THE USES OF PUTATIVITY AND NEGATIVITY IN THE CONFLICT OF LAWS

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I. INTRODUCTION

Putativity is a useful concept in the conflict of laws, allowing reference to be made to an outcome which was intended to have come about, but which has failed, as a result of human actings or divine intervention.[1] To apply to something which is imperfect a consequence which would arise if it were perfect[2] is justifiable on the pragmatic grounds of convenience, speed, and cost—and thence, through the merit of certainty, to the satisfaction (perhaps) of party expectation, or at least to the forestalling of disappointment. Reference to the putative applicable law may be permissible therefore on the ground of enabling a resolution to emerge, the more so if the result of so doing commends itself to the disinterested observer and to one, at least, of the parties; on the other hand, the result may disappoint the reasonable expectations of both parties. Whatever the rationale, it can be observed that use of the device is authorized at common law, by statute, in Convention, and Regulation. But if one does not ask whether this methodological technique begs the question, one begs the question.

Examples of the exercise of a putative mode of thinking can be garnered from a number of subject areas in the conflict of laws, and across the tripartite arrangement of the subject (jurisdiction; choice of law; judgments), suggesting that the courts make use of the concept of putativity when it commends itself in the circumstances.

The use of putative reasoning often may involve an element of *circularity*; attention may require to be paid by the court to *contingency*; and the cases frequently display 'negative' actings by parties. Consequently, this essay

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[1] Convenient and neat though its application may be, Dicey & Morris, *The Conflict of Laws* (13th edn Sweet & Maxwell 2000) pp 32–158, explains the injustices which may arise.

[2] As in *Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd* (1961) 111 L J 519. To treat as still existing (as a consequence of the operation of a choice of law rule) that which physically has been destroyed is surely somewhat less tenable; cf *Velasco v Coney* [1934] P 143. Consider also in this connection the character of some legal or lay acts as inchoate (crime) or ambulatory (testamentary writing). The scope of this discussion is limited to matters of conflict of laws. There are of course areas of substantive law, most notably in the rules of restitution, which are characterized by the desire to deliver a fair result where matters have turned out differently from expected.

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seeks to identify examples of circular reasoning, treatment of contingencies, and instances of negative or pre-emptive actings by (putative) litigants, and to describe and analyse the reaction of the courts[3] to such arguably nefarious stratagems. The subject of discourse, therefore, is a consideration of methodological devices which operate on the periphery of the conflict of laws. The use of the hypothetical appears in certain circumstances to be necessary in order to activate our conflict rules.

II. PUTATIVE REASONING IN JURISDICTION

A. Problems arising at inception: proof of choice of court agreement, capacity to make agreement; and scope of agreement

Frequently there is recourse to putativity-based solutions in cases where parties have reached agreement expressly, or through course of dealing/usage of trade, on the matter of the court to which exclusively they will resort should dispute arise between them, and where one party 'reneges' on that agreement.[4]

Matters requiring to be established[5] will include proof of the fact of agreement, and of the terms of agreement; matters of proof and law concerning legal capacity to contract; and, crucially, points of interpretation of the choice of court agreement (principally, whether the dispute in question falls within its terms). Possibly relevant may be an assessment of the bona fides of the party who seeks to litigate in disregard of the agreement.[6]

Belgian International Insurance v McNicoll[7]

In *Belgian International Insurance v McNicoll*, the Court of Session, allowing appeal from the court below, held that a jurisdiction clause in favour of the courts of Belgium, contained in a compromise repayment contract signed by the debtor, McNicoll, should continue to operate, despite the fact that it was alleged McNicoll had failed to honour that agreement in its substance, that is to say had failed to pay timeously. The clause 'Any dispute arising from the execution, implementation or interpretation of this agreement' [shall be brought in the courts of Brussels-Hal-Vilvoorde] was apt to cover litigation arising out of the non-execution of the compromise agreement. An argument

[3] In a conflict context, one must query also 'the attention of *which* court?' (not always the court which at the outset the parties were thought to have chosen).

[4] Strictly, the verb should not be employed until the merits of the matter have been established (but one must ask, by *which* court?).

[5] But one may ask, again, by *which* court?

[6] Though not, it seems, where the case arises within the purlieu of the Brussels regime: see *Erich Gasser GmbH v Misat Srl* [2004] 1 Lloyd's Rep 222, discussed below.

[7] 1999 GWD 22-1065, reversing single judge decision reported at 1999 GWD 13-622.

based on mutuality of obligation,[8] to the effect that performance by one party (submission to the agreed forum) was dependent on performance of the counter-obligation (repayment), failed. This question too, it must be inferred, was considered to be a matter for decision by the agreed forum.

These are perplexing points, and it must be recorded that their Lordships of the Inner House did not consider that the pleadings supported the creditors' contention that the defender's alleged failure timeously to make a down payment of £50,000 released them from their counter-obligations. That evidential matter had not been conceded by the debtor, McNicoll. Consequently, there remained, on the basis of the pleadings and the history of the litigation in Scotland, a genuine dispute between the parties as to whether the parties were thereby discharged from any obligation under the agreement; but 'this dispute falls within the scope of clause 10 of the agreement'.

The case provides a paradigm example of the operation of putativity (and circularity). If the Belgian court were to find, on the facts,[9] that as a result of the debtor's recalcitrance, the creditors were released from all their obligations, including their agreement as to jurisdiction,[10] which court then would be the forum? In these circumstances, that matter would revert for decision to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (henceforth 'Regulation 44'): pre-eminent would be the Scots 'domicile' of the debtor (Article 2).

B. Relationship between the choice of court agreement and main contract

In *Mackender v Feldia*[11] an exclusive jurisdiction clause was held to prevail even where the contract of which it formed part was alleged to be void.[12] The case concerned a jewellers' block insurance policy covering loss or damage to the defendants' stock anywhere in the world. The defendants were diamond merchants in three different European countries. The policy contained a choice of law clause for Belgium, and an exclusive jurisdiction clause for Belgium. A loss of diamonds and pearls worth approximately £48,000 occurred in Naples. The insurers refused to pay the defendants' claim for the loss, on the grounds that the defendants had been in the practice of smuggling diamonds into Italy (ie were circumventing the revenue laws of Italy),[13] and initiated litigation in

[8] As to which, in its operation in Scots law, see House of Lords decision *Bank of East Asia Limited v Scottish Enterprise* 1997 SLT 1213.

[9] As found and proved by the law of Belgium.

[10] Applying to this question of mutuality whatever be the governing law of the compromise agreement, possibly Scots law, as proved to the Belgian court.

[11] [1967] 2 QB 590.

[12] See Hague Convention on Choice of Court Agreements of 30 June 2005, Art 3d (henceforth ('Hague Choice of Court Convention'), discussed below.

[13] cf *Re Emery's Investment Trust, Emery v Emery* [1959] Ch 410; *Foster v Driscoll* [1929] 1 KB 470; and *Regazzione v Sethia* [1957] 3 All ER 286.

England seeking a declaration (which now would be termed a 'negative declaration') that the policy was void for illegality, or voidable for non-disclosure.

But if the policy was void or voidable, could it reasonably be said that the choice of jurisdiction clause remained extant? The Court of Appeal held that the effect (if any) of nefarious actings (if proved) upon the validity of the jurisdiction clause, was a matter for decision by the 'proper law of the contract', as applied in this case by the Belgian court expressly chosen by the parties. Lord Denning MR stated: 'But things already done are not undone. The contract is not avoided from the beginning, but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is a "dispute arising under" a contract, and remains within the clause.'[14] Lord Diplock, in response to the argument that the issues presented were not disputes arising under the contract, but rather whether there was a contract at all, concurred with Lord Denning in stating that whether, in the circumstances, repudiation was permitted for non-disclosure was a matter for the agreed law.

Mackender bears certain similarities to *Euro-Diam v Bathurst*,[15] in which an insurance claim was made in respect of the theft from a warehouse in Germany of diamonds which the plaintiff had exported to Germany. The export had been negotiated by a party of Israeli nationality, who, in doing so, was flouting (West) German immigration laws. Further doubt on the good faith of the plaintiffs' enterprise was cast by the revelation that the value of the diamonds, on entry into Germany, had been misrepresented in order to reduce the import tax. The defendants argued that the plaintiffs' claim was barred, on the ground of breach of the implied term to carry out their adventure in a lawful manner.

