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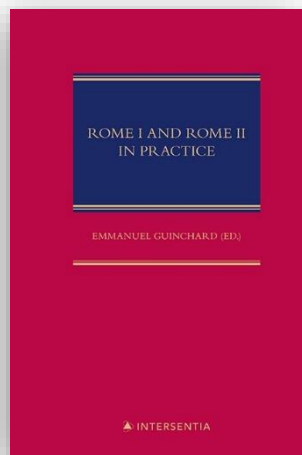
Rome I and Rome II in Practice

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Emmanuel Guinchard (ed.)

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THE APPLICATION OF THE ROME I AND ROME II REGULATIONS IN THE UNITED KINGDOM

Uglješa GRUŠIĆ

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1. INTRODUCTION

‘All roads lead to Rome!’ For a while, this saying could have been invoked by private international lawyers in the United Kingdom, as well as in the Member States of the European Union (apart from Denmark), to succinctly capture the evolution and reality of the part of this discipline dealing with choice of law

for contractual and non-contractual obligations. But the voters of the UK have spoken – EU law and the writ of the Court of Justice of the EU are no longer welcome. This is why any presentation and assessment of the application of the Rome I and Rome II Regulations¹ in this country has to start with a brief note of what Brexit – the withdrawal of the UK from the EU – brings for private international law in general and the two Regulations in particular.

The UK left the European Union on 31 January 2020.² However, the EU-UK Withdrawal Agreement³ provides for a Brexit implementation period, which is currently set to end on 31 December 2020. Until that time, the EU Treaties will continue to apply to the UK and the European Communities Act 1972, by virtue of which EU law is incorporated into UK law, will continue to have effect. This means that the Rome I and Rome II Regulations will continue to be directly effective in the UK until the expiry of the Brexit implementation period. The UK Government has decided to retain the provisions of the two Regulations as part of UK law and the retained provisions will be applicable after the expiry of the Brexit implementation period as part of domestic law.⁴ The main consequence of this is that UK courts will not be bound by any principle laid down, or any decision made, by the CJEU and will not be able to refer any matter to the CJEU. Even though they will be able to ‘have regard to anything done ... by the European Court, another EU entity or the EU,’⁵ it is possible that the UK courts’ interpretation of the retained provisions of the two Regulations will depart from that of the CJEU.

The Rome I and Rome II Regulations have been frequently applied by English courts, not so much in other parts of the UK. As of 1 April 2020, which has been chosen as the cut-off date for the purposes of this chapter, there had been 26 cases in which Rome I was applied⁶ and 48 cases applying Rome II.⁷ There have also

¹ Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6; Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

² European Union (Withdrawal) Act 2018; European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 3) Regulations (SI 2019/1423), regulation 2(2).

³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384I/1, implemented into UK law by the European Union (Withdrawal Agreement) Act 2020.

⁴ Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations (SI 2019/834).

⁵ European Union (Withdrawal) Act 2018, section 6(2).

⁶ There are more cases applying the Rome Convention on the law applicable to contractual obligations [1980] OJ L266/1, as amended by later accession conventions. This chapter, however, deals only with cases applying Rome I or Rome II.

⁷ Two notes are in order here. First, I looked for UK cases on Rome I and Rome II in the Westlaw and LexisNexis databases. I searched for all judgments which contain either the term ‘864/2007’ or the term ‘593/2008’, which are the numbers of the two Regulations. My assumption was that any case applying, discussing or mentioning one of the Regulations would also include a complete reference to the Regulation, including its number. I then cross-checked my list of cases against the cases referred to in L. Collins (gen. ed.), *Dicey, Morris and Collins on the*

been other cases in which the provisions of Rome I or Rome II have been either mentioned or discussed, but not applied. In light of the large number of cases applying, mentioning or discussing the two Regulations, the aim of this chapter is not to offer an in-depth analysis of the issues that have arisen or could arise in the future. This is not necessary given the excellent commentaries on these two instruments, including by UK scholars and in UK journals.⁸ What this chapter aims to do is, firstly, to describe the legal and commercial contexts in which disputes concerning choice of law for contractual and non-contractual obligations have arisen before UK courts. Next, this chapter will outline the treatment by UK courts of some of the key general issues that are common to the two Regulations and of certain specific issues that are idiosyncratic to either Rome I or Rome II.

Conflict of Laws (London: Sweet & Maxwell, 15th ed., 2012) and the fifth supplement of this book (2018). Second, 'the application of' Rome I and Rome II has been understood widely as covering not only the cases where the provisions of the Regulations were applied to determine the applicable law, regardless of whether that part of the judgment forms part of the ratio decidendi or is obiter, but also the cases where the provisions of the Regulations were applied for other purposes (e.g. in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234, the court applied the provisions on the subject-matter scope of the Regulations to determine whether a claim brought in China was contractual for the purposes of determining whether an exclusive English jurisdiction agreement had been breached and an anti-suit injunction should be granted). There are also cases where the courts applied an exclusion from the subject-matter scope of the Regulations, which cases have not been counted as 'applying' the Regulations: see *Enka Insaat ve Sanayi AS v. OOO 'Insurance Co. Chubb'* [2019] EWHC 3568 (Comm) (arbitration exclusion in Article 1(2)(e) of Rome I); *European Film Bonds A/S v. Lotus Holdings LLC* [2019] EWHC 2116 (Ch) (arbitration exclusion in Article 1(2)(e) of Rome I); *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581, [2018] 4 WLR 14 (evidence and procedure exclusion in Article 1(3) of Rome II); *Actavis UK Ltd v. Eli Lilly & Co.* [2015] EWCA Civ 555, [2016] 4 All ER 666 (evidence and procedure exclusion in Article 1(3) of Rome II), reversed in part in [2017] UKSC 48, [2018] 1 All ER 171 without discussing this point; *Integral Petroleum SA v. SCU-Finanz AG* [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217 (company law exclusions in Article 1(2)(f) and (g) of Rome I); *Subotic v. Knezevic* [2013] EWHC 3011 (QB) (defamation exclusion in Article 1(2)(g) of Rome II); *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [2013] EWHC 1328 (Comm), [2013] 2 All ER (Comm) 898 (choice-of-court agreement exclusion in Article 1(2)(e) of Rome I); *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER (Comm) 1 (arbitration exclusion in Article 1(2)(e) of Rome I). I have also not counted as 'applying' the Regulations the cases which discussed the temporal scope of Rome II and concluded that the matter fell outside its temporal scope: see *Docherty v. Secretary of State for Business, Innovation and Skills* [2018] CSOH 25, 2018 SLT 349, reversed on a different point in [2018] CSIH 57, 2019 SC 50; *Allen v. Depuy International Ltd* [2014] EWHC 753 (QB), [2015] 2 WLR 442; *Homawoo v. GMF Assurance SA* [2010] EWHC 1941 (QB), [2011] ILPr 12.

⁸ See, among others, A. Dickinson, *The Rome II Regulation* (Oxford: Oxford University Press, 2008); M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford: Oxford University Press, 2015); M. Wilderspin and R. Plender, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 4th ed., 2015). The *International and Comparative Law Quarterly*, *Journal of Private International Law* and *Lloyd's Maritime and Commercial Law Quarterly* are among the UK academic journals that frequently feature articles on Rome I and Rome II. Excellent case notes can also be found in the *Cambridge Law Journal* and the *Law Quarterly Review*.

2. THE NATIONAL LANDSCAPE

Prior to the entry into force of the Rome I and Rome II Regulations, the law applicable to contracts and torts in the UK was largely determined pursuant to the choice-of-law rules of the Contracts (Applicable Law) Act 1990, which implemented the Rome Convention into UK law, and Part III of the Private International Law (Miscellaneous Provisions) Act 1995, which reformed choice-of-law rules in tort. Choice of law for matters and obligations not covered by the two instruments was determined by the common law choice-of-law rules. Initially, the UK did not participate in the adoption of Rome I,⁹ but eventually decided to opt into it.¹⁰ The UK participated in the adoption and application of Rome II.¹¹ The UK also decided to extend the application of the two Regulations (with the exception of insurance contracts) in the case of conflicts between the laws of different parts of the UK and between the laws of one or more parts of the UK and Gibraltar.¹²

In order to describe the context in which disputes concerning choice of law for contractual and non-contractual obligations have arisen before UK courts, the kinds of cases in which such disputes have arisen and their legal context will be presented first.

Rome I has been applied in the following circumstances:

- to determine the law applicable to the existence and validity of a contract for the sale of sugar to decide on a claim for a declaration that an arbitral tribunal had substantive jurisdiction over a dispute between the parties;¹³
- to a claim for injunctive relief and damages under a contract for the supply of condoms;¹⁴

⁹ Recital 45 of Rome I.

¹⁰ See Commission Decision 2009/26/EC of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No. 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2009] OJ L10/22.

¹¹ Recital 39 of Rome II.

¹² Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations (SI 2008/2986); Law Applicable to Non-Contractual Obligations (Scotland) Regulations (SSI 2008/404); Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations (SI 2009/3064); Law Applicable to Contractual Obligations (Scotland) Regulations (SSI 2009/410). See also *Docherty v. Secretary of State for Business, Innovation and Skills* [2018] CSOH 25, 2018 SLT 349, reversed on a different point in [2018] CSIH 57, 2019 SC 50.

¹³ *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344.

¹⁴ *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842.

- to a claim for a declaration of invalidity and unenforceability of an undertaking by deed to purchase certain assets upon the occurrence of certain events;¹⁵
- to a claim for damages under a contract for the sale of junk bonds;¹⁶
- to claims for payment under a contract for the sale of private placement notes;¹⁷
- to a claim for fraudulent misrepresentation and breach of contract in respect of a contract for the purchase of shares;¹⁸
- to a claim for recovery of sums paid to a third party under a contract of guarantee;¹⁹
- to determine the law applicable to a claim for a declaration of non-liability under a comfort letter concerning the financing of an airline;²⁰
- to claims for breach of alleged contracts for the provision of services to refinance a company;²¹
- to a claim for damages for personal injuries suffered abroad during a travel package;²²
- to a claim under a contract for organising an excursion for damages and other remedies for personal injuries suffered in a road accident abroad;²³
- to a claim for the payment of sums due under a betting account contract;²⁴
- to determine whether a claim under a warehouse receipt brought abroad was contractual in nature for the purposes of determining whether an exclusive English jurisdiction agreement had been breached and an anti-suit injunction should be granted;²⁵
- to determine whether a party was the sole beneficiary or a joint promisee under a letter a credit for the purposes of deciding on the setting aside of an interim third party debt order;²⁶

¹⁵ *Dana Gas PJSC v. Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep 177.

¹⁶ *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm).

¹⁷ *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm).

¹⁸ *Scott v. West* [2012] EWHC 1890 (Ch).

¹⁹ *European Union v. Syria* [2018] EWHC 1712 (Comm).

²⁰ *Etiihad Airways PJSC v. Flöther* [2019] EWHC 3107 (Comm), [2020] 2 WLR 333.

²¹ *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm).

²² *Committeri v. Club Mediterranee SA* [2018] EWCA Civ 1889, [2019] ILPr 19.

²³ *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814, reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I; *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB).

²⁴ *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law.

²⁵ *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234.

²⁶ *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037, reversed in [2017] UKSC 64, [2018] AC 690 without discussing choice of law.

- to determine the situs of a debt for the purposes of deciding on the setting aside of an interim third party debt order;²⁷
- to a claim on a guarantee ancillary to a contract of affreightment;²⁸
- to determine whether a choice-of-law clause from a charterparty had been incorporated into bills of lading;²⁹
- to determine the effect of incorporation into a bill of lading of the ‘law and arbitration clause’ of a charterparty, which clause provided, not for English law and arbitration, but for English law and court jurisdiction;³⁰
- to a claim for damages related to a contract for the provision of brokerage services;³¹
- to a claim for the payment of commission for the provision of the service of introducing a purchaser to a broker which resulted in the sale of a luxury yacht;³²
- to a claim for the payment of sums due under a settlement agreement concerning the provision of entertainment services;³³
- to a claim for failure to pay the minimum wage and provide paid leave under an employment contract;³⁴
- to a claim for unfair dismissal and a bonus payment under an employment contract;³⁵ and
- to determine the validity of the change of applicable law in the context of schemes of arrangement.³⁶

There are also cases in which the provisions of Rome I have been either mentioned or discussed but not applied.

²⁷ *Hardy Exploration and Production (India) Inc. v. India* [2018] EWHC 1916 (Comm), [2019] QB 544.

²⁸ *Aquavita International SA v. Ashapura Minechem Ltd* [2014] EWHC 2806 (Comm); [2015] EWHC 2807 (QB).

²⁹ *Seniority Shipping Corp SA v. City Seed Crushing Industries Ltd* [2019] EWHC 3541 (Comm).

³⁰ *Caresse Navigation Ltd v. Office National de l'Electricité (Channel Ranger)* [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep 337, affirmed in [2014] EWCA Civ 1366, [2015] QB 366 without discussing choice of law.

³¹ *Pan Oceanic Chartering Inc. v. UNIPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196.

³² *Wrigley v. Wood* [2014] EWHC 3684 (Comm).

³³ *Bill Kenwright Ltd v. Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB).

³⁴ *Aslam v. Uber BV* [2017] IRLR 4, ET, affirmed in [2018] ICR 453, EAT and [2018] EWCA Civ 2748, [2019] 3 All ER 489 without discussing choice of law.

³⁵ *Olsen v. Gearbulk Services Ltd* [2015] IRLR 818, EAT.

³⁶ *Re Syncreon Group BV* [2019] EWHC 2068 (Ch); *Re Far East Capital Ltd SA* [2017] EWHC 2878 (Ch); *In re APCOA Parking Holdings GmbH and others (No 2)* [2014] EWHC 3849 (Ch), [2015] 4 All ER 572.

Rome II has mostly been applied in road accident cases,³⁷ but has also been applied in the following circumstances:

- to other claims for damages for personal injuries suffered abroad;³⁸
- to a claim for restitution in unjust enrichment arising from the end of a romantic relationship;³⁹
- to a claim for damages and restitution following a fraud;⁴⁰
- to a claim for damages for harassment;⁴¹
- to a claim for damages for diminishing the assets of a company with the purpose of preventing the claimant from satisfying an arbitration award;⁴²
- to a claim against a co-worker for whistleblowing detriment;⁴³
- to claims for damages for conspiracy, dishonest assistance, knowing receipt and bribery;⁴⁴
- to claims concerning the infringement of unitary Community intellectual property rights;⁴⁵

³⁷ *Pandya v. Intersalonika General Insurance Co. SA* [2020] EWHC 273 (QB); *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB); *Folkes v. Generali Assurances* [2019] EWHC 801 (QB); *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh); *Gunn v. Diaz* [2017] EWHC 157 (QB), [2017] 2 All ER (Comm) 129; *Moreno v. Motor Insurers' Bureau* [2016] UKSC 52, [2016] 1 WLR 3194; *Le Guevel-Mouly v. AIG Europe Ltd* [2016] EWHC 1794 (QB); *Syred v. Powszechny Zaklad Ubezpieczen (PZU) SA* [2016] EWHC 254 (QB), [2016] 1 WLR 3211; *XP v. Compensa Towarzystwo SA* [2016] EWHC 1728 (QB), [2016] Med LR 570; *Bianco v. Bennett* [2015] EWHC 626 (QB), [2015] ILPr 24; *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400, affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20; *Vann v. Ocidental-Companhia De Seguros SA* [2015] EWCA Civ 572; *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263; *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12; *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB); *Wink v. Croatia Osiguranje DD* [2013] EWHC 1118 (QB); *Bacon v. Nacional Suiza Cia Seguros y Reseguros SA* [2010] EWHC 2017 (QB), [2010] ILPr 46; *Bonsall v. Cattolica Assicurazioni* [2010] ILPr 45, County Court (Winchester).

