CONNECTION AND COHERENCE BETWEEN AND AMONG EUROPEAN INSTRUMENTS IN THE PRIVATE INTERNATIONAL LAW OF OBLIGATIONS

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Abstract This article considers points of connection and coherence between and among the Rome I Regulation, the Rome II Regulation, and Regulation 1215, and relevant predecessor instruments. The degree of consistency in aim, design and detail of conflict of laws rules is examined, vertically (between/among consecutive instruments) and horizontally (across cognate instruments). Symbiosis between instruments is explored, as is the interrelationship between choice of court and choice of law. Disadvantaged parties, and the cohesiveness of their treatment under the Regulations, receive particular attention.

Keywords: coherence, connection, continuity, disadvantaged parties, Regulation 1215, Rome I Regulation, Rome II Regulation.

I. INTRODUCTION

Since 17 December 2009,[1] there have been two companion regulations, furnishing for EU Member States rules of applicable law to govern issues arising out of contractual and non-contractual obligations, respectively, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('the Rome I Regulation') and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('the Rome II Regulation'). The Rome Regulations, together with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels Regulation'), form a triangle of rules governing cases in all Member State courts, in virtually[2] the whole area of the private international

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[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, art 28 (as amended by Corrigendum of 19 October 2009 (13497/1/09, REV 1, JUR369).

[2] See exclusions from scope of instrument in Rome I Regulation, art 1.2 and 1.3; Rome II Regulation, art 1.2 and 1.3, and Regulation 1215 (q.v.) art 1.2.

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law of obligations. In respect of legal proceedings to be instituted on or after 10 January 2015, the third side of the private international law triangle—the jurisdiction and judgments arm—will be constituted by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)[3] ('Regulation 1215').

This article searches for continuity in interpretation between and among the Rome I Regulation, the Rome II Regulation, and Regulation 1215 and, in the case of the Rome I Regulation and Regulation 1215,[4] the predecessor conventions;[5] it also strives to identify among these instruments points of connection and coherence as to substance, and to detect inconsistencies and gaps, if and where they occur. Symmetry or asymmetry between Rome I and Rome II will be scrutinized; points of congruence at the Rome/Brussels crossroads noted; and symbiosis between and among the instruments examined. Disadvantaged parties, and the cohesiveness of their treatment under the Regulations, will receive particular attention in Section IV.

II. CONTINUITY OF INTERPRETATION

One aim of the process of harmonization of the rules of jurisdiction and choice of law in the law of obligations is the creation of consistency of interpretation between and among the relevant instruments. This consistency in general aim, approach, design, detail of rules, and meaning might be *vertical* (ie between/among consecutive instruments dealing with and refining the rules relative to a given topic, such as exemplified by the Rome I Convention/Rome I Regulation, or the 1968 Brussels Convention/Brussels Regulation/Regulation 1215) or it might be *horizontal* (that is, cross-fertilization between instruments dealing with related subjects, such as Rome I Regulation/Rome II Regulation). As the cohort of instruments grows, there may be found both vertical and horizontal continuity of interpretation, as for example, where a provision in an applicable law instrument ('the Rome family') clearly derives from a provision in a jurisdiction instrument ('the Brussels family'), and may benefit from the interpretation accorded thereto in successive jurisdiction instruments.[6]

[3] OJ 20 December 2012, L351/1. See for background EB Crawford and JM Carruthers, 'Brussels I *bis* – the Brussels I Regulation recast: closure (for the foreseeable future)' 2013 SLT (News) 89.

[4] On matters of jurisdiction and judgment enforcement, reference in this article principally will be to Regulation 1215, but also, where specified, to the Brussels Regulation.

[5] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('Brussels Convention'); and 1980 Rome Convention on the Law Applicable to Contractual Obligations ('Rome Convention').

[6] A form of parallel continuity is represented by the 1988 Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters (horizontal continuity with the 1968 Brussels Convention), and by the 2007 Lugano II Convention (vertical continuity with Lugano I; and horizontal continuity with the Brussels Regulation).

A. Vertical Continuity

In civil and commercial jurisdiction generally, and in choice of law in contract, there has been an historical progression from Convention to Regulation; and in the case of jurisdiction, from Regulation to recast Regulation.

1. The Brussels family

By Recital (34) of Regulation 1215,

> Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it.[7]

This encompasses two aspects of vertical continuity: first, the temporal scope of application of each succeeding instrument, including transitional provisions, and, secondly, judicial interpretation of the instrument where an identical or similar form of words is found in succeeding instruments. Vertical continuity in the second sense is readily seen in the evolution of jurisdictional provisions from the 1968 Brussels Convention through the Brussels I Regulation to Regulation 1215.[8] Where a provision in a subsequent instrument is intended to be equivalent in purpose to one in a predecessor instrument (allowing for modest semantic refinement), weight should be given to pre-existing decisions of the Court of Justice of the European Union and of national courts, which were interpretative of the earlier provision. General approbation of the principle of vertical continuity was contained in the Brussels Regulation vis-à-vis the 1968 Brussels Convention, and is plain in Regulation 1215 with regard to the Brussels Regulation and the Convention.[9]

Regulation 1215 follows the Brussels Regulation in structure, and the content of a number of provisions is repeated *verbatim*, although many of the core jurisdiction provisions have been renumbered, viz.: the general rule of jurisdiction that a person domiciled in a Member State shall be sued in that state is found in Article 4 (ex-Article 2); rules of special jurisdiction, providing alternative grounds of jurisdiction at the claimant's option, based on a close connection between the court and the action, or in order to facilitate the sound administration of justice are located in Article 7 (ex-Article 5);[10]

[7] For vertical continuity between the 1968 Brussels Convention and the Brussels Regulation, see Brussels Regulation, recital (19).

[8] Equally, it must be borne in mind that evolutionary change in the core European instruments may be deliberately eschewed in rules applicable domestically within a given Member State. See eg *Fishers Services Ltd v All Thai'd Up Ltd t/a Richmond House Hotel* 2013 GWD 13-273.

[9] Regulation 1215, recital (34).

[10] Supplemented, however, by a new ground of jurisdiction in respect of civil claims for the recovery, based on ownership, of cultural objects (art 7.4).

the prorogation of jurisdiction provisions are to be found in Articles 25 and 26 (ex-Articles 23 and 24); the rules on exclusive jurisdiction are contained in Article 24 (ex-Article 22); and the *lis pendens* system is set out in Articles 29–32 (ex- Articles 27–30). Chapter III, concerning recognition and enforcement, begins at Article 36 (ex-Article 33).

There are many examples of vertical continuity of expression extending back to the 1968 Brussels Convention, such as the circumstances in which consumer jurisdiction provisions are triggered,[11] a point raised in 2009, by way of reference from Austria to the European Court of Justice in *Ilsinger v Dreschers*.[12] The facts of *Ilsinger* were on all fours with *Engler v Janus*,[13] decided by the ECJ in 2005 on the meaning and scope of application of Article 13.1.3 of the Brussels Convention, a provision which was substantially re-enacted, first, in the Brussels Regulation, Article 15.1.c, and more recently in Regulation 1215, Article 17.1.c. Although the threshold wording in both Regulations is somewhat simpler than in the original, all three instruments demand that for the protective jurisdiction rule to apply, a contract shall have been concluded by the consumer with a commercial/professional party.

In *Ilsinger*, it was necessary to decide whether Article 15.1.c of the Brussels Regulation had to be interpreted in the same way as Article 13.1.3 of the Brussels Convention in *Engler*, or whether the later provision might be interpreted differently by reason of its partially different wording.[14] Since the ECJ already had departed from the principle of continuity of interpretation where differences in wording between instruments were substantial,[15] the question in *Ilsinger* was whether the modified wording of the Regulation, combined with strengthened resolve to protect consumers, justified a different interpretation. The ECJ observed[16] that, since the Brussels Regulation largely replaced the Brussels Convention, the Court's interpretation of the Convention extended to the Regulation, where its provisions and those of the Convention could be treated as equivalent. The same approach can confidently be expected to be taken, should corresponding circumstances arise for decision under Regulation 1215. Where there has been vertical continuity of expression over three generations of an instrument, this interpretative approach is likely to be more entrenched still.

[11] With regard to disadvantaged parties, the provisions in Regulation 1215 concerning insured parties appear in arts 10–16 (ex-arts 8–14); those concerning consumers in arts 17–19 (ex-arts 15–17); and those in respect of employees in arts 20–23 (ex-arts 18–21). See further Section IV, below.

[12] *Renate Ilsinger v Martin Dreschers*, acting as administrator in the insolvency of *Schlank & Schick GmbH* Case C-180/06 OJ 2009 C153/3, [2009] ECR 1-3961.

[13] *Engler v Janus Versand GmbH* Case C-27/02 [2005] ECR 1-481.

[14] See Opinion of Advocate General Trstenjak, *Renate Ilsinger v Martin Dreschers* Case C-180/06 [2009] ECR 00, paras 36–37.

[15] *Glaxosmithkline and another v Rouard* Case C-462/06 [2008] ICR 1375.

[16] *Renate Ilsinger v Martin Dreschers* Case C-180/06 OJ 2009 C153/3, [2009] ECR 1-3961, para. 41.