Contracts of insurance are contracts *uberrimae fidei*. Further, a forum in a conflict case should be sensitive to evidence of malpractice and conniving schemes, designed to hoodwink friendly systems.[16] But in this instance the Court of Appeal considered that there was no implied warranty that the parties would comply strictly with the law where the adventure was being carried out, a distinction being drawn with marine insurance.[17] While disapproval was expressed regarding the undervalue of the diamonds imported, together with acknowledgment of the criminal nature of that undervaluation in German law, it was noted that the *defendant* was not deceived or disadvantaged: the correct premiums had been paid. So it might be said that the malfeasance was tangential to the main issue.

[14] At 598.

[15] [1990] 1 QB 1.

[16] See *Re Emery's Investment Trust, Emery v Emery*, *Foster v Driscoll, Regazzione v Sethia*, all above; and *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448. See also *Mackender*, above, per Lord Diplock at 602. That which is illegal by the governing law will not be enforced: *Heriz v Riera* 1840 11 Sum 318.

[17] Marine Insurance Act 1906, s 41.

Hague Choice of Court Convention

It is interesting to note that in the Choice of Court Hague Convention Article 3d provides that: 'An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.'[18]

The Hague Choice of Court Convention, which is limited to business-to-business exclusive choice of court agreements,[19] contains a presumption of exclusivity,[20] and imposes a compulsory jurisdiction upon the chosen court. Not only is the chosen court prohibited from declining jurisdiction, but any other court seised by one[21] party (in the face of the choice of court agreement) is required to suspend or dismiss its proceedings. The Hague regime therefore must be contrasted with the unbending emphasis of the Brussels regime on the pre-eminence of the court first seised, and the effect which in turn this has,[22] in circumstances falling to be governed by the Brussels regime, upon the legal effect of parties' actings where, for good motives or bad, they seek to depart from a previously agreed choice. However, under the Hague Convention, the matter cannot be said yet to have received comprehensive treatment. It seems not possible to ignore anterior disputed questions, if raised, such as capacity to enter into a choice of court agreement,[23] and validity of the putative choice of court agreement itself. The validity and effectiveness of the choice of court agreement shall be treated as an agreement independent of the other terms of the contract, and its validity cannot be contested solely on the ground that the contract of which it forms part is not valid.[24] But which court/which law is to decide upon the validity of the *choice of court* agreement? The question of (presumably *essential*)[25] invalidity of the choice of court agreement is to be

[18] cf *Benincasa v Dentalkit* 1997 ECR I-3767: it is for the national court designated by a jurisdiction clause validly concluded under the Brussels rules to determine whether the substance of the dispute falls within the clause, and whether that clause is apt to cover any dispute concerning the validity of the contract containing the clause.

[19] The Convention does not regulate non-exclusive choice of court agreements since this would have necessitated the formulation of rules to address problems of parallel proceedings of equal standing, resulting potentially in irreconcilable judgments.

[20] Art 3b.

[21] Or both? It is questionable whether this would constitute a change of mind by subsequent actings. cf Reg 44, Art 24.

[22] *Erich Gasser GmbH v Misat Srl* [2004] 1 Lloyd's Rep 222, discussed below.

[23] See Art 6. Though, given the 'business to business' basis of the proposed instrument, and the concomitant exclusion (in Hague Convention Art 2a) of the status and legal capacity of natural persons, questions of capacity surely must be questions of *vires* of bodies. Yet Hague Draft Convention Art 2m excludes from the application of the Convention 'the validity, nullity or dissolution of legal persons, and the validity of decisions of their organs'.

[24] By which law is the validity of the principal contract to be judged? By its putative law, presumably: 1980 Rome Convention on the Law Applicable to Contractual Obligations (henceforth 'Rome I'), Art 8. cf *Mackender*, above.

[25] The undemanding requirements as to form are contained in Hague Draft Convention Art 3c.

decided by the law of the State of the chosen court,[26] a solution which, though circular, belongs recognizably to the 'putative solution' argument; the question of lack of capacity to contract, on the other hand, is to be decided by the law of the court first seised (in defiance of the agreement).[27] This latter suggested solution seems wrong in principle, for by this route the well-informed 'contractor' may confer retrospective incapacity upon himself.[28] Examination of the final version of the Convention reveals that evaluation of choice of court agreement is a power conferred (in a negative manner) on both the court chosen and the court not chosen (but first seised).

C. Enforceability of exclusive choice of court agreements within the EU

One of the changes made by Regulation No 44 to the Brussels Convention was the insertion into the prorogation Article (ex 17, now 23) of a presumption that such a choice of jurisdiction 'shall be exclusive unless the parties have agreed otherwise'.[29]

It has been the avowed aim from the inception of the Brussels regime of jurisdiction and judgments in 1968, and ever more strongly emphasized in later years, that the system of harmonized rules of jurisdiction and enforcement of judgments among Member States exists so as to deliver, protect and uphold the efficiency of the Internal Market; it follows that the rules must be interpreted so as to facilitate the free flow of judgments and to minimize the risk of occurrence of irreconcilable judgments. This aim tends to be inimical to the enforcement of agreements as to jurisdiction made by individuals.

In the course of 2004/5, notable decisions have been received from the ECJ[30] upon the proper operation of the Brussels Convention (now Regulation 44), specifically upon the ranking of provisions therein, themselves potentially competing,[31] which exist to regulate the subject of competing or conflicting jurisdictions.

[26] ibid Art 5. But the endowment is phrased in a negative manner. And see also Art 6A.

[27] ibid Art 7. At least, the court seised shall suspend or dismiss its proceedings unless by *its* law, the agreement is null and void; a party lacked capacity; giving effect to the agreements would lead to manifest injustice or would be manifestly contrary to *its* public policy; for exceptional reasons the agreement cannot reasonably be performed; or the chosen court has decided not to hear the case.

[28] cf generally the misgivings of Cheshire upon the application of the putative proper law to govern contractual capacity if such putative proper law were chosen expressly or impliedly by the parties (see EB Crawford *International Private Law in Scotland* (W Green & Son Edinburgh 1998) para 12.44); and the misgivings of North (GC Cheshire and PM North's *Private International Law*, above, ch 20, 691–2), upon the possibility that in relationary restitutionary obligations the applicable law (being the applicable law or putative applicable law of the related contract), might have been selected by the parties.

[29] As to defects of earlier situation, see J Fawcett 'Non Exclusive Jurisdiction Agreements in Private International Law' (2001) *LMCLQ* 234.

[30] *Gasser* (n 22); *JP Morgan Europe Ltd v Primacom AG and anr* [2005] EWHC 508 (Comm); *Turner v Grovit* [2005] 1 AC 101; *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* Case C281/02, *The Times* 9 Mar 2005.

[31] Principally Arts 23, 27, and 28.

In *Erich Gasser GmbH v Misat Srl*,[32] a reference was made by the national court (of Austria), in effect, for a ruling upon the respective ranking of Regulation 44 Article 27 (pre-eminent jurisdiction of court first seised) and Article 23 (jurisdiction of court selected by parties by means of prorogation agreement or business practice or trade usage).

May a court which is second seised, but which has 'exclusive' jurisdiction under Article 23 give judgment without waiting for a declaration from the court first seised that it (the court first seised) has no jurisdiction? This scenario is likely to occur only if one party deliberately flouts the prorogation agreement, or if there is doubt about its incorporation, or its validity or its import. The answer given by ECJ in *Gasser* is that Article 27 must prevail and must be permitted to operate without derogation; account shall not be taken of the prorogation agreement nor of alleged excessive slowness by the Court first seised in making its decision about its own jurisdiction to hear the case. The *lis pendens* system rewards speed on the part of *litigants*, and does not hasten to penalize, it seems, self-serving tactics by parties.

