

CHOICE OF LAW FOR UNJUST ENRICHMENT/RESTITUTION AND THE ROME II REGULATION

ADELINE CHONG*

I. INTRODUCTION

After being considered as niche territory for a long period,¹ conflicts of law and restitution has provided a fertile ground for exposition in recent times.² Whilst some development on the jurisdictional front has occurred,³ choice of law has lagged behind somewhat as, in England at least, no one seemed to be quite sure what was or should be the choice of law rule for restitutionary claims.⁴ However, the Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (commonly known as the Rome II Regulation) has now entered into force and will apply from 11 January 2009.⁵

* Assistant Professor of Law, Singapore Management University. I would like to thank Professor James Fawcett for comments on an earlier draft of this article and Veronika Gaertner for her advice on civil law systems. All errors remain my own. The genesis of this paper is a paper that was presented at the *Law of Obligations III Conference: Justifying Remedies in the Law of Obligations*, TC Beirne School of Law, University of Queensland, July 2006. I am grateful to the British Academy for providing funding for me to participate in that conference.

¹ Examples of the older literature include: JG Collier, 'The Draft Convention and Restitution or Quasi-Contract' in K Lipstein, *Harmonisation of Private International Law by the EEC* (Institute of Advanced Legal Studies, London, 1978); K Zweigert and D Müller-Gindullis, 'Quasi-Contract' in K Lipstein (ed), *International Encyclopaedia of Comparative Law* (Tübingen, The Hague, 1974) Vol III; S Cohen, 'Quasi Contract and the Conflict of Laws' (1956) 31 LA Bar Bull 71; A Ehrenzweig, 'Restitution in the Conflict of Laws: Law and Reason Versus the Restatement Second' (1961) 36 NYLR 1298, HC Gutteridge and K Lipstein, 'Conflict of Law in Matters of Unjustifiable Enrichment' (1939) 7 Camb LJ 80.

² eg G Panagopoulos, *Restitution in Private International Law* (Hart Publishing, Oxford, 2000); F Rose (ed), *Restitution and the Conflict of Laws* (Mansfield Press, Oxford, 1995); TW Bennett, 'Choice of Law Rules in Claims of Unjust Enrichment' (1990) 39 ICLQ 136; J Blaikie, 'Unjust Enrichment in the Conflict of Laws' [1984] Jur Rev 112; S Lee, 'Choice of Law for Claims in Unjust Enrichment' (2002) 26 MULR 192; S Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20 UQLJ 1; R Leslie, 'Unjustified Enrichment in the Conflict of Laws' (1998) 2 Edinburgh LR 233; R Stevens, 'Restitution and the Rome Convention' (1997) 113 LQR 249; A Dickinson, 'Restitution and Incapacity: A Choice of Law Solution?' (1997) 5 RLR 66; A Dickinson, 'Restitution and the Conflict of Laws' [1996] LMCLQ 556, J Bird, 'Choice of Law and Restitution of Benefits Conferred Under a Void Contract' [1997] LMCLQ 182; J Bird, 'Choice of Law Rule for Priority Disputes in Relation to Shares' [1996] LMCLQ 57; J Bird, 'Bribes, Restitution and the Conflict of Laws' [1995] LMCLQ 198.

³ A new ground for service out of jurisdiction was introduced for restitutionary claims in CPR Rule 6.20(15). However, the Brussels I Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 does not contain a rule dealing specifically with restitution.

⁴ The restitutionary choice of law rule set out in editions of *Dicey, Morris and Collins* has always been prefaced with the word *semble*; cf Scotland: *Baring Brothers v Cunninghame District Council* [1997] CLC 108.

⁵ [2007] OJ L199/40.

Article 10 of the Rome II Regulation sets out a choice of law rule for unjust enrichment.

This article will focus on Article 10 and consider how well the Rome II Regulation caters for choice of law for restitution. Reference will be made to approaches that are or were taken in individual Member States and other countries in order to lay out the background in this area.⁶ The structure of this article will be as follows. The first question that is dealt with is whether the appropriate terminology was adopted by Article 10: should it be choice of law for ‘unjust enrichment’ or choice of law for ‘restitution’? Secondly, Article 10 adopts the framework of several rules pointing towards different connecting factors. These various specific choice of law rules will be considered in terms of their appropriateness and hierarchy towards each other. Thirdly, some specific problems concerning restitution for wrongs, proprietary restitution and *renvoi* will be examined.

II. A QUESTION OF TERMINOLOGY: CHOICE OF LAW FOR UNJUST ENRICHMENT VERSUS CHOICE OF LAW FOR RESTITUTION

One of the first issues that needs to be made clear is the correct label to be attached to the choice of law rules: are they choice of law rules for ‘unjust enrichment’ or choice of law rules for ‘restitution’? For example, *Dicey, Morris and Collins*’s Rule 230 appears in the chapter entitled ‘Restitution’ but from the language used it is clearly concerned specifically with claims arising to reverse unjust enrichment.⁷ Similarly, §221 of the *Restatement (Second) on Conflict of Laws* covers ‘actions for restitution’ but goes on to emphasise elements relating to the ‘enrichment’ as contacts to be considered when deriving the applicable law.⁸ Article 10 of the Rome II Regulation, on the other hand, is headed ‘Unjust enrichment’.

This issue raises a question of characterization and the correct label to be attached to the characterization category. An analysis of a few different domestic systems of restitution will be looked at, followed by a study of the various arguments for and against either label.

A. Comparative Domestic Laws of Restitution

It is never a good idea to be overly dependent on domestic requirements and classifications for conflicts purposes,⁹ but a quick overview of the state of the English domestic law of restitution provides a good idea of the hurdles faced

⁶ Especially German law (which is known to have a well-established domestic law of unjustified enrichment); Swiss law (which was looked at when the unjust enrichment choice of law provision in Rome II was being drafted; see *Explanatory Memorandum*, COM (2003) 427 final, 22); and US law (which clarifies the common law approach.

⁷ L Collins (ed), *Dicey, Morris and Collins: The Conflict of Laws* (14th edn, Sweet & Maxwell, London) (hereafter *Dicey, Morris and Collins*).

⁸ § 221(2).

⁹ *Re Bonacina* [1912] 2 Ch 394.

at the conflicts level.¹⁰ It is trite law that restitution is now no longer subsumed under the label of ‘quasi-contract’¹¹ but is instead recognised as being a separate branch of law.¹² That much is clear; the rest is regrettably murkier. The main problem in the domestic law of restitution that also impinges at the choice of law level is the uncertainty concerning its scope and taxonomy.¹³ Three different types of claims could be said to fall within the rubric of the ‘law of restitution’ under domestic law. First are claims relating to the conferment of a benefit on the defendant; examples being a claim for money had and received and a *quantum meruit*¹⁴ claim. Second would be actions which seek to prevent a wrongdoer from profiting from his or her wrong, such as an action for an account of profits pursuant to a breach of fiduciary duty. The third potential type of claim would be founded upon property rights; for example, a claim that money paid over pursuant to a mistake is impressed with a constructive trust. The first type of claim is universally recognised as being based on the reversal of unjust enrichment. The other two, which can be referred to as restitution for wrongs and proprietary restitution respectively, have a more cloudy basis. The question is whether these two latter forms of claims are also based on the principle of unjust enrichment.¹⁵ There are advocates on each side of the fence.¹⁶ On the one hand, the quadrationists hold the view that restitution is only ever about reversing unjust enrichment, whilst on the other hand the multi-causalists argue that restitution can arise from a number of events, one of which is unjust enrichment.¹⁷ So, for example, whilst quadrationists argue that the cause of action for restitution for wrongs is still

¹⁰ This must necessarily be a gross simplification of the complicated debates taking place between restitutionary scholars.

¹¹ A misunderstanding that the word ‘quasi’ meant ‘sort of contractual’ (instead of ‘not contractual’) led to restitutionary actions being thought as based on an implied promise of the recipient to return the enrichment: P Millett, ‘Proprietary Restitution’ in S Degeling and J Edelman, *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) 313.

¹² *Lipkin Gorman v Karpnale* [1991] AC 548.

¹³ In relation to Rule 230, the commentary in *Dicey, Morris and Collins* states that: ‘In some ways, the definition of the territory governed by this Rule is the most difficult aspect of choice of law for restitution’ (n 7) 1865, para 34-005.

¹⁴ A claim for reasonable payment for goods supplied or services rendered.

¹⁵ Some go further and question whether there is even a category of proprietary restitution: Lord Goff and G Jones, *Goff & Jones: The Law of Restitution* (7th edn, Sweet & Maxwell, London, 2007) 12, para 1-011; 92, para 2-007; cf *NABB Brothers Ltd v Lloyd’s Bank International (Guernsey) Ltd* [2005] EWHC 405, [2005] ILPr 506, paras 76–77.

¹⁶ Disparate views on the taxonomy of the law of restitution and the role to be played by the unjust enrichment principle can be found in, eg P Birks, *Unjust Enrichment* (2nd edn, OUP, Oxford, 2005); A Burrows, *The Law of Restitution* (2nd edn, Butterworths, 2002); S Hedley, *A Critical Introduction to Restitution* (Butterworths, London, 2001); G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP, Oxford, 2006); J Edelman, *Gain-Based Damages* (Hart Publishing, Oxford, 2002).

¹⁷ See Birks, ‘Unjust Enrichment and Wrongful Enrichment’ (2001) 79 *Texas LR* 1767 for a useful exposition on the schism between these two camps.

unjust enrichment,¹⁸ the multi-causalists argue that the cause of action is the wrong itself.¹⁹

A look at how other jurisdictions handle the same issues of taxonomy and role to be played by the unjust enrichment principle might help illuminate matters. After all, the law of obligations in civil law systems has long recognised a right to restitution on the basis of unjust enrichment²⁰ and the American Law Institute published the *Restatement of the Law of Restitution* in 1937. In contrast, unjust enrichment was only recognised as being part of English law in 1991.²¹

The role to be played by the unjust enrichment principle appears clearer under US law. The draft of the *Restatement (Third) of Restitution and Unjust Enrichment* classifies restitution of profits from a wrongful act as being based on unjust enrichment.²² The draft *Restatement* also recognises that restitution has a role to play in vindicating a claimant's proprietary rights.²³ Therefore, proprietary remedies such as a constructive trust,²⁴ subrogation and equitable lien are considered to be examples of remedies preventing the unjust enrichment of the claimant.

What about our continental cousins? It used to be said that a continental lawyer might regard himself as 'entering another world'²⁵ when approaching the common law conceptions of restitution, but this may no longer be quite true.²⁶ For example, the German law of unjustified enrichment can be divided into two main categories: *Leistungskonditionen* and *Eingriffskonditionen*.²⁷

¹⁸ eg Burrows (n 16) 5–7. Birks was originally of this view too but later changed his mind: see *An Introduction to the Law of Restitution* (revised edn, Clarendon Press, Oxford, 1989) 26 and later, 'Misnomer' in WR Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future* 14–15 and *Unjust Enrichment* (n 16) 12–16.

¹⁹ eg Virgo (n 16) 9–10, 425–428.

²⁰ B Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54 CLJ 100.

²¹ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Although see Virgo (n 16) 13 and in 'Reconstructing the Law of Restitution' (1996) 10 Trust Law International 20, 23–24, who argues that the case paradoxically was not truly concerned with unjust enrichment.

²² See Chapter 5. Note that the drafters prefer the term 'unjustified enrichment' as being the more accurate label for enrichment that lacks a legal basis than the open-ended connotations of 'unjust enrichment': § 1, comment b. All references to the draft *Restatement (Third) of Restitution and Unjust Enrichment* are based on the draft that is current through March 2008 and can be found on Westlaw.

²³ See § 4, comment and provisional (and informal) reporter's note.

²⁴ US law recognises the remedial constructive trust which could arise in response to unjust enrichment. See § 160 of the *Restatement of the Law of Restitution* (1937). (Although the remedial constructive trust could be imposed even where there has been no unjust enrichment: *Korkontzilas v Soulos* (1997) 146 DLR (4th) 214.) English law has yet to adopt this type of constructive trust: *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812.

²⁵ K Zweigert and H Kötz, *An Introduction to Comparative Law, Vol II: The Institutions of Private Law* (North-Holland Publishing Co, Oxford, 1977) 235.

²⁶ K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press, Oxford, 1998) 551.

²⁷ Some German scholars put forward more than two categories: see R Zimmermann and J du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' (1994) 2 RLR 14 at 25; Dickson (n 20) 121.