Yet a granddaughter instrument may *depart* from her ancestors in order to bolster a principle or policy, by means of addition, deletion or substantial rephrasing of a rule. For example, a significant change effected by Regulation 1215 is the extension of consumer-protective jurisdiction which, by virtue of Article 18.1, may be established in the court of the consumer's domicile, not only against an EU domiciled defendant, or a non-EU domiciled defendant having an EU-established branch or agency, but also against a non-EU domiciled defendant. Likewise, by Article 21.2, a non-EU domiciled employer may be sued by his employee in a court of the Member State in which the employee habitually carries out his work, or last did so, or in the courts for the place where the business which engaged the employee is or was situated.[17] A further example of departure from a predecessor instrument in order to strengthen an accepted policy is found in Regulation 1215, Chapter III, Section 3. In the Brussels Regulation, challenge, at the point of enforcement, to the jurisdiction of the court of origin was extended via Article 35 to consumers and insured persons, but not to employees. Under the granddaughter instrument, however, such challenge is permitted if the exercise of jurisdiction of the court of origin conflicts with Section 5 of Chapter II (jurisdiction over individual contracts of employment).[18]

Evidence in favour of the embedding of a policy is the elevation of a provision from a subordinate position, as part of a general article, to the status of a bespoke, freestanding article(s), such as can be traced in the matter of jurisdiction pertaining to individual contracts of employment, from Article 5.1 of the 1968 Brussels Convention, through Articles 18–21 of the Brussels Regulation, to Articles 20–23 of Regulation 1215. But it is noteworthy that, essentially, the wording and import of these elevated provisions have not changed markedly over 50 years.

2. The Rome family

Turning to choice of law, there is no general approbation in the Rome I Regulation of the principle of vertical continuity between that Regulation and the Rome Convention, such as was contained in the Brussels Regulation with regard to the 1968 Brussels Convention, and in Regulation 1215 in relation to the Brussels Regulation and the Convention. Nonetheless, it would seem perverse if vertical continuity did not operate in relation to identical, or broadly equivalent provisions.

By way of example, the difference in import between the wording in the Rome I Convention, Article 3.1 ('the choice must be express or demonstrated with reasonable certainty'), and that in the Rome I Regulation, Article 3

[17] There is no equivalent extension of jurisdiction with regard to non-EU domiciled insurers beyond the pre-existing 'branch, agency' concession contained in art 11.2 of Regulation 1215.

[18] See further Section IV, below.

('the choice shall be made expressly or clearly demonstrated') is almost certainly a matter of semantics. Cooke J in *Caterpillar Financial Services Corp v SNC Passion*,[19] adhered strictly to the terms of Article 3.3 of the Rome Convention when enforcing a contract of loan, Article 3.3 not being applicable unless all pertinent aspects of the situation were connected with one other single law.[20] Although the language of Article 3.3 of the Rome I Regulation is briefer than that employed in the Convention, the essence is the same, and in terms of recital (15) of the Regulation, Article 3.3 should be construed in the same way as was the corresponding provision of the Convention. In contrast, Article 4.2 of the Rome I Regulation, though it gives to the 'characteristic performer' of a contract a cameo role, does not cast him as a character of central importance, as did Article 4.2 of the Rome Convention. Article 4, in its original and later manifestations, is an interesting example of evolution, in that the 'family likeness' is apparent, but there are certain distinguishing features. The extent to which there is significant divergence between Articles 4 of the Convention and of the Regulation marks the limit of influence of earlier (national) interpretations.

Vertical continuity is exhibited to some extent with regard to contracts for the carriage of goods. Recital 22 of the Regulation directs that the definition of a contract for the carriage of goods, set out in Article 4.4 of the Rome Convention, shall operate for the purposes of the Regulation. However, there is a significant difference in substantive treatment between mother and daughter instruments in that contracts of carriage, both of goods and persons, are now subject to a specific, discrete rule (Article 5) rather than being assigned a subordinate position within the general applicable law rule in Article 4; in addition, in an important particular (the outcome should the principal rule fail), the rule diverges in substance.

Material redesign of the mandatory rules tool is clearly to be seen in Article 9 of the Rome I Regulation. The changes demonstrated by Article 9 are more than cosmetic, in order to address the misgivings held by those states which entered reservations in relation to Article 7.1 of the Rome Convention. Article 9 constitutes a new approach to an old, important problem, viz. the extent to which it is justifiable to permit as possibly determinative a law or policy which is neither that of the *lex fori* nor of the *lex causae*.

Notably, with regard to choice of law concerning non-contractual obligations, there is an absence of vertical continuity. In hailing the successful completion of the Rome II negotiations, the European Parliament's Rapporteur made much of the fact that it was the first time that a regulation in the field of

[19] [2004] EWHC 569 (Comm); [2004] 2 Lloyd's Rep. 99.

[20] The fact that the parties have chosen a foreign law shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice 'mandatory rules' of that country.

judicial cooperation in civil and commercial matters had come into being without a predecessor international convention.[21]

B. Horizontal Continuity

Replication and reiteration of certain rules horizontally across instruments is apparent,[22] for reasons of principle, consistency and practicality. Horizontal continuity may be expressly directed in an instrument, as, for example, in recital (7) of the Rome I Regulation:[23]

> The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/ 2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations (Rome II).

Where a principle set in one instrument is imitated in another, the effect is to affirm and consolidate that principle.[24]

Some repetition of principles across instruments is more than the mere insertion of boilerplate clauses as, for example, the provisions in Rome I and Rome II concerning mandatory rules. While Article 16 of Rome II clearly is modelled on the mandatory rule tool contained in Article 7.2 of the Rome Convention, because Rome II, ironically, pre-dates the Rome I Regulation, it lacks an autonomous definition such as is provided by Article 9.1 of Rome I Regulation. Article 14.2 of Rome II appears to be a progeny of Article 3.3 of the Rome Convention, and so an argument could be made that a case interpreting Article 3.3 of the Convention legitimately could be used to interpret the corresponding provision for non-contractual obligations. But the fact that Article 3.3 of the Convention has been superseded by Article 3.3 of the Regulation means that Article 14.2 of Rome II now must be construed in

[21] <http://dianawallismep.org.uk/en/article/2007/063886/rome-ii-a-first>.

[22] eg in applicable law in obligations: Rome I, art 18 = Rome II, art 22 (burden of proof); Rome I, art 20 = Rome II, art 24 (exclusion of *renvoi*); Rome I, art 21 = Rome II, art 26 (public policy); Rome I, art 22 = Rome II, art 25 (states with more than one legal system); Rome I, art 23 = Rome II, art 27 (other provisions of Community law); Rome I, art 25 = Rome II, art 28 (relationship with other international conventions); and Rome I, art 27 = Rome II, art 30 (review clause).

[23] cf recital (7) Rome II. Regulation 1215 has no horizontal continuity provision.

[24] eg in the subject of awards of damages in contractual and non-contractual disputes. cf Rome I Regulation, art 12.1.c and Rome II Regulation, art 15c, both shifting power to fix the award of damages in favour of the *lex causae*. For background in relation to the rule in non-contractual obligations, see *Harding v Wealands* [2007] 2 AC 1; G Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1(1) JPrivIntlL 69; JM Carruthers, 'Damages in the Conflict of Laws – the Substance and Procedure Spectrum: *Harding v Wealands*' (2005) 1(2) JPrivIntlL 323; and R Weintraub, 'Choice of Law for Quantification of Damages: A Judgment of the House of Lords makes a Bad Rule Worse' (2007) 43 TexasIntlLJ 311l.

light of, and arguably consistently with, the equivalent rule in the Rome I Regulation.

Horizontal continuity of autonomous definitions is not yet apparent. Although there is growing incidence of the use of autonomous definitions for the purposes of an individual instrument, there is little evidence yet of the presence of definitions which are autonomous to the entire corpus of the European regime of private international law. For example, the provision of definitions of 'habitual residence' for the purposes of Rome I (Article 19) and Rome II (Article 23) is noteworthy, but their use is strictly limited to the purposes of the Regulation in which they appear.

C. Horizontal Consistency and Consensus

It seems not unreasonable to speculate that when a new provision emerges in an instrument, assistance in interpreting it may be had not only from predecessor instruments in the vertical line (if such exist), but also on the horizontal plane, so as to ensure consistency and coherence.

In this context one may consider interpretation of the critical phrase in Article 9.3 of the Rome I Regulation, viz. the 'law of the country where the obligations arising out of the contract have to be or have been performed'. In interpreting Article 9.3, that is, for the purposes of applicable law, is it legitimate to draw assistance from Regulation 1215, Article 7.1.b (ex-Brussels Regulation, Article 5.1.b), directing that unless otherwise agreed the place of performance of the obligation in question shall be, depending on the nature of contract, the place of delivery of goods or of provision of services? It would seem perverse for a judge vested with special jurisdiction in contract under Article 7.1.b to conclude for choice of law purposes under Article 9.3 of Rome I, that 'the law of the country where the obligations arising out of the contract have to be or have been performed' was *other* than the place of delivery of goods, or provision of services, as appropriate.[25] Similarly, in tort, the acceptance of jurisdiction by a forum on the ground of its being the place of occurrence of harm, actual or threatened, under Article 7.3 (ex-Brussels Regulation, Article 5.3) might be thought properly to influence that court's approach to the interpretation of 'the country in which the damage occurs' for the purpose of Article 4.1 of Rome II. Recitals (7) of the Rome I Regulation, and of the Rome II Regulation, respectively, seem to endorse such holistic consistency of interpretation.