The particular interest which *Gasser* holds for the purpose of this discussion is, *first and relatively technically*, the ECJ's decision that a national court may seek an interpretative ruling upon the meaning of the Convention/Regulation even where the interpretative point arises from submissions which have not been examined by the national court, provided that the national court considers that a preliminary ruling is necessary to give judgment. In *Gasser*, in a trial of strength between the principal governing rule of allocation of jurisdiction as contained in Regulation 44, on the one hand, and *party* choice of court, albeit sanctioned and authorized by the Regulation, on the other, the parties' choice was said to reside in the course of dealings between them (repeated acceptance and payment by one party of invoices sent by the other party, said invoices containing a jurisdiction clause), rather than upon express agreement. Had the ECJ been unwilling on the basis merely of this hypothesis to give judgment on the interpretative point, factual evidence would have been required of the course of dealings between the parties, and thereafter—but at national level? or above?—a decision would have been necessary on the question of whether such conduct by the parties reflected their own usage and/or a usage in international trade of which they were aware or ought to have been aware.[33] The claimant Austrian company argued that the Austrian court had jurisdiction as the court for the place of performance of the contract; but also on the ground that the defendant's acceptance of the

[32] [2004] 1 Lloyd's Rep 222.

[33] ibid para 18. Reg 44 Art 23.1: 'Such an agreement conferring jurisdiction shall be either: . . . (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

invoices amounted to an agreement to confer jurisdiction on the Austrian court on the basis of the practice between the parties and the usage prevailing in trade and commerce between Austria and Italy.[34] This important matter (ie the fact of agreement by the parties as to choice of court) was taken as established for the purpose of permitting the ECJ to proceed to the consideration of the interpretative point.

Gasser is interesting in the second place, given the arguments put forward by the UK Government (relying on an argument rooted in the ECHR that a putative debtor should not be entitled to pursue proceedings in the knowledge that those proceedings would be lengthy, with the aim of delaying the pronouncement of judgment against him, thereby acquiring an unfair advantage of control of the whole litigation), to the effect that a derogation from the rule confirming the pre-eminent position of the court first seised was justified by a combination of the (putative) debtor's (assumed) bad faith or vexatiousness,[35] inducing slowness of process. The response of the ECJ was that since derogations of the type suggested would encourage uncertainty, and would increase the likelihood of irreconcilable judgments, the Brussels scheme must be upheld in preference to holding parties to their pact.

1. Negative tactics

Arguments used to arise, before the entry into force in UK of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (henceforth 'Rome I') by means of the Contracts (Applicable Law) Act 1990, about the identification of the point at which, in the matter of party choice of proper law of contract, self-interest might be said to slide into bad faith.[36] The approach taken by Rome I to party choice of law is *ex facie* permissive,[37] the application of the content of the chosen law being potentially capable of being excluded or circumscribed in any given Contracting State forum by the operation of mandatory rules[38] and by the forum's public policy.[39] Now we might ask in light of Rome I to what extent negative tactics in litigation should be tolerated.

The first negative tactic[40] in an adversarial system is for one party to refrain from raising, or for both parties to agree not to raise, the foreign

[34] [2004] 1 Lloyd's Rep 222, para 16.

[35] The manner of drafting of the UK pleadings itself invites question. It seems that it must have been envisaged that the existence and nature of 'bad faith' in the bringing of proceedings in breach of a private agreement would be judged by the court allegedly chosen by the parties.

[36] *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R. 378. (See, in England, *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, per Lord Wright, at 290).

[37] Rome I, Art 3.

[38] Of two types: Art 3.3; Art 7.1 (not applicable in a UK court) and 7.2. See Clarkson and Hill, op cit 225.

[39] Art 16.

[40] As to negative tactics, see generally A Bell *Forum Shopping and Venue in Transnational Litigation* (OUP Oxford 2003) ch 4 ('Venue and the Defendant—Reverse Forum Shopping').

element in a case in order that, for good or ill, the case will proceed by default as a domestic one.[41] Such conduct is quite within the rules. More controversially,[42] it seems that, aside from the Brussels framework,[43] a litigant may refrain from using, in a foreign litigation, a defence based upon one of the many variants of fraud, which defence he may store up for use at a later stage when the foreign decree is sought to be enforced in England or Scotland.[44]

2. *Negative declarations*

Cases which evince the use of putative reasoning frequently display also examples of 'negative' actings on the part of litigants. This is particularly apparent in respect of threshold disputes as to jurisdiction. A party whose anticipated litigation against another party will be regulated by the *lis pendens* system may be tempted or advised to seek (in a forum available to him, and favoured by him, but not in that forum agreed by the parties, where such agreement is alleged to have been made) a judicial declaration that no legal liability accrues to him in a given situation ('a negative declaration'),[45] in order to gain the signal advantage of having the litigation open in a forum of his choice; that forum then would be accorded the pre-eminent status of being the 'court first seised'. Where this is done in the face of a clause expressing the parties' agreement on the choice of a different court, English courts to date have sought to punish the dishonourable behaviour of the party who has flouted the clause, by means of the grant of an anti-suit injunction to prevent that party proceeding elsewhere with his negative (or indeed positive) proceedings:[46] parties should be held to their bargain.[47] Often it has been held that this is a suitable case for an order restraining foreign proceedings, though now we must take care that we do not overreach ourselves, that is, that such

[41] *Rodden v Whatlings* 1960 SLT (Notes) 96; *Bonnor v Balfour Kilpatrick* 1975 SLT (Notes) 3; *Pryde v Proctor & Gamble* 1971 SLT (Notes) 18; and *De Reneville v De Reneville* [1948] P 100.

[42] *Syal v Hayward* [1948] 2 KB 443; *Owens Bank v Bracco* [1992] 2 All ER 193 (HL)—from which position the Privy Council seemed to wish to distance itself in *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44.

[43] *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180.

[44] *Jet Holdings Inc v Patel* [1990] 1 QB 335; and *Clarke v Fennoscandia (No 2)* 2001 SLT 1311.

[45] cf cases at n 66.

[46] *Continental Bank NA v Aeakos Cia Naviera SA* [1994] 2 All ER 540*; The Angelic Grace* [1995] 1 Lloyd's Rep 87 CA. Where the parties disagree on the question whether a choice of court or arbitration clause has been incorporated in the contract—or it suits one side later to cast doubt on this fundamental point—problems of circularity are present. Cf *Egon Olderndorff v Libera Corporation* [1995] 2 Lloyd's Rep 64, and [1996] 1 Lloyd's Rep 380 (see text at n 98).

[47] cf in simpler days *Mackender*, above, per Diplock LJ, at 604: 'Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reasons to induce me to permit one of them to go back on his word.'

orders are made only in the geographical/legal sphere where we can be confident that such orders remain competent.[48]

But within the EU, where strict, priority of process rules of jurisdiction apply, and where, for this reason, and because of the mutual trust and confidence which is said to exist within the Member States of the European judicial area, challenge to jurisdiction is normally not possible or appropriate,[49] there is a particular difficulty if the court of a Member State takes jurisdiction, seemingly in the face of party choice of forum, on the ground that the choice of forum clause has not been incorporated in the contract,[50] or is essentially invalid, or in ignorance of that clause.

Within the new European order, the question has been raised, and now answered, whether this British response itself is competent. The matter was referred to the European Court of Justice as part of the *Turner v Grovit* litigation. It follows from the decision in *Gasser* that the use by any forum of an anti-suit injunction to require a litigant to desist from proceedings begun by him in the court first seised (by him), in disregard of an earlier contrary choice of court agreement by the parties, is inappropriate in an EU context.[51] Any other view would be inconsistent with *Gasser*. This view has been confirmed by the decision of the ECJ in response to the reference from the UK in *Turner v Grovit*.[52] The view of the ECJ, expressed in *Gasser*[53] (that Article 27 of Regulation 44 is superior to Article 23 thereof, ie priority in time is the main rule and 'trumps' party choice) means that parties must rely on the spirit of faith and trust which is intended to permeate the courts of the Member States in their operation of the Brussels system, to effect justice in such a case. Hence, on that basis, we must suppose the court first seised to be able and willing to decline jurisdiction in favour of a different court clearly chosen by the parties, but we await an example.

[48] This matter is controversial: *Tracomin SA v Sudan Oil Seeds Co Ltd (No 2)* [1983] 3 All ER 140 (restraint by English court of party taking Swiss proceedings disregarding an English arbitration clause). See also *Continental Bank v Aekos* above. But see now *Turner v Grovit*, above.

[49] Regulation 44, Art 35.