³⁸ *Vilca v. Xstrata Ltd* [2018] EWHC 27 (QB); *His Royal Highness Okpabi v. Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [2017] Bus LR 1335, affirmed in [2018] EWCA Civ 191, [2018] Bus LR 1022 without discussing choice of law under Rome II; *Committeri v. Club Mediterranee SA* [2016] EWHC 1510 (QB), affirmed in [2018] EWCA Civ 1889, [2019] ILPr 19 without discussing choice of law under Rome II; *Rai v. Ministry of Defence*, Queen's Bench Division, 9 May 2016.

³⁹ *Gray v. Hurley* [2019] EWHC 1636 (QB).

⁴⁰ *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm), [2019] ILPr 40.

⁴¹ *BVC v. EWF* [2019] EWHC 2506 (QB).

⁴² *KMG International NV v. Chen* [2019] EWHC 2389 (Comm), [2020] Bus LR 133.

⁴³ *Foreign and Commonwealth Office v. Bamieh* [2019] EWCA Civ 803, [2019] IRLR 736.

⁴⁴ *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm), affirmed in [2020] EWCA Civ 245 without discussing choice of law.

⁴⁵ *W3 Ltd v. Easygroup Ltd* [2018] EWHC 7 (Ch), [2018] FSR 16; *Eli Lilly and Co. v. Genentech Inc.* [2017] EWHC 3104 (Pat), [2018] 1 WLR 1755; *Parainen Pearl Shipping Ltd v. Kristian Gerhard Jebsen Skipsrederi AS* [2017] EWHC 2570 (Pat).

- to a claim for conspiracy to injure by using a Twitter account to make allegations of bribery and corruption against the claimant and to disclose confidential information;⁴⁶
- to claims for damages for breach of competition law brought by retailers for overpaying merchant service charges under the MasterCard payment scheme;⁴⁷
- to a claim for damages for a conspiracy to defraud;⁴⁸
- to a claim for restitution in unjust enrichment concerning non-existent contracts for the provision of services to refinance a company;⁴⁹
- to a claim for damages for tortious interference with contractual relations;⁵⁰
- to a claim for damages for the torts of fraudulent misrepresentation and conspiracy to injure by opening and debiting betting accounts;⁵¹
- to a claim for damages and interest founded on non-contractual liability of the defendant majority beneficial owner of the claimant who acted dishonestly and in breach of duties owed to the claimant;⁵²
- to claims for damages in the tort of deceit and restitution in unjust enrichment arising out of a fraud;⁵³
- to a claim for damages for unlawful means conspiracy and unlawful interference with economic interests and contractual relations;⁵⁴
- to determine whether a claim under a warehouse receipt brought abroad was contractual in nature for the purposes of determining whether an exclusive English jurisdiction agreement had been breached and an anti-suit injunction should be granted;⁵⁵
- to issues concerning public policy in a claim for contribution at the behest of the fraudster against the victim;⁵⁶
- to an application for an interim injunction to restrain the publication of a book pending trial;⁵⁷

⁴⁶ *MX1 Ltd v. Farahzad* [2018] EWHC 1041 (Ch), [2018] 1 WLR 5553.

⁴⁷ *Deutsche Bahn AG v. Mastercard Inc.* [2018] EWHC 412 (Ch), [2018] 4 CMLR 31.

⁴⁸ *Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm), [2018] Lloyd's Rep FC 363.

⁴⁹ *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm).

⁵⁰ *Pan Oceanic Chartering Inc. v. UNIPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196.

⁵¹ *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law.

⁵² *AS Latvijas Krajbanka (In Liquidation) v. Antonov* [2016] EWHC 1679 (Comm).

⁵³ *Banque Cantonale de Geneve v. Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394.

⁵⁴ *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706.

⁵⁵ *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234.

⁵⁶ *Group Seven Ltd v. Allied Investment Corp Ltd* [2014] EWHC 2046 (Ch), affirmed in [2015] EWCA Civ 631 without discussing choice of law.

⁵⁷ *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4, reversed in [2015] UKSC 32, [2016] AC 219 without discussing choice of law.

- to a claim for damages for the torts of conspiracy, unlawful interference, procuring breach of contract and dishonest assistance in relation to a complex investment;⁵⁸
- to a claim for an interim injunction restraining a former employee from disclosing confidential information;⁵⁹
- to a claim for injunctions restraining a party from breaching confidence in a patent dispute;⁶⁰
- to a claim for a declaration of non-liability concerning the claimant's alleged negligence for the defendant's online betting losses;⁶¹ and
- to a claim for damages for fraudulent misrepresentation inducing the claimant to enter a contract (ISDA master agreement).⁶²

There are also cases in which the provisions of Rome II have been either mentioned or discussed but not applied.

UK judgments on the application of the Rome I and Rome II Regulations offer a wealth of empirical evidence on the operation of these two instruments. This evidence can be used to test two hypotheses that have been advanced in academic literature, which should help us to better understand the practical operation of the two Regulations before UK courts.

The first hypothesis is succinctly explained by McLachlan:

‘Intuitively, one might have expected that the process of globalisation would have led to a welter of cases on that central concern of the conflict of laws, namely choice of law. In fact, the reverse has been true. There has been only a trickle of cases reported over the last 25 years in the English law reports on choice of law issues. By contrast, there have been a myriad of reported decisions on every aspect of the *process* of litigation, and in particular on jurisdiction. ...

The internationalisation of the litigation process itself has wrought a revolution – or at least a major re-orientation – in the preoccupations of private international law of far greater significance in practice than anything achieved by the work of scholars in the so-called American Revolution in the conflict of laws.’⁶³

While it is beyond the scope of this chapter to compare in detail the cases on choice of law and on the process of litigation, it is nevertheless possible to test

⁵⁸ *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973.

⁵⁹ *OJSC TNK-BP Holding v. Lazurenko* [2012] EWHC 2781 (Ch).

⁶⁰ *Innovia Films Ltd v. Frito-Lay North America Inc.* [2012] EWHC 790 (Pat), [2012] RPC 24.

⁶¹ *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986.

⁶² *Morgan Stanley & Co. International Plc v. China Haisheng Juice Holdings Co. Ltd* [2009] EWHC 2409 (Comm), [2010] 2 All ER (Comm) 514.

⁶³ C. McLachlan, ‘International Litigation and the Reworking of the Conflict of Laws’ (2004) 120 LQR 580, 581, with reference to P. North, ‘Private International Law: Change or Decay?’ (2001) 50 ICLQ 477, 500. See also McLachlan, *ibid.*, 600–607.

this hypothesis by looking at the legal context in which choice-of-law disputes arise under the Rome I and Rome II Regulations. Out of the 26 cases in which Rome I was applied, choice of law was relevant for the process of litigation, not for deciding the case on the substance, in 17 cases or 65 per cent. Most of these ‘procedural’ choice-of-law cases concerned service out of the jurisdiction and/or the *forum (non) conveniens* doctrine.⁶⁴ Other cases concerned the application of Article 25 of the Brussels I Regulation,⁶⁵ an application for an anti-suit injunction,⁶⁶ an application for summary judgment,⁶⁷ an application under section 32 of the Arbitration Act 1996 seeking the court’s determination of questions relating to the jurisdiction of an arbitral tribunal,⁶⁸ and an interim third-party debt order.⁶⁹ Out of the 48 cases applying Rome II, choice of law was relevant for the process of litigation in 25 cases or 52 per cent. Procedural contexts included: service out and/or *forum (non) conveniens*,⁷⁰ an application for

⁶⁴ *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm); *Bill Kenwright Ltd v. Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB); *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law; *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814, reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I; *Aquavita International SA v. Ashapura Minechem Ltd* [2014] EWHC 2806 (Comm) (this judgment was affirmed at trial in which the defendant did not participate [2015] EWHC 2807 (QB)); *Wrigley v. Wood* [2014] EWHC 3684 (Comm); *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm); *Caresse Navigation Ltd v. Office National de l’Electricité (Channel Ranger)* [2013] EWHC 3081 (Comm), [2014] 1 Lloyd’s Rep 337, affirmed in [2014] EWCA Civ 1366, [2015] QB 366 without discussing choice of law; *Scott v. West* [2012] EWHC 1890 (Ch); *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842.

⁶⁵ Regulation (EC) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, superseding Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1; *Etihad Airways PJSC v. Flöther* [2019] EWHC 3107 (Comm), [2020] 2 WLR 333.

⁶⁶ *Seniority Shipping Corp SA v. City Seed Crushing Industries Ltd* [2019] EWHC 3541 (Comm); *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234.

⁶⁷ *European Union v. Syria* [2018] EWHC 1712 (Comm).

⁶⁸ *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd’s Rep 344.

⁶⁹ *Hardy Exploration and Production (India) Inc. v. India* [2018] EWHC 1916 (Comm), [2019] QB 544; *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037, reversed in [2017] UKSC 64, [2018] AC 690 without discussing choice of law.

⁷⁰ *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB); *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm), [2019] ILPr 40; *Gray v. Hurley* [2019] EWHC 1636 (QB); *Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm), [2018] Lloyd’s Rep FC 363; *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm); *Eli Lilly and Co. v. Genentech Inc.* [2017] EWHC 3104 (Pat), [2018] 1 WLR 1755; *Gunn v. Diaz* [2017] EWHC 157 (QB), [2017] 2 All ER (Comm) 129; *His Royal Highness Okpabi v. Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [2017] Bus LR 1335, affirmed in [2018] EWCA Civ 191,

an anti-suit injunction,⁷¹ the way in which expert evidence was to be adduced,⁷² an application to strike out a statement of case/for summary judgment,⁷³ and an application for an interim injunction.⁷⁴ There are two possible explanations for the fact that cases applying Rome II concern the process of litigation less frequently than cases applying Rome I. The first is that many cases falling into the former category involve road accidents, which usually raise issues of liability and quantum, typically between insurers. The second lies in the fact that one of the most popular jurisdictional ‘gateways’ under traditional English law is that the contract is governed by English law.⁷⁵ Overall, out of the 69 cases applying the two Regulations, choice of law was relevant for the process of litigation, not for deciding the case on the substance, in 39 cases, or 57 per cent.⁷⁶ This indicates not only that the number of cases on choice of law under the two Regulations is more than a ‘trickle’, but also that the majority of choice-of-law cases in fact concern procedure in which choice-of-law issues often arise in an incidental or accidental manner.

The legal context in which a choice-of-law dispute arises is important because it can affect the choice-of-law process. For example: in service out cases the claimant must show a reasonable prospect of success on the merits, which

[2018] Bus LR 1022 without discussing choice of law under Rome II; *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law; *Le Guevel-Mouly v. AIG Europe Ltd* [2016] EWHC 1794 (QB); *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706; *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB); *Wink v. Croatia Osiguranje DD* [2013] EWHC 1118 (QB); *Innovia Films Ltd v. Frito-Lay North America Inc.* [2012] EWHC 790 (Pat), [2012] RPC 24. Similarly, *Parainen Pearl Shipping Ltd v. Kristian Gerhard Jebsen Skipsrederi AS* [2017] EWHC 2570 (Pat) (jurisdiction under the Lugano Convention).

⁷¹ *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd* [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234; *Morgan Stanley & Co. International Plc v. China Haisheng Juice Holdings Co. Ltd* [2009] EWHC 2409 (Comm), [2010] 2 All ER (Comm) 514.

⁷² *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263.

⁷³ *BVC v. EWF* [2019] EWHC 2506 (QB); *KMG International NV v. Chen* [2019] EWHC 2389 (Comm), [2020] Bus LR 133; *MX1 Ltd v. Farahzad* [2018] EWHC 1041 (Ch), [2018] 1 WLR 5553; *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973; *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986.

⁷⁴ *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4, reversed [2015] UKSC 32, [2016] AC 219; *OJSC TNK-BP Holding v. Lazurenko* [2012] EWHC 2781 (Ch).

⁷⁵ Civil Procedure Rules Practice Direction 6B, paragraph 3.1(6)(c).

⁷⁶ This chapter lists 26 cases as applying Rome I and 48 cases as applying Rome II, but ‘only’ 69 cases as applying the two Regulations. This is because some cases applied both Rome I and Rome II and are therefore counted within both the 26 cases applying Rome I and the 48 cases applying Rome II. Similarly, this chapter lists 17 cases applying Rome I and 25 cases applying Rome II where choice of law was relevant for the process of litigation, not for deciding the case on the substance. But because some cases applied both Rome I and Rome II, the total number of cases applying either Regulation or both of them and where choice of law was relevant for the process of litigation is 39.

may include showing a reasonable prospect of success on a legal issue under the applicable law; the applicable standard of proof in service out cases and under the *forum (non) conveniens* doctrine is not the balance of probabilities, but the standard of a good arguable case; in an application to strike out a statement of case, one of the relevant issues is whether the statement of case discloses reasonable grounds for bringing or defending the claim under the governing law; in an application for summary judgment, one of the relevant issues is whether the claim or defence has a real prospect of success under the governing law; one of the requirements for obtaining an interim injunction is that there is a serious issue to be tried under the governing law. This is why the issue of applicable law in 'procedural' choice-of-law cases does not necessarily receive the same amount of scrutiny as at trial, where the applicable standard of proof is the balance of probabilities and the reasonable prospect of success test or its variant is not used, and why such cases should be read and used cautiously.⁷⁷

The second hypothesis that can be tested is that the application of the Regulations is influenced not only by the legal context but also by the need to balance multiple policy issues generated by international commercial litigation. This hypothesis has been advanced by Penadés Fons,⁷⁸ who has demonstrated, in a study on implied choice and the application of the escape clauses of the Rome Convention and the Rome I Regulation by UK courts, that the judges support the national policy to promote England as a centre for commercial dispute resolution and to export English law in certain 'strategic industries', namely the shipping, banking and finance, and insurance sectors. It is justified to use this chapter to test this hypothesis for two reasons. Firstly, because the present chapter deals with both the Rome I and Rome II Regulations, whereas the mentioned study focused only on choice of law for contractual obligations. This is potentially important because disputes concerning 'strategic industries' give rise to choice-of-law issues concerning both contractual and non-contractual obligations. Secondly, because, with respect to choice of law for contractual obligations, the present chapter focuses on the 26 cases applying Rome I, whereas the mentioned study covered cases up to and including 1 April 2014 and was therefore able to include only three cases applying Rome I.⁷⁹ This is potentially important because the provisions of Rome I, at least in theory, should leave less room than the provisions of the Rome Convention for judicial discretion and,

⁷⁷ See McLachlan (n. 63) 601; M. Penadés Fons, 'Commercial Choice of Law in Context: Looking Beyond Rome' (2015) 78 MLR 241; P. Rogerson, 'Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case' (2013) 9 JPIL 387.

⁷⁸ Penadés Fons (n. 77).

⁷⁹ These are the High Court judgment in *Brownlie v. Four Seasons Holdings Inc.* [2014] EWHC 273 (QB) (this case eventually went to the Supreme Court); *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm); *Scott v. West* [2012] EWHC 1890 (Ch). Importantly, Penadés Fons predicted the continuation of the English practice under Rome I.

therefore, for policy-influenced judgments. This second hypothesis will be tested in the following section after the examination of the way UK courts have dealt with party autonomy, including implied choice of law, and the determination of the applicable law in the absence of party autonomy.