The former covers claims based on a transfer; for example, a loan contract that is rescinded by the bank on the grounds of fraud.²⁸ The latter is based on encroachment by the defendant, such as where a person lets his cattle graze in someone else's meadow.²⁹ One can surmise therefore that *Leistungskonditionen* is analogous to the English concept of unjust enrichment by subtraction whilst *Eingriffskonditionen* appears to approximate the English concept of restitution for wrongs.³⁰ However, in contrast with debates by English scholars as to whether restitution for wrongs is founded on the principle of unjust enrichment, it is accepted that this is so for the concept of *Eingriffskondition*.

It is usually said that civil law systems do not admit proprietary restitution.³¹ Yet in a comparative survey of restitution and unjust enrichment, it was noted that 'the interrelationship between purely personal unjust enrichment claims and proprietary actions is . . . subject to many debates even within most of the legal systems under review . . .'.³² The matter therefore may not be as clear-cut as believed. For example, if a vendor sells a painting pursuant to a void contract, title passes even if the underlying contract is defective under the German concept of *Abstraktionprinzip*. The vendor however can invoke §812(1) BGB, which is the general clause pertaining to rights arising from 'unjustified enrichment' and demand restitution of the benefit conferred, that is, ownership of the painting.³³ Under French domestic law, a claimant may also pursue an action based on unjust enrichment to retain or regain title to property which is in the defendant's hands. However, the fundamental difference with the common law is that these are *personal* claims³⁴ whereas the common law conception of proprietary restitution generally involves the claimant asserting a proprietary interest.³⁵ On French law, it is said that 'the reversion of title to the property in the transferor merely forms the background to a personal claim based on the other party's unjust enrichment . . . The idea of a claim *in rem* based on the principle of unjust enrichment would strike a French lawyer as a contradiction in terms.'³⁶ Yet, bar situations involving insolvency, the end result in common law and civil law systems would be the

²⁸ Zweigert and Kötz (n 26) 541.

²⁹ *ibid* 544.

³⁰ Dickson (n 20) 120.

³¹ Panagopoulos (n 2) 14, 61; G Gretton, 'Proprietary issues' in D Johnston and R Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 571.

³² P Schlechtriem, C Coen and R Hornung, 'Restitution and Unjust Enrichment in Europe' [2001] *European Rev of Pri Law* 377.

³³ Zweigert and Kötz (n 26) 542.

³⁴ *A ius in personam ad rem acquirendam*: Gretton (n 31) 579.

³⁵ Although there is debate as to whether that interest must be a pre-existing interest or one which arose to prevent unjust enrichment. See, eg W Swadling, 'A Claim in Restitution?' [1996] LMCLQ 63; A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412; RB Grantham and CEF Rickett, 'Restitution, Property and Ignorance—A Reply to Mr Swadling' [1996] LMCLQ 463; Birks, 'Misnomer' (n 18); Virgo (n 16) Chapter 20.

³⁶ J Bell, S Boyron and S Whittaker, *Principles of French Law* (OUP, Oxford, 1998) 402–403.

same in most cases. Moreover, *rei vindicatio* claims³⁷ found in civil law systems import 'restitutionary' principles despite being dealt with within the law of property.³⁸ The important point though is that *vindicatio* claims are not dependent on there being some unjust enrichment.

From the above cursory study of various domestic laws of restitution, it appears that a choice of law rule that purports to be for 'restitution' should not just seek to cover claims based on the principle of reversing unjust enrichment. It cannot be assumed that all 'restitutionary' claims will be based on the principle of unjust enrichment. In fact, given this uncertainty, it may well be that the more appropriate route is to have a choice of law rule for 'unjust enrichment' and not a choice of law rule for 'restitution'. This issue will now be examined.

B. Reasons Against a Choice of Law Rule for 'Restitution'

The fact that the label 'restitution' rather than 'unjust enrichment' came to be the more popular label for this area of law in the common law world could be said to be a result of historical happenstance. It was under the label of 'restitution' that 'the first serious attempts were made to overcome the problems of misdescription and misclassification which deprived unjust enrichment of its own place on the map of that law.'³⁹ This attempt started in the US in the 1930s and culminated in the *Restatement of Restitution*. However, there is now a concerted effort to redirect attention to the core of the subject, that is, the principle of unjust enrichment. The project to replace the original *Restatement of Restitution* restores the full title, *Restitution and Unjust Enrichment*, which was first proposed but eventually dropped from the official text published in 1937. The aim of this reinstatement is to emphasize 'that the subject matter encompasses an independent and coherent body of law, the law of unjust enrichment, and not simply the remedy of restitution.'⁴⁰

This brings us to the next point. Claims that are potentially discussed under the rubric of 'restitution', that is, claims to reverse unjust enrichment, claims for restitution for wrongs and claims for proprietary restitution, all have the common feature of depriving the defendant of a gain rather than compensating the claimant for loss suffered. In other words, 'restitution' is a term of art and the law of restitution can more accurately be defined as the area of law concerned with the 'award of a generic group of

³⁷ Such as § 985 of the BGB which allows an owner who has lost possession of his property to demand the property back from the possessor.

³⁸ T Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish, 2001) 229; Schlechtriem et al (n 32) 388; BS Marquesinis, W Lorenz, G Dannemann, *The German Law of Obligations, Volume I* (Clarendon Press, Oxford, 1997) 742.

³⁹ Birks (n 16) 4.

⁴⁰ ALI website: http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=46 (as on 4 August 2008).

remedies.⁴¹ When this definition is transposed onto the conflicts of law landscape, one problem is clear: choice of law rules are predicated upon causes of action, not remedies. If the law of restitution concerns remedies, then it is fallacious to speak of a choice of law rule for restitution. Remedies, according to conflicts orthodoxy, are categorized as being procedural in nature. Matters of procedure do not raise choice of law issues; they are always governed by the *lex fori*.⁴² In contrast, ‘unjust enrichment’ is not usually conflated with remedies.

In addition, ‘restitution’ as a term of art does not appear to be confined to the common law.⁴³ Under French law, a party to a loan, hire or deposit contract owes the other party an *obligation de restitution* but these obligations are *contractual* in nature.⁴⁴

Another problem with the ‘restitution’ label for choice of law purposes stems from the uncertainty of the scope of the subject. There is a growing body of opinion⁴⁵ that argues that claims for restitution for wrongs should be characterized in accordance with the ‘wrong’ and governed by the law that governs the wrong.⁴⁶ The cause of action is the ‘wrong’ itself, albeit with a restitutionary remedy. In a similar vein, claims for proprietary restitution should be characterized as being concerned with ‘property’ and governed by the property choice of law rules.⁴⁷ This approach accords with the multi-causalist argument that restitution for wrongs and proprietary restitution are not based on unjust enrichment.

C. Problems With and Reasons for a Choice of Law Rule for ‘Unjust Enrichment’

The above makes the case that having the category of ‘restitution’ for choice of law purposes is inappropriate. However, there are also detractors for the alternative; some argue that ‘unjust enrichment’ as a characterization category is not ideal either.

⁴¹ Virgo (n 16) 3. See also J Walker, *Castel & Walker: Canadian Conflict of Laws* (6th edn, LexisNexis Butterworths, Ontario, 2005) para 32-1.

⁴² *Phrantzes v Argenti* [1960] 2 QB 19.

⁴³ That ‘restitution’ is more of a ‘term of art’ is also recognised by the draft *Restatement (Third) of Restitution and Unjust Enrichment*, § 1, comment c: ‘most of what is covered by the law of restitution might more helpfully be called the law of unjust or unjustified enrichment.’

⁴⁴ Bell et al (n 36) 403. English courts have also used the word ‘restitution’ when referring to compensatory remedies: *Target Holdings Ltd v Redfern (a firm)* [1996] AC 421 (HL); *Swindle v Harrison* [1997] 4 All ER 705 (CA); see Virgo (n 16) 429.

⁴⁵ Influenced by multi-causalist arguments in domestic law.

⁴⁶ Panagopoulos (n 2) 81–94; J Bird, ‘Choice of Law’ in Rose (n 2) 71–76; R Stevens, ‘The Choice of Law Rules of Restitutionary Obligations’ in Rose (n 2) 187–191; TM Yeo, *Choice of Law for Equitable Doctrines* (OUP, Oxford, 2004) 319–320.

⁴⁷ R Stevens, ‘Resulting Trusts in the Conflict of Laws’ in P Birks and F Rose (eds), *Restitution and Equity, Vol 1, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000) 154; A Chong, ‘The Common Law Choice of Law Rules for Resulting and Constructive Trusts’ (2005) 54 ICLQ 855, 873–880.

One of the arguments put forward is that ‘unjust enrichment’ is merely a principle and not a cause of action in its own right.⁴⁸ There are two ways to counteract this. First, characterization at the conflicts level is not an exact science. The ‘thing’ that is characterized is variously said to be the cause of action,⁴⁹ issue at stake,⁵⁰ rule of law,⁵¹ or even a combination or variation of these at the same time.⁵² If unjust enrichment is merely a principle, no doubt this will not be fatal to its forming a ‘thing’ that can be characterized for conflicts purposes. The flexibility inherent in the characterization process should be able to accommodate putting cases which concern the unjust enrichment principle in a ‘box’ together.⁵³ Secondly, and compellingly, it is incorrect to state that unjust enrichment is merely a principle. A cause of action can be defined as a fact or combination of facts which gives rise to a right of action.⁵⁴ In order to succeed in an action for unjust enrichment, the claimant is not relying on any abstract proposition of doing justice as might be inferred from use of the word ‘unjust’.⁵⁵ For example, under English law, the claimant has to prove three component elements, namely: (i) that the defendant has been enriched; (ii) that the enrichment was at the claimant’s expense; (iii) that the enrichment was unjust.⁵⁶ All these elements are then defined in considerable detail and a claimant who proves these three elements is plainly relying on facts to establish his right to a remedy.⁵⁷ In fact, there have been judicial dicta referring to unjust enrichment as a cause of action.⁵⁸

A different argument that suggests that ‘unjust enrichment’ should not form a separate category for characterization purposes is made by Atiyah and

⁴⁸ S Pitel, ‘Characterisation of Unjust Enrichment in the Conflict of Laws’ in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart, Oxford and Portland, Oregon, 2004) 338.

⁴⁹ Most self-evidently since choice of law rules are divided up into different actions, such as contract, tort and property.

⁵⁰ *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.

⁵¹ C Forsyth, ‘Characterisation Revisited: An Essay in the Theory of the English Conflict of Laws’ (1998) 114 LQR 141.

⁵² In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, Staughton LJ sought to characterise the ‘issue’ and ‘question in this action’ (391H and 393G); Auld LJ spoke of charactering ‘the true issue or issues’ and ‘relevant rule of law’ (at 407B–C).

⁵³ This same flexibility would not at the same time be able to accommodate the problem of ‘restitution’ being considered as remedial because of the well-established rule that remedies are procedural in nature and therefore governed by the *lex fori*.

⁵⁴ *Read v Brown* (1889) 22 QBD 702 (CA) 131; *Coburn v Colledge* [1897] 1 WB 702 (CA); *Central Electricity Board v Halifax Corporation* [1963] AC 785 (HL), 800 (Lord Reid).

⁵⁵ Although there might have an element of the truth in this in the early days of the law of restitution. In *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 681, Lord Mansfield said: ‘... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.’ See also R Goff and G Jones, *The Law of Restitution* (1st edn, Sweet & Maxwell, London, 1966) 11–12.

⁵⁶ Under Canadian law, the third element is the absence of any juristic reason for the enrichment: *Pettkus v Becker* [1980] 2 SCR 834, (1980) 117 DLR (3d) 257 (SCC).

⁵⁷ See in general, Pitel (n 48) 341–344.

⁵⁸ *Foskett v McKeown* [2001] 1 AC 102, 129 (Lord Millet); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 375, 379 (Deane and Dawson JJ).

Hedley.⁵⁹ They argue that cases interpreted as being concerned with unjust enrichment can actually be accommodated within the well-established categories of contract, tort and property law.⁶⁰ Whatever the merits of this argument, the law has progressed to the point where unjust enrichment is recognized as being an independent branch of the law. Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* stated that ‘unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations.’⁶¹ Other jurisdictions as well evidently adhere to this view.⁶² For example, a comment found in the draft *Restatement (Third) of Restitution and Unjust Enrichment* affirms that the law of unjust enrichment ‘is itself a source of obligations, analogous in this respect to tort or contract’.⁶³ Another example is the German Civil Code, whose structure clearly reveals that unjustified enrichment forms an independent category in the law of obligations alongside contracts and torts.⁶⁴

In addition, from a comparative viewpoint, ‘unjust enrichment’ is a term which has ‘wide currency throughout Europe’.⁶⁵ The acceptance of the unjust enrichment principle in the domestic law of legal systems, not only within Europe but throughout the world,⁶⁶ in contrast with just a generalized right to restitution with different underlying bases, is a persuasive point in support of a category of ‘unjust enrichment’ rather than ‘restitution’ for conflicts purposes. Indeed, when one shifts to the choice of law level, the conclusion that unjust enrichment must be the correct label is borne out when one looks at the provisions in other countries who have generally adopted the terminology of unjust enrichment for choice of law purposes.⁶⁷ Article 10 of the Rome II Regulation thus is suitably headed ‘Unjust enrichment’.⁶⁸

⁵⁹ See Pitel (n 48) 338–339.