In contrast, in view of the reformulation of Article 4 of the Rome I Regulation, it would seem a step too far to suggest that a judge may derive

[25] Affirmation of this interpretative strategy, to some extent, may be drawn from Rome I Regulation, recital (17), which enjoins consistency of interpretation of the applicable law rule in the absence of choice in contracts for the provision of services and sale of goods, and the special jurisdiction rule in art 5.1 of the Brussels Regulation. This very connection between Rome I and Brussels Regulation is attributable to changes in wording introduced in the Rome I Regulation.

assistance from the ancestor choice of law instrument, the Rome I Convention (which demonstrated a preference to identify as the characteristic performer of a contract the party who was required to effect the more active performance), so as to support an argument that the place of payment would be a less likely contender for 'place of performance' under Article 9.3 of the Rome I Regulation than would be the place of manufacture and/or delivery.

While there is much evidence of harmony of intent, and of harmonious intent having been translated into the construction of mutually consistent rules across the Rome and Brussels instruments, it is possible nonetheless to identify occasional discord. It may be permissible, for example, to cavil at the mismatch produced by the conjoined effect of Regulation 1215, Article 7.1.b (ex-Brussels Regulation, Article 5.1.b) (special jurisdiction governing contracts for the sale of goods, designating as the forum the place in a Member State where the goods were delivered or should have been delivered—the buyer's court, as it were) and the Rome I Regulation, Article 4.1.a (leading to application of the seller's law, ie the law of his habitual residence). Thus, in a sale of goods case where there is no party choice of court and no party choice of law, litigation will proceed, harlequin-style, in the 'buyer's forum', applying the 'seller's law'.[26] The combination of Brussels rules and those of Rome II produces a related example, flowing from the jurisdiction principle enshrined in *Bier BV*,[27] which permits suit at the claimant's option in the court of the place of acting or the court of the place of resulting harm. Should the claimant elect to sue in the former, the effect of his choice will be that the (EU) court of the place of acting, in the absence of choice of law by the parties under Article 14 of Rome II, normally must apply the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred.[28]

Every private international law instrument is defined in terms of material, temporal, and territorial scope. The material scope of instruments is an important aspect of *horizontal consistency*—what might be deemed *consensus* between instruments. The regulatory jigsaw is being completed, and it is necessary to ensure that each piece has its place and fits with the others, and that two pieces never vie for one space. One example of successful avoidance of duplication of regulation is the exclusion from the scope of the Rome I Regulation of obligations arising out of dealings prior to the conclusion of a contract (Article 1.2.i), an exclusion which matches the express inclusion of the rule in Article 12 of the Rome II Regulation for obligations arising out of *culpa in contrahendo*. But this may be a little complacent, for there can yet be jostling for position between instruments.[29]

[26] In respect of franchisees and distributors, however, court and law appear to coincide. Applying the bespoke rules in the Rome I Regulation, art 4.1.e and f, in combination with Regulation 1215, art 7 (ex-Brussels Regulation, art 5), there would be a match between court and law: the franchisee's/distributor's court *and* law will be selected.

[27] *Bier BV v Mines de Potasse d'Alsace SA* [1978] QB 708.

[28] Rome II Regulation, art 4.1.

[29] See below, Section III.B.2.

D. Internal Coherence within an Instrument

Difficult questions of characterization may arise in the application of a single instrument as, for example, on the question whether a certain set of facts should be characterized as falling within one rule or another, eg whether a contract is one for the sale of goods or provision of services for the purposes of Regulation 1215.[30] Rome I anticipates possible difficulties of characterization by providing, in Article 4.2, that where the elements of the contract straddle more than one of those types listed in Article 4.1(a)–(h), the contract shall be governed by the law of the habitual residence of the characteristic performer of the contract. The same is not true of the tort-specific rules contained in Rome II, Articles 5–9, since that instrument provides no 'tie-breaker' rule.

The interrelationship of provisions *within* a single instrument is significant. This is particularly true of Regulation 1215 and its predecessors. It is very important to ensure that there is clarity as to which parts of a Regulation are self-contained and which parts operate throughout the scheme of jurisdictional rules. This is a matter of ranking and hierarchy. For example, the rules of exclusive jurisdiction (Chapter II, Section 6: Article 24) (ex-Brussels Regulation, Article 22) and the rules contained in Articles 15, 19 and 23 (ex-Articles 13, 17 and 21) (party autonomy provisions relative to insurance, consumer and employment contracts), take priority over the general prorogation of jurisdiction provision contained in Article 25 (ex-Article 23). On the other hand, Article 26 (ex-Article 24), itself subject to Article 24 (ex-Article 22), overrides not only Article 25, but also is generally assumed to apply to disadvantaged parties,[31] despite their special treatment elsewhere in the Regulation. Likewise, the fact that the protective 'codes' contained in Chapter II, Sections 3, 4 and 5 of Regulation 1215 must be read[32] without prejudice to Articles 4[33] and 7.5[34] demonstrates that those 'codes' are not hermetically sealed.

The interplay between Article 7.1 and 7.3 of Regulation 1215 (ex-Brussels Regulation, Articles 5.1 and 5.3) is an area of some subtlety. The same is true in relation to consumer contract claims/tort claims.[35] The decision of the ECJ in *Kalfelis v Schroder*,[36] that the phrase 'matters relating to tort, delict or quasi-delict' in Article 5.3 of the Brussels Convention must be regarded as an

[30] cf under Brussels Regulation, *Peter Rehder v Air Baltic Corporation* (reference from the Bundesgerichtshof, Germany) OJ 2009 C205/8; and *Car Trim GmbH v KaySafety Systems SRL* (reference from the Bundesgerichtshof, Germany).

[31] This is confirmed by the softening of the rule in favour of such parties (specifically named), per art 26.2. See Section IV.A, below.

[32] Arts 10, 17.1 and 20.1.

[33] Regarding defendants not domiciled in a Member State.

[34] Special jurisdiction as regards disputes arising out of the operations of a branch, agency or other establishment.

[35] See eg decision of the German Federal Supreme Court in *In Re a Mail Order Promise of Win in a Draw* [2003] ILPr 46. See Section IV. B, below.

[36] *Kalfelis v Schroder* [1988] ECR 5565; [1989] ECC 407 (a case under Brussels Convention). See also *Source Ltd v TUV Rheinland Holding AG* [1998] QB 54.

'independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a ''contract'' within the meaning of Article 5(1)', underpins the decision of the Irish High Court in *Burke v Uvex Sports*.[37] In *Burke*, the claimant sought damages for personal injuries caused when the visor on his motorcycle helmet broke after he skidded and struck a roadside in Ireland. The claimant framed his action solely in tort against two defendants, both domiciled in Germany: first, the manufacturer, and second, the party from whom Burke had bought the helmet and visor, and with whom he had, therefore, a contractual relationship. The court could not overlook the existence of the contractual element,[38] with the result that it could not properly take jurisdiction over the second defendant on the basis of Article 5.3 (occurrence of the delict in Ireland). It did not matter that in these circumstances, by the national law of Ireland, the contractual element of the claim did not foreclose a claim in tort; nor could account be taken of the possible detriment to the claimant if, as a result of time limitation rules, he was unable to sue the second defendant in Germany under Article 2.[39]

III. SYMBIOSIS BETWEEN INSTRUMENTS

A. Rome I and Rome II, Chapter II (Torts/Delicts)

An investigation into coherence within and between instruments can be extended to an examination of the symbiotic relationship between instruments. To what extent does the applicable law identified by application of the rules of the Rome I Regulation influence identification of the applicable law under the Rome II Regulation? The traffic is mostly one-way. It is difficult to cite any instance where the applicable law per Rome II influences or determines the applicable law per Rome I; at best, in appropriate circumstances, the applicable law under Rome II may be a factor to be weighed in the balance for an assessment under, eg Article 4.5 of Rome I.

This is a different subject from ascertaining the measure of horizontal consistency and consensus between instruments. Rather, it is a question of the

[37] *Burke v UVEX Sports GmbH, Motorrad TAF GmbH* (Record No 2003 4850P) before the Irish High Court [2005] ILPr 26 (a Brussels Regulation case). See *contra*, *Re a Mail Order Promise of Win in a Draw* [2003] ILPr 46 (German Federal Supreme Court), which is distinguishable from the scenario in *Burke*, where there was no doubt that a contract existed.

[38] It was agreed between the parties, and accepted by Herbert J, that the contract between Burke and the second defendant was *not* a consumer contract within the provisions of arts 15–17 of the Brussels I Regulation (para 31).

