing, but it is all part of the same game of creep and aggrandisement.

(h) The end game

We should note, first, the curtailment of discretion customarily belonging to a forum under the time-honoured public policy exception. That which is accorded by way of public policy discretion traditionally empowers the forum, and may allay its fears upon agreement or ratification of an international instrument. It is worthy of comment that the forces of harmonisation should attempt to achieve their aims through the very medium which normally is available as a permitted expression of individuality. If discretion must be exercised in a uniform way, that is an affront to the very concept of discretion. Second, if a concept of "Community public policy" is a signal for alarm, how much more so is the prediction by Mario Tenreiro of the European Commission in his evidence to the House of Lords Inquiry:

One day, it will be possible to withdraw the public order principle. It is just one factor adding to the confidence of having a kind of common system because the final aim is that we abolish public policy exception one day and that the recognition will be automatic.¹⁸⁹

To be continued.

187 See section B.(3) above.

188 If competent; see note 173 above.

189 Scott Report, Evidence: Mario Tenreiro, Q23.