3. ISSUES COMMON TO BOTH REGULATIONS

There are certain issues that are common to both Regulations, including: interpretation; temporal and subject-matter scope; party autonomy; application of escape clauses; legal certainty versus flexibility dilemma; overriding mandatory provisions; public policy; scope of applicable law, including the substance versus procedure dichotomy; pleading and proof of foreign law; habitual residence; and *renvoi*.

3.1. INTERPRETATION

A fundamental principle of interpretation of the two Regulations is that of autonomous European interpretation. This principle has been applied faithfully by UK courts.

For example, in *Committeri v. Club Mediterranee SA*⁸⁰ the question was whether a claim for damages for personal injuries suffered abroad during a package travel was based on the breach of a contractual or non-contractual obligation. The claimant's employer had made a contract with the defendant for the provision of travel and accommodation services for the claimant in France. The claimant injured his leg during a team-building exercise. The contract contained a clause providing that the booking conditions were governed by English law. The claimant, as a beneficiary under the contract, brought a claim against the defendant under French law, namely the *Code de tourisme*, which implemented Directive 90/314⁸¹ into French law. The defendant disputed the application of French law on the basis that the obligation on which the claim was based was contractual in nature and that English law applied pursuant to the choice-of-law clause contained in the contract. The choice-of-law issue was crucial because liability under French law was strict, whereas English law required a breach of reasonable skill and care and the parties were in agreement that the defendant's conduct was not careless. The court found that under both European case law and the domestic laws of England and France the obligation that formed the basis of the claim was to be regarded as contractual.

⁸⁰ [2018] EWCA Civ 1889, [2019] ILPr 19.

⁸¹ Council Directive 90/314/EEC on package travel, package holidays and package tours [1990] OJ L158/59.

One notable exception where the courts initially failed to give an autonomous interpretation to the Rome II Regulation was cases for compensation under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003.⁸² The Supreme Court has recently overturned these cases and given a correct interpretation, in line with the principle of autonomous European interpretation, to the relevant provisions of Rome II, as well as to Directive 2009/103/EC and the Directives which it superseded.⁸³ It is also worth mentioning in this respect that not all the judges have adopted the terminology of the two Regulations. One can thus still find references in judgments to the old common law term ‘proper law’ of the contract, issue or tort.⁸⁴

UK courts have also frequently referred to cases decided under other European private international law instruments, such as the Rome Convention and the Brussels I Regulation, thus interpreting the provisions of the Rome I and Rome II Regulations in a systemic manner. There are some cases, however, in which the principle of systematic interpretation has been cautiously applied.⁸⁵

⁸² SI 2003/37, implementing a series of Council Directives, which were subsequently superseded by the codifying Directive 2009/103/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

⁸³ *Moreno v. Motor Insurers' Bureau* [2016] UKSC 52, [2016] 1 WLR 3194. Discussed below in sub-section 3.8.

⁸⁴ See *KMG International NV v. Chen* [2019] EWHC 2389 (Comm), [2020] Bus LR 133 at [41], [50]; *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 at [18], [22]; *The Law Debenture Trust Corp Plc v. Ukraine* [2017] EWHC 655 (Comm), [2017] QB 1249 at [71], [75], [170], [175]; *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB) at [59], [60], affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law; *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814 at [38]; *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [11], [81], [83], [91] et seq.; *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037 at [35]; *Integral Petroleum SA v. SCU-Finanz AG* [2014] EWHC 702 (Comm) at [61]; *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4 at [95], [97], [110]; *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344 at [14]; *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 at [43]; *Caresse Navigation Ltd v. Office National de l'Électricité (Channel Ranger)* [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep 337 at [34]; *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 at [82]; *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 at [46].

⁸⁵ *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm) at [485], [486], affirmed in [2020] EWCA Civ 245 without discussing choice of law (the case law under Article 7(2) of the Brussels I Regulation is ‘likely to be useful’ under the Rome II Regulation, referring to *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706 at [90], [91] and *Fortress Value Recovery Fund I LLC v. Blue Sky Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 at [44]). See also *Kennedy v. National Trust for Scotland* [2019] EWCA Civ 648, [2020] 2 WLR 275 at [55] (the meaning of ‘elements’ in ‘international elements’ for the purposes of determining the international scope of the Brussels I Regulation does not have the same meaning as ‘elements’ for the purposes of Article 3(3) of Rome I).

3.2. TEMPORAL AND SUBJECT-MATTER SCOPE

The two Regulations are of universal application,⁸⁶ in the sense that any law specified as applicable by the Regulations is applied regardless of whether it is the law of a Member State of the EU or of a non-EU state. However, in order for the choice-of-law rules of the two Regulations to apply, the matter must fall within their temporal and subject-matter scope.

The temporal scope of Rome I has not caused problems in practice. This is because Rome I uses a relatively simple criterion for determining its application in time that is based on the date of conclusion of the contract – it applies to contracts concluded after 17 December 2009.⁸⁷

The same cannot be said about the temporal scope of Rome II. That Regulation provides in Article 31 ('Application in time') that it shall apply to events giving rise to damage which occur after its entry into force (which was on 20 August 2007) and in Article 32 ('Date of application') that it shall apply from 11 January 2009, except for Article 29 concerning certain notification duties of the Member States, which shall apply from 11 July 2008. These articles initially caused a considerable degree of legal uncertainty.⁸⁸ But the CJEU judgment in *Homawoo*,⁸⁹ which was given on a reference for a preliminary ruling from the High Court of England and Wales,⁹⁰ put the matter to rest. The CJEU held that Rome II applies 'to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope *ratione temporis*'. The *Homawoo* rule was interpreted in three subsequent cases. In *Docherty v. Secretary of State for Business, Innovation and Skills*,⁹¹ the court dealt with an industrial illness case where the relatives of a deceased person brought a claim for damages against that person's previous employers who allegedly negligently exposed him to asbestos which caused the development of plural plaques and death. One feature of asbestos cases is that the causal event (the inhalation of asbestos fibres) typically takes place many years, even decades, before the development of symptoms of illness. The court held that the reference to 'events giving rise to damage' is linked to the distinction drawn in Article 4(1) of Rome II between

⁸⁶ Article 2 of Rome I; Article 3 of Rome II.

⁸⁷ Articles 28 and 29(2) of Rome I.

⁸⁸ See in particular *Bacon v. Nacional Suiza Cia Seguros y Reseguros SA* [2010] EWHC 2017 (QB), [2010] ILPr 46 at [37]–[66]; *Bonsall v. Cattolica Assicurazioni* [2010] ILPr 45, County Court (Winchester); *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 at [23]–[25].

⁸⁹ Case C-412/10 *Deo Antoine Homawoo v. GMF Assurances SA*, ECLI:EU:C:2011:747, [2012] ILPr 2.

⁹⁰ *Homawoo v. GMF Assurance SA* [2010] EWHC 1941 (QB), [2011] ILPr 12.

⁹¹ [2018] CSOH 25, 2018 SLT 349, reversed on a different point in [2018] CSIH 57, 2019 SC 50.

three separate concepts: (i) the event giving rise to the damage; (ii) the damage; and (iii) the indirect consequences of the event. It held that the relevant event in the present case was the allegedly negligent exposure to asbestos which occurred long before 11 January 2009.⁹² In *Allen v. Depuy International Ltd*,⁹³ a product (hip implants) liability case, the court held that the date of the ‘events giving rise to damage’ was the date of manufacture or distribution of the defective product or, if that was wrong, the date of implantation.⁹⁴ In *Alliance Bank JSC v. Aquanta Corp*,⁹⁵ the court pointed out that the wording ‘events giving rise to damage occurring after 11 January 2009’, as interpreted by the CJEU in *Homawoo*, was ambiguous as it could refer both to ‘the date when the damage is caused’ and ‘the date of the event which subsequently, possibly years later, caused the damage.’⁹⁶ The court, nevertheless, expressed its preference for the former interpretation on the basis that Article 4(1) and (2) of Rome II refers to the law of the country in which and the time when the damage occurs,⁹⁷ but proceeded with the analysis of both the choice-of-law rules of Rome II and Part III of the Private International Law (Miscellaneous Provisions) Act 1995.⁹⁸

With regard to the subject-matter scope of the two Regulations, they apply to ‘civil and commercial matters’,⁹⁹ although there are some undoubtedly civil and commercial matters which are excluded from the scope of the two instruments.¹⁰⁰ Furthermore, Rome I applies to contractual obligations,¹⁰¹ whereas Rome II applies to non-contractual obligations.¹⁰² Both Regulations apply if there is a situation involving a conflict of laws.¹⁰³

The interpretation of the term ‘civil and commercial matters’ was one of the main issues in *Rai v. Ministry of Defence*.¹⁰⁴ The claimant was a soldier in the British Army. While stationed in Canada, he was undergoing a training exercise in horse management provided by a private company. A horse kicked him, causing him personal injuries. The court held that the claim did not relate to the ‘liability of the State for acts and omissions in the exercise of State authority’,

⁹² Ibid at [14], [15].

⁹³ [2014] EWHC 753 (QB), [2015] 2 WLR 442.

⁹⁴ Ibid at [14].

⁹⁵ [2011] EWHC 3281 (Comm), [2012] 1 Lloyd’s Rep 181, affirmed in [2012] EWCA Civ 1588, [2013] 1 All ER (Comm) 819 without discussing this point.

⁹⁶ [2011] EWHC 3281 (Comm), [2012] 1 Lloyd’s Rep 181 at [37].

⁹⁷ Ibid at [38].

⁹⁸ It is also worth noting that both the High Court and the Court of Appeal held that not even a provisional view could be reached on the law governing the tort without a full understanding of the facts.

⁹⁹ Article 1(1) of Rome I; Article 1(1) of Rome II.

¹⁰⁰ Article 1(2) of Rome I; Article 1(2) of Rome II.

¹⁰¹ Article 1(1) of Rome I.

¹⁰² Articles 1(1) and 2 of Rome II.

¹⁰³ Articles 1(1) of Rome I; Article 1(1) of Rome II.

¹⁰⁴ Queen’s Bench Division, 9 May 2016 at [43]–[89].

since the basis of the claim did not arise out of some positive exercise or projection of a power that was peculiar to the state. Importantly, such type of training could have been undertaken within the private sector.

The application of the exclusions,¹⁰⁵ with the exception of the exclusion for evidence and procedure,¹⁰⁶ has not been problematic. Evidence and procedure will be addressed below in sub-section 3.8 concerning the scope of applicable law.

The fault line between contractual and non-contractual obligations was considered in *Committeri v. Club Mediterranee SA*,¹⁰⁷ presented in the preceding sub-section. The courts were faced with the problem of classification in two other cases. *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) PTE Ltd*¹⁰⁸ concerned an application for an anti-suit injunction. The relevant question was whether a claim under a warehouse receipt brought in the Shanghai courts was contractual in nature for the purposes of determining whether an exclusive English jurisdiction clause contained in the receipt had been breached. If so, there would be a basis for granting an anti-suit injunction. To answer this question, the court applied the provisions on the subject-matter scope of the Rome I and Rome II Regulations. It gave an autonomous interpretation to those provisions and held that the claim, which was based on an obligation under a warehouse receipt, was contractual and therefore covered by the jurisdiction clause. In *Pan Oceanic Chartering Inc. v. UNIPPEC UK Co. Ltd*¹⁰⁹ the court dealt with the issue of relevance of the domestic law under which the claim is pleaded for the classification of the defendant's obligation. A ship chartering broker brought a claim for damages against the charterers of a vessel for breach of an 'implied in law' promise under the law of

¹⁰⁵ See *Enka Insaat ve Sanayi AS v. OOO 'Insurance Co. Chubb'* [2019] EWHC 3568 (Comm) at [9] (arbitration exclusion in Article 1(2)(e) of Rome I); *European Film Bonds A/S v. Lotus Holdings LLC* [2019] EWHC 2116 (Ch) at [142] (arbitration exclusion in Article 1(2)(e) of Rome I); *AS Latvijas Krajbanka (In Liquidation) v. Antonov* [2016] EWHC 1679 (Comm) at [8] (company law exclusion in Article 1(2)(d) of Rome II); *Integral Petroleum SA v. SCU-Finanz AG* [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217 at [39]–[47] (company law exclusions in Article 1(2)(f) and (g) of Rome I); *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [2013] EWHC 1328 (Comm), [2013] 2 All ER (Comm) 898 at [15] (choice-of-court agreement exclusion in Article 1(2)(e) of Rome I); *Subotic v. Knezevic* [2013] EWHC 3011 (QB) at [51] (defamation exclusion in Article 1(2)(g) of Rome II); *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER (Comm) 1 at [8] (arbitration exclusion in Article 1(2)(e) of Rome I). See also *BVC v. EWF* [2019] EWHC 2506 (QB) at [189] (the exclusion for claims arising from violations of privacy and rights relating to personality, including defamation in Article 1(2)(g) of Rome II does not apply to a claim for harassment); *Re Far East Capital Ltd SA* [2017] EWHC 2878 (Ch) at [39], [40] (company law exclusion in Article 1(2)(f) of Rome I does not apply to schemes of arrangement).

¹⁰⁶ Article 1(3) of Rome I; Article 1(3) of Rome II.

¹⁰⁷ [2018] EWCA Civ 1889, [2019] ILPr 19.

¹⁰⁸ [2015] EWHC 811 (Comm), [2015] 2 All ER (Comm) 234 at [62], [74]–[75], [81].

¹⁰⁹ [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 at [150]–[161], [173]–[181].

New Jersey not to do anything improper or unjustified that would deprive the broker of their commission. At the stage of determining whether the defendant's obligation is contractual or non-contractual for the purposes of determining the scope of the Rome I and Rome II Regulations, the law governing the relationship between the parties is unknown. It may be the law under which the claim is pleaded (e.g. New Jersey law), but it may well be another law (e.g. English law). The law governing the relationship between the parties will only be discovered after the defendant's obligation is classified and the relevant choice-of-law rules are applied. The court confirmed that determining the nature of an obligation was an autonomous exercise, to be conducted without regard to the *lex fori* or the *lex causae*. Nevertheless, the court had to look at the facts which, if made out, would give rise to an implied in law promise, and those facts could not be identified without an understanding of what the law under which the claim was pleaded (i.e. New Jersey law) required. The relevant facts were the provision of services by the broker, the buyer's knowledge of the mechanism by which the broker would be paid commission by the seller, and the entry into a contract for sale. Since the parties directly accepted the broker's services and negotiated and entered the contract in the knowledge of the brokerage commission arrangement, the implied in law promise was a contractual obligation for the purpose of Rome I. In other words, the court took into account the domestic law under which the claim was pleaded (i.e. New Jersey law) to ascertain the relevant facts. The relevant facts clearly indicated that the alleged obligation of the defendant was contractual and Rome I was applied. Under Rome I, the applicable law was English. Because the implied in law claim arose under the domestic law under which the claim was pleaded (i.e. New Jersey law), but not under the applicable English law, it fell away and the claim was dismissed.

3.3. PARTY AUTONOMY

Party autonomy is a cornerstone of the Rome I Regulation¹¹⁰ and an important principle under Rome II.¹¹¹ Article 3 of Rome I, as well as Article 3 of its predecessor, the Rome Convention, have been frequently invoked by UK courts. The same cannot be said of Article 14 of Rome II, which has been considered in only three cases and applied in none.¹¹²

¹¹⁰ Recital 11 of Rome I.