⁶⁰ PS Atiyah, *Essays on Contract* (Clarendon Press, Oxford, 1990) 48–56; PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 767–768; S Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell, London, 2001) 224–228, 231–232.

⁶¹ [1999] 1 AC 221, 227.

⁶² Especially continental ones with a Roman law heritage; see Schlechtriem et al (n 32) 378. ⁶³ § 1, comment h.

⁶⁵ Schlechtriem et al (n 32) 379.

⁶⁴ Markesinis et al (n 38) 711.

⁶⁶ A notable restitution scholar has said that that he is unaware of any legal system which has no law of unjust enrichment: R Stevens, ‘Choice of Law for Equity: Is it Possible?’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) 177.

⁶⁷ eg § 46 of the Austrian Federal Statute on Private International Law; Art 38 of the Introductory Law to the German Code of Civil Procedure (hereafter EGBGB); § 35 of the Hungarian Decree on Private International Law; Art 128 of the Swiss Federal Statute on Private International Law; Art 3125 of the Quebec Civil Code; Art 14 of the Japanese Horei 2007. Austria, Germany and Hungary will now be subject to the Rome II Regulation.

⁶⁸ However, claims falling under such an ‘unjust enrichment’ choice of law rule can still be termed as ‘restitutionary’ claims or claims concerning a ‘restitutionary’ obligation. The latter phrases will therefore be used below.

D. Conclusion on the Terminological Question

Article 10's choice of label is advantageous from the viewpoint of English lawyers as it would accord with both the quadrationist and multi-causalist camps. The quadrationists should approve as this characterization emphasises the centrality of the unjust enrichment principle within the law of restitution, whilst also appeasing the multi-causalists as they would presumably characterize restitution for wrongs in accordance with the particular wrong involved and proprietary restitution as property. Having said that, Recital 11 of the Rome II Regulation makes it clear that the concepts covered by the Regulation are subject to European autonomous meanings. This though may be difficult in view of the divergences in the domestic systems of restitution. For example, if the claim relates to the defendant using a machine belonging to the claimant, the German court would likely characterize the claim as lying in the unjust enrichment category⁶⁹ and hence within the scope of Article 10, whereas the English court, if it accepts the arguments of the multi-causalists, would characterize it in accordance with the 'wrong', that is, as a tortious claim and outside the scope of Article 10.⁷⁰ Given that the state of the English law of restitution is currently still precarious, it is all the more important that English courts take to heart Recital 11 and undertake the characterization process for restitutionary claims in a generous spirit pending guidance from the European Court of Justice. One is reminded of Briggs's counsel that:

'It is a commonplace that conceptual divisions in domestic law do not necessarily translate into the conflict of laws . . . To take a distinction which is struggling to define itself within the domestic law of restitution and then project this into the realm of choice of law may be unwise.'⁷¹

Although it may be concluded that Article 10 is labelled appropriately, this is by no means the end of the matter as far as unjust enrichment and conflicts of law is concerned. The next question is what should form its content. Coming up with choice of law rules for unjust enrichment is problematic as the formulation would have to satisfy the various views on what claims belong within the 'unjust enrichment' box. How well Article 10 of the Rome II Regulation achieves this will now be examined.

III. CHOICE OF LAW RULES FOR UNJUST ENRICHMENT: THE ROME II REGULATION

As mentioned above, the Rome II Regulation sets out definitive unjust enrichment choice of law rules for the first time in English law. However,

⁶⁹ B Dickson, 'The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law' (1987) 36 ICLQ 751, 776–777.

⁷⁰ See the Torts (Interference With Goods) Act 1977.

⁷¹ A Briggs, 'Restitution Meets the Conflict of Laws' [1995] RLR 94, 97; cited by Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 407. The quotation was in relation with whether a proprietary claim should be classified as restitutionary in nature.

there was early resistance on the inclusion of unjust enrichment within the scope of the Rome II Regulation. The UK Government and the House of Lords' Select Committee on European Union expressed qualms about the viability of including unjust enrichment within the scope of the Rome II Regulation.⁷² The latter thought that it was inadvisable to have a harmonized choice of law rule for unjust enrichment as this was an area of law which was in an 'embryonic state'.⁷³ The main concern was that since the law of restitution is still developing and there is no great uniformity between the substantive laws of Member States, it would be unwise and premature to attempt to harmonize the choice of law rules in this area at this point in time.⁷⁴ Indeed, the state of flux of this area of the law was acknowledged by the Commission in the *Explanatory Memorandum* attached to an earlier version of the proposal.⁷⁵ It was observed that:

'The difficulty is in laying down rules that are neither so precise that they cannot be applied in a Member State whose substantive law makes no distinction between the relevant hypotheses nor so general that they might be open to challenge as serving no obvious purpose.'⁷⁶

Yet, despite the real concerns mentioned above, an overview of individual Member States' unjust enrichment choice of law rules reveals a remarkable similarity across board. The same choice of law rules can be observed to crop up in different jurisdictions' formulations.⁷⁷ This suggests that although it may be a developing area of law⁷⁸ and there may be differences in the substantive detail of the various domestic laws of restitution/unjust enrichment, these factors may not be crucial at the choice of law level.

Article 10 has adopted the more popular forms of choice of law rules. It sets out choice of law rules in favour of the law governing the relationship between the parties,⁷⁹ the law of common habitual residence⁸⁰ and the law of the place of enrichment.⁸¹ There is then a displacement rule in favour of the law of closest connection.⁸² However, Article 14, which gives parties some autonomy to choose the applicable law, trumps the provisions set out in Article 10.

⁷² Lord Chancellor's Department, *Consultation Response: Preliminary draft proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (Response of the Government of the United Kingdom)*, paras 20–21; European Union Committee, *The Rome II Regulation—Report with Evidence (8th Report of Session 2003–04) (HL Paper 66)* (The Stationery Office Ltd, London, 2004). The *Eighth Report* is accessible online at: <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/66/6602.htm> (as on 4 August 2008).

⁷³ *ibid* paras 144, 199.

⁷⁴ See Lord Chancellor's Department (n 72); R Fentiman, *Written Evidence*, paras. 4.2, 9.24–9.29; EB Crawford, *Written Evidence*; CGJ Morse, *Written Evidence*, para 2 (all *Written Evidence* cited here and below are attached to the *Eighth Report* (n 72)).

⁷⁵ COM (2003) 427 final.

⁷⁷ Albeit the hierarchy of the rules may differ.

⁷⁸ This is more true of the common law than civil law.

⁸⁰ Article 10(2).

⁸² Article 10(4).

⁷⁶ *ibid* 21.

⁷⁹ Article 10(1).

⁸¹ Article 10(3).

Each of these choice of law rules will now be examined in hierarchical order. In addition to their appropriateness, the background and possible influences of each rule will be considered.

A. *The Recognition of Party Autonomy: Article 14*

The concept of party autonomy has long been recognised in the field of contract.⁸³ This is due to the principle of freedom of contract and the desirability of increasing certainty and efficiency in international contracts. Party autonomy, however, has had a slower rise in relation to non-contractual obligations even though the advantages of recognising this concept, such as certainty, predictability and avoiding litigation just on the issue of what law governs a claim, apply for both contractual and non-contractual obligations.

In so far as unjust enrichment is concerned, a number of commentators have in the past proposed that since the restitutionary obligation is imposed by law and is not of the parties' volition, party choice should not be relevant.⁸⁴ However, the fact that the restitutionary obligation is imposed by law is not a reason to say that the parties should not have the autonomy to choose the law governing the unjust enrichment claim. As has been pointed out by Brereton, frustration of a contract is not a matter of volition but is imposed by law; yet few would suggest that frustration is not a matter to be governed by the expressly chosen law of the contract.⁸⁵ This gives the lie to the notion that obligations imposed by law cannot be governed by a law chosen by the parties.

A limited form of party autonomy is recognised in the Swiss Federal Statute on Private International Law. Article 128(2) allows the parties to choose the *lex fori* if the unjust enrichment does not relate to a relationship between the parties. In relation to tort and delict, a more generous approach was taken by the Law Commission and the Scottish Law Commission who recommended that the parties' choice should not be restricted to the *lex fori* and that the choice can be made before or after the occurrence of the tort or delict.⁸⁶

⁸³ Article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1 (hereafter the Rome Convention; enacted into English law by the Contracts (Applicable Law) Act 1990). On party autonomy in contract, see in general P Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford, 1999).

⁸⁴ Gutteridge and Lipstein (n 1) 90; Blaikie (n 2) 123; J Morris, 'The Choice of Law Clause in Statutes' (1946) 62 LQR 170 at 183; Cohen (n 1) 74; PM North and JJ Fawcett, *Cheshire and North's Private International Law* (13th edn, Butterworths, London, 1999) (hereafter *Cheshire and North*) 685; P North, *Essays in Private International Law* (Clarendon Press, Oxford, 1993) 43; L Collins (ed), *Dicey and Morris on the Conflict of Laws* (12th edn, Sweet & Maxwell, London, 1993) 1473 (However, the editors' stance since has considerably softened: (n 7) 1871–72, para 34-016.

⁸⁵ P Brereton, 'Restitution and Contract' in Rose (n 2) 157.

⁸⁶ The Law Commission and the Scottish Law Commission, *Working Paper No 87 and Consultative Memorandum No 62* (HMSO, London, 1984) 265. However, this recommendation was not followed up in either the consequent Report (*Law Commission No 193, Scottish Law Commission No 129* (HMSO, London, 1990)), nor the Private International Law (Miscellaneous Provisions) Act 1995; J Carruthers and E Crawford, 'Variations on a Theme of Rome II.

This most liberal understanding of party autonomy is not readily accepted for non-contractual obligations. While there is growing awareness that restricting party choice to the *lex fori* may be overly parochial, most instruments, like Article 42 of the EGBGB, restrict autonomy to a choice made after the unjust enrichment occurs. The decision to allow a *post ante* but not *ex ante* choice seems to be based on the concern to protect weaker parties.⁸⁷ However, allowing a choice only after the dispute arises is also no guarantee that the weaker party is not taken advantage of.⁸⁸ For example, unless one can be sure that a less economically advantaged party has access to the same quality of legal advice which would be available to a wealthier party, there is no reason to suppose that a stronger party who has imposed his will on the weaker party prior to the dispute will not seek to do so after the dispute arises. In fact, the stronger party will be all the more anxious to do so. The weaker party may be better off relying on the standard public policy and mandatory rule provisions commonly found in choice of law instruments for protection.

The Rome II Regulation chooses a halfway house approach. Article 14(1)(a) allows the parties to choose the applicable law after the event giving rise to the ‘damage’⁸⁹ occurs. Article 14(1)(b) then provides that ‘where all the parties are pursuing a commercial activity’, a choice that is ‘freely negotiated before the event giving rise to the damage occurred’⁹⁰ will be given effect. There are two points to note about Article 14.⁹¹ First, the restriction to ‘commercial activity’ and emphasis on a ‘freely negotiated’ choice are aimed at safeguarding weaker parties’ interests.⁹² The provision probably achieves its objective as it would most clearly cover contracting parties who have later cause to sue in unjust enrichment.⁹³ If the contract falls within the scope of the Rome Convention, any choice made by the parties would have to pass the protectionist rules⁹⁴ set out in that Convention anyway, thus rendering a choice

Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part I’ (2005) 9 Edin LR 65.

⁸⁷ *Explanatory Memorandum*, COM (2003) 427, 22; P Hay, ‘From Rule-Orientation to “Approach” in German Conflicts Law: the Effect of the 1986 and 1999 Codifications’ (1999) 47 *Am J Comp Law* 633, 45; Carruthers and Crawford (n 86) 87–88.

⁸⁸ Carruthers and Crawford, *ibid* 88.

⁸⁹ Article 14 is a general provision covering torts/delicts and unjust enrichment claims. The word ‘damage’ is inappropriate for restitutionary claims as liability is not assessed in terms of ‘damage’, but in terms of the defendant’s enrichment. A more neutral term such as ‘non-contractual obligation’, which would cover both torts/delicts and unjust enrichment claims, should have been substituted.

⁹⁰ Note again the inappropriate use of the word ‘damage’.

⁹¹ Note that Article 14(1) does not apply to unfair competition and acts restricting free competition (Article 6(4)) and infringement of intellectual property rights (Article 8(3)).

⁹² *Explanatory Memorandum*, COM (2006) 83 final, 4.