[50] Judgments may not be re-opened as to substance (Reg 44, Art 36). This has implications for the finality of an EU Member State judgment which has pronounced, eg, on the scope of an exclusive jurisdiction clause, including perhaps the scope of an *arbitration* clause, though an arbitration clause normally is excluded from the Brussels remit. See *The Heidberg*, above, and see generally *Benincasa*, above. Also cases cited at Crawford, above, para 19.28; and A Briggs and P Rees, *Civil Jurisdiction and Judgments* (2nd edn LLP Professional Publishing London 1997) 7.07. A Member State's view of its own jurisdiction may not be reviewed in the general case: Reg 44 Art.35.

[51] Leaving aside for now how 'an EU context' may be defined: cf *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 CA.

[52] *Turner v Grovit* [2005] 1 AC 101. But this does not represent the current state of the law with regard to arbitration agreements, in respect of which anti-suit injunctions remain available: see *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] EWHC 455. Moreover there may be a question of identity, or not, of cause of action: see *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Commercial Court before Cooke J).

[53] See discussion of *Gasser*, above.

D. Operation of lis pendens*: the use of conditional reasoning (Article 30)*

The existence of differences in procedural law within the Member States of the EU, together with a desire to impose an autonomous Community meaning on the main criterion for operation of the *lis pendens* rule, namely the point at which a court 'shall be deemed to be seised', have resulted in the insertion in Regulation 44 of Article 30.[54] The underlying purpose of Article 30 is not only to provide certainty and, so far as possible, a uniform approach, but also to attempt to meet the difficulties of a claimant who seeks to establish jurisdiction against a defendant on the (main) basis of 'domicile' (Article 2). Domicile, for the purposes of EU jurisdiction, is a connecting factor for individual Member States to define, but, in the UK, for example, it may be established after three months' residence,[55] and hence a claimant may have the task of aiming to hit 'a moving target'. For this reason, the House of Lords in *Canada Trust Co v Stolzenberg (No 2)*[56] held that, for the purposes of the operation of the Brussels Convention within UK, a defendant was 'sued' when proceedings were initiated, which, in English terms, meant the date of issue of writ, not the date of service of proceedings; otherwise, evasion was too easy. An autonomous definition, favouring the earlier or earliest possible dates for deemed seising, seemed called for, and was provided by Article 30 of Regulation 44.

In order to achieve this aim, the new rule required not only to be bifurcated (to reflect each of the two systems already existing in Europe),[57] but also, for reasons of natural justice and observance of procedural rules, to contain in each branch a proviso or condition. To take Article 30.1, for example, the *tempus inspiciendum* shall be the date when the document instituting the proceedings is lodged with the court, *provided that* the plaintiff does not subsequently fail to have service effected on the defendant. Hence, the *tempus inspiciendum* is certain only up to a point; the exercise is completed only when

[54] 'For the purposes of this Section, a court shall be deemed to be seised:
- at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
- if the document has to be served before being lodged with the court, at the time when it was received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.'

[55] Civil Jurisdiction and Judgments Act 1982, s 41.

[56] [2002] 1 AC 1. Contrast *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] 2 All ER 450 in the Court of Appeal. Prior to the entry into force of Regulation 44, Art 30, the situation was that Art 21 of the Brussels Convention (then applicable) should be interpreted to the effect that the court 'first seised' was the one before which 'the requirements for proceedings to become definitively pending were first fulfilled, these requirements being determined in accordance with the national law of each of the courts concerned' (*Zelger v Salinitri* Case 129/83 1984 ECR 2397).

[57] W Kennett 'Current Developments: Private International Law' (2001) 50 *ICLQ* 725, 731/2.

service is effected on the defendant. The nature of the condition as suspensive or resolutive is not entirely clear.

In a sense the condition is suspensive, for seisin crystallizes only if and when service is effected. But in view of the retrospective validation given to seisin once service is effected, with consequences for priority of process, the condition might be thought resolutive. Among the categories of conditions, this seems to be a hybrid example, and of 'mixed' character in so far as the ability to have service effected on the defendant is not solely within the power of the claimant. Presumably, if service is never effected[58] on the defendant, the court in which proceedings were 'instituted' cannot be said to have been seised. Nevertheless, on a simple view,[59] 'England is a category (a)[60] country, and the date stamped on the claim form by the court will identify the date of seisin.'[61] Briggs admits that problems may arise in relation to Article 30, but considers that such problems can be reviewed at the end of the five-year period prescribed by Article 68.[62] Moreover, Article 30 improves a previously 'chaotic' situation and 'it would be ungrateful to cavil'.[63] There is nevertheless something unfinished about the provision. The certainty of the date of seisin may prove illusory: what seems at first sight to be fixed, is contingent. However, it may plausibly be argued that where—as in Article 30—the draftsmen use a proviso rather than a condition, their expectation is that the requirement *will* be fulfilled;[64] this is an example, not of 'what might (not) be', but rather, of 'what is likely to occur'.

E. Disputed existence of a contract/good arguable case

Having in mind *Mackender*, one should note now that modern interpretative authority on the meaning of Article 5(1) of the Brussels Convention (viz that a person domiciled in a contracting State may, in another contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question[65]) has ruled that the disputed existence of a contract is, or qualifies as, 'a matter relating to a contract'.[66]

[58] ibid 732, comments that perhaps a time limit within which further steps in the proceedings should be taken should have been imposed. On the other hand, it could be said that if a time limit had been mentioned, this could be conducive to circumvention by the defendant.

[59] Briggs (n 50) p 83. [60] ie a case falling under Art 30.1.

[61] Briggs (n 50) p 83. [62] ibid pp 83–4. [63] ibid.

[64] A 'condition' on the other hand does not carry this positive connotation and is neutral.

[65] A much-litigated two-clause construction, which has been amended in Reg 44 by the provision of an autonomous concept by which to interpret '*place of performance* of the obligation in question' in the majority of cases.

[66] *Boss Group Ltd v Boss Group France SA* [1996] 4 All ER 970 which, on the facts, is authority for the further proposition that the plaintiff who resorts to that special jurisdiction may be the party who denies that a contract exists. In *Boss Group*, the plaintiff sought a declaration that no contract existed between plaintiff and defendant. The Court of Appeal overturned the decision of the courts below, holding that the special contractual jurisdiction under Art 5.1 is not confined to cases where the existence of a contract is unchallenged, and for enforcement or for damages for

The term 'good arguable case' is frequently found, most often in a jurisdiction context,[67] it being a matter arising at the threshold (eg that a contract exists or, for the purposes of Brussels, that a matter relating to a contract has arisen between the parties), usually to justify the court tenuously seised tightening its grip on the litigation. The 'benefit' of the doubt is given.[68] The advantage may also be extended to a defendant, as in *Halki Shipping Corporation v Sopex Oils Ltd*,[69] in which the contention by a claimant that the defendant had 'no arguable defence' and that therefore the arbitration clause designed to deal with contractual disputes between them fell away and was no longer available, was unsuccessful.

With regard to the operation of the English rules permitting service out of the jurisdiction, the decision of the House of Lords in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*[70] (under the then RSC Order 11)[71] is that the court must consider first whether there is a good arguable case that it has jurisdiction under one of the authorizing heads; and second, whether there is a serious issue to be tried. On the second point, the evidence need not reach the higher test of good arguable case.[72] This must mean that credence is given to a hypothesis which, in turn, forms a foundation for further investigation.

III. PUTATIVE REASONING IN CHOICE OF LAW

A. Anterior problems

Circularity in choice of law

The largest and most fundamental instance of the anterior methodological problem of the *circulus inextricabilis* concerns the central question of

breach thereof, but 'referred generally to matters relating to a contract'. But such a plaintiff must show a good arguable case, *not* that there was a contract (for that would surely pre-judge and wrongfoot him), but that a matter relating to a contract was in issue between them—amply vouched in *Boss Group* by the fact that the defendant had sought in France to enforce the contract against him! See to the same effect *Halki Shipping Corp v Sopex Oils Ltd* [1997] 3 All ER 833: where one side goes to court in defiance of an arbitration clause in the contract, justifying the action on the ground that the matter at issue does not fall within the arbitral remit; or that the arbitration clause was not incorporated into the contract. The courts have usually held to the contractual terms, deferring in favour of the *curia*. cf *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Tatry* [1999] QB 515; *The Angelic Grace* [1995] 1 Lloyd's Rep 87. In *Halki*, the avoidance was based on the argument that since the defendant had no arguable defence, there was no 'dispute' within the meaning of the arbitration clause.