[39] See J Hill and A Chong, *International Commercial Disputes: Commercial Conflicts of Laws in English Courts* (4th edn, Hart 2010) para 5.6.8; and U Magnus and P Mankowski (eds), *European Commentaries on Private International Law: Brussels I Regulation* (2nd rev edn, Sellier European Law Publishers 2012) 116–19. Possibly, in practice, the approach taken may be less 'legalistic'. See discussion in JJ Fawcett and JM Carruthers (eds), *Cheshire, North & Fawcett's Private International Law* (14th edn, OUP 2008) 251–2.

extent to which connections exist in the formulation of the rules concerning different areas of law. Symbiosis between the Rome instruments is observable, eg in Rome II, Article 4.3, in the provision conferring discretion on the forum, in effect, to override both the *lex loci damni* rule in Article 4.1 and the rule of commonality in Article 4.2, in order to secure as the governing law in tort that law which, in the view of the forum, is manifestly more closely connected with the tort. In exercising that discretion, the forum is given a hint that such a manifestly closer connection might be based upon a pre-existing relationship between the parties, *such as a contract* that is closely connected with the tort in question. The particularity of expression is important: the tort in question, it seems, must derive from, or have a close association with, the contract referred to.

Article 4.3 of the Rome II Regulation is loosely drawn, both by use of the word 'might' and by the reference, at second remove, to a contract. In the employer–employee situation (say, in an accident occurring in the workplace where the injured employee would not have been but for his employment) or carrier–passenger situation, the provision is likely to be apposite[40]—assuming that there has not been a valid choice of law per Article 14—as may also be the case with economic torts, such as inducement or procurement of breach of contract. If, in the view of the forum, torts arising from the employment and carriage situations fall within Article 4.3 of Rome II, reference will be made, not simply to the applicable law of the contract identified per the general rules contained in the Rome I Regulation,[41] but also to the contract-specific rules contained in Articles 5–8 thereof. This exercise would involve an incursion into the detail of the rules of Rome I in order to arrive at a conclusion under Rome II.

If one considers in this context the celebrated problem at common law of a party adducing a contractual defence to a tortious claim, such as arose in *Brodin v A/R Seljan*[42] and *Sayers v International Drilling Co NV*,[43] is it right to assume that the forum, in this era of harmonized rules, still would look, first, to the applicable law of the tort in order to ascertain whether by that law a contractual defence can be offered,[44] and thereafter ascertain, by the law governing the contract as determined by the Rome I Regulation, if the contract and the relevant term thereof are valid in themselves and apt to provide a defence? To employ Article 4.3 of Rome II in order to establish at the outset of this exercise—by reference to the pre-existing contractual relationship between the parties—the applicable law in the tort, would cause confusing circularity.

[40] As in eg *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14.
[41] Arts 3 and 4.
[42] 1973 SC 213.
[43] [1971] 1 WLR 1176. See also *Coupland v Arabian Gulf Oil Co* [1983] 3 All ER 326; and *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157.
[44] Reference to art 15b of the Rome II Regulation suggests such an approach.

B. Rome I and Rome II, Ch III (Unjustified enrichment, negotiorum gestio *and* culpa in contrahendo*)*

1. The consequences of nullity of contract and problems of unjust enrichment

By Article 12.1.e of the Rome I Regulation, the law governing a contract will govern the consequences of nullity of a contract, including the repayment of sums[45] due under a void or nullified contract. As a result of a UK reservation[46] the equivalent provision of the Rome I Convention, Art 10.1.e, did not apply in a UK court since the consequences of nullity were regarded by UK legal systems as pertaining to rules of restitution. In many cases the applicable law identified by the contractual route and by the restitution route would be the same. Now, however, since there is pan-European agreement that nullity of contract should be dealt with by the (putative) applicable law of the necessarily putative contract, it is time to address the possibility that the co-existence of this rule with the choice of law rules under the Rome II Regulation, Chapter III, may generate problems of characterization and distribution of issues between possibly applicable laws.

The area of void and nullified contracts can cause doubt in the *jurisdictional* aspect. A claim arising in restitution from a *void* contract does not fall under special jurisdiction in contract, for the purpose of allocation of jurisdiction intra-UK per Schedule 4 to the Civil Jurisdiction and Judgments Act 1982.[47] On the other hand, 'matters relating to a contract' can include matters relating to a *disputed* contract.[48] Arguably (especially from a European perspective), the consequences of nullity of a contract *should* be characterized as contractual for the purposes of jurisdiction, to chime with Article 12.1.e of the Rome I Regulation for the purposes of choice of law. It seems not unreasonable that in all Member State courts the remedy for such claims be regulated by the content of what must be the putative applicable law of the void contract, and that the court properly seised to implement this remedy be the 'putative court' having special jurisdiction in contract under Article 7.1 of Regulation 1215 (ex-Brussels Regulation, Article 5.1). To say that claims resulting from *void* contracts should fall outside the ambit of Article 7.1, but those which arise out of *voidable* contracts should fall within its ambit, is not a helpful dividing line, and is likely to produce uncertainty, and also would deprive of jurisdiction to

[45] Giuliano and Lagarde Report, at 33 reveals that the equivalent provision under the Rome I Convention, art 10.1.e, was inserted to make it clear that the applicable law under the Convention governed this issue.

[46] Italy also entered a reservation under art 10.1.e.

[47] *Kleinwort Benson Ltd v Glasgow District Council* [1999] 1 AC 153. *Kleinwort* is not an ECJ decision, and the ECJ may take a different view if circumstances should present for its ruling.

[48] *Boss Group SA v Boss Group France* [1996] 4 All ER 970; *Halki Shipping Corp v Sopex Oils Ltd* [1997] 3 All ER 833; and *Belgian International Insurance Group SA v McNicoll* 1999 GWD 22-1065.

award a restitutionary payment a forum which had decided that the alleged contract is void.[49]

A substantial proportion of *choice of law* problems arising under the head of unjust enrichment has a foundation in a pre-existing relationship, often contractual, between the parties. It is not surprising, therefore, that the first limb of the legislative solution in Article 10 of Rome II gives due weight to this consideration. By Article 10.1, non-contractual obligations arising out of unjust enrichment, including payment of amounts wrongly received, *where they concern a pre-existing relationship between the parties such as one arising out of a contract or a tort* (ie relational unjust enrichment) shall be governed by the law which governs that relationship, that is to say, by the applicable law identified according to either the Rome I (contract) or Rome II Regulation (tort). It seems that under Article 10.1 of Rome II the applicable law in contract will govern the obligation arising out of unjust enrichment *only* if that unjust enrichment derives from, or is closely associated with, that very contract.[50] It is not clear whether the existence of a void or voidable contract (such status being determined by application of the choice of law rules in Rome I) would suffice to trigger the operation of Article 10.1.[51] Borderline cases are the conflict lawyer's stock-in-trade. Turf wars, or boundary disputes, are to be expected between Article 12.1.e of Rome I and Article 10.1 of Rome II.

2. *Rome II, Article 12* (culpa in contrahendo)

Like the consequences of nullity of contract, the subject of *culpa in contrahendo* weaves around the line between contractual and non-contractual obligations. Article 1.2.i of the Rome I Regulation expressly excludes from the scope of Rome I obligations arising out of dealings prior to the conclusion of a contract. Article 12.1 of the Rome II Regulation applies to what it firmly classes as a non-contractual obligation (albeit one arising out of dealings prior to the conclusion—or not—of a contract) the applicable law of the contract, or the putative applicable law thereof. This choice of law rule applies whether or not a contract was actually concluded.[52] If, however, the law applicable cannot be determined under Article 12.1 of Rome II (which surely must be a very rare case[53]), then the rule which must be applied under Article 12.2 is in the same terms as the general rule for tort contained in Article 4.

[49] See Hill and Chong (n 39) para 5.6.17 citing the views of Lord Nicholls (dissenting) in *Kleinwort*.

[50] Also art 11.1 (*negotiorum gestio*). cf Rome II, art 4.3.

[51] The same question arises in relation to Rome II, art 4.3, but it is unlikely that a court would place great reliance on a contract of doubtful validity, in identifying the governing law in tort; and *mutatis mutandis* art 11.1.

[52] Art 12.1.

[53] See *Cheshire, North & Fawcett* (n 39) 835–6, where the case postulated is that during negotiations each party had tried to impose without success its preferred choice of law clause on the other, but the parties never reached consensus on the point. Or if contractual negotiations had broken off at a very early stage, it may be impossible to ascertain the applicable law—in such circumstances, art 12.2 must be intended to govern liability for any loss, though if negotiations

As to the jurisdictional aspect of pre-contractual obligations (a matter left open in *Kleinwort*), the House of Lords in *Agnew*[54] was prepared to hold that special jurisdiction in contract applied. The justification for utilizing special jurisdiction in contract is likely to be strongly fact-dependent. While a misrepresentation during the negotiation of a contract might justify engaging that provision, allegations of breach of a 'duty' not to use undue influence or duress, or other negative obligation, would seem to be a less persuasive case for special jurisdiction in contract[55] (but surely would not foreclose an argument for the engagement of special jurisdiction in tort, assuming that the forum putatively seised was that of the occurrence of the actual or anticipated harm). For example, where it was alleged that a party unjustifiably broke off negotiations, the ECJ held in *Fonderie Officine Meccaniche Tacconi SpA*[56] that since no obligation had been assumed by one party to another, there was no justification for the application of special jurisdiction in contract. Any alleged breach of the duty of good faith imposed by the Italian Civil Code which the claimant sought to rely upon would have to be categorized, in jurisdictional terms, in tort. In *Fonderie*, no contract resulted, and *Agnew* is distinguishable on that ground.

C. Reliance between Instruments

Agreements on choice of court and/or on choice of law are themselves contracts.