⁹³ *ibid*. Cf A Rushworth and A Scott, ‘Rome II: Choice of Law For Non-Contractual Obligations’ [2008] LMCLQ 274, 293, who are doubtful of the utility of the requirement of ‘free negotiation’.

⁹⁴ Such as the rules on public policy (Article 16), mandatory rules (Article 7) and specific rules on consumers (Article 5) and employees (Article 6).

made to govern their contract 'safe' for use for any consequential unjust enrichment claim. The stress in Article 14 on free negotiation would help protect parties who do not have the benefit of the Rome Convention's safeguards.

Secondly, Article 14(1)(b) goes some way towards rectifying an anomaly inherent in the Commission's first draft which only allowed a choice made after, but not before, a dispute arises. However, under that first draft, an *ex ante* choice made to govern, say a contract between the parties, would be given effect under Article 10(1)⁹⁵ as the law governing the relationship between the parties to govern any consequential unjust enrichment claim if the contract later fails. In practical terms this means that a choice of law made *before* the dispute but which is not expressly stated to cover non-contractual obligations would be given effect in relation to an unjust enrichment claim, whereas an express indication in the contract that a law is chosen specifically to govern disputes arising from their transaction would not. The parties in the latter situation were being penalized for having the foresight to choose a law to govern disputes before any dispute arises. Thus the acceptance by the Commission that a choice may be made before a dispute arises is in the interest of autonomy of the parties and would avoid unnecessary litigation.⁹⁶

B. Law Governing the Relationship: Article 10(1)

In the absence of party autonomy, it is commonly accepted that the law governing the relationship should govern the action founded on unjust enrichment if the unjust enrichment claim arises out of a relationship between the parties.⁹⁷ The rationale for this is well put by Zweigert and Müller-Gindullis:

[T]he law which governs the move from the loser to the winner and which declares the shift of assets subject to its control to be unjustified is alone suitable to regulate, in addition, the necessity for and the manner of any adjustments to be made between the loser and the winner, and to pronounce on the object of the claim for unjustifiable enrichment.⁹⁸

The law governing the relationship should only govern the unjust enrichment claim when the relationship is the *sine qua non* of the restitutionary claim.⁹⁹ For example, if A has rendered services to B pursuant to a contract

⁹⁵ Previously Article 9(1), COM (2003) 427 final.

⁹⁶ See A Briggs, *Written Evidence*, para 9; R Fentiman, *Written Evidence*, para 9.30; D Wallis, *Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")*, A6-0211/2005 (27.6.2005) 17.

⁹⁷ Art 10(1) of the Rome II Regulation; § 46 of the Austrian Federal Statute on Private International Law; Art 38(1) of the German EGBGB; Art 128(1) of the Swiss Federal Statute on Private International Law; § 221(2)(a) of the *Restatement (Second) of Conflict of Laws* lists 'the place where a relationship between the parties was centred, provided that the receipt of the enrichment was substantially related to the relationship' as a contact which is, 'as to most issues, is given the greatest weight in determining the state of the applicable law' (comment d, 730).

⁹⁸ Zweigert and Müller-Gindullis (n 1) 11, para 20.

⁹⁹ A Briggs, *The Conflict of Laws* (OUP, Oxford, 2002) 197.

but B refuses payment, A could rescind the contract and pursue a *quantum meruit* claim¹⁰⁰ against B.¹⁰¹ The contract forms the basis upon which B is enriched and it is appropriate that the governing law of the contract governs the unjust enrichment claim. It is the law of closest connection to the claim.

The importance of there being a strong link between the relationship and the enrichment before this choice of law rule comes into play is recognized explicitly by some statutes. Article 128(1) of the Swiss Federal Statute on Private International Law states that '[c]laims for unjust enrichment are governed by the law that governs the actual or assumed legal relationship *by virtue of which* the enrichment occurred.'¹⁰² Article 38(1) of the German EGBGB also makes clear the importance of the connection between the relationship and the claim: 'Claims for unjust enrichment based on performance rendered are governed by the law applicable to the legal relationship with respect to which the performance was rendered.'¹⁰³ In contrast, the language used by Article 10(1) of the Rome II Regulation is more vague as it does not insist on a direct correlation between the relationship and the enrichment:

'If a non-contractual obligation arising out of unjust enrichment, . . . , *concerns* a relationship existing between the parties, . . . , that is *closely connected* with that unjust enrichment, it shall be governed by the law that governs that relationship.'¹⁰⁴

'Concerns' and 'closely connected' have been criticized as not making sufficiently clear the degree of closeness that is required between the relationship and the restitutionary obligation.¹⁰⁵ However, despite the potential ambiguity of the phrasing used,¹⁰⁶ Article 10(1) should also work to weed out claims which do not arise out of the relationship. For example, if A transfers assets to B pursuant to a void contract and B thereupon transfers the same asset to C, an argument could be made that the 'contract' between A and B is 'closely connected' to A's claim against C since but for that 'contract', C would not have been enriched. However, the wording of Article 10(1) refers to 'the relationship between the parties' so the relevant connecting factor here is the relationship between A and C, not between A and B. The putative governing law of the contract between A and B will not be relevant at all. To give another example,¹⁰⁷ where trust money is mistakenly paid to a third party recipient, the existence of the trust, although incidental to the main unjust

¹⁰⁰ Or alternatively sue for breach of contract.

¹⁰¹ *De Bernardy v Harding* (1853) 8 Exch 822.

¹⁰² Translation found in S Symeonides, 'The New Swiss Conflicts Codification: An Introduction' (1989) 37 Am J Comp Law 187 (the '*LSU Translation*') (emphasis added).

¹⁰³ Translation found in Hay (n 87) 650.

¹⁰⁴ Emphasis added.

¹⁰⁵ T Petch, 'The Rome II Regulation: An Update: Part 2' (2006) 21 JIBLR 509, 513.

¹⁰⁶ Recent cases on what falls within the scope of arbitration and jurisdiction cases have called for a liberal and commonsensical interpretation of phrases used: *Fiona Trust & Holding v Privalov* [2007] 4 All ER 951; *Leo Laboratories v Crompton BV* [2005] 2 IR 225.

¹⁰⁷ Panagopoulos (n 2) 150.

enrichment claim which may be brought against the third party, may be thought to supply the 'close connection' required by Article 10(1). But since one is concerned with the relationship between the parties to the action, and not the relationship between the parties to the trust, the law governing the latter relationship would not come into play under Article 10(1). These conclusions must be correct as the unjust enrichment claims do not have their roots in the 'contract' between A and B in the first example, or the trust in the second example.

One should therefore only rely on this choice of law rule when the relationship forms an essential component of the unjust enrichment claim and not where it merely forms the backdrop to the claim. This will have the advantage of ensuring that this choice of law rule only applies when the law governing the relationship is the law of closest connection to the claim.

There are other advantages in adopting this choice of law rule. Since the law governing the relationship would also govern matters prior to the restitutionary claim, consistency of result will be achieved by having the same law govern the restitutionary claim itself. This is because both stem from a single state of affairs.¹⁰⁸ In addition, it would be rational to conclude that if the parties had given any thought to the matter, they would have expected that the law governing their relationship would govern any matters arising from that relationship. Thus, the parties' legitimate expectations are preserved.

Another point that could be raised is that, to a certain extent, this choice of law rule is able to deal with the problem of uncertainty over the scope of the law of restitution and the unjust enrichment principle that was discussed above. This is done primarily by minimising characterization problems. To revert back to domestic English terminology, both quadratationists and multi-causalists accept that claims arising out of a failed contract would be classed as unjust enrichment claims. Dealing with these claims at the choice of law level is straightforward—they would be governed by the governing law of the contract in accordance with this choice of law rule. However, what about the more contentious categories of restitution for wrongs¹⁰⁹ and proprietary restitution?¹¹⁰ For example, a claim for an account of profits made due to a breach of fiduciary duty would be considered by some to be based on the reversal of unjust enrichment¹¹¹ and therefore fall within the scope of a choice of law rule for unjust enrichment. Where there is a pre-existing relationship between the parties, this choice of law rule would apply and point towards the law governing the relationship between the fiduciary and

¹⁰⁸ Although this justification, in itself, does not make a case for having the law governing the relationship govern the restitutionary consequences of that relationship. See A Chong, 'Choice of Law for Void Contracts and their Restitutionary Aftermath: The Putative Governing Law of the Contract' in P Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Martinus Nijhoff, Leiden/Boston, 2007) 178–181.

¹¹⁰ See Section IV(B).

¹⁰⁹ See Section IV(A).

¹¹¹ Burrows (n 16) 6.

principal.¹¹² Others however, would class this type of claim as an example of restitution for wrongs and one which is not based on the principle of unjust enrichment.¹¹³ In so far as the claim relates to breach of duties arising from voluntary undertakings within consensual relationships, Yeo suggests that the law governing the pre-existing relationship should also govern the claim for unauthorized profits. However, Yeo's suggestion is based on the premise that such claims are analogous to contractual claims and should thus in the first place be characterized as contractual.¹¹⁴ The contract choice of law rule points towards the law governing the relationship between the parties, that is, the governing law of the contract.¹¹⁵ Therefore the same result is reached irrespective of whether the claim is classed as being an unjust enrichment claim or as a contractual claim.

If we now turn towards the field of proprietary restitution, scholars such as Birks¹¹⁶ and Burrows¹¹⁷ argue that such claims are again based on the unjust enrichment principle. Virgo, on the other hand, thinks claims for proprietary restitution are based on the law of property and the principle of vindication of property rights.¹¹⁸ If one transposes these arguments to a choice of law level, Virgo's views would lead to characterizing the claim as a property one which is governed by the property choice of law rule. So if the claimant is arguing that land in Canada is held on a constructive trust for him, Canadian law would apply as the *lex situs* in accordance with the property choice of law rule.¹¹⁹ On Birks's and Burrows's alternative viewpoint, the claim should presumably be characterized as being an unjust enrichment claim for conflicts purposes. It is suggested that Canadian law would also be the law governing the relationship between the parties for the particular issue of whether the land is held on trust for the claimant. Even if there is, say, a contract between the two parties relating to the land that is governed by some other law, arguably, since the land is situated in Canada, Canadian law trumps the governing law of the contract because the precise issue at stake relates to title and ownership of the land. Canadian law is the law which would govern the rights and obligations of the parties towards each other *vis-à-vis* the land, that is, Canadian law is the law that governs the relationship between the parties on this particular issue. Thus, under either route, Canadian law arguably should end up governing the claim.¹²⁰

Therefore, having this choice of law rule in a restitutionary choice of law formulation helps to minimise characterization problems. It would not matter

¹¹² *Arab Monetary Fund v Hashim* 15 June 1994 (Chadwick J); *Kuwait Oil Tanker SAK v Al Bader* (No 3) [2000] 2 All ER (Comm) 271 (CA); *BJ McAdams Inc v Winston M Boggs* 439 F Supp 738. See also *Att-Gen for England and Wales v R* [2002] 2 NZLR 91 (CA Wellington) [29]–[30].

¹¹⁴ Yeo (n 46) 215–235.

¹¹⁵ Articles 3 and 4 of the Rome Convention.

¹¹⁶ Birks (n 16) 32–38, Chapter 8.

¹¹⁷ Burrows (n 16) 60–75 and (n 35).

¹¹⁸ Virgo (n 16) 11–17, Chapter 20.

¹¹⁹ *Nelson v Bridport* (1846) 8 Beav 547.

¹²⁰ On the problem of the exclusion of *renvoi* from the Rome II Regulation, see Section IV(C).

whether the claim is characterised as being contractual or restitutionary, proprietary or restitutionary, as the same choice of law rule would apply. In view of its myriad advantages, it is unsurprising that this choice of law rule is given primacy in Article 10¹²¹ as Articles 10(2) and 10(3) only apply if there is no pre-existing relationship.

C. Law of Common Habitual Residence of the Parties: Article 10(2)

Article 10(2) of the Rome II Regulation provides that where the claim does not concern a relationship between the parties, if ‘the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.’

This choice of law rule is commonly found in tort choice of law. Article 4(2) of the Rome II Regulation sets out the same choice of law rule for tortious cases but examples can be found in earlier statutes. Article 133(1) of the Swiss Federal Statute on Private International Law Statute, and Article 40(2) of the German EGBGB¹²² and §32(3) of the Hungarian Decree on Private International Law set out tort choice of law rules in favour of the law of common habitual residence¹²³ or common domicile.¹²⁴

Although there have not been as many explicit provisions in favour of the common personal law of the parties in the field of unjust enrichment as for tort, some statutes provide for the application of the law of common habitual residence in a more indirect manner. Section 221(2)(d) of the *Restatement (Second) of Conflict of Laws* lists the ‘domicil, residence, nationality, place of incorporation and place of business of the parties’ as a contact to be taken into account for choice of law for restitutionary actions and the commentary states that ‘the fact that the domicil and place of business of all parties are grouped in a single state is an important factor to be considered in determining the state of the applicable law.’¹²⁵ After setting out primary choice of law rules in favour of other laws,¹²⁶ Article 41(1) of the German EGBGB provides a displacement rule in favour of the law of closest connection.¹²⁷ The fact that both parties are habitually resident in the same place at the time the causal facts took place is listed as an indication that there might be a substantially closer

¹²¹ It also finds favour in many statutory (see n 97 above) and academic formulations (*Dicey, Morris and Collins*’s Rule 230(2)(a) (law governing the contract) (n 7) 1863, para 34R-001; Bird (n 46) 135, section 1(a) and (b); Brereton (n 85) (law governing the contract); Zweigert and Müller-Gindullis (n 1) 11, para 20).

¹²² This has its roots in rather parochial 1942 Nazi statute providing for the application of German law to torts committed between German citizens whilst abroad. See M Reimann, ‘Codifying Torts Conflicts: The 1999 German Legislation in Comparative Perspective’ (1999–2000) 60 *La L Rev* 1297, 1301, fn 18.

¹²³ Switzerland and Germany.

¹²⁵ Comment d, 733.

¹²⁴ Hungary.

¹²⁶ Article 38 EGBGB.

¹²⁷ A displacement rule in favour of the law of closest connection will be examined separately below; see section III(E).

connection to the unjust enrichment claim than the law designated by the primary choice of law rules.¹²⁸ The explicit provision for the law of common habitual residence for claims for unjust enrichment in the Rome II Regulation is therefore an unsurprising progression of status.

It might be speculated that the rationale for this choice of law rule stems from the American governmental interest doctrine and the series of tort cases where the parties' common home state overrode the *lex loci delicti*.¹²⁹ *Babcock v Jackson*¹³⁰ concerned resident New Yorkers who had an accident in Ontario. In an action by the passenger against the driver for injuries suffered during that accident, the court held that New York law had a greater interest in being applied than Ontario law. What was at issue in *Babcock* was the extent of the driver's liability towards her passenger. Ontario had a 'guest' statute under which a driver was not liable for injuries caused to gratuitous passengers, whilst New York had no such law. Since the parties were both from New York, the purposes of the Ontario 'guest' statute, amongst which were to protect Ontario drivers and insurance companies, were not germane; whereas New York law, New York being the place where the guest–host relationship arose and the start point and supposed end point of the trip, had a greater claim to be applied. So New York law was not applicable merely because New York was the home state of both parties; it was applicable because it was thought to provide the 'centre of gravity' for the particular issue at stake.¹³¹ There is no mechanism for this type of sophisticated analysis under Article 10(2) of the Rome II Regulation as it merely sets out a rigid rule in favour of the law of common habitual residence outside relationship-based claims.¹³²

The rationale for this choice of law rule therefore cannot be that the law of the common habitual residence has the closer connection to the claim¹³³ merely because both parties reside in that jurisdiction. Its rationale must lie in more simple and uncomplicated reasons. For one, the fact that the parties are habitually resident in the same place means that trial will likely take place there too. The convenience of the court applying its own law need hardly be stated. For another, since the parties come from the same environment, they would likely have the same or similar expectations¹³⁴ and it therefore makes sense that their common law would govern any claims arising between them.

¹²⁸ Article 41(2)(2). This covers claims that are not based on performance.

¹²⁹ Petch (n 105) 455; 'Editorial comments: Sometimes it takes thirty years and even more . . . ' (2007) 44 CMLR 1567, 1571.

¹³⁰ 12 NY 2d 473, 191 NE 2d 279, 240 NYS 2d 743(1963). The case is said to be the starting point of the American choice of law revolution: *Cheshire and North* (n 84) 606.

¹³¹ It was conceded by Fuld J that the *lex loci delicti* might be more appropriate if the issue at stake had been whether the driver exercised due care whilst driving: 12 NY 2d 473, 483.

¹³² A 'centre of gravity'-based analysis would be possible under the German EGBGB since the common habitual residence of the parties is only relevant under the displacement rule of closest connection.

¹³³ Although the rule of course has the closer connection to the *parties*.

¹³⁴ Reimann (n 122) 1301.

Nevertheless, there are objections against a choice of law rule prefaced on the personal law of the parties. The main complaint is that it leads to fortuitous results.¹³⁵ This form of choice of law rule used to be directed towards the common nationality of the parties¹³⁶ before being expanded to encompass common residence.¹³⁷ The criticism of fortuity has credence if common nationality were to be the connecting factor;¹³⁸ however, the modern focus on the place where the parties normally reside and live means that there is the likelihood that this choice of law rule would result in a court applying its own law and protecting parties' shared expectations as mentioned above. These practical advantages outweigh the fortuity point.

Having said that, the law of common habitual residence must play second fiddle to the law governing the relationship if the enrichment arises out of a relationship between the parties. The former, for the reasons stated above, is the more appropriate choice of law rule in relationship-based cases. The hierarchy adopted in the Rome II Regulation is correct.

D. A Territorially-Based Choice of Law Rule: Article 10(3)

There has always been considerable enthusiasm for a territorially based rule for at least some, if not all, unjust enrichment claims. In earlier choice of law proposals, a territorially based choice of law rule for unjust enrichment was based on an analogy with the *lex loci delicti* rule for torts and the vested rights theory.¹³⁹ This analogy has been shown to be inappropriate.¹⁴⁰ Even though both unjust enrichment and tort involve non-consensual legal consequences attaching to factual events,¹⁴¹ unjust enrichment arises by operation of law and not from acts or omissions as torts do.¹⁴² In addition, for some multi-causalists at least, unjust enrichment is not wrong-based¹⁴³ and therefore is not focused on the defendant's acts. Furthermore, the vested rights theory has now been largely discredited.¹⁴⁴

Nevertheless, the rejection of the vested rights theory and the tortious analogy does not mean that a territorially based rule should be summarily dismissed; other grounds can be found on which to substantiate support for such a rule. The problem is that there are three main potential *loci*: the place of

¹³⁵ Bird (n 46) 108; Zweigert and Müller-Gindullis (n 1) 13–14, para 25.

¹³⁶ eg Art 31(2) of the Polish Law on Private International Law of 12 November 1965 and earlier versions of the German EGBGB rule; see Hay (n 87) 637.

¹³⁷ Hay, *ibid* (in relation to the German EGBGB).

¹³⁸ Since one can still be a national of a country even after having long left that country. There is also the problem of dual-nationality.

¹³⁹ See Cohen (n 1) 78; Collier (n 1) 85.

¹⁴⁰ See Collier, *ibid* 83–84; Zweigert and Müller-Gindullis (n 1) 7, para 13; cf Panagopoulos (n 2) 160, 164.

¹⁴¹ Collier (n 1) 83.

¹⁴² L Smith, 'The Province of the Law of Restitution' (1992) 71 *Can Bar Rev* 672, 683; Bird (n 46) 72, 112.

¹⁴³ See *Cheshire and North* (n 84) 20–22.

the act giving rise to the enrichment, the place of loss, and the place of enrichment.

The law of the place of loss was principally proposed by Cohen¹⁴⁵ and has few other supporters. There are more authorities in favour of the law of the place of the act and the law of the place of enrichment. The relevant draft provision in the Rome II Regulation vacillated between these two options. In the Commission's first draft, the choice of law provision was in favour of 'the law of the country in which the enrichment takes place.'¹⁴⁶ However, Wallis, the Rapporteur for the European Parliament's Committee on Legal Affairs, argued against application of the law of the place of enrichment on the grounds that the place of enrichment could be entirely fortuitous; for example, the applicable law would then be dependent upon where a fraudster chooses to open the bank account to which monies are fraudulently paid over.¹⁴⁷ Instead, she advocated application of the law of the country in which the event giving rise to the unjust enrichment substantially occurred. Although the Commission indicated that it accepted this amendment,¹⁴⁸ Article 10(3) of the final version of Rome II seems to reinstate the Commission's first draft's preference and is worded in terms of 'the law of the country in which the unjust enrichment took place.'¹⁴⁹ The question to be considered is whether the better option has been chosen.

1. The options: the law of the place of the act or the law of the place of enrichment?

While Article 13 of the EEC Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations is in favour of 'the law of the country in which that event occurred',¹⁵⁰ there is much more support for the law of the place of enrichment. Section 46 of the Austrian Federal Statute of Private International Law, Article 38(3) of the German EGBGB, § 35 of the Hungarian Decree on Private International Law, Article 128(2) of the Swiss Federal Statute on Private International Law, *Dacey, Morris and Collins's* Rule 230(2)(c), § 453 of the *Restatement (First) of Conflict of Laws*, all opt for the law of the place of enrichment.¹⁵¹ In addition, although the *Restatement (Second) Conflict of Laws* lists both 'the place where

¹⁴⁵ Cohen (n 1) depends on the (inappropriate) analogy with tort, the fact that the label 'restitution' emphasises the person who has suffered the loss, and that the place of loss will seldom have only a casual connection with the transaction giving rise to the restitutionary obligation.

¹⁴⁶ Article 9(3), COM (2003) 427 final.

¹⁴⁷ Wallis (n 96) 26.

¹⁴⁸ COM (2006) 83 final, 17.

¹⁴⁹ [2007] L199/40 (31.7.2007). It seems reasonably clear that this means the law of the place of enrichment.

¹⁵⁰ This Convention never came to fruition. Attention was thereafter focussed on contractual obligations the result of which was the Rome Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1. This was enacted into English law by the Contracts (Applicable Law) Act 1990.

¹⁵¹ So too does Canadian law; (n 41) 32-1.

the act conferring the benefit or enrichment was done'¹⁵² and 'the place where the benefit or enrichment was received'¹⁵³ as factors to be taken into account when trying to determine the applicable law, the commentary reveals that priority is to be given to the latter.¹⁵⁴

This prevailing of the law of the place of enrichment over the law of the place of the act can be justified. A choice of law rule in favour of the law of the place of the act causing the unjust enrichment suffers from several flaws. First, it has been pointed out that liability in unjust enrichment derives from the effect of an act and not the act itself. It is the fact of enrichment which gives rise to a claim for unjust enrichment.¹⁵⁵ Thus, even though the act is typically one of the most significant elements of the events leading to a claim, it is not as significant an element as the defendant's enrichment. This leads to the second point, which is that since the emphasis of an action in unjust enrichment is not on the act but on the defendant's enrichment, the place of the act will not normally be closely connected with the obligation to reverse an unjust enrichment.¹⁵⁶ In addition, this choice of law rule would not strictly cover an obligation which arises as a result of an omission. This could possibly be circumvented as most omissions could be attributed a *locus* which could be considered as the counterpart of the *locus* of an act giving rise to the enrichment. For example, an omission to abide by certain formalities would be situated in the country where those formalities should have been observed. However, an obligation which is not based on an event or non-event is more problematic. Thus, it is not clear how contractual incapacity would work under this choice of law rule.¹⁵⁷

2. *The preferred choice of law rule: the law of the place of enrichment*

The above has argued against adopting the law of the place of the act. Nevertheless, a choice of law rule in favour of the law of the place of enrichment is also not without its critics. Some of the criticisms are on the basis that claims for unjust enrichment commonly arise when the parties are or assume they are in a legal relationship, therefore the law governing the legal relationship is preferable as the transfer of assets would have taken place based on the relationship.¹⁵⁸ This can be dealt with easily; the law of the place of enrichment should be the choice of law rule where there is no prior relationship between the parties. Where there is such a relationship and the unjust enrichment claim arises from that relationship, the law governing the relationship should govern. This is the approach adopted by Article 10.

However, not all are satisfied even after confining the law of the place of enrichment to 'non-relational restitution'.¹⁵⁹ Although Rule 230(2)(c) of

¹⁵² § 221(2)(c).

¹⁵³ § 221(2)(b).

¹⁵⁴ Comment d, 732–733.

¹⁵⁵ Collier (n 1) 86; Zweigert and Müller-Gindullis (n 1) 7, para 13.

¹⁵⁶ Bird (n 46) 111.

¹⁵⁷ Bennett (n 2) 148.

¹⁵⁸ Zweigert and Müller-Gindullis (n 1) 7, para 14.

¹⁵⁹ Briggs (n 99) 198.

Dicey, Morris and Collins has received judicial approval,¹⁶⁰ the commentary notes that sub-rule 2(c) only represents a starting point for the identification of the proper law of the restitutionary obligation outside cases falling within sub-rules 2(a) and (b). This ‘lukewarm’¹⁶¹ support is also echoed by Collins J in *Barros Mattos* where he stated that it only a ‘tentative formulation’ and not to be treated as a ‘free-standing rule’ to be mechanically applied.¹⁶²

The unenthusiastic reception towards a law of the place of enrichment rule is rather surprising given that many of its perceived flaws can be ironed out, particularly if the definition of ‘place of enrichment’ is further refined. The most commonly cited disadvantages are that it may be fortuitous and have little connection with the unjust enrichment claim,¹⁶³ be difficult to identify¹⁶⁴ and open to manipulation by the defendant.¹⁶⁵ The first point can be countered: since the heart of unjust enrichment actions is the defendant’s enrichment, the place of enrichment, even if fortuitous, will be one of the most appropriate connecting factors to consider as it goes to the core of the action. Moreover, it is said that:

‘given that the liability is imposed on the defendant involuntarily, it is preferable to found it on a law which is connected with him; the law of the place of the defendant’s enrichment is ... closely connected with the defendant ...’¹⁶⁶

The second criticism, that the place of enrichment is difficult to identify, is particularly acute in relation to electronic transfers of funds and e-commerce transactions. When the funds have passed through more than one jurisdiction, there could be more than one potential location of enrichment. For example, if money was mistakenly transferred to A’s bank account in New York, but A withdraws the money in the London branch of the bank, which is the place of enrichment? Is it the place of immediate enrichment (New York) or the place of ultimate enrichment (London)? One could look at the circumstances of each case to determine whether the place of ultimate or immediate enrichment provides the closest connection to the restitutionary obligation.¹⁶⁷ However, when the facts are quite evenly balanced between both places, the

¹⁶⁰ *Chase Manhattan Bank NA v Israel-British Bank* [1981] Ch 105; *Re Jorgia* [1988] 1 WLR 484; [1988] 2 All ER 328; *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717, reversed on other grounds [1994] 2 All ER 685 (CA); *Kuwait Oil Tanker Co SAK v Al Bader* (unreported, 16 November 1998) affirmed [2000] All ER (Comm) 271; *Hong Kong and Shanghai Banking Corp Ltd v United Overseas Bank* [1992] 2 Sing LR 495; *Cofacredit v morris* [2007] 2 BCLC 99.

¹⁶¹ Burrows (n 16) 617.

¹⁶² *Barros Mattos Junior v MacDaniels Ltd* [2005] EWHC 1323 (Ch D), [2005] ILPr 630, at [117]. See also [86]–[105].

¹⁶³ Bird (n 46) 114; Blaikie (n 2) 120; Brereton (n 85) 152; Zweigert and Müller-Gindullis (n 1) 7, para 14; Morris (n 84) 182; Wallis (n 96) 26.

¹⁶⁴ Bennett (n 2) 149; Bird (n 46) 114; Zweigert and Müller-Gindullis (n 1) 7, para 14.

¹⁶⁵ Bird (n 46) 110; Briggs (n 99) 198. In *Arab Monetary Fund v Hashim* [1993] 1 Lloyd’s Rep 543, 566, the plaintiff suggested that the defendant had deliberately arranged the place of enrichment to be outside Abu Dhabi.

¹⁶⁶ Bird (n 46) 114.
¹⁶⁷ *Dicey, Morris and Collins* (n 7) 1889, para 34-052.

decision to be made by the court would be difficult and, some would argue, arbitrary.¹⁶⁸

The problem with advocating the place of ultimate enrichment is that no place can be considered as the place of ultimate enrichment until the funds are settled in one jurisdiction, or the defendant withdraws the funds in a certain jurisdiction. Hwang JC gives this example:

‘If the fraudster is in the process of transferring the misappropriated funds from country A to country D using countries B and C as intermediate points, what happens if the funds are attached by a court order in country C? This would not be the country of immediate benefit (which would be country B) nor the country of ultimate enrichment (which is intended to be country D) unless it could be argued that country C has become the place of ultimate enrichment by virtue of the court order. Further difficulties would arise with this latter argument if the court order in country C prevents the fraudster from receiving the funds in country C by (say) freezing them in the hands of the bank—where then would the enrichment be?’¹⁶⁹

It is suggested that the place of immediate enrichment would be a better option for the following reasons.¹⁷⁰ First, it is more easily identifiable than the place of ultimate enrichment in situations such as that described by Hwang JC, since the identification process does not hinge on any further transfers that may be instigated by the defendant. Secondly, an analogy can be drawn with other provisions. For tortious and delictual claims, Article 4(1) of the Rome II Regulation favours the ‘law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur’. Moreover, there is Article 5(3) of the Brussels I Regulation which gives jurisdiction to the courts of the place where the harmful event occurred in matters relating to tort. ‘The place where the harmful event occurred’ has been interpreted to cover the place where the direct damage occurs and not the place where indirect damage occurs.¹⁷¹ Thirdly, it does appear that under English law at least, immediate enrichment would be

¹⁶⁸ Panagopoulos (n 2) 137–138. This is also one of the reasons why Briggs, n 99 above, p. 198, rejects a place of enrichment choice of law rule: ‘a rule which is based on this matter of happenstance is hard to promote.’

¹⁶⁹ *Hongkong and Shanghai Banking Corp v United Overseas Bank* [1992] 2 SLR 495, 500–501.

¹⁷⁰ *Bowling v Cox* [1926] AC 751 (PC); cf *Hongkong and Shanghai Banking Corp v United Overseas Bank* [1992] 2 SLR 495, where Singaporean law as the law of the place of ultimate enrichment was applied based on the interpretation that *Dacey, Morris and Collins’s* Rule 230(2)(c) referred to the place of ultimate enrichment. However, it must be noted that Hwang JC observed (501) that on one view, Singapore could be regarded as being the only place of enrichment, in which case no choice was made between the places of ultimate or immediate enrichment.

¹⁷¹ *Dumez France and Tracoba v Hessische Landesbank* Case 220/88 [1990] ECR 49; *Marinari v Lloyds Bank plc (Zubaidi Trading Co Intervener)* Case C-364/93 [1996] QB 217.

enough to found the legal cause of action.¹⁷² Fourthly, while both the places of immediate and ultimate enrichment are subject to a risk of the third criticism listed above, namely, manipulation by one of the parties to ensure that receipt takes place in a country whose law is favourable to that party, the place of immediate enrichment is less amenable, in most cases, to manipulation. This is because the payor has to agree to send the funds to a particular place and the fraudster has to agree to receive the funds, at least initially, in that same place. This last point also illustrates that the law of the place of immediate enrichment would be less fortuitous since the initial place of transfer needs at least to be agreed upon by two parties. In contrast, if one prefers the place of ultimate enrichment, the fraudster could transfer funds from one jurisdiction to another at will and the place of ultimate enrichment could depend upon where and when the funds are withdrawn or a freezing order is obtained.

This conclusion, that the law of the place of immediate enrichment is preferable to the law of the place of ultimate enrichment, is also borne out when one looks at enrichment in e-commerce transactions. For example, how do you identify the place of enrichment if credit card details are provided to the incorrect party over the internet and payment is taken from the card? Fawcett, Harris and Bridge suggest that enrichment takes place wherever the payee's bank account is situated. So, if a French credit card company pays money into the payee's bank account in Germany, the payee is enriched in Germany and German law governs the consequential unjust enrichment claim even if the payee is resident in and ultimately withdraws the money in England.¹⁷³

Therefore, it is suggested that the final version of Article 10(3) of the Rome II Regulation goes for the correct choice of law option. The law of the place of enrichment provides a satisfactory choice of law rule for non-relational restitutionary claims.¹⁷⁴ Moreover, references to the law of the place of

¹⁷² In the case of electronic transfers of money, the recipient is enriched by acquiring a chose in action in the nature of a debt owed to him by the bank. This is obviously the case if title passed in the transaction, as will normally be the case with money (as title to money passes on delivery). In these circumstances, the recipient is clearly benefited by the bank's crediting of his account.

¹⁷³ J Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (OUP, Oxford, 2005) 1313. They also argue that where a service provider has supplied digitized products to the wrong person, the state where the recipient downloads the product is the place of enrichment: 1313–1314.

¹⁷⁴ So, given that the defendant (secondary recipient) in *Barros Mattos Junior v MacDaniels Ltd* [2005] EWHC 1323 (Ch D), [2005] ILPr 630, would have been immediately enriched in Switzerland when the disputed funds were credited into his bank account there, Swiss law should straightforwardly have been identified as the applicable law of the restitutionary claim notwithstanding the defendant's residence in Nigeria or the fact that the transactions between the primary recipient and the defendant took place in Nigeria. This conclusion is supported by the fact that the cause of action would have arisen immediately once the defendant's bank account in Switzerland was credited. That said, the factual ties with Nigeria were thought to be important by Collins J and it may be Nigerian law would be of relevance in establishing the defendant's degree of knowledge. But the extent of the role to be played by Nigerian law would be something for Swiss law to decide (in the sense of establishing the threshold of knowledge and not in the sense of a renvoi by Swiss law to Nigerian law).

enrichment should always be understood as referring to the law of the place of immediate enrichment. It is the rule which would do justice in most cases and there are enough reasons in its favour to be able to discard the practice of having to consider whether the place of immediate or ultimate enrichment provide the closer connection to the claim.¹⁷⁵ However, although it has been held that the law of the place of enrichment should govern wrongs-based claims¹⁷⁶ and assertions that property is held on a constructive trust,¹⁷⁷ it is suggested that better approaches exist for these types of claims.¹⁷⁸ This will be dealt with below.¹⁷⁹

*E. Displacement Rule in Favour of the Law of Closest Connection:
Article 10(4)*

Most choice of law rules seek to identify a connecting factor which will point towards the law of closest connection to the claim.¹⁸⁰ So, for example, torts are generally thought to be most closely connected to the place where the tort occurred; hence the predominance of the *lex loci delicti* rule for torts. Unjust enrichment claims which arise out of a relationship are seen to be most closely connected to that relationship and therefore, as seen above, the law governing the relationship is generally accepted to be the choice of law rule for this particular situation.

Some go further and think that the law of closest connection should be the *only* choice of law rule for unjust enrichment claims.¹⁸¹ This suggestion usually takes the form of a proper law of the restitutionary obligation. Lord Penrose in *Baring Brothers v Cunninghame District Council* held that first, the restitutionary obligation is governed by the proper law of that obligation and,

¹⁷⁵ The example given in *Dacey, Morris and Collins* of a situation where the law of the place of ultimate enrichment applies instead of the law of the place of immediate enrichment is where payment in made at the Paris branch of an English bank to be credited to the account of X at the London branch of the same bank. The proper law here is English law, which is identified as the law of the place of ultimate enrichment: 1889, para 34-052. However, surely English law is actually the law of the place of immediate enrichment given that X's enrichment only arises when the money is actually credited to his account in England?

¹⁷⁶ *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717, reversed on other grounds [1994] 2 All ER 685 (CA); *Kuwait Oil Tanker Co SAK v Al Bader* (unreported, 16 November 1998) affirmed [2000] All ER (Comm) 271; *Hong Kong and Shanghai Banking Corp Ltd v United Overseas Bank* [1992] 2 Sing LR 495.

¹⁷⁷ *Christopher v Zimmerman* (2001) 192 DLR (4th) 476 (BCCA).

¹⁷⁸ Although, in relation to proprietary restitutionary claims involving title to land, the place of enrichment would be synonymous with the *lex situs* which is the preferred choice of law rule.

¹⁷⁹ Sections IV(A) and (B).

¹⁸⁰ Such as the rules contained in the Swiss Federal Statute on Private International Law, Austrian Federal Statute of Private International Law (made explicit in §1(2)) and *Restatement (Second) of Conflict of Laws* (which generally tries to identify the state with which the parties and transaction have the 'most significant relationship'). See S McCaffrey, 'The Swiss Draft Conflicts Law' (1980) 28 Am J Comp Law 235, 249-250.

¹⁸¹ Or at least, the only choice of law rule outside relational unjust enrichment: Briggs (n 99) 198.

secondly, the proper law of the obligation is the law of the country with which, in the light of the whole facts and circumstances, the critical events had their closest and most real connection.¹⁸²

A fully flexible choice of law rule however raises the problem of too much uncertainty. Indeed, most unjust enrichment choice of law frameworks are content with a displacement rule which allows courts to disregard the applicable law that is determined according to the general rules in favour of the law of closest connection in certain situations. Article 10(4) of the Rome II Regulation, like Article 41 of the German EGBGB and Article 15 of the Swiss Federal Statute on Private International Law, is to this effect.¹⁸³ Whilst the provisions in Article 10 points towards sensible connecting factors and would, in the main, point towards the law of closest connection anyway, a displacement rule in favour of the law of closest connection forms a useful component in any unjust enrichment choice of law framework given the various permutations in which claims may arise. The problem is ensuring that courts do not invoke the displacement rule so freely that it becomes the norm rather than the exception.

Article 10(4) seeks to prevent this from happening. The standard that is required before it can be invoked appears to be very high. Article 10(4) states that the law of a country other than that pin-pointed by the prior choice of law rules applies only 'where it is clear from *all* the circumstances that the non-contractual obligation is *manifestly* more closely connected' to that other country.¹⁸⁴ One may wish to compare this form of words with that in Article 4(5) of the Rome Convention, which provides that the presumptions set out earlier in Article 4, which point towards the law of closest connection of the contract where the parties have made no choice of applicable law of the contract, is rebutted if 'it appears from the circumstances as a whole that the contract is more closely connected with another country'. There have been a number of cases considering whether Article 4(5) is to be applied restrictively or liberally, with courts in different Member States not reaching any consistent interpretation.¹⁸⁵ However, similar litigation and disparity between the

¹⁸² [1997] CLC 108, 127; rejecting *Dicey and Morris's* formulation and preferring the approach taken by *Blaikie* (n 2). See also *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543, 565–566, reversed on other grounds [1996] 1 Lloyd's Rep 589, at 597 (CA) and *Cheshire and North* (n 84) 687–692.

¹⁸³ These displacement rules generally do not apply when parties have exercised their autonomy to choose the applicable law of the non-contractual obligation.

¹⁸⁴ Emphasis added.

¹⁸⁵ The English courts favour a more liberal application of Article 4(5) in comparison with the Scottish and Dutch courts. See *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep 87; *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283; cf *Caledonia Subsea Ltd v Micoperi Srl (First Division, Inner House, Court of Session)* 2001 SC 716 (OH), 2003 SC 70; *Société Nouvelle des Papeteries de l'Aa v Machinefabriek BOA*, 25 September, NJ (1992) No 750, RvdW (1992) No 207 (Dutch Supreme Court). The Rome I Regulation [2008] OJL 177/6 which modernised and transposed the Rome Convention into Regulation form, has dealt with this problem by replacing the series of presumptions with fixed

courts should be avoided for Article 10(4) as it is clear from the stronger form of words used for Article 10(4) that it should only be invoked in limited circumstances.

Having said that, the role to be played by Article 10(4) may prove to be more extensive than initially envisaged. This displacement rule may potentially be able to, on the one hand, cater to the differences of opinion between quadrationists and multi-causalists in domestic English law, and, on the other hand, help smooth over the gaps that exist between civil law and common law conceptions of unjust enrichment. This will be considered in section IV next, in the context of examining how restitution for wrongs and proprietary restitution could be dealt with under the Rome II Regulation.

F. Conclusion to Section III

The choice of law rules set out in the Rome II Regulation can be justified and will, in most cases, point towards the law of closest connection. The recognition of party autonomy and the rule in favour of the law of common habitual residence are not concerned with identifying the centre of gravity of the case, but there are persuasive practical reasons underlying these rules.

Although there is much to support about Article 10, there remain a few problems. In view of the uncertainty of the scope of restitution and the unjust enrichment principle under domestic English law, the main concern for common lawyers may be how claims for restitution for wrongs and proprietary restitution can be dealt with at the choice of law level. These topics deserve separate treatment in their own right and therefore only a brief discussion can be offered below. In particular, how such claims fit within Article 10 of the Rome II Regulation will be considered. A related issue, that of renvoi and unjust enrichment, will also be looked at.

IV. SPECIFIC PROBLEMS

A. Restitution for Wrongs

Restitution for wrongs raises fraught choice of law problems. Not everyone agrees that this category is based on the principle of reversing unjust enrichment¹⁸⁶ and therefore whether such claims should be characterized as unjust enrichment for conflicts of law purposes and governed by the unjust enrichment choice of law rules is unclear. Having said that, some equitable wrongs have been characterised as being restitutionary and governed by the unjust enrichment choice of law rule. In *El Ajou v Dollar Land Holdings* Millett J

rules; Article 4(1) sets out choice of law rules in favour of the law of the habitual residence of the characteristic performer of the contract for different categories of contracts.

¹⁸⁶ Virgo (n 16) 425–428; Birks (n 16) 12–16, 74; Edelman (n 16) 34, 36, 41.

stated that a knowing receipt claim is the ‘counterpart in equity of the common law action for money had and received. Both can be classified as receipt-based restitutionary claims.’¹⁸⁷ His Lordship thought, *obiter*, that *Dicey, Morris and Collins’s* now Rule 230(2)(c)¹⁸⁸ would be applicable to knowing receipt claims, ie the law of the country where the defendant received the money. Sub-rule (2)(c) has also been considered in other knowing receipt cases such as *Trustor v Smallbone*.¹⁸⁹ In *Berry Trade Ltd v Moussavi*,¹⁹⁰ the defendant had ‘laid his hands’ on the claimant’s goods. This was held to concern liability for usurpation under Iranian law which was recognized as being broadly analogous to the English tort of conversion or unlawful interference with goods. However, Cooke J accepted that *if* there had not been a tort, the claim would be governed by the law of place of receipt of proceeds, that is, Canada and England, on the basis of application of sub-rule (2)(c).¹⁹¹ The obligation to pay over bribes or misappropriated money received in breach of fiduciary duty has also been held to be governed by sub-rule (2)(c).¹⁹² Similarly, in *Kuwait Oil Tanker v Al Bader (No 3)*,¹⁹³ Moore-Bick J applied sub-rule (2)(c) to derive the proper law of the relationship between parties when it was claimed that the defendants, who were members of the senior management of the claimant company, were unjustly enriched when they breached their duties of good faith and honesty by conspiring to steal money from the claimant.¹⁹⁴ In *Douglas v Hello! Ltd (No 6)*,¹⁹⁵ the Court of Appeal characterised a breach of confidence claim as being restitutionary and governed by the law of the country where the enrichment occurred.¹⁹⁶

Although the above cases seem to indicate that the law of the place of enrichment should be applicable in wrongs-based restitutionary claims, Collins J concluded after an extensive review of case law in this area that the authorities in favour of Rule 230(2)(c) were weak.¹⁹⁷ In fact, there are those who persuasively argue that restitution for wrongs should not be characterized as restitution or unjust enrichment. The causative event is the wrong, so characterization should instead be carried out in accordance with the

¹⁸⁷ [1993] 3 All ER 717 at 736. See also *Grupo Torras SA v Al-Sabah* [2001] Lloyd’s Rep Bank 36, para 122.

¹⁸⁸ Then Rule 203(2)(c) (11th edn, 1987).

¹⁸⁹ [2000] EWCA Civ 150 (9/5/2000).

¹⁹⁰ [2004] EWHC 49.

¹⁹¹ *ibid* para 64. This alternative liability would be based on Articles 301 and 303 of the Civil Code of Iran (set out in para 7 of the judgment). The principles elucidated therein appear to be analogous to a ‘knowing receipt’ claim.

¹⁹² *Kartika Ratna Thahir v PT Pertamina Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257; *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 2 SLR 495.

¹⁹³ [2000] 2 All ER Comm 271 (CA).

¹⁹⁴ *cf Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 WLR 1157, [2005] 1 All ER (Comm) 17, where the Court of Appeal applied the law of place of incorporation of the company for the breach of an equitable duty of care owed by a company director. For a commentary of this case, see Yeo, ‘Choice of Law for Director’s Equitable Duty of Care and Concurrence’ [2005] LMCLQ 144.

¹⁹⁵ [2006] QB 125.

¹⁹⁶ *ibid* 160.

¹⁹⁷ *Barros Mattos Junior v MacDaniels Ltd* [2005] EWHC 1323 (Ch D), [2005] ILPr 630, at [117].

underlying wrong even if the remedy is gain-based.¹⁹⁸ So, for example, an account of profits for the commission of a tort should be governed by the choice of law rules for tort.¹⁹⁹ If restitutionary damages are awarded for breach of contract then the claim should be characterized as being contractual in nature and governed by the contractual choice of law rules.²⁰⁰

In the field of equitable wrongs, Yeo's important thesis fleshes out this approach of characterizing in accordance with the wrong. First of all, he convincingly argues that the distinction between law and equity is not relevant for choice of law purposes.²⁰¹ This means that equitable claims should be treated in a similar manner as all other legal claims and that any domestic classifications as to the nature of a claim only become relevant once the law of that particular country is pinpointed by the relevant choice of law rule. He then argues that claims that would be equitable wrongs under English law or analogous to equitable wrongs under English law should be characterized under the main choice of law categories like contract, tort, property or restitution.²⁰² For example, if there is a breach of fiduciary duties arising from a contract, then the claim should be characterized as being contractual and governed by the governing law of the contract.²⁰³ If the duty arises from a consensual relationship not amounting to a contract, then by analogy the claim should still be characterized as being contractual.²⁰⁴ If the wrong is committed by a third party assisting in a breach of trust or fiduciary duty, the claim to reverse unjust enrichment should be characterised as tortious and governed by the law governing the tort.²⁰⁵

Some of the above propositions can be fitted within the structure of Article 10.²⁰⁶ A claim for restitutionary damages for breach of contract, if not characterized as being contractual in the first place, would still be governed by the governing law of the contract under Article 10(1). The same would happen for a claim for breach of fiduciary duties. In all other cases, Article 10(4) will have to be relied upon, if possible, to achieve the same result as would have occurred if the claim had been characterized in accordance with the underlying wrong.

¹⁹⁸ J Bird, 'Bribes, Restitution and the Conflict of Laws: *Thahir v Pertamina*' [1995] LMCLQ 198, 199; Virgo (n 21) 22.

²⁰⁰ Yeo (n 46) 315.

²⁰² *ibid* Chapter 8.

²⁰³ *ibid* 234. See *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 Sing LR 377. TM Yeo (2007) 9 Yrbk of Pri Int Law 459; W Tong [2007] SJLS 405. Cf *Base metal Trading v Shamyryn* [2005] 1 WLR 1157; *WPP Holdings Italy Sr l v Benatti* [2007] 1 WLR 2316.

²⁰⁴ *ibid* 320; cf P Millett (in the context of domestic law): '... it is misleading, and potentially dangerous, to equate a breach of trust or fiduciary obligation as if it were the equitable counterpart of breach of contract at common law ...' (n 11) 310.

²⁰⁵ Yeo (n 46) 320. In *Arab Monetary Fund v Hashim (No 9)*, *The Times* (11 October 1994), Chadwick J held that a compensatory claim for dishonest assistance was to be governed by the rule of double actionability for torts.²⁰⁵ However, for three possible interpretations of Chadwick J's judgment, see Yeo (n 46) 276–278.

²⁰⁶ See also nn 111–115.

B. Proprietary Restitution

It has been seen above that it is unclear whether civil law systems have a form of proprietary restitution and that English domestic law has not settled the question of whether such claims are based on unjust enrichment. Constructions such as the constructive trust, however, are acknowledged to arise from unjust enrichment in certain circumstances in common law jurisdictions like the US and Canada so it is necessary to determine how claims for proprietary restitution will be dealt with, if at all, under the Rome II Regulation.²⁰⁷

The first question must be whether such claims even fall within the scope of the Rome II Regulation. One might assume that since the Regulation is phrased in terms of non-contractual *obligations*, the natural meaning would be that its scope is limited to claims requesting personal remedies and would not cover claims requesting proprietary remedies. In fact, Article 1(2)(e) specifically excludes obligations arising from express trusts from the Regulation's scope. The initial draft of Article 1(2)(e) was more ambiguous and raised the question whether the exclusion covered claims arising from a resulting or constructive trust.²⁰⁸ In her report, Wallis suggested a change of terminology from the Commission's initial draft of Article 1(2)(e) 'to avoid difficulty or confusion arising from the employment of the trust in common-law jurisdictions as a device for dealing with situations such as unjust enrichment.'²⁰⁹ The Commission said that it accepted the principle of the amendment, although it preferred to adopt the wording of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 instead of the phrasing suggested by Wallis.²¹⁰ The Hague Trusts Convention covers choice of law rules for express trusts²¹¹ and therefore it is clear that obligations arising out of express trusts do not fall within the scope of the Rome II Regulation. However, it is less clear what is meant to fall within the scope of the Regulation by the change of terminology of Article 1(2)(e). Use of the trust as an unjust enrichment 'device' in the common law could be construed in two ways. On the one hand, there is the concept of a 'constructive trusteeship' which denotes the personal liability of a wrongdoer to account for losses caused to the principal or profits obtained from abusing a fiduciary position. Claims alleging a 'constructive trusteeship' have been held to fall within Rule 230 of *Dicey, Morris and Collins*.²¹² On the other hand, there are the proprietary constructions of a resulting and constructive trust which some also

²⁰⁷ It does not matter if the law specified by the Regulation is not the law of a Member State: Article 3.

²⁰⁸ *Eighth Report* (n 72) para 86.

²⁰⁹ Wallis (n 96) 15.

²¹⁰ COM (2006) 83 final, 4.

²¹¹ Although Contracting States have the option of extending the scope of the Convention to 'trusts declared by judicial decisions': Article 20.

²¹² eg *Trustor AB v Smallbone* [2000] EWCA Civ 150 (9/5/2000); *Kuwait Oil Tanker Co SAK v Al Bader (No 3)* (unreported, 17 December 1998); [2000] 2 All ER (Comm) 271 (CA).

think arise in response to unjust enrichment.²¹³ Which of the two (or is it both) is intended to fall within the scope of the Rome II Regulation?

The former notion of ‘constructive trusteeship’ would be an example of restitution for wrongs and should be dealt with as discussed above. The latter involves proprietary restitution. It is suggested that claims for proprietary restitution should really be classified as being proprietary in nature and not restitutionary or for the reversal of unjust enrichment.²¹⁴ This is because claims that property is held on a constructive or resulting trust are ultimately proprietary actions even if the cause of action is framed in terms of unjust enrichment. The claimant is pursuing an *in rem* claim when asserting beneficial *ownership* of the property. Such property cannot form part of the defendant’s patrimony and would not be available to the defendant’s creditors. Furthermore, once beneficial entitlement is established, the claimant would normally wish to terminate the trust and compel the defendant to transfer the property to the claimant, that is, gain absolute ownership of the property.²¹⁵ Therefore, the property choice of law rules should be applicable.

Having said that, the European Court of Justice has held that a declaration that immovable property is held on trust does not relate to a right *in rem*.²¹⁶ Coupled with the ambiguity over the intention behind the change of terminology of Article 1(2)(e), equitable rights such as being a beneficiary under a trust, which common lawyers would classify as being proprietary, may well be interpreted as being personal in nature and hence fall under the Regulation and within the scope of Article 10. If this happens, the choice of law rules therein should be used so as to simulate the result that would be achieved if the claim had been classified as being proprietary. In so far as the claim involves title to land and tangible movables,²¹⁷ a proprietary characterisation would lead towards application of the *lex situs*. Under Article 10(3), the law of the place of enrichment would probably be synonymous with the *lex situs*.²¹⁸ An argument has been made earlier that it might be possible to regard Article 10(1) as pointing towards the *lex situs* too.²¹⁹ In cases where the same law does not end up being applied under an unjust enrichment characterization as under a proprietary characterization, recourse could be had to Article 10(4).

²¹³ R Chambers, *Resulting Trusts* (Clarendon Press, Oxford, 1997; P Millet, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399; Burrows (n 35); Birks (n 16) Chapter 8.

²¹⁴ Stevens (n 46) 182–185, 216; Chong (n 47) 873–882; cf Panagopoulos (n 2) 67.

²¹⁵ Under English law, this would be done by invoking the rule in *Saunders v Vautier* (1841) 4 Beav 115.

²¹⁶ *Webb v Webb* (Case No. C-294/92) [1994] 1 ECR 1717; [1994] QB 696.

²¹⁷ Certain intangibles such as the assignment of debts are treated as contractual in nature and governed by the applicable law of the contract (Article 12 of the Rome Convention). See *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825; [2001] 2 WLR 1344.

²¹⁸ For movables, this would be the *lex situs* of the last relevant transaction (*Cammell v Sewell* (1860) 5 H&N 728; *Winkworth v Christie* [1980] Ch 496) which should coincide with the *lex situs* at the time of enrichment.

²¹⁹ See nn 116–120.

The foremost reasons for the *lex situs* rule when questions of title are concerned are practicality and control: the courts of the *situs* have the greatest interest and ultimate power in regulating how property within its jurisdiction is transferred.²²⁰ These justifications have the greatest force when land is concerned. However, it is important not to conflate claims in which title is affected with personal claims for restitution which are concerned in some way with land. The latter is also sometimes suggested to be governed by the *lex situs*. For example, *Dicey, Morris and Collins's* Rule 230(2)(b) states that if the obligation to restore the benefit of an enrichment obtained at another person's expense arises in connection with a transaction concerning land, the *lex situs* should be applied.²²¹ It is clear from their citation²²² of *Batthyany v Walford*²²³ that this rule would cover personal obligations arising in connection with ownership of land. Thus, for example, a claim for the value of improvements made to someone else's land would fall under the scope of this sub-rule. The *Restatement (Second) of Conflict of Laws* also lists the *situs* of a physical thing, particularly land, as a contact pointing towards the law of the state which has the most significant relationship to an action for restitution.²²⁴ However, the commentary notes that: 'There are still other contacts to be considered. Normally, the physical thing will have been located in the state where either the enrichment was received or the benefiting act was done.'²²⁵ This indicates that the *lex situs* is not in and of itself the preferred choice of law rule with respect to unjust enrichment claims concerning land. This seems sensible as while there may be a good basis to apply the *lex situs* to claims involving assertions of title, as would be the situation in cases of proprietary restitution, it is more questionable whether the same choice of law rule should be applicable when the issue at stake concerns a mere personal obligation. Ruritanian law does not have a special interest in whether A is entitled to be remunerated for improving B's house, just because the house is situated in Ruritania. Neither would a Ruritanian court justifiably be offended if another law decides whether A gets remunerated. Just because land is involved should not entail a knee-jerk reaction that application of the *lex situs* is paramount. This applies *a fortiori* when the property in question is a movable.

Although it may be possible to manipulate Article 10 satisfactorily to deal with claims for proprietary restitution, two potential problems arise. First is Article 14 whereby parties are given the autonomy to choose the law governing the non-contractual obligation. Article 14 prevails over Article 10.

²²⁰ Albeit this justification is less strong where movable property is concerned.

²²¹ *Dicey, Morris and Collins* (n 7) 1863, para 34R-001.

²²² *ibid* 1877, para 34-029.

²²³ (1887) 36 Ch D 269. The case, which is also cited in the commentary to the *Restatement (Second) of Conflict of Laws*, concerned a claim for payment for permissive waste, an action which *Dicey, Morris and Collins* note may today be more naturally classified as tortious: *ibid* 877, fn 96.

²²⁵ *ibid* Comment d.

²²⁴ § 221(2)(e) and see comment d (733).

In proprietary claims however, it is inappropriate for parties to be able to choose the applicable law governing their claim for the reasons of practicality and control mentioned above, especially if title to land is concerned.²²⁶ The policy reasons which may arise when proprietary restitution is concerned are not catered for by the Rome II Regulation.²²⁷ The second problem concerns renvoi and is considered next.

C. Renvoi

This is not the place for an extensive review of the strengths and weaknesses of the doctrine of renvoi²²⁸ but merely a brief examination of its applicability to unjust enrichment claims.

The German EGBGB accepts the principle of renvoi²²⁹ apart from choice of law in contract²³⁰ and instances where the parties have exercised their autonomy to choose the applicable law.²³¹ In these situations, the applicable law is construed as its internal law. This has the result that if the unjust enrichment claim arises from a failed contractual relationship,²³² renvoi would not apply²³³ whereas the doctrine may be applicable if the unjust enrichment claim arises from some other situation.²³⁴

Any form of renvoi for unjust enrichment claims is however rejected by the Swiss Federal Statute on Private International Law²³⁵ and *Restatement (Second) of Conflict of Laws*.²³⁶ The Rome II Regulation follows this latter approach.²³⁷ This position is necessary if the applicable law according to the Regulation were the law of a Member State as circularity would otherwise ensue.²³⁸ But even if the applicable law were not the law of a Member State, the rejection of renvoi in Rome II seems, except in one aspect discussed

²²⁶ These justifications have admittedly less force if the property concerned is a movable. In *Christopher v Zimmerman* (2001) 192 DLR (4th) 476 (BCCA) British Columbia Court of Appeal applied *Dicey, Morris and Collins's* sub-rule (2)(c) to a claim of constructive trust over movable property.

²²⁷ cf Article 42 of the German EGBGB which is a general provision allowing a *post ante* party choice but does not apply to property law: Hay (n 87) 645.

²²⁸ This can be found in, eg *Cheshire and North* (n 84) Chapter 5; O Kahn-Freund, *General Problems of Private International Law* (Sijthoff & Noordhoff, Alpena an den Rijn, 1980) 285–291; WW Cook, *The Logical and Legal Bases of the Conflict of Laws*, Chapter IX (Harvard University Press, Cambridge, Massachusetts, 1942); A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 ICLQ 877.

²³⁰ Article 35(1).

²³² Article 38(1) points towards the law governing the relationship.

²³³ Article 32(1) includes 'the consequences of invalidity of the contract' within the scope of the governing law of the contract.

²³⁵ The Swiss Federal Statute on Private International Law generally rejects renvoi apart from certain limited situations such as succession (Art 91(2)) and personal status (if the reference from a foreign law leads to Swiss law: Art 14(2)). The limited scope for renvoi can be explained as the Code generally seeks to apply the law of the state of closest connection: McCaffrey (n 180) 256.

²³⁷ Article 24.

²³⁶ § 221 refers to the 'local law of the state'.
²³⁸ Carruthers and Crawford (n 86) 89.

below, a sensible position to take.²³⁹ Too often, renvoi is used as an escape device or tool to enable courts to arrive at the result which they wish to achieve²⁴⁰ and it is wise to limit this device only to situations where it may achieve ‘the policy objectives of the particular choice of law rule’.²⁴¹

Those policy objectives raise their head when one deals with questions of title. If, as may be the case, claims for proprietary restitution fall within the scope of the Rome II Regulation, then the outright rejection of renvoi in Article 24 is problematic. On the one hand, if such claims were characterised as being unjust enrichment claims falling within the scope of the Rome II Regulation, renvoi would be excluded. On the other hand, if the claims were classed as being proprietary in nature and therefore falling outside the scope of Rome II, renvoi may be applicable. If what is at issue is title to land situated abroad, English courts would apply not just the domestic law of the *lex situs* but also its private international law rules.²⁴² If the claim is concerned with title to movables situated abroad, the authorities are weaker here but there are suggestions that renvoi would also be relevant.²⁴³ Thus, claims for proprietary restitution may end up being decided differently depending on whether it is characterised as being a property matter or an unjust enrichment matter.²⁴⁴

V. CONCLUSION

There was concern as to whether unjust enrichment was an appropriate area for inclusion into the Rome II Regulation. Article 10 however succeeds on most counts insofar as its choice of law rules seek to cover actions based on the unjust enrichment principle. However, the uncertainty over the scope and taxonomy of the law of restitution under the common law still poses choice of law problems. Specifically, there is the issue of whether restitution for wrongs

²³⁹ In *Barros Mattos Junior v MacDaniels Ltd* [2005] EWHC 1323 (Ch D), [2005] ILPr 630, [121], Collins J stated that: ‘the claim to the application of *renvoi* in restitution claims is weak ...’.

²⁴⁰ eg *Collier v Rivaz* (1841) 2 Curt 855. See also *The Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132, [2007] Bus LR D65 at [20]; R Mortensen, ‘“Troublesome and Obscure”: The Renewal of *Renvoi* in Australia’ (2006) 2 Journal of Pri Int Law 1, 24–25 (in relation to Australian High Court decision in *Neilson v Overseas Projects Corp of Victoria Ltd* [2005] HCA 54, where six of the judges accepted that the doctrine of renvoi was applicable in foreign tort claims).

²⁴¹ *The Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132, [2007] Bus LR D65 at [20].

²⁴² *Re Ross* [1930] 1 Ch 377; *Re Duke of Wellington* [1947] Ch 506.

²⁴³ *Winkworth v Christie, Mason & Woods Ltd* [1980] Ch 496, 514; *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd’s Rep 284, para 38; *Cheshire and North* (n 84) 66; *Dicey, Morris and Collins* (n 7) 84, para 4-025; cf *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 at 1008; *The Islamic Republic of Iran v Berend* [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132, [2007] Bus LR D65 [19]–[31].

²⁴⁴ There does not seem a way around this. One could possibly attempt to interpret the law of closest connection under Article 10(4) to mean not the *lex situs* but the domestic system of law which is identified by the choice of law rules of the *situs* for claims for proprietary restitution. However, this, apart from being unattractively complicated, would directly contravene Article 24.

and proprietary restitution fall within the scope of an unjust enrichment choice of law rule. It has been seen that the Rome II Regulation does not always lead to the appropriate results if these actions are considered to fall within its ambit. If the basis of restitution for wrongs and proprietary restitution were conclusively found to be the unjust enrichment principle, the unjust enrichment choice of law rules could be re-tooled to accommodate better the inclusion of such claims. However, unless and until the issue is settled at the domestic arena, problems will continue to plague at the conflicts of law level.