¹¹¹ Recital 31 of Rome II.

¹¹² *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm) at [71]–[73] (no choice of law for non-contractual obligations was expressed and no circumstances were relied on to support an implied choice beyond the mere fact of an alleged express agreement as to the contractual governing law and jurisdiction); *Pan Oceanic Chartering Inc. v. UNIPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 at [185]–[192] (no choice of law to govern a tort because of choice-of-law or jurisdiction agreements in related contracts);

Party autonomy under Article 3 of Rome I can be exercised expressly or impliedly. An express choice of law can be made by means of incorporation of a choice-of-law clause contained in another document (e.g. incorporation into a bill of lading of the choice-of-law clause contained in a charterparty).¹¹³ An implied choice of law was found to have been made in three cases. In *Etihad Airways PJSC v. Flöther*,¹¹⁴ the court found an implied choice of English law on the basis that the parties had expressly agreed on the applicable law in related and previous contracts. In *Hardy Exploration and Production (India) Inc. v. India*,¹¹⁵ the parties entered a contract which did not contain an express choice of law, but did contain an Indian jurisdiction clause and an Indian arbitration clause. Furthermore, the jurisdiction clause disapplied the Indian Arbitration and Conciliation Act 1996, the contract was related to other contracts which were expressly governed by Indian law and contained Indian jurisdiction clauses, and the payment under the contract was made to the Government of India in India. The party who commenced the English proceedings for the setting aside of an interim third party debt order argued that the parties to the contract had impliedly chosen Indian law, which was not contested. The court also found that the contract was governed by Indian law. *Aquavita International SA v. Ashapura Minecham Ltd*¹¹⁶ concerned a guarantee ancillary to a contract of affreightment, which was expressly governed by English law. The court held that where a contract contained an express or implied choice of law and a guarantee was given in respect of obligations under the contract, the court would often infer that the parties had chosen that the guarantee should be governed by the same system of law as the contract to which it related in the absence of some contrary indication. If the rights and obligations under the main contract were governed by a chosen

Stylianou v. Toyoshima [2013] EWHC 2188 (QB) at [82] (no agreement arising by inference or implication from the 'choice' of commencing proceedings in Western Australia; nevertheless, the continued and active pursuit of the proceedings in Western Australia was an important factor under the escape clause).

¹¹³ *Caresse Navigation Ltd v. Office National de l'Electricité (Channel Ranger)* [2013] EWHC 3081 (Comm), [2014] 1 Lloyd's Rep 337 at [30]–[37], affirmed in [2014] EWCA Civ 1366, [2015] QB 366 without discussing choice of law. The court added that the choice of law was irrefutable, at any rate provided that the law so chosen was usual and proper for the trade in question. Since the Amwelsh (Americanised Welsh Coal Charter) form was a commonly used charter form for the carriage of coal, there was nothing surprising or unusual about the choice of English law, which was what the printed form provided. Similarly, *Seniority Shipping Corp SA v. City Seed Crushing Industries Ltd* [2019] EWHC 3541 (Comm) at [12]–[14], [16]; *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344 at [18]; *Aquavita International SA v. Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) at [13]–[15], affirmed at trial in which the defendant did not participate [2015] EWHC 2807 (QB) at [97].

¹¹⁴ [2019] EWHC 3107 (Comm), [2020] 2 WLR 333 at [85].

¹¹⁵ [2018] EWHC 1916 (Comm), [2019] QB 544 at [84].

¹¹⁶ [2014] EWHC 2806 (Comm) at [16]–[31], affirmed at trial in which the defendant did not participate [2015] EWHC 2807 (QB) at [94]–[105].

system of law, it would be incongruous for the guarantee to be governed by a different system. Differences between the two systems might potentially result in a mismatch between the obligations of the party to the main contract which were the subject matter of the guarantee, and the obligations of the guarantor to fulfil those obligations. The rationale of the general principle was not merely that the guarantee had a close connection with the main contract, but also that businessmen would not normally choose to have their rights and obligations under the guarantee governed by a different system of law. The courts have also confirmed that the parties are free to change the applicable law.¹¹⁷

The courts have interpreted widely the scope of choice-of-law agreements. In *Committeri v. Club Mediterranee SA*,¹¹⁸ for example, the High Court held that a choice-of-law clause in a contract for the provision of travel and accommodation services covered matters relating to payment, modification, cancellation, responsibility and performance. That left nothing to be governed by a separate or implied choice of law.

3.4. APPLICATION OF ESCAPE CLAUSES

One of the major problems with the Rome Convention, the resolution of which was an important impetus behind its conversion into a Regulation, was a perceived lack of legal certainty and foreseeability in the application of Article 4 of the Convention concerning the determination of the applicable law in the absence of party autonomy.¹¹⁹ The two Regulations aim to infuse legal certainty and foreseeability into choice of law by laying down a number of fixed choice-of-law rules for contractual and non-contractual obligations¹²⁰

¹¹⁷ *Re Syncreon Group BV* [2019] EWHC 2068 (Ch) at [31]; *In re APCOA Parking Holdings GmbH and others (No 2)* [2014] EWHC 3849 (Ch), [2015] 4 All ER 572 at [230], [231], [245]–[248].

¹¹⁸ [2016] EWHC 1510 (QB) at [54]–[56], affirmed in [2018] EWCA Civ 1889, [2019] ILPr 19. See also *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at [62], [63]. But see *Aslam v. Uber BV* [2017] IRLR 4, ET at [104]–[105], affirmed in [2018] ICR 453, EAT and [2018] EWCA Civ 2748, [2019] 3 All ER 489 without discussing choice of law.

¹¹⁹ See European Commission, 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 final; S. Attrill, 'Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw' (2004) 53 ICLQ 549; J.J. Fawcett, 'A United Kingdom Perspective on the Rome I Regulation' in N. Boschiero (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)* (Rome: Giappichelli, 2009) 191; R. Fentiman, 'Choice of Law in Europe: Uniformity and Integration' (2008) 82 *Tulane Law Review* 2021; J. Hill, 'Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts' (2004) 53 ICLQ 325; C.S.A. Okoli and G.O. Arishe, 'The Operation of the Escape Clause in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 *JPIL* 513; Z. Tang, 'Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation' (2008) 71 *MLR* 785; cf. Penadés Fons (n. 77).

¹²⁰ The fixed choice-of-law rules of Rome I and Rome II are dealt with in section 4 below.

and providing that the vast majority of these rules can be departed from where it is *clear* from all the circumstances of the case that the contract or non-contractual obligation (and not an individual issue) is *manifestly* more closely connected with another country.¹²¹ The question arises whether UK courts have applied the fixed choice-of-law rules and the escape clauses with the intended strictness.

Judging from the reported cases, UK courts have generally followed a strict interpretation. Although they have been willing to take into account all factors as they stood at the date of the decision,¹²² the escape clauses have not often led to the displacement of the law designated by the fixed choice-of-law rules.

The following two cases illustrate the strict approach adopted by UK courts. In *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP*,¹²³ which concerned a claim for damages under a contract for the sale of junk bonds to an English buyer negotiated by an English broker, the court held that the contract was subject to New York law as the seller was habitually resident in New York and the contract was not manifestly more closely connected with England. The court stressed that the language and structure of Rome I suggested a higher threshold than in the Rome Convention and required that the cumulative weight of the factors connecting the contract to another country had to clearly and decisively outweigh the *desideratum* of certainty in applying the fixed choice-of-law rules. Decisive factors were that the bonds were essentially New York instruments, the issuing entity was a New York entity set up by a bank headquartered in New York, performance would take place in New York, the price was in US dollars, and the substantive rights attaching to the bonds were represented by a book

¹²¹ Cf. Article 8(4) of Rome I on individual employment contracts which is worded in slightly different terms.

¹²² *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 at [42]–[63]; factors to be taken into account under Article 4(3) of Rome II include the country in which the accident and the damage occurred and the common habitual residence of the parties at the time of the accident, as well as all facts as they stood at the date of the decision, not limited to the date of the tort, regardless of whether connected with the tort or with the consequences of the tort. See also *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [62]; *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm) at [517], affirmed in [2020] EWCA Civ 245 without discussing choice of law. That a tort is part of a multi-party accident may be a highly relevant factor: *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20 at [14].

¹²³ [2015] EWHC 3419 (Comm) at [91]–[106]. Similarly, *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) (English law applicable under Article 4(1) of Rome I; the court spoke, at [64], of ‘a high hurdle’ which Article 4(3) deliberately places in the way of a party seeking to displace the primary rule). The courts also refused to apply the escape clause in Article 4(3) of Rome I in *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd’s Rep 344 at [18] (English law applicable under Article 4(1) of Rome I) and *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814 at [32], [41], reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I (Egyptian law applicable under Article 4(1) of Rome I) and the escape clause in Article 8(4) of Rome I concerning individual employment contracts in *Olsen v. Gearbulk Services Ltd* [2015] IRLR 818, EAT at [60] (Swiss law applicable under Article 8(2) of Rome I).

entry in New York. In *Committeri v. Club Mediterranee SA*,¹²⁴ a case concerning personal injuries suffered abroad, the High Court refused to apply the escape clause in Article 4(3) of Rome II. It held that there was a high hurdle in order to displace the law designated by the fixed choice-of-law rules in Article 4 and that there was nothing in this case which came close to overcoming that high hurdle. The law of the place of the damage, namely French law, governed under Rome II.

The adoption of the strict approach does not mean that the escape clauses have never been applied. The escape clause in Article 4 of Rome I was applied in one case and the escape clause in Article 4 of Rome II was applied in five cases. In *Bill Kenwright Ltd v. Flash Entertainment FZ LLC*,¹²⁵ after holding that in a settlement agreement the ‘characteristic performance’ for the purposes of Article 4(2) of Rome I was the payment of money, which in that case pointed to the law of Abu Dhabi, the court applied the escape clause in favour of English law. The court stated, seemingly without appreciating the difference between the escape clause in the Rome I Regulation and that in the Rome Convention, that ‘in the present case, the presumption [was] weak and displaced by the fact that the Settlement Agreement [was] more closely connected with England than Abu Dhabi, in particular because the key meetings and negotiations took place in England ... and the invoices provided for payment in England.’¹²⁶

¹²⁴ [2016] EWHC 1510 (QB) at [57], affirmed in [2018] EWCA Civ 1889, [2019] ILPr 19 without discussing choice of law under Rome II. Similarly, *Microsoft Mobile Oy (Ltd) v. Sony Europe Ltd* [2017] EWHC 374 (Ch), [2018] 1 All ER (Comm) 419 at [173]–[176] (the court said, at [176], that Article 4(3) of Rome II is a provision that will only rarely be triggered; it was not possible to identify the applicable law at the time); *Pan Oceanic Chartering Inc. v. UNIPPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 at [205]–[210] (New York law applicable under Article 4(1) of Rome II; the court spoke, at [206], of ‘exceptional circumstances’ and overcoming a ‘high hurdle’ that are needed to engage Article 4(3)); *Rai v. Ministry of Defence*, Queen’s Bench Division, 9 May 2016 at [90]–[118] (English law applicable under Article 4(2) of Rome II; the court spoke, at [117], of ‘the high hurdle contained in Article 4(3)’); *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 at [38]–[63] (German law applicable under Article 4(1) of Rome II; the court clarified, at [42], that the standard required to satisfy Article 4(3) was ‘high’); *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [55]–[83] (Western Australian law applicable under Article 4(1) of Rome II; the court spoke, at [83] of the need for an ‘exceptional case’ before the escape clause in Article 4(3) can apply). See also *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm) at [76] and *Banque Cantonale de Geneve v. Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394 at [19], where the courts refused to apply the escape clause in Article 10(4) of Rome II. [2016] EWHC 1951 (QB) at [34]–[38].

¹²⁵

¹²⁶

Ibid at [38]. See also *Wrigley v. Wood* [2014] EWHC 3684 (Comm), where the court had to determine the applicable law of two contracts, one made before the entry into force of the Rome I Regulation, the other after that date. The court applied Article 4 of the Rome Convention, including the escape clause in Article 4(5), to determine the law applicable to the first contract. The court did not conduct a separate choice-of-law analysis under the Rome I Regulation and did not ask the question whether the fact that the escape clause under Article 4(3) of Rome I was meant to operate in exceptional circumstances where the contract was *manifestly* more closely connected with another country made a difference to the choice-of-law analysis. The court mentioned, at [19], that the second contract would be affected by Article 19(1) of the Rome I Regulation which deals with habitual residence of natural persons.

In *Marshall v. Motor Insurers' Bureau*,¹²⁷ after finding that the rule of the common habitual residence would point to English law, the court departed from this law in favour of the law of the place of the damage, namely French law. This was done by reliance on the following factors: (i) both parties were hit by another, French, car driven by a French driver in France and any claims brought against the French driver and her insurers were governed by French law; (ii) the collision was the cause of the accident and the injuries suffered by the claimants; and (iii) any claims against the insurer of the French vehicle recovery truck were also governed by French law. In *Hillside (New Media) Ltd v. Baasland*,¹²⁸ which concerned economic loss (nearly £3 million) suffered by a Norwegian who placed bets through the bet365 website, the court held that English law was applicable as the law of the country where the damage occurred because the *situs* of one of the claimant's online betting accounts was in England where the betting company was domiciled. The court also said obiter that the same result would have been reached under the escape clause of Article 4(3) of Rome II because the mentioned factors pointed to England and because the parties were bound by a contract governed by English law. A similar reasoning was applied in two other cases.¹²⁹ In *Innovia Films Ltd v. Frito-Lay North America Inc*¹³⁰ the court noted that neither party relied on Article 4(1) of Rome II and that the claim was more closely connected with England. There are three more cases where the courts said that there was an argument that Article 4(3) of Rome II applied and pointed to the application of English law,¹³¹ that it was likely that English law applied by virtue of Article 4(3) of Rome II¹³² and that the claimant had a real prospect of establishing at trial that English law governed because the tortious acts and conduct were manifestly more closely connected with England for the purposes of Article 4(3) of Rome II.¹³³

¹²⁷ [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400 at [9]–[23], affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20 at [14]–[21].

¹²⁸ [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 at [28]–[37], [46].

¹²⁹ *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm) at [511]–[519], affirmed in [2020] EWCA Civ 245 without discussing choice of law (English law governed under either Article 4(1) or Article 4(3)); *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706 at [84]–[100] (Article 4(1) did not point to England and, in any event, for the purposes of Article 4(3) the alleged tort was manifestly more closely connected with Russia than with any other place).

¹³⁰ [2012] EWHC 790 (Pat), [2012] RPC 24 at [111].

¹³¹ *Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm), [2018] Lloyd's Rep FC 363 at [198], [200].

¹³² *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4 at [112], reversed in [2015] UKSC 32, [2016] AC 219 without discussing choice of law (the court could not make any final decision for the purposes of Article 4(3) because it was not making any findings of fact).

¹³³ *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 at [42]–[75] (it was neither necessary nor appropriate to determine on a summary basis before trial whether the applicable law of any claim in tort was the law of England or Luxembourg).

3.5. LEGAL CERTAINTY VERSUS FLEXIBILITY DILEMMA

A good framework for analysing the exercise of judicial discretion in choice of law has been developed by Penadés Fons.¹³⁴ The starting point is that implied choice and the escape clauses are functional equivalents in that they represent the two means offered by the Regulations to the courts of the Member States to reach appropriate choice-of-law decisions. The exercise of discretion depends on a number of factors, most importantly the legal and commercial contexts of the claim.