[67] cf *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch).

[68] *Boss Group Ltd v Boss France SA* (n 66), where however, the irony is that initiation of proceedings in England was by a party who sought the negative declaration that no contract existed between it and the defendants.

[69] [1997] 3 All ER 833.

[70] [1993] 4 All ER 456.

[71] Civil Procedure Rules (CPR) 6.20; for contract, CPR 6.20(5). See CMV Clarkson and J Hill, *Jaffey on the Conflict of Laws* (2nd edn Lexis Nexis UK London 2002) 104.

[72] Per Lord Goff, at 467, after review of authority and departing from decision of Court of Appeal.

characterization. Whatever misgivings may be entertained about the dominant position which the forum holds in the matter of characterization of issues arising in a case, in a traditional jurisdiction-selection approach, a very basic objection to the claim that characterization ought to be performed by the *lex causae* is that the forum does not know the identity of the *lex causae* until the issue has been characterized.[73]

Similarly, the '*renvoi*' conundrum is characterized by oscillation. There is the so-called endless oscillation often remarked upon by commentators with regard to the English preferred Foreign Court Theory, namely that if the foreign court in question should also happen to be applying double *renvoi*, the theory will not work successfully: it's a loop.[74] Or is it? A loop suggests an inescapable circuit. In cases where *renvoi* arises, the loop traditionally is broken (arguably illogically) at a certain stage in accordance with the particular approach to the *renvoi* problem which is being adopted.

In the operation of single *renvoi* theory, the loop is broken, one hopes, by acceptance of the *renvoi* by the original forum. In double *renvoi* theory (or Foreign Court Theory), so long as the foreign court is not also employing the double *renvoi* theory, the loop is broken at stage three (the reference back to the foreign law by operation of the conflict rules of the (English) forum), by (putative) acceptance or rejection by the foreign court of the reference: in either event, the *lex causae* must be the domestic law of one of the systems. Might it be suggested that if the foreign court were to apply the Foreign Court Theory, this should be anticipated by the English forum. Stage 1 then would involve the English forum endeavouring to place itself, at the outset, in the position of the foreign court, and to decide the question as that court would decide it. The tacit anticipatory exercise, which is a necessary prelude to the operation of the double *renvoi* theory (as originally envisaged in *Re Annesley*,[75] to suit *Annesley*-type circumstances (ie where the foreign court is not also applying the Foreign Court Theory) could be performed in an even more elaborate or far-seeing manner with the result that the initial putative step in the putative exercise would 'take place' in England (that is, the first rules used would be the conflict rules of England). Then the finishing point also would differ, giving the result that it would fall to the English forum (not the foreign court) to decide whether to accept the reference back. This suggestion is made diffidently, as the classical objection to double *renvoi* or the Foreign Court Theory is so well entrenched, and *this* result, equally, can be criticised as lacking in logic, the route hypothetically travelled 'undertaken'

[73] The leading proponents of characterization by the *lex fori* are Bartin and Kahn. But Despagnet and Wolff considered characterization by the *lex causae* to be an essential part of applying that law. Robertson takes a middle course, distinguishing between primary and secondary characterization. See generally AH Robertson *Characterization in the Conflict of Laws* (1940).

[74] *pace* A Briggs *The Conflict of Laws* (OUP Oxford 2002) 16.

[75] [1926] Ch 692.

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unnecessarily. Moreover, the effect is indistinguishable from that obtained by the use of the single *renvoi* theory.

The character of humanly constructed rules of laws or fancies such as the flirtation with the *renvoi* concept, which may produce a loop, is that the loop can be broken by human action, judicial or legislative.[76] *Renvoi* is not part of the inexorable laws of nature or mathematics;[77] rather logic may require to surrender to utility and purpose[78] and the curbing of unnecessary expense. It is submitted that, whenever the reference returns to the original forum which has begun the process (by admitting the element of *renvoi* into the problem), it is desirable for that forum to accept the reference. If an English court were to choose to interpret a reference back as a reference to its conflict rules, then it would be set upon a truly unending loop, and there would be no sense in that approach. It is noteworthy that the *renvoi* process, which we are accustomed to see repressed in most contexts, has the potential to arise where not expressly excluded.[79]

B. Particular problems

1. Examples from the law of contract

(a) Problems arising at inception: material validity/formation of contract

In cases where the substantive content of potentially interested laws differs upon the question of when and whether a proposed contract can be said technically to have been concluded, recourse is had, both at common law in England[80] and in Rome I,[81] to the putative device for a solution. Where doubt

[76] eg Family Law Act 1986, s 50, which provides that if a divorce or annulment is worthy of recognition in England or Scotland, a party thereto may validly re-marry, in our view, here or abroad, notwithstanding any contrary view held by the personal law(s) (say domicile(s)) of the previously married party and his/her new partner. This legislative intervention does not regulate the reverse situation (where the personal law, but not the English or Scots forum, regards the consistorial decree as valid), a problem which therefore must be solved according to the common law (eg *Schwebel v Ungar* 1964 48 DLR (2d) 644). An equivalent to s 50 does not exist in Council Regulation (EC) No 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, repealing Regulation (EC) No 1347/2000 (27 Nov 2003) (OJ 2003 L338/1), perhaps because in a system of virtually automatic recognition among Member States of consistorial decrees granted in a fellow Member State, differences of view among Member States on recognition are not expected—though not impossible if there were different views on the application of Art 3 in the circumstances or a public policy objection (Art 22), even in its attenuated Brussels form (Art 25).

[77] cf M Wolff *Private International Law* (2nd edn Clarendon Press Oxford 1950) 198.

[78] JHC Morris *The Conflict of Laws* (D McClean (ed)) (5th edn Stevens London 2000) 509–12.

[79] As in child abduction, arguably unwisely: *Re JB (Child Abduction) (Rights of custody: Spain)* [2004] 1 FLR 796; and, in an Australian forum, in tort: *Mercantile Mutual Insurance v Neilson* [2004] WASCA 60 (5 Apr 2004).

[80] *Albeko Schumaschinen & Co v Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519.

[81] Art 8: '1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid. 2. Nevertheless a party may rely upon the law of the country in which he has his habitual

attends the technical aspect of evidencing consensus, the 'postal acceptance rule' applies in the domestic law of England[82] and Scotland[83] (to the effect that an acceptance is effective when posted; with different rules for instances of instantaneous communication, as these have developed over time),[84] and while the postal acceptance rule remains current, it will apply in the forum of a Contracting State which holds English or Scots law to be the applicable law, under Rome I, Article 8.1 or 8.2. Whatever solution is favoured by the putative governing law, the forum of a Contracting State to Rome I is bound to apply, subject to the discretion provided by Article 8.2. In ascertaining the putative applicable law, the court will follow Articles 3 or 4 of Rome I, as appropriate. The use of putativity in this context accords with common law authority in England.

In *Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd*[85] (where suit was taken in England for breach of contract by a disappointed would-be employee, whose expected contract of employment as the defendants' agent in Switzerland had not come into being), the forum applied to the question whether there existed a contract between the parties the law of which would have been the governing law of the contract had there been a contract.

A comparable, but less well known, and more complex, example is provided by *The Parouth*,[86] where the question at issue was not only as to the existence of a contract but also as to the identity of the contracting parties.

residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.' The Art 8.2 proviso was inserted to guard against the effect of domestic rules of the putative *lex causae* which were thought unacceptable—exorbitant, one might say: eg that silence by offeree denotes acceptance. See M Giuliano and P Lagarde Report on Rome I (1980) OJ C282 23 (31/10/80) 29. The Green Paper on the Conversion of the Rome Convention of 1980 into a Community Instrument and its Modernization (COM (2002) 654) makes no recommendation for change to the terms of Art 8.

[82] To its full logical or illogical extent: *Household Fire and Carriage Accident and Ins Co v Grant* (1879) 4 Ex D 216.

[83] The Scottish Law Commission in Report No 144 (1993) on 'Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods', criticized the rule, and recommended its replacement by a rule that to be effective an acceptance must be received by the offeror. See pt IV, and Draft Bill, sch 1, cl 9(2). There has been no implementing legislation. An offer can be retracted at any time before posting of an acceptance. Where an offer and the retraction thereof arrived at the same time at the house of the offeree, the court in Scotland has held the retraction to be effective: *Dunmore v Alexander* (1830) 9 S 190, in which, therefore, Lady Agnew's maid, Betty Alexander, found that she had the status merely of putative maid of the Countess of Dunmore. See generally H MacQueen and J Thomson *Contract Law in Scotland* (Lexis Nexis UK Edinburgh 2000) 2.29 et seq.

