at least, the law's primary focus is the vindication of property rights. This is manifested through a continuing beneficial interest in misapplied funds. Alternatively, when a transaction is falsified, the trustee's liability as an accounting party is strict. The consistent theme is that for well rehearsed policy reasons, the trust's performance interest must be rigorously enforced. *Tang* is a cogent reminder of this principle.

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ECONOMIC TORTS IN THE CONFLICT OF LAWS

IN *AMT Futures Ltd. v Marzillier* [2017] UKSC 13; [2017] 2 W.L.R. 853, the Supreme Court had to decide where a "harmful event" occurred in order to determine whether the English court had jurisdiction over the defendant, Marzillier, a German lawyer. AMT brought an action in England against Marzillier for inducing breaches of contracts made between AMT and their European clients. Although the client contracts contained an exclusive jurisdiction clause in favour of the English courts, Marzillier had encouraged the clients to bring actions against AMT in Germany. The claims were made under German law of delict alleging that AMT were accessory to the bad investment advice given by the clients' brokers. The brokers were insolvent. The German claims were brought directly against AMT and AMT settled. It had lost on the jurisdiction question in Germany because the exclusive jurisdiction clause did not bind the clients. They were consumers. Additionally, the actions were in tort and therefore did not fall within the scope of the clause. AMT brought this action in England after paying over £2m in settlement and costs in Germany. AMT argued that Marzillier had deprived AMT of the benefit of the contractual exclusive jurisdiction agreement by inducing the clients to sue in Germany. Marzillier, a defendant domiciled in Germany, could only be sued in England if the harmful event occurred here. Lord Hodge J.S.C., giving a beautifully clear judgment, held that the case could not be heard in England. England was not the place where the harm occurred, despite payment out of an account in England and the alleged breach of the exclusive English jurisdiction agreement. He held that Germany was the place where the harm occurred under what is now Article 7(2) (ex Article 5(3)) of the Brussels I Regulation Recast (Regulation EC No 1215/2012).

The place where harm or damage occurs is an important connecting factor in conflict of laws for choice of law and jurisdiction purposes both under the European regimes and under the national rules. The courts where "the harmful events occur" have special jurisdiction in Article 7(2) Brussels I

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Regulation Recast. The claimant has an option to sue a defendant domiciled in a Member State in the State where the harm occurs rather than under the general rule of suit at the defendant's domicile. For choice of law, the general rule makes the law of the country "in which the damage occurs" applicable (Article 4.1 Rome II Regulation (Regulation EC No 864/2007)). Under the national rules the English court has power to serve the claim form out of the jurisdiction where the claim is for damage "sustained within the jurisdiction" (CPR PD 6B r. 3.1(9)). The provisions of the European private international law instruments are to be construed consistently with one another (Recital 7 Rome II Regulation) and the service out provisions are interpreted in the same manner despite the different wording (*Brownlie v Four Seasons Holdings Inc.* [2015] EWCA Civ 665). They all require the court to identify the place where the damage occurs.

However, locating that place is not as straightforward as at first blush. In claims for damages for personal injury, the financial losses are usually those relating to medical expenses and loss of earnings. Those can reasonably be argued to be suffered where the victim lives out the life damaged by the tortfeasor. Arden L.J. disagreed with that argument in *Brownlie*. She held that a claim for damage resulting from a road accident in Egypt could not be brought in England. The direct harm had not been sustained here even though England was the residence of the victim. In this she was quite right. Extending the scope of the place where the harm was sustained to include anywhere the consequences might be felt would be too wide-ranging. It is even more difficult to locate the damage in cases of economic harm. Where does the harm occur for claims of misrepresentation, conspiracy, deceit or inducing breach of contract? The defendant may act by email or telephone anywhere in the world, and the claimant may pay out of any number of bank accounts. Any of these factors may be unpredictable, accidental or manipulated.

Certainty as to the applicable law and the court with jurisdiction to determine the dispute is important for both victim and tortfeasor. An expansive and fluid definition of the place the harm occurred to include where payment was made, where the advice was given, and where the contract was breached results in many possible laws or courts. These would be too numerous and unpredictable at the time the tortfeasor acts. Part of the role of domestic tort law is to regulate the actors and allocate risk. That role would be frustrated if the choice of law rule is uncertain. The tortfeasor would be unable to adjust behaviour or obtain insurance. Choice of law rules also work best if a single system of law is identified, otherwise gaps and inconsistent overlaps cause difficulties. Likewise, the rules allocating jurisdiction need a reasonable degree of certainty. Overlapping jurisdiction can be dealt with by *lis pendens* rules but these are blunt instruments.