1. Brussels/Rome I

By dint of Article 1.2.e of the Rome I Regulation (like its predecessor, Article 1.2.d of the Rome Convention), agreements on choice of court and arbitration agreements are excluded from the scope of the Rome I Regulation and their validity will be judged in a Member State court by that court's national rules. Thus, in a UK forum, a choice of court agreement will be judged as to formal and essential validity by common law rules.[57] But within the Brussels scheme of jurisdiction and judgments, in the matter of prorogation, Article 25 of Regulation 1215 (ex-Brussels I Regulation, Article 23) makes

were at a very early stage one would imagine that reparable loss such as to give rise to litigation engaging art 12.2 would be infrequently encountered.

[54] *Agnew v Lansforsakringsbolagens AB* [2001] 1 AC 223 (a Lugano case).

[55] *Cheshire*, *North & Fawcett* (n 39) 231–2.

[56] *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Machinenfabrik GmbH* Case C-334/00 [2002] ECR 1-7377.

[57] See EB Crawford, *International Private Law in Scotland* (W Green & Son 1998) paras 12.21–12.31; and PM North and JJ Fawcett, *Cheshire and North's Private International Law* (11th edn, Butterworths 1987) ch 18.

special provision as to form.[58] No doubt residual, important questions might arise as to essential validity or interpretation, requiring recourse to national choice of law rules in contract, but for many matters (encompassing not only form, but also the presumption of exclusivity), Article 25 will provide. This is an example of the *sharing* between harmonized instruments and national rules, of the treatment of different aspects of one topic, ie permission to choose a court, and the constitution of the contract by which that court is chosen: a modern manifestation of *dépeçage*.

Article 25 of Regulation 1215 makes no provision regarding the material validity of prorogation agreements. UK jurisprudence suggests that only in a very extreme case can the appearance of consensus be challenged,[59] but if such a case were to arise, consent is to be tested, presumably, by reference to pre-existing national choice of law rules.[60]

2. Rome II, Article 14 and Rome I

There can be direct choice of law, per Rome II, Article 14, and choice of applicable law at second remove, through operation of Rome II, Article 10.1. Where the agreement on choice of law is authorized by Article 14, reference must be had to the Rome I Regulation when assessing formal validity, interpretation, material validity (at least so far as demonstrating consensus), and breach. To the issue of contractual capacity in Article 13 of the Rome I Regulation, however, must be added the antecedent proviso supplied by Rome II, Article 14, that only 'parties pursuing a commercial activity' can make such an agreement before the event giving rise to the damage occurs.[61]

As to essential validity of the terms of the choice of law agreement, the position is less clear. For example, A and B, commercial parties, agree in advance of any potential tortious incident that liability will be governed by the law of Evasia, by which, let it be assumed, there is no principle of vicarious liability of an employer for an employee. The employment contract in which

[58] Presumably governing also the formal requirements of choice of court clauses adverted to in arts 15, 19 and 23 of Regulation 1215, though such choices made by disadvantaged parties are restricted as to content in their own perceived best interests. There is interdependence, therefore, in that while art 25 appears to be the source of the rules governing the making of a valid jurisdiction agreement, no agreement can be made under the aegis of art 25 which contravenes arts 15, 19 and 23.

[59] *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008]2 Lloyd's Rep 619. Considered *by Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm); and followed by *UBS AG v HSH Nordbank AG* [2009] 2 Lloyd's Rep 272. The Court of Appeal distinguished the situation from the type of case demonstrated by *Bols Distilleries BV t/a Bols Royal Distilleries v Superior Yacht Services Ltd* [2007] 1 WLR 12 where it could be seen that although a jurisdiction clause existed, no substantive final agreement on the contract itself had been reached between the parties.

[60] Represented in the UK by *Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co* (1961) 111 LJ 519.

[61] Noting again also the prohibitions upon freedom of choice contained in Rome II, arts 6 and 8.

A and B make this 'Rome II, Article 14 agreement', contains a clause to the effect that the law governing the contract as a whole shall be Scots law (per Rome I Regulation, Article 3). Insofar as employer vicarious liability is a principle of Scots law which cannot be derogated from by agreement, the question arises whether the essential validity of the tortious choice of law agreement must be judged by the applicable law of the main contract (Scots law) or by the applicable law, contractually agreed by the parties, to govern the non-contractual obligation (Evasian law). Rome II appears to anticipate this problem through its mandatory rules provision in Article 14.2,[62] but this will not cover all cases. In a situation in relation to which more than two laws have an interest in being applied, it is arguable that the policing mechanisms operative under the Rome I Regulation, namely, Articles 8 (employment contracts), 9 (overriding mandatory provisions), and 21 (public policy of the forum) will apply so as to temper the choice of law agreement made under Article 14 of Rome II.[63] Viewed from this perspective, the extent of party autonomy in the non-contractual sphere is restricted by the rules governing party autonomy in contractual obligations.

This conclusion suggests that the non-contractual obligation is subjugated to the larger contractual choice of law provision. By this mode of reasoning, any attempt by parties to evade a principle such as employer vicarious liability for the wrongful actings of employees would be difficult to achieve.[64]

3. Interrelationship between choice of court and choice of law(s): Regulation 1215, Article 25 and Rome I

A draft formulation of the Rome I Regulation,[65] within the then Article 3.1, proposed that there be a presumption that if parties had agreed to confer jurisdiction on a court of a Member State to hear disputes arising out of the contract, they should be presumed also to have chosen the law of that Member State to govern the contract. There was no indication of the factors which might serve to rebut this presumption, nor any concession that the existence of such a presumption would diminish the importance, and curtail the scope of operation, of Article 4, which in the same draft contained eight bespoke rules to identify the applicable law for different types of contract in the absence of choice of law by the parties. In effect, choice of court was prioritized, being elevated and equated to an implied or imputed choice of law.

Although the 'choice of court imputing choice of law' presumption was excised during negotiations, it cannot be said that all trace of it has disappeared from the Regulation, for there is to be found in recital (12) the provision that,

[62] So too per art 14.3, mandatory rules of Community law.
[63] See further, Section IV below.
[64] cf *Brodin v A R Seljan* 1973 SC 213.
[65] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) (COM (2005) 650 final; 2005/0261 (COD)) art 3.1.

'An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated'. Possibly the mind of a judge applying Article 4 may be influenced by the terms of the recital, and knowledge of its genesis.

The link between choice of court and choice of law was not unknown at common law in the UK.[66] It does not seem unreasonable in an otherwise evenly-balanced case that the parties' exclusive choice of court should weigh in the balance to support a finding that the law of the forum is the applicable law of the contract. From a pragmatic perspective, a contract containing a choice of court clause is likely to contain a choice of law clause. Conceivably, parties might wish to choose a law different from the law of their selected court,[67] but it does not seem too much to require that the onus should be upon them to bring this about by express provision.

IV. DISADVANTAGED PARTIES

In the light of these musings on continuity, consistency and consensus, it is a worthwhile exercise to consider how the Regulations, in combination, treat so-called disadvantaged parties.

A. The Brussels/Rome I Axis

On the Brussels/Rome I axis, there has been steady and purposeful progress towards the creation of a set of rules to protect those persons who are perceived to be of unequal bargaining power in their dealings as private individuals with commercial or professional parties. These rules comprise specialized provisions of jurisdiction and choice of law tantamount to a quasi-code to assist such persons.[68]

The process of catch-up, instrument with instrument, in this subject area can clearly be traced. The time line from 1968 shows that protective jurisdictional provisions were made in the Brussels Convention in favour of consumers, insured parties and, to a lesser extent, employees.[69] The Rome Convention provided advantageous applicable law rules for consumers and employees.[70] The Brussels Regulation enhanced employee protection in jurisdiction by

[66] See discussion at EB Crawford and JM Carruthers, *International Private Law: A Scots Perspective* (3rd edn, W Green & Son 2010) para 15–12.

[67] cf the default position effected by combination of art 5.1.b, Brussels I Regulation, and art 4.1. a of Rome I Regulation: see above, Section II.C.

[68] Regulation 1215, Chapter II, Sections 3, 4 and 5 and Rome I Regulation, arts 6, 7 and 8. As to the protection afforded by the Rome II Regulation, see Section IV.B, below.

[69] Arts 8–15. Contracts of employment were provided for in the 1968 Brussels Convention under art 5.1.

[70] Arts 5 and 6.

giving employees[71] treatment equivalent to consumers and insured parties, and welcoming them fully to the favoured ranks of the disadvantaged. The Rome I Regulation has a bespoke provision governing insurance contracts.[72] Regulation 1215 will improve the situation of consumers and employees, respectively, as above noted,[73] in bestowing on them the further benefit of suing a non-EU domiciled commercial party or a non-EU domiciled employer in the weaker party's EU Member State of domicile or place of work. Unevenness remains, however, in that this advantage has not been extended to insured parties. On the other hand, the lack of parity among the disadvantaged which exists under the Brussels I Regulation per Article 35.1[74] has been remedied by Regulation 1215, Article 45.1(e). The rationale for the Brussels I Regulation exclusion of employee protection in this matter of judgment enforcement appeared to be that the employee is more likely to be the claimant in the court of origin, and so it would be to his detriment, or at least potentially so, to frame the rules in such a way that the jurisdiction of the court of origin might be open to challenge in the court addressed.[75] Be that as it may, Regulation 1215, by Article 45.1(e) has placed employees on an equal footing with those in the other 'weaker party' categories. Evidently, therefore, there is broad equivalence in conflict of laws treatment of 'weaker parties', and a clear policy objective across all the instruments to protect them.