With regard to the legal context, it has been mentioned that out of the 26 cases in which Rome I was applied, choice of law was relevant for the process of litigation, not for deciding the case on the substance, in 17 cases or 65 per cent. This is in line with the conclusions of the study by Penadés Fons, who found that approximately two thirds of choice-of-law disputes are dealt with in interlocutory proceedings.¹³⁵ Out of the 48 cases applying Rome II, choice of law was relevant for the process of litigation in 25 cases or 52 per cent.

A further question that can be asked is how frequently judicial discretion was exercised at the interlocutory stage or on an application to strike out a statement of case/for summary judgment as opposed to the trial stage. Implied choice under Rome I was demonstrated in three cases.¹³⁶ The escape clause of Article 4(3) of Rome I was applied in one case.¹³⁷ Article 4(4) of Rome I, under which the applicable law is decided through direct application of the principle of closest connection, was applied in two cases.¹³⁸ It was unclear in one case whether the applicable law was determined by the application of the escape clause in Article 4(3) or by the application of Article 4(4) of Rome I.¹³⁹ All of these cases, except one,¹⁴⁰ were decided at the interlocutory stage. This contrasts with ten cases applying the fixed choice-of-law rules of Rome I, five of which were at the interlocutory stage or decided on an application to strike out a statement

¹³⁴ Penadés Fons (n. 77).

¹³⁵ *Ibid.*, 254.

¹³⁶ *Etiihad Airways PJSC v. Flöther* [2019] EWHC 3107 (Comm), [2020] 2 WLR 333 (application of Article 25 of the Brussels I Regulation; English law applicable); *Hardy Exploration and Production (India) Inc. v. India* [2018] EWHC 1916 (Comm), [2019] QB 544 (application for setting aside a third party debt order; Indian law applicable); *Aquavita International SA v. Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) (service out; English law applicable), affirmed at trial in which the defendant did not participate [2015] EWHC 2807 (QB).

¹³⁷ *Bill Kenwright Ltd v. Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB) (service out; English law applicable).

¹³⁸ *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm) (service out; Russian law applicable); *Scott v. West* [2012] EWHC 1890 (Ch) (service out; English law applicable).

¹³⁹ *Wrigley v. Wood* [2014] EWHC 3684 (Comm) (service out; the law of Florida applicable).

¹⁴⁰ *Hardy Exploration and Production (India) Inc. v. India* [2018] EWHC 1916 (Comm), [2019] QB 544.

of case/for summary judgment.¹⁴¹ These results depart from the conclusions of the study by Penadés Fons, who found that, under the Rome Convention and Rome I, the gateways for discretion were applied in nearly 60 per cent of all choice-of-law decisions rendered before jurisdiction has been established and in 32 per cent of all choice-of-law decisions rendered at trial under a higher standard of proof.¹⁴² One possible explanation for this is that the courts are now resorting to judicial discretion in choice of law more sparingly, in line with the tightening of the rules of Rome I. This appears to be consistent with the fact that the escape clauses of Rome II were applied in only five cases, twice at trial,¹⁴³ twice on an application for permission to serve out¹⁴⁴ and once on an application for summary judgment,¹⁴⁵ although there are three more cases where the courts said before trial that there was an argument that Article 4(3) of Rome II applied and pointed to the application of English law,¹⁴⁶ that it was

¹⁴¹ *European Union v. Syria* [2018] EWHC 1712 (Comm) (application for summary judgment; Belgian or Luxembourg law applicable); *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law (service out; English law likely applicable); *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814, reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I (service out; Egyptian law applicable); *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) (service out; English law applicable); *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 (service out; Indian law applicable). Cf. *Aslam v. Uber BV* [2017] IRLR 4, ET, affirmed in [2018] ICR 453, EAT and [2018] EWCA Civ 2748, [2019] 3 All ER 489 without discussing choice of law (trial of a claim for failure to pay the minimum wage and provide paid leave; Dutch law applicable; English law also relevant under Articles 8 and 9); *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) (trial of a claim for damages under a contract for the sale of junk bonds; New York law applicable); *Olsen v. Gearbulk Services Ltd* [2015] IRLR 818, EAT (trial of a claim for unfair dismissal and a bonus payment under an employment contract; Bermuda law applicable; Swiss law also relevant under Article 8); *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344 (application under section 32 of the Arbitration Act 1996; English law applicable); *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037, reversed in [2017] UKSC 64, [2018] AC 690 without discussing choice of law (application for setting aside an interim third party debt order; English law applicable).

¹⁴² Penadés Fons (n. 77) 253.

¹⁴³ *EM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm), affirmed in [2020] EWCA Civ 245 without discussing choice of law (conspiracy, dishonest assistance, knowing receipt and bribery; English law applicable); *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400, affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20 (trial of a claim for damages for personal injury suffered in a road accident abroad; French law applicable).

¹⁴⁴ *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706 (service out; Russian law applicable); *Innovia Films Ltd v. Frito-Lay North America Inc.* [2012] EWHC 790 (Pat), [2012] RPC 24 (service out; English law applicable).

¹⁴⁵ *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 (English law applicable).

¹⁴⁶ *Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm), [2018] Lloyd's Rep FC 363 (service out).

likely that English law applied¹⁴⁷ and that the claimant had a real prospect of establishing at trial that English law governed by virtue of Article 4(3) of Rome II.¹⁴⁸ The fixed choice-of-law rules of Rome II were applied in many more cases, both before and at trial.¹⁴⁹ Neither express nor implied choice has yet been demonstrated under Rome II.

The discussion in the preceding paragraph has not taken into account the commercial context of the claim, which according to Penadés Fons is the crucial factor for the outcome of the application of the gateways for discretion. Penadés Fons has found that in cases concerning ‘strategic industries’, namely shipping, banking and finance, and insurance, the courts resort to the discretionary gateways and apply English law much more often than in cases concerning other sectors.¹⁵⁰ Looking at the cases under Rome I which actually or potentially concerned the exercise of judicial discretion at the interlocutory stage or on an application to strike out a statement of case/for summary judgment, English law was found to be applicable in six out of ten cases.¹⁵¹ In the six cases under Rome I which

¹⁴⁷ *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4, reversed in [2015] UKSC 32, [2016] AC 219 without discussing choice of law (application for an interim injunction; the court could not make any final decision for the purposes of Article 4(3) because it was not making any findings of fact).

¹⁴⁸ *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 (application to strike out a statement of case/for summary judgment; it was neither necessary nor appropriate to determine on a summary basis before trial whether the applicable law of any claim in tort was the law of England or Luxembourg).

¹⁴⁹ See sub-section 4.3 below.

¹⁵⁰ Penadés Fons (n. 77) 257 et seq.

¹⁵¹ *Etiihad Airways PJSC v. Flöther* [2019] EWHC 3107 (Comm), [2020] 2 WLR 333 (application of Article 25 of the Brussels I Regulation; comfort letter concerning the financing of an airline); *Bill Kenwright Ltd v. Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB) (service out; settlement agreement concerning the provision of entertainment services); *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law (service out; betting account contract); *Aquavita International SA v. Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) (service out; guarantee ancillary to a contract of affreightment), affirmed at trial in which the defendant did not participate [2015] EWHC 2807 (QB); *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) (service out; contract for the sale of private placement notes); *Scott v. West* [2012] EWHC 1890 (Ch) (service out; sale of shares). Cf. *European Union v. Syria* [2018] EWHC 1712 (Comm) (application for summary judgment; contract of guarantee; Belgian or Luxembourg law applicable); *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm) (service out; alleged contracts for the provision of services to refinance a company; Russian law applicable); *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814, reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I (service out; contract for organising an excursion; Egyptian law applicable); *Wrigley v. Wood* [2014] EWHC 3684 (Comm) (service out; provision of service of introducing a purchaser to a broker; the law of Florida applicable); *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 (service out; supply of condoms; Indian law applicable).

actually or potentially concerned the exercise of judicial discretion and were not decided at the interlocutory stage or on an application for summary judgment, English law was applicable in two cases.¹⁵² Only three of these cases in which foreign law was found to be applicable (as opposed to many cases in which English law was applicable) concerned a ‘strategic industry’, namely banking and finance. It should be noted, however, that the first case¹⁵³ concerned New York instruments which were found to be governed by New York law. The second case¹⁵⁴ concerned alleged contracts between Russian businessmen to refinance a Russian company. The third case concerned European Union’s guarantee of Syria’s repayment obligations under loan agreements entered between Syria and the European Investment Bank.¹⁵⁵ Looking at the cases which actually or potentially concerned the exercise of judicial discretion under Rome II at the interlocutory stage or on an application to strike out a statement of case/for summary judgment, English law was found to be applicable in nine out of 19 cases.¹⁵⁶ In the cases which actually or potentially concerned the exercise

¹⁵² *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd’s Rep 344 (sale of sugar); *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq* [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037, reversed in [2017] UKSC 64, [2018] AC 690 without discussing choice of law (letter of credit). Cf. *Hardy Exploration and Production (India) Inc. v. India* [2018] EWHC 1916 (Comm), [2019] QB 544 (fee guarantee contract; Indian law applicable); *Aslam v. Uber BV* [2017] IRLR 4, ET, affirmed in [2018] ICR 453, EAT and [2018] EWCA Civ 2748, [2019] 3 All ER 489 without discussing choice of law (employment contract; Dutch law applicable; English law also relevant under Articles 8 and 9); *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) (sale of junk bonds; New York law applicable); *Olsen v. Gearbulk Services Ltd* [2015] IRLR 818, EAT (employment contract; Bermuda law applicable; Swiss law also relevant under Article 8).

¹⁵³ *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm).

¹⁵⁴ *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm).

¹⁵⁵ *European Union v. Syria* [2018] EWHC 1712 (Comm).

¹⁵⁶ *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm), [2019] ILPr 40 (service out; fraud; sale of goods); *Gray v. Hurley* [2019] EWHC 1636 (QB) (service out; claim for restitution in unjust enrichment arising from the end of a romantic relationship); *Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm), [2018] Lloyd’s Rep FC 363 (service out; conspiracy to defraud; investment); *MX1 Ltd v. Farahzad* [2018] EWHC 1041 (Ch), [2018] 1 WLR 5553 (application to strike out a statement of case/for summary judgment; conspiracy to injure by using a Twitter account); *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law (service out; fraud; online betting); *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4 at [112], reversed in [2015] UKSC 32, [2016] AC 219 without discussing choice of law (application for an interim injunction to restrain the publication of a book pending trial; intentional infliction of emotional harm); *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 (application for summary judgment; fraud; investment); *Innovia Films Ltd v. Frito-Lay North America Inc.* [2012] EWHC 790 (Pat), [2012] RPC 24 (service out; patent dispute); *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 (application for summary judgment; negligence and online betting losses). Cf. *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB) (road accident

of judicial discretion under Rome II at trial, English law was applied in four out of 23 cases (in one further case, both English and a foreign law were applied to different claims).¹⁵⁷

These findings support the conclusion that the commercial context is very important for the exercise of discretion under Rome I. These findings also

abroad; Egyptian law applicable); *BVC v. EWF* [2019] EWHC 2506 (QB) (application for summary judgment; harassment; foreign law applicable); *Bazhanov v. Fosman* [2017] EWHC 3404 (Comm) (service out; unjust enrichment concerning non-existent contracts for the provision of services to refinance of a Russian company; Russian law applicable); *His Royal Highness Okpabi v. Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [2017] Bus LR 1335, affirmed in [2018] EWCA Civ 191, [2018] Bus LR 1022 without discussing choice of law under Rome II (service out; environmental damage; mining and extraction; Nigerian law applicable); *Gunn v. Diaz* [2017] EWHC 157 (QB), [2017] 2 All ER (Comm) 129 (service out; road accident abroad; Costa Rican law applicable); *Le Guevel-Mouly v. AIG Europe Ltd* [2016] EWHC 1794 (QB) (*forum non conveniens*; road accident in Scotland; French law applicable); *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706 (service out; unlawful means conspiracy; banking and finance; Russian law applicable); *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) (service out; road accident abroad; West Australian law applicable); *Wink v. Croatia Osiguranje DD* [2013] EWHC 1118 (QB) (service out; road accident abroad; Croatian law applicable); *OJSC TNK-BP Holding v. Lazurenko* [2012] EWHC 2781 (Ch) (application for an interim injunction; employment relationship; Russian law applicable).

¹⁵⁷ *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm), affirmed in [2020] EWCA Civ 245 without discussing choice of law (conspiracy, dishonest assistance, knowing receipt and bribery; investment); *Rai v. Ministry of Defence*, Queen's Bench Division, 9 May 2016 (personal injury abroad; military training); *Bianco v. Bennett* [2015] EWHC 626 (QB), [2015] ILPr 24 (road accident in England); *Morgan Stanley & Co. International Plc v. China Haisheng Juice Holdings Co. Ltd* [2009] EWHC 2409 (Comm), [2010] 2 All ER (Comm) 514 (application for an ASI; *culpa in contrahendo*; ISDA master agreement). Cf. *Pandya v. Intersalonika General Insurance Co. SA* [2020] EWHC 273 (QB) (road accident abroad; Greek law applicable) *Foreign and Commonwealth Office v. Bamieh* [2019] EWCA Civ 803, [2019] IRLR 736 (whistleblowing detriment; Kosovan law applicable); *Folkes v. Generali Assurances* [2019] EWHC 801 (QB) (road accident abroad; French law applicable); *Vilca v. Xstrata Ltd* [2018] EWHC 27 (QB) (personal injury abroad; mining and extraction; Peruvian law applicable); *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) (road accident abroad; Spanish law applicable); *Pan Oceanic Chartering Inc. v. UNIPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 (tortious interference with contractual relations; shipping; New York law applicable); *AS Latvijas Krajbanka (In Liquidation) v. Antonov* [2016] EWHC 1679 (Comm) (non-contractual liability of the defendant majority beneficial owner of the claimant who acted dishonestly and in breach of duties owed to the claimant; Latvian law applicable); *Committeri v. Club Mediterranee SA* [2016] EWHC 1510 (QB), affirmed in [2018] EWCA Civ 1889, [2019] ILPr 19 without discussing choice of law under Rome II (personal injury abroad; French law applicable); *Moreno v. Motor Insurers' Bureau* [2016] UKSC 52, [2016] 1 WLR 3194 (road accident abroad; Greek law applicable); *Syred v. Powszechny Zaklad Ubezpieczen (PZU) SA* [2016] EWHC 254 (QB), [2016] 1 WLR 3211 (road accident abroad; Polish law applicable); *XP v. Compensa Towarzystwo SA* [2016] EWHC 1728 (QB), [2016] Med LR 570 (road accident abroad; Polish law applicable); *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400, affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20 (road accident abroad; French law applicable); *Vann v. Occidental-Companhia De Seguros SA* [2015] EWCA Civ 572 (road accident abroad; Portuguese law

indicate that this framework for analysing the exercise of judicial discretion in choice of law is unsuitable for cases concerning the application of Rome II. This is because the functions of choice of law for contractual and non-contractual obligations are different. In particular, the function and operation of choice of law in cases concerning international torts, which comprise the bulk of cases concerning the application of Rome II, are different depending on whether the tort in question raises a conflict between laws that primarily regulate conduct ('conduct-regulating rules') or between laws that primarily allocate the loss resulting from the injury ('loss-allocating' or 'loss-distributing rules').¹⁵⁸ Any further analysis of the exercise of judicial discretion in choice of law under Rome II would have to take into account this alternative framework.¹⁵⁹

3.6. OVERRIDING MANDATORY PROVISIONS

Both Rome I and Rome II allow the courts to apply the overriding mandatory provisions of the law of the forum.¹⁶⁰ Rome I also allows the courts to give effect, under certain conditions, to the overriding mandatory provisions of the law of the country of performance even if that law is not the governing law.¹⁶¹ This is a major novelty in the Regulation as far as the UK is concerned because the UK exercised its right not to apply Article 7(1) of the Rome Convention on the effect of mandatory rules of third countries.