[83] See H MacQueen 'Scots and English Law: The Case of Contract', JAC Thomas Lecture, delivered at University College, London, 15 Mar 2001.

[84] Telephone/telex/e-mail: see *Entores v Miles Far East Corporation* [1955] 2 QB 327, as re-evaluated, approved and potentially widened by House of Lords in *Brinkibon Ltd v Stahag Stahl* [1982] 1 All ER 293.

[85] (1961) 111 LJ 519.

[86] [1982] 2 Lloyd's Rep 351. See also *Union Transport plc v Continental Lines SA* [1992] 1 WLR 15, discussed, together with the potential demerits of the putativity approach, in Dicey & Morris, 32–151 et seq (material validity).

Dispute arose regarding extent of authority, and ostensible authority, and permission to hold out as having authority. The defendants failed to provide the cargo which had been expected to form the subject of carriage from Germany to Mexico, denying that there ever was a concluded contract; or, if there was a contract, arguing that it had been made by brokers not acting on their behalf or, alternatively, that the brokers had no authority in this instance. There was, in the defendants' contention, no suggestion that *they* had held out the brokers as having authority. One factor which Bingham J at first instance was persuaded to find 'neutral', but which in the Court of Appeal was held to be significant (indeed decisive) was the inclusion, in the debatably extant charter-party, of an arbitration clause providing for arbitration in London. In those days (which were pre-Rome I, but post-dating the House of Lords decision in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*),[87] the clause for London was held probably to indicate an English proper law. In *The Parouth*, in the Court of Appeal, their Lordships remarked that, contrary to counsel for the defendant's submission that the principle of 'putativity' must have been in everybody's mind in the court below, rather had that principle escaped everyone's notice, and the attention of Bingham J had not been drawn to the point. Although the principle of putativity operated in the case in hand in favour of the plaintiffs,[88] the judgment of Ackner LJ (in reporting—but rejecting—defending counsel's argument that the arbitration clause be treated as neutral, as the very issue between the parties was whether there *was* a contract), repeats counsel's unsuccessful submission that [according significance to the arbitration clause] 'begs the question whether the plaintiffs are right'.[89] Begging the question is of course the inherent flaw and potential injustice of seeking a solution along the putative path.

(b) Consensus in idem*; incorporation of contractual terms; interpretation of terms*

Whether, *essentially,* consensus has been reached is a substantive matter, for decision by the putative *lex causae*. So too is the question whether a particular term has been incorporated; and to further questions such as whether resort must be had to the court chosen by the parties in a contract the validity of

[87] [1970] AC 583, in which the House of Lords distinguished between the law governing the curial procedure and the law governing the contract which contained the curial clause; and, further, held that the existence of a curial (arbitration) clause was merely one factor among many which ought to be taken into account in identifying the proper law in the absence of express choice, and was no longer to be considered a determining factor.

[88] On the reasoning that there was a good arguable case that a contract existed, its governing law being English law, the case fell within the then RSC Ord 11 allowing the English court to take jurisdiction by permitting service out of the jurisdiction. (The defendants could have complained that they had been 'landed' in a court rather than in an arbitration room, but, having been offered arbitration, they refused it).

[89] At 353. Noting, however, that the putativity argument had not been put to Bingham J at first instance.

which is in doubt,[90] or where doubt attends the question of incorporation of the choice of court clause.[91] As noted above with regard to jurisdiction, the Scots case of *Belgian International Insurance v McNicoll*[92] held that effect must be given to a choice of court clause in a compromise agreement between debtor and creditor, despite alleged dishonour by the debtor of the substance of the agreement.

A case in point concerning the incorporation of terms into a contract is *Morin v Bonhams*,[93] in which Morin ('M'), an antique dealer, in his haste to bid at auction in Monaco, signed the auctioneers' Conditions of Sale, paying little heed to their content. Clause 9.9.1 of those Conditions provided a clear choice of Monegasque law, such as to satisfy Rome I, Article 3.1. The question whether the Conditions had been incorporated into the parties' agreement, and the legal effect of M's (careless) acquiescence therein, evidenced by his signature, was referred to the putative law of the contract by judge Jonathan Hirst QC.[94] The judge stated that, in terms of Rome I, Article 8.1, it would be a matter for that law (Monegasque law) to determine whether the Conditions were incorporated into the contract. Expert evidence from Monaco was to the effect that M, by signing the bidder registration form, could be considered implicitly to have accepted the terms set out in the catalogue. Mr Hirst accepted the evidence, and spent little time entertaining the notion that Article 8.2 might have justified the application of English law. 'I cannot see why it is unreasonable to determine the effect of Monsieur Morin's conduct in Monaco in accordance with Monegasque law.'[95] In any event, there was no conflict of laws because the substance of English law was the same as Monegasque law. In the Court of Appeal (the principal concern being the issues in tort), Mance LJ accepted, as to the scope of the choice of law clause contained in the catalogue, that '"the transactions to which these Conditions apply and all matters connected therewith" embraces any claim for negligent misstatement allegedly contained in the catalogue . . . cl 9.1 should be read as embracing any claim arising therefrom.'[96] (The case is of greater importance for its contribution to the development of our conflict rules in tort, and for the interpretation

[90] See *Mackender v Feldia AG* [1967] 2 QB 590 above. Or even whether a choice of *law* is effective—very circular, very much 'bootstraps' argument: see *Egon Olderndorff v Libera* [1995] 2 Lloyd's Rep 64 below. This is in accordance with the rule in Brussels jurisdiction: *Boss Group v Boss Group France SA* [1996] 4 All ER 970, above at n 66.

[91] *The Angelic Grace*, above*; Egon Olderndorff v Libera* above.

[92] 1999 GWD 22-1065; reversing single judge 1999 GWD 13-622. See discussion at Part I, above.

[93] [2003] I.L.Pr 25. See, on appeal [2004] 1 Lloyd's Rep702.

[94] [2003] I.L.Pr 25, paras 23 and 24. Admittedly in para 22, Mr Hirst refers to English law to the effect that even if M did not trouble to read the agreement, he was bound by its terms.

[95] At para 24.

[96] [2004] 1 Lloyd's Rep 702 at para 22. Mance LJ noted that evidence of Monegasque law suggested that any claim based on alleged negligent misrepresentation in the catalogue would probably be regarded by that law as arising in contract rather than tort.

of Private International Law (Miscellaneous Provisions) Act 1995, section 11(2)(c)).[97]

Putativity has the potential to indulge homing tendencies

In *Egon Oldendorff v Libera Corporation*,[98] an English court, set to decide whether a contract had been concluded between German and Japanese parties, and if so, whether there had been incorporated into the contract an arbitration agreement for London, was influenced by indications that the parties' intention was to arbitrate in London (itself an indication at second remove, it having been agreed, it seems, that the parties would go to arbitration in London if no other arbitration location was specified). The English court concluded[99] that if the arbitration clause was validly incorporated into the contract, the contract would be governed by English law; and if English law governed the contract, the arbitration clause was validly incorporated. Moreover the (disputed) existence of the arbitration clause supported the English court in taking jurisdiction to hear argument on these initial questions. If, these matters having been heard initially in Japan, the Japanese court had found that there *was* a contract between the parties, the English court surmised that the Japanese forum would have held the contract to be governed by English law; English proceedings then would have been required in order to deal with measure and quantum of loss.

It can readily be seen from *Egon Oderndorff* that where the putative argument is employed, circularity of reasoning often is present also.