Predictability and minimising concurrent proceedings are important purposes of the Brussels I Regulation Recast (Recitals (15) and (21)). Lord

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Hodge in *AMT Futures Ltd. v Marzillier* noted that promoting certainty is also central to the Regulation. The rules are part of a compulsory scheme in which the general rule requires suit in the courts of the defendant's domicile and only exceptionally in a different court. Prospective litigants, whether claimants or defendants, can foresee which court will have jurisdiction. The alternative grounds of jurisdiction that derogate from the general rule (such as Article 7(2)), must be restrictively interpreted and only in so far as to achieve the other aims of the Regulation. The alternative grounds of jurisdiction have to be based on a close connection between the court and the action or in order to facilitate the sound administration of justice (Recital (16)). The courts where the harmful event occurred are identified as being in a particularly good position to determine the evidence of actual damage.

The CJEU has limited the scope of Article 7(2) to initial and direct damage to the immediate victim (Case C-220/88, *Dumez France SA* EU:C:1990:8; Case C-364/93, *Marinari* EU:C:1995:289). It was clear in *AMT Futures Ltd. v Marzillier* that the inducement to breach the contract happened in Germany, and the settlement payments and those for costs of employing German lawyers to conduct the German proceedings were also made in Germany. AMT nevertheless argued that the payments were made out of accounts in England and that the effect of the breach of the obligation in the exclusive jurisdiction agreement occurred in England where AMT was domiciled. They were successful at first instance. The Court of Appeal and Lord Hodge in the Supreme Court disagreed. The CJEU is generally unwilling to adopt a definition of a special ground of jurisdiction permitting a claimant to sue in the claimant's domicile as that would detract from the general rule (Case C-360-12, *Coty Germany GmbH* EU:C:2014:1318). Nevertheless, the CJEU has crafted some exceptional rules to locate the harm in the claimant's domicile. For example, actions for violation of privacy rights on the Internet (Cases C-509/09 and C-161/10, *eDate Advertising GmbH* EU:C:2011:685); infringements of IP rights (Case C-523/10, *Wintersteiger AG* EU:C:2012:220) and rights arising out of breaches of competition rules (C-352/13 *Cartel Damage Claims* Case EU:C:2015:335). Lord Hodge held that the harm in this case was not so exceptional as to require a departure from the general rule. The harm directly and immediately occurred in Germany and the English courts could not take jurisdiction over a claim for it. The related action against the clients for breach of the exclusive jurisdiction clause could, however, continue in England. The joinder rules under the Regulation are more limited than those under the national rules. Also, there is no *forum conveniens* analysis possible under the Regulation which might enable related proceedings to be brought together in one court. The *dépeçage* of proceedings is inconvenient, wasteful and could

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lead to irreconcilable judgments. As Lord Hodge articulated, that is the price of certainty under the Regulation.

Post Brexit, and in the absence of any contrary agreement, the UK will become a third State for jurisdiction and enforcement of judgments. The Regulation depends on reciprocity to work. Without reciprocity, English parties would be constrained by the *lis pendens* and joinder rules, among others, without the advantages of certainty or the protected rules on jurisdiction in the Regulation. The national rules in CPR PD 6B r 3 adopt a more flexible *forum conveniens* approach. Those rules are easily altered to reflect practices in international commercial litigation. They are well established and currently in use for all defendants not domiciled in a Member State. They are highly developed to deal with multi-party litigation and to protect jurisdiction agreements, if necessary with anti-suit injunctions outlawed under the Regulation. The Brussels I Regulation Recast must not be simply replicated in UK legislation.

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JUSTIFIABLE DISCRIMINATION: THE CASE OF OPPOSITE-SEX CIVIL PARTNERSHIPS

OPPOSITE-SEX couples are prohibited from forming a civil partnership. Following the introduction of same-sex marriage, the Civil Partnership Act 2004 was not extended to opposite-sex couples, resulting in the unusual position that English law permits same-sex couples access to two relationship forms (marriage and civil partnership) yet limits opposite-sex couples to one (marriage). This discrimination was recently challenged in the courts by an opposite-sex couple, Rebecca Steinfeld and Charles Keidan, who wish to enter a civil partnership owing to their deeply-rooted ideological opposition to marriage. Rejecting marriage as a patriarchal institution and believing that a civil partnership would offer a more egalitarian public expression of their relationship, the couple argued that the current ban constitutes a breach of Article 14 read in conjunction with Article 8 of the European Convention on Human Rights.

The recent Court of Appeal decision in *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81 provides the latest statement on this issue following the couple's earlier and unsuccessful challenge in the High Court. At first instance, the couple's challenge was found not to fall within the ambit of Article 8, on the basis that they were able to marry and it was merely the couple's consciences that prevented them from accessing an equivalent legal recognition of their status. Drawing upon dicta from the House of Lords in *M v Secretary of State for Work*

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