The identification and application of overriding mandatory provisions have not caused many problems in practice. In *KMG International NV v. Chen*,¹⁶² the court found that the English rule against reflective loss was not an overriding mandatory provision for the purposes of Article 16 of Rome II. In *Syred v. Powszechny Zakład Ubezpieczen (PZU) SA*,¹⁶³ the court was asked to find that

applicable); *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 (road accident abroad; German law applicable); *Bacon v. Nacional Suiza Cia Seguros y Reseguros SA* [2010] EWHC 2017 (QB), [2010] ILPr 46 (road accident abroad; Spanish law applicable); *Bonsall v. Cattolica Assicurazioni* [2010] ILPr 45, County Court (Winchester) (road accident abroad; Italian law applicable). See also *Jacobs v. Motor Insurers' Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609 (road accident abroad; Spanish law applicable). In *Banque Cantonale de Geneve v. Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394, which concerned the tort of deceit and restitution in unjust enrichment arising out of a fraud in the banking and finance sector, the claim in tort was governed by Swiss law, while the claim in restitution was governed by English law.

¹⁵⁸ See further S.C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 AJCL 173.

¹⁵⁹ See *ibid*, 188 et seq., for an analysis of the rules of Rome II along these lines.

¹⁶⁰ Article 9(2) of Rome I; Article 16 of Rome II.

¹⁶¹ Article 9(3) of Rome I.

¹⁶² [2019] EWHC 2389 (Comm), [2020] Bus LR 133 at [50].

¹⁶³ [2016] EWHC 254 (QB), [2016] 1 WLR 3211 at [144]–[152].

section 17 of the Social Security (Recovery of Benefits) Act 1997, which governs the assessment of damages in a claim by an injured person against the tortfeasor, was an overriding mandatory provision for the purposes of Article 16 of Rome II. The court held that this provision was not so crucial for the protection of the political, social or economic order of the UK as to override a rule of the applicable Polish law, which follows the general common law principle that damages should be compensatory. In *Eurobank Ergasias SA v. Kalliroi Navigation Co. Ltd*,¹⁶⁴ the court was asked to apply to a contract governed by English law the old common law rule on the effect of supervening illegality at the place of performance laid down in the famous case of *Ralli Bros v. Compania Naviera Sota y Aznar*.¹⁶⁵ The court was invited to find that this case was overridden by Article 9(3) of Rome I. The court refused to do this on the basis that the contract in question was governed by English law and applied the *Ralli Bros* case as part of the applicable English law. The court further held, obiter, in respect of another contract that Chapter F of Act No 2501 of the Governor of the Bank of Greece of 31 October 2002 prohibiting commission fees on lending was not an overriding mandatory provision because it was not exclusively or even mainly concerned with advancing consumer protection or some other interest serving what might be referred to as weaker contractual parties or the types of interest set out in Article 9(1) of Rome I. However, even if it was wrong, the court held that it would have exercised its discretion in favour of permitting the enforcement of the contract in question.

There is one case that arguably should have been dealt with under the framework of Article 9(3) of Rome I, but was instead treated as engaging the doctrine of public policy. In *Dana Gas PJSC v. Dana Gas Sukuk Ltd*,¹⁶⁶ the court considered whether an undertaking by deed governed by English law to purchase certain assets upon the occurrence of certain events was invalid and unenforceable, on the basis that it formed part of an Islamic financial transaction that was governed by the law of United Arab Emirates and was unlawful and unenforceable under that law. The claimant, who sought a declaration of invalidity and unenforceability, relied on a principle that, as a matter of public policy, the English courts will not enforce a contract entered for a purpose which is unlawful under the law of a friendly foreign state. This principle derives from the famous cases of *Foster v. Driscoll*¹⁶⁷ and *Regazzoni v. Sethia*,¹⁶⁸ which concern initial illegality at the place of performance and were decided long before the Rome I Regulation became part of UK law. The court in *Dana* held that in the

¹⁶⁴ [2015] EWHC 2377 (Comm) at [31]–[37], [39], [40].

¹⁶⁵ [1920] 2 KB 287 (CA).

¹⁶⁶ [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep 177 at [81]–[83].

¹⁶⁷ [1929] 1 KB 470 (CA).

¹⁶⁸ [1958] AC 301 (HL).

present case there was nothing to indicate that the undertaking had as its object and intention the doing of anything in the UAE which was unlawful under the laws of the UAE and therefore was not contrary to English public policy. But as the UK Ministry of Justice observed in its consultation paper ‘Rome I – Should the UK Opt In?’,¹⁶⁹ Article 9(3) of Rome I is formulated in terms that are sufficiently broad to cover situations of unlawful contractual performance where the applicable law is foreign and removes the uncertainty that existed under the Rome Convention as to whether *Foster v. Driscoll* properly fell within the scope of the public policy rule.¹⁷⁰ In order not to reignite these old uncertainties, it is better to treat cases like *Dana Gas PJSC v. Dana Gas Sukuk Ltd* as engaging Article 9(3) of Rome I and not the old common law authorities.

Another problem concerning overriding mandatory provisions and Rome I is the choice-of-law treatment of so-called statutory claims. In certain areas, most importantly employment and consumer law, claimants often base their claims on the provisions of domestic statutes. UK courts approach these claims as raising not choice-of-law issues, but issues of statutory construction, which approach results in an over-application of domestic law. The questions that the courts ask are not whether the employment and consumer contracts in question are governed by domestic law or, if not, whether the domestic statutes should be applied as overriding mandatory provisions. The courts are only asking whether the claim falls within the territorial scope of the statute in question. It has been argued that this way of reasoning is contrary to the scheme and logic of Rome I.¹⁷¹ Nevertheless, UK courts have not questioned this approach even after the coming into force of Rome I and have continued to approach statutory claims as raising only issues of statutory construction.¹⁷²

3.7. PUBLIC POLICY

Both Rome I and Rome II allow the courts to refuse to apply a provision of the foreign applicable law if such application is manifestly incompatible with domestic public policy.¹⁷³

¹⁶⁹ Consultation Paper CP05/08, 2 April 2008.

¹⁷⁰ *Ibid.*, 33.

¹⁷¹ See C. Bisping, ‘Avoid the Statutist Trap: The International Scope of the Consumer Credit Act’ (2012) 8 JPIL 35; U. Grušić, *The European Private International Law of Employment* (Cambridge: Cambridge University Press, 2015) Ch. 3.

¹⁷² *Olsen v. Gearbulk Services Ltd* [2015] IRLR 818, EAT; *Aslam v. Uber BV* [2017] IRLR 4, ET at [115]–[118], [120] (see also [111]–[114] on the concept of ‘individual employment contract’), affirmed in [2018] ICR 453, EAT and [2018] EWCA Civ 2748, [2019] 3 All ER 489 without discussing choice of law.

¹⁷³ Article 21 of Rome I; Article 26 of Rome II.

Public policy has so far been raised in three cases. It has been argued in the preceding sub-section that *Dana Gas PJSC v. Dana Gas Sukuk Ltd*¹⁷⁴ was wrongly treated as engaging the doctrine of public policy, not Article 9(3) of Rome I. In *KMG International NV v. Chen*,¹⁷⁵ the court found that the English rule against reflective loss is not a rule of English public policy. In *Group Seven Ltd v. Allied Investment Corp Ltd*,¹⁷⁶ the court considered whether the rules on contributory negligence of the applicable Maltese law allowing a plea of contribution at the behest of a fraudster against the victim were contrary to domestic public policy. The court rejected this argument by holding that it is overwhelmingly the case that the normal position is that the courts in this jurisdiction recognise laws of foreign jurisdictions even when they are different. The court did not consider that the rule of Maltese law could lead to a result so wholly alien to the fundamental requirements of justice as administered by an English court.

3.8. SCOPE OF APPLICABLE LAW AND SUBSTANCE/ PROCEDURE DICHOTOMY

The two Regulations contain non-exclusive lists of issues that fall within the scope of the law governing contractual and non-contractual obligations.¹⁷⁷ This is to be contrasted with issues of evidence and procedure, which are always governed by the law of the forum.¹⁷⁸

In English private international law, the issue of assessment of damages was traditionally regarded as a procedural issue and therefore governed by the *lex fori*.¹⁷⁹ But the Rome I and Rome II Regulations now provide that this issue falls within the scope of the applicable law.¹⁸⁰ Nevertheless, it took a while for UK courts to completely give up the old reasoning. In the EU, the compensation scheme for victims of road accidents caused by uninsured drivers has been set up by Directive 2009/103/EC and the Directives which it superseded. These Directives are implemented into UK law by means of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, which enable UK residents to obtain compensation for injuries suffered

¹⁷⁴ [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep 177.

¹⁷⁵ [2019] EWHC 2389 (Comm), [2020] Bus LR 133 at [56], [57].

¹⁷⁶ [2014] EWHC 2046 (Ch) at [405]–[410], affirmed in [2015] EWCA Civ 631 without discussing choice of law.

¹⁷⁷ Article 12 of Rome I; Article 15 of Rome II. See also Article 18 of Rome I and Article 22 of Rome II on burden of proof.

¹⁷⁸ Article 1(3) of Rome I; Article 1(3) of Rome II.

¹⁷⁹ *Harding v. Wealands* [2006] UKHL 32, [2007] 2 AC 1.

¹⁸⁰ Article 12(1)(c) of Rome I; Article 15(1)(c) of Rome II. This includes the discount rate and the multipliers which follow from them for the assessment of future loss: *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [84]–[93].

in a Member State of the EU in road accidents caused by uninsured drivers. The Directives do not state whether questions of liability and assessment of damages are to be determined by reference to the law governing the tort or the *lex fori*. The 2003 Regulations are also silent on this point. UK courts had accepted that the issue of liability is governed by the law governing the tort, but had initially held that the issue of assessment of damages was a matter for the *lex fori*.¹⁸¹ But this case law was overturned by the Supreme Court in *Moreno v. Motor Insurers' Bureau*,¹⁸² in which the court held that compensation under the 2003 Regulations should be assessed by reference to the law governing the tort.¹⁸³ In other cases, the Court of Appeal held that the law governing the tort was broad and included lawful¹⁸⁴ 'practices, conventions and guidelines regularly used by foreign judges in assessing damages under their law',¹⁸⁵ while the High Court held that evidence and procedure are restricted to 'the constitution, powers of courts and mode of trial'¹⁸⁶ and rules that are 'an indispensable feature of the forum's legal framework for resolving disputes'.¹⁸⁷

Other decisions confirm that the following issues fall within the scope of the law governing contractual and non-contractual obligations: whether the English rule against reflective loss applies,¹⁸⁸ limitation,¹⁸⁹ remedies and interest,¹⁹⁰

¹⁸¹ *Jacobs v. Motor Insurers' Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609; *Bloy v. Motor Insurers' Bureau* [2013] EWCA Civ 1543, [2014] Lloyd's Rep IR 75; *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400 at [64], [65], affirmed on other grounds [2017] EWCA Civ 17, [2017] RTR 20.

¹⁸² [2016] UKSC 52, [2016] 1 WLR 3194.

¹⁸³ For the interpretation of controversial Recital 33 to Rome II, see *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [74]–[78], where the court concluded, at [78], that: 'The solution to the problem lies ... in the court looking at the actual costs, for example, of aftercare in the victim's place of residence, and taking those into account when assessing damages, but only insofar as the applicable law permits it to do so.' See also *Gunn v. Diaz* [2017] EWHC 157 (QB), [2017] 2 All ER (Comm) 129 at [10]; *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 at [11] (Longmore LJ), [37] (Jackson LJ).

¹⁸⁴ Unlawful practice will not be taken into account: *Syred v. Powszechny Zaklad Ubezpieczen (PZU) SA* [2016] EWHC 254 (QB), [2016] 1 WLR 3211 at [45]–[47].

¹⁸⁵ *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 at [21]–[24] (Longmore LJ), [32]–[34] (Jackson LJ), [49]–[51] (Christopher Clarke LJ). See also *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) at [17].

¹⁸⁶ *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [92], referring to *Dicey, Morris and Collins* and Tugendhat J in *Wall v. Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB), [2013] 1 WLR 3890.

¹⁸⁷ *KMG International NV v. Chen* [2019] EWHC 2389 (Comm), [2020] Bus LR 133 at [36](6).

¹⁸⁸ *Ibid* at [36], [42], [43].

¹⁸⁹ *Pandya v. Intersalonika General Insurance Co. SA* [2020] EWHC 273 (QB); *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB) at [6], [38], [47]; *W3 Ltd v. Easygroup Ltd* [2018] EWHC 7 (Ch), [2018] FSR 16 at [360]; *Vilca v. Xstrata Ltd* [2018] EWHC 27 (QB) at [51]; *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581, [2018] 4 WLR 14 at [72]; *Deutsche Bahn AG v. Mastercard Inc.* [2016] CAT 14, [2017] Bus LR 63 at [48]–[50], [69].

¹⁹⁰ *AS Latvijas Krajbanka (In Liquidation) v. Antonov* [2016] EWHC 1679 (Comm) at [9], [10]; *OJSC TNK-BP Holding v. Lazurenko* [2012] EWHC 2781 (Ch) at [20].

and burden of proof.¹⁹¹ By contrast, the following issues are to be treated as procedural and thus outside the scope of the applicable law: whether a change of parties is allowed,¹⁹² standard of proof,¹⁹³ the power to order an interim payment,¹⁹⁴ whether amendments to particulars of claim raise a new cause of action,¹⁹⁵ rules or conditions for obtaining a declaration of non-liability,¹⁹⁶ the way in which evidence of fact or opinion is to be given to the court,¹⁹⁷ and what evidence is admissible.¹⁹⁸

3.9. TREATMENT OF FOREIGN LAW

Pleading and proof of foreign law are considered to be matters of evidence and procedure and are thus outside the scope of the law governing contractual and non-contractual obligations.¹⁹⁹ In England, a party wishing to rely on foreign law needs to plead that foreign law and prove its content. This is done by means of expert evidence.²⁰⁰

The reason why the treatment of foreign law is singled out in this chapter, even though it is a procedural and evidentiary issue (which was dealt with in the preceding sub-section), is that the parties' decisions on whether to plead and prove foreign law can have substantive effects. In some cases, the courts have recorded that the parties were in agreement with respect to how a particular

¹⁹¹ *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) at [15]–[17]; *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400 at [25], affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20.

¹⁹² *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB) at [53].

¹⁹³ *Folkes v. Generali Assurances* [2019] EWHC 801 (QB) at [12]; *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400 at [25], affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20; cf. *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) at [15]–[17].

¹⁹⁴ *Folkes v. Generali Assurances* [2019] EWHC 801 (QB) at [16].

¹⁹⁵ *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581, [2018] 4 WLR 14 at [29]–[33].