A secondary question is whether, on closer analysis, the same people qualify to benefit from the favourable jurisdiction rules as from the favourable choice of law rules. In terms of horizontal harmony, it is reasonable to ask whether, for example, a consumer as envisaged by Regulation 1215 has a doppelgänger in the choice of law provisions in the Rome I Regulation.[76] Searching for guidance in interpretation, greater assistance is to be derived from the jurisprudence concerning jurisdiction,[77] where there are many more cases, from high and low in the judicial hierarchy, on the definition of consumer[78] than there are for choice of law. The Giuliano and Lagarde Report states that the definition of consumer contracts in the Rome I Convention corresponds to that contained in

[71] Arts 18–21. Protective provisions for employees, under Brussels and Rome, are restricted to 'individual' contracts of employment, as distinguished from collective agreements.

[72] Art 7.

[73] Section II.A.1, above.

[74] And art 35.3.

[75] Hill and Chong (n 39) para.13.3.5.

[76] Albeit that the edifice of protection does not rest simply on the individual being a 'consumer', though being a consumer is a condition precedent.

[77] cf *Gruber v BayWa AG* Case C-464/01 [2006] QB 204.

[78] See eg *Benincasa v Dentalkit Srl* Case C-269/95 [1998] All ER (EC) 135, *Hans-Hermann Mietz v Intership Yachting Sneek BV* (Case C-99/96) [1999] ILPr 541; *Standard Bank of London v Apostolakis* (*Protodikeio* Athens) [2003] ILPr29; and *Engler v Janus Versand GmbH* Case 27/02 [2005] 7 CL 76 (ECJ). Contrast *Chris Hart (Business Sales) Ltd v Niven* 1992 SLT (Sh. Ct) 53; *B. J. Mann (Advertising) Ltd v Ace Welding & Fabrications Ltd* 1994 SCLR 763; *Standard Bank London Ltd v Apostolakis (No 1)* [2000] ILPr 766; *Rayner v Davies* [2003] ILPr 15; *Semple Fraser v Quayle* 2002 SLT (Sh Ct) 33; *Prostar Management Ltd v Twaddle* 2003 SLT (Sh Ct) 11; and *Verein für Konsumenteninformation v Henkel* Case C 167-1000 [2003] All ER (EC) 311 (ECJ).

Article 13 of the Brussels Convention.[79] If a person acts partly within and partly outside his trade or profession, he will be regarded as a consumer only if, in the instance in question, he acts *primarily outside* his trade or profession.[80]

An illustration of the degree of consistency sought to be achieved between subsequent instruments, whether in the same family line or not, in the treatment of consumers, is provided by recital (24) of the Rome I Regulation,[81] to the effect that that instrument and the Brussels Regulation should take the same approach to the significance of dealings by way of the internet. As regards online consumer transacting, the Rome I Regulation caught up with the Brussels I Regulation in adopting the verb 'directed to'—a phrase repeated in Regulation 1215, Article 17.1(c)—and it is clear that there is a harmony of aim and interpretation between the instruments.[82] All roads seem to lead us to a common junction of consensus.

In terms of internal coherence within a single instrument, there is a separate question whether, for example, an insured person can 'double-up' as a consumer, and if so, which set of protective rules within an instrument, be it Regulation 1215 or the Rome I Regulation, should take precedence? It may be in any given case that though in principle an 'active' seeker of insurance cover also can be regarded as a consumer, the consumer protective conflict of laws provisions may be beyond his reach by reason of some specialty in the facts, such as the 'consumer' acting primarily in a business capacity.[83] If so, the question of precedence of provisions in the instant case is answered. If not, although it has been asserted[84] that Section 3 (insurance) takes precedence over Section 4 (consumer contracts), a purposive interpretation of the instruments would lead to the conclusion that not only should weaker parties be protected by conflict of law rules that are more favourable to their interests than the general rules,[85] but that, by extension, they should have the better of the protective options available.

[79] Giuliano and Lagarde Report, OJ C282, 31.10.80, at 24.

[80] *Cheshire*, *North & Fawcett* (n 39) 726. An intended coincidence of forum and law is visible also in relation to individual contracts of employment: see Jenard Report OJ C59 5.3.79, at 24.

[81] 'With more specific reference to consumer contracts, . . . Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation . . . '.

[82] Schlosser Report, OJ C59, 5.3.79, at 119; and Giuliano and Lagarde Report, OJ C282, 31.10.80, at 24.

[83] *Gruber v BayWa AG* Case C-464/01 [2006] QB 204. Protection under Section 3 extends to policyholders who take out insurance contracts as part of their trade or profession: *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361. See Magnus and Mankowski (n 39) 333; and Lord Collins et al (eds), *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 11-339, making the point in connection with *New Hampshire* that 'matters relating to insurance' is not restricted to insurance for domestic or private purposes.

[84] Schlosser Report, OJ C59, 5.3.79, at 119; and Magnus and Mankowski (n 39) 365 (without, however, reference to authority).

[85] Regulation 1215, recital (18) and Rome I Regulation, recital (23).

In the matter of insurance contracts, the persons who are to benefit from Articles 10–16 of Regulation 1215 (ex-Articles 8–14 of the Brussels I Regulation) comprise the policyholder, the insured or a beneficiary. In the case of *Odenbreit*,[86] the ECJ, in a significant decision effectively enlarged the class of persons who may derive advantage from Chapter II, Section 3 of the Brussels Regulation, by holding that the victim of a road accident occurring in the Netherlands, might sue in Germany (his own domicile) the insurance company (established in the Netherlands) of the person responsible for the accident. This, therefore, brings the claimant/victim into the front rank for protection alongside those categories of persons explicitly named in Article 9, who, as a class, enjoy the benefit of *forum actoris* rules. The ECJ, in taking a teleological approach, relied upon the purpose of Chapter II, Section 3[87] of the Regulation, which, as noted, guarantees more favourable protection to the weaker party than is conferred by the general rules of jurisdiction.[88] To deny the injured party the right to litigate in his own domicile would be contrary to the spirit of the Regulation. In German private international law, the right of action of an injured party was regarded as a right in tort, and not as a right under an insurance contract. The ECJ held that the tortious nature in German law of the action by the injured party, as a matter extrinsic to the contractual relations between the insured wrongdoer and his insurer, did *not* preclude opening to the injured party the benevolent jurisdiction provisions of Article 9. The overriding spirit of the Regulation seems to have resulted in fudging subtleties of characterization. Notably, however, in *Vorarlberger Gebietskrankenkasse*,[89] the ECJ decided that a further extension of *forum actoris* benefit should not be granted to a social security institution acting as a statutory assignee of the rights of the victim of a road traffic accident, since the institution was not to be regarded as an economically weaker party, and the contending parties were to be regarded as equals. It was made clear by the ECJ in the *Group Josi* litigation[90] that although special rules on jurisdiction apply to certain insurance contracts, those rules have no application to reinsurance contracts, for protection of the insured party is not justified in the context of the equal relationship between the reinsurer and the reinsured.

Clearly, both in choice of law rules, and in jurisdiction rules with regard to insurance, the draftsmen have been concerned to draw distinctions between different, widely varying types of insurance contract, so as to ensure that preferential treatment is given only where preference is due; and also with the aim of avoiding undue disturbance to the large-scale insurance sector. Within the class of insured persons, provided for in the Rome I Regulation, Article 7,

[86] *FBTO Schadeverzekeringen NV v Odenbreit* (Case C-463/06) before the Court of Justice of the European Communities (Second Chamber) 13 December 2007 [2008] ILPr 12.

[87] cf Chapter II, Sections 4 and 5.

[88] See recital (13), Brussels I Regulation.

[89] *Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG* Case C-347/08 OJ 2008 C272/11, [2010] ILPr 2.

[90] *Universal General Insurance Co v Group Josi Reinsurance Co SA* [2001] QB 68.

there is a difference in treatment between insurance contracts covering large risks as defined[91] (whether or not the risk covered is situated in a Member State) and all *other* insurance risks situated *inside* the territory of the Member States. Similarly, in provisions concerning insurance,[92] a distinction is made between those specialized or large-scale risks itemized in Article 16 of Regulation 1215[93] and those more general or smaller risks represented typically by life assurance, motor insurance, and liability insurance contracts.

With regard to Regulation 1215, one may query the relationship between Chapter II, Section 7 (particularly Article 26) and Sections 3, 4 and 5. There was no overt indication in the Brussels Regulation that Section 7 (prorogation of jurisdiction) was outranked by the Sections containing protective provisions for disadvantaged persons,[94] nor any authoritative ECJ interpretation thereon, such as is provided by the ruling in *Erich Gasser GmbH v Misat Srl*[95] on the relationship between Articles 17 and 21 of the Brussels Convention.[96] It was assumed that the principle of submission without protest as found in Article 24 of the Brussels Regulation applied with full force to disadvantaged parties,[97] the rationale of Article 24 being that, since it represents a later choice by a party, it supersedes any choice of court made earlier; and if Article 24 affects disadvantaged parties in like manner, this must mean that no account was to be taken, upon the later eventuality of submission to a jurisdiction, of lack of full freedom to choose in the first instance.[98] No special treatment was to be afforded on the second occasion: to have provided otherwise would have been seen as benefiting the disadvantaged twice—a benefit too far, there being no intention, seemingly, to strengthen such parties' pre-existing protection. The Brussels Regulation approach was that, after the dispute had arisen,[99] weaker parties were not to be treated as being in need of special protection, and therefore it was right to regard them as fully *capax* and so they would 'completely regain their freedom'[100] in the matter of choice of

[91] See First Council Directive 73/239/EEC of 24 July 1973, art 5.d.