(c) Negative obligations

In deciding both jurisdiction and choice of law in contract, how should an English/Scots forum treat an obligation which lies on a (German) party *not* to make, or allow to be made, any communication to an individual or company in the United Kingdom? When such a person, of German 'domicile', was sued

[97] Where the events constituting a tort occur in different countries, the applicable law is the law of the country in which the most significant element or elements of those events occurred. On these facts, the most significant elements of 'a continuum of activity, starting in England' occurred in Monaco. But had application of s 11, in the court's view, pointed to England, would the presence of an express choice of law in contract have been admissible as 'a factor connecting the tort' with Monaco, in terms of s 12? This was a matter which Mr Hirst at first instance raised, but was disinclined to answer, as unnecessary. Similarly, in the Court of Appeal, the matter is touched upon speculatively, and *obiter*, but, it is thought, positively, by Mance LJ, at para 23, 'In general terms, it would seem odd, if an express choice of law were not at least relevant to the governing law of a tort. . . . Further, one should not forget that cl 9.1 not only deals with governing law, but provides for submission to the non-exclusive jurisdiction of the Monegasque courts. It may be open to argument that that itself constitutes a "factor connecting the tort" to Monaco. The Judge did not decide any points relating to s 12, and, since we do not have to do so either, I prefer to leave them all open.'

[98] [1995] 2 Lloyd's Rep 64.

[99] Relying on Rome I, Arts 3.1 and 8.1 (rejecting the defendants' invocation of Art 8.2).

in an English forum,[100] he challenged the jurisdiction of the English court, claiming that he must be sued in his German 'domicile'/place of business under Article 2, unless it could be shown that the special jurisdiction in contract (Article 5.1) was applicable. Since the case arose before the coming into operation of Regulation 44, the forum was required to perform a two-step system of reasoning, which necessitated it, first, to ascertain the applicable law by its own conflict rules, in order to identify by that applicable law the place of performance.[101] The problem was how to apply Rome I, Article 4.1 et seq to a negative obligation in order to find the applicable law thereof. Who was the characteristic performer? Would this be an instance which justified escape into Article 4.5 to find the law of closest connection? Was the characteristic performer the party who was enjoined not to contact the other party? Or was he the party who was not to suffer being contacted? The 'obligations', if such they be—that is to say, a duty not to contact, and a right not to be contacted—were negative and passive, respectively. The effect of applying Article 4.2 (taking the view that the party under order was the characteristic performer) would be to have German law apply *qua* applicable law, to the jurisdiction question of identification of place of performance; but if resort was had to Article 4.5, the greater freedom permitted thereby to the forum would allow it to give legal significance to its observation that while the defendant's obligations would remain the same wherever he was in the world, the consequence (of correct, restrained conduct) would be felt in the UK alone. By this latter reasoning, the negative obligation was held to be most closely connected with the UK, meaning that there could be a finding of English applicable law. By English law, the English court would have jurisdiction under the Brussels Convention, Article 5.1.

This case therefore affords another example of circular reasoning (use of choice of law to find jurisdiction),[102] though the incidence of this in contract cases will be reduced by the introduction in Article 5.1 of Regulation 44, of the autonomous concept of 'place of performance'. But on the basic point of 'centre of gravity' of the circumstances, the solution is surely sensible,[103] having much in common with the 'central fixed point of one party' line of argument seen in a case such as *Sayers v International Drilling Co NV*.[104]

[100] *Kenburn Waste Management Limted v Bergmann* [2002] I.L.Pr 33, in the decision of Pumphrey J, and confirmed on appeal.

[101] *William Grant & Sons International Ltd v Marie Brizard Espana SA* 1998 SC 536; and *Ferguson Shipbuilders Ltd v Voith Hydro GmbH & Co KG* 2000 SLT 229.

[102] cf nn 130 and 131, below.

[103] Albeit homeward walking. The effect is that this decision has added to a number handed down recently by the English courts, demonstrating a fondness for the use of Art 4.5: *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH (No 2)* [2001] 4 All ER 283; and *Samcrete Egypt Engineers & Contractors SAE v Land Rover Exports Ltd*. [2001] EWCA Civ 2019, [2002] CLC 533. See also Green Paper on the Conversion of the Rome Convention of 1980 into a Community Instrument and its Modernization (COM (2002) 654), at 3.2.5.

[104] [1971] 3 All ER 163 (contract *between* a Dutch company, itself a subsidiary of a Texan

(d) 'in favorem' *reasoning*

Expectations and intentions; deemed, best, and thwarted

A variation on the theme of deemed intention, putativity and circularity is 'the more effective law' presumption which, from time to time, was entertained in pre-Rome I days to help identify the proper law of the contract in the absence of express choice of law by the parties. The argument—which is clearly open to abuse—was that for *in favorem* reasons the presumption lay in favour of the validity of the contract, said validity to be confirmed by means of application of such one of the contending putative *leges causae* which would hold the contract, or term thereof, to be valid.[105] 'It is an accepted principle that a contract is, if possible, to be construed so as to make it valid rather than invalid. The Latin maxim is well known. A stipulation must be construed *ut res magis valeat quam pereat*.'[106] Examples which may be cited are *P&O v Shand*;[107] *In re Missouri SS Co*;[108] *Bodley Head Ltd v Flegon*;[109] and *Monterosso Shipping Co Ltd v International Transport Workers Federation*,[110] in all of which the contract, or clause, was held valid as a result of choice of application of the law which held it valid. In *Hamlyn,*[111] Lord Herschell, Lord Chancellor, opined that it is not reasonable to attribute to parties the intention to produce a nullity. One feels, however, that this line is only superficially attractive, and that there may be something specious about it. Moreover, it relies upon looking ahead to view the outcome in a manner which is not methodologically orthodox.[112] The seventh edition of Dicey's *The Conflict of Laws*[113] warned of the danger of putting too much reliance on

company, which employed personnel of many nationalities to service off-shore oil drilling operations in many locations *and* an Englishman to be employed as a derrickman on one of the company's rigs off the coast of Nigeria).

[105] cf other positive impetuses, eg, in favour of marriage (*Hill* [1959] 1 WLR 127; *Mahadervan* [1964] P. 233); wills where, famously, *renvoi* was employed: *Collier v Rivaz* (1841) 2 Curt. 855. In the same way with the circular problem of status and domicile, the desire to apply the domicile of a parent by whose personal law the child will be legitimate: cf Anton (1st edn op cit) 346; see n 128, below.

[106] *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34 *per* Lord Denning MR at 44. In *Hamlyn & Co v Talisker Distillery* (1894) 21 R (HL) 21, the contract was held to have an English proper law, by which the arbitration clause was valid (any dispute to be 'settled by two members of the London Corn Exchange, or their umpire, in the usual way'). It was then a requirement of Scots law that arbitrators/arbiters be named; lack of name could not be regarded as a fundamental affront to Scots public policy; and indeed Scots law on the point was changed soon after by Arbitration (Scotland) Act 1894.

[107] (1865) 3 PC Moore (MS) 272.

[108] (1889) 42 Ch D 321.

[109] [1972] 1 WLR 680.

[110] [1982] 3 All ER 841: see, however, per May LJ, at 848, to the effect that the enforceability or unenforceability of the agreement by a particular law is irrelevant in the search for the law of objective closest and most real connection.

[111] (1894) 21 R (HL) 21, 23.

[112] cf re domicile, n 126, below.

[113] (1958) by JHC Morris.

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the *in favorem* indicator;[114] that which is done *ex post facto* may be unfair and expedient. EU draftsmen, on the contrary, appear to place faith in the safeguards which choice *ex post facto* in its nature contains.[115]

It could be said that each of the common law approaches[116] of identifying the proper law of contract in the absence of express choice, that is to say by either subjective (deemed intention of parties, where most likely there was no intent), or objective (ascribing an intention which *ex hypothesi* was not there, but for which the intention deemed to be have been held by reasonable persons in the circumstances was substituted)[117] contains an element of unreality and disingenuousness; the intention is an imputed intention. Nevertheless, some deeming sometimes must be done. It is submitted that it is defensible for a forum, in some cases, to supply a notional intention, or to apply the law which would have applied had not the parties' contractual intentions been thwarted.[118] In choice of law, the enlightened forum in a conflict case will be prepared to treat as a contract that which does not satisfy the indicia of domestic law, but which is recognisably of the genus.[119]As a legitimate aid to the identification of the applicable law in tort or delict, the English or Scots court may, in a displacement exercise, take into account, inter alia, (any) consequences of the events which constitute the tort or delict.

With regard to choice of law rules governing questions of restitution, which within the United Kingdom are generally held to be undeveloped, but which have engaged the attention of EU draftsmen as falling within the task of

[114] Citing as examples of its use *NV Handel Maatschappij J Smits v English Exports (London) Ltd* [1955] 2 Lloyd's Rep 137 (CA) and *P & O Steam Navigation Co v Shand* op cit (rejected in *British South Africa Co v De Beers Consolidated Mines Ltd* [1912] AC 52.

[115] Admittedly in specialized areas of choice of jurisdiction (unsurprising) and choice of law (surely more debateable), in favour of permitting party choice of jurisdiction, or of choice of law only *after* the event: Draft Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations ('Rome II'), Preamble, recital 16, and Art 10(1). As to jurisdiction, see the protective wording of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Arts 13 (insured persons), 17 (consumers) and 21 (employees). See 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) *Edinburgh Law Review* 9 65, at 82 et seq.

[116] Overtaken by Rome I, Arts 3 and 4, largely, though Art 4.5 would seem to afford recourse to either of the former approaches in a forum sympathetic to such an exercise. While Art 3 (express choice of law) affords a small leeway to permit choice to be inferred other than from express terms (eg from previous course of actings), it does not authorize wide-ranging judicial investigations into parties' intentions. Giuliano and Lagarde, at 18: 'This Article does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice.'

[117] eg *The Assunzione* [1954] 1 All ER 278, 292, per Singleton LJ: 'One must look at all the circumstances, and one must seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract.'

[118] Though by giving effect to best intentions, we deny to the other side the opportunity which the law affords to make the best tactical use of the situation which has arisen.

[119] *Re Bonacina* [1912] 2 Ch 394; cf Private International Law (Miscellaneous Provisions) Act 1995, s 9(2) (tort).

harmonizing conflict rules in the law of non-contractual obligations,[120] the law favoured (both 'domestically', and putatively in the preliminary draft proposal for an EU Council Regulation on the Law Applicable to Non-Contractual Obligations, colloquially termed 'Rome II')[121] has been that of the putative applicable law of the underlying contract. Not only does this rule effectively admit party choice to govern a qualifying restitutionary question,[122] it will require care in its application in a UK court,[123] for the contract (the governing law of which is to be applied to regulate the restitutionary issue) is possibly a nullity. If so, Articles 3 and 4 of Rome I should not be used to identify the law applicable to govern restitutionary issues.[124]

2. *Examples from family law*

Circularity of reasoning also features in other, non-commercial, areas of the conflict of laws,[125] and in family law and matters of personal status, especially within the rules of domicile, deemed intention and temporal issues are of great importance.[126]

[120] See House of Lords, European Union Committee, 8th Report of Session 2003–4. HL Paper 66, published 7 Apr 2004 (henceforth 'the Scott Report'). See 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 *Edinburgh Law Review* 65.

[121] See Carruthers and Crawford 'Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part II' *Edinburgh Law Review* 9 (2005) 238. Also Draft Report Revised Version on the proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ('Rome II') (COM (2003) 427-C5-0338/2003–2003/0168 (COD)) (5 Apr 2004), Rapporteur Diana Wallis MEP.

[122] cf n 28.

[123] The most likely ground of jurisdiction of a court in the UK is *qua* domicile of the defendant under Art 2, since Reg 44 introduced no special rule of jurisdiction for restitutionary matters. *Kleinwort Benson Ltd v Glasgow District Council* [1997] 4 All ER 641.

[124] UK Reservation in respect of Art 10.1.e. See Giuliano and Lagarde Report OJ C282 31.10.80, 33.

[125] See eg *Smijth v Smijth* 1918 SLT 156 (question of status as legitimate of children of a putative (Scots?) marriage. The doctrine in Scots law of a putative marriage demonstrates a benevolent attitude, with a willingness to concede that some of the incidents of marriage (legitimate status of children) may attach to a relationship which in law does not amount to marriage. The requirement is that the 'marriage', to qualify as putative, must have been entered into in the bona fide belief by one or both parties that there was no impediment to the marriage. It is generally thought that the error must have been factual and not of law.

[126] cf the importance of *tempus inspiciendum* in the ascertainment for any given purpose of the domicile of the *propositus:* usually for purposes of succession: *Bell v Kennedy* (1868) 6 M (HL) 69; *Re Flynn, Deceased* [1968] 1 All ER 49; *Morgan v Cilento* [2004] All ER (D) 122; *In the Estate of Fuld, No 3*, above; *Re Furse, Furse v IRC* [1980] 3 All ER 838; *Winans v Attorney General* [1904] AC 287; *Liverpool Royal Infirmary v Ramsay* 1930 SC (HL) 83; and *Re Lloyd Evans* [1947] Ch 695. In the most recent example of *Morgan*, above, where acquisition of domicile of choice had been established but it was suggested that the enthusiasm of the *propositus* for that legal system might have waned by the date of his death, it was held in the Court of Appeal that it did not die before he did (para 76). The connecting factor of habitual residence may admit conjecture by the court as to what might happen in the future ('the projection argument': Crawford 'A Day is Not Enough: Further Views on the Meaning of Habitual Residence' (2000) JR 89, at 93 and 98).

Famous circular problems include the rule[127] that a child will take the domicile of his father at the date of his birth if the child is legitimate;[128] since domicile waits upon status, and status depends upon domicile, which law should be applied to fix the domicile of the child?[129] Likewise, from the subject area of the history of the conflict rules of annulment, a decision on the status of the marriage would precede a decision on the jurisdictional competence of the foreign court,[130] because jurisdiction rested upon domicile; and the domicile of the woman depended, in an English or Scots court, upon the rules of unity of domicile of 'spouses'. The same cumbersome and dubious process was required in order to decide if the English or Scots court had jurisdiction, at a time when the grounds of jurisdiction differed according to whether the marriage was judged (by the forum) to be void or voidable.[131]

Certain examples of circularity can be found in parliamentary drafting. Thus, for example, in the interpretation of the Family Law Act 1986, section 46(2)(b)(ii), where a court in the UK is enjoined to recognise a foreign divorce etc. obtained otherwise than by means of proceedings (it being effective where obtained), if it emanates from the law of the domicile of either party, and is recognized as valid by the law of the domicile of the other party. If that last-mentioned domicile should be the legal system of any part of the UK, there is a circularity: the question whether a court in the UK should recognize the divorce depends upon whether the divorce is recognized in the UK. [132] Such cases are attributable to rare drafting lapses, and seldom arise.

[127] Proposed to be changed, in Scots law, by means of and in terms of the Family Law (Scotland) Bill clause 16: '(1) A person who is under 16 years of age shall be domiciled in the country with which the person has for the time being the closest connection. (2) The presumptions in subsection (3) shall apply in determining for the purposes of subsection (1) the country with which a person has the closest connection . . . '.

[128] Law Reform (Parent and Child) (Scotland) Act 1986, s 9.

[129] Wolff (n 77) p 109; AE Anton *Private International Law* (1st edn W Green & Son Edinburgh 1967), 345–6. The Scottish Law Commission proposed in 1992 that s 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 be amended to the effect that 'no one whose status is governed by Scots law shall be illegitimate'. But how will it be decided whose status shall be governed by Scots law?

[130] *Chappelle* [1950] P 134; *Gray v Formosa* [1963] P 259; and *Lepre* [1965] P 52.

[131] As in *Prawdziclazarska* 1954 SC 98, in which the Scots 'forum' by its own rule would take jurisdiction *qua locus celebrationis* only if the marriage was void. See also *De Reneville* [1948] P 100, where the parties neglected to offer to prove the French law which in the view of the English forum *would have been* the *lex causae*. The effect was very circular, in that the forum, by default, perforce applied the substance of its own law on the topic of legal effect of wilful refusal to consummate, in order to decide whether the marriage was void or voidable, in order thereby to determine whether it had jurisdiction. In the event, it had not jurisdiction because the marriage, by this reasoning being voidable, the wife's dependent domicile was French.

[132] In these circumstances, North advises that recognition is not possible. Cheshire and North's *Private International Law* (North and Fawcett (eds)) (13th edn Lexis Nexis UK 1999) 808.

IV. CONCLUSION

One would not wish to end this perambulation on a negative or an uncertain note. The comments and speculations offered in this essay are in truth a celebration of devices (arguably generally of positive effect) which a well-developed system of conflict rules keeps at its disposal to afford latitude, and to supply feasible solutions to otherwise intractable problems. The result of quiet reflection on shadowy matters is an appreciation of the tactical significance and substantive benefit that arguments on a permitted hypothesis can bring.

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