¹⁹⁶ *Parainen Pearl Shipping Ltd v. Kristian Gerhard Jebsen Skipsrederi AS* [2017] EWHC 2570 (Pat) at [19]; *Actavis UK Ltd v. Eli Lilly & Co.* [2015] EWCA Civ 555, [2016] 4 All ER 666 at [100]–[145], reversed in part in [2017] UKSC 48, [2018] 1 All ER 171 without discussing this point.

¹⁹⁷ *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 at [11]–[20] (Longmore LJ), [39]–[46] (Jackson LJ), [48] (Christopher Clarke LJ).

¹⁹⁸ *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) at [17].

¹⁹⁹ Article 1(3) of Rome I; Article 1(3) of Rome II.

²⁰⁰ On pleading and proof of foreign law in a case concerning Rome II, see *OPO v. MLA* [2014] EWCA Civ 1277, [2015] EMLR 4 at [108]–[111], reversed in [2015] UKSC 32, [2016] AC 219 without discussing choice of law; *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814 at [88], [89], [92], reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing pleading and proof of foreign law.

choice-of-law rule of the Regulations should be applied.²⁰¹ In such cases, the courts accept the agreement between the parties and do not conduct a separate choice-of-law analysis. In other cases, the parties refrain from mentioning foreign law altogether. In such cases, English courts are entitled to proceed on the basis of the presumption that the foreign law is the same as English law. In both types of case, the exclusion of evidence and procedure from the scope of the Regulations, coupled with the English rules on pleading and proof of foreign law, represent an instrument of party autonomy.

3.10. HABITUAL RESIDENCE

The concept of habitual residence of companies and natural persons acting in the course of a business activity is a legal concept. The habitual residence of a company is the place of its central administration.²⁰² There is also a special rule for determining the habitual residence of companies acting in the course of operations of a branch, agency or other establishment.²⁰³ UK courts have not yet had an opportunity to address the concept of habitual residence of companies for the purposes of the Rome I and Rome II Regulations. The habitual residence of a natural person acting in the course of a business activity is his or her principal place of business.²⁰⁴ In *Wrigley v. Wood*,²⁰⁵ the court had to determine the applicable law of two contracts for the payment of commission for the provision of service of introducing a purchaser to a broker which resulted in the sale of a luxury yacht. One contract was made before the entry into force of the Rome I Regulation, the other after that date. The contracts were between the captain of the yacht and the broker. The court found that the captain had entered this contract in the course of his trade or profession as a yacht captain. The question arose as to whether or not the captain had a principal place of business or indeed any place of business. The evidence established that the captain effectively spent 47 weeks of his year on the yacht. The court felt that there was something wholly artificial in suggesting that the yacht was a place of business or indeed in seeking to ascribe a place, a location, in relation to it, because of its itinerant nature. The submission of the defendants was that Monaco was the place in question because that was where the yacht's managing agents were established. The court

²⁰¹ See, for example, *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581, [2018] 4 WLR 14 at [29] and *Lebara Mobile Ltd v. Lycamobile UK Ltd* [2015] EWHC 3318 (Ch) at [31].

²⁰² Article 19(1) of Rome I; Article 23(1) of Rome II.

²⁰³ Article 19(2) of Rome I, on which see *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law; Article 23(1) of Rome II.

²⁰⁴ Article 19(1) of Rome I; Article 23(2) of Rome II.

²⁰⁵ [2014] EWHC 3684 (Comm) at [19], [20].

concluded this part of the judgment by noting that ‘There appear few, if any, other true candidates.’²⁰⁶ The captain’s habitual residence for the purposes of Rome I was therefore unclear.

The concept of habitual residence of natural persons not acting in the course of a business activity is a question of fact. This notion was interpreted in two cases. In *Gray v. Hurley*,²⁰⁷ the defendant was found to have been habitually resident in England because he spent more time in London than anywhere else (763 days over the course of five years) and had a home in London. *Winrow v. Hemphill*²⁰⁸ concerned a personal injury suffered abroad in a road accident. The claimant, a UK national, had been living and working in Germany for eight-and-a-half-years by the time of the accident. She was living there with her husband. Three of their children were at school in Germany. The claimant had moved to Germany because her husband was in the army and had been posted there. The claimant and her family returned to the UK approximately 18 months after the accident, which was earlier than they had originally planned. The court held that, although Germany had not been her husband’s first choice, the residence of the claimant in Germany was voluntary and established for a considerable period of time. In light of the length of stay in this country, its purpose and the establishment of a life there, the habitual residence of the claimant at the time of the accident was held to be in Germany.

3.11. *RENOI*

Renvoi is excluded in matters that fall within the scope of the Rome I and Rome II Regulations.²⁰⁹ This exclusion has been mentioned by the courts on several occasions²¹⁰ and has not led to any problems in practice.

4. ISSUES SPECIFIC TO EITHER ROME I OR ROME II

This part of the chapter will examine certain issues that have come up in practice that are specific to either the Rome I or the Rome II Regulation, including: fixed choice-of-law rules in contract; choice-of-law rules for formal validity of contracts; choice-of-law rules in tort; choice-of-law rules for unjust enrichment; and choice-of-law rules for *culpa in contrahendo*.

²⁰⁶ Ibid at [20].

²⁰⁷ [2019] EWHC 1636 (QB) at [190].

²⁰⁸ [2014] EWHC 3164 (QB), [2015] ILPr 12 at [39]–[41].

²⁰⁹ Article 20 of Rome I; Article 24 of Rome II.

²¹⁰ See *Integral Petroleum SA v. SCU-Finanz AG* [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217 at [23], [48]; *Jacobs v. Motor Insurers’ Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609 at [27].

4.1. ROME I: CHOICE-OF-LAW RULES IN CONTRACT

Article 4 of Rome I lays down fixed choice-of-law rules for the vast majority of contracts (other than contracts of carriage, consumer, insurance and employment contracts). Article 4(1) sets out fixed choice-of-law rules for a number of nominate contracts. Article 4(2) covers innominate contracts that have a characteristic performance. Article 4(4) is a catch-all provisions that applies to innominate contracts without a characteristic performance.

Article 4(1) was applied in four cases.²¹¹ The courts applied Article 4(2) in four cases.²¹² In *European Union v. Syria*,²¹³ the court held that the characteristic performance under a contract of guarantee was that of payment of money by the guarantor. In *Bill Kenwright Ltd v. Flash Entertainment FZ LLC*,²¹⁴ the court held that in a settlement agreement the ‘characteristic performance’ was the payment of money. In *Eurasia Sports Ltd v. Tsai*,²¹⁵ the court considered (while leaving the point open) that a betting account contract was governed by the law of the place where the relevant branch of the betting company, as the provider of the characteristic obligation, was located, which was English law. In *Taurus Petroleum Ltd v. State Oil Marketing Co. of the Ministry of Oil, Iraq*,²¹⁶ the High Court held that a letter of credit fell within Article 4(2) and that the characteristic performance was effected by the bank making payment by taking steps to credit the payee’s account, which pointed to English law. In the Court of Appeal, Moore-Bick VP²¹⁷ seems to have confused the Rome Convention and the Rome I Regulation,²¹⁸ but did express his disagreement with the judge that

²¹¹ *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB) at [6]; *Brownlie v. Four Seasons Holdings Inc.* [2015] EWCA Civ 665, [2016] 1 WLR 1814 at [32], [41] (provision of services under a contract for organising an excursion), reversed in *Four Seasons Holdings Inc. v. Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 without discussing choice of law under Rome I; *Toyota Tsusho Sugar Trading Ltd v. Prolat Srl* [2014] EWHC 3649 (Comm), [2015] 1 Lloyd’s Rep 344 at [18] (sale of sugar); *BNP Paribas SA v. Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at [62], [64] (sale of private placement notes regarded as a sale of goods); *SSL International Plc v. TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 at [82] (supply of condoms).

²¹² See also *Molton Street Capital LLP v. Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [92]–[94] (sale of junk bonds).

²¹³ [2018] EWHC 1712 (Comm) at [74].

²¹⁴ [2016] EWHC 1951 (QB) at [37].

²¹⁵ [2016] EWHC 2207 (QB) at [37], [60], affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law.

²¹⁶ [2013] EWHC 3494 (Comm), [2014] 1 All ER (Comm) 942 at [18].

²¹⁷ [2015] EWCA Civ 835, [2016] 2 All ER (Comm) 1037 at [35], reversed in [2017] UKSC 64, [2018] AC 690 without discussing this point.

²¹⁸ See *ibid*: ‘The letters of credit contain no express choice of proper law and in those circumstances, by virtue of art 4(1) of the Rome Convention (“Rome”). The letter of credit in *Taurus* was issued after 17 December 2009, so Rome I applied.’

the performance which was characteristic of the contract was taking steps to effect payment rather than actually making payment. Nevertheless, the result was the same – English law governed.

Article 4(4) was applied in two cases. In *Bazhanov v. Fosman*,²¹⁹ the court dealt with the law applicable to alleged contracts for the provision of services to refinance a Russian company. Since the alleged contracts contemplated that services would be provided by both parties, Article 4(1) and (2) did not apply. Had the judge been persuaded that there was a good arguable case that enforceable contracts had been made, he would have concluded that Russian law governed under Article 4(4). In *Scott v. West*,²²⁰ which concerned a contract for the purchase of shares. The court held that the contract in question was most closely connected with England.

There is one case where the court had to apply Article 4 of Rome I, but where it is unclear which particular paragraph of Article 4 was relied upon. In *Wrigley v. Wood*,²²¹ the court had to determine the applicable law of two contracts for the payment of commission for the provision of service of introducing a purchaser to a broker which resulted in the sale of a luxury yacht. One contract was made before the entry into force of the Rome I Regulation, the other after that date. The contracts were between the captain of the yacht and the broker. It has already been mentioned²²² that the judgment is unclear with respect to the captain's habitual residence. It is also unclear which of the four paragraphs of Article 4 the court relied upon to determine that the applicable law was the law of Florida. This is because the court applied the Rome Convention to determine the law governing the contract entered before 17 December 2009, but failed to conduct a separate choice-of-law analysis under the Rome I Regulation for the contract entered after this date. The contract in question was for the provision of the service of introducing a purchaser to a broker, so it falls under Article 4(1)(b) of Rome I which points to the law of the country of the service provider's habitual residence. But given that the court struggled to determine the habitual residence of the claimant, it is unclear whether it applied the escape clause in Article 4(3) or the closest connection test in Article 4(4) to determine the applicable law. Ultimately, the outcome would have been the same, but the case demonstrates a lack of rigour in the application of Rome I.

²¹⁹ [2017] EWHC 3404 (Comm) at [62]–[64].

²²⁰ [2012] EWHC 1890 (Ch) at [10], [11].

²²¹ [2014] EWHC 3684 (Comm).

²²² See n. 205 above.

4.2. ROME I: CHOICE-OF-LAW RULES FOR FORMAL VALIDITY OF CONTRACTS

The only case considering Article 11 of Rome I on formal validity of contracts is *Integral Petroleum SA v. SCU-Finanz AG*.²²³ This case concerned an oil supply contract between two Swiss oil trading companies. Although the Swiss Register of Commerce listed two joint authorised signatories (*prokurists*) of the seller, only one had signed the supply contract. The buyer, alleging that no oil had been supplied under the contract, obtained judgment in default of defence in an action for damages for breach of contract. The judge held that the defence that the sole signatory could not bind it was bound to succeed. The buyer appealed. The main issue on appeal was which system of law should apply, namely Swiss law or the law applicable to the formal validity of contracts pursuant to Article 11 of Rome I. The court held that the issue was not one of formal validity, but one of the authority of a sole signatory to bind the company. Since that was a matter for the company's constitution, it was governed by common law principles of agent and principal. The court further held that even if the ability of the sole signatory to bind the company could be brought within Article 11, it would still be excluded from the scope of Rome I by Article 1(2)(f) and/or (g).

4.3. ROME II: CHOICE-OF-LAW RULES IN TORT

With regard to choice-of-law rules in tort, Article 4 has been by far the most frequently applied provision. In personal injury cases, the courts have usually applied the law designated by either the fixed choice-of-law rule in Article 4(1) (*lex loci damni*)²²⁴ or Article 4(2) (the law of the common habitual residence

²²³ [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217 at [17]–[23], [39]–[48].

²²⁴ *Pandya v. Intersalonika General Insurance Co. SA* [2020] EWHC 273 (QB) at [9], [12]; *Brownlie v. Four Seasons Holdings Inc. (No 2)* [2019] EWHC 2533 (QB) at [6]; *Folkes v. Generali Assurances* [2019] EWHC 801 (QB) at [7]; *Vilca v. Xstrata Ltd* [2018] EWHC 27 (QB) at [3], [51]; *Gilmour v. Linea Directa Aseguradora Sa Compania De Seguros Y Reaseguros* 2017 GWD 39-603, Sheriff Court (Lothian and Borders) (Edinburgh) at [2], [15]; *Gunn v. Diaz* [2017] EWHC 157 (QB), [2017] 2 All ER (Comm) 129 at [9]; *Committeri v. Club Mediterranee SA* [2016] EWHC 1510 (QB) at [57], affirmed in [2018] EWCA Civ 1889, [2019] ILPr 19 without discussing choice of law under Rome II; *XP v. Compensa Towarzystwo SA* [2016] EWHC 1728 (QB), [2016] Med LR 570 at [55]; *Bianco v. Bennett* [2015] EWHC 626 (QB), [2015] ILPr 24 at [28]; *Vann v. Occidental-Companhia De Seguros SA* [2015] EWCA Civ 572 at [17]; *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 at [38]–[63]; *Stylianou v. Toyoshima* [2013] EWHC 2188 (QB) at [55]–[83]; *Wink v. Croatia Osiguranje DD* [2013] EWHC 1118 (QB) at [49]. See also *Jacobs v. Motor Insurers' Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609; *Bacon v. Nacional Suiza Cia Seguros y Reseguros SA* [2010] EWHC 2017 (QB), [2010] ILPr 46 at [25]; *Bonsall v. Cattolica Assicurazioni* [2010] ILPr 45, County Court (Winchester).

of the parties).²²⁵ Cases concerning economic loss have caused particular difficulties for the application of Article 4(1). In such cases, the courts have been applying the law of the country where the losses were irreversibly suffered as the *lex loci damni*.²²⁶ If economic loss is suffered in more than one country,

²²⁵ *Le Guevel-Mouly v. AIG Europe Ltd* [2016] EWHC 1794 (QB) at [19]; *Rai v. Ministry of Defence*, Queen's Bench Division, 9 May 2016 at [90]–[118]. See also *Winrow v. Hemphill* [2014] EWHC 3164 (QB), [2015] ILPr 12 at [39] (the court clarified that 'the person claimed to be liable' for the purposes of Article 4(2) was the first defendant driver, not the second defendant insurer); *Marshall v. Motor Insurers' Bureau* [2015] EWHC 3421 (QB), [2016] Lloyd's Rep IR 400 at [17], [18], affirmed in *Pickard v. Marshall* [2017] EWCA Civ 17, [2017] RTR 20 (Article 4(2) is not to be construed strictly to confine it to apply to proceedings where one person is bringing proceedings against another person and also applies to multi-party cases).