[92] Arts 10–16.

[93] As, for example, all 'large' risks as defined in Directive 2009/138/ of the European Parliament and of the Council of 25 November 2009.

[94] Contrast the specific exception of art 22 from the application of art 24.

[95] C-116/02 [2003] ECR 1-4207.

[96] cf arts 23 and 27 of the Brussels Regulation; and, by way of corrective, art 31.2 of Regulation 1215.

[97] See Hill and Chong (n 39) paras 5.8.3 and 5.8.24; and *Cheshire*, *North & Fawcett* (n 39) 268, 272 and 275. More ambivalently, see Magnus and Mankowski (n 39) 390–1; the text at pages 522–3 concludes that the submission principle applies with equal force to the disadvantaged, but looks forward to a more lenient approach in Regulation 1215 (with reference to Judgment of the Court (Fourth Chamber) of 20 May 2010 (reference for a preliminary ruling from the *Okresní soud v Chebu* Czech Republic) *Česká podnikatelská pojišt'ovna as, Vienna Insurance Group v Michal Bilas* (Case C-111/09)).

[98] Though under Brussels Regulation weaker parties were required to follow art 23, the content of their choice was circumscribed for their own benefit by arts 14, 17 and 21.

[99] Arts 13.1, 17.1 and 21.1.

[100] Jenard Report, OJ C59, 5.3.79, at 34.

jurisdiction,[101] whether that choice be made expressly (Articles 13.1, 17.1 or 21.1), or tacitly through submission (per Article 24). Should they have found themselves in a court other than their own, they and their advisers were equipped by these special rules[102] to make an effective challenge, provided that the litigant could prove his membership of the ranks of the disadvantaged, and that the facts otherwise justified application of the protective provisions.[103] There has been a slight softening of attitude in that Article 26.2 of Regulation 1215 seeks to protect such parties from ill-judged submission under Article 26.1, by providing that the court, before assuming jurisdiction on the basis of submission, is required to ensure that such a defendant is informed of his right to contest the jurisdiction of the court, and of the consequences of entering or not entering an appearance.

B. The Rome I/Rome II Axis (Rome II, Ch II: Torts/Delicts)

In the Rome II Regulation, there is less *ex facie* protection of 'disadvantaged' or 'weaker' parties; one must search carefully for any indication of special treatment, or of even vestigial advantage. Looking at Rome II through the lens of a consumer, it can be seen that the terms of Article 5 (product liability) are driven partly by the objective of protecting consumers. This is expressly supported by the terms of recital (20).[104] In Article 6.1 (unfair competition and acts restricting free competition), there is overt protection of consumers' interests.[105] With regard to employment protection, reference may be made to Rome II, Article 9 (industrial action): although an aim of the Rome I Regulation and the Brussels instruments is to confer employee protection, the employee normally being regarded as the party at the disadvantage, Article 9 of Rome II, by contrast, confers a degree of protection, not only on workers, but also on employers.[106]

On the theme of the interrelationship of articles within one instrument, Rome II, in Article 7 (environmental damage), affords a choice to an aggrieved party, namely, that while normally the applicable law shall be that set down by Article 4.1 (the law of the country in which the damage occurs), the person seeking compensation (the victim) may choose to base his claim on the law of

[101] But not as to choice of law, for Rome I Regulation, art 6 still will apply, conferring special protection (by way of restriction).

[102] ie as provided for by arts 12, 16.2, and 20.

[103] See Crawford and Carruthers (n 66) para 7-53.

[104] 'The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, *protecting consumers' health*, stimulating innovation, securing undistorted competition and facilitating trade'. (Emphasis added.)

[105] 'The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the *collective interests of consumers* are, or are likely to be, affected'. cf recital (21): 'The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, *the conflict-of-law rule should protect competitors, consumers and the general public* and ensure that the market economy functions properly'. (Emphasis added.)

[106] Recital (27).

the country in which the event giving rise to the damage occurred.[107] This is a form of positive discrimination in favour of the victim.[108] There is a related question, not yet answered, concerning the internal coherence of Rome II, as to whether the benevolent Article 7 outranks Article 5 (product liability) in a situation where an allegedly defective product causes environmental damage. Arguably, in all situations where doubt arises about the ranking of choice of law rules, the victim should be able to invoke that provision which is more favourable to him.

1. Choice of law implications of the jurisdiction hierarchy

Although tactical advantage may result from the application of different choice of law rules governing, respectively, consumer actions in contract and in tort, speculation as to advantageous choice of law provision is brought down to earth by the rules of jurisdiction of the regime, in particular the supremacy of the rule of special jurisdiction in contract over that in tort, which precludes suit under the head of tort if there exists a contractual link between the parties.[109] There are therefore conflict of laws constraints upon party freedom to choose to sue in contract and tort in the alternative, in contrast with the situation which obtains under the domestic laws of some Member States. It is arguable, therefore, that the prescient adviser, in the product liability/consumer contract case, anxious not to exclude any advantage for his client, should recommend suing under Article 4 of Regulation 1215 (general jurisdiction; ex-Brussels Regulation, Article 2), to permit presentation of claims in the alternative.

But what is the position in terms of choice of law pleading once jurisdiction is established on any ground? If Article 4 jurisdiction is used, presumably the benefit to the claimant is that he may sue in contract *or* tort under Rome I or Rome II in the alternative, to hedge his risk or better his chances.[110] Moreover Article 4 is available where the circumstances cannot be said to fall into any of the special categories (in particular neither within contract nor tort)[111]. But if Article 7.1 or 7.3 of Regulation 1215 be used (special jurisdiction; ex-Brussels Regulation, Article 5.1 or 5.3), then the claimant's case would appear to be limited to an argument in contract or tort, respectively. It would seem as

[107] In sympathy with the jurisdictional principle of ubiquity contained in *Bier BV v Mines de Potasse D'Alsace SA* (21/76) [1978] QB 708.

[108] Recital (25): 'Regarding environmental damage, . . . the principle that the polluter pays, fully justifies *the use of the principle of discriminating in favour of the person sustaining the damage*'. (Emphasis added.)

[109] *Kalfelis v Schroder* [1988] ECR 5565; [1989] ECC 407 (a Brussels Convention case). See also *Source Ltd v TUV Rheinland Holding AG* [1998] QB 54. See Section II.D, above.

[110] See Hill and Chong (n 39) para 5.6.8.

[111] See *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153. But see above, Section III.B.1, re consideration of jurisdiction in cases of nullity of contract.

impossible under the Brussels regime, as in any steeplechase, to change horses once through the gate.[112]

There is a question whether or not this apparently felicitous equine metaphor is indeed well chosen; not only might the legal situation before a national court be, in practice, a little more flexible than indicated, but also it is possible that in strict law the point still may be open. Riding two horses at the same time is a feat which may be achievable in the jurisdictional context, for example, where the two claims in contract and tort, though arising essentially out of the same set of circumstances, are entirely separate, the claim in contract being founded simply on an argument that payment was due, and the claim in tort resting on an alleged misstatement by an employee of the defendant as to the correct manner of payment.[113] That a court properly seised under Article 24 (exclusive jurisdiction; ex-Brussels Regulation, Article 22) may deal incidentally with 'non-exclusive' issues; and that a 'non-exclusive forum' may deal incidentally with an 'exclusive' issue is an interesting, but distinguishable point from that under scrutiny—for in the Article 24 scenario, the issues being advanced are principal and auxiliary, rather than 'alternative' claims. By way of contrast, the ECJ in *Kalfelis* made clear that since the bases of special jurisdiction constitute derogations from the principle that the courts of the State where the defendant is domiciled have jurisdiction, and these derogations must be interpreted strictly, it must be accepted that a court with special jurisdiction in tort dealing with the part of a claim which is based on tort, does *not* have jurisdiction to deal with the other parts of the same claim which are not so based.[114] Generally, however, what must first be decided is whether, in terms of jurisdiction under Regulation 1215, the claim pertains to contract or to tort: 'jurisdiction is not allocated according to the remedy sought'.[115] Since the contract and tort bases of special jurisdiction are mutually exclusive,[116] it follows that, if the claim is founded upon a contractual agreement, the fact that under the national law of the forum a claim might lie also in tort is irrelevant.[117] This canter round the course tends to confirm the assertion that, in a single race, one may not change horses.

It is necessary to examine the Rome I/Rome II borderland in the situation where a consumer is injured by the defective product which was the subject of

[112] *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157, being concerned with choice of law, is not on all fours with the point under discussion.

[113] Example cited in *Cheshire, North & Fawcett* (n 39) 252, discussing *Domicrest v Swiss Bank Corporation* [1999] QB 548, per Rix J at 561.

[114] *Kalfelis v Schroder* [1988] ECR 5565; [1989] ECC 407, para 19.

[115] *Kleinwort Benson Ltd v Glasgow City Council* [1996] QB 678 (Court of Appeal—reversed by House of Lords on another point), per Millett LJ, at 698, cited with approval in *Source Ltd v TUV Rheinland Holding AG* [1998] QB 54, per Staughton LJ at 63.

[116] Discussed above, Section II.D. See discussion in *Cheshire, North & Fawcett's Private International Law* (n 39) 251–2.

[117] But see L Merrett, *Employment Contracts in Private International Law* (OUP 2011) at para 4.49, pertaining to a distinction which may be legitimate to make in connection with the specialties of employment cases.

his consumer contract. A different outcome might be produced by application of the Rome I Regulation, Article 6 (consumer contracts), than by application of the Rome II Regulation, Article 5 (product liability). Admittedly, the first localizing agent under both provisions is the law of the habitual residence of the consumer, but, especially under Rome II, there are other possibilities, which not implausibly the forum might follow, such as the law of the country of acquisition of the product,[118] or the law of the country in which the damage occurred,[119] and account also would require to be taken of a general discretion available to the forum under Article 5 of Rome II.[120] Additionally, party choice of law appears to be unfettered in relation to product liability under Rome II (whether direct choice within the terms of Article 14,[121] or at second remove by virtue of choice of applicable law in related contractual matters, per Article 5.2), whereas choice of law, though permitted in principle with regard to consumers under Article 6.3 of the Rome I Regulation, cannot deprive a consumer of the protection afforded to him by those rules of the otherwise applicable law (of his habitual residence) which cannot be derogated from by contract. It is impossible to say in the abstract which instrument would prove more beneficial to a consumer, but the Rome I Regulation appears to provide greater certainty as to governing law than does the Rome II Regulation.

C. Restrictions on Party Autonomy: The Temporal Dimension

Since Regulation 1215, like the Brussels Regulation, is infused in Chapter II, Sections 3, 4 and 5 with examples of protective concern to prevent the naïve and unwary from making a choice of court to their detriment, and since the Rome I Regulation equally is characterized by the same concern with regard to choosing an applicable law unfavourable to a person of inferior bargaining power, it is perhaps surprising that the Rome II Regulation, by allowing expressly freedom of choice of governing law per Article 14, makes only limited attempts to safeguard weaker parties. Such mandatory protections as are contained in Rome II (in the form of prohibitions against contracting out of the applicable law rules provided by the Regulation) are to be found in Article 6.4, to the effect of forbidding contracting out of the applicable law rule contained in Article 6 (unfair competition and acts restricting free competition), and in Article 8.3 (infringement of intellectual property rights), by means of choice under Article 14.[122]

The principal protection is founded upon the factor of time, that is, whether the choice of law may be made before or only after the event giving rise to the

[118] Rome II, art 5.1.b.

[119] Rome II, art 5.1.c.

[120] Rome II, art 5.2. Rome I Regulation, art 6 affords the forum no such discretion.

[121] Contrast Rome II, arts 6.4 (unfair competition) and 8.3 (infringement of intellectual property rights).

[122] Arts 6.4 and 8.3 both provide that: 'The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.'

damage occurred. Parties who are pursuing a commercial activity are authorized in terms of Article 14.1.b to make a choice of law by an agreement freely negotiated before the event giving rise to the damage. Other parties may agree to submit the issue to the law of their choice only by an agreement entered into after the event.[123] During the Rome II negotiations, the principle of party autonomy and the temporal dimension were matters of active debate.[124] The resulting provision is a compromise among strongly held differing Member State views. For the UK, express authorization of such autonomy is a novelty.[125]

Choice *ex ante* is not available to non-commercial parties. Yet choice *ex post* is not necessarily informed choice, permission to choose the applicable law only after the event being no guarantee that advantage will not be taken of the weaker or less well-informed party. Nevertheless, the theory behind the limitation of parties to choice *ex post* seems to be that they will thereby be protected from inadvertently waiving their rights, or yielding to the will of the other party in advance of the dispute. Similarly, in Regulation 1215, parties deemed to be weak (where there is inequality, real or supposed, in bargaining power) are restricted in their exercise of free will to the making of choices after the event or within certain safeguards.[126] There being no specific guidance in Article 14 or in recital (31) of Rome II on the definition of 'pursuing a commercial activity', it is not entirely clear whether an employee could be regarded as pursuing a commercial activity. Only if that were the case, could the employer and employee in the employment contract make a choice of law in tort *ex ante*;[127] in that situation, a degree of protection could be afforded to the employee by the terms of Article 8 of the Rome I Regulation. If, however, the employer/employee agreement as to choice of law in (future) torts was a discrete agreement, separate from the main employment contract, the Article 8 protection would slip. *Ex facie*, there is no requirement in Article 14 of Rome II that commercial activities are being undertaken by parties of equal bargaining power.

[123] See also recital (31): 'To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.'

[124] See A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2008) 540; and JM Carruthers and EB Crawford, 'Variations on a Theme of Rome II: Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations, Part I' (2005) 9 EdinLR 65, 87–8.

[125] PM North, *Essays in Private International Law* (OUP 1993) 85–6.

[126] Regulation 1215, arts 15, 19 and 23 (ex-Brussels I Regulation, arts 13, 17 and 21).

[127] cf example postulated above at Section III.C.2.

V. CONCLUSION

What emerges from this examination is that there exists a strong degree of connection and interdependence between and among the main jurisdiction and applicable law instruments in the private international law of obligations. The conclusion that these instruments are operating, or will operate, in a refined and mutually cooperative manner does not mean, however, that the Regulations are entirely self-contained (for private international law instruments are subject, for example, to Community law)[128] or self-sufficient.[129]

Outside the private international law of obligations, a complication which must be reflected upon is the comprehensiveness or otherwise of the European harmonization programme *within* Europe as a result, first, of the UK/Irish discretion to opt-in,[130] and secondly, of the possibility of non-participation by certain Member States in certain (family law) instruments.[131] Additionally, certain of the newer instruments, by virtue of the exclusions from their respective scopes, seem to be ripe for the production of demarcation problems.[132] This problem, though visible in relation to nullity of contract, is more pressing in family law and property matters, and seems increasingly to be a feature of the advancing harmonization programme.

The territorial scope of EU instruments on jurisdiction and the recognition and enforcement of judgments, notoriously, is not beyond argument, as evidenced by decisions in *Owusu*[133] and *Orams*,[134] and development of

[128] Rome I Regulation, art 23; and Rome II Regulation, art 27. Further, with regard to road traffic accidents taking place within the EU, for example, account must be taken of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L263/11). See also the Proposal for a Regulation on a Common European Sales Law (CESL) (COM (2011) 635 final; 2011/0284 (COD)).

[129] For example, in disputes concerning individual contracts of employment, questions may arise as to the intended territorial scope of a domestic statute of the *lex causae*. See further Merrett (n 117) para 1.12–1.16; and Crawford and Carruthers (n 66) para 3.07.

[130] Protocol No 21 on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice (OJ 2008 C115/295) (ex-Protocol No 4 (OJ 1997 C340/99)).

[131] eg enhanced cooperation per Council Regulation (EU) No 1259/201 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III').

[132] As among eg Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM (2011) 126 final; 2011/0059 (CNS); and the parallel Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships COM (2011) 127 final; 2011/0060 (CNS).

[133] *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02) [2005] QB 801. See also *Samengo-Turner v J&H Marsh & McLennan Services Ltd* [2007] EWCA Civ 723.

[134] *Orams v Apostolides* [2007] 1 WLR. 241, reversed by *Apostolides v Orams* Case C-420/07, *Times*, 1 May 2009.

'reflexive effect' reasoning.[135] Regulation 1215 has drawn back from full-scale engagement, for the time being,[136] with the subject of the impact of the European regime on Third States, but there is no doubt that this will be a topic of considerable ongoing importance. In choice of law, there is a related problem, namely, the interaction of the European regime with 'non-EU' instruments, principally Hague Conference conventions, and notably in the context of the law of obligations, the 1971 Hague Convention on the Law Applicable to Traffic Accidents, the 1973 Hague Convention on the Law Applicable to Products Liability, and the 2005 Hague Convention on Choice of Court Agreements. EU Regulations accommodate ranking problems by means of disconnection clauses,[137] the framing of which themselves display a certain continuity, perhaps masking the complexity of situations to which they will be called in aid. While this article has sought to examine the compatibility of the EU Regulations *inter se*, their coexistence with Hague Conventions and other instruments is a further dimension worthy of analysis. To provide comprehensive advice would demand omniscience.

Though one must be alert to the hinterland, it can be concluded that the trio of Regulations examined in this article constitutes an admirable body of law, refined over decades and sophisticated in its operation and cooperation, befitting the stage of development of harmonized rules of private international law which Europe now has reached.

[135] eg *Catalyst Investment Group Ltd v Max Lewinsohn et al* [2009] EWHC 1964 (Ch); and *Ferrexpo AG v Gilson Investments Ltd & ors* [2012] EWHC 721 (Comm).

[136] Regulation 1215, art 79.

[137] eg Rome I Regulation, art 25; Rome II Regulation, art 28; and Regulation 1215, art 71.