²²⁶ *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm), [2019] ILPr 40 at [59]–[69] (unlawful means conspiracy; the damage occurred in the place in England where the claimant paid out funds to purchase goods and received allegedly forged warehouse receipts); *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm) at [484]–[510], in particular [493], affirmed in [2020] EWCA Civ 245 without discussing choice of law (conspiracy, dishonest assistance, knowing receipt and bribery; if economic loss consists in the non-receipt of money, the *lex loci damni* is the place where 'the claimant complains that he has not received a sum which he should have received'); *MX1 Ltd v. Farahzad* [2018] EWHC 1041 (Ch), [2018] 1 WLR 5553 at [31]–[40] (conspiracy to injure; according to the court, at [39](8), the 'touchstone' in cases of economic loss for identifying the applicable law appears to be reversibility; the losses in this case, which consisted in the costs incurred in uncovering the defendant's tracks as the person behind a Twitter account used to make allegations of bribery and corruption against the claimant and to disclose confidential information, were irreversibly suffered in England); *Pan Oceanic Chartering Inc. v. UNIPPEC UK Co. Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 at [193]–[204] (tortious interference with contractual relations; the damage was the loss of commission, which should have been paid in New York); *AS Latvijas Krajbanka (In Liquidation) v. Antonov* [2016] EWHC 1679 (Comm) at [8] (the bank argued that the defendant had caused the bank to enter transactions which were not in its interests and which were arranged to benefit the defendant; the bank's losses were incurred in Latvia); *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB) at [59], affirmed in [2018] EWCA Civ 1742, [2018] 1 WLR 6089 without discussing choice of law (the claimant argued that the defendants set up 11 betting accounts which went rapidly into debt; damage held to have been sustained in England); *Banque Cantonale de Geneve v. Polevent Ltd* [2015] EWHC 1968 (Comm), [2016] QB 394 (claim in deceit; an employee of the claimant Geneva bank had been defrauded to transfer the claimant's moneys to an account in London held by the defendant; bank's losses accepted to have occurred in Geneva); *Hillside (New Media) Ltd v. Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986 at [28]–[37] (losses (nearly £3 million) suffered by a Norwegian who placed bets on the bet365 website were suffered in England because the *situs* of one of the claimant's online betting accounts was in England where the betting company was domiciled; the losses were suffered when the claimant used the funds to place bets). See also *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581, [2018] 4 WLR 14 at [29] (dishonest scheme to misappropriate sums in Russia owed to a Russian assignor; common ground that Russian law applicable); *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 at [42]–[75] (the claimant was an investor in certain Italian assets; the investment structure was based around a fund, in the form of an English limited partnership, which held shares in a Luxembourg company which held the Italian assets; the principal limited partner in the fund was a Luxembourg company that was the joint venture vehicle

the applicable law pursuant to Article 4(1) is not the place where the damage predominantly occurs – where damage occurs across several jurisdictions there will be several applicable laws.²²⁷

UK courts have also considered the special choice-of-laws rules contained in Articles 6 (Unfair competition and acts restricting free competition), 7 (Environmental damage) and 8 (Infringement of intellectual property rights).

In *Innovia Films Ltd v. Frito-Lay North America Inc.*,²²⁸ the claimant commenced two actions concerning various patent applications made by the defendant. The claimant argued that it had devised the inventions for food packaging film described and claimed in those applications, and that they had been disclosed to the defendant in confidence. The claimant thus claimed to be the rightful owner of those applications and any patents resulting therefrom, and that the defendant had acted in breach of confidence. One of the issues was the law applicable to the claim for breach of confidence. The court indicated that claims for breach of an equitable obligation of confidence fell within Article 6. The court then specified that Article 6(2) was the applicable rule on the ground that the alleged acts of unfair competition affected the interests of a specific competitor, namely the claimant. It followed that Article 4 applied. The claim was held to be manifestly more closely connected with England, so English law applied. In *Deutsche Bahn AG v. Mastercard Inc.*,²²⁹ the court dealt with connected claims brought by 1,300 retailers operating in 18 EU countries that, in breach of EU/EEA and domestic competition rules, the merchant service charges which they had paid in respect of MasterCard credit card and Maestro debit card transactions under the MasterCard payment scheme were higher than they should have been. It was common ground that Article 6(3) was the relevant choice-of-law rule for the claims that fell within the temporal scope of Rome II. The parties also agreed that the country ‘where the market is, or is likely to

by which the claimant and other investors invested in the fund; the claimant argued that it was the victim of a dishonest scheme to reorganise the fund and its assets, diminishing or eliminating its rights and interests in the assets and taking the control and benefit of the assets; it was neither necessary nor appropriate to determine on a summary basis before trial whether the applicable law of any claim in tort was the law of England or Luxembourg; the claimant had a real prospect of establishing at trial that English law governed on the basis that the direct damage occurred in England for the purposes of Article 4(1)); *Erste Group Bank AG (London) v. JSC (VMZ Red October)* [2015] EWCA Civ 379, [2015] 1 CLC 706 at [94]–[96] (if the loss suffered by the claimant as the result of a conspiracy was the damage to its right to repayment under a loan agreement and a guarantee, that loss was suffered in New York, as the place of payment under the two contracts).

²²⁷ *MX1 Ltd v. Farahzad* [2018] EWHC 1041 (Ch), [2018] 1 WLR 5553 at [41]–[44].

²²⁸ [2012] EWHC 790 (Pat), [2012] RPC 24 at [109]–[111]. See also *Conductive Inkjet Technology Ltd v. Uni-Pixel Displays Inc.* [2013] EWHC 2968 (Ch), [2014] 1 All ER (Comm) 654 at [125]; *Force India Formula One Team Ltd v. 1 Malaysia Racing Team SDN BHD* [2012] EWHC 616 (Ch), [2012] RPC 29 at [388].

²²⁹ [2018] EWHC 412 (Ch), [2018] 4 CMLR 31 at [21]–[23].

be, affected', within the meaning of Article 6(3), was the country in which the merchant was based at the time of the transaction upon which a merchant service charge was paid by the merchant to the acquiring bank. The parties also agreed that for practical reasons all UK transactions in respect of which a claim was made should be treated as having occurred in England, so that the applicable law was English law.

Article 7 was discussed in *His Royal Highness Okpabi v. Royal Dutch Shell Plc*.²³⁰ The claim for damages was brought by Nigerian claimants against Royal Dutch Shell Plc, an Anglo-Dutch oil company incorporated in England, and its Nigerian subsidiary for environmental damage in Nigeria caused by oil leaks from pipelines and associated infrastructure operated by the subsidiary. The judge held that Article 7 applied and that the claimants were entitled to elect to pursue an environmental claim under the law where negligent supervisory acts and omissions occurred, rather than the place where the damage occurred. The claimants maintained that this entitled them to proceed against Royal Dutch Shell Plc under English law as the acts and omissions occurred (or were said to have occurred) in England. The defendants contended that the claim against Royal Dutch Shell Plc was governed by Nigerian law. The judge did not decide this issue because he found that, given the substantial similarity between English and Nigerian common law, the difference was immaterial.

Article 8 was applied in three cases, all of which concerned the infringement of unitary Community intellectual property rights. The courts applied the rule that the applicable law, for any question that is not governed by the relevant Community instrument, is the law of the country in which the act of infringement was committed.²³¹

4.4. ROME II: CHOICE-OF-LAW RULES FOR UNJUST ENRICHMENT

Article 10 of Rome II was applied in four cases. It has already been mentioned that in *Bazhanov v. Fosman*²³² the court dealt with the law applicable to alleged contracts for the provision of services to refinance a Russian company. The claim in unjust enrichment was advanced as an alternative to a contract claim to cover the situation where, contrary to the claimant's primary case, no contract had

²³⁰ [2017] EWHC 89 (TCC), [2017] Bus LR 1335 at [55], affirmed in [2018] EWCA Civ 191, [2018] Bus LR 1022 without discussing choice of law under Rome II.

²³¹ *W3 Ltd v. Easygroup Ltd* [2018] EWHC 7 (Ch), [2018] FSR 16 at [357]–[360] (EU trade marks); *Eli Lilly and Co. v. Genentech Inc.* [2017] EWHC 3104 (Pat), [2018] 1 WLR 1755 at [35] (European patent); *Parainen Pearl Shipping Ltd v. Kristian Gerhard Jebsen Skipsrederi AS* [2017] EWHC 2570 (Pat) at [18] (European patent).

²³² [2017] EWHC 3404 (Comm).

been in fact entered. After having found that the parties had not agreed on the governing law, the judge held²³³ that Article 10(1) did not apply because on the hypothesis that there was no contract, there was no governing law that could be derived from it for the purposes of Article 10(1). Article 10(2) did not apply because one party was habitually resident in England, the other in Russia. It was common ground that for the purposes of Article 10(3) the unjust enrichment took place in Russia and that Article 10(4) would not point to any other law. Because Russian law does not recognise claims based on unjust enrichment, the unjust enrichment claim did not raise a serious issue to be tried.

In *Gray v. Hurley*,²³⁴ the court dealt with a claim for restitution in unjust enrichment arising from the end of a romantic relationship. The court held that Article 10(1) did not apply. Since both parties were habitually resident in England, English law applied by virtue of Article 10(2).

In *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd*,²³⁵ the court held that the unjust enrichment concerned a closely connected relationship existing between the parties that arose out of the alleged unlawful means conspiracy to defraud. Since the law governing the tort was English law, the unjust enrichment was governed by the same law. But the court also held that, if Article 10(1) did not apply, Article 10(3) would lead to the application of Singaporean law since Singapore was the place where the unjust enrichment took place. The defendant was from Singapore and the allegedly forged warehouse receipts concerned goods which were located in warehouses in several countries, including Singapore.

In *Banque Cantonale de Geneve v. Polevent Ltd*,²³⁶ the claimant was a bank in Geneva. One of its employees was defrauded by the defendant into believing that she was acting on instructions from the claimant's deputy chief executive officer and transferred moneys to an account in London held by the defendant. The claimant brought two claims against the defendant: a claim in the tort of deceit and a claim for restitution in unjust enrichment based on the mistaken transfer induced by fraud. The question was whether the restitution claim was governed by English law, as the law of the place where the unjust enrichment had taken place, or by Swiss law, either because it arose out of the tort of deceit and therefore Article 4 of Rome II was applicable or because it was a claim for unjust enrichment arising out of a 'relationship existing' between the parties and therefore, by virtue of Article 10(1), was governed by the law applicable to the relationship. The court held that Article 4 was not applicable because, while the deceit explained why the transfer had been made, it was not a necessary

²³³ Ibid at [70]–[77].

²³⁴ [2019] EWHC 1636 (QB) at [188]–[191].

²³⁵ [2019] EWHC 1661 (Comm), [2019] ILPr 40 at [70]–[73].

²³⁶ [2015] EWHC 1968 (Comm), [2016] QB 394.

ingredient of a claim for restitution. ‘Relationship’ for the purposes of Article 10(1) was not intended to refer to the mere ‘relationship’ of wrongdoer and victim created by the commission of the tort. It referred to a relationship in existence before the facts which had given rise to the claim had occurred. Accordingly, since there had been no relationship between the claimant and the defendant before the events which had led to money being mistakenly paid into the latter’s account in London, Article 10(3) applied with the result that the law governing the restitution claim was English, as the law of the country where the unjust enrichment had occurred.

It has further been accepted by the parties in one case²³⁷ that Article 10 is not applicable to claims in knowing receipt because these are not ‘pure unjust enrichment’ claims but claims relating to a wrong.

4.5. ROME II: CHOICE-OF-LAW RULES FOR *CULPA IN CONTRAHENDO*

The only case that applied Article 12 of Rome II is *Morgan Stanley & Co. International Plc v. China Haisheng Juice Holdings Co. Ltd.*²³⁸ After noting that it was common ground that English law applied to a contract, the court held that the law applicable to a party’s claim for damages for fraudulent misrepresentation inducing that party to enter the contract was likely to be English law.

5. CONCLUSION

The aim of this chapter was, firstly, to describe the legal and commercial contexts in which disputes concerning choice of law for contractual and non-contractual obligations have arisen before UK courts and, secondly, to outline the treatment by UK courts of some of the key general issues that are common to the Rome I and Rome II Regulations and of certain specific issues that are idiosyncratic to either Rome I or Rome II.

The two Regulations have been frequently applied by UK courts. On 1 April 2020, there had been 69 cases in which the courts applied the Regulations, 26 applying Rome I and 48 applying Rome II (as explained at fn. 76). There are many other cases where the courts mentioned or discussed the Regulations, without applying them. An interesting feature of the application of the

²³⁷ *FM Capital Partners Ltd v. Marino* [2018] EWHC 1768 (Comm) at [482], affirmed in [2020] EWCA Civ 245 without discussing choice of law; cf. *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm), [2019] ILPr 40 at [70], [71].

²³⁸ [2009] EWHC 2409 (Comm), [2010] 2 All ER (Comm) 514 at [36].

Regulations in the UK is that choice of law was often (in 65 per cent of cases applying Rome I and in 52 per cent of cases applying Rome II) relevant for the process of litigation, not for deciding the case on the substance. Many cases thus concerned service out of the jurisdiction and/or the *forum (non) conveniens* doctrine, applications for an anti-suit injunction, to strike out a statement of case, for summary judgment or interim injunction and interim third party debt orders. The legal context is crucial for understanding the practical operation of the two Regulations because in many 'procedural' choice-of-law cases, choice-of-law issues arose in an incidental or accidental manner and were dealt with under a lower standard of proof or on a summary basis. Because choice-of-law issues do not necessarily receive the same amount of scrutiny in 'procedural' choice-of-law cases as at trial, such cases should be read and used cautiously. With regard to the commercial context, the cases concerned various types of disputes and kinds of contracts and non-contractual obligations. Of particular note is the fact that the majority of cases under Rome II concerned claims for damages for personal injuries suffered abroad. Most of the remaining cases under Rome II concerned economic loss.

The chapter reveals that UK courts are well versed in the application of the two Regulations. They have been applying faithfully the principle of autonomous European interpretation, even when this meant a departure from the traditional common law approach (e.g. with respect to the choice-of-law treatment of the issue of assessment of damages), and have often referred to other EU private international law instruments, most importantly the Rome Convention and the Brussels I Regulation. UK courts have had the opportunity to apply many different provisions of the two Regulations and, generally speaking, have been doing that correctly. In particular, implied choice of law and the escape clauses have been resorted to sparingly, although the courts have been more willing to exercise judicial discretion when dealing with choice-of-law issues at the interlocutory stage or on an application to strike out a statement of case/for summary judgment.

This is not to say that the two Regulations have been applied perfectly. An issue of particular concern is the choice-of-law treatment of so-called statutory claims under Rome I. In the areas of employment and consumer law, claimants often base their claims on the provisions of domestic statutes. UK courts approach these claims as raising not choice-of-law issues, but issues of statutory construction, which approach results in the over-application of domestic law. Another peculiarity of the application of the two Regulations in UK courts in the treatment of foreign law. Although this is a procedural and evidentiary issue, the parties' decisions on whether to plead and prove foreign law can have substantive effects. Whenever the parties are in agreement with respect to how a particular choice-of-law rule of the Regulations should be applied or the parties choose not to plead and prove foreign law, the courts have

been willing to follow the parties' wishes. The rules on pleading and proof of foreign law have therefore been used as tools of party autonomy.

Overall, it can be concluded that the innovations introduced by the Rome I and Rome II Regulations have proved to be both satisfactory and successful. The Regulations have achieved greater legal certainty, foreseeability and uniformity in the area of choice of law for contractual and non-contractual obligations. The Rome I and Rome II Regulations have been applied on many occasions in the UK. UK courts have thus contributed significantly to the understanding of the provisions of two instruments. They will continue to do so even after the expiry of the Brexit implementation period because their provisions will continue to be applied indirectly in the UK, as UK domestic law by virtue of the European Union (Withdrawal) Act and the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations.