



Claims for Indemnity, Contribution, Reimbursement, and Recourse in Private
International Law: Legal Obstacles to Satisfactory Recovery

Ph.D. THESIS

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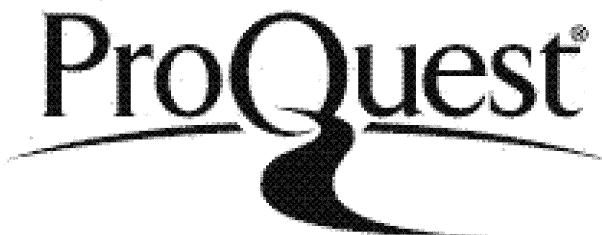


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Abstract

Where a person (D) who has become liable to pay another person (P) seeks from a third person (R) restitution of all or part of the payment, if the different relationships involved between P, D and R are decided in different forums or under different governing laws, D may not be able to obtain satisfactory recovery from R because the same issues may be determined differently or because there may be a mismatch between different governing laws.

This thesis examines the rules of private international law relevant to such situations and proposes some reforms of the law.

Thus if the same issues have to be determined in P's claim against D and in D's claim against R independently from each other in different forums, matters that have been established to support P's claim against D may not be established in support of D's claim against R. We will examine whether matters established in P's action against D in a foreign forum are recognised as conclusive against R in D's action against R in England. Then, we will examine in the international context English third party procedure as another way of avoiding independent determination of the same issues.

Turning to the obstacles to satisfactory recovery caused by a mismatch of different governing laws, we will first consider whether different claims of recovery that D may have against R should be governed by a single governing law. We will, then, consider whether the contract between P and D and the contract between D and R involved in chain transactions should be referred to a single governing law. Finally, we will consider whether D's liability to P and R's liability to P should be determined by a single governing law for the purpose of recovery under the Civil Liability (Contribution) Act 1978.

Outline Contents
(For page numbers, see Detailed Contents)

PART 1: INTRODUCTION

**PART 2: OBSTACLES TO RECOVERY DUE TO THE INDEPENDENT TRIAL
OF D'S CLAIM AGAINST R FROM THE TRIAL OF P'S CLAIM AGAINST D¹**

**CHAPTER 1: Inconsistent determinations of the issues in P's claim against D and D's
claim against R**

**CHAPTER 2: Conclusive effect against R in D's action against R in England of the
matters established in P's action against D in a foreign forum**

**CHAPTER 3: Third party procedure in England as a means of avoiding separate trials of
P's claim against D and D's claim against R**

Sub-Chapter 1: Merits and Drawbacks of English Third Party Procedure

Sub-Chapter 2: Availability of English Third Party Procedure in the International Context

**Sub-Chapter 3: Hindrances to English Third Party Procedure Posed by Foreign Parallel
Proceedings**

**Sub-Chapter 4: Jurisdiction to issue an antisuit injunction to eliminate hindrances from
foreign proceedings to English third party procedure**

**PART 3: OBSTACLES TO RECOVERY DUE TO A PLURALITY OF
GOVERNING LAWS**

**CHAPTER 4: Obstacles to Recovery Due to a Mismatch Between Different Laws
Governing Different Claims of Recovery**

**CHAPTER 5: Obstacles to recovery in chain transactions due to a mismatch between the
governing law of D's liability to P and the governing law of R's liability to D**

**CHAPTER 6: Obstacles to recovery under the 1978 Act due to a mismatch between the
law governing D's liability to P and the law governing R's liability to P**

¹ For the meaning of P, D and R, see the opening paragraphs of Part 1.

Detailed Contents

Abstract	2
Glossary	13
Bibliography	14
List of Abbreviations and Definitions	22
Table of Cases	25
PART 1	
INTRODUCTION	36
1 Purposes of the thesis	37
2 The types of situation falling within the paradigm scenario	37
3 Overview of the thesis	43
3.1 Obstacle due to the independent trial of D's claim against R from the trial of P's claim against D (Part 2)	44
3.2 Obstacles due to a plurality of governing laws (Part 3)	46
PART 2	
OBSTACLES TO RECOVERY DUE TO THE INDEPENDENT TRIAL OF D'S CLAIM AGAINST R FROM THE TRIAL OF P'S CLAIM AGAINST D ..	49
CHAPTER 1	
Inconsistent determinations of the issues in P's claim against D and D's claim against R	50
1 Purpose of this chapter	50
2 Issues that may be determined inconsistently	50
2.1 R's liability to P and the facts peculiar thereto	51
2.2 D's liability to P	53
2.2.1 Where D seeks to recover from R pursuant to R's contractual undertaking	

.....	53
2.2.2 Where D is contending to have discharged R's debt to P	54
2.2.3 Where D is contending that he has paid more than his share of compensation for a wrong committed by him together with R	55
2.3 Facts that must be ascertained to establish D's liability to P	56
3 How inconsistent determinations arise	57
3.1 Determination of the existence of D's liability to P	58
3.2 Determination of the amount of D's liability to P	59

CHAPTER 2

Conclusive effect against R in D's action against R in England of the matters established in P's action against D in a foreign forum	61
1 Purpose of this chapter	61
2 Judgments from Germany, Austria, or Switzerland rendered under <i>litis denunciatio</i>	62
3 Judgments rendered by the application of the CMR or CIM	65
4 Other cases	68
4.1 Conclusive effect of D's liability to P where D's claim against R is based upon the Civil Liability (Contribution) Act 1978	69
4.1.1 Present law	69
4.1.2 Comparison with the conclusive effect of D's liability to P established in England	72
4.1.3 Comparison with the conclusive effect of D's liability to P where D settled with P	74
4.2 Conclusive effect in general of a judgment given in P's action against D in a foreign forum against R in D's action against R in England	77
4.2.1 Governing law of estoppel against a non-party	78
4.2.1.1 Possible choice-of-law rules compared	79

4.2.1.2 Where the judgment comes from a Contracting State	82
4.2.1.3 Where the judgment comes from a non-Contracting State	84
4.2.2 English law regarding the conclusive effect of a judgment against a non-party	87

CHAPTER 3

Third party procedure in England as a means of avoiding separate trials of P's claim against D and D's claim against R	92
--	----

Sub-Chapter 1

Merits and Drawbacks of English Third Party Procedure	93
---	----

1 Merits of third party procedure	93
2 Drawbacks of third party procedure	95

Sub-Chapter 2

Availability of English Third Party Procedure in the International Context	98
--	----

1 Purposes of this sub-chapter	98
2 Requirements for third party procedure	98
2.1 Procedural requirements	99
2.1.1 Recourse claims under the CIM or CMR	99
2.1.2 Third party procedure under Order 16	101
2.1.2.1 Heads of available third party procedure in Order 16, rule 1(1)	101
2.1.2.2 Discretion under Order 16, rules 2 and 4(3)(c)	102
2.2 Jurisdictional requirements	104
2.2.1 Relationship between the jurisdictional rules of the Convention and the procedural rules of the forum	109
2.2.1.1 Applicability of procedural rules	109
2.2.1.2 Do procedural rules merely control procedure or also limit the scope of jurisdiction?	119

2.2.2 The scope of Article 6(2) of the Convention	120
2.2.2.1 Does Article 6(2) have an autonomous scope?	120
2.2.2.2 The scope of “actions on a warranty or guarantee”	123
2.2.2.3 The scope of “any other third party proceedings”	126
2.2.2.4 How wide will the autonomous scope be?	130
2.2.3 The scope of Order 11, rule 1(1)(c)	132
2.2.3.1 A good arguable claim on the merits	133
2.2.3.2 A claim falling within the letter and the spirit of rule 1(1)(c)	134
2.2.3.3 The <i>forum conveniens</i> discretion	136
2.2.3.4 How wide a scope will be given to Order 11, rule 1(1)(c) through the exercise of the <i>forum conveniens</i> discretion?	138
3 Historical developments of procedural rules and jurisdictional rules concerning third party procedure	140
3.1 Procedural rules	140
3.1.1 English law	140
3.1.2 The US law	142
3.1.3 The Guadalajara Convention	143
3.2 Jurisdictional rules	144
3.2.1 Order 11, rule 1(1)(c)	144
3.2.2 The US federal court rules	145
3.2.2.1 Subject matter jurisdiction	146
3.2.2.2 Personal jurisdiction	147
3.2.2.3 Venue	149
3.3 The implications of the historical developments for the present rules	150

Sub-Chapter 3

	Hindrances to English Third Party Procedure Posed by Foreign Parallel Proceedings	153
1	Introduction	153
2	Effect of <i>lis alibi pendens</i> as it operates as a hindrance to third party procedure	155
2.1	How English third party procedure will be hindered by <i>lis alibi pendens</i> ..	155
2.1.1	Where proceedings corresponding to either set of the English proceedings are brought in a Contracting State	156
2.1.2	Where proceedings corresponding to either set of the English proceedings are brought in a non-Contracting State	161
2.2	How an English court can prevent its proceedings from hindering foreign third party procedure	166
2.2.1	Where third party procedure in another Contracting State is hindered	167
2.2.2	Where third party procedure in a non-Contracting State is hindered	174
3	Effect of a foreign jurisdiction agreement as it operates as a hindrance to English third party procedure	177
3.1	Where the jurisdiction agreement has chosen the courts of a Contracting State	178
3.1.1	Where the proposed third party is domiciled in a Contracting State	180
3.1.1.1	Cases and official commentaries	181
3.1.1.2	Scope of the jurisdiction agreement	183
3.1.2	Where the proposed third party is not domiciled in a Contracting State ..	186
3.2	Where the jurisdiction agreement has chosen the courts of a non-Contracting State	187
3.2.1	Where the proposed third party is not domiciled in a Contracting State ..	189
3.2.2	Where the proposed third party is domiciled in a Contracting State	191
3.3	Summary	195

4	Effect of an arbitration agreement as it operates as a hindrance to English third party procedure	196
4.1	Present law	196
4.2	Rationale of the present law	198
5	Conclusion	204

Sub-Chapter 4

Jurisdiction to issue an antisuit injunction to eliminate hindrances from foreign proceedings to English third party procedure	207
--	-----

1	Restraining proceedings in a non-Contracting State	207
1.1	Restraining foreign proceedings corresponding to the English original proceedings	208
1.2	Restraining foreign proceedings for a negative declaration corresponding to English third party proceedings	211
2	Restraining proceedings in a Contracting State	214

PART 3

OBSTACLES TO RECOVERY DUE TO A PLURALITY OF GOVERNING LAWS	216
--	-----

CHAPTER 4

Obstacles to Recovery Due to a Mismatch Between Different Laws Governing Different Claims of Recovery	217
---	-----

1	The purpose of this chapter	217
2	Non-merger of the three different claims of recovery in substantive law ..	218
3	Recovery by way of subrogation	219
3.1	Where P has “a contractual claim” upon R	220
3.2	Where P does not have “a contractual claim” upon R	224
4	A claim of recovery pursuant to R’s preexisting contractual undertaking ..	228

5	A claim based on a right of recovery created by operation of law	230
5.1	Present law	230
5.2	What the law should be	232
5.2.1	Examination of the reasoning of Chadwick J.	232
5.2.1.1	The <i>lex fori</i>	233
5.2.1.2	Peremptory character of the 1978 Act	234
5.2.1.3	The application of the 1978 Act as the better law	237
5.2.2	Characterisation as equity	244
5.2.3	Characterisation as tort	246
5.2.4	Characterisation as restitution of unjust enrichment	249
5.2.5	Characterisation as a <i>sui generis</i> category	253
5.2.5.1	Where both D's liability to P and R's liability to P arise out of a tort	254
5.2.5.2	Where D and R owe P a debt arising out of their respective contract	256
6	Justification for separate choice-of-law rules for different claims of recovery	258
7	The consequences of different laws governing different claims of recovery	261

CHAPTER 5

Obstacles to recovery in chain transactions due to a mismatch between the governing law of D's liability to P and the governing law of R's liability to D	267	
1	The purpose of this chapter	267
2	How unsatisfactory recovery is caused by an imbalance in the liability regime of different governing laws	268
2.1	Insurance-reinsurance transactions	268
2.2	Bill of exchange transaction	274

2.3	Credit transfers	276
2.4	Letters of credit transactions	280
2.5	Multimodal transports commissioned to subcarriers	284
2.6	Other transactions	289
3	Grounds for reference to a single governing law	291
3.1	Perception of the transaction as one single operation	291
3.2	The simplification of bill of exchange transactions	294
3.3	Rapidity of the transaction	295
3.4	To foster clarity and simplicity in the operation of transactions	296
3.5	For the purpose of ensuring a back-to-back cover	298
4	Where the Rome Convention applies to either or both of two adjacent contracts	299
4.1	Application of the Rome Convention to contracts involved in chain transactions	300
4.2	Whether, in what circumstances and how adjacent contracts should be referred to a single governing law	304
4.3	Pointers that indicate the existence or non-existence of the intention as defined in the proposed principle	316
4.3.1	The extent to which the transaction has a back-to-back nature	317
4.3.2	The extent to which D can be regarded as having accepted the risk of inadequate recovery	321
4.3.3	The degree of seriousness of the obstacle to recovery	322
4.4	Can the proposed principle be applied through a provision of the Rome Convention?	324
5	Where the Rome Convention applies to neither of two adjacent contracts	325
5.1	Choice-of-law rules for credit transfers	326

5.2	Choice-of-law rules for bill of exchange transactions	328
5.3	Issues relating to the creation and scope of liability	330
5.3.1	Policy considerations	330
5.3.2	The present law	331
5.4	Issues relating to steps that must be taken to exercise or preserve the right of recourse	332
5.4.1	Steps the last holder must take to preserve his and the prior indorsees' right of recourse	333
5.4.1.1	Policy considerations	333
5.4.1.2	The present law	335
5.4.2	Steps each indorsee must take to exercise his right of recourse	337
5.5	Issues relating to formal requirements	339
5.6	A brief comment	340

CHAPTER 6

	Obstacles to recovery under the 1978 Act due to a mismatch between the law governing D's liability to P and the law governing R's liability to P	342
1	Purposes of this chapter	342
2	Possibility of different laws governing D's liability to P and R's liability to P	343
3	Illustrations of obstacles to recovery due to imbalances in liability regime	345
3.1	Imbalances in liability regime regarding the existence of liability	345
3.2	Imbalances in liability regime regarding the amount of liability	346
4	Should a single governing law be ascertained for D's liability to P and R's liability to P?	348

Glossary

adjacent contracts = two contracts adjacent to each other in a chain transaction sharing a person between them

chain transaction = transaction consisting of string contracts such as a string sale, a transport commissioned to successive carriers, a bill of exchange transaction and so forth

joinder of parties (defendants) = the combination as defendants of two or more persons in a single action, c.f. third party procedure

negative declaration, proceedings (claim) for = proceedings (claim) for a declaration that the plaintiff is not liable to the defendant

string contracts = two or more successive contracts for the same objective with the same terms in material respects, with each pair of adjacent contracts sharing a party between them

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List of Abbreviations and Definitions

Brussels Convention = 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended by Accession Conventions and as given force of law in the United Kingdom by s.2(1) of the Civil Jurisdiction and Judgments Act 1982 and set out in Sched. 1.

CIM = Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (given statutory force in the UK by the International Transport Conventions Act 1983)

CMR = Convention on the Contract for the International Carriage of Goods by Road (given statutory force in the UK by the Carriage of Goods by Road Act 1965)

EC Directive on Cross-border Credit Transfers = Directive of the European Parliament and of the Council of 27 January 1997 on Cross-border Credit Transfers, 97/5/EC, Official Journal of the European Communities, 1997, L43, p.25

EC Second Insurance Directive = Second Council Directive of June 22, 1988 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services, Official Journal of the European Communities, 1988, L172, p. 1, implemented in the United Kingdom by section 94B of the Insurance

Companies Act 1982 and Schedule 3A, Part 1, to that Act

EC Product Liability Directive = Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 85/374/EEC, Official Journal of the European Communities, 1985, L210, p. 29

Guadalajara Convention = Convention Supplementary to the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (entered into force on 1 May 64) as embodied in the Carriage by Air (Supplementary Provisions) Act 1962.

Lugano Convention = Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Done At Lugano on 16 September 1988 (88/592/EEC) as given force of law in the United Kingdom by s. 3A(1) of the Civil Jurisdiction and Judgments Act 1982 and set out in Sched. 3C.

Model Law = UNCITRAL Model Law on International Credit Transfers

Multimodal Transport Convention = United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980)

New York Convention = New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Rome Convention = Rome Convention of 1980 on the Law Applicable to Contractual Obligations (given force of law in the United Kingdom by section 2 of the Contracts (Applicable Law) Act 1990)

RSC = Rules of Supreme Court

UCP = Uniform Customs and Practice for Documentary Credits

UCP 500 = Uniform Customs and Practice for Documentary Credits - 1993 Revision (ICC Publication No. 500)

UCC = Uniform Commercial Code

Uniform Rules For Demand Guarantees, (1992) ICC Publication No. 458

1935 Act = Law Reform (Married Women and Joint Tortfeasors) Act 1935

1945 Act = Law Reform (Contributory Negligence) Act 1945

1950 Act = Arbitration Act 1950

1975 Act = Arbitration Act 1975

1978 Act = Civil Liability (Contribution) Act 1978

1996 Act = Arbitration Act 1996

Table of Cases

12 July 1982, French Cour de Cassation	182
13 November 1983, French Cour de Cassation	277
18 April 1977, Tokyo District Court	281
18 October 1989, French Cour de Cassation	182, 185, 188
30 March 1993, French Cour de Cassation	188, 194
<i>Abidin Daver, The</i> [1984] 2 WLR 196 (HL)	205
<i>Air Crash Disaster at Washington D.C., Re</i> (1983) 559 F. Supp. 333	242, 248
<i>Allen v. Merchants' Bank of New York</i> [1839] 22 Wendell 215	335
<i>American Surety of New York v. Wrightson</i> , (1910) 16 Com.Cas 37	244
<i>Arab Monetary Fund v. Hashim</i> (No. 9), The Times, 11 October 1994 (Transcript available on Lexis)	75, 76, 230, 253
<i>Arab Monetary Fund v. Hashim</i> (No.4) [1992] 1 WLR 553; affd [1992] 1 WLR 1176.	139
<i>Arctic Electronics Co (UK) Ltd v. McGregor Sea & Air Services Ltd</i> [1985] 2 Lloyd's Rep 510	67, 109
<i>Arkwright Mutual Insurance Co. v. Bryanston Insurance Co. Ltd.</i> [1990] 3 WLR 705	163
<i>Asahi Metal Indus. Co. v. Superior Court of California</i> (1987) 480 U.S. 102; 107 S. Ct. 1026	248
<i>Ashmore v. British Coal Corp.</i> [1990] 2 QB 338 (CA)	90, 91
<i>Athanasios Kalfelis v. Bankhaus Schröder, Muenchmeyer, Hengst Und Co.</i> , Case 189/87 [1988] ECR 5565	131
<i>Baldry v. Jackson</i> (No. 2) [1977] 1 NSWLR 494.	246
<i>Bank of Baroda v. Vysya Bank</i> [1994] 2 Lloyd's Rep 87	297, 302, 303, 344

<i>Bank of England v. Cutler</i> [1908] 2 KB 208	40
<i>Banku Polskiego v. K. J. Mulder</i> [1941] 2 KB 266	336
<i>Benarty, The</i> [1987] 1 WLR 1614	230
<i>Bertrand v. OTT Case 150/77, [1978] ECR 1432</i>	120
<i>Birmingham and District Land Company v. London and North Western Railway Company</i> (1886) 34 ChD 261 (CA)	40, 141
<i>Bossard et al. v. McGinn</i> , 27 F.Supp. 412	146
<i>Boys v. Chaplin</i> [1971] AC 356	59, 60, 233
<i>Brabo, The</i> [1949] AC 326	139
<i>Brandt v. Olson</i> , 179 F Supp 363	146
<i>Bremen v. Zapata Off-Shore Company</i> (1972) 407 U.S. 1	190
<i>Bruce v. Strong</i> [1951] 2 KB 447 (CA)	200
<i>Builders Supply Co. v McCabe</i> , (1951) 366 Pa 322	241
<i>Burford v. Clifford</i> [1932] 2 Ch 122 (CA)	102, 142
<i>Burnand v. Rodocanachi</i> (1882) 7 App.Cas. 333	227
<i>Caltex Singapore Pte Ltd v. BP Shipping Ltd</i> [1996] 1 Lloyd's Rep 286.	59
<i>Camilla Cotton Oil Co. v. Granadex S.A.</i> [1976] 2 Lloyd's Rep. 10 (HL)	175
<i>Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena</i> (1968, DC NY) 293 F Supp 892, affd as mod. on other grounds (CA2) 433 F2d 686, cert den 403 US 905	86
<i>Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd (No 2)</i> [1967] 1 AC 853	86
<i>Castellan v. Preston</i> (1883) 11 QBD 380	227
<i>Castree v. E. R. Squibb & Sons Ltd. And Another</i> [1980] 1 WLR 1248 (CA)	144
<i>Caterpillar Tractor Co. v Teledyne Industries Inc.</i> (1975) 53 Cal App 3d 693; 126 Cal Rptr 455.	247
<i>Cleveland Museum of Art v. Capricorn</i> [1990] 2 Lloyd's Rep 166	163

<i>Cohen v. Rothfield</i> [1919] 1 KB 410	212
<i>Coleman v. American Export Isbrandtsen Lines, Inc.</i> (2d Cir. 1968) 405 F.2d 250	
.....	148
<i>Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd</i> [1987] SLT 443 (HL)	71
<i>Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others</i> , 21 November 1991 (CA), Transcript available on Lexis. (Partly reported in [1992] 2 All ER 82)	51, 133, 135, 198, 203, 231, 312, 342
<i>Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.</i> [1971] AC 572	298
<i>Continental Bank N.A. v. Aeakos Cia Naviera S.A.</i> [1994] 1 WLR 588 (CA), 184, 214	
<i>Cooney v. Osgood Mach. Inc.</i> (1993) 81 NY2d 66.	233
<i>Cornelius v. Banque Franco-Serbe</i> [1941] 2 All ER 728. The report of this case in [1942] 1 KB 29 is incomplete.	336
<i>Corvi v. Ellis</i> [1969] SLT 350	73
<i>Crum v. Appalachian Electric Power Co. et al.</i> , 27 F.Supp. 138	
.....	146
<i>Cummins Engine Co. Ltd. v. Davis Freight Forwarding (Hull) Ltd</i> , [1981] 1 WLR 1363 (CA)	68, 100, 108
<i>Dawson v. Bankers & Traders Insurance Co. Ltd.</i> [1957] VR 491	218
<i>Deering v. Winchelsea (Earl)</i> (1787) 1 Cox.Eq.Cas. 318	252
<i>Department of Education and Science v. Taylor & Others</i> [1992] IRLR 308.....	88
<i>Dixon v. Fiat-Roosevelt Motors, Inc.</i> (1973) 8 Wash App 689, 509 P2d 86.	52
<i>Donoghue v. Stevenson</i> [1932] AC 562	323
<i>Duijnsteet v. Goderbauer</i> Case 288/82 [1983] ECR 3663	114
<i>Dumez France S.A. v. Hessische Landesbank</i> , Case 220/88 [1990] ECR I-49. ...	131
<i>Eastern Counties Farmers, Ltd. v. J. & J. Cunningham, Ltd.; Grimsdale & Sons, Ltd. (Third Party); Holland Colombo Trading Society, Ltd. (Fourth Party)</i> [1962] 1 Lloyd's Rep 261 (CA)	104, 200, 201

<i>Eastern Shipping Co. v. Quah Beng Kee</i> , [1924] AC 177	142
<i>EI du Pont de Nemours & Co and Endo Laboratories Inc v. Agnew (No 2)</i> [1988] 2 Lloyd's Rep 240 (CA)	209, 212
<i>El Amria, The</i> [1981] 2 Lloyd's Rep. 119	189, 191, 193
<i>Elefanten Schuh v. Jacqmain</i> , Case 150/80, [1981] ECR 1671.	184
<i>Eleftheria, The</i> [1970] P 94	189
<i>Engdiv v. Trentham</i> [1990] SLT 617.	105
<i>Esal (Commodities) Ltd. and Reltor Ltd. v. Oriental Credit Ltd. and Wells Fargo Bank N.A.</i> [1985] 2 Lloyd's Rep. 546 (CA)	53
<i>Evans Marshall & Co. Ltd. v. Bertola</i> [1973] 1 WLR 349 (CA)	191
<i>Finley v. United States</i> (1989) 490 U.S. 545; 109 S. Ct. 2003	146
<i>First National Bank of Boston v. Union Bank of Switzerland</i> [1990] 1 Lloyd's Rep. 32 (CA)	175
<i>G. & H. Montage GmbH v. Irvani</i> [1990] 1 WLR 667 (CA)	332
<i>Galeries Segoura Sprl v. Bonakdarian</i> , Case 25/76 [1976] ECR 1851	131
<i>Gerling v. Treasury Administration</i> , Case 201/82 [1983] ECR 2503	180
<i>Gourdain v. Nadler</i> Case 133/78, [1979] ECR 743	120
<i>Gowar v. Hales</i> [1928] 1 KB 191	115
<i>Gray v. Lewis, Parker v. Lewis</i> (1873) 8 Ch App 1035	87
<i>Gubisch Maschinenfabrik AG v. Giulio Palumbo</i> , Case 144/86 [1987] ECR 4861	157
<i>Hagen, The</i> [1908] P. 189 (CA)	139
<i>Harrods (Buenos Aires) Ltd., Re</i> [1991] 3 WLR 397 (CA)	162, 192, 193
<i>Hemain v. Hemain</i> [1988] 2 FLR 388 (CA)	209, 212
<i>Hoffmann v. Krieg</i> Case 145/86 [1988] ECR 645	114, 170
<i>Hoffmann v. Krieg</i> , Case 145/86 [1988] ECR 645.	82

<i>Hollandia</i> [1983] AC 565.	235, 307
<i>Hollerbach & Andrews Equipment Company v. Southern Concrete Pumping v. Centex Bateson Construction Company</i> [1995] U.S. Dist. LEXIS 14990.	190
<i>Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.</i> [1907] AC 59 (Privy Council)	273
<i>Horne v. Rouquette</i> (1878) 3 QBD 514 (CA)	337
<i>House of Spring Gardens Ltd. v. Waite</i> [1990] 3 WLR 347	88, 90, 91
<i>Hunter v. Chief Constable of the West Midlands Police</i> , [1982] AC 529	90
<i>Hunter v. Chief Constable of West Midlands Police</i> [1982] AC 529	90, 91
<i>Insurance Co. of Africa v. Scor (UK) Reinsurance Co. Ltd.</i> [1985] 1 Lloyd's Rep. 312 (CA)	54
<i>Insurance Co. of Ireland v. Strombus International Insurance Co.</i> [1985] 2 Lloyd's Rep. 138	175
<i>International Commercial Bank plc v. Insurance Corporation of Ireland plc and Meadows Indemnity Company</i> [1989] IR 466 (Supreme Court of Ireland) ...	145, 165
<i>International Shoe Co. v. Washington</i> (1945) 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154.	147
<i>Islanders Canning Corp. Ltd v Hoekstra v. Schmalbach-Lubeca-Werke AG, Arrondissementsrechtbank, Leeuwarden, 2 September 1976, Digest of Case-Law Relating to the European Communities, D series 1-17.1.1-B4</i>	182
<i>ITT Schaub-Lorenz Vertriebsgesellschaft mbH v. Birkart Johann Internationale Spedition GmbH & Co. K.G.</i> [1988] 1 Lloyd's Rep 487 (CA)	94, 101
<i>Jacob Christensen</i> [1895] P 281.	141
<i>Jakob Handte GmbH v. Traitements Mécano-chimiques des Surfaces</i> , Case C-26/91 [1992] ECR I-3967	125
<i>Jemrix, The</i> [1981] 2 Lloyd's Rep 544	200, 201
<i>Jones v. Birch Bros. Ltd.</i> [1933] 2 KB 597.	115
<i>K. and Another v. P. and Others, J. (Third Party)</i> [1992] 3 WLR 1015	.41, 55

<i>Kalfelis v. Schroeder</i> , Case 189/87 [1988] ECR 5565	121
<i>Kapetan Georgis, The; sub nom. Virgo Steamship Co. SA v. Skaarup Shipping Corporation</i> [1988] 1 Lloyd's Rep 352	70, 105, 137, 164, 198, 230
<i>Karl Presser & Co. GmbH v. Eurosped Srl</i> , Judgment of the <i>Corte di Cassazione, Sezioni Unite</i> , No 5256 of 10 October 1979, Court of Justice of the European Communities, <i>Digest of Case-law Relating to the European Communities, D series</i> , 1-5.1.2-B28.	124
<i>Kinnear v. Falconfilms NV and others (Hospital Ruber Internacional and another, third parties)</i> [1994] 3 All ER 42.	57, 96, 117, 122, 127, 131, 135
<i>Kirin-Amgen Inc v. Boehringer Mannheim GmbH</i> , 31 July 1996 (CA) (Transcript available on Lexis)	91
<i>Kohr v. Allegheny Airlines Inc.</i> 504 F.2d 400.(7th Cir. 1974), cert. denied, 421 U.S. 978 (1975)	239, 254
<i>Kongress Agentur Hagen GmbH v. Zeehaghe BV</i> Case 365/88 [1990] 1 ECR 1845	110, 121, 125, 127, 135
<i>Kravas v. Great Atlantic & Pacific Tea Co.</i> , 28 F.Supp. 66	146
<i>Kruger & Co. v. Moel Tryvan Ship Company</i> [1907] AC 272.	41
<i>Ladkarn Holdings v. Summit Property Developments</i> (1991) 32 Con LR 66	88
<i>Lee v. Citibank N.A.</i> [1981] Hong Kong L.R. 470	166
<i>Lesnik v. Public Industrials Corp.</i> (2d Cir., 1944) 144 F.2d 968	142
<i>Lewis et al. v. United Air Lines Transport Corporation</i> , 29 F.Supp. 112	146
<i>Liberian Insurance Agency Inc. v. Mosse</i> [1977] 2 Lloyd's Rep. 560	55, 77, 87
<i>Lieber v. Göbel</i> , Case C-292/93 [1994] ECR I-2535.	131
<i>Lone Star Package Car Co. v. Baltimore & O. R. Co.</i> (1954, CA5 Tex) 212 F2d 147	147, 150
<i>Lonrho v. Shell and British Petroleum</i> , 31 Jan. 1978 in IV (1979) Yearbook of Commercial Arbitration, pp. 320-323, no. 5.....	199

<i>Lord Mayor & C. of Sheffield v. Barclay</i> [1905] AC 392	40
<i>Maciej Rataj, The</i> [1991] 2 Lloyd's Rep. 458, on appeal [1992] 2 Lloyd's Rep. 552 (CA)	157
<i>Manchester Courage, The</i> [1973] 1 Lloyd's Rep 386	144, 198
<i>Manley v. Standard Oil Co.</i> (1948, DC Tex) 8 FRD 354	150
<i>Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.</i> , Case C-190/89 [1991] ECR I-3855	197
<i>Martin Peters Bauunternehmung v. Zuid Nederlandse Aannemers Vereniging</i> Case 34/82, [1983] ECR 987.	120
<i>Mccheane v. Gyles</i> [1902] 1 Ch. 287 (CA)	144
<i>McConnell v. Lynch-robinson; Coulter & Son (Third Party)</i> [1957] N.Ire.L.Rep. 70 (CA)	238
<i>Meadows Indemnity Co Ltd v. Insurance Corporation of Ireland Ltd</i> , [1989] 1 Lloyd's Rep 181 affirmed in [1989] 2 Lloyd's Rep 298 (CA).	164, 165, 176
<i>Meeth v. Glacetal.</i> , case 23/78, [1978] ECR 2133	181
<i>Mercantile Investment and General Trust v. River Plate Trust, Loan and Agency</i> [1894] 1 Ch 578	53
<i>Merryweather v. Mixan</i> , (1799) 8 TR. 186, 101 E.R. 1337	238
<i>Metall und Rohstoff</i> [1990] 1 QB 391	133
<i>Morrell v. United Air Lines Transport Corp.</i> 29 F Supp 757	146
<i>Multinational Gas & Petroleum Co v. Multinational Gas & Petroleum Services Ltd</i> [1983] Ch 258	139
<i>Myers v. N. & J. Sherick Ltd.</i> [1974] 1 WLR 31	87, 91, 95
<i>Nelson v. The Empress etc. corp., Faber (third party)</i> [1905] 2 KB 281 (CA)	317
<i>Neste Chemicals S.A. v. DK Line S.A.</i> [1994] 3 All ER 180 (CA)	159
<i>New Hampshire Insurance v. Strabag Bau AG</i> [1992] 1 Lloyd's Rep 361	137

<i>Nile Rhapsody, The</i> [1994] 1 Lloyd's Rep 382 (CA)	193, 195
<i>Nissenberg v. Felleman</i> , (1959) 162 NE 2d 304	245, 252
<i>Nominal Defendant v. Bagots Executor & Trustee Company Limited</i> [1971] SASR 346	
	231
<i>North West Water Ltd v. Binnie and Partners (a firm)</i> [1990] 3 All ER 547 ...	88, 90
<i>Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH</i> [1977] 1 WLR 713 (HL)	
	332
<i>NV De Jong Verenigde and Coöperatieve Melkproduktenbedijven 'Domo-Bedum' v. Sahne Heinrich KG and Heinrich</i> , Judgment of 4 February 1981, Arrondissementsrechtbank, Amsterdam, [1981] NJ, No 449. Digest of case-law relating to the European Communities, D series, 1-6-B7.	122
<i>Overseas Union Insurance v. New Hampshire Insurance Company</i> , Case C-351/89 [1991] ECR I-3317	156, 158
<i>Owen v. Tate</i> [1976] QB 402	55, 261
<i>Owens Bank Ltd. v. Bracco</i> [1992] 2 AC 443 (CA) affd. on other grounds [1992] 2 AC 443 (HL)	172
<i>Owens Bank Ltd. v. Bracco</i> , Case C-129/92, [1994] ECR I-117	171, 172
<i>Philip Alexander Securities and Futures Ltd. v. Bamberger</i> [1997] ILPr 104 (CA)	
	202
<i>Power Curber International v. National Bank of Kuwait</i> [1981] 1 WLR 1233 (CA)	290
<i>Princes Buitoni v. Hapag-Lloyd AG</i> [1991] 2 Lloyd's Rep 383 (CA). The judgment of the Queen's Bench Division on 21 December 1989 is unreported.	308
<i>Qatar Petroleum v. Shell</i> [1983] 2 Lloyd Rep 35	197
<i>Quinones v. Pennsylvania General Ins.</i> (10th Cir. 1986) 804 F.2d 1167	
	148
<i>R. A. Lister & Co. Ltd. And Others v. E. G. Thomson (Shipping) Ltd. And Another</i> (No. 2) [1987] 1 WLR 1614	70, 105, 342
<i>Re Gillespie</i> (1886) 18 QBD 286 (CA)	275
<i>Re Jogia</i> [1988] 1 WLR 484	139

<i>Reichert v. Dresdner Bank</i> , Case 115/88 [1990] ECR I-27	131
<i>Rewia, The</i> [1991] 1 Lloyd's Rep 69, overruled on a different point [1991] 2 Lloyd's Rep 325 (CA).	194
<i>Ronex Properties Ltd v. John Laing Construction</i> [1983] 1 QB 398	218
<i>Royal Products Ltd v. Midland Bank Ltd.</i> [1981] 2 Lloyd's Rep 194	277
<i>Salotti v. Ruewa</i> , Case 24/76, [1976] ECR 1831	181
<i>Salotti v. RÜWA</i> , Case 24/76 [1976] ECR 1831	131
<i>Sanders v. Vander Putte</i> , Case 73/77 [1977] ECR 2383	131
<i>Santa Fe v. Gates</i> (CA) 16 January 1991, Transcript is available on Lexis.	104
<i>Sarrio SA v. Kuwait Investment Authority</i> [1997] 1 Lloyd's Rep 113 (CA)	168
<i>Satink v. Township of Holland</i> , 28 F.Supp. 678	146
<i>Segoura v. Bonakdarian</i> , case 25/76, [1976] ECR 1851	181
<i>Sennar, The (No. 2)</i> [1985] 1 WLR 490 (HL)	88, 189
<i>Soc. Nat. Ind. Aérospatiale (SNIAS) v. Lee Kui Jak</i> [1987] AC 871 (Privy Council)	70, 95, 168, 173, 191, 208, 215
<i>Sohio Supply Co v. Gatoil (USA) Inc.</i> [1989] 1 Lloyd's Rep. 588 (CA)	213
<i>Somafer S.A. v. Saar-ferngas A.G.</i> , Case 33/78 [1978] ECR 2183	131
<i>Speller & Co. v. The Bristol Steam Navigation Company</i> , (1884) 13 QBD 96 (CA)	141
<i>Speller v. Bristol, etc., Co.</i> (1884) 13 Q.B.D. 96	144
<i>Spiliada v. Cansulex</i> [1987] AC 460	137, 161, 162
<i>Sprow v. Hartford Ins. Co.</i> 594 F.2d 412 (5th Cir. 1979)	148
<i>St. Paul Fire and Marine Insurance Co. v. Morice</i> (1906) 11 Com. Cas. 15	318

<i>Standard Securities Ltd. v. Hubbard</i> [1967] Ch 1056.	102
<i>Stephenson v. Garrett</i> [1898] 1 QB 677 (CA)	90
<i>Stewart v. Honey</i> , [1972] 2 SASR 585	249
<i>Stolt Marmaro, The</i> [1985] 2 Lloyd's Rep 428	137
<i>Stott v. West Yorkshire Roadcar Ltd.</i> [1971] 2 QB 651	55, 75, 76
<i>Tatry, The</i> , Case C-406/92, [1994] ECR 1-5439.	156, 157, 169, 170, 173
<i>Technisch Handelsbureau P.J. van London BV v NV Gieterijen Technomet, Arrondissementsrechtsbank</i> , Arnhem, 23 December 1982, Digest of Case-Law Relating to the European Communities, D series 1-17.1.2-B24, (1983) NIPR No. 246.	
.....	182
<i>Tolbert v. Gerber Industries Inc.</i> (1977, Minn) 255 NW2d 362	242
<i>Tullgren v. Jasper</i> , 27 F.Supp. 413	146
<i>Turkiye Is Bankasi AS v. Bank of China</i> [1993] 1 Lloyd's Rep. 132	292
<i>Union Bank of the Middle East Ltd. v. Clapham</i> , The Times, July 20, 1981 (CA)	
.....	136
<i>Vervaeke (Formerly Messina) v. Smith</i> [1983] 1 AC 145.	85
<i>Vesta v. Butcher</i> [1989] 2 WLR 290 (HL)	85, 270, 309, 315, 319
<i>Virgin Aviation v. CAD Aviation</i> , The Times, 2 Feb.1990.	171
<i>Volvox Holiandia, The</i> [1988] 2 Lloyd's Rep. 361 (CA)	163, 175
<i>Walek & Co. v. Chapman & Ball</i> [1980] 2 Lloyd's Rep. 279.....	52
<i>Wall v.Radford</i> [1991] 2 All E.R. 741	88
<i>William Tatton & Co. Ltd. v. Ferrymasters Ltd</i> ,(1974) 9 ETL 167.	
.....	67, 100
<i>Wilson Electric Transformers Co. Pty Ltd v. Electricity Commission (N.S.W.)</i> [1968] VR 330	246
<i>Wilson v. Massagee</i> (1944) 224 NC 705, 32 SE(2d) 335	60

<i>Woolwich Building Society v. Brown</i> , Independent, 22 January 1996 (QB)	224
<i>Xin Yang, The</i> [1996] 2 Lloyd's Rep 217	168
<i>Zelger v. Salinitri (No. 2)</i> Case 129/83 [1984] ECR 2397	159

PART 1

INTRODUCTION

This introduction will state the purpose of the thesis, define the scope of the situations to be analysed and give an overview of the entire thesis.

1 Purposes of the thesis

The situations dealt with in this thesis are those which involve international elements and which fall within the scenario (referred to as paradigm scenario) where a person (D) who has become liable to pay another person (P) seeks to claim from a third person (R) restitution of all or part of the payment.

In such situations, if the different relationships involved between P, D and R are decided in different forums or under different governing laws, D may not be able to obtain satisfactory recovery from R because the same issues may be determined differently or because there may be a mismatch between the rules of different governing laws.

The purposes of this thesis are to illustrate the situations where such obstacles to D's recovery from R may arise, to examine the rules of private international law relevant to such situations and to propose some reforms of the law.

2 The types of situation falling within the paradigm scenario

D's claim for recovery from R in the paradigm scenario is variously called, depending on the type of situation, a claim for indemnity, contribution, reimbursement, recoupment, or recourse. The word restitution as used in the widest sense may perhaps cover all these claims.¹ But the situations discussed in this thesis are a special type of restitution which,

¹ At common law, the word restitution was ordinarily used to denote the return or restoration of some specific thing or condition. But 20th-century usage has extended the sense of the word to include not only the restoration or giving back of something, but also compensation, reimbursement, indemnification, or reparation for benefits derived from -

unlike other areas of restitution,² involves the complexities of three-party relationships. D's payment to P may affect the relationship between P and R as well as the relationship between D and R and the relationship between D and P. There are special problems pertaining to this type of restitution which justify a separate discussion from the other types of restitution.³

The letters P, D, and R signifying the parties in the paradigm scenario will be used throughout this thesis. The relationships between P, D and R are based on substantive rights and liabilities as described in the paradigm scenario and not on the procedural positions of the parties in litigation. Accordingly, P and D do not connote plaintiff and defendant although in many circumstances discussed in this thesis P brings an action against D rather than the other way round. In certain circumstances, however, D may bring an action against P for a negative declaration, or R may bring an action for a negative declaration against D who may bring third party proceedings against P for a negative declaration.

It will be helpful at this point to illustrate some of the situations that fall within the paradigm scenario. Three different viewpoints are taken below to illustrate them: classification of D's claim against R; whether D seeks to recover the all or part of the payment; and the nature of D's liability to P and R's liability to P. For the purpose of these illustrations it is assumed that D is liable to pay P under the law governing their

or loss caused to - another. Garner, p. 765.

² For conflict-of-laws problems regarding other areas of restitution in general, see Rose.

³ Friedmann & Cohen, *Payment of Another's Debt and Adjustment among Multiple Debtors* discuss the restitution of the benefit arising from a discharge of a debt separately from other areas of restitution on the assumption that such a separate treatment can be justified in view of a number of special problems arising out of the three-party situation. Friedmann & Cohen, *Payment of Another's Debt*, para. 1.

relationship.

From the first viewpoint, D may have three different claims of recovery against R. Thus he may have a claim against R pursuant to R's preexisting contractual undertaking to him. In addition or alternatively, he may have a claim against R by way of subrogation to P's right against R.⁴ In addition or alternatively, he may have a claim against R based on a right of recovery created by operation of law such as the Civil Liability (Contribution) Act 1978.⁵ These three different claims will be further examined below.

R's contractual undertaking may be either express or implied.

A typical example of an express undertaking is found in a contract of liability insurance whereby the insurer (R) undertakes to repay the insured (D) any amount, up to the limits of the policy, which the latter becomes liable to pay to an injured person (P). Another obvious example of an express undertaking is a counter-guarantee whereby the instructing party (R) undertakes to reimburse the guarantor (D) who becomes liable to pay under a demand guarantee to the beneficiary (P).⁶

Whether R's undertaking to D can be implied depends on the governing law of their contract. A very wide range of contracts can give rise to an implied undertaking. Among the typical contracts in which R's undertaking may be implied are⁷ a contract between an

⁴ Subrogation is regarded as a restitutive remedy by both Goff & Jones, p. 70 and Supreme Court Practice 1995, para. 16/1/19.

⁵ Various concepts have been suggested as the foundation of a right of contribution such as unjust enrichment, fairness, the concept of "common debtors" and, occasionally in continental law, *negotiorum gestio*. See Friedmann & Cohen, *Adjustment among Multiple Debtors*, paras. 8 and 9.

⁶ Goode, *Guide to the ICC Uniform Rules for Demand Guarantees*, comment to Article 20(b).

⁷ Many of the following examples are made by reference to comment a. to § 51 of the Restatement of the Law, Second, Judgments.

employer (or principal contractor) (D) and his employee (or sub-contractor) (R) in which the employee's (sub-contractor's) undertaking may be implied to indemnify the employer (principal contractor) against the compensation which the employer (principal contractor) becomes liable to pay for certain wrongs committed by the employee in the course of his employment; a contract between the owner (D) and a driver (R) of a motor vehicle in which the driver's undertaking may be implied to indemnify the owner against the compensation which the owner becomes liable to pay for injuries caused by the driver's use of the vehicle; a contract between an agent (D) and his principal (R) in which the principal's undertaking may be implied to indemnify the agent against the compensation which the agent becomes liable to pay for matters within the scope of the agency relationship;⁸ a contract between a property owner (D) and a person occupying the property (R) in which the occupant's undertaking may be implied to indemnify the owner against the compensation which the owner becomes liable to pay to a third person for his injury on the premises; a charterparty in which the charterer's (R's) undertaking may be implied to indemnify the shipowner (D) against the compensation which the shipowner becomes liable to pay to a cargo owner in spite of a clause in the charterparty exempting the shipowner from such liability;⁹ a contract between the retailer (D) and the manufacturer (R) of a product in which the manufacturer's undertaking may be implied to indemnify the retailer against the compensation which the retailer becomes liable to pay to the buyer for the injury suffered due to a defect in the product; a contract between

⁸ E.g. *Lord Mayor & C. of Sheffield v. Barclay* [1905] AC 392; *Bank of England v. Cutler* [1908] 2 KB 208; *Birmingham and District Land Company v. London and North Western Railway Company* (1886) 34 ChD 261, 275 (CA) *per* Bowen, L.J.

⁹ E.g. *Kruger & Co. v. Moel Tryvan Ship Company* [1907] AC 272.

a carrier (D) and his subcontracting carrier (R) in which the subcontracting carrier's undertaking may be implied to indemnify the first carrier against the compensation which the latter becomes liable to pay to the cargo claimant for the loss of the cargo which takes place during the subcontracting carrier's leg of carriage; and a contract between a surety (D) and the principle debtor (R) in which the principle debtor's undertaking may be implied to indemnify the surety against the payment which the surety becomes liable to make to the creditor.

Turning to a claim by way of subrogation, subrogation is an assignment of a right by operation of law which in effect substitutes one party for another as an obligee. D may, therefore, be able to claim to be subrogated to P's right against R. Thus a surety (D) who becomes liable to pay to the creditor (P) may be able to claim to be subrogated to the latter's right against the principle debtor (R).

A third claim which D may have against R is a claim based upon a right of recovery created by operation of law such as the Civil Liability (Contribution) Act 1978. Thus a right to contribution may arise as between joint debtors, or joint contractors, or joint trustees, or joint sureties, or joint wrongdoers,¹⁰ even if there is no contract between them. A surety (D) who has paid the creditor (P) may have a right of indemnity from the principle debtor (R) even if there is no contract between them, i.e. the surety voluntarily guarantees the creditor. Also, the person (D) who has become liable as a party to a contract concluded by another person (R) who purported to act as his agent may have a claim over against the latter as an ostensible agent. The right of recourse of an indorser (D) of a bill of exchange against one of his prior indorsers (R) is also a right of recovery

¹⁰ *E.g. K. and Another v. P. and Others, J. (Third Party)* [1992] 3 WLR 1015. Supreme Court Practice 1995, para. 16/1/3.

created by operation of law.

Proceeding to the second viewpoint, D's claim for the recovery from R may be either for the whole or a part of the payment to P. In some contexts the words "indemnity" and "contribution" are distinguished on this basis: a claim for the recovery of the whole payment is called a claim for indemnity whereas a claim for the recovery of a partial payment is called a claim for contribution.¹¹ D will claim indemnity where he paid money which he alleges R was solely liable to pay. D will claim contribution where he alleges that he and R were jointly liable to P for the same damage or debt and that he discharged more than his proportionate share of the common liability.¹² A right to indemnity arises, for example, from the relationship between principal and agent. A right to contribution usually arises, for example, as between joint debtors, or joint contractors, or joint trustees, or joint sureties, or joint wrongdoers. D who is claiming indemnity may, however, be found to be only entitled to contribution while D who is claiming contribution may be held entitled to recover the whole payment.¹³

From the third viewpoint, D's liability to P or R's liability to P comes, broadly speaking, in two ways: liability to pay a debt and liability to pay compensation for wrongs. According to this distinction, the situations that fall within the paradigm scenario can be classified in three ways.¹⁴

¹¹ Garner, p. 219.

¹² Goff & Jones, p. 300.

¹³ See s. 2(2) of the 1978 Act.

¹⁴ See Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 1.

First, D and R may be co-debtors.¹⁵ They may incur obligation to pay a debt by their contractual undertaking towards P and become co-sureties, co-insurers, co-mortgagors, co-tenants or co-contractors. The obligation may be assumed by them at the same time or at different times. In the absence of such contractual undertaking, the obligation to pay a debt may be imposed on them *ex lege* as where a maintenance obligation is imposed on a number of relatives for the benefit of one family member.

Secondly, D and R may co-wrongdoers, such as co-contractors and co-tortfeasors, liable to pay compensation for the same wrong. The liability may be in tort, breach of contract, breach of trust or in accordance with a specific statute which imposes liability for wrong.

Thirdly, D's liability to P and R's liability to P may be of a different nature. For example, where P's property was insured by D and damaged by R, D's liability is to pay a contractual debt, while R's liability is to pay compensation in tort.

The foregoing illustrations will have sufficiently demonstrated the diversity of the situations falling within the paradigm scenario. Accordingly, the analysis of this thesis has bearings on a huge variety of situations.

3 Overview of the thesis

In the rest of the thesis following this introductory part (Part 1), we will examine in turn two types of legal obstacles to D's recovery from R. They are the obstacle due to the

¹⁵ In order to avoid the impression that there must necessarily be a contractual relationships between D and R, the prefix "co-" is used in preference to the word "joint" e.g. joint debtors, joint tenants, joint contractors, and joint wrongdoers.

independent trial of D's claim against R from the trial of P's claim against D (Part 2) and the obstacles due to a plurality of governing laws (Part 3). Although such obstacles will be sketched below, few short sentences are not always sufficient to clearly describe the ways in which such obstacles arise. Readers are, therefore, asked to refer to each section of the thesis for precise illustration.

3.1 Obstacle due to the independent trial of D's claim against R from the trial of P's claim against D (Part 2)

If the same issues have to be determined in P's claim against D and in D's claim against R independently from each other in different forums, matters that have been established¹⁶ to support P's claim against D may not be established in support of D's claim against R. If such inconsistent determinations arise, D may not be able to obtain satisfactory recovery from R.

In Chapter 1, we will consider what issues may be determined inconsistently if D's claim against R is decided independently from P's claim against D and will examine the ways in which inconsistent determinations of such issues may arise.

The independent determination of the same issues in P's claim against D and D's claim against R can be avoided in two ways. One way is to recognise the matters established in P's action against D as conclusive against R in D's action against R. Another way is to consolidate the trial of D's claim against R with the trial of P's claim against D by third party procedure. Third party procedure is a procedure by which the

¹⁶ Since we are not concerned with the burden of proof, the word "establish" is used irrespective of the existence or non-existence of presumptions.

defendant in an action can bring proceedings (called “third party proceedings”¹⁷) against a non-party¹⁸ so that they are tried together with the original proceedings¹⁹ in one action. It ensures that the same issues arising in the original proceedings and in third party proceedings are determined uniformly. We will examine these two ways in turn.

In Chapter 2, we will examine whether the matters established in P’s action against D in a foreign forum are recognised as conclusive against R in D’s action against R in England.

Then in Chapter 3, we will examine third party procedure in England as a means of avoiding separate trials of P’s claim against D and D’s claim against R.

Sub-Chapter 1 expounds the merits and drawbacks of third party procedure.

In the three sub-chapters that follow, we will analyse English third party procedure in the international context from three different angles.

In Sub-Chapter 2, we will examine how widely English third party procedure is available by clarifying its requirements, both procedural requirements and jurisdictional requirements.

The third and fourth sub-chapters deal with external impacts on English third party procedure.

In Sub-Chapter 3, we will examine how English third party procedure is hindered by

¹⁷ The claim made in third party proceedings is called “third party claim.”

¹⁸ In this thesis the non-party against whom the defendant is seeking to bring third party proceedings will be referred to as “the proposed third party.” He becomes a “third party” if the requirements for third party procedure are satisfied. Rather confusingly, however, the term “third party” is often used to refer to “non-party” in authorities and academic writings.

¹⁹ “The original proceedings” is sometimes called “the main proceedings.” The claim in the original proceedings is called “the original claim (or the main claim).”

foreign parallel proceedings. Where proceedings brought by P against D are pending in England, the English court may have to decline jurisdiction over, or have to stay, third party proceedings which D seeks to bring against R, if corresponding proceedings to the third party proceedings are brought in another forum. In such cases, if the court or arbitral tribunal in that other forum cannot entertain both the original proceedings and third party proceedings either because, in the given circumstances, its procedural rules do not permit third party procedure or because it lacks jurisdiction over either proceedings, nowhere may third party procedure be available to D and he will consequently face the risk of irreconcilable decisions. Parallel proceedings may arise from *lis alibi pendens*, foreign jurisdiction agreements, and arbitration agreements. We will examine how English third party procedure is hindered by them.

And finally in Sub-Chapter 4, we will consider whether an English court can issue an antisuit injunction to eliminate hindrances from foreign proceedings to English third party procedure. In some cases, if foreign proceedings result in a judgment earlier than the corresponding English proceedings, English third party procedure may be precluded. In other cases, foreign proceedings may prevent an English court from exercising jurisdiction over proceedings involved in third party procedure. In such cases, if the foreign court cannot entertain third party proceedings which D seeks to bring against R, D will face the risk of inconsistent judgments.

3.2 Obstacles due to a plurality of governing laws (Part 3)

Following the examination in Part 2 of the obstacles due to the determination of issues in D's claim against R independently from the determination of the same issues in P's

claim against D, we will move on to address obstacles of another type, those due to a plurality of governing laws. In the situations falling within the paradigm scenario, there involved many different relationships not only as between different pairs of the parties but also as between the same pair of the parties. If they are governed by different laws (plurality of governing laws) D's recovery from R may be obstructed if there is a mismatch between the governing laws.

In Chapter 4, the first chapter in Part 3, we will deal with the obstacle to recovery caused by a mismatch of different laws governing three different claims of recovery that D may have against R, namely a claim pursuant to R's preexisting contractual undertaking, a claim by way of subrogation and a claim based upon a right created by operation of law. Since each governing law may only govern one of the three claims of recovery, D may not have a right of recovery even if each governing law would give him a right of recovery if it were to govern the claim(s) other than the claim which it actually governs. For example, there may be cases where no claim of recovery is available because the law governing subrogation only allows a claim based upon a right created by operation of law and the law governing a claim based upon a right created by operation of law only allows subrogation. We will consider how such an anomalous situation should be addressed.

In Chapter 5, we will address obstacles to satisfactory recovery in chain transactions due to a mismatch between the law governing D's liability to P and the law governing R's liability to D. By chain transactions are meant transactions consisting of two or more successive contracts for the same objective with the same terms in material respects, each pair of adjacent contracts sharing a party, such as a transport commissioned to successive carriers, a bill of exchange transaction, a letter of credit transaction and so forth. Where

the relationships between P and D and between D and R are based on adjacent contracts in a chain transaction, D may well have an expectation that his liability to P will be covered back-to-back by R's liability to him. But such an expectation may be defeated if P's claim against D and D's claim against R are governed by different laws and there is a mismatch between them in respect of the requirements for D's liability to P and R's liability to D. Consequently, D may be left exposed to liability to P without having a corresponding right of recovery from R. In view of this risk, we will consider whether the contract between P and D and the contract between D and R should be referred to a single governing law in order to ensure the correspondence of liability.

Finally, in Chapter 6, we will address obstacles to satisfactory recovery under the Civil Liability (Contribution) Act 1978 due to a mismatch between the law governing D's liability to P and the law governing R's liability to P. The 1978 Act appears to require both D's liability to P and R's liability to P to be established under the law specified by the English choice-of-law rules. If they are governed by different laws and the law governing R's liability to P provides for a more lenient liability regime (e.g. liability based on negligence) than the law governing D's liability to P (e.g. strict liability), D may become liable to P while R is not liable to P, or the amount of D's liability to P may become bigger than that of R's liability to P, even if R is more culpable for the damage to P than D. In such a case, D may not be able to obtain satisfactory recovery from R. We will consider whether D's liability to P and R's liability to P should be determined by a single governing law in order to ensure D's satisfactory recovery.

PART 2

OBSTACLES TO RECOVERY DUE TO THE INDEPENDENT TRIAL OF D'S CLAIM AGAINST R FROM THE TRIAL OF P'S CLAIM AGAINST D

If the same issues have to be determined in P's claim against D and in D's claim against R independently from each other in different forums, matters that have been established to support P's claim against D may not be established in support of D's claim against R. This is the type of obstacle to D's satisfactory recovery from R which is to be discussed in this Part.



CHAPTER 1

Inconsistent determinations of the issues in P's claim against D and D's claim against R

1 Purpose of this chapter

The purpose of this chapter is to consider what issues may be determined inconsistently if D's claim against R is decided independently from P's claim against D and to examine the ways in which inconsistent determinations of such issues can arise.

2 Issues that may be determined inconsistently

The issues that may be determined inconsistently if D's claim against R is decided independently from P's claim against D are the issues which must be determined to decide both claims. The question what issues must be determined to decide each claim depends upon the type of claim and its governing law.²⁰

In the following analysis, different issues will be classified into four categories to see whether they must be established to support both P's claim against D and D's claim against R and hence may be determined inconsistently. The four categories are: R's liability to P, the facts peculiar to R's liability to P, D's liability to P, and the facts that

²⁰ Choice-of-law rules determining the governing law of different types of D's claim against R will be examined in Chapter 4.

must be ascertained to establish D's liability to P.

2.1 R's liability to P and the facts peculiar thereto

In some cases R's liability to P does not have to be established to support D's claim from R. Where, for example, D claims against R in accordance with a preexisting contractual relationship, the contract as interpreted by its governing law may not require R's liability to P to be established. Thus if an insurer (D) claims against his reinsurer (R) under a reinsurance contract which stipulates that cover is to be provided on the same terms and conditions as those of the original contract of insurance, then the liability of the reinsurer to the insured (P) need not be established.

But if D's claim against R is of some other type, R's liability to P may have to be established. Thus where D claims against R under the Civil Liability (Contribution) Act 1978, section 1(1) requires R's liability to P as well as D's liability to P to be established.²¹

R's liability to P will not usually have to be established to support D's liability to P. Likewise, certain facts peculiar to R's liability to P which have to be established to support D's claim against R will not have to be established to support P's claim against D.

²¹ See also Law Com. No.79, para. 51; the judgment of Mustill L.J. in PART I, F. "The Derivative Claims" in *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others*, 21 November 1991 (CA), Transcript available on Lexis. (Partly reported in [1992] 2 All ER 82). Mustill L.J. in this case described obtaining recovery under the 1978 Act as a harder task for D than obtaining recovery under the contract between D and R because of the need to establish R's liability to P. See his judgment in PART VI, Arbitration, A. The claim by Clarksons against Howdens, 2. The scope of the arbitration clause.

Where, for example, a carrier (D), who has paid compensation for the loss of cargo to the cargo interest (P), is claiming indemnity from his subcontracting carrier (R), the fact that the loss occurred during the leg of the voyage in which the subcontracting carrier was in charge must be established.²² This fact, however, does not have to be ascertained to decide the cargo interest's claim against the first carrier as long as it can be established that the loss occurred somewhere in the voyage. Similarly, where the seller of a defective product (D), who has paid compensation to the buyer (P) for injury suffered in using the product, is claiming indemnity from the manufacturer (R), the fact that the defect existed when the product was manufactured must be established. This fact, however, does not have to be ascertained to decide the buyer's claim against the seller as long as it can be established that the defect existed when the product was bought from the seller.²³ Likewise, where the manufacturer of a defective product (D), who has paid compensation to a user of the product (P) for injury suffered from using the product, is claiming indemnity from the supplier of a component (R), the fact that the defect existed in the component must be established. This fact, however, does not have to be ascertained in the user's claim against the manufacturer as long as it can be established that the product as a whole was defective. Also, where a person (D) insured under an ordinary liability insurance policy, who has paid compensation to the victim (P) of his tortious act, is claiming reimbursement from the insurer (R), the fact that the tortious act was not intentional must be established. This fact, however, may not have to be ascertained in the victim's claim against the insured as long as it can be established that a tortious act,

²² *E.g. Walek & Co. v. Chapman & Ball* [1980] 2 Lloyd's Rep. 279.

²³ *E.g. Dixon v. Fiat-Roosevelt Motors, Inc.* (1973) 8 Wash App 689, 509 P2d 86.

regardless of whether it was negligent or intentional, was committed.

2.2 D's liability to P

Needless to say, D's liability to P is the subject matter of P's claim against D and therefore has to be established in that claim. It may also have to be established to support D's claim against R depending on what type of claim it is and its governing law. Three types of claim will be examined below.

2.2.1 Where D seeks to recover from R pursuant to R's contractual undertaking

Where D is claiming against R pursuant to R's contractual undertaking, the question whether his liability to P has to be established depends on the contractual terms and their interpretation under the law governing the contract. In some contracts R may be considered to have given an undertaking to indemnify D for the latter's actual payment to P made pursuant to a judgment given in P's action against D, irrespective of whether that judgment was correct.²⁴

Thus in *Esal (Commodities) Ltd. and Reltor Ltd. v. Oriental Credit Ltd. and Wells Fargo Bank N.A.*,²⁵ the confirming bank (D) of a performance bond, having paid the beneficiary (P) as ordered by an Egyptian tribunal, claimed indemnity in England from the issuing bank (R) at whose request they added their confirmation to the bond. The

²⁴ See Dicta by Romer J. in *Mercantile Investment and General Trust v. River Plate Trust, Loan and Agency* [1894] 1 Ch 578, 595; Hartley [1991] 16 ELRev. 75.

²⁵ [1985] 2 Lloyd's Rep. 546, 550 (CA).

English court held that the confirming bank was entitled to be indemnified from the issuing bank irrespective of whether the Egyptian tribunal was right or wrong.

Similarly, under a reinsurance agreement which contains what is known as a “follow settlements” clause, the reinsurer (R) undertakes to indemnify the reinsured (D) against his liability under the original policy by simply following the reinsured's *bona fide* settlement with the insured (P) whether or not the reinsured is actually liable to the insured.²⁶ In *Insurance Co. of Africa v. Scor (UK) Reinsurance Co. Ltd.*,²⁷ it was held that if the insurers had acted honestly and taken all proper steps in making the settlement, the reinsurer had to honour the “follow settlements” clause even if they could prove that the insured's claim had been fraudulent.

2.2.2 Where D is contending to have discharged R's debt to P

Where D is claiming against R, contending that R's debt to P has been discharged by his payment, his liability to P to make that payment does not have to be established where his claim is governed by a typical civil law system. Under such a system, a person who paid another's debt is generally entitled to recover from that debtor.²⁸ The position is more complicated where it is governed by a typical common law system, since, under such a system, the mere fact of payment of another's debt does not entitle the payer to recover from that debtor. If, however, the debtor has given a prior or subsequent approval to the

²⁶ Merkin, “The Proper Law of Insurance and Reinsurance Contracts” in Rose (ed.) *New Foundations for Insurance Law: Current Legal Problems* (1987) p. 61, 73.

²⁷ [1985] 1 Lloyd's Rep. 312 (CA).

²⁸ Friedmann & Cohen, *Payment of Another's Debt*, para. 9.

payment or the payer was under compulsion of law to make the payment,²⁹ as where he was a joint debtor to the creditor liable for the whole debt, then the payer is entitled to recover from the debtor.³⁰ It follows that where D's payment to P has not been approved by R, D's liability to P to make the payment has to be established to support his claim against R if it is governed by a typical common law system.

2.2.3 Where D is contending that he has paid more than his share of compensation for a wrong committed by him together with R

Where D is claiming against R, contending that he has paid more than his share of compensation for a wrong committed by him together with R, his liability to P has to be established if his claim is based on the Civil Liability (Contribution) Act 1978.³¹ Section 1(1) of the Act reads:

Subject to the following provisions of this section, any person *liable* in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise). (Emphasis

²⁹ Where the payer's claim for recovery is governed by English law, compulsion by a foreign law is sufficient: *Liberian Insurance Agency Inc. v. Mosse* [1977] 2 Lloyd's Rep. 560, 562.

³⁰ Friedmann & Cohen, *Payment of Another's Debt*, para.10; Goff & Jones, p. 300; *Owen v. Tate* [1976] QB 402.

³¹ The position was the same under the Law Reform (Married Women and Joint Tortfeasors) Act 1935. See *Stott v. West Yorkshire Roadcar Ltd.* [1971] 2 QB 651, 657 (CA) *per* Lord Denning MR. The defence of *ex turpi causa* is not available as an answer to a claim under the Civil Liability (Contribution) Act 1978. See *K. v. P.J. (Third Party)* [1993] Ch 140.

added.)

2.3 Facts that must be ascertained to establish D's liability to P

Where D's liability to P has to be established to support D's claim against R, as a corollary, all the facts that must be ascertained to establish D's liability to P have to be ascertained to decide D's claim against R. But even where D's liability to P does not have to be established to support D's claim against R, some of the facts that must be ascertained to establish D's liability to P also have to be ascertained to decide D's claim against R.

Thus in order to decide the claim by a person (P) who injured his foot while walking in a shop against the shopowner (D), whether the shop floor was in a dangerous condition has to be ascertained. This fact will also have to be ascertained to decide the claim by the shopowner against the caretaker of his shop (R) under a building maintenance contract, even if the shopowner's liability to the injured person does not have to be established to support the latter claim.

Similarly, to decide the claim by the cargo interest (P) against the carrier (D) for the loss of their cargo, whether his servant (R) took all measures to avoid the loss may have to be ascertained.³² This fact will also have to be ascertained to decide the carrier's claim for indemnity against the servant, even if the carrier's liability to the cargo interest does not have to be established to support the claim.

³² E.g. Art. 5(1) of the Hamburg Rules; Art. 16(1) of the Multimodal Transport Convention.

Likewise, to decide the claim by a person (P) injured by another's (D's) tortious act against the latter, it may be necessary to ascertain whether there was a malpractice in the subsequent medical treatment given by a doctor (R) and if so, whether it broke the chain of causation between the tortious act and the plaintiff's handicap. The question whether there was a malpractice by the doctor will also have to be ascertained to decide the tortfeasor's claim for contribution against the doctor.³³

3 How inconsistent determinations arise

If the issues that have to be determined to decide R's liability to D have to be determined in D's claim against R independently from their prior determination in P's claim against D, inconsistent determinations of those issues may arise. This is because the facts of the case may be ascertained differently or because, if these claims are decided in different forums, different laws may be applied to decide the existence or the amount of D's liability to P. We will examine the latter cause of inconsistent determinations in further details below.

3.1 Determination of the existence of D's liability to P

Suppose that D was held liable to P in P's action against him under the governing law specified by the choice-of-law rules of that forum. If his liability to P has to be determined in his action against R in another forum independently from its establishment

³³ See E.g. *Kinnear v. Falconfilms NV and others (Hospital Ruber Internacional and another, third parties)* [1994] 3 All ER 42.

in P's action against him, it will be determined by reference to the law specified by the choice-of-law rules of the latter forum.³⁴ The governing law so specified may be different from the law which was applied in the former forum. Consequently, his liability to P may not be established in his claim against R and he may not be able to obtain recovery.

Thus the seller (D) of a product may be held liable for the injury suffered by a user of the product (P) under a law which imposes an obligation on the seller of a product to inspect it before selling it if he has reason to know that it is likely to be dangerous. When the seller brings an action for indemnity against the manufacturer of the product (R) in another forum, his liability to the user may have to be determined, independently from its establishment in the prior action, under the governing law specified by the choice-of-law rules of that latter forum. If, under the law so specified, the seller of a product is not liable for the injury caused by the product unless he actually knows of its dangerous condition, he may not be held to have been liable to the user. Consequently, he may not be able to obtain indemnity from the manufacturer even if the dangerous condition of the product was created by the manufacturer.

3.2 Determination of the amount of D's liability to P

³⁴ This may be the position under s. 1(6) of the 1978 Act which reads;

References in this section to a person's liability in respect of any damage are references to any such liability which has been or *could be established* in an action brought against him *in England and Wales* by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) *by reference to the law of a country outside England and Wales*. (Emphasis added.)

This section will be analysed in Chapter 6.

Where D's liability to P is for a debt, the governing law of the debt may not have much bearing on the ascertainment of its amount. But that is not the case where D's liability to P is for a wrong. The process of ascertaining the amount of liability for a wrong can be divided into the identification of the heads of damages and the quantification of damages in respect of those heads of damages. Under the English choice-of-law rules the heads of damages are governed by the *lex causae* and the quantification of damages is governed by the *lex fori*³⁵ except that in the case of contracts, the quantification of damages is also governed by the *lex causae* in so far as it is governed by rules of law.³⁶ Under the choice-of-law rules of some other States, the quantification of damages is also governed by the *lex causae*.

If the amount of D's liability to P has to be determined in D's claim against R independently from its prior determination in P's claim against D in another forum, it is possible that either the heads of damages or the quantification of damages or both will be determined by different laws in the two forums.

Consequently, the heads of damages recoverable under the law applied by the forum which decided P's claim against D may not be recoverable under the law applied by the forum trying D's claim against R. Or the measure of quantification of damages used under the law applied by the forum which decided P's claim against D may be larger than the measure under the law applied by the forum trying D's claim against R.

Thus damages for wrongful death may be quantified under one system of law on the

³⁵ *Boys v. Chaplin* [1971] AC 356, at pp. 379, 381-382, 393, 395. Statutory provisions limiting a defendant's liability *prima facie* depend on the *lex causae*. See Dicey & Morris, p. 184 and cases cited there. Cf. *Caltex Singapore Pte Ltd v. BP Shipping Ltd* [1996] 1 Lloyd's Rep. 286.

³⁶ Article 10(1)(c) of the Rome Convention.

basis of the present worth of the pecuniary value of the deceased's life and under another system of law on the basis of the pecuniary loss sustained by the beneficiary.³⁷ Likewise, under one system of law, heads of damages such as pain and suffering,³⁸ loss of personal belongings, and future aggravation of injuries may be recoverable by a victim of tortious acts, or *solatium* may be recoverable by the relative of a person killed, whilst under another system of law these heads of damages may not be recoverable.

The amount of recovery which D will seek from R is either the whole or a part of the amount for which he was held liable to P. Therefore, if the amount of D's liability to P ascertained in P's claim against D is smaller than the amount of D's liability to P ascertained in D's claim against R, the former amount of liability will represent the maximum amount D will seek to recover from R. This would be R's good fortune. If, on the contrary, the amount of D's liability to P ascertained in P's claim against D is higher than the amount of D's liability to P ascertained in D's claim against R,³⁹ D will not be allowed to claim more than the latter amount.⁴⁰ In such a case, D will not be able to obtain satisfactory recovery.

³⁷ See *Wilson v. Massagee* (1944) 224 NC 705, 32 SE(2d) 335.

³⁸ In *Boys v. Chaplin*, a majority of the House of Lords referred the question whether damages were recoverable for pain and suffering to the *lex causae*.

³⁹ For this purpose, the amount of liability should be determined in respect of the entire wrong committed by D and R. It is said that some States of the United States have statutes limiting the liability of each tortfeasor who is jointly and severally liable with other tortfeasors to his share in the responsibility. See Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 4. Such rules cannot be applied to determine the amount of liability for the present purpose.

⁴⁰ This may be the effect of section 1(6). However, where D settled with P, the effect of section 1(4) may be that D is allowed to claim up to the amount of settlement as long as the settlement was *bona fide*.

CHAPTER 2

Conclusive effect against R in D's action against R in England of the matters established in P's action against D in a foreign forum

1 Purpose of this chapter

As seen in Chapter 1, there are issues that have to be determined to decide both P's claim against D and D's claim against R and if they are determined in each claim independently from each other, inconsistent determinations of the same issues may arise. This may obstruct D's satisfactory recovery from R.

One way to avoid inconsistent determinations of the same issues is to recognise the matters established in P's action against D as conclusive against R in D's action against R.

The purpose of this chapter is to examine whether the matters, in particular D's liability to P, established in P's action against D in a foreign forum are conclusive against R in D's action against R in England.

We will begin our analysis with relatively clear rules that can be found in the Brussels and Lugano Conventions, the CMR and the CIM.

2 Judgments from Germany, Austria, or Switzerland rendered under *litis denunciatio*

German law has a procedure called *Streitverkfindung*.¹ It is a German version of the procedure known as *litis denunciatio*. The essence of *litis denunciatio* is that certain matters established in an action become conclusive against a non-party to that action in a subsequent separate action for recourse brought by the defendant to the original action against that non-party. While the original action is under way, the defendant must serve a notice on the non-party to let him know of that action. It is up to the latter to decide whether or not to join the action. Even if he does not join the action, matters established in the action becomes conclusive against him. *Litis denunciatio* performs the same function as what is usually referred to as the third party procedure to the extent that decisions in the original action becomes conclusive against a non-party. But while under the third party procedure the defendant's claim for a recourse against the non-party will also be decided in the original action, under *litis denunciatio* the recourse claim is not decided in the original action but will have to be decided in a separate action.

Streitverkfindung is given an international effect by the Brussels Convention. The first paragraph of Article V in the Annexed Protocol provides in material part:

In [Germany], any person domiciled in another Contracting State may be sued in the courts in pursuance of Articles 68, 72, 73 and 74 of the code of civil procedure (Zivilprozessordnung) concerning third-party notices.

Presumably, this provision means that the defendant in an action in Germany may serve a notice on any non-party domiciled in another Contracting State in order to give

¹ Arts. 68, 72, 73 and 74 of the Code of Civil Procedure (Zivilprozessordnung). See also Jenard Report, p. 27.

such effects as *Streitverkfindung* would provide in a subsequent action. The time that must be allowed for the notification and intervention is left to German law. It does not matter how inconvenient Germany is as a forum for that non-party.

Presumably, this provision is not intended to confer on German courts jurisdiction for a subsequent action for recourse against the non-party so served. A recourse action will have to be brought in a forum having jurisdiction on whatever Convention or national ground. If it is brought in a Contracting State having jurisdiction, the second paragraph of Article V provides in material part:

Any effects which judgments given in [Germany] may have on third parties by application of Articles 68, 72, 73 and 74 of the code of civil procedure (Zivilprozessordnung) shall also be recognized in the other Contracting States.

This provision means that the court of a Contracting State trying a recourse claim against the non-party must give such effects as the decision in Germany would have on the non-party under *Streitverkfindung*. Presumably, before such effects are given, the German judgment must be entitled to recognition in accordance with the normal Convention rules of recognition. The question what matters in the judgment are to have the conclusive effect is left to German law.

Litis denunciatio is given international effects also by the Lugano Convention. The official commentary to the latter convention says that as under German law, the function performed by third party procedure is fulfilled by means of *litis denunciatio* under Austrian, Spanish and Swiss law.² The first paragraph of Article V of Protocol 1 provides

² Jenard & Möller Report, para. 105.

that any person domiciled in another Contracting State may be sued in the courts of these States (Germany, Spain, Austria and Switzerland) under *litis denunciatio* of each State. The second paragraph provides that any effects which judgments given in these States may have on third parties under *litis denunciatio* of each State must be recognized in the other contracting States.

The relations of the United Kingdom with Austria and Switzerland are governed by the Lugano Convention and the relations with Germany and Spain are governed by the Brussels Convention. The Brussels Convention, however, does not mention the Spanish *litis denunciatio*. This means that as between the United Kingdom and Spain, the Spanish *litis denunciatio* will not be given such effect as provided by the Lugano Convention. Paragraph 22 of the Cruz, Real & Jenard Report says it would be wiser to omit a reference to Spain in Article V of Protocol 1 of the Lugano Convention. The Lugano Convention treats Article 1482 of the Spanish Civil Code as providing for *litis denunciatio*. However, the Cruz, Real & Jenard Report seems to be reading the same article as a provision for third party procedure. This apparent contradiction may have arisen from the procedural uncertainty in Spanish law in this matter.³

It follows from the foregoing analysis that if D, in P's action against him in Germany, Austria, or Switzerland, served a notice of the action on R pursuant to *litis denunciatio* of these States and subsequently properly commenced a recourse action against R in England, the English court must give such conclusive effects to the judgments of these States as conferred by *litis denunciatio* of these States, provided that the judgment is entitled to recognition in England.

³ This is pointed out in the Cruz, Real & Jenard Report.

3 Judgments rendered by the application of the CMR or CIM

The procedure of *litis denunciatio* is also adopted and given an international effect by the CMR and CIM. Under Article 62 of the CIM and Article 39 of the CMR, the validity of the payment made by a carrier (D) to the cargo claimant (P) as a compensation for the loss or damage to the cargo pursuant to a judgment given in an action between them is conclusive against another responsible carrier (R) in a subsequent action for recourse.

Article 62(1) of the CIM provides:

The validity of the payment made by the railway exercising one of the rights of recourse under Articles 60 and 61 may not be disputed by the railway against which the right of recourse is exercised, when compensation has been determined by a court and when the latter railway duly served with notice, has been afforded an opportunity to intervene in the proceedings. The court seized of the main proceedings shall determine what time shall be allowed for such notification and for intervention in the proceedings.

Article 39(1) of the CMR provides:

No carrier against whom a [recourse] claim is made under Articles 37 and 38 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.

Hill & Messent suggests⁴ that Article 39(1) of the CMR applies even when the judgment which ordered the compensation was given by a court of a State not party to the CMR but only if the compensation was ordered by applying the provisions of the CMR. The same may be the case in respect of the CIM. Where the original action was tried in Germany, Austria, or Switzerland, the provisions of the CIM or the CMR take precedence over the Brussels or Lugano Convention.⁵

Unlike the Conventions, the CMR and CIM define the matter which is to have the conclusive effect as “the validity of the payment.” This concept presumably includes not only the amount of the compensation but also the existence of the liability to the cargo claimant of the carrier who was ordered to make the compensation.

But the carrier against whom a recourse claim is made is not precluded from arguing that he himself was not responsible for the loss or damage which has occurred⁶ by alleging, for example, that the loss occurred during a leg of the voyage other than the leg of which he was in charge. He can normally dispute these matters in a forum which is convenient for him since Article 39(2) of the CMR and Article 63 of the CIM limits the courts having jurisdiction over a recourse claim to the courts of the States with which the carrier against whom recourse claim is made⁷ has some connections.

As with other versions of *litis denunciatio*, the carrier who is to be precluded from disputing the validity of the payment must have been afforded by due notice an

⁴ P. 227.

⁵ Art. 57(1).

⁶ As regards the CMR, see Hill & Messent, p. 228; Clarke, p. 283.

⁷ Not the carrier who is making a recourse claim. See *Arctic Electronics Co (UK) Ltd v. McGregor Sea & Air Services Ltd* [1985] 2 Lloyd's Rep. 510.

opportunity to intervene in the cargo claimant's action. Article 62(1) of the CIM provides that the time that must be allowed for such notification and for intervention is determined by the court seized of the original action. This is the same position as under the Brussels and Lugano Conventions. The CMR gives no express guidance, but the position may be the same.⁸

If a carrier duly served with a notice of the cargo claimant's action against his fellow carrier has information which contradicts the defendant carrier's liability to the cargo claimant or may reduce the amount of such liability, he is not allowed to rely on that information to dispute the validity of the payment otherwise than by intervening in the action. However, the forum of that action may be an inconvenient one for him. The indifference to the non-party's interest in this respect is the same as in the Brussels and Lugano Conventions. Thus the English case law gives no indication that the courts have tried to ensure that England was not an inconvenient forum for the carrier. In *Arctic Electronics Co (UK) Ltd v. McGregor Sea & Air Services Ltd*⁹ and in *William Tatton & Co. Ltd. v. Ferrymasters Ltd*,¹⁰ the third party notice purporting to institute third party proceedings for a recourse claim was set aside because the English court did not have jurisdiction over the recourse claim under Article 39(2) of the CMR, but the court held that the notice nonetheless constituted "due notice" for the purpose of Article 39(1). In *Cummins Engine Co. Ltd. v. Davis Freight Forwarding (Hull) Ltd*,¹¹ third party notice was set aside for the same reason but Brandon L.J. said that if notice of the action had

⁸ Hill & Messent, p. 226.

⁹ [1985] 2 Lloyd's Rep. 510.

¹⁰ (1974) 9 ETL 167.

¹¹ [1981] 1 WLR 1363 (CA).

been given by letter, Article 39(1) would have applied.

It follows from the foregoing analysis that where a judgment is given in the cargo claimant's (P's) action against a carrier (D) in a foreign forum by applying the CMR or the CIM, and that carrier subsequently commences a recourse action against a successive carrier (R) in England as the forum having jurisdiction under Article 39(2) of the CMR or Article 63 of the CIM, as the case may be, the validity of the payment ordered by the judgment is conclusive against the latter carrier if the former carrier served him with due notice of the original action while it was under way in accordance with the law of that forum even if the forum for that action was not a convenient forum for the latter carrier.

4 Other cases

Where a judgment was given in P's action against D in a foreign forum but it was rendered neither by the application of the CMR or the CIM, nor in Germany, Austria or Switzerland under *litis denunciatio* of these States, what conclusive effect, if any, does it have against R in D's action against R in England?

Formal and exact statement of the law in this area are scarce. This may be because there is not often much dispute about D's liability to P in D's claim against R and, even if there is, R may not wish to dispute that matter since the cost of so doing might be large.¹² It may also be because to dispute that matter may not often prove a fruitful avenue for exploration.¹³

¹² I thank Professor Cyril Glasser for suggesting these points.

¹³ Law Com. No. 79 para. 46.

We will first examine, as a special problem, the conclusive effect of D's liability to P established in P's action against D in a foreign forum against R in D's action against R based upon the Civil Liability (Contribution) Act 1978 in England. We will then examine the conclusive effect in general of a judgment given in P's action against D in a foreign forum against R in D's action against R in England.

4.1 Conclusive effect of D's liability to P where D's claim against R is based upon the Civil Liability (Contribution) Act 1978

4.1.1 Present law

Section 1(6) of the 1978 Act provides:

References in this section to a person's liability in respect of any damage are references to any such liability which has been or *could be* established in an action brought against him *in England and Wales* by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales. (Emphasis added.)

This section deals not with R's liability to D, but with the liability of either or both of them to P.¹⁴ Although English courts do not have to be able to actually exercise

¹⁴ *Virgo Steamship Co. SA v. Skaarup Shipping Corporation (The Kapetan Georgis)* [1988] 1 Lloyd's Rep. 352.

jurisdiction over P's action against D,¹⁵ it is necessary that D's liability to P could be established in England if the English court could exercise jurisdiction.

Further, this section can be read as stating that D's liability to P established in P's action against D in a foreign forum cannot be relied upon in D's claim for contribution against R under this Act. If this reading is correct, D's liability to P has to be reassessed in England by reference to the law specified by the English choice-of-law rules.¹⁶ The law so specified may be different from the law applied by the foreign forum. The facts that support D's liability to P may also be ascertained differently. Consequently, D's liability to P may be denied or the amount of the liability may be reduced. Hence D may not be able to obtain satisfactory recovery from R.

Whether or not this reading is correct was, however, left open by the Privy Council on appeal from Brunei in *Soc. Nat. Ind. Aérospatiale v. Lee Kui Jak* (hereafter referred to as the *SNIAS* case).¹⁷ In this case the widow (P) of a person killed in a crash of a helicopter serviced by an operating company (R), sued the manufacturer of the helicopter (D) in Texas. Lord Goff said:¹⁸

Now, let it be supposed that the proceedings in Texas against [D] are allowed to

¹⁵ In *R. A. Lister & Co. Ltd. And Others v. E. G. Thomson (Shipping) Ltd. And Another* (No. 2) [1987] 1 WLR 1614, it was held that the requirements of this section could be satisfied even though R's liability to P could not be established in England and Wales, as P's action against R in England had been stayed by reason of the exclusive jurisdiction agreement between them selecting the courts of Indonesia.

¹⁶ *R. A. Lister & Co. Ltd. And Others v. E. G. Thomson (Shipping) Ltd. And Another* (No. 2) [1987] 1 WLR 1614, 1620.

¹⁷ [1987] AC 871 (Privy Council).

¹⁸ P. 901.

continue to proceed, and that in those proceedings [D] are held liable to [P]. Then let it be further supposed that [D] claim contribution or indemnity from [R] in Brunei, relying upon a judgment of the Texas court as showing that they, [D], were liable in respect of the relevant damage. Would that judgment provide conclusive evidence that [D] were so liable? Or would [D] have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, [D] would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to [P] in Texas without any right over against [R] in that court, and might be held not liable to [P] in Brunei, in which event they would have no claim over against [R], even though negligence on the part of [R] may in fact have been a substantial cause of the accident.

In seeking contribution from R, D would have had to invoke the Brunei legislation which was in the same terms as the English Law Reform (Married Women and Tortfeasors) Act 1935, a predecessor of the 1978 Act. Since their Lordships were sitting on an interlocutory application, they could not resolve the question whether D's liability to P, if established in Texas, would be conclusive against R in D's contribution claim against R in Brunei. However, Lord Goff drew attention to a Scottish case, *Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd*¹⁹ in which the House of Lords held that the provisions of a Scottish Act which was comparable to the 1978 Act, applied only in respect of liability established in an action in Scotland, and not in respect of liability

¹⁹ [1987] SLT 443 (HL).

established in a foreign forum. Moreover, referring to the view²⁰ that a foreign judgment gave no right to seek contribution under the 1978 Act, their Lordships did not consider that such a view could be dismissed as being without substance.

4.1.2 Comparison with the conclusive effect of D's liability to P established in England

As the Privy Council left open the question whether D's liability to P established in a foreign forum is conclusive as a basis for D's contribution claim against R under the 1978 Act, the examination of the conclusive effect of D's liability to P established in England may provide a pointer.

Section 1(6) is presumably not intended to provide for the conclusive effect of a judgment which has been given in England, since it deals with liability which "could be" established as well as liability which has been established. That being so, the 1978 Act is silent as to whether D's liability to P established in P's action against D in England is conclusive as a basis for a contribution claim by D against R under the 1978 Act.

There is, however, a provision as to the conclusive effect of a judgment given in P's action against R holding that R is not liable to P. Section 1(5) provides:

A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for

²⁰ As expressed in Clerk & Lindsell on Torts (15th ed., 1982), p. 144. The view of the authors of this book remained unchanged in 16th ed. (1989), p. 183.

contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

Accordingly, if a judgment was given in P's action against R in the United Kingdom holding that R was not liable to P, that finding is conclusive against D in his later action against R. If it were otherwise, D might succeed in recovering contribution from R by persuading the court that R is liable to P with a result that R would have to pay indirectly for a liability from which he has been directly exonerated. This provision avoids putting R at such a risk but at the sacrifice of D's interests. Since the conclusive effect is given even if D was not afforded an opportunity to intervene in P's action against R, D may lose his right of contribution from R even if he had better evidence of R's liability to P than P did. There is also a risk of collusion between P and R. In a Scottish case prior to the enactment of the 1978 Act, *Corvi v. Ellis*,²¹ the owner (P) of a car involved in a collision with a van sued the van driver (D) for the damage to his car. The owner brought another action against his daughter (R) who was driving his car at the time of the collision in respect of the same damage but he later lodged a minute of abandonment. The Scottish court held that the van driver's right to recover a contribution from the car owner's daughter could not be defeated by the transaction between the owner and his daughter. Section 1(5), however, does not provide for a safeguard against such a collusion.²²

If D and R are to be treated even-handedly, D's liability to P established in P's action against D in the United Kingdom should be given conclusive effect against R in D's

²¹ [1969] SLT 350.

²² The Law Commission's recommendation was, however, intended to cope with such a collusion by requiring the judgment to be given after a hearing on the merits. Law Com. No.79, paras. 62-65.

claim against R under the 1978 Act. It is not impossible to interpret the silence of the Act as sanctioning such conclusive effect.

However, since section 1(5) is limited to United Kingdom judgments, this does not enable us to conclude that D's liability to P established in a foreign forum other than the United Kingdom is conclusive against R in D's claim against R under the 1978 Act.²³

4.1.3 Comparison with the conclusive effect of D's liability to P where D settled with P

Support for giving conclusive effect to a foreign judgment can be derived from section 1(4) of the 1978 Act which provides:

A person who has made or agreed to make any payment in *bona fide* settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to *whether or not he himself is or ever was liable in respect of the damage*, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.²⁴ (Emphasis added)

²³ Briggs, however, suggests that a foreign judgment may also be given the conclusive effect under section 1(5) if it is registered under the Civil Jurisdiction and Judgments Act 1982 or if an action on that judgment is brought at common law. Briggs, "The International Dimension to Claims for Contribution, *Arab Monetary Fund v. Hashim*" [1995] LMCLQ 437, 441.

²⁴ In *Arab Monetary Fund v. Hashim*, The Times, 11 October 1994 (Transcript available on Lexis), Chadwick J. held that it was open to R to resist a contribution claim on the ground that D would not have been liable to P, not only (i) in circumstances in which the

This section is based upon a Law Commission's recommendation which thought it was unsatisfactory to require D who settled with P to prove his own liability in order to recover contribution from R. Three reasons were laid down:²⁵

The first is that it means turning all the usual conventions of civil litigation upside down; [D] has to call evidence that is in the possession of [P] in order to establish his liability in tort, and [R] then calls [D]'s witnesses in order to raise a doubt as to [D]'s liability. The second is that if the result of the contribution proceedings on the facts of *Stott's* case²⁶ was that the liability of [R] was established but that the liability of [D] was not, the person who made the compromise, [D], would get no contribution towards the £10,000 although he was not in fact to blame, and [R] who really was to blame would have to pay nothing at all. The third reason is that defendants might be deterred from compromising claims in which liability was in doubt if their right of contribution was thereby put at risk.

The first and second reasons can be used in the case where D, instead of opting for settlement, fights out the case to a judgment to justify giving conclusive effect to D's liability to P established by that judgment. Furthermore, these reasons can equally be used to justify giving conclusive effect to a foreign judgment as well as to an English

factual basis for P's claim gives rise to no liability in law, but also (ii) in circumstances in which D had a collateral defence to P's claim arising out of facts which it would have been for D, and not P, to establish.

²⁵ Law Com. No. 79, para. 45.

²⁶ *Stott v. West Yorkshire Roadcar Ltd.* [1971] 2 QB 651 (CA).

judgment.

In addition, there is also no difference in the objections to such conclusive effect in a settlement case and in a judgment case.

The primary objection is that such conclusive effect is unfair for R who will be deprived of an opportunity to dispute D's liability to P.

Another objection is that if D does not have to prove his liability to P in his action against R, he may collude with P in reaching a settlement. This concern was indeed a basis for the position under the Law Reform (Married Women and Tortfeasors) Act 1935. Under the latter Act, D who settled with P could only claim a contribution from another tortfeasor (R) if he proved that he himself was liable.²⁷ Section 1(4) of the 1978 Act was intended to reverse this position²⁸ while addressing the concern over a collusive settlement by requiring the settlement to be *bona fide*.²⁹ Concern over collusion is not confined to a settlement case. For D may not dispute his liability to P diligently also in legal proceedings by colluding with P until the proceedings result in a judgment.³⁰ And such a concern can be addressed without denying the conclusive effect of a judgment by requiring D's defence to be *bona fide*.

²⁷ Law Com. No.79, para. 21; *Stott v. West Yorkshire Roadcar Ltd.* [1971] 2 QB 651, 657 (CA) per Lord Denning MR.

²⁸ Per Chadwick J., *The Arab Monetary Fund v. Hashim*, 28 May 1993 (Transcript available on Lexis); "Contribution Notice Where Defendants settle with Plaintiff" [1994] Con L D 11(3) p. 30.

²⁹ R appears to bear the burden of proving that the settlement was not *bona fide*. See Law Com. No.79, para. 81(e); In *The Arab Monetary Fund v. Hashim*, Times 11 October 1994 (Transcript available on Lexis), Chadwick J. held that D was *prima facie* entitled to recover contribution from R as R did not contend that the settlement agreement had not been made *bona fide*.

³⁰ E.g. *Liberian Insurance Agency Inc. v. Mosse* [1977] 2 Lloyd's Rep. 560.

Despite all this, section 1(4) cannot provide decisive support for giving conclusive effect to a foreign judgment. This is because the third reason in the extract quoted above only applies to a settlement case. Particular importance was attached to that reason by the Law Commission. To this extent, justification is weaker for giving conclusive effect to a judgment than for giving conclusive effect to a settlement.

It must, therefore, be concluded that the comparison with related provisions such as sections 1(4) and 1(5) in the 1978 Act cannot give an unequivocal answer to the question whether D's liability to P established in P's action against D in a foreign forum is conclusive as a basis for D's contribution claim against R in England under the 1978 Act.

4.2 Conclusive effect in general of a judgment given in P's action against D in a foreign forum against R in D's action against R in England

The 1978 Act does not apply to all types of D's claim for contribution or indemnity against R. For example, a contribution claim between joint debtors is outside the scope of the 1978 Act. Besides, the 1978 Act may not have application under the English choice-of-law rules.³¹ It is, therefore, necessary to inquire what the general principle is: what conclusive effect, if any, a judgment given in P's action against D in a foreign forum has in D's action against R in England.

Furthermore, as already seen, the question whether D's liability to P established in P's action against D in a foreign forum is conclusive as a basis for D's contribution claim against R under the 1978 Act has not been settled. At any rate, that Act is totally silent

³¹ The application and scope of the Act will be considered in Chapter 4, § 5 below.

as to the question whether the facts supporting D's liability to P, as opposed to D's liability to P itself, which have been ascertained in P's action against D in a foreign forum are conclusive as a basis for D's contribution claim against R under that Act. It is, therefore, possible that the general principle will be applied to these questions as well.

This general principle is an aspect of a wider principle known as the principle of estoppel since the question can be rephrased as: whether R is estopped from disputing the judgment given in P's action against D. It is one facet of the principle of estoppel against a non-party.³² The conclusive effect of D's liability to P may be regarded as an aspect of cause-of-action estoppel since D's liability to P was the subject matter of P's action against D. On the other hand, the conclusive effect of the facts ascertained to support D's liability to P may be regarded as an aspect of issue estoppel.

4.2.1 Governing law of estoppel against a non-party

Before examining the principle of estoppel prevailing in any particular State, we must consider choice-of-law rules for determining the law governing the question what conclusive effect, if any, a judgment given in a foreign action has in England against a non-party to that foreign action.

4.2.1.1 Possible choice-of-law rules compared

The conclusive effect of a judgment given in a foreign action against a non-party to

³² The estoppel against R from disputing in P's action against R the judgment given in P's action against D would be another facet of the principle of estoppel against a non-party.

that action may be answered by applying either the law of that foreign State (judgment-State) or the *lex fori*. The advantages of each approach are the disadvantages of the other approach.

A judgment may become conclusive against a non-party in return for some opportunity afforded to that non-party to defend his interests in the action. The application of the *lex fori* to the conclusive effect of a foreign judgment may destroy this relation. Droz illustrates this point.³³ In France, for example, a judgment obtained against a principal debtor is conclusive against the surety as well, who also, therefore, has a right to defend himself in the action brought against the principal debtor, whereas neither of these rules exists under the law of the Netherlands. If a French court, in recognising a Dutch judgment against a principal debtor, treats it as conclusive against the surety, the latter would not have had the compensating advantage of defending his interests in the Dutch action. This result would be unfair for the surety.

However, one may be forgiven for taking a cautious attitude towards the application of the law of the judgment-State.³⁴ This is because the opportunities afforded by foreign rules to the non-party to defend his interests in the action in return for the conclusive effects may not be sufficient in the eyes of the *lex fori*: the non-party may be required to intervene in an inconvenient forum or he may not be permitted to fully assert his interests

³³ Droz, p 281.

³⁴ Under § 98 of the Restatement of the Law, Second, Conflict of Laws, a judgment rendered in a foreign nation will be recognized in the United States only so far as the immediate parties and the underlying cause of action are concerned. This section can be contrasted with § 94 and § 95 which provide that as regards a judgement rendered in a sister State of the United States, what issues are conclusive against what persons are to be determined by the law of the judgment-State. Scoles & Hay at § 24.37 says the limitation in § 98 on the effects of a foreign nation judgment to the immediate parties expresses a certain uneasiness about automatic recognition of foreign notions of privity.

under the procedural rule of that foreign forum.

Thus it is said that in the United States their version of *litis denuntiatio* (vouching-in) can be resorted to even when third party procedure is unavailable for lack of jurisdiction over the non-party.³⁵ This means that the decisions made under the vouching-in in an inconvenient forum may become conclusive against the non-party.

From the procedural point of view, the protection of the non-party's interest under section 57(2) of the Restatement of the Law, Second, Judgments³⁶ may not be sufficient in the eyes of the *lex fori*. It states:

If there is a conflict of interest between the indemnitee [D] and the indemnitor [R] regarding the injured person's [P's] claim against the indemnitee, so that *the indemnitor could not properly have assumed the defence of the indemnitee*, a judgment for the injured person precludes the indemnitor only with respect to issues determined in that action as to which:

- (a) there was no conflict of interest between the indemnitee and the indemnitor; and
- (b) the indemnitee conducted a defence with due diligence and reasonable prudence.

(Emphasis added.)

A conflict of interest between the indemnitee and the indemnitor with regard to its defence occurs, according to the accompanying commentary, when the injured person's claim may be upheld on different grounds, one of which is within the terms of the

³⁵ Cohn, para. 223; Comment c. to § 57 of the Restatement of the Law, Second, Judgments.

³⁶ Even if this section does not accurately reflect the law of the United States, it is quite possible that other States have a similar rule.

indemnity obligation and the other of which is not. For example, if a person insured under a conventional liability insurance policy is sued for a tortious act alleged alternatively to have been negligent and intentional, there is a conflict of interest between him and his insurer because the latter would be liable in indemnity if the act was negligent but not if it was intentional.

The effect of section 57(2) is that certain issues decided in an action by an injured person (P) against the indemnitee (D) may become conclusive against the indemnitor (R) who was not allowed to participate in the action. The protection of the indemnitor's interest under clause (b) may not be sufficient in the eyes of the *lex fori*.

The application of the *lex fori* to decide the conclusive effect of a judgment given in a foreign action against a non-party to that action can also be supported by the ease of application. The proof and determination of the law of the judgment-State regarding the question what matters in a judgment become conclusive against whom may impose difficult and expensive burdens on the party relying on the foreign judgment and the court.³⁷

On the other hand, it would be odd, under the principles of public international law, if an act of State, which includes the giving of judgments, has more effects abroad than it has in the State itself. Hence a compromise approach arises whereby the conclusive effect of a foreign judgment against a non-party is determined by the cumulative application of the *lex fori* and the law of the judgment-State so that it has only such

³⁷ Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, p. 1408; Smit, "International Res Judicata and Collateral Estoppel in the United States" 9 UCLA L Rev 44, 63.

effects as recognised by both laws.³⁸

4.2.1.2 Where the judgment comes from a Contracting State

The special provisions in the Brussels or Lugano Convention for *litis denuntiatio* in relation to Germany, Austria and Switzerland were made to compensate for the lack of third party procedure in these States. It is conceivable that some other Contracting States have both third party procedure and *litis denuntiatio* or other procedural devices that will give a judgment conclusive effect against a non-party to the action. Thus according to Cohn,³⁹ under French *assignation en declaration de jugement commun* (literally meaning "order for a declaration relating to a judgment in common"), the judgment becomes *res judicata* against a non-party not being a judgment debtor himself.

What law, then, decides the conclusive effect of a judgment given in P's action against D in a Contracting State against R in D's action against R in England?

The European Court in *Hoffmann v. Krieg* quoted the Jenard Report which says,⁴⁰ "Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given" and held that a foreign judgment which had been recognised under the Convention must in principle have the same effects in the State in which enforcement was sought as it did in the State

³⁸ The cumulative application was favoured by Advocate General Darmon in his Opinion in *Hoffmann v. Krieg*, Case 145/86 [1988] ECR 645.

³⁹ Para. 229.

⁴⁰ P. 43.

in which judgment had been given.⁴¹ But presumably neither the Jenard Report nor the European Court was contemplating the conclusive effect of a judgment against a non-party when they mentioned the authority, effectiveness or effect of a judgment. *Hoffmann v. Krieg* was a case concerning the enforcement in the Netherlands of a German judgment ordering a husband to make maintenance payments to his wife in the circumstances where a decree of divorce had been granted in the Netherlands. That decree had not been recognised in Germany. Accordingly, a question arose whether the German judgment was enforceable in the Netherlands because it remained enforceable in Germany. The ruling of the European Court as described above was given as a preliminary answer to this question.

As to the conclusive effect of a foreign judgment against a non-party, the Schlosser Report says:⁴²

The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against the surety, whereas in the Netherlands and Germany it is not.

The Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems.

It must, therefore, be concluded that there is as yet no Community-wide answer to the question what law decides the conclusive effect against R in D's action against R in a Contracting State of a judgment given in P's action against D in another Contracting State

⁴¹ Case 145/86. [1988] ECR 645, paras. 10 and 11.

⁴² Para. 191(b).

except where the judgment was rendered by the application of the CIM or the CMR or where the judgment was given in Germany, Austria, or Switzerland under *litis denuntiatio* of these States.

When recognition is sought in England, section 4(3) of the Civil Jurisdiction and Judgments Act 1982 may be relevant. It provides:

A judgment registered under this section shall, for the purposes of its enforcement, be of the same force and effect, ... as if the judgment had been originally given by the registering court and had (where relevant) been entered.

It might, therefore, be argued⁴³ that English courts are bound to decide the conclusive effect of a judgment from a Contracting State against a non-party in accordance with English law.

4.2.1.3 Where the judgment comes from a non-Contracting State

A judgment given in P's action against D under certain procedures in a non-Contracting State may have conclusive effects against R in D's action against R in that State.

Thus some States may draw certain conclusive effects from a clause known as a claims control clause. A claims control clause in an insurance contract, for example, states that

⁴³ Depending on what is comprehended by "enforcement" in this section. See Briggs, "The International Dimension to Claims for Contribution, *Arab Monetary Fund v. Hashim*" [1995] LMCLQ 437, text accompanying n. 37; Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, p. 1409.

“In the event of loss no payment shall be made without the consent of the underwriters who shall have control of all negotiations.”⁴⁴ If a contract between D and R has a claims control clause stipulating that R shall have the right to take charge of the defence in P’s action against D, certain matters in the judgment given in that action may become conclusive against R, whether or not he actually took charge of the defence, in D’s action against him in the same State.⁴⁵

Also, some States may have their version of *litis denuntiatio*. Thus D can give notice to R of P’s action against him in Japan under the Japanese version of *litis denuntiatio* (*sosho kokuchi*)⁴⁶ if R has standing to intervene to support him in that action by virtue of other provisions. Irrespective of whether or not R actually intervened, certain matters in the judgment will become conclusive against him in D’s subsequent action against him in Japan, except where he intervened too late to be allowed to take certain procedural steps as an intervener, or where he was prevented from taking steps by D’s steps, or where D did not, either intentionally or through negligence, resort to steps which R as an intervener was not allowed to take.

What law, then, decides the conclusive effect of a judgment given in P’s action against D in a foreign non-Contracting State against R in D’s action against R in England?

In *Vervaeke (Formerly Messina) v. Smith*,⁴⁷ Lord Simon said that although the balance of authority was not entirely clear, it probably favoured the view that estoppel was a matter for the *lex fori*, i.e. English law. Presumably, his Lordship did not mean to deny

⁴⁴ E.g. the claims control clause in *Vesta v. Butcher* [1989] 2 WLR 290 (HL).

⁴⁵ See Scoles & Hay, p. 255.

⁴⁶ Arts. 53 and 46 of the Japanese Code of Civil Procedure.

⁴⁷ [1983] 1 AC 145.

the following speech by Lord Reid in an earlier case, *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd (No 2)*:⁴⁸

When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. ... There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the *lex fori* but the *lex fori* ought to be developed in a manner consistent with good sense.

Lord Reid, however, acknowledged the difficulty of making sure that the issues had been determined finally and conclusively in a foreign forum so that they could not be relitigated there.⁴⁹ He cited this as one of the reasons for being cautious about creating an issue estoppel based on a foreign judgment, although he affirmed that there was no reason in principle why a foreign judgment could not create an issue estoppel.⁵⁰

Consequently, subject to the caution expressed by Lord Reid, where a judgment given in P's action against D in a non-Contracting State established certain matters finally and conclusively according to the law of that State, the question whether the matters so

⁴⁸ [1967] 1 AC 853, 919.

⁴⁹ In a related American case, *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena* (1968, DC NY) 293 F Supp 892, affd as mod. on other grounds (CA2) 433 F2d 686, cert den 403 US 905, the court said that it would not be prevented from according estoppel effect to the findings of the court of Germany as to certain issues merely because the German courts would not give such effect to them.

⁵⁰ At p. 918.

established are conclusive against R in D's action against R in England will be decided by English law.

4.2.2 English law regarding the conclusive effect of a judgment against a non-party

There are some English cases in which it was held that the decisions made in P's action against D were not conclusive against R in D's action against R.⁵¹ Among them, *Gray v. Lewis*, *Parker v. Lewis* is a 19th-century case and its vitality as a precedent may be doubted. In another case, *Liberian Insurance Agency Inc. v. Mosse*, D made no effort to deny his liability to P in a prior action by P against him in a foreign forum and consequently this case does not tell us what the position would be if D's defence were *bona fide*. However, a clear statement of law can be found in *Myers v. N. & J. Sherick Ltd.* where Goff J. said:⁵²

Counsel says ... provided the defendants [D] ... properly fight the action and lose, then the judgment will be conclusive against the firm [R] as to the defendants' liability to the plaintiff [P] and the quantum of damage. In my judgment, however, that is not so. In their claim for breach of duty, the defendants must prove their loss, and the firm, if not brought into the main action as third parties will not be bound by the judgment in it, but will be free to dispute the extent of the defendants' true liability. In particular, in my

⁵¹ *Gray v. Lewis*, *Parker v. Lewis* (1873) 8 Ch App 1035, 1059; *Myers v. N. & J. Sherick Ltd.* [1974] 1 WLR 31; *Liberian Insurance Agency Inc. v. Mosse* [1977] 2 Lloyd's Rep. 560.

⁵² At p. 35.

view, it will be open to the firm to argue afresh the point taken in the defence to the main action that the plaintiff is not entitled to sue on the implied covenants.

But this statement was made in passing as a collateral issue in deciding whether or not to allow third party procedure. Furthermore, it does not reflect the recent developments of the principles of estoppel in English law which took place after this case was decided. It may, therefore, be better to examine the recent developments to see whether they are such as will demand an alteration to this statement.

In *The Sennar (No. 2)*,⁵³ a case with international elements, the House of Lords enunciated three requirements that must be satisfied in order to create an issue estoppel. The second requirement was that the parties (or their privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same.⁵⁴ Is, then, R privy to D so that the judgment given in P's action against D becomes conclusive against R in D's action against him?

Some idea of what privies mean may be acquired from *House of Spring Gardens Ltd.*

v. *Waite*.⁵⁵ The first and second defendants in Ireland applied there to set aside the

⁵³ [1985] 1 WLR 490 (HL).

⁵⁴ However, there are cases in which a non-party to a previous action was allowed to raise an estoppel against a party to that action, e.g. the cases where the judgment in an action against codefendants was relied upon as creating an estoppel in a subsequent action between the codefendants as to their liability *inter se*. See *North West Water Ltd v. Binnie and Partners (a firm)* [1990] 3 All ER 547; *Ladkarn Holdings v. Summit Property Developments* (1991) 32 Con LR 66, *c.f. Wall v. Radford* [1991] 2 All E.R. 741; *Department of Education and Science v. Taylor & Others* [1992] IRLR 308. See also Andrews, p. 505. These cases are irrelevant to the question with which we are presently concerned, viz. whether R is estopped by the decisions made in P's action against D, to which he was not a party.

⁵⁵ [1990] 3 WLR 347.

judgment against them alleging it had been obtained by fraud. The Irish court, however, held that there had been no fraud. Subsequently, the plaintiff of the Irish action brought a claim in England against all three defendants of the Irish Action in respect of the sum awarded by the Irish court. The English Court of Appeal held that the third defendant in the Irish court, who did not join in the Irish proceedings to set aside the judgment, was also estopped from alleging that the judgment was obtained by fraud. Since that judgment was a judgment against the defendants jointly and severally, the third defendant was well aware of the proceedings for setting it aside, and accordingly he was regarded as privy to the first and second defendants.

This case may suggest that R is privy to D for the purpose of P's subsequent action against him. However, it has no bearing on the question whether R is privy to D for the purpose of D's subsequent action against him because this case was not concerned with the question whether the third defendant was allowed to allege that the Irish judgment had been obtained by fraud if the first and second defendants paid to the plaintiff and then claimed contribution from the third defendant. It is possible that R is privy to D for the purpose of P's action against him but that he is not privy to D for the purpose of D's action against him.⁵⁶ In P's action against D, R is on the same side as D as against P since they both benefit if D is held not to be liable to P. This may, in appropriate cases, justify making the judgment given in P's action against D conclusive against R in P's action against R. But D and R, in their relationships *inter se*, have conflicting interests: D, if held liable to P, will claim contribution from R.

⁵⁶ *Halsbury's Laws of England*, 4th ed., Reissue vol. 16, para. 995 takes the view that the indemnitor is not privy to the indemnitee to whom he undertook to give indemnity by contract and that a surety is not privy to the principal debtor.

In a separate but related development, the recent authorities have sometimes held that it is an abuse of process of the court to seek to relitigate the issue in a second action which has been decided in the first action. The power to strike out relitigation on this ground concerns the inherent power which any court of justice possesses to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless bring the administration of justice into disrepute among right-thinking people.⁵⁷ It has often been relied on as an alternative ground to the principle of estoppel. But it can be applied in wider circumstances than the principle of estoppel.⁵⁸ Then, even if R is not estopped in D's action against him from relitigating the decisions made in P's action against D, does such relitigation constitute an abuse of the process?

The previous cases in which relitigation was struck out as being an abuse of process were either cases in which a person who was a party to the prior action attempted to relitigate the issues decided in that action⁵⁹ or cases in which a person who was in the same position as a party to the prior action attempted to litigate the issue decided in that action in a subsequent action brought by or against the other party to the prior action.⁶⁰ An example of the latter type of the case is *House of Spring Gardens Ltd. v. Waite* in which an abuse of process was relied upon as an alternative ground to the principle of

⁵⁷ Per Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police*, [1982] AC 529, 536.

⁵⁸ Per Drake J. in *North West Water Ltd v. Binnie and Partners (a firm)* [1990] 3 All ER 547.

⁵⁹ *Stephenson v. Garrett* [1898] 1 QB 677 (CA); *Hunter v. Chief Constable of West Midlands Police* [1982] AC 529

⁶⁰ *Ashmore v. British Coal Corp* [1990] 2 QB 338 (CA); *House of Spring Gardens Ltd. v. Waite* [1990] 3 WLR 347 (CA).

estoppel. Another example of this type is *Ashmore v. British Coal Corp.*⁶¹ where issues of fact had been litigated exhaustively in sample cases which had been selected from numerous similar claims. It was held to be an abuse of process for a litigant, who had ample opportunity to put forward her claim for selection but did not do so, to relitigate all the issues of fact on substantially the same evidence.

For R to dispute in D's action against him the decisions made in P's action against D is neither of these types. Therefore, in the absence of facts which would otherwise bring the administration of justice into disrepute, for R to do so would not be an abuse of process.

The suggestions in relation to the principle of estoppel and striking out as an abuse of process are made tentatively here not least because the precise definition of privies has not been formulated⁶² and because the categories of abuse of process are not closed.⁶³ Nevertheless it would seem unlikely that R is precluded by findings as to which he had no opportunity to dispute and, accordingly, it is submitted that the position stated by Goff J. in *Myers v. N. & J. Sherick Ltd.* has not been altered by reason of later developments.

⁶¹ [1990] 2 QB 338 (CA).

⁶² See *Kirin-Amgen Inc v. Boehringer Mannheim GmbH*, 31 July 1996 (CA) (Transcript available on Lexis); *House of Spring Gardens Ltd. v. Waite and Others* [1990] 3 WLR 347, 356 (CA).

⁶³ *House of Spring Gardens Ltd. v. Waite* [1990] 3 WLR 347, 358 (CA); *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, 536, per Lord Diplock.

CHAPTER 3

Third party procedure in England as a means of avoiding separate trials of P's claim against D and D's claim against R

It will be recalled that in the present Part we are dealing with the obstacle to D's recovery from R due to the determination of issues in D's claim against R independently from the determination of the same issues in P's claim against D. In Chapter 2 we considered one means of avoiding an independent trial, namely the recognition of the matters established in P's action against D in a foreign forum as conclusive against R in D's action against R in England. In the present chapter we are going to consider another means of avoiding an independent trial, namely the consolidated trial of P's claim against D and D's claim against R in one action in England by third party procedure. Third party procedure ensures that the same issues arising in the original proceedings and in third party proceedings are determined uniformly.

In the following discussion, Sub-Chapter 1 expounds the merits and drawbacks of third party procedure. In the three sub-chapters that follow, we will analyse English third party procedure in the international context from three different angles. In Sub-Chapter 2, we will examine how widely English third party procedure is available by clarifying its requirements. The third and fourth sub-chapters deal with external impacts on English third party procedure. In Sub-Chapter 3, we will examine how English third party procedure is hindered by *lis alibi pendens*, foreign jurisdiction agreements or arbitration agreements. And finally in Sub-Chapter 4, we will consider whether an English court can issue an antisuit injunction to eliminate hindrances from foreign proceedings to English third party procedure.

Sub-Chapter 1

Merits and Drawbacks of English Third Party Procedure

English third party procedure has the following merits and drawbacks. Presumably, these characters, with minor modifications, are shared by the third party procedure of other States.

1 Merits of third party procedure

The party who benefits most from third party procedure is the defendant. There are three advantages he can enjoy.

First and foremost, third party procedure ensures consistent decisions of the original claim and third party claim. It, therefore, enables the defendant to avoid suffering from inconsistent determinations of the same issues that may arise out of separate trials of the two claims.¹ English courts have a flexible power under third party procedure to ensure consistent decisions by giving directions “as to the extent to which the third party is to be bound by any judgment or decision in the action.”² The flexibility of this power is illustrated by the suggestion of the Supreme Court Practice that in an appropriate case the

¹ Ord. 16, r. 1(1)(c) makes this very effect a ground for third party procedure. Other grounds for third party procedure provided in Ord. 16, r. 1(1) do not expressly state this effect but it is implicit in all of them. See O’Hare and Hill, p. 295.

² Ord. 16, r. 4.

court can direct the same issues arising under all contracts in a chain transaction to be determined as between the first party in the chain, who started proceedings as the plaintiff, and the last party in the chain, who was brought in as a third party, so that their determinations will be conclusive against the other parties in the chain, who were the defendant or prior third parties.³

This first merit is not only often regarded as being more important than two other merits,⁴ but is also the reason why third party procedure is the subject of discussion in this thesis. However, two other merits are also anticipated, often in conjunction with the first merit, when third party procedure is resorted to. Those two merits distinguish third party procedure from *litis demociatio*. In order also to keep the first merit in perspective, these other merits must not be overlooked.

The second merit of third party procedure is that by dispensing with the trial of duplicate issues, it enables two claims to be resolved less expensively and more expeditiously than trying them separately in two actions. Furthermore, needless litigation may be avoided since a settlement between all three parties may well result.

The third merit of third party procedure is that it eliminates or reduces the time lapse while the non-party's liability to the defendant is explored after the latter is held liable to the plaintiff in the original action. During the time lapse, which may be long,⁵ the defendant would be out of pocket. This is especially undesirable in cases where large

³ Supreme Court Practice 1995, para.16/4/3.

⁴ To the same effect in relation to the US impleader, the US equivalent to English third party procedure, see "Symposium on Ancillary Jurisdiction in Third Party Practice --- Rule 14" 51 (1956-57) Northwestern University Law Review 354, 366.

⁵ See *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v. Birkart Johann Internationale Spedition GmbH & Co. K.G.* [1988] 1 Lloyd's Rep. 487, 495 (CA).

sums are involved.⁶

It is suggested that English courts will generally value the merits of third party procedure highly. This attitude is most symbolically indicated by *SNIAS*⁷ in which the Privy Council issued an antisuit injunction to restrain foreign proceedings in order to bring domestic third party procedure into operation. The facts and ruling of this case will be examined in sub-Chapter 4.

2 Drawbacks of third party procedure

In contrast to the defendant who benefits from third party procedure, the plaintiff and the non-party may be disadvantaged by having their disputes tried under third party procedure rather than in separate actions.

Although if the plaintiff's claim against the defendant and the defendant's claim against the third party are taken together, third party procedure saves time and expense in aggregate, if each claim is looked at in isolation, trial under third party procedure takes more time and expense than a separate trial because the trial is complicated by the involvement of the other claim.

The defendant's claim against the third party may be of no concern to the plaintiff. He would, therefore, like to have his claim against the defendant decided speedily by a separate trial.

A contrast can be made with the joinder of defendants (joinder of parties),⁸ a procedure

⁶ *Per* Goff J. in *Myers v. N. & J. Sherick Ltd.* [1974] 1 WLR 31, 36.

⁷ [1987] AC 871.

⁸ Ord. 15, r. 4.

by which the plaintiff seeks to join a non-party as an additional defendant. The plaintiff does so of his own volition,⁹ accepting the accompanying delay and additional expenses. But in third party procedure, it is the defendant who seeks to join a non-party to the action. The reason why the plaintiff brought an action only against the defendant may be that he wanted a speedy decision of his claim against the defendant. Especially where P brought an action against D, seeking to hold D vicariously liable for the wrong caused by R, he may have chosen D instead of R as the defendant of his action because he was expecting to receive compensation more speedily by holding D vicariously liable than claiming against R. If, however, D is allowed to join R by third party procedure, P may be burdened with the delay and expense and the whole purpose of P's claim may be defeated.

But it must be noted that the delay and expense for the plaintiff arising from third party procedure can be alleviated in appropriate cases without disallowing third party procedure by directing that the third party claim will be determined after the original claim.¹⁰ Then, the only remaining disadvantage for the plaintiff is that he has to deal not only with the defendant but also with the third party with respect to his own claim against the defendant.

Turning to the third party's position, the conclusive effect is not by itself unfair to a third party if he is given sufficient opportunities to defend his interests in the third party procedure. English courts can give a third party leave to defend the action, either alone

⁹ However, the plaintiff may seek to join a non-party under the joinder of defendants because the defendant will in any event join the non-party under third party procedure. See e.g. *Kinnear and others v. Falconfilms NV and others (Hospital Ruber Internacional and another, third parties)* [1994] 3 All ER 42.

¹⁰ *Per* Goff J. in *Myers v. N. & J. Sherick Ltd.* [1974] 1 WLR 31, 36.

or jointly with the defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just.¹¹

Moreover, a third party retains the same rights of defence as if he were sued by the defendant in a separate action in respect of the issues which are not the subject of dispute between the plaintiff and the defendant.¹²

There are, however, issues in the plaintiff's claim against the defendant which are of no concern to the third party. Having to get involved in their disputes under third party procedure costs him time and expenses. He would, therefore, like to have the defendant's claim against him tried separately while retaining his right to dispute the matters established in the plaintiff's claim against the defendant.¹³

¹¹ Ord. 16, r. 4(4).

¹² Ord. 16, r. 1(3).

¹³ A "no action" clause is frequently found in insurance policies which forbids the insured (D) to sue his insurer (R) before he is held liable to the victim of his tort (P).

Sub-Chapter 2

Availability of English Third Party Procedure in the International Context

1 Purposes of this sub-chapter

Where P's proceedings against D are pending in England, if D cannot bring third party proceedings against R, D must bring an action against R in a foreign forum. And if D's liability to P or other matters have to be established in that forum independently from their determinations in England, inconsistent determinations may arise. As a consequence he may not be able to obtain satisfactory recovery. Accordingly, the more widely English third party procedure is available, the less likely D will face an obstacle to his recovery from R.

Thus the purpose of this sub-chapter is to examine the availability of English third party procedure in the international context. We will first examine the jurisdictional and procedural requirements for third party procedure. Then we will trace the historical developments of jurisdictional rules and procedural rules concerning third party procedure and consider what pointer the history gives to the interpretation of the present law.

2 Requirements for third party procedure

Third party procedure is available if both procedural requirements and, except in

purely domestic cases, jurisdictional requirements are satisfied. We will examine these requirements in turn and clarify the relationships between them.

2.1 Procedural requirements

The procedural requirements for third party procedure in England are provided by Order 16 of the Rules of Supreme Court (RSC). In addition, for a recourse claim arising under the CIM or the CMR, there are provisions in each of them relevant to third party procedure. We will start the analysis with the latter provisions.

2.1.1 Recourse claims under the CIM or CMR

Title VI of the CIM and Chapter VI of the CMR lay down the provisions concerning the relations between successive carriers. They include the provisions dealing with a recourse claim by a carrier (D), who has paid compensation to the cargo interest (P) for the loss or damage, against the other carrier (R) who is responsible for the loss or damage.

Thus Article 62(5) of the CIM provides:

Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled on the basis of the contract of carriage.

It is clear from this provision that third party procedure is not available for a recourse claim under the CIM. This provision cannot be derogated from even if the relevant

carriers otherwise agree.¹

The CMR is not so unequivocal. Article 37 provides:

A carrier who *has paid* compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, ... from the other carriers who have taken part in the carriage ... (Emphasis added.)

Master Elton in *William Tatton & Co. Ltd. v. Ferrymasters Ltd.*² set aside the third party notice holding that under this Article compensation must be paid first before a recourse claim could be made against another carrier. Brandon L.J. in *Cummins Engine Co. Ltd. v. Davis Freight Forwarding (Hull) Ltd. And Others*, also relied on this provision and said:³

CMR appears to contemplate that these two kinds of legal proceedings will be separate from one another, the first and main action being followed by a second and consequential action.

But he immediately continued:

It seems to me, however, that, where the procedure of the Court in which the first and main action is brought allows claims by a defendant for contribution or indemnity to be

¹ Art. 64.

² (1974) 9 ETL 167, 198.

³ [1981] 1 WLR 1363, 1371.

added to the main action by way of third party proceedings, as is the situation in the present case, there is no good reason in principle why what is contemplated by CMR as the second and consequential action should not be brought by way of such third party proceedings....

This reasoning seems to contradict the principle of law under which the rules of specific application (CMR) should override the rules of general application (Order 16). Nonetheless, this opinion was supported by Bingham L.J. in *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v. Birkart Johann Internationale Spedition GmbH & Co. K.G.*⁴

2.1.2 Third party procedure under Order 16

The procedural requirements for third party procedure under Order 16 consist of the heads of available third party procedure in rule 1(1) and the discretion under rule 2 and rule 4(3)(c).

2.1.2.1 Heads of available third party procedure in Order 16, rule 1(1)

Order 16, rule 1(1) enumerates the type of cases in which third party procedure is available. Rule 1(1)(a) provides that third party procedure is available for a claim for indemnity or contribution. Rule 1(1)(b)⁵ provides that it is also available for claims by the

⁴ [1988] 1 Lloyd's Rep. 487 (CA). The fact that his case concerned a contribution claim between co-defendants under Ord. 16, r. 8 does not affect the present discussion.

⁵ For the interpretation of a similar provision contained in the rule for a contribution claim between co-defendants (now Ord. 16, r. 8), see *Burford v. Clifford* [1932] 2 Ch 122 (CA).

defendant against a non-party for any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff. Rule 1(1)(c) provides for an even wider scope: third party procedure is available for a claim to have any question or issue arising out of the plaintiff's claim decided not only as between the plaintiff and defendant but also as between either or both of them and a non-party. This last rule is so wide that there is a suggestion⁶ that third party procedure is available even if the defendant is claiming no remedy against the proposed third party. Where, for example, an action is brought for an injunction to restrain a builder from continuing with the building work, the builder can, according to this suggestion, bring third party proceedings against his customer who would claim damages for breach of contract against him if he stops the building work.

It follows that where, in the paradigm scenario described in Part 1, P brings an action against D, D's third party proceedings against R would, in most cases, if not all, fall within one or more heads in Order 16, rule 1(1).⁷

2.1.2.2 Discretion under Order 16, rules 2 and 4(3)(c)

Even if a case falls within one or more heads in Order 16, rule 1(1), English courts have discretion to disallow or terminate third party procedure. There are two stages at which they can exercise discretion. First, they have discretion under rule 2 not to allow a third party notice to issue. Secondly, they have discretion under rule 4(3)(c) to terminate

⁶ O'Hare & Hill, p. 295.

⁷ E.g. *Standard Securities Ltd. v. Hubbard* [1967] Ch 1056. See also O'Hare & Hill, p. 295.

third party procedure by dismissing the defendant's summons for third party directions.

In the exercise of the discretion, the merits and drawbacks of third party procedure are evaluated on the facts of individual cases.

The fundamental question would be whether the defendant's interests in securing consistent decisions, in saving time and expense, and in avoiding a time lapse between the two judgments should outweigh the plaintiff's interest in speedy determination of his own claim against the defendant⁸ and the proposed third party's interest in defending the defendant's claim against him separately. Added weight will be given to the defendant's interests in saving time and expense if, in the event third party procedure is not allowed, he will have to claim against the proposed third party abroad. Added weight will also be given to the proposed third party's interest in defending the defendant's claim against him separately if, in the event third party procedure is allowed in England, he will have to attend the proceedings in England from abroad.

The court is not, however, confined to these considerations.⁹ Thus where the proposed third party does not have sufficient opportunities to prepare his defence by the hearing date of the original action, third party proceedings may be disallowed to avoid subjecting the proposed third party to injustice.¹⁰ Some other considerations only arise in cases with international elements, e.g. the residence of the witnesses, the location of the evidence, the governing law, and the possibility of there being a *lis alibi pendens*.

Since there are many relevant factors to be considered, there is ample leeway in the discretion.

⁸ Supreme Court Practice 1995, paras.16/2/3, 16/4/5.

⁹ Supreme Court Practice 1995, para.16/4/7.

¹⁰ Supreme Court Practice 1995, paras.16/4/7 and 16/4/9.

2.2 Jurisdictional requirements

To support third party procedure, the court must have jurisdiction over both the original claim and the third party claim. Jurisdiction over the third party claim does not have to be founded upon the same jurisdictional rule as jurisdiction over the original claim.

Any jurisdictional rule contained in Order 11, rule 1(1) or the Brussels or Lugano Convention that can found jurisdiction over the original claim is capable of founding jurisdiction over a third party claim.¹¹

Thus Order 11, rule 1(1)(d)(iii) provides for jurisdiction over a claim for relief in respect of the breach of a contract which is governed by English law. This provision can be relied upon to found jurisdiction over the original claim and successive third party claims against the parties to string contracts incorporating the same terms and conditions of a trade association which select English law as the governing law.¹²

As for the jurisdictional rules in the Convention, in *Santa Fe v. Gates*,¹³ Ognall J. held, with some hesitation, that Article 5(3) of the Brussels Convention, which provides for jurisdiction in matters “relating to” tort, can be relied upon to found jurisdiction over a claim by one tortfeasor against another tortfeasor for contribution under the Civil

¹¹ Ord. 16, r. 3(4) provides that Ord. 11 shall apply in relation to a third party notice without specifying a particular head of Ord. 11.

¹² *Eastern Counties Farmers, Ltd. v. J. & J. Cunningham, Ltd.; Grimsdale & Sons, Ltd. (Third Party); Holland Colombo Trading Society, Ltd. (Fourth Party)* [1962] 1 Lloyd's Rep. 261 (CA).

¹³ Transcript for the Court of Appeal judgment on 16 January 1991 is available on Lexis.

Liability (Contribution) Act 1978.¹⁴ In this case the contribution claim was brought in a separate action from the action brought by the victim of the tort against the tortfeasor who brought the contribution claim. If Ognall J. is correct,¹⁵ Article 5(3) of the Convention should also be able to found jurisdiction over a contribution claim made as a third party claim.

In *Engdiv v. Trentham*,¹⁶ a person, having paid compensation for breach of a contract, brought an action claiming contribution against another person in breach of a separate but related contract. The Scottish Court of Session held that the claim fell within Article 5(1) of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 which dealt with intra-United Kingdom jurisdiction. Article 5(1) confers jurisdiction in matters “relating to” a contract on the courts for the place of performance of the obligation in question. If this interpretation applies to Article 5(1) of the Convention, it should also be able to found jurisdiction over a contribution claim made as a third party claim.

However, of particular importance in relation to third party procedure are Order 11, rule 1(1)(c)¹⁷ and Article 6(2) and the first paragraph of Article 10 of the Convention.

¹⁴ The 1978 Act does not provide for jurisdiction over a contribution claim. See *R.A. Lister Lid. v. Thomvon (Shipping)* [1987] 1 WLR 1614, 1622 approved by *The Kapetan Georgis* [1988] 1 Lloyd's Rep. 352.

¹⁵ On appeal, the Court of Appeal did not decide whether this ruling was correct but held that if it was correct, then the relevant acts or events which constituted a “harmful event” in relation to the victim’s claims against the tortfeasors were also the “harmful event” for the purpose of the claim for contribution.

¹⁶ [1990] SLT 617.

¹⁷ Ord. 11, r. 1(1)(c) was made applicable in relation to third party proceedings by the proviso to Ord. 16, r. 3 (4).

They provide for jurisdictional grounds catering specifically for third party proceedings.¹⁸

Article 6(2) provides:

A person domiciled in a Contracting State may also be sued ...

as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

The first paragraph of Article 10 provides:

In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party had brought against the insured.

Article 6(2) is a provision of general application while the first paragraph of Article 10 is a special provision concerning liability insurance. Where, for example, an injured person in an accident brought an action against the person who caused the accident, the latter may be able to rely on the first paragraph of Article 10 to found jurisdiction over the third party proceedings he seeks to bring against his insurer for indemnity.¹⁹

Two points of difference between Article 6(2) and the first paragraph of Article 10 can

¹⁸ Sometime jurisdictional bases which are designed to allow courts to hear related claims are referred to as "accessory jurisdiction," a term also embracing jurisdiction specified in Arts. 6(1) and 6(3) of the Convention. See e.g. Rose (ed) *Restitution and the Conflict of Laws* p.40.

¹⁹ The Jenard Report at p. 32 says that this provision is of particular importance in relation to road accidents.

be observed.

First, unlike Article 6(2), the first paragraph of Article 10 does not prohibit instituting a third party claim against the insurer solely with the object of removing him from the jurisdiction of the court which would otherwise be competent in his case. This is presumably a reflection of the Convention's preference for the insured, who is assumed to be in a weaker position than the insurer.

Secondly, while Article 6 states that it applies where the proposed third party is “[a] person domiciled in a Contracting State,” the first paragraph of Article 10 is silent on this point. But Article 8 limits its scope to the case where an insurer is domiciled in a Contracting State. Article 10 is in the same section as Article 8 and they are both concerned with jurisdiction over an insurer. It is, therefore, suggested that the application of the first paragraph of Article 10 should also be limited to cases where the insurer who is proposed as a third party is domiciled in a Contracting State.

If the proposed third party is not domiciled in any Contracting State or the subject matter of the action is not in a civil or commercial matter as defined by Article 1 of the Convention, jurisdiction over third party proceedings has to be provided by the traditional jurisdictional rules such as Order 11, rule 1(1)(c) which reads in material part:

... service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ ...

the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;

Special consideration must be given where a cargo interest (P) brings an action in

England against the carrier (D) of his cargo and the latter is seeking to bring third party proceedings against another carrier (R) who took part in the same carriage operation. It was held in *Cummins Engine*,²⁰ as seen in § 2.1.1, above, that the CMR did not preclude third party procedure under Order 16, rule 1. The court in that case also decided the jurisdictional point.²¹ The carrier sued by the cargo interest sought to rely on Article 39(2) of the CMR to found jurisdiction of the English court over the third party proceedings against another carrier. Article 39 (2) reads in pertinent part:

A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made...

The defendant carrier contended that the expression "the carriers concerned" included not only the carrier against whom a recourse claim was being made, but also the carrier who was making a recourse claim. The court rejected this submission holding that the expression meant, and meant only, the carriers against whom a recourse claim was being made.²² Brandon L.J. further held that although Article 39(2) said that a carrier "may" make his claim before the competent court of the country specified therein, "may" should be interpreted as meaning "must." Eveleigh L.J. was not prepared to say that "may" was

²⁰ [1981] 1 WLR 1363.

²¹ Approved in *Arctic Electronics Co. (U.K.) v. McGregor Sea and Air Services* [1985] 2 Lloyd's Rep. 510.

²² Followed in *Arctic Electronics* [1985] 2 Lloyd's Rep. 510, 513.

the equivalent of "must," since that article, unlike Article 31, did not contain the words "and in no other courts or tribunals." In a later case, *Arctic Electronics*,²³ Hobhouse J. held that Article 39(2), to the exclusion of other jurisdictional basis such as those provided in Order 11, defined the scope of the jurisdiction which was permitted to a State party to the CMR to assume.²⁴ If Brandon L.J. and Hobhouse J. were right, a carrier cannot bring third party proceedings to claim recourse from another carrier who took part in the same carriage operation unless the original action is brought in the State in which the carrier against whom the recourse claim is made is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage with the carrier claiming recourse was made.²⁵

In the following discussions, we will first consider the relationship between the jurisdictional rules of the Convention and the procedural rules of the forum. Then we will analyse the scope of Article 6(2) of the Convention and Order 11, rule 1(1)(c) in turn.

2.2.1 Relationship between the jurisdictional rules of the Convention and the procedural rules of the forum

2.2.1.1 Applicability of procedural rules

²³ [1985] 2 Lloyd's Rep. 510.

²⁴ At p. 514.

²⁵ O'Connor L.J. in *Cummins Engine* said it was regrettable that Article 39(2) could not be construed to consolidate the proceedings for the original claim and the recourse claim in England. However, for the purpose of avoiding the risk of inconsistent judgments, as Brandon L.J. pointed out, it was open to the defendant carrier to give notice of the original action persuant to Article 39(1), the provision concerning *litis denunciatio*.

The first paragraph of Article 10 of the Convention provides that the insured can bring in the insurer as a third party if the *lex fori* so permits. The reference of the *lex fori* in this context would be to the procedural rules regarding the admissibility of an insured's third party proceedings against his insurer. Thus if an injured person is suing the person who allegedly committed the offense in a French criminal court as *partie civile* (jurisdiction being founded by, for example, Article 5(4) of the Convention), the first paragraph of Article 10 cannot be invoked by the alleged offender to bring third party proceedings against his insurer on a liability insurance policy, because according to French law an insurer or other third party cannot be brought into such an action.²⁶

Where the case comes under Article 6(2), the applicability of the procedural rules of the forum is not expressly stated in the provision. But the Schlosser Report says.²⁷

... the provisions already existing in, or which may in future be introduced into, the legal systems of the new Member States with reference to the joining of third parties in legal proceedings, remain unaffected by the 1968 Convention.

This view was echoed by the European Court in *Kongress Agentur Hagen GmbH v. Zeehaghe BV*²⁸ which held that the Convention did not have the object of unifying procedural rules.²⁹

That being so, also in cases where jurisdiction over third party proceedings is founded

²⁶ Droz, p.87, para.120.

²⁷ (1979) OJ C.59/71, para.135.

²⁸ Case 365/88 [1990] 1 ECR 1845.

²⁹ Para. 17.

by other provisions of the Convention than the first paragraph of Article 10 or Article 6(2), it is suggested that the procedural rules of the forum will be applied to determine the admissibility of third party proceedings.

However, this apparently self-evident principle was qualified by the European Court in *Hagen* which said:³⁰

The national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings.

Although this passage was made in relation to Article 6(2), there is no reason why it should be restricted to the cases arising under Article 6(2). The effectiveness of the Convention should not be impaired by the procedural rules of the forum also in cases where jurisdiction over third party proceedings is founded by other provisions of the Convention.

The meaning of the proviso contained in this passage (hereafter “the *Hagen* proviso”) will be considered below in two parts.

2.2.1.1.1 Rule that requires leave to bring third party proceedings to be refused on the ground that the proposed third party is resident or domiciled in another

³⁰ Para.22.

Contracting State

The *Hagen* proviso gives an example of the procedural rules that impaire the effectiveness of the Convention: a rule that requires leave to bring an action on the warranty or guarantee to be refused on the ground that the proposed third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings. The meaning of this example requires some exploration.

Whether third party proceedings can be brought against a non-party who resides or is domiciled in a Contracting State other than the forum State is a question that has both jurisdictional and procedural aspects. If a procedural rule of the forum does not allow third party procedure on the sole ground that the proposed third party resides or is domiciled in another Contracting State, that rule is answering the jurisdictional aspect of the question. Such a procedural rule would, therefore, impair the effectiveness of the Convention. Accordingly, the example stated in the *Hagen* proviso should be understood to include the procedural rule that does not allow third party procedure on the sole ground that the proposed third party resides or is domiciled in another Contracting State.³¹

Then, should the example in the *Hagen* proviso be understood to include also exercising discretion to disallow third party proceedings by taking into account the proposed third party's residence or domicile abroad?³² In the context of the discretion under English Order 16, rules 2 and 4(3)(c), the fact that the proposed third party resides or is domiciled in another Contracting State would increase the level of inconvenience

³¹ See also the opinion of Advocate General Lenz in *Hagen*, para. 31.

³² Advocate General Lenz was contemplating this wider scope of preclusion: para.32.

associated with travelling and communication which, on the one hand, the proposed third party would incur if third party procedure goes ahead in England and, on the other hand, the defendant would incur if third party procedure is not allowed in England and he has to bring a separate action against the proposed third party in the latter's State. In the first place, it is doubtful whether that the inconvenience of third party procedure to the proposed third party can be properly gauged by disregarding the fact that he resides or is domiciled abroad. Secondly, even assuming that it is possible to do so, if the defendant's interest in saving time and expense of duplicate trials is given additional weight by the increased level of inconvenience he would incur in the event third party procedure is not allowed, to disregard only the increase in the level of inconvenience to the proposed third party would distort the exercise of discretion. It is, therefore, submitted that neither the increase in the level of inconvenience to the defendant nor the increase in the level of inconvenience to the proposed third party by the proposed third party's residence or domicile abroad should be disregarded in the exercise of discretion.

If this conclusion is correct, the example stated in the *Hagen* proviso would have little significance because there are presumably not many procedural rules that do not allow third party procedure on the sole ground that the proposed third party resides or is domiciled abroad.

2.2.1.1.2 Rules that impair the effectiveness of the Convention

The *Hagen* proviso generally precludes the application of procedural rules that impair the effectiveness of the Convention. It is, however, difficult to see what procedural rules, apart from the example given in the proviso, would impair the effectiveness of the

Convention.

The *Hagen* case was referred to the European Court from the Netherlands. The Dutch court did not allow third party procedure on two grounds. First, the proposed third party was not domiciled in the Netherlands. Secondly, if the proposed third party had been joined as a third party, the decision in the original proceedings would have been delayed.³³ Whether the first ground is permitted to be relied upon depends upon the discussion in § 2.2.1.1.1 above concerning the example in the *Hagen* proviso. Whether the second ground falls within the proviso is not clear since the European Court did not apply the proviso to the facts of the referred case.

The European Court devised the *Hagen* proviso by deriving an inspiration³⁴ from the decision in *Duijnstee v. Goderbauer*³⁵ and *Hoffmann v. Krieg*³⁶ earlier cases which were concerned with the relationships of the Convention with the procedural rules of the forum. In these cases it was held that "the Convention [overrode] national provisions which [were] incompatible with it."³⁷

In *Duijnstee* it was held that Article 19 of the Convention required the court of a Contracting State to declare of its own motion that it had no jurisdiction whenever it found that a court of another Contracting State had exclusive jurisdiction under Article 16 of the Convention, even if it was sitting as an appeal court which, under its procedural rules, could review only the grounds raised by the parties and the parties did not plead the

³³ Per Advocate General Lenz, para. 30.

³⁴ Para.20. See also Opinion of Advocate General Lenz para.29.

³⁵ Case 288/82 [1983] ECR 3663.

³⁶ Case 145/86 [1988] ECR 645.

³⁷ *Duijnstee*, Case 288/82 [1983] ECR 3663, para. 14.

jurisdictional point.

In *Hoffmann*, it was held that after the expiry of the time-limit for appeal against the enforcement order laid down by the second paragraph of Article 36 of the Convention, the court must dismiss as inadmissible an appeal against the execution of a foreign judgment lodged pursuant to the procedural rules of the forum by the person who could have appealed against the enforcement order on the same grounds.

While specific procedural rules were at issue in these cases, the *Hagen* proviso makes it necessary to find out which rules on third party procedure impair the effectiveness of the Convention.

Rules on third party procedure can be divided into two categories: rules concerning the availability of third party procedure and rules laying down the incidental matters of third party procedure. To take the English procedural rules as an example, Order 16, rule 1(1) which enumerates the type of cases in which third party procedure is available and Order 16, rules 2 and 4(3)(c) which confer discretionary power on the courts to disallow or terminate third party procedure belong to the first category. Also such rules of case law as the rule which does not allow third party proceedings to be brought against the defendant's insurers if the original action for personal injuries caused in a road accident is tried by jury³⁸ belong to the first category. To the second category belong many provisions in Order 16, rules 1-7 and 10, which include the provisions concerning the issue, service and acknowledgment of the notice of third party proceedings, the form of such notice, and the directions to be given by the court in third party procedure.

There can be no doubt that the procedural rules belonging to the second category do

³⁸ *Gowar v. Hales* [1928] 1 KB 191; *Jones v. Birch Bros. Ltd.* [1933] 2 KB 597.

not impair the effectiveness of the Convention and accordingly, are applicable. The question is, therefore, what rules among those belonging to the first category would, if applied, impair the effectiveness of the Convention. The first category can be further divided into two types. The first type is the rules which directly address the availability of third party procedure. For example, the rules in Order 16, rule 1(1) are of this type. The second type is the rules that indirectly affect the availability of third party procedure such as the rules providing for the capacity in which, the purpose for which and the point in the proceedings at which a non-party can be joined as a third party. Thus if the proposed third party lacks the necessary capacity as a third party, third party procedure will not be allowed.

If “the effectiveness of the Convention” refers to the function of the Convention to support third party procedure by providing jurisdiction over third party proceedings, the application of the rules of the first type may be regarded as impairing the effectiveness of the Convention since those rules may not allow third party procedure in cases where there are jurisdictional grounds in the Convention which provide jurisdiction over the third party proceedings. But if all the rules of the first type are regarded as impairing the effectiveness of the Convention, Order 16, rule 1(1) cannot be applied. Such a consequence would change the nature of the *Hagen* proviso from an exception to the rule.

On the other hand, the Convention is silent concerning the issues dealt with by the rules of the second type. Therefore, these rules must be applied at any event.³⁹ However, inasmuch as they affect, albeit indirectly, the availability of third party procedure, they may impair the effectiveness of the Convention in the same way as the rules of the first

³⁹ Schlosser Report, para 135; Briggs & Rees, para.2.10.9.3.

type. Moreover, there is no bright line between the first and second type. For example, the rule providing for the purpose for which third party procedure is available can be classified as either type.

It must, therefore, be concluded that what procedural rules would, if applied, impair the effectiveness of the Convention is not clear.

There is, however, an English case which touched on the meaning of the *Hagen* proviso from a different point of view. In *Kinnear and others v. Falconfilms NV and others (Hospital Ruber Internacional and another, third parties)*,⁴⁰ Phillips J. held that the *Hagen* proviso did not preclude having regard to the implications on the litigation of adding to the original proceedings a third party claim which should more appropriately be pursued abroad in exercising the procedural discretion under Order 16, rule 4. He dismissed the argument made on behalf of the defendant that to disallow third party procedure in exercising the procedural discretion on the ground that the appropriate forum was another Contracting State would frustrate the scheme of the Convention.

The scheme of the Convention is based on hard-and-fast rules and therefore a case-by-case inquiry as to which forum among those in the Contracting States is the appropriate forum (the *forum (non) conveniens* inquiry) is generally incompatible with the scheme of the Convention. The general exclusion of the *forum (non) conveniens* inquiry from the scheme of the Convention is reflected in the solution taken by the drafting Committee to a question which arose in connection with the first paragraph of Article 10.⁴¹ They considered the question whether third party procedure should be made available under

⁴⁰ [1994] 3 All ER 42.

⁴¹ Jenard Report, p.32.

the first paragraph of Article 10 for an insured to claim against his insurer even where they were both domiciled in another Contracting State. Thus where an accident was caused in France by a person domiciled in Germany who was insured with a German company and the insurance contract between them was subject to German law, should third party procedure be made available in France? The Committee's solution was to permit an insurer under Article 12(3) to agree with the insured domiciled in the same Contracting State to confer jurisdiction on the courts of that State at the time of the contract. This solution means that subject to Article 12(3), third party procedure is made available under the first paragraph of Article 10 for an insured to claim against his insurer even if another Contracting State is more appropriate to try the claim.

In spite of the general exclusion of the *forum (non) conveniens* inquiry from the scheme of the Convention, the ruling of Phillips J. can be supported in view of the difference between the *forum (non) conveniens* discretion and the procedural discretion under Order 16. While the purpose of the *forum (non) conveniens* is to ascertain the appropriate forum in comparison with the English forum, the purpose of the procedural discretion under Order 16 is to ascertain the appropriateness of the English forum as a forum to try a third party claim. Under the procedural discretion, the relative appropriateness of other forums is taken into account only as one of many factors. In *Kinnear*, even though Phillips J. regarded Spain as being the convenient forum to determine the third party claim, he exercised the procedural discretion in favour of allowing third party procedure because, *inter alia*, England was, on the facts of the case, the only forum available for the defendants to seek contribution from the proposed third party.

2.2.1.2 Do procedural rules merely control procedure or also limit the scope of jurisdiction?

Where jurisdiction over the defendant's claim against a non-party can be founded by a provision of the Convention other than Article 6(2) or the first paragraph of Article 10, if the procedural rules of the forum do not allow third party procedure, the defendant can presumably still bring a separate action against the non-party in that forum State. The plaintiff's claim against the defendant and the latter's claim against the non-party will then be tried in separate actions in the same forum State.

Trying them in the same forum State, albeit in separate actions, is not without merit. Admittedly, consistency between the two actions in respect of the ascertainment of facts is not ensured. But to the extent that the same forum State, even in different actions, would specify the same governing law, inconsistent decisions can be avoided.

There would be the same merit if Article 6(2) or the first paragraph of Article 10 can found jurisdiction over the defendant's claim against a non-party even where procedural rules of the forum do not allow third party procedure. It is, however, suggested that the provisions of these articles cannot found jurisdiction over a claim brought in a separate action from the original action.⁴² These are the provisions specifically catering for third party procedure. They cannot, therefore, be invoked where third party procedure is not allowed by the procedural rules of the forum. Such an interpretation finds support in Article V of the annexed protocol to the Brussels Convention and Article V of Protocol 1 to the Lugano Convention. They provide that jurisdiction specified in Articles 6(2) and

⁴² The tenor of the judgment by Phillips J. in *Kinnear* also supports this interpretation.

10 cannot be resorted to in the States listed therein, which do not have third party procedure.⁴³

Under the suggested interpretation, the procedural rules of the forum indirectly limit the scope of jurisdiction provided by Article 6(2) or the first paragraph of Article 10. As a result, the scope becomes different in different Contracting States. It must be admitted that this result is not consistent with the efforts usually made by the European Court to ensure that the rights and obligations which derive from the Convention are uniform.⁴⁴

2.2.2 The scope of Article 6(2) of the Convention

Now we will consider the scope of jurisdictional rules in the Convention. Our focus is on Article 6(2). The scope of the first paragraph of Article 10 does not appear to involve a difficult question which merits separate analysis. And the scope of other provisions of the Convention will not be different from their ordinary scope in other contexts just because they are invoked to found jurisdiction over third party proceedings.

In the following discussion, we will first address whether Article 6(2) has an autonomous scope, and then try to define the scope of each limb of the provision. Finally, we will consider how wide the autonomous scope will be.

2.2.2.1 Does Article 6(2) have an autonomous scope?

⁴³ See Chapter 2 on *litis denunciatio* for issues on the German procedure.

⁴⁴ E.g. Case 133/78, *Gourdain v. Nadler* [1979] ECR 743; Case 150/77, *Bertrand v. OTT* [1978] ECR 1432; Case 34/82, *Martin Peters Bauunternehmung v. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987.

Does Article 6(2) have a Community-wide autonomous scope defined independently of the procedural rules of the forum?

An autonomous scope would operate to limit the availability of third party procedure. Thus if Article 6(2) does not have an autonomous scope, third party procedure is available whenever the procedural requirements of the forum are satisfied if the proposed third party is domiciled in a Contracting State. If, instead, it has an autonomous scope, there may be cases where third party procedure is not available, even if the procedural requirements of the forum are satisfied, on the ground that the case does not fall within the scope of Article 6(2).

The following passage of the European Court in *Hagen* suggests the existence of an autonomous scope:⁴⁵

... the court seised must *first decide* whether it has jurisdiction under the provisions of the convention *and then* determine whether the application satisfies such other conditions for an action on a warranty or guarantee as are laid down by the *lex fori*, ...
(Emphasis added.)

The national courts of the Contracting States have also held that Article 6(2) has an autonomous scope.

Thus a Dutch court held that the term 'guarantee' as used in Article 6(2) of the

⁴⁵ At para.16. Incidentally, the European Court of Justice in *Kalfelis v. Schroeder*, Case 189/87 [1988] ECR 5565 held that the nature of a connection that must exist for Art. 6 (1) to apply between the various actions brought by the same plaintiff against different defendants must be determined independently.

Convention could not, as a term of Community law, be given as wide an interpretation as the corresponding term in Article 68 *et seq.* of the Netherlands Code of Civil Procedure.⁴⁶

In England, Master Murray in *Kinnear*⁴⁷ held that the words "in any other third party proceedings" in Article 6(2) should be interpreted independently of the English procedural rules. Phillips J. allowed the appeal against the master's order but on a different ground. He, too, appears to have assumed that Article 6(2) had an autonomous meaning when he said:⁴⁸

In my judgment the nexus between the plaintiff's claim against the defendant and the defendant's claim against the third party required to satisfy Ord 16, rule 1(1) is likely to be sufficient to justify the special jurisdiction granted by Art 6(2).

Although the grounds for these decisions are not clearly stated, it may have been thought illogical that depriving the proposed third party of the right to be sued in his own State under Article 2 of the Convention should depend upon the procedural rules, which may differ widely amongst the Contracting States.⁴⁹ However, because the application of the procedural rules was approved in *Hagen*, the procedural rules of the forum inevitably

⁴⁶ *NV De Jong Verenigde en Coöperatieve Melkproduktenbedijven 'Domo-Bedum' v. Sahne Heinrich KG and Heinrich*, Judgment of 4 February 1981, *Arrondisementsrechtbank*, Amsterdam, [1981] NJ, No 449. Digest of case-law relating to the European Communities, D series, 1-6-B7.

⁴⁷ [1994] 3 All ER 42.

⁴⁸ At p. 48.

⁴⁹ Supreme Court Practice 1995, para.16/1/22.

affect the decision whether a non-party can be sued by third party procedure, even if Article 6(2) is given an autonomous scope. It is, therefore, suggested that there is no reason why the jurisdiction under Article 6(2) must have an autonomous scope. It is to be observed that the scope of the first paragraph of Article 10 can also be read as corresponding to the scope of the procedural rules of the forum. Denying an autonomous scope to jurisdictional rules has a merit of simplifying the process of determining the admissibility of third party procedure.

For all that, since the previous decisions by the European Court and national courts have assumed Article 6(2) to have an autonomous scope, we will base the following discussion on that assumption. We will consider the scope of “actions on a warranty or guarantee” and “any other third party proceedings” in Article 6(2) and then predict how wide an autonomous scope will be given. The difficulties of defining an autonomous scope of Article 6(2), which will be shown below, would further weaken the case for giving Article 6(2) an autonomous scope.

2.2.2.2 The scope of “actions on a warranty or guarantee”

The Jenard Report in its explanation of “actions on a warranty or guarantee,” draws attention⁵⁰ to the rules on third party procedure of some of the Contracting States. But its intention is not to define the scope of “actions on a warranty or guarantee” by reference to any of these rules.

The word “guarantee” has two literal meanings. In one sense, a guarantee is a

⁵⁰ At p.27.

secondary agreement in which a person (the guarantor) is liable for the debt of another (the principal debtor), who is the party primarily liable for the debt. Another meaning is the same as the meaning of the word “warranty” and denotes an undertaking by one party to another to indemnify the latter against some possible default or defect.⁵¹ The phrase used in the French text corresponding to the English text “actions on a warranty or guarantee” is “*une demande en garantie*.” Since the normal English translation of the French word *garantie* is “indemnity,”⁵² the word “guarantee” in the English text should be understood in the second meaning. Although the European Court has a tendency to give teleological interpretations to the Community law rather than literal interpretations,⁵³ this interpretation can be supported by the fact that actions on a “guarantee” in the first sense are more properly subject to Article 6(1). Since Article 6(2) treats “actions on a warranty or guarantee” as a species of third party proceedings, it would mean actions by the defendant against a non-party on the latter’s undertaking to indemnify the defendant against the payment the defendant may be held liable to make to the plaintiff.

Turning to the ways in which undertakings to indemnify are given, there can be no doubt that an undertaking can be given expressly.⁵⁴

Also, it appears that an undertaking can be implied. Thus according to the Jenard Report, in a case where the purchaser of defective product sues the importer of the

⁵¹ Garner, p. 394.

⁵² According to Professor Trevor Hartley.

⁵³ Hartley, *Civil Jurisdiction and Judgments*, p.5; Briggs & Rees, para. 2.0.1.4.

⁵⁴ E.g. *Karl Presser & Co. GmbH v. Eurosped Srl*, Judgment of the *Corte di Cassazione, Sezioni Unite*, No 5256 of 10 October 1979, Court of Justice of the European Communities, *Digest of Case-law Relating to the European Communities, D series*, 1-5.1.2-B28.

product for the injury suffered in using it, the importer can bring an action for breach of warranty against the exporter in the same court. The existence of an express undertaking to indemnify on the part of the exporter is not hinted in this example.⁵⁵

It will be recalled that, as listed in Part 1, there are a large number of contracts in which an undertaking to indemnify can potentially be implied. It is not known, however, in which of these contracts an undertaking is implied for the purpose of Article 6(2). In *Hagen*,⁵⁶ for example, D, having been sued by P for cancelling a reservation made at the request and on behalf of R with P for hotel rooms, sought to bring third party proceedings against R claiming for indemnity. The European Court did not decide whether R's undertaking to indemnify D against his liability to P could be implied, while the questions referred by the Dutch court to the Court appear to have assumed that to be the case.

There are at least three ways to imply an undertaking to indemnify in contracts for the purpose of Article 6(2).

First, if it is thought that the scope of Article 6(2) should be independent of substantive rules as well as procedural rules of the Contracting States, a catalogue of the contracts in which an undertaking to indemnify is implied for the purpose of Article 6(2) must be drawn up. But given the wide diversity of contracts in which such an undertaking can potentially be implied, the catalog may become very long.

Secondly, an undertaking to indemnify can be implied in a contract according to the

⁵⁵ A similar example can be found in the observation by the European Commission submitted in *Jakob Handte GmbH v. Traitements Mécano-chimiques des Surfaces*, Case C-26/91 [1992] ECR I-3967. The Commission suggested where the buyer of goods sued the seller, the latter could bring an action on a guarantee against the manufacturer without mentioning the existence of an express undertaking to indemnify on the part of the manufacturer.

⁵⁶ Case 365/88 [1990] ECR I-1845.

lex fori or the *lex causae*. But this solution also has difficulties. Although it is theoretically possible to rest the scope of Article 6(2) on the substantive rules of the *lex fori* while maintaining its independence from the procedural rules of that law, it will raise the question why an autonomous scope must be insisted on. On the other hand, to imply an undertaking to indemnify in a contract according to the *lex causae* will preempt the question on the merits of the case. The contracts in which an undertaking to indemnify is implied for the purpose of taking jurisdiction do not have to coincide with the contracts in which such an undertaking is implied on the merits.

A third solution is to imply an undertaking to indemnify for the purpose of Article 6(2) whenever the defendant alleges that the proposed third party gave such an undertaking. This would effectively mean that the jurisdiction over third party proceedings can be founded whenever there is a preexisting relationship between the defendant and the proposed third party. The task of narrowing down the scope of available third party procedure would then be left to the procedural rules of the forum which will be applied pursuant to the ruling in *Hagen*. In effect, this solution is hardly distinguishable from denying an autonomous scope to “actions on a warranty or guarantee.”

2.2.2.3 The scope of “any other third party proceedings”

The Jenard Report quotes some provisions of the Belgian Judicial Code as setting out the simplest definition of third party proceedings.⁵⁷ But read in the context, it is merely explaining what third party proceedings are, and should not be taken as defining the

⁵⁷ At p.28.

precise scope of “third party proceedings” within the meaning of Article 6(2).

In an English case, *Kinnear*,⁵⁸ an actor was injured during the shooting of a film in Spain and died in a hospital (R) there. The administrators (P) of the actor's estate, brought an action in England against the film company (D), alleging that the actor's death was caused by their negligence. The film company sought to bring third party proceedings against the hospital in order to claim an indemnity or contribution, alleging that the actor's death was due to medical malpractice on the part of the hospital.

Master Murray ordered the third party proceedings to be struck out, holding that the proceedings were not “any other third party proceedings” within the meaning of Article 6(2) on the ground that they related to the death in the hospital and not to the original accident. From the brief report of the master's judgment it is not possible to know what precisely he thought was contemplated by “any other third party proceedings.” The master said⁵⁹ that he had drawn some guidance from *Hagen*. But no suggestion can be found in *Hagen* as to the meaning of these words. Perhaps he may have thought that the claims for contribution between co-wrongdoers liable in respect of the same damage were outside the scope of “any other third party proceedings” if the damage was caused by their separate acts on different occasions.

On appeal against the master's order, Phillips J. allowed the appeal, holding that where domestic procedure allowed third party proceedings to be brought against a non-party, this was likely to be on grounds which justified overriding the basic right of the non-party to be sued separately in the country of his domicile and that those grounds were almost

⁵⁸ [1994] 3 All ER 42.

⁵⁹ At p. 46.

certain to be some form of nexus between the plaintiff's claim against the defendant and the defendant's claim against the non-party. With respect to the English procedural rules, he held that the nexus necessary to bring the case within Order 16, rule 1(1) was likely to be sufficient to bring the case within Article 6(2) of the Convention.

Three points can be made on this ruling.

First, Article 6(2) does not expressly require that a sufficient nexus should exist between the original claim and the third party claim. But such a requirement naturally results from the fact that Article 6(2), together with Article 6(1) (plurality of defendants) and Article 6(3) (counter-claim), is designed to cater for the need to concentrate related claims in a single action in order to avoid inconsistent decisions.⁶⁰

Secondly, according to a comparative survey of procedural rules in major legal systems concerning involuntary third party intervention, the scope of the available English third party procedure is described as "remarkably wide."⁶¹ This description is borne out by the examination of Order 16, rule 1(1) made in § 2.1.2.1 above. That being so, if, as Phillips J. said, the nexus required to exist by Order 16, rule 1(1) is likely to be sufficient to justify the application of Article 6(2) of the Convention, Article 6(2) would be able to found jurisdiction over third party proceedings allowed by the procedural rules of most other Contracting States, if not all of them. It must, however, be noted that there is no evidence in the report that Phillips J. based his judgment on any comparative survey on the scope of the procedural rules of the Contracting States.

Thirdly, the ruling of Phillips J. will be relied on as an excuse by English courts in

⁶⁰ Huet, 120 (1993) Clunet 151.

⁶¹ Cohn, p. 219.

future cases for omitting to examine the jurisdictional requirements of Article 6(2). Such a practice would create a better predictability as to the availability of third party procedure. Presumably for this reason, the decision of Phillips J. was welcomed by a practitioners' journal.⁶²

One commentary on this case makes the following suggestion on the scope of "in any other third party proceedings":⁶³

It is submitted that the words "or in any other third party proceedings" do not include all third party proceedings brought pursuant to O.16, r.1(1); it is anticipated that the European Court will give an autonomous interpretation of the article restricting the scope of third party proceedings to situations analogous to a warranty or guarantee. In Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeehage B.V.* [1990] 1 E.C.R. 1845 the European Court stressed there must be a connecting factor in proceedings on a warranty or guarantee. In other cases it is thought that a defendant will have to demonstrate that there is a real danger of conflicting decisions before a third party can be deprived of the entitlement to be sued in his own jurisdiction under Article 2 unless some other ground for assumption of jurisdiction under another article can be established.

It is, however, not clear what level of the risk of conflicting decisions amounts to "a real danger." Any two or more claims involving overlapping issues create a certain level of risk of conflicting decisions if they are not tried in one action. And all the cases that

⁶² [1994] *Journal of Personal Injury Litigation* 329, 331.

⁶³ *Supreme Court Practice 1995*, para.16/1/22.

fall within Order 16, rule 1(1) contain two or more claims involving overlapping issues. The Jenard Report says⁶⁴ one of the purposes of the Convention is to ensure the greatest possible degree of legal certainty. To meet that purpose, unequivocal criteria must be adopted for jurisdictional rules of the Convention.

Then, can the scope of “any other third party proceedings” be categorically defined? One category may be formed by the procedural rules of some Contracting States which, as the English Order 16, rule 1(1)(c), make third party procedure available for the defendant who requires some issue arising between him and the plaintiff to be determined also between him and a non-party without claiming any relief from the non-party. Where, on the other hand, the defendant claims some relief from a non-party, the situations for which third party procedure may be made available are of enormous diversity embracing all the situations covered in this thesis, which are illustrated in Part 1. It is doubtful that any categorisation made in Part 1 is appropriate for the purpose of defining the scope of “any other third party proceedings.” There is a growing tendency in the substantive rules of major legal systems to remove barriers between different categories of situations and generally to give rights of indemnity or contribution when common obligations are involved.⁶⁵ Then why erect a barrier at the level of jurisdiction? The use of the words “any other third party proceedings” indicates non-differentiation of categories.

2.2.2.4 How wide will the autonomous scope be?

⁶⁴ P. 15.

⁶⁵ Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 10.

In the scheme of the Convention, the basic jurisdictional rule is provided by Article 2 which confers jurisdiction on the courts of a Contracting State in which the defendant is domiciled. The European Court has a tendency to give a strict construction to the other provisions of the Convention which confer jurisdiction on the courts of other Contracting States.⁶⁶ In relation to Article 6(1), the European Court in *Athanasios Kalfelis v. Bankhaus Schröder, Muenchmeyer, Hengst Und Co.* confirmed this canon of construction as follows:⁶⁷

The principle laid down in the Convention is that jurisdiction is vested in the courts of the state of the defendant's domicile and that the jurisdiction provided for in Article 6(1) is an exception to that principle. It follows that an exception of that kind must be treated in such a manner that there is no possibility of the very existence of that principle being called in question.

While the European Court has not made a similar statement in relation to Article 6(2), the same canon of construction may well be adopted.⁶⁸

⁶⁶ In relation to Arts. 16 and 17 which, if applied, would exclude the jurisdiction of the court of the domicile, see Case 24/76 *Salotti v. RÜWA* [1976] ECR 1831; Case 25/76 *Galeries Segoura Sprl v. Bonakdarian* [1976] ECR 1851; Case 73/77 *Sanders v. Vander Putte* [1977] ECR 2383; Case 115/88 *Reichert v. Dresdner Bank* [1990] ECR I-27; Case C-292/93 *Lieber v. Göbel* [1994] ECR I-2535. In relation to Article 5 which, if applied, would multiply the bases of jurisdiction in one and the same case, see Case 33/78 *Somafer S.A. v. Saar-ferngas A.G.* [1978] ECR 2183; Case 220/88 *Dumez France S.A. v. Hessische Landesbank* [1990] ECR I-49.

⁶⁷ Case 189/87 [1988] ECR 5565, para.8.

⁶⁸ In *Kinnear* the counsel for the third party contended for the use of this canon of construction in relation to Art. 6(2).

However, Briggs & Rees argues that a wide scope should be given to Article 6(2).⁶⁹ It points out that Article 6 performs a function quite distinct from Article 5 since its purpose is to prevent irreconcilable judgments. It says that if Article 6 is narrowly constructed, the practical effect of the Convention, as a means of preventing irreconcilable judgments, will be jeopardised.

This view may be supported by the last phrase of Article 6(2) which provides “unless [the third party proceedings] were instituted solely with the object of removing [the proposed third party] from the jurisdiction of the court which would be competent in his case.” This phrase could be interpreted to indicate that Article 6(2) protects the right of the proposed third party to be sued in the State of his domicile only to the extent it ensures that third party proceedings are not brought with the sole object of removing him from that State.

Furthermore, it may be possible to draw a distinction between Article 6(2) and Article 6(1). Unlike Article 6(1), Article 6(2) does not require the original action to be brought in the courts for the place where the defendant is domiciled. Jurisdiction over the original claim under Article 6(2) can be provided by provisions of the Convention other than Article 2 or even by the national jurisdictional rules listed in the paragraph 2 of Article 3.⁷⁰ This may be taken as an indication that the Convention is more lenient towards jurisdiction over third party proceedings than jurisdiction over joinder of defendants.

2.2.3 The scope of Order 11, rule 1(1)(c)

⁶⁹ Para. 2.10.9.3; See also Briggs “The International Dimension to Claims for Contribution, *Arab Monetary Fund v. Hashim*” [1995] LMCLQ 437, 441.

⁷⁰ Gaudemet-Tallon, p. 167, para. 226.

To grant leave to serve a third party notice out of the jurisdiction under Order 11, rule 1(1)(c), the case must be, as in other Order 11 cases, a proper one for service out of the jurisdiction.⁷¹ In other Order 11 cases, this requirement imposes three burdens on the plaintiff seeking leave. First, he must show that the claim he wishes to pursue is a good arguable claim on the merits. Secondly, he must show a strong probability that the claim falls within the letter and the spirit of the sub-head or sub-heads of Order 11, rule 1(1) relied upon. Thirdly, he must persuade the court that England is the forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice (*forum conveniens*).⁷²

We will first examine these burdens in turn in the context of Order 11, rule 1(1)(c). We will then consider how wide a scope will be given to the jurisdiction under Order 11, rule 1(1)(c) through the exercise of the *forum conveniens* discretion.

2.2.3.1 A good arguable claim on the merits

The Court of Appeal in *ERAS*⁷³ pointed out that if this burden was imposed on the defendant in Order 11, rule 1(1)(c) cases in the same way as it is imposed on the plaintiff in other Order 11 cases, it would lead to an absurd result because if the defendant

⁷¹ Ord. 11, r. 4(2). The proposed third party served with a notice can apply to set aside the leave under Ord. 12, r. 8(1)(c).

⁷² Per Slade L.J. in *Metall und Rohstoff* [1990] 1 QB 391, 434(CA) approved in *Société Commerciale de Réassurance v. ERAS (International) Ltd. (formerly ERAS (UK)) and Others* [1992] 1 Lloyd's Rep. 570 (CA).

⁷³ [1992] 1 Lloyd's Rep. 570 (CA).

honestly believed that he had a good defence as against the plaintiff, he could not honestly assert that he had a "good arguable case" against the proposed third party. The court, however, did not go on to define what standard should be applied to the defendant's claim against a proposed third party. It, however, drew attention to Order 11, rule 4(1)(d) under which the affidavit in support of the application for leave to serve a third party notice out of the jurisdiction must state the deponent's belief that there was between the plaintiff and the defendant "a real issue which the plaintiff may reasonably ask the court to try."

2.2.3.2 A claim falling within the letter and the spirit of rule 1(1)(c)

Order 11, rule 1(1)(c) requires the proposed third party to be "a necessary or proper party" to the original claim. We will consider the meaning of this phrase.

Order 11, rule 1(1)(c) can be relied upon to found jurisdiction for the purpose of joinder of parties (Order 15, rule 4 *et al.*) as well as third party procedure. Its application in previous cases in the context of joinder of parties is summarised by Dicey & Morris as follows:⁷⁴

The question whether Y is a proper party to an action against X depends on this: supposing both X and Y had been in England, would they both have been proper parties to the action? If they would, and only one of them, X, is in this country, then Y is a proper party and leave may be given to serve him out of the jurisdiction.

⁷⁴ P. 326.

In the context of third party procedure, the Court of Appeal in *ERAS* held that “necessary or proper party” encompassed a wide and elastic class of persons which could be identified by looking at Order 15, rule 6(2)(b). The latter rule provides for the necessary addition of the parties while the proceedings are under way.

Three points can be made on these decisions.

First, they suggest that in cases where Order 11, rule 1(1)(c) founds jurisdiction, the procedural rules are applied in the same way as they are applied in domestic cases. Their application is not fettered by such restriction as is imposed by the *Hagen* proviso in cases where jurisdiction is founded by a rule of the Convention.

Secondly, these decisions suggest that the meaning of “a necessary or proper party” depends on the procedural rules. This manner of interpretation should be welcomed since it would simplify the process of determining the availability of joinder or third party procedure.⁷⁵

Thirdly, it ought to be Order 16, rule 1(1) rather than Order 15, rule 6(2)(b) by reference to which the class of persons constituting a “necessary or proper party” should be identified in relation to third party procedure.⁷⁶ Order 15, rule 6(2)(b) allows the court to add another person to the action as an additional plaintiff or defendant rather than as a third party. In *ERAS* it was contended on behalf of the proposed third party that Order 11, rule 1(1)(c) was confined to cases where the proposed third party could have been joined by the plaintiff as a defendant to his action. It was for the purpose of dismissing

⁷⁵ Cf. The discussion in § 2.2.2.1 above, on the an autonomous scope of Art. 6(2) of the Convention.

⁷⁶ It will also be recalled that in applying Art. 6(2) of the Convention, the court in *Kinnear* was relying on Ord. 16, r. 1(1).

this submission that the Court of Appeal relied on Order 15, rule 6(2)(b). It pointed out that Order 15, rule 6(2)(b)(ii) identified a further class, i.e. persons against whom the plaintiff might wish to claim no relief or against whom he did not even have a cause of action and explained that the latter class was wide enough to include the case where the defendant was seeking an indemnity from a person who was not a party to the plaintiff's action. If so, the scope of Order 15, rule 6(2)(b) would be similar to that of Order 16, rule 1(1).⁷⁷ Nevertheless, they are not the same. Thus, Order 15, rule 6(2)(b) enables the defendant to join a non-party as an additional defendant in order to counterclaim against the plaintiff.⁷⁸ The same non-party in the same situation may not be joined as a third party under Order 16, rule 1(1). Since the procedural requirements provided by Order 16, rule 1(1) have to be satisfied in any event, it is simpler to determine the availability of third party procedure, both in respect of jurisdictional requirements and in respect of procedural requirements, by reference to Order 16, rule 1(1). It is, therefore, suggested that the scope of "a necessary or proper party" should be decided by asking whether the proposed third party is a person against whom a third party claim may be made under Order 16, rule 1(1) if he were within the jurisdiction.

2.2.3.3 The *forum conveniens* discretion

⁷⁷ However, if discretion is also taken into account there is a clear difference. A non-party against whom no relief is sought by the plaintiff will generally not be added as a defendant against the plaintiff's wish under Ord. 15, r. 6(2)(b). Instituting third party proceedings under Ord. 16, r. 1 is said to be the proper course in such a case. Supreme Court Practice 1995, para. 15/6/6.

⁷⁸ *Union Bank of the Middle East Ltd. v. Clapham*, The Times, July 20, 1981 (CA).

Where a case comes within one of the sub-heads of Order 11, rule 1(1), the exercise of jurisdiction is discretionary. This can be contrasted with cases where a rule of the Convention founds jurisdiction. In exercising the discretion, the court will consider whether England is the *forum conveniens*, in other words whether England is clearly the appropriate forum for the trial of the action for the interests of all the parties and for the ends of justice.⁷⁹

The exercise of this discretion in the context of Order 11, rule 1(1)(c) is illustrated in *The Kapetan Georgis*.⁸⁰ In this case, the defendant in an English action sought to bring third party proceedings against a non-party in Canada. To reach a conclusion that England was a more appropriate forum than Canada, the English court took into account various factors such as: respective connections with Canada and England; the availability of discovery; and the experience and knowledge acquired by lawyers and experts through the trial of a similar case.⁸¹ But the court gave greater weight to the following two factors: the merit of third party procedure in England to render all parties bound by a single decision;⁸² and the inconvenience of an English action to the proposed third party in Canada. These were the factors that weigh against each other in the balance. Although their relative weight may vary with the cases, on the facts of *The Kapetan Georgis*, the

⁷⁹ *Spiliada v. Cansulex* [1987] AC 460, 480.

⁸⁰ [1988] 1 Lloyd's Rep. 352. The judgment of this case made no mention of the meaning of "necessary or proper party" but described the *forum conveniens* discretion as the most important aspect of the case.

⁸¹ The so-called Cambridgeshire factor.

⁸² The consideration that all the related claims should be dealt with in one jurisdiction played a major part in the discretion under other heads of Ord. 11, r. 1(1) as well where a plaintiff was claiming against different defendants. See *New Hampshire Insurance v. Strabag Bau AG* [1992] 1 Lloyd's Rep. 361, 370; *The Stolt Marmaro* [1985] 2 Lloyd's Rep. 428, 436.

former factor was given greater weight than the latter factor. The significance of the latter factor was diminished because a large number of witnesses of the proposed third party would probably have to attend the trial in England in any event even if the proposed third party was not joined as a third party.

Two points can be made on this case.

First, it must be noted that courts have a separate discretion under Order 16, rule 2 and rule 4(3)(c) as part of the procedural requirements. The ruling in this case suggests that the important factors under the Order 16 discretion are also considered to be important under the Order 11, rule 1(1)(c) discretion.

Secondly, this case suggests that the appropriateness of the forum will not be assessed with sole reference to the defendant's claim against the proposed third party but with reference to the entire case including any other claims made in England or abroad. In this case the plaintiff in the English action brought an action in Canada against the proposed third party. This fact was taken into account as a pointer in favour of Canada as the appropriate forum.

2.2.3.4 How wide a scope will be given to Order 11, rule 1(1)(c) through the exercise of the *forum conveniens* discretion?

Since the *forum conveniens* discretion gives the court some leeway, the question arises how wide a scope will be given to Order 11, rule 1(1)(c) through the exercise of the *forum conveniens* discretion.

In relation to Order 11, rule 1(1) generally, two points have been established. First, the court ought to be exceedingly careful before it allows a writ to be served out of the

jurisdiction. Secondly, if there is any doubt on the construction of the provision, it ought to be resolved in favour of the foreigner.⁸³

In some cases on joinder of defendants under Order 11, rule 1(1)(c), the courts called for even greater self-restraint in exercising the *forum conveniens* discretion than under the other provisions of Order 11, rule 1(1).⁸⁴ The reason was that, while in other Order 11, rule 1(1) cases the dispute must have some connection with England, Order 11, rule 1(1)(c) enabled a foreigner to be sued in England when the dispute might have no territorial connection with England at all. Therefore, the same attitude of even greater self-restraint may well be taken also in cases where Order 11, rule 1(1)(c) is relied on for the purpose of third party procedure.

However, Briggs & Rees argues that jurisdiction under Order 11, rule 1(1)(c) should be exercised widely by stressing a strong sense of pragmatism embodied in this head of jurisdiction.⁸⁵ This contention is in line with its argument in favour of giving a wide scope to Article 6(2) of the Convention. As to the general principle of narrow construction of Order 11, rule 1(1), Briggs points out⁸⁶ that it is not always followed in the actual cases.⁸⁷

3 Historical developments of procedural rules and jurisdictional rules concerning

⁸³ *The Hagen* [1908] P. 189 (CA) per Farwell L.J.

⁸⁴ *The Brabo* [1949] AC 326 per Lord Porter; *Multinational Gas & Petroleum Co v. Multinational Gas & Petroleum Services Ltd* [1983] Ch 258; *Arab Monetary Fund v. Hashim (No.4)* [1992] 1 WLR 553, 557; affd [1992] 1 WLR 1176.

⁸⁵ Para. 4.4.2.3.

⁸⁶ Briggs, “Jurisdiction under the traditional Rules” in Rose (ed.), *Restitution and the Conflict of Laws* (1995) p. 49, 53.

⁸⁷ Citing some cases as examples. Among them, in *Re Jogia* [1988] 1 WLR 484, it was held that a “contract” within Ord. 11, r. 1(1)(d) included a quasi-contract.

third party procedure

We will now trace the historical developments of procedural rules and jurisdictional rules of mainly Anglo-American laws concerning third party procedure. It will show the nature of third party procedure as a modern procedure or a trend of expansion in the availability of third party procedure. We will then consider the implications of such historical developments for the present rules by exploring the the policy behind the developments and by seeking a pointer the history offers to the question how widely third party procedure should be made available.

3.1 Procedural rules

3.1.1 English law

The English third party procedure was founded by section 24(3) of the Judicature Act 1873.⁸⁸ Under that provision, given effect by the Rules of Supreme Court (R.S.C.) 1875, the defendant had a power to join a non-party as a third party against whom he could claim some relief or remedy over.⁸⁹

As this power was felt to be too wide, Order XVI, rule 48 of the R.S.C. 1883 confined third party procedure to claims for “contribution or indemnity.”⁹⁰ This was a temporary

⁸⁸ Cohen “Impleader: Enforcement of Defendants’ Rights Against Third Parties” 33 Columbia Law Review 1147, 1169.

⁸⁹ See comment under the heading “Scope of this Order” in The Annual Practice 1964 Vol.1 Ord.16, r.1.

⁹⁰ Supreme Court Practice 1995, para.16/1/1.

set back in the early days of the history of English third party procedure. In the cases decided under this rule, a claim for damages was distinguished from a claim for indemnity and was not allowed to be made by way of third party procedure. The distinction was defined by Bowen L.J. in *Birmingham and District Land Company*⁹¹ in these terms:

A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

Cotton L.J. in the same case said that an obligation to indemnify may be implied as follows:⁹²

There may be an implied contract in two ways; the circumstances may be such that the Court can come to the conclusion that in fact there was a contract, though not made in express terms, or the position of the parties is such that the Court comes to the conclusion that either in law or in equity there is an obligation upon the one party to indemnify the other.

Some cases were characterised as being the case of a claim for damages⁹³ while other

⁹¹ 34 Ch.D. 261, 274.

⁹² 34 Ch.D. 261, 271.

⁹³ *Birmingham and District Land Company*, 34 Ch.D. 261; *Speller & Co. v. The Bristol Steam Navigation Company*, (1884) 13 QBD 96 (CA); *The Jacob Christensen* [1895] P

cases as being the case of a claim for indemnity based upon an implied undertaking.⁹⁴ But a clear line between them was hard to discern.

In 1929 a new rule was introduced which considerably extended the scope of third party procedure.⁹⁵ This new rule allowed third party procedure in most of the cases in which it had not been allowed under the previous rule.⁹⁶ In particular, the distinction between a claim for damages and a claim for indemnity was abolished.

In 1962 the scope of available third party procedure was further widened by omitting certain words in Order 16, rule 1(1)(c) which required the similarity of certain issue between the original claim and third party claim.⁹⁷

3.1.2 The US law

Rule 14 of the Federal Rules of Civil Procedure⁹⁸ provides for the US version of third party procedure, often referred to as impleader. Under this rule a defendant may cause a summons and complaint to be served upon a non-party who is or may be liable to him for all or part of the plaintiff's claim.

Rule 14 was first introduced in 1938. It was described in *Lesnik v. Public Industrials*

281.

⁹⁴ *Eastern Shipping Co. v. Quah Beng Kee*, [1924] AC 177.

⁹⁵ *Burford v. Clifford* [1932] 2 Ch. 122, 136-137 (CA).

⁹⁶ Supreme Court Practice 1995, paras. 16/1/8, 16/1/12 and the cases cited there.

⁹⁷ Supreme Court Practice 1995, para. 16/1/1.

⁹⁸ Federal Rules of Civil Procedure govern the procedure in the United States district courts (Rule 1).

*Corp.*⁹⁹ as “a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court.”

Similar State court rules are also regarded as being a modern procedure.¹⁰⁰

3.1.3 The Guadalajara Convention

The Guadalajara Convention deals with international carriage by air performed by a person other than the contracting carrier. Article 7 of the Convention provides that if an action for damages is brought against either the actual carrier or the contracting carrier, that carrier has the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

In the drafting meeting in 1961, Germany proposed that national law should decide the possibility of joining the other carrier in the proceedings as well as its procedure and effects.¹⁰¹ Among the participating States in this meeting were other central European States, Scandinavian States¹⁰² and Japan where third party procedure was not available.

⁹⁹ (2d Cir., 1944) 144 F.2d 968, 973.

¹⁰⁰ See “Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured” 24 A.L.R.2d 913; Restatement of the Law, Second, Judgments, comment c. to s.57 “Effect on Indemnitor of Judgment Against Indemnitee.”

¹⁰¹ International Conference on Private Air law, Guadalajara, Aug.-Sept. 1961, Vol.I, Minutes, Doc 8301-LC/149-1, p.158.

¹⁰² Idem p.210; Cohn, para.231.

But the German proposal was not adopted.¹⁰³

This is an episode in which the merits of third party procedure were recognised at the international stage. As of 1 January 1994, 68 States including Germany are parties to this Convention.

3.2 Jurisdictional rules

3.2.1 Order 11, rule 1(1)(c)

Formerly, third party proceedings were treated in England as a separate action for the purpose of jurisdiction. The rules equivalent to the present Order 11, rule 1(1)(c) could be used only in the case of joinder of defendants.¹⁰⁴ Consequently, only where a defendant had a third party notice properly served upon a person within the jurisdiction, could he have another third party notice served on someone else who was outside the jurisdiction, as a necessary or proper party to the third party proceedings already instituted.¹⁰⁵ Otherwise, other heads of Order 11, rule 1(1) had to be relied upon to found jurisdiction over third party proceedings.¹⁰⁶ The lack of jurisdictional ground designed for third party procedure was regretted by Williams L.J. in *Mccheane v. Gyles*.¹⁰⁷

¹⁰³ P. 160.

¹⁰⁴ e.g. *Speller v. Bristol, etc., Co.* (1884) 13 Q.B.D. 96

¹⁰⁵ E.g. *The Manchester Courage* [1973] 1 Lloyd's Rep. 386.

¹⁰⁶ E.g. *Castree v. E. R. Squibb & Sons Ltd. And Another* [1980] 1 WLR 1248 (CA) relying on Ord.11, r.1(1)(h) (now (f) with some modification).

¹⁰⁷ [1902] 1 Ch. 287, 297 (CA).

By a proviso added to Order 16, rule 3(4) in 1983, a non-party can now be joined in the proceedings under Order 11, rule 1(1)(c), not only as a co-defendant but also as a third party. Coinciding with this development in England, the Irish Supreme Court held in 1989 that there was nothing in the terms of Order 11, rule 1(h), the Irish equivalent to English Order 11, rule 1(1)(c), which would justify restricting its application to the case of joinder of defendants.¹⁰⁸

Furthermore, prior to 1983, the original defendant had to be duly served within the jurisdiction. But now the defendant who has been served outside the jurisdiction can serve a third party notice outside the jurisdiction.¹⁰⁹

3.2.2 The US federal court rules

The jurisdictional rules of the US federal courts are composed of three types of rules: the rules of subject matter jurisdiction; the rules of personal jurisdiction; and the rules of the venue requirements. The rules of subject matter jurisdiction are concerned with the question whether the federal courts in general as opposed to the State courts in general can hear the case. The rules of personal jurisdiction are concerned with the question which federal district court can hear the case. To hear the case the district courts must, in addition, satisfy the venue requirements, which are intended to prevent inconvenience to the defendant.¹¹⁰

¹⁰⁸ *International Commercial Bank plc v. Insurance Corporation of Ireland plc and Meadows Indemnity Company* [1989] IR 466 (Supreme Court of Ireland)

¹⁰⁹ Supreme Court Practice 1995 para.11/1/12

¹¹⁰ See Born & Westin, p. 342.

The developments of these three types of rules concerning third party procedure (impleader) will be traced in turn below.

3.2.2.1 Subject matter jurisdiction

Since Rule 14 of the Federal Rules of Civil Procedure was enacted, it had been held that where the federal district courts had jurisdiction over the original claim, there was no need for an independent jurisdictional basis over a third party claim.¹¹¹

This line of authority was, however, disturbed in 1989 by the Supreme Court ruling in *Finley v. United States*.¹¹² This was a case of joinder of parties rather than impleader, but the decision was couched in broad terms that could also cover the case of impleader. The majority of the Court held that a grant of jurisdiction over claims involving particular parties did not in principle confer jurisdiction over additional claims by or against different parties over whom no independent basis of jurisdiction existed.

The confusion created by this judgment was quickly settled by Congress by the enactment of 28 USC Section 1367.¹¹³ Subsection (a) confers on the district courts supplemental jurisdiction over claims that are so related to the claim over which they have jurisdiction as to form part of the same case or controversy. This provision applies

¹¹¹ See *Crum v. Appalachian Electric Power Co. et al.*, 27 F.Supp. 138; *Bossard et al. v. McGinn*, 27 F.Supp. 412, 413; *Kravas v. Great Atlantic & Pacific Tea Co.*, 28 F.Supp. 66; *Tullgren v. Jasper*, 27 F.Supp. 413; *Satink v. Township of Holland*, 28 F.Supp. 678; *Lewis et al. v. United Air Lines Transport Corporation*, 29 F.Supp. 112; *Morrell v. United Air Lines Transport Corp.* 29 F Supp 757, 759; *Brandt v. Olson*, 179 F Supp 363.

¹¹² (1989) 490 U.S. 545; 109 S. Ct. 2003.

¹¹³ H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 6802.

to actions commenced on or after 1 December 1990.

If an independent jurisdictional basis had to be established in respect of a third party claim, Rule 14 would only have a limited effect. The supplemental jurisdiction provided by 28 USC Section 1337 enhances self-sufficiency of the federal courts and accordingly is in accord with the spirit and purpose of Rule 14, i.e. to dispose of all related claims in a single suit.

3.2.2.2 Personal jurisdiction

A federal district court has personal jurisdiction over persons who are subject to the personal jurisdiction of the State courts of the State in which the district court is located.¹¹⁴ Accordingly, a federal district court has personal jurisdiction over a proposed third party if he is subject to the personal jurisdiction of the State courts of the State in which the district court is located. The State courts have personal jurisdiction, subject to the due process clause of the federal Constitution, to the extent that the long-arm statute of that State allows service of process out of the State.¹¹⁵ According to the Supreme Court ruling in *International Shoe Co. v. Washington*,¹¹⁶ the due process clause permits State courts to exercise jurisdiction over a person located outside the State only if that person possesses “minimum contacts” with that State.

Where a proposed third party is not subject to the personal jurisdiction of the State

¹¹⁴ Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.

¹¹⁵ E.g. The court in *Newmark v. Gimbel's, Inc.* (1969) 54 NJ 585, 258 A2d 697, 6 UCCRS 1205 indicated liberal application of a long-arm service rule.

¹¹⁶ (1945) 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154.

courts of the State in which the district court is located, the district court still has personal jurisdiction over that party if service can be made within 100 miles from the court whether or not that place is within the forum State. Rule 4(k)(1)(B) of the Federal Rules of Civil Procedure reads in pertinent part:

Service of a summons ... is effective to establish jurisdiction over the person of a defendant ... who is a party joined under Rule 14 ... and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues.

The application of this “bulge rule” is also subject to the due process clause of the federal Constitution. However, the minimum contacts test in this context has been applied in two different ways. The Fifth Circuit in *Sprow v. Hartford Ins. Co.* examined whether the proposed third party had minimum contacts with the forum State or the bulge area.¹¹⁷ The Tenth Circuit in *Quinones v. Pennsylvania General Ins.* appears to have supported the same approach.¹¹⁸ On the other hand, the Second Circuit in *Coleman v. American Export Isbrandtsen Lines, Inc.*¹¹⁹ looked to the minimum contacts of the proposed third party with the entire State in which bulge service occurred.¹²⁰

Prior to 1993, the “bulge rule” was contained in Rule 4(f). Rule 4(f) had been playing the key role in the history of expansion of the personal jurisdiction of the district courts.

¹¹⁷ (5th Cir. 1979) 594 F.2d 412, 417.

¹¹⁸ (10th Cir. 1986) 804 F.2d 1167, 1173.

¹¹⁹ (2d Cir. 1968) 405 F.2d 250, 252.

¹²⁰ Presumably, as well as the contacts with the forum State.

Formerly, a district court had the general jurisdiction only within its district and did not have jurisdiction over a person living in the same State but in a different district. When first promulgated in 1937, Rule 4(f) extended the general jurisdiction to the territorial limits of the State in which the district court was sitting.¹²¹ Rule 4(f) was amended in 1963 to include the “bulge rule.” The amendment first proposed which purported to extend the general jurisdiction to the bulge area was not adopted.¹²² Instead, the “bulge rule” was adopted only for jurisdiction over persons joined under Rule 14 and Rule 19 (rule on joinder of parties) in order “to promote the objective of enabling the court to determine entire controversies.”¹²³

3.2.2.3 Venue

The venue requirements are provided by 28 USC Section 1391 or other federal venue statutes.

Since 28 USC Section 1391(d) provides that an alien (someone who is not a US citizen) may be sued in any district, if the proposed third party is an alien, there is in effect no venue requirement. In other cases, the district courts that satisfy the venue requirements depend upon the type of case but usually are the courts of the district in

¹²¹ It provided “All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held.”

¹²² See Nordbye “Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts” (1956) 18 F.R.D. 105, 107.

¹²³ “Notes of the committee on the 1963 amendments to Rule 4(f)” in the advisory committee note to Rule 4 of the Fed. R. Civ. P.

which the defendant is resident or the claim arose.¹²⁴

In relation to impleader, the question arises whether the venue requirements have to be satisfied with respect to the impleader proceedings as well as the original proceedings. The Supreme Court does not appear to have directly passed upon this question. The lower federal courts rulings are in conflict, but two extensive surveys concludes¹²⁵ that although some of the early decisions¹²⁶ required impleader proceedings to satisfy the venue requirements independently, later decisions¹²⁷ have not so required. If so, this trend would be contributing to the widening availability of impleader.

3.3 The implications of the historical developments for the present rules

The survey of history above has shown that third party procedure is getting more widely available through the expansion of the scope of procedural rules and jurisdictional rules.

One cause of this trend may be an increasing demand for third party procedure generated by growing specialisation in professions in modern society. Thus the modern society has witnessed the increasing separation of manufacturers from sellers, freight forwarders from carriers, and so forth. Between these persons is a fertile ground which

¹²⁴ 28 USC Section 1391(a)(b).

¹²⁵ “Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party” 100 A.L.R.2d 693, Section 2; Moore’s Federal Practice, 14.28[2].

¹²⁶ E.g. *Manley v. Standard Oil Co.* (1948, DC Tex) 8 FRD 354.

¹²⁷ E.g. *Lone Star Package Car Co. v. Baltimore & O. R. Co.* (1954, CA5 Tex) 212 F2d 147.

creates demands for third party procedure. As specialisation in professions looks set to increase further in the future, demands for third party procedure will further grow.

The increasing convenience of travel and communication may be another underlying cause. This fact cuts both ways because it reduces the burden on the proposed third party to defend in the court seised of the original claim as well as on the defendant to bring a separate action in another State. As the inconvenience for the defendant and for the proposed third party has become less significant, the avoidance of inconsistent decision has become a relatively more important factor in balancing the merits and drawbacks of third party procedure. Since the latter factor is one of the merits of third party procedure and as travel and communication look set to become still easier in the future, it would be justifiable for third party procedure to be extended even further.

If the expansion of the scope of jurisdiction over third party proceedings is not confined to Anglo-American law, there may be a multiplier effect. Where a judgment is given in favour of the defendant in his third party claim but the third party does not have asset within the judgment-State, the defendant has to seek enforcement of the judgment in the State where the third party has asset. In such a case if the jurisdiction of the court of the judgment-State over the third party proceedings was too extensive in the eyes of the enforcement-State, enforcement of the judgment may be refused. Then, the third party procedure will be wasted and the defendant will have to institute a new action against the third party in the State where the latter has asset. If, however, there is a trend of expansion in the scope of jurisdiction over third party proceedings in the international communities, the enforcement of a judgment will be less likely to face objection on the ground of exorbitant jurisdiction over third party proceedings. This, in turn, could justify having a wider scope of jurisdiction over third party proceedings.

These points have the following implications for the interpretation of the present rules.

First, a wide scope should be given to “actions on a warranty or guarantee” and “any other third party proceedings” in Article 6(2) of the Convention. It is difficult to see any good reason why some situations have to be categorically excluded from the scope. This position would ultimately lead to the view that Article 6(2) should not be given an autonomous scope.

Secondly, the courts should use whatever leeway they have in their discretion in favour of allowing third party procedure. They have such leeway in the procedural discretion in both Order 11 cases and the Convention cases as well as in the *forum conveniens* discretion in Order 11 cases.

Sub-Chapter 3

Hindrances to English Third Party Procedure Posed by Foreign Parallel Proceedings

1 Introduction

In this Sub-Chapter we will examine how English third party procedure is hindered by foreign parallel proceedings. Parallel proceedings refer in the present discussion to the situation in which two sets of corresponding proceedings are running concurrently as legal proceedings in different courts or running concurrently as legal proceedings and arbitral proceedings. One set of proceedings corresponds to another set of proceedings for the purpose of the present discussion if they involve the same subject matter and the same parties regardless of the procedural position of the parties as plaintiff, defendant, and third party. Thus third party proceedings in England brought by D against R correspond to the original proceedings in another forum brought by R against D. Also the original proceedings in England brought by P against D correspond to third party proceedings in another forum brought by D against P.

When faced with actual or possible parallel proceedings, an English court may have to decline jurisdiction over, or have to stay, its proceedings. Therefore, where proceedings brought by P against D are pending in England, the English court may have to decline jurisdiction over, or have to stay, third party proceedings which D seeks to bring against R, if corresponding proceedings to the third party proceedings are brought in another

forum. Where, on the other hand, P seeks to bring (original) proceedings against D in England in the circumstances in which D is expected to bring third party proceedings against R, the English court may have to decline jurisdiction over, or have to stay, the original proceedings if corresponding proceedings to the original proceedings are brought in another forum. In these cases, if the court or arbitral tribunal in that other forum cannot entertain both the original proceedings and third party proceedings either because, in the given circumstances, its procedural rules do not permit third party procedure or because it lacks jurisdiction over either proceedings, nowhere may third party procedure be available to D and he will consequently face the risk of irreconcilable decisions.

Parallel proceedings may arise from *lis alibi pendens*, foreign jurisdiction agreements, and arbitration agreements. We will examine how English third party procedure is hindered by each of them in turn.

Lis alibi pendens literally means “suit pending elsewhere” and refers in the present discussion to the situation where legal proceedings corresponding to English legal proceedings are running concurrently in a foreign court. It is one type of parallel proceedings, the type involving two sets of corresponding legal proceedings pending in different courts.

A foreign jurisdiction agreement is an agreement that a court or the courts of a particular foreign State are to have jurisdiction to settle disputes between the parties to the agreement which have arisen or which may arise. It gives rise to *lis alibi pendens* if it is ignored by the English court and enforced by the foreign court chosen.

An arbitration agreement is an agreement whereby parties to the agreement refer to arbitration disputes between them which have arisen or which may arise. If it is ignored by the English court and enforced by the arbitral tribunal, it gives rise to another type of

parallel proceedings, the type involving two sets of corresponding proceedings before a court and an arbitral tribunal.

2 Effect of *lis alibi pendens* as it operates as a hindrance to third party procedure

We will start with examining the effect of *lis alibi pendens* as it operates as a hindrance to third party procedure. We will first examine how English third party procedure will be hindered by *lis alibi pendens*. Then we will reverse the situation and consider how an English court can prevent its proceedings from hindering foreign third party procedure.

2.1 How English third party procedure will be hindered by *lis alibi pendens*

Where third party procedure is available under the English procedural rules, in what circumstances will the English court have to decline jurisdiction over, or have to stay, either the original proceedings or third party proceedings by the reason of actual or possible *lis alibi pendens*?

We will address this question below, first where proceedings corresponding to either set of the English proceedings are brought in another Contracting State to the Brussels or Lugano Convention¹ and then where they are brought in a non-Contracting State.

2.1.1 Where proceedings corresponding to either set of the English proceedings

¹ We will not address the effect of *lis alibi pendens* when corresponding proceedings are brought in another part of the United Kingdom.

are brought in a Contracting State

Article 21 of the Convention provides:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

As evident from the text, where two sets of corresponding proceedings are pending in England and another Contracting State, Article 21 applies. This is so irrespective of the domicile of the parties to these proceedings.²

In *The Tatry*,³ the European Court held that where some of the parties before the court of one Contracting State were the same as the parties to proceedings which had already been started before the court of another Contracting State, Article 21 required the court seised second to decline jurisdiction only to the extent that the parties before it were also parties before the court first seised. Although this case did not involve third party procedure, this ruling can be also applied in cases concerning third party procedure. Accordingly, even if third party procedure is available under the English procedural rules,

² *Overseas Union Insurance v. New Hampshire Insurance Company*, Case C-351/89 [1991] ECR I-3317.

³ Case C-406/92, [1994] ECR 1-5439.

the English court has to decline jurisdiction over either the original proceedings or third party proceedings, as the case may be, where the jurisdiction of a foreign court seised earlier of proceedings corresponding to either set of the English proceedings is established. English third party procedure will thus be hindered by *lis alibi pendens*.

Article 21 applies even if the procedural position as plaintiff and defendant is reversed as between the two sets of corresponding proceedings.⁴ It will also apply even if the earlier proceedings are for a declaration that the plaintiff is not liable to the defendant (negative declaration) brought purely for the purpose of pre-emptively striking the later corresponding proceedings.⁵ It follows that where third party proceedings are sought to be brought in England after the proposed third party has already brought corresponding proceedings for a negative declaration against the defendant in another Contracting State, the English court may have to decline jurisdiction over the third party proceedings. Likewise where (original) proceedings are sought to be brought in England after the defendant has already brought proceedings for a negative declaration against the plaintiff in another Contracting State, the English court may have to decline jurisdiction over the original proceedings. If, in the latter scenario, the defendant wishes to avail himself of English third party procedure, he would be advised to discontinue his proceedings in that other Contracting State.

As seen in Sub-Chapter 2, there are various jurisdictional grounds upon which English courts may have jurisdiction over third party proceedings. Where a jurisdictional ground

⁴ *Gubisch Maschinenfabrik AG v. Giulio Palumbo*, Case 144/86 [1987] ECR 4861.

⁵ *The Maciej Rataj* [1991] 2 Lloyd's Rep. 458, on appeal [1992] 2 Lloyd's Rep. 552 (CA) which made a reference to the European Court resulting in *The Tatry*, Case C-406/92, [1994] ECR I-5439.

specifically designed to cater for third party procedure, such as Article 6(2) or the first paragraph of Article 10 of the Convention or Order 11 rule 1(1)(c), provides jurisdiction over third party proceedings, will Article 21 still apply to oust that jurisdiction? Article 21 may not take precedence over all the jurisdictional grounds of the Convention. Thus the English Court of Appeal in *Continental Bank N.A. v. Aeakos Cia Naviera S.A.*⁶ held that the court was entitled to exercise jurisdiction conferred by the parties' agreement pursuant to Article 17 of the Brussels Convention even if corresponding proceedings became pending earlier in another Contracting State. In *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.*,⁷ the European Court held that under Article 21 the court second seised could, if it did not decline jurisdiction, only stay the proceedings and must not itself examine the jurisdiction of the court first seised but expressly left open the position of the court seised second which had exclusive jurisdiction under Article 16. Dicey & Morris reads⁸ this ruling as also having left open the question whether a court having exclusive jurisdiction under Article 16 can continue with its proceedings even if corresponding proceedings have become pending earlier in another Contracting State. Jurisdictional grounds under Article 6(2) or the first paragraph of Article 10 of the Convention or Order 11 rule 1(1)(c) are neither jurisdiction conferred by the parties' agreement nor exclusive jurisdiction. They are, therefore, unlikely to escape the application of Article 21.

Then, when are the relevant courts regarded as having been seised? The European

⁶ [1994] 1 WLR 588, 596 (CA).

⁷ Case C-351/89 [1991] ECR I-3317.

⁸ P. 437.

Court in *Zelger v. Salinitri (No. 2)*⁹ held that a court which had to consider whether to stay its proceedings under Article 21 must determine the time at which the relevant courts were seised according to the rules of the national law of each court. Based on this ruling, the English Court of Appeal held in *Neste Chemicals S.A. v. DK Line S.A.*¹⁰ that the English court became seised for the purpose of Article 21 not on the date of issue of the writ but on the date of service. The reason was, *inter alia*, that that was the time when the defendant was made aware of the proceedings. Inferring from this reason, it is suggested that where corresponding proceedings to English third party proceedings are brought in another Contracting State, the English court will be regarded as having been seised of the third party proceedings for the purpose of Article 21 when the third party notice is served and not when it is issued or when the writ of the main action is served.

The rule of Article 21 is a hard-and-fast rule allowing no discretion which would enable the court to avoid hindering third party procedure in order to save the merits of such procedure.¹¹ Consequently, irreconcilable decisions may arise. But since a decision is binding only on the parties to the proceedings in which it was made, the legal consequences of the decision made in the proceedings in one forum and the decision made in the proceedings in another forum between a party to the proceedings in the first

⁹ Case 129/83 [1984] ECR 2397.

¹⁰ [1994] 3 All ER 180 (CA).

¹¹ Under the so-called recognition prognosis approach adopted in some States, a court will or may decline jurisdiction if the foreign proceedings are likely to lead to a judgment entitled to recognition. See Gaudemet-Tallon, *France* in ch. 8 Fawcett, *Declining Jurisdiction in Private International Law* 175, 181; Schack, *Germany* in ch. 9 Fawcett, *Declining Jurisdiction in Private International Law* 189, 196. Since this approach also pays no regard to the merits of third party procedure, the same consequences as under the Convention will follow in the appropriate cases.

forum and a non-party to the same proceedings cannot be mutually exclusive.¹² The irreconcilability of such decisions can only relate to the underlying reasoning. Therefore, they can be enforced together in each State of origin or in a third State. Article 27(3) of the Convention lists as a ground for non-recognition irreconcilability with a judgment given in a dispute *between the same parties*. The Convention does not make irreconcilability with a judgment made in a dispute between a different pair of parties a ground for non-recognition. It follows that the objective of the Convention, viz. to facilitate the recognition and enforcement of judgments between the Contracting States,¹³ will not be impaired even if the decision made in the proceedings in one Contracting State is irreconcilable with the decision made in the proceedings in another Contracting State between a party to the proceedings in the first-mentioned Contracting State and a non-party to the same proceedings. Rather, the type of irreconcilability that must be avoided to achieve this objective is the one relating to the final result or order between decisions made in two sets of corresponding proceedings. It is therefore necessary to stamp out the possibility of *lis alibi pendens* in different Contracting States. The hard-and-fast rule of Article 21, which provides a clear guidance as to which forum should prevail, is ideal to achieve this purpose.

Therefore, it can be said that Article 21 is designed to prevent irreconcilable decisions made in two sets of corresponding proceedings at the risk of irreconcilable decisions made in two sets of proceedings between different pairs of parties.

¹² Opinion of Advocate General Tesauro in *The Tatry*, Para. 27.

¹³ See the preamble of the Convention.

2.1.2 Where proceedings corresponding to either set of the English proceedings are brought in a non-Contracting State

In the cases where proceedings corresponding to either set of the English proceedings involved in third party procedure are brought in a non-Contracting State, Article 21 does not apply. In those cases the English court takes into account the existence or possibility of *lis alibi pendens* in exercising the *forum (non) conveniens* discretion. It is, therefore, convenient to briefly explain the principle of *forum (non) conveniens*.

First, where the defendant is not domiciled in a Contracting State, the Brussels and Lugano Conventions provide in Article 4 that jurisdiction depends on the national law of the Contracting State. In England the courts have a certain discretion to decide whether or not to exercise jurisdiction. The discretion comes in two types. Where the defendant has been served out of the jurisdiction under one of the heads of Order 11, rule 1(1), the court may set aside the leave to serve out of the jurisdiction if, *inter alia*, the plaintiff fails to establish that England is the *forum conveniens*, i.e. England is clearly the appropriate forum to try the action in the interests of all the parties and the ends of justice.¹⁴ Where, on the other hand, the defendant has been served within the jurisdiction, English courts may stay the proceedings if the defendant succeeds in establishing that England is a *forum non conveniens*, i.e. there is some other forum, having competent jurisdiction, which is clearly more appropriate than England to try the action in the interests of all the parties and the ends of justice.¹⁵ The burden on the plaintiff to establish that England is the *forum*

¹⁴ *Spiliada v. Cansulex* [1987] AC 460, 478.

¹⁵ *Spiliada v. Cansulex* [1987] AC 460, 475.

conveniens is a mirror image of the burden on the defendant to establish that England is a *forum non conveniens*.¹⁶ Therefore, the same factors are taken into account in exercising discretion.

Secondly, where a defendant is domiciled in a Contracting State, the question has not been settled yet whether a court in a Contracting State can stay the proceedings over which it has jurisdiction under the Convention on the ground that a court in a non-Contracting State is more appropriate for the trial of the action. In this regard, section 49 of the Civil Jurisdiction and Judgments Act 1982 provides that nothing in the Act is to prevent any court in the United Kingdom from staying any proceedings on the ground of *forum non conveniens* or otherwise where to do so is not inconsistent with the Convention. In *Re Harrods (Buenos Aires) Ltd.*,¹⁷ the English Court of Appeal held that it was not inconsistent with the Convention for an English court to stay its proceedings brought against a defendant domiciled in England on the ground of *forum non conveniens* when the courts of a non-Contracting State were the appropriate forum. The court thought that the Convention was intended to regulate jurisdiction only as between the Contracting States. Although a reference was subsequently made to the European Court, the case was eventually settled without waiting for the ruling of the European Court.

In exercising the *forum (non) conveniens* discretion, English courts will look at various factors relevant to the determination of the appropriate forum.¹⁸ Amongst those factors, three of the most significant for the present purpose will be examined below: the existence or possibility of *lis alibi pendens*, a claim for a negative declaration and the

¹⁶ *Spiliada v. Cansulex* [1987] AC 460, 481.

¹⁷ [1991] 3 WLR 397 (CA).

¹⁸ *Spiliada v. Cansulex* [1987] AC 460, 478.

merits of third party procedure.

First, the existence of *lis alibi pendens*, unlike under Article 21 of the Convention, is not usually conclusive under the principle of *forum (non) conveniens* in deciding whether to stay the proceedings or set aside the leave. The weight given to it varies according to the circumstances of the case. Although, unlike under Article 21, not only the existence of *lis alibi pendens* but also the possibility of it will be taken into account, the *lis alibi pendens* factor carries more weight if it has already existed for some time. Thus in *Cleveland Museum of Art v. Capricorn*,¹⁹ a case not concerning third party procedure, the proceedings in Ohio were ready for trial after over two years of pre-trial procedure during which a lengthy discovery had been gone through. Also the plaintiffs in the Ohio proceedings had by then incurred significant legal costs. The English court held that these facts pointed very strongly in favour of Ohio as the more appropriate forum.

Secondly, English courts generally take sceptical stance towards claims for negative declarations as the Court of Appeal in *The Volvox Holiandia* held that such claims “must be viewed with great caution in all situations involving possible conflicts of jurisdictions ...” on the ground that they lend themselves to improper attempts at forum shopping.²⁰ Thus in *Arkwright Mutual Insurance Co. v. Bryanston Insurance Co. Ltd.*,²¹ the existence of the New York proceedings was not given much weight because they were for a negative declaration and were thought to have been commenced as a pre-emptive strike in the knowledge that English proceedings were being contemplated.

¹⁹ [1990] 2 Lloyd’s Rep. 166.

²⁰ [1988] 2 Lloyd’s Rep. 361, 371 (CA).

²¹ [1990] 3 WLR 705, 720 (overruled on other grounds: *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72 (CA)).

Thirdly, English courts will generally value the merits of third party procedure highly. This attitude is most symbolically indicated by the *SNIAS* case²² in which the Privy Council issued an antisuit injunction to restrain foreign proceedings in order to bring domestic third party procedure into operation.²³ Significant weight has been given to the merits of third party procedure also in the *forum (non) conveniens* discretion exercised in relation to third party proceedings: in *The Kapetan Georgis*²⁴ the application to set aside the service of the third party proceedings under Order 11, rule 1(1)(c) was declined; in *Meadows Indemnity Co Ltd v. Insurance Corporation of Ireland Ltd*,²⁵ the application to stay the third party proceedings was declined. It follows that where third party proceedings are sought to be brought in England, the merits of third party procedure are a weighty factor which points in favour of England as the appropriate forum for the defendant's claim against the proposed third party. Likewise where (original) proceedings are sought to be brought in England in circumstances where the defendant is expected to bring third party proceedings against a non-party, if England is the only forum in which third party procedure is available, it is a weighty factor which points towards the appropriateness of England for the determination of the original proceedings.²⁶

As a result of both the existence or possibility of *lis alibi pendens* and the merits of third party procedure being taken into account, it follows that under the principle of the *forum (non) conveniens*, unlike Article 21 of the Convention, the choice is not a clear-cut

²² [1987] AC 871.

²³ See Sub-Chapter 4.

²⁴ [1988] 1 Lloyd's Rep. 352.

²⁵ [1989] 1 Lloyd's Rep. 181 affirmed in [1989] 2 Lloyd's Rep. 298 (CA).

²⁶ No relevant case has been found.

one between proceedings here and proceedings abroad, but rather a choice between two sets of proceedings confined here on the one hand and, on the other, one set of proceedings here and another set abroad. Thus in *Meadows Indemnity Co Ltd v. Insurance Corporation of Ireland Ltd*, the English third party proceedings were not stayed notwithstanding that corresponding proceedings were pending in Ireland because England was the only forum in which third party procedure was definitely available at the time of decision.

Inasmuch as the merits of third party procedure are taken into account, the principle of *forum (non) conveniens* is more capable of preserving third party procedure faced with *lis alibi pendens* than Article 21 of the Convention.

However, not as much of the merits of third party procedure may in the end come true as expected when third party procedure was preserved through the *forum (non) conveniens* discretion. This is because the principle of *forum (non) conveniens* does not, unlike Article 21, eliminate *lis alibi pendens* in all cases. Thus in the case of *Meadows Indemnity Co. Ltd v. Insurance Corporation of Ireland Ltd*, the English court decided to exercise jurisdiction over both the original proceedings and third party proceedings. But the Irish court also eventually decided to exercise jurisdiction over both the original proceedings brought there by the third party to the English proceedings against the defendant to the English proceedings and third party proceedings also brought there by the defendant to the English proceedings against the plaintiff to the English proceedings.²⁷ Such *lis alibi pendens* would not have remained under Article 21 of the Convention. The English court indeed acknowledged, without deciding, that if Ireland had been a

²⁷ *International Commercial Bank plc v. Insurance Corporation of Ireland plc* [1989] IR 466 (Supreme Court of Ireland)

Contracting State,²⁸ the third party might have had a case for stay of the English third party proceedings.

The failure to eliminate *lis alibi pendens* has a repercussion on the English third party procedure. If the foreign proceedings result in a judgment before the English corresponding proceedings and that judgment is entitled to recognition in England, it may give rise to *res judicata*.²⁹ Consequently, consistency between the decision made in the original proceedings and the decision made in third party proceedings cannot be ensured. Thus if the third party to English third party proceedings brings proceedings in a foreign forum against the defendant to the English proceedings and the foreign proceedings result in a judgment earlier than the English third party proceedings reach a judgment, the foreign judgment may have to be recognised in England as binding on the defendant and the third party. When, subsequently, the English original proceedings result in a judgment, it may be irreconcilable with the foreign judgment.

It can, therefore, be said that although the principle of *forum (non) conveniens* is better equipped to preserve third party procedure than Article 21, the merit of third party procedure as a means of ensuring consistent decisions may be qualified by the *res judicata* effect of a foreign judgment resulting from *lis alibi pendens* which the principle of *forum (non) conveniens* is less able to eliminate than Article 21.

2.2 How an English court can prevent its proceedings from hindering foreign third party procedure

²⁸ Ireland had not at that time implemented the Brussels Convention.

²⁹ *Res judicata* arises irrespective of which proceedings are commenced first. *Lee v. Citibank N.A.* [1981] Hong Kong L.R. 470.

Just as English third party procedure may be hindered by *lis alibi pendens*, English proceedings may hinder foreign third party procedure. In such cases third party procedure is not always available in England due to procedural or jurisdictional reasons. We will, therefore, consider the ways in which English courts can avoid hindering foreign third party procedure.

2.2.1 Where third party procedure in another Contracting State is hindered

English proceedings may hinder third party procedure in another Contracting State through Article 21 of the Convention if the English court is seised of the proceedings earlier than the court of that other Contracting State is seised of corresponding proceedings brought either as the original proceedings or as third party proceedings. To describe a scenario, where an English court is seised of proceedings brought by a non-party to proceedings pending in another Contracting State against the defendant to the same proceedings, the court of that other Contracting State may be obliged under Article 21 to decline jurisdiction over corresponding proceedings brought as third party proceedings by the defendant against that non-party. The English court, for its part, may be obliged under Article 21 to decline jurisdiction over third party proceedings brought by that defendant against the plaintiff to the foreign proceedings. In the face of the deadlock in this scenario (hereafter referred to as “the described scenario”), the question arises whether the English court can avoid hindering foreign third party procedure.

Where the defendant in the described scenario is domiciled in a non-Contracting State, it would seem that the English court can avoid hindering foreign third party procedure by

staying the English proceedings brought by the non-party against the defendant on the ground that England is a *forum non conveniens* or by setting aside the leave to serve the defendant out of the jurisdiction under Order 11 on the ground that England is not the *forum conveniens*. In *The Xin Yang*³⁰ and in *Sarrio SA v. Kuwait Investment Authority*,³¹ the English courts held that where the defendant was domiciled outside a Contracting State, the English court which would otherwise be first seised was entitled to decline to exercise jurisdiction on the ground of *forum non conveniens* in favour of the courts of another Contracting State. In *Sarrio SA v. Kuwait Investment Authority*, the English Court of Appeal held,³² *obiter*, that jurisdiction of the English court was not “established” for the purposes of Article 21 if the court in the exercise of that jurisdiction ordered a stay of the proceedings in question. It is thought that this is the correct interpretation of Article 21 because otherwise, the stayed English proceedings would block proceedings in other Contracting States and nowhere could the claim be pursued. It follows that if the English court in the described scenario stays its proceedings, the court of the other Contracting State will not be bound by Article 21 to decline jurisdiction over the third party proceedings brought against the non-party.

As already seen in § 2.1.2, above, in exercising the *forum (non) conveniens* discretion, various factors are taken into account including the merits of third party procedure and the existence or possibility of *lis alibi pendens*. In view of the high premium given to the merits of third party procedure by the Privy Council in *SNIAS*,³³ English courts may well

³⁰ [1996] 2 Lloyd’s Rep. 217, 222.

³¹ [1997] 1 Lloyd’s Rep. 113, 124(CA).

³² [1997] 1 Lloyd’s Rep. 113, 123(CA).

³³ [1987] AC 871.

give significant weight, in exercising the *forum (non) conveniens* discretion, to the fact that the foreign court is the only forum in which third party procedure is available and the fact that the English proceedings will hinder the third party procedure there.

Another way for the English court to avoid hindering third party procedure in the other Contracting State in the described scenario would be to stay, or decline jurisdiction over, its proceedings brought by the non-party against the defendant under Article 22 of the Convention. The European Court said in *The Tatry*,³⁴ albeit not specifically referring to third party procedure, that Article 22 could mitigate the fragmentation of proceedings caused by the application of Article 21. Unlike the principle of *forum (non) conveniens*, Article 22 can be relied upon irrespective of whether the defendant in the described scenario is domiciled in a Contracting State or non-Contracting State. It provides:³⁵

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

³⁴ Case C-406/92, [1994] ECR 1-5439, para. 34.

³⁵ Art. 22 of the Brussels Convention and Art. 22 of the Lugano Convention are in identical terms.

The first question that must be addressed is whether actions which stand in such a relation to each other that they may be brought as the original proceedings and third party proceedings under the procedural rules of some Contracting State can be deemed to be “related” as defined by the third paragraph. There is no doubt that such actions are actions which “it is expedient to hear and determine … together.” A more subtle point is whether they have “the risk of irreconcilable judgments” if tried as separate actions. There is no European Court decision which specifically ruled upon this point. But in *The Tatry*,³⁶ the European Court held that the term “irreconcilable” used in the third paragraph of Article 22 has a different meaning from the same term used by Article 27(3). As for the meaning under Article 27(3), the European Court held in *Hoffmann v. Krieg*³⁷ that two judgments are irreconcilable if they entail legal consequences that are mutually exclusive. As for Article 22, Advocate General Tesauro said in his Opinion in *The Tatry*³⁸ that the rationale of this article was to encourage harmonious judicial decisions and obviate the danger of judgments which conflict with each other, albeit only as regards their reasoning. The European Court held that the term “irreconcilable” must be interpreted by reference to the rationale as identified by the Advocate General.³⁹ Therefore, the phrase “irreconcilable judgments” in Article 22 appears to have a wider meaning than the same phrase in Article 27(3) and embraces judgments based upon irreconcilable underlying reasoning irrespective of whether their legal consequences are mutually exclusive. As previously seen in § 2.1.1, above, two judgments arising out of actions which stand in

³⁶ Case C-406/92, [1994] 417 ECR I-5439.

³⁷ Case 145/86, [1988] ECR 645, para. 22.

³⁸ Case C-406/92, [1994] 417 ECR I-5439, para. 28.

³⁹ Para. 54.

such a relation as may be brought as the original proceedings and third party proceedings are not mutually exclusive, since each of them is only binding on the parties to the action from which it arises. But such actions, if tried in separate forums, may produce judgments based upon irreconcilable underlying reasoning. Such actions can, therefore, be deemed to be “related” within the meaning of Article 22.

Under the first paragraph of Article 22, the court can stay its proceedings of its own motion. Thus the English court in the described scenario can stay its proceedings brought by the non-party against the defendant to avoid barring the court of the other Contracting State from exercising jurisdiction over the third party proceedings which the defendant seeks to bring against the non-party.

The Jenard Report observes⁴⁰ "Where actions are related, the first duty of the court is to stay its proceedings." Advocate General Lenz in *Owens Bank Ltd. v. Bracco*⁴¹ and Ognall J. in *Virgin Aviation v. CAD Aviation*⁴² read this passage as signifying strong presumption in favour of stay. However, while a stay of proceedings brought by the non-party in the described scenario against the defendant continues, the non-party is deprived of justice. Therefore, a stay should not be continued longer than it would reasonably take for a prudent person in the position of the defendant to make application to the English court for the declining of jurisdiction under the second paragraph.

Turning to the second paragraph, its literal reading makes no sense. It would mean that the court seised second may decline jurisdiction if the court seised first has jurisdiction over both claims and the court seised *second* permits consolidation of the actions. The

⁴⁰ At p. 41.

⁴¹ Case C-129/92, [1994] ECR I-117, para. 75.

⁴² The Times, 2 Feb.1990.

Court of Appeal in *Owens Bank Ltd. v. Bracco*⁴³ saw no reason why the paragraph should apply only when the court second seised had power to consolidate. More significantly, if the court first seised does not have power to consolidate, it will continue to hear only the first claim, and the second claim must still be heard somewhere and it is pointless for the court seised second to decline jurisdiction over the second claim.

Rationally, it should be in cases where the court first seised has jurisdiction over, and power to consolidate, both claims that the court seised second will be able to decline jurisdiction. This reading finds support in the English-language version of the Jenard Report.⁴⁴ Academic opinion is also overwhelmingly in favour of this reading.⁴⁵ However, the proper interpretation will not be settled until the European Court gives ruling.⁴⁶

Under the rational reading, the English court in the described scenario can decline jurisdiction over its proceedings brought by the non-party against the defendant under the second paragraph of Article 22 to avoid barring the court of the other Contracting State from exercising jurisdiction over third party proceedings which the defendant seeks to bring against the non-party if third party procedure is available under the procedural rules of the latter court and that court has jurisdiction over both the original proceedings and the third party proceedings.

Since it is the defendant who will benefit from third party procedure, the application for declining jurisdiction under the second paragraph of Article 22 is likely to be made

⁴³ [1992] 2 AC 443, 455 (CA) affd. on other grounds [1992] 2 AC 443 (HL).

⁴⁴ At p. 41.

⁴⁵ See e.g. Dicey & Morris, p. 417; Briggs para. 2.11.2.2.3.; Hartley, “Introduction to the Brussels Jurisdiction and Judgments Convention” p. 259; Collins, p. 98.

⁴⁶ Advocate General Lenz left the interpretation of this paragraph open at n. 75 of his Opinion in *Owens Bank Ltd. v. Bracco*, Case C-129/92, [1994] ECR I-117

by the defendant. The defendant may have to show the English court his intention to bring third party proceedings against the non-party in the other Contracting State. For without this showing, it would be futile for the English court to inquire whether third party procedure is available in the other Contracting State and whether the court there has jurisdiction over both the main and the third party proceedings.

Both staying proceedings under the first paragraph and declining jurisdiction under the second paragraph are discretionary. In view of the high premium attached to the merits of third party procedure by the Privy Council in *SNIAS*,⁴⁷ English courts may well try to avoid hindering third party procedure in another Contracting State by relying on these provisions. If, however, by the time application for declining jurisdiction under the second paragraph is made, the English proceedings have already become ripe for judgment, the English court should refuse to decline jurisdiction. In such a case, the defendant in the described scenario ought to accept the risk of irreconcilability between the decision in the other Contracting State on the plaintiff's action against him and the decision in England on the non-party's action against him. It is a consequence of his lack of prudence.

In view of the generally sceptical attitude of English courts towards claims for negative declarations, where the proceedings brought in England by the non-party against the defendant in the described scenario are for a negative declaration, the English court may show greater willingness to stay the proceedings or decline jurisdiction. However, it must be noted that the European Court in *The Tatry*⁴⁸ signalled its neutral view on a

⁴⁷ See Sub-Chapter 4.

⁴⁸ Case C-406/92, [1994] ECR I-5439. See Briggs "The Brussels Convention Tames the Arrest Convention" [1995] LMCLQ 161, 164.

claim for a negative declaration by holding that the court was bound to decline jurisdiction under Article 21 even if the corresponding proceedings brought earlier in another Contracting State were for a negative declaration intended purely as a pre-emptive strike. If the European Court clarifies its neutral stance in a future case, the English court cannot insist on its sceptical view in applying Article 22.

The function of Article 22 of removing hindrance to third party procedure in another Contracting State is restricted by the fact that this article limits the courts that have power to stay its proceedings or decline jurisdiction to the courts other than the court first seised.⁴⁹ Consequently, where, unlike the described scenario, proceedings are already pending in England when a non-party to the English proceedings brings proceedings in another Contracting State against the defendant to the English proceedings, the English court cannot stay its proceedings or decline jurisdiction in order to enable that defendant to bring third party proceedings in that other Contracting State against the plaintiff to the English proceedings. This is so even if the defendant cannot bring third party proceedings against the non-party in England.

2.2.2 Where third party procedure in a non-Contracting State is hindered

Since Article 21 of the Convention is not applied by a non-Contracting State, the question whether and how third party procedure in a non-Contracting State is hindered by English proceedings depends upon the jurisdictional rules of that State. It is possible

⁴⁹ By contrast, an English court can avoid hindering third party procedure in another Contracting State by staying its proceedings or by setting aside the leave to serve out of the jurisdiction on the *forum (non) conveniens* grounds even if it would otherwise be first seised.

that a non-Contracting State has to stay or, decline jurisdiction over, either the main or third party proceedings if corresponding proceedings or related proceedings are brought in England. In such situations, English courts will be able to stay its proceedings or set aside the leave under the principle of *forum (non) conveniens* to remove hindrance to foreign third party procedure especially if third party procedure is not available in England for procedural or jurisdictional reason.

It is also conceivable that foreign court seised of proceedings refrains from issuing notice to a non-party under *litis denunciatio* if proceedings brought by the non-party against the defendant to the foreign proceedings are already pending in England. As seen in Chapter 2, § 2 above, *litis denunciatio* shares with third party procedure the merit of preventing inconsistent decisions. Therefore, the English court will be able to set aside the leave or stay its proceedings on the ground of *forum (non) conveniens* in order to avoid hindering the foreign *litis denunciatio*.

If the English proceedings are for a negative declaration, in view of the generally sceptical stance of English courts towards such a claim, English courts may show more willingness to set aside the leave⁵⁰ or to stay proceedings.⁵¹ In *Insurance Co. of Ireland v. Strombus International Insurance Co.*,⁵² the insured (P) brought proceedings against the insurer (D) in California claiming payment under the insurance contract. The insurer sought to pass that claim to their reinsurer (R) by bringing a cross-complaint, equivalent to English third party proceedings, against the reinsurers in California. The reinsurer

⁵⁰ *Insurance Co. of Ireland v. Strombus International Insurance Co.* [1985] 2 Lloyd's Rep. 138, 144 (CA); *The Volvox Hollandia* [1988] 2 Lloyd's Rep. 361 (CA).

⁵¹ *Camilla Cotton Oil Co. v. Granadex S.A.* [1976] 2 Lloyd's Rep. 10 (HL); *First National Bank of Boston v. Union Bank of Switzerland* [1990] 1 Lloyd's Rep. 32 (CA).

⁵² [1985] 2 Lloyd's Rep. 138, 144.

sought to bring an action in England by serving a writ out of the jurisdiction on the insurer. The English court, however, set aside the leave on the ground, *inter alia*, that the reinsurer's claim was for a negative declaration. The court also took the view that it could not, on the facts of the case, entertain third party proceedings which the insurer, upon being sued by the reinsurer, might seek to bring against the insured.⁵³ In this case it was not argued that the English proceedings between the reinsurer and the insurer would, had they been permitted to go ahead, have hindered the Californian third party procedure. If that had been the case, it would have reinforced the case for setting aside the leave.

Where a non-party to foreign proceedings seeks to bring proceedings for a negative declaration in England against the defendant to the foreign proceedings, unless the defendant shows his intention to bring third party proceedings against the non-party in the foreign forum, the English court should not set aside the leave or stay its proceedings in order to avoid hindering the foreign court from trying such proceedings. For the non-party should not be denied his opportunity to have his claim against the defendant decided. Even if the defendant later moves to bring third party proceedings against the non-party in the foreign forum, the English court should continue with its proceedings if they have already become ripe for judgment. In such a case, the defendant ought to accept the consequence of his lack of prudence, viz. the risk of inconsistency between the decision in the foreign forum and the decision in the English action.

⁵³ The reason given was that a claim for a negative declaration could not be passed on by the insurer to the insured. But its ground was not stated. Such procedure was allowed in a later case, *Meadows Indemnity Co. Ltd v. Insurance Corporation of Ireland Ltd*, [1989] 1 Lloyd's Rep. 181 affirmed in [1989] 2 Lloyd's Rep. 298 (CA). In that case the reinsurer claimed a declaration against the insurer that they were entitled to avoid the contract of reinsurance and the insurer was allowed to bring third party proceedings against the insured claiming that they were entitled to avoid the contract of insurance.

Before setting aside the leave or staying proceedings, English courts should satisfy themselves that the judgment ensuing in the foreign forum has a reasonable chance of recognition in England.⁵⁴ Judgments arising out of proceedings in a non-Contracting State are not always entitled to recognition in England. It is pointless for an English court to stay, or decline jurisdiction over, its proceedings brought by a non-party to foreign proceedings against the defendant to the foreign proceedings in order to avoid hindering the foreign court from trying third party proceedings which the defendant may bring against the non-party, if the judgment resulting from the foreign third party proceedings is unlikely to be recognised in England because even if the foreign judgment is in favour of the defendant against the non-party, the latter would still be able to bring an action against the defendant in England.

3 Effect of a foreign jurisdiction agreement as it operates as a hindrance to English third party procedure

In this part of the Sub-Chapter we will examine whether and how English third party procedure is hindered by a foreign jurisdiction agreement between the defendant and the proposed third party.

This question will be answered below in four categories of situations. These categories depend upon whether or not the jurisdiction agreement has chosen the courts of a

⁵⁴ This is the type of prediction which the courts of some States make in applying the so-called recognition prognosis approach to *lis alibi pendens*. But the recognition prognosis approach is not useful for the purpose of removing hindrance to foreign third party procedure, as it gives courts no discretion in which to take into account the merits of foreign third party proceedings.

Contracting State and whether or not the proposed third party is domiciled in a Contracting State.⁵⁵

3.1 Where the jurisdiction agreement has chosen the courts of a Contracting State

Where the jurisdiction agreement has chosen the courts of a Contracting State, Article 17 of the Convention applies. The first paragraph of Article 17 of the Brussels Convention provides:⁵⁶

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either--

- (a) in writing or evidenced in writing or,
- (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

⁵⁵ We will not address the effect of a jurisdiction agreement choosing the courts of another part of the United Kingdom which would make the analysis unduly complicated since Schedule 4 to the 1982 Act, which deals with the allocation of jurisdiction within the United Kingdom, adopted Article 17 of the Convention with significant modifications.

⁵⁶ Art. 17(1) of the Lugano Convention is in identical terms.

in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

In matters relating to insurance, Article 12 is applicable. Article 12 of the Brussels Convention provides:⁵⁷

The provisions of this Section may be departed from only by an agreement on jurisdiction--

1. which is entered into after the dispute has arisen, or
2. which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
3. which is concluded between a policy-holder and an insurer, both of whom are domiciled in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
4. which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 12a.

⁵⁷ Art. 12 of the Lugano Convention is identical except para. 3. The differences in para. 3 are, however, not significant for the present analysis.

“The provisions of this Section” refers to the provisions providing for jurisdictional grounds in matters relating to insurance. Among them is the first paragraph of Article 10 which, as examined in Sub-Chapter 2, § 2.2, above, provides for jurisdiction over third party proceedings brought by the insured who has been sued by the injured person, against the insurer in respect of liability insurance.

Although the Jenard Report says⁵⁸ this Section applies independently of the rest of the Convention, the European Court in *Gerling v. Treasury Administration*⁵⁹ applied the formal requirements of Article 17 together with the requirements of Article 12 to decide the validity of a jurisdiction agreement in matters relating to insurance. It is submitted that the other aspects of Article 17, including the effects of a jurisdiction agreement, should also be applied in matters relating to insurance. Article 12 should be read as merely laying down additional requirements for the validity of a jurisdiction agreement in order to afford a greater-than-normal protection to the insured person who is assumed to be in a weaker bargaining position.⁶⁰

3.1.1 Where the proposed third party is domiciled in a Contracting State

Where the proposed third party is domiciled in a Contracting State, English courts may have jurisdiction over the third party proceedings by virtue of Article 6(2), the first paragraph of Article 10 or other provisions of the Convention. If, however, there is a

⁵⁸ P. 31.

⁵⁹ Case 201/82 [1983] ECR 2503.

⁶⁰ Jenard Report, p. 28.

jurisdiction agreement between the defendant and the proposed third party choosing the courts of another Contracting State, would it deprive the English court of that jurisdiction in accordance with Article 17 of the Convention?

3.1.1.1 Cases and official commentaries

The European Court has repeatedly stated that a jurisdiction agreement complying with the requirements of Article 17 will generally exclude jurisdiction conferred by the provisions of the Convention. Thus in *Salotti v Ruewa*, it said:⁶¹

The way in which [the provision of the first paragraph of article 17] is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.

Jurisdiction over third party proceedings is also excluded by Article 17. The Jenard Report says in relation to Article 6(2):⁶²

... under Article 17, the court seised of the original action will not have jurisdiction over the action on the warranty where the warrantor and the beneficiary of the warranty have

⁶¹ Case 24/76, [1976] ECR 1831, para. 7. For similar passages, see also *Segoura v. Bonakdarian*, case 25/76, [1976] ECR 1851, para. 6; *Meeth v. Glacetal.*, case 23/78, [1978] ECR 2133, para. 5.

⁶² P. 27.

agreed to confer jurisdiction on another court, provided that the agreement covers actions on the warranty.

The proviso in this passage will be discussed shortly. There are Dutch cases which followed the advice contained in this passage.⁶³ Article 333 of the French New Code of Civil Procedure, on the other hand, provides, quite contrary to the advice contained in this passage, that jurisdiction over third party proceedings cannot be challenged on the basis of a jurisdiction agreement. But the French Cour de Cassation⁶⁴ denied the applicability of this article in the intra-Community relations as opposed to domestic relations.⁶⁵

Similarly, jurisdiction agreements complying with the requirements of Article 12 exclude jurisdiction conferred by the first paragraph of Article 10. The Schlosser Report says:⁶⁶

Agreements on jurisdiction cover all legal proceedings between insurer and policy-holder, even where the latter wishes, pursuant to the first paragraph of Article 10, to join

⁶³ *Islanders Canning Corp. Ltd v Hoekstra v. Schmalbach-Lubeca-Werke AG, Arrondissementsrechtsbank*, Leeuwarden, 2 September 1976, Digest of Case-Law Relating to the European Communities, D series 1-17.1.1-B4; *Technisch Handelsbureau P.J. van London BV v NV Gieterijen Technomet, Arrondissementsrechtsbank*, Arnhem, 23 December 1982, Digest of Case-Law Relating to the European Communities, D series 1-17.1.2-B24, (1983) NIPR No. 246.

⁶⁴ Première Chambre Civile, 18 October 1989, note Huet (1991) 118 Clunet 155.

⁶⁵ For another Cour de Cassation decision consistent with the advice of the Jenard Report, see *Soc. des Etablissements Voith v. Soc. Chantiers et Ateliers de la Perrière*, Première chambre civile, 12 July 1982, Digest of Case-Law Relating to the European Communities, D series 1-17.1.1-B19, note Lagarde (1983) Rev. Crit. 658, 239; Holleaux (1982) Clunet 405.

⁶⁶ At para. 148.

the insurer in the court in which he himself is sued by the injured party.

3.1.1.2 Scope of the jurisdiction agreement

The proviso in the quoted passage of the Jenard Report suggests that a jurisdiction agreement will exclude jurisdiction founded by Article 6(2) only if it is intended to cover third party proceedings.⁶⁷ Since this suggestion is in accord with the underlying philosophy of Article 17, viz. to make the parties abide by their agreement, it should equally apply where jurisdiction over third party proceedings is founded by other provisions. Therefore, the defendant can preserve the possibility of relying upon third party procedure by excluding third party proceedings from the scope of the jurisdiction agreement with the person against whom he may bring third party proceedings.⁶⁸

⁶⁷ For the same view, see Huet (1993) 120 Clunet 151.

⁶⁸ The same idea of the parties' responsibility for a vigilant choice of forum is behind Article 28 of the Uniform Rules For Demand Guarantees (ICC Publication No. 458, 1992) which reads:

Unless otherwise provided in the Guarantee or Counter-Guarantee, any dispute between the Guarantor and the Beneficiary relating to the Guarantee or between the Instructing Party and the Guarantor and relating to the Counter-Guarantee shall be settled exclusively by the competent court of the country of the place of business of the Guarantor or Instructing Party (as the case may be) or, if the Guarantor or Instructing Party has more than one place of business, by the competent court of the country of the branch which issued the Guarantee or Counter-Guarantee.

Articles 28, together with other Articles of the Rules, operates as a contractual term by incorporation. If effect is given to Article 28, the courts having jurisdiction in disputes concerning the guarantee will be different from those having jurisdiction in disputes concerning the counterguarantee. This consequence is sought to be justified by Goode, *Guide to the ICC Uniform Rules for Demand Guarantees* (ICC Publication No. 510) p. 119, on the ground that if the parties consider this to be inconvenient, they should ensure that the guarantee and the counter-guarantee both contain a jurisdiction clause and that

However, as jurisdiction agreements do not usually state expressly whether they cover third party proceedings, the question arises how to ascertain the parties' intention in such cases.

The construction of a jurisdiction agreement is governed by the law applicable to the agreement as determined by the choice-of-law rules of the forum.⁶⁹ Thus in *Continental Bank N.A. v. Aeakos Cia Naviera S.A.*,⁷⁰ the question whether the jurisdiction agreement covered not only a contractual claim but also a claim in tort was determined by the law governing the jurisdiction agreement.⁷¹

On the other hand, jurisdiction agreements are an area where Community-wide uniformity is especially desirable. In *Elefanten Schuh v. Jacqmain*, the European Court held that the formal validity of jurisdiction agreements was to be decided solely by reference to Article 17 of the Convention to the exclusion of the rules of national law.⁷² This decision is supported by Hartley on the ground that it would be undesirable if a jurisdiction agreement were regarded as valid by one set of courts but invalid by the other, in view of the fact that Article 17 purports not only to give jurisdiction to the court chosen but also to deprive all other courts of jurisdiction.⁷³ It would then be similarly

the two clauses match.

⁶⁹ Since the Rome Convention excludes agreements on the choice of court from its scope (Art. 1(2)(d)), the law applicable to a jurisdiction agreement will be determined under the preexisting choice-of-law rules of the forum, e.g. in England by traditional common law rules.

⁷⁰ [1994] 1 WLR 588 (CA).

⁷¹ P. 592.

⁷² Case 150/80, [1981] ECR 1671.

⁷³ Hartley, "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser" (1993) 18 ELRev 506, 507.

undesirable if a court of one Contracting State exercised jurisdiction over third party proceedings by construing a jurisdiction agreement between the defendant and the proposed third party as not covering third party proceedings while the court chosen by the same jurisdiction agreement in another Contracting State exercised jurisdiction over proceedings brought by the proposed third party against the defendant by construing the agreement as covering third party proceedings. In the first place, the question what presumption should be adopted in the construction of jurisdiction agreements is more than a question concerning a particular individual jurisdiction agreement but is a question of the general principle applicable to all jurisdiction agreements. Accordingly, it does not necessarily have to be decided by the law governing the construction of a particular jurisdiction agreement. It is, therefore, submitted that a Community-wide presumption should be adopted. Then what should be the presumption?

In one case,⁷⁴ the French Cour de Cassation allowed the appeal against the decision of a lower court to exercise jurisdiction over third party proceedings brought in breach of a jurisdiction agreement choosing the courts of another Contracting State on the ground that the lower court had breached Articles 6(2) and 17 of the Convention in failing to establish that the jurisdiction agreement was not intended to cover third party proceedings. This judgment has been regarded as stating the presumption that jurisdiction agreements cover third party proceedings in the absence of a contrary indication.⁷⁵ This presumption is said to have been followed by other French courts.⁷⁶ And it has also

⁷⁴ Première Chambre Civile on 18 October 1989.

⁷⁵ Gaudemet-Tallon, para. 234.

⁷⁶ Huet (1991) 118 Clunet 155, 157.

academic support⁷⁷ on the ground that it would give a straightforward effect to the general principle that a jurisdiction agreement choosing the courts of one State normally deprives all other courts of jurisdiction.⁷⁸ It is submitted that this presumption should be adopted as the Community-wide presumption.

3.1.2 Where the proposed third party is not domiciled in a Contracting State

Where third party proceedings are sought to be brought in England against a non-party who is not domiciled in a Contracting State, the English court may have jurisdiction by virtue of Order 11 rule 1(1)(c) or other grounds of the traditional jurisdictional rules. If, however, there is a jurisdiction agreement between the defendant and the proposed third party choosing the courts of another Contracting State, the jurisdiction so conferred on the English court is subject to Article 17 of the Convention. It applies in two ways. First, where the defendant is domiciled in a Contracting State, the first sentence of the first paragraph of Article 17 confers exclusive jurisdiction on the courts chosen and the jurisdiction of the English court over the third party proceedings will thereby be ousted. Secondly, where neither the proposed third party nor the defendant is domiciled in a Contracting State, the third sentence of the first paragraph of Article 17 applies and the English court can maintain the jurisdiction over the third party proceedings only if the courts chosen have declined jurisdiction.

⁷⁷ Gaudemet-Tallon, para. 234. Cf. Gothot et Holleaux, *La Convention de Bruxelles du 27 septembre 1968* (1985), para. 116.

⁷⁸ Huet (1991) 118 Clunet 155, 158; Gaudemet-Tallon, p.172, n.18.

3.2 Where the jurisdiction agreement has chosen the courts of a non-Contracting State

Where the jurisdiction agreement has chosen the courts of a non-Contracting State and either party to the agreement brings proceedings against the other in the chosen forum, it is for the law of that State to decide whether to exercise jurisdiction over the claim.

But if third party proceedings are brought in England in breach of their jurisdiction agreement and the English court would, if it were not for the jurisdiction agreement, have jurisdiction over the third party proceedings by virtue of Article 6(2) or the first paragraph of Article 10 of the Convention or Order 11 rule 1(1)(c) or any other jurisdictional ground, what effect does the jurisdiction agreement have?

First of all, the validity of a jurisdiction agreement must be determined, according to the Schlosser Report, by the *lex fori* including the choice-of-law rules. The relevant part of the Report says as follows:⁷⁹

If a court within the Community is applied to despite ... an agreement [to bring the disputes before the courts of a non-Contracting State], its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own *lex fori*.

In so far as the local rules of conflict of laws support the authority of provisions of foreign law, the latter will apply. If, when these tests are applied, the agreement is found to be invalid, then the jurisdictional provisions of the [Brussels] Convention become applicable.

⁷⁹ At para. 176(a).

If the jurisdiction agreement is in matters relating to insurance, it must also satisfy the requirements for validity provided in Article 12. The text of Article 12 does not confine its application to jurisdiction agreements choosing the courts of a Contracting State. Dicey & Morris also suggests⁸⁰ that Article 12 applies even where the courts of a non-Contracting State are chosen.

Secondly, the effect of a valid jurisdiction agreement would have to be determined by a national law since Article 17 of the Convention does not apply as its scope is expressly limited to a jurisdiction agreement choosing the courts of a Contracting State. Because the effect of a valid jurisdiction agreement is either a procedural or a jurisdictional question, it must be determined by the *lex fori*. In some States, there may be a distinction between the jurisdictional rules applicable to this question and jurisdictional rules applicable to decide internal jurisdiction. In *Compagnie Marocaine de Navigation (COMANAV) v. Compagnie D'assurance Seine-et-Rhone*,⁸¹ the French Cour de Cassation held that section 333 of the New Code of Civil Procedure⁸² did not apply to decide international jurisdiction.⁸³

We will examine below the rules of English law applicable to the effects of a valid jurisdiction agreement on third party proceedings brought in breach of the agreement in two categories of cases. The categories depend on whether or not the proposed third party

⁸⁰ P. 377.

⁸¹ 30 March 1993, (1995) 6 ILP 26.

⁸² See § 3.1.1.1 above, for the provision.

⁸³ The previous decision of the French Cour de Cassation, Première Chambre Civile on 18 October 1989, examined in § 3.1.1.2, above, denied the applicability of this section in intra-Community relations but left open its applicability in international relations other than intra-Community relations.

is domiciled in a Contracting State.

3.2.1 Where the proposed third party is not domiciled in a Contracting State

Where third party proceedings are sought to be brought in England against a non-party who is not domiciled in a Contracting State, the English court may have jurisdiction over the proceedings by virtue of Order 11 rule 1(1)(c) or other grounds of the traditional rules. If, however, there is a jurisdiction agreement between the defendant and the proposed third party choosing the courts of a non-Contracting State, the question arises what effects, if any, it has on the English third party proceedings.

The relevant English principle is sometimes called *The El Amria* principle.⁸⁴ Under this principle, the English court has discretion to stay proceedings or, in Order 11 cases, refuse to grant leave to serve a writ out of the jurisdiction⁸⁵ if the proceedings are brought in breach of a jurisdiction agreement choosing foreign courts unless strong cause for not doing so is shown. In exercising its discretion, the court takes into account all the circumstances of the case.

There appears to be no case in which *The El Amria* principle was applied in relation to third party proceedings. It is, however, suggested that the court will take into account the merits of third party procedure as one of the factors which militate against a stay of third party proceedings or militate in favour of granting leave to serve a third party notice

⁸⁴ First enunciated by Brandon J. in *The Eleftheria* [1970] P 94, 99. Approved in *The El Amria* [1981] 2 Lloyd's Rep. 119, 123, per Brandon L.J. (CA); *The Sennar (No. 2)* [1985] 1 WLR 490, 500, per Lord Brandon (HL).

⁸⁵ See Dicey & Morris, p. 318 and cases cited there.

out of the jurisdiction. Then how much weight will English courts give to the merits of third party procedure?

In an American case, *Hollerbach & Andrews Equipment Company v. Southern Concrete Pumping v. Centex Bateson Construction Company*,⁸⁶ the Maryland District Court dismissed the third party complaint for lack of jurisdiction because there was a jurisdiction agreement between the defendant and the proposed third party choosing the courts of Texas. The court did so despite that the third party complaint satisfied both the procedural requirement under Rule 14 and the jurisdictional requirement under Rule 4(k) of the Federal Rules of Civil Procedure. The principle relied upon was that of *Bremen v. Zapata Off-Shore Company*,⁸⁷ in which the United States Supreme Court held that jurisdiction agreements would be generally enforced in the absence of a strong showing that the enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. The similarity of this principle to *The El Amria* principle is evident. Relying upon this *Bremen* principle, the Maryland District Court dismissed the defendant's contention that a jurisdiction agreement should not be enforced as to a third party complaint. It was held that the efficiency of adjudicating cases in a single forum was not compelling enough to ignore the obligations which the parties bargained for.

This American case may lead us to suspect that English courts may not give much weight to the merits of third party procedure, either. However, there are some evidence

⁸⁶ [1995] U.S. Dist. LEXIS 14990.

⁸⁷ (1972) 407 U.S. 1, 32.

that contradicts such impression. In some cases⁸⁸ concerning joinder of defendants by the plaintiff, the English courts, despite the existence of a foreign jurisdiction agreement, granted leave to serve out of the jurisdiction or refused to stay its proceedings. In one of such cases, *The El Amria*, the risk of conflicting decisions arising out of separate trials of related proceedings was emphasised in these terms;⁸⁹

I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials ... that the same issues might be determined differently in the two countries.

This passage can be also used to stress the merits of third party procedure. In view of the high premium attached to the merits of third party procedure by the Privy Council in *SNIAS*,⁹⁰ English courts may well grant leave to serve third party notice out of the jurisdiction or refuse to stay third party proceedings even if there is a foreign jurisdiction agreement between the defendant and the proposed third party.

3.2.2 Where the proposed third party is domiciled in a Contracting State

⁸⁸ *Evans Marshall & Co. Ltd. v. Bertola* [1973] 1 WLR 349 (CA); *The El Amria* [1981] 2 Lloyd's Rep. 119 (CA).

⁸⁹ P. 128 per L.J. Brandon.

⁹⁰ See Sub-Chapter 4.

Where the proposed third party is domiciled in a Contracting State, an English court may have jurisdiction over the third party proceedings by virtue of Article 6(2), the first paragraph of Article 10 or other provisions of the Convention. If, however, there is a jurisdiction agreement between the defendant and the proposed third party choosing the courts of a non-Contracting State, what will be the effect of that agreement?

The background to this question is a wider question whether English courts can stay proceedings when jurisdiction over the proceedings is founded by the Convention. In this connection, section 49 of the Civil Jurisdiction and Judgments Act 1982 provides:

Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention.

The wording of this section is wide enough to cover the stay of proceedings on the basis of a jurisdiction agreement choosing foreign courts. As seen previously in § 2.1.2, above, the Court of Appeal in *Re Harrods*⁹¹ held that it was not inconsistent with the Convention to stay proceedings on the ground of *forum non conveniens* when jurisdiction was founded by Article 2 of the Convention. While academic opinion is divided on the correctness of this ruling, there is almost a unanimous academic support⁹² for the view

⁹¹ [1991] 3 WLR 397 (CA).

⁹² Briggs and Rees, para. 2.12.2; Hartley, “Introduction to the Brussels Jurisdiction and Judgments Convention” in Academy of European Law (ed., 1996), *Collected Courses of the Academy of European Law*, Volume V, Book 1, p. 223, 248; Morse, “Forum-Selection Clause - EEC Style” (1989) 1 African Jo. Int’l and Comp. L. 551, 578; Gaudemet-Tallon, p. 174, para. 237 and [1992] Rev Crit 333, 337.

that a court of a Contracting State can, whether by staying proceedings or by declining jurisdiction, give effect to a jurisdiction agreement choosing the courts of a non-Contracting State, even if its own jurisdiction is founded by the provisions of the Convention. Of course, this question, as well as the question of a stay on the ground of *forum non conveniens*, must in the end be settled by the European Court.⁹³ But there can be no doubt that a jurisdiction agreement can offer a stronger justification than the principle of *forum non conveniens* for staying proceedings over which jurisdiction is founded by the provisions of the Convention, since ignoring a jurisdiction agreement would impede commercial arrangements.⁹⁴

Thus, in *The Nile Rhapsody*,⁹⁵ an Egyptian plaintiff sued an English defendant in England in breach of a jurisdiction agreement between them choosing the courts of Egypt. It was argued on behalf of the plaintiff that the English court had no power to stay the proceedings because the plaintiff had the right to bring proceedings in England by reason of Article 2 of the Convention. However, the plaintiff conceded that the decision in *Re Harrods* applied *a fortiori* to a case where there was a jurisdiction agreement choosing the courts of the State where the plaintiff was domiciled. Relying on *The El Amria* principles, the court granted a stay.

The use of *The El Amria* principles in this case suggests that English courts draw no distinction between the cases where jurisdiction is founded by the traditional jurisdictional rules and the cases where jurisdiction is founded by the provisions of the Convention in deciding whether to stay the proceedings on the ground of a jurisdiction

⁹³ See *The Nile Rhapsody* [1994] 1 Lloyd's Rep. 382 (CA).

⁹⁴ Morse, *ibid.*

⁹⁵ [1994] 1 Lloyd's Rep. 382 (CA).

agreement choosing foreign courts.⁹⁶ It also follows from the application of *The El Amria* principles that in exercising discretion whether to stay proceedings, English courts will take into account the merit of third party procedure and may give them significant weight. In *The Rewia*,⁹⁷ Sheen J. refused to stay proceedings brought in breach of a jurisdiction agreement choosing the courts of Hong Kong when jurisdiction over the proceedings was founded by Article 6(1) of the Convention. He relied upon *The El Amria* principles and weighed various factors in exercising his discretion. He said:

There is one overriding consideration, against which all other matters pale into insignificance, and that is that the plaintiffs should not have to bring two separate sets of proceedings in different venues. That would inevitably result in an increase in costs and inconvenience. But above all there would remain the possibility that the issue ... would be decided differently in the two venues.

This passage is another indication of the weight English courts will attach to the merits of third party procedure when in future cases they are asked to decide whether to stay third party proceedings on the ground of a foreign jurisdiction agreement.

⁹⁶ In France it has been held that if the defendant is domiciled in a Contracting State a jurisdiction agreement choosing the courts of a non-Contracting State is ineffective: *Bruno v. Soc. Citibank*, (1991) Ct. App. Versailles [1992] *Rev. Crit.* 333. If, however, the defendant is domiciled in a non-Contracting State, a jurisdiction agreement choosing the courts of a non-Contracting State was given effect: *Compagnie Marocaine de Navigation (COMANAV) v. Compagnie D'assurance Seine-et-Rhone*, the French Cour de Cassation, 30 March 1993, (1995) 6 ILP 26.

⁹⁷ [1991] 1 Lloyd's Rep. 69, 75, overruled on a different point [1991] 2 Lloyd's Rep. 325 (CA).

3.3 Summary

The foregoing analyses have revealed the difference in the applicable rules between the cases where the jurisdiction agreement has chosen the courts of a Contracting State and the cases where it has chosen the courts of a non-Contracting State. Whether the proposed third party is domiciled in a Contracting State or not makes no difference unless the European Court rules in a future case that the courts of Contracting States do not have power to stay proceedings where jurisdiction is founded by the provisions of the Convention.

In all cases, the primary policy consideration for the court faced with a jurisdiction agreement is to make the parties abide by their agreement.

However, where the jurisdiction agreement has chosen the courts of a non-Contracting State, English courts will consider other factors as well. The jurisdiction agreement may be ignored if a strong case is shown why the court should not stay the proceedings or should grant leave to serve out of the jurisdiction. And such a case may be supported by the desirability of realising the merits of third party procedure.

Where, on the other hand, the jurisdiction agreement has chosen the courts of a Contracting State and complies with the requirements of Article 17, the sanctity of contract will be upheld.

However, this does not mean that the Convention sees no value in third party procedure. The very existence of Article 6(2) attests to the contrary. Nor is it true that the Convention gives effect to jurisdiction agreements more often than the English traditional rule since Article 17 of the Convention lays down stricter formal requirements for jurisdiction agreements as the price for upholding the sanctity of contract. In *The Nile*

Rhapsody,⁹⁸ the English court stayed proceedings on the ground of an oral jurisdiction agreement choosing the courts of Egypt. If the chosen courts had been those of a Contracting State, the jurisdiction agreement might have failed to meet the formal requirements of Article 17.

The real reason why hard-and-fast rule was adopted by Article 17 lies in its policy objective, viz. to prevent parallel proceedings in different Contracting States. It is to be observed that the scope of Article 17, confined to clauses choosing the courts of a Contracting State, coincides with this policy.

4 Effect of an arbitration agreement as it operates as a hindrance to English third party procedure

Where the defendant to English proceedings seeks to bring third party proceedings against a non-party, but there is an arbitration agreement between them, what effect does it have on the proposed third party procedure?

In the following discussion, the examination of the relevant present law will be followed by the considerations of its rationale.

4.1 Present law

At the outset it may be appropriate to say a brief word on the relevance of the Brussels and Lugano Convention. Article 1(4) of the Convention provides that the Convention

⁹⁸ [1994] 1 Lloyd's Rep. 382 (CA).

does not apply to arbitration. Although the precise meaning of this provision is in dispute, it is generally accepted that the exclusion covers the effect of an arbitration agreement on court proceedings. Thus the European Court in *Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.* stated:⁹⁹

... the ... New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ... lay down rules which must be respected ... by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration It follows that, by excluding arbitration from the scope of the convention ..., the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

It follows that a court of a Contracting State is allowed to stay proceedings brought in breach of an arbitration agreement even if its jurisdiction is founded by the provisions of the Convention. To put it in the terms of section 49 of the Civil Jurisdiction and Judgments Act 1982, staying proceedings on the ground of an arbitration agreement is not inconsistent with the Convention.

Where proceedings are brought before an English court in breach of an arbitration agreement, Section 9(4) of the Arbitration Act 1996 provides that the English court, on an application by the party to the agreement against whom the proceedings are brought, must stay¹⁰⁰ the proceedings unless satisfied that the arbitration agreement is null and

⁹⁹ Case C-190/89 [1991] ECR I-3855, para. 18.

¹⁰⁰ Where an application for leave to serve a writ out of the jurisdiction is made under Order 11, there are suggestions, citing in support *Qatar Petroleum v. Shell* [1983] 2 Lloyd Rep 35, that leave should be refused when the proceedings begun by the writ are

void, inoperative, or incapable of being performed. This rule applies even if the seat of the arbitration is outside England or no seat has been designated or determined.¹⁰¹

Accordingly, where the defendant to English proceedings seeks to bring third party proceedings against a non-party in breach of their arbitration agreement, the English court is bound to stay the third party proceedings upon application by the non-party.

This is also the position assumed, without any hint of doubt, to be correct by the cases decided under the Arbitration Act 1975.¹⁰² Prior to the replacement by the 1996 Act, section 1 of the 1975 Act provided for a mandatory stay of proceedings brought in breach of what was then called a non-domestic arbitration agreement. Since section 9 of the 1996 Act did not change section 1 of the 1975 Act in material respects, the position regarding the stay of third party proceedings will remain unchanged.

4.2 Rationale of the present law

The rationale for staying proceedings on the ground of an arbitration agreement is to

doomed to be stayed under the Act: Lord & Salzedo, p. 12; Dicey & Morris, p. 318. But in *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others* (CA) (1991) (Transcript available on Lexis) the court pointed out that there is a “radical difference” between the setting aside of leave for service out and stay of proceedings: in cases where leave was set aside, jurisdiction was renounced and the action came to an end while in cases where proceedings were stayed, the action remained in existence but the jurisdiction was not presently exercised so that if the party who sought the stay afterwards failed to honour the arbitration agreement, the action would be revived.

¹⁰¹ S. 2(2)(a).

¹⁰² See *The Manchester Courage* [1973] 1 Lloyd’s Rep. 386, 391 per Brandon J.; *Virgo Steamship Co SA v. Skaarup Shipping Corporation (The Kapetan Georgis)* [1988] 1 Lloyd’s Rep. 352, 360 per Hobhouse J.; *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others* (CA) (1991) (Transcript available on Lexis) PART VI of the judgment by Mustill L.J.

make the parties abide by their arbitration agreement. Section 1(b) of the 1996 Act makes clear that section 9 is founded on the principle, *inter alia*, that the parties should be free to agree how their disputes are to be resolved. In return for this freedom, the parties must be held to their agreement once they have made one. The rule of a mandatory stay has the advantage of enabling the parties to predict with certainty, at the time of agreement, what effect their arbitration agreement will have on court proceedings.

However, the rule of a mandatory stay under section 9(4) of the 1996 Act leaves no room for discretion which would enable the courts to continue with third party proceedings in order to realise the merits of third party procedure. Third party procedure will be torn apart into two sets of separate proceedings; court proceedings between the plaintiff and the defendant and arbitral proceedings between the defendant and the proposed third party.

Occasionally, English courts have expressed their preference for having a discretion to decide whether to stay proceedings brought in breach of an arbitration agreement.¹⁰³ Thus in *Lonrho v. Shell and British Petroleum*, a case involving joinder of defendants sought by the plaintiff, Brightman J. said:¹⁰⁴

I am bound by the Arbitration Act 1975, at the instance of Shell and BP, to stay all proceedings in the action as between the Plaintiffs and such Defendants. I think it is a pity that the court is not given a discretion in the matter. I would have preferred to have had an opportunity to consider and decide whether in all the circumstances the better course might not be for all the claims to be dealt with in a single proceeding in the High

¹⁰³ See Yearbook.

¹⁰⁴ 31 Jan. 1978 in IV (1979) Yearbook of Commercial Arbitration, pp. 320-323, no. 5.

Court.

Prior to the replacement by the 1996 Act, section 4(1) of the Arbitration Act 1950 provided for a discretionary stay of proceedings brought in breach of what was then called a domestic arbitration agreement. There were cases in which the discretion was exercised to decide whether to stay third party proceedings brought in breach of an arbitration agreement. Thus in *Eastern Counties Farmers v. J & J Cunningham*,¹⁰⁵ the court refused to stay third party proceedings and allowed both the original proceedings and third party proceedings to be tried together. In exercising the discretion, the desirability of trying common issues in the two sets of the proceedings was stressed. On the other hand, in *The Jemrix*¹⁰⁶ and in *Bruce v. Strong*,¹⁰⁷ a stay of third party proceedings brought in breach of an arbitration agreement was granted notwithstanding that the original proceedings and the third party proceedings previously brought¹⁰⁸ without breaching any arbitration agreement were continued. As Somervell L.J. said in *Bruce v. Strong*,¹⁰⁹ the discretion had been exercised by looking at all the circumstances of the case, of which the merits

¹⁰⁵ [1962] 1 Lloyd's Rep. 261 (CA).

¹⁰⁶ [1981] 2 Lloyd's Rep. 544.

¹⁰⁷ [1951] 2 KB 447 (CA).

¹⁰⁸ In *Bruce v. Strong*, the third party proceedings stayed were the proceedings between the fourth and fifth parties in a chain of contracts. Prior to that set of third party proceedings, there existed the original proceedings brought by the first party in the chain against the second party and two sets of third party proceedings brought respectively by the second party against the third party and by the third party against the fourth party.

¹⁰⁹ P. 453.

of third party procedure were one factor.¹¹⁰

It is obviously dangerous to conclude which principle - mandatory stay or discretionary stay - is better by reference only to their application to third party proceedings. But it cannot be denied that the rule of discretionary stay has an advantage of enabling the court to take into account the merits of third party procedure in deciding whether or not to grant a stay. That being so, it is worth investigating why English law has nevertheless come to adopt the rule of a mandatory stay.

The ultimate reason for the adoption of a mandatory stay lies in the treaty obligation of the United Kingdom under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Article II(3) of the New York Convention provides for a mandatory stay. That Article was inserted in the Convention at the last moment because it was felt that provisions on the recognition and enforcement of awards could be rendered ineffective if the courts of Contracting States were free to ignore arbitration agreements.¹¹¹

¹¹⁰ It must, however, be accepted that the mixed result of these cases cannot be attributed solely to the differences in facts. The reasoning stated in these cases was irreconcilable. Thus in *The Jemrix*, the court granted a stay because it thought that it was theoretically possible but highly improbable that an arbitrator would make different findings of fact from the court. The court also thought that it would not be able to try the entire set of relations in view of the fact that if the third party brought third party proceedings against the fourth party in the chain of contracts, they would be subject to a mandatory stay under the 1975 Act on account of a non-domestic arbitration agreement. In *Eastern Counties Farmers v. J & J Cunningham*, notwithstanding the fact that a comparable situation of chain contracts was involved, the court decided to disregard the fact that it was in any event unable to try the entire set of relations in the chain. It must, however, be noted that the irreconcilability of reasoning in these cases is not in itself evidence of a weakness in the rules of discretionary stay. Rather, it simply means the courts did not pay due regard to precedent in the proper exercise of their discretion.

¹¹¹ Private International Law Committee, *Recognition and Enforcement of Foreign Arbitral Awards*, Fifth report (1961) Cmnd. 1515, para. 18.

In implementing the New York Convention, the Private International Law Committee sought to find a way to preserve the discretion which English courts had long exercised in certain cases in deciding whether or not to stay proceedings brought in breach of an arbitration agreement, without facing accusations of breach of the treaty obligation.¹¹² This led to the distinction between what was called domestic arbitration agreements and non-domestic arbitration agreements; domestic arbitration agreements being subject to the rule of a discretionary stay under the 1950 Act and non-domestic arbitration agreements being subject to the rule of a mandatory stay under the 1975 Act.

In enacting the 1996 Act, it was originally intended that Section 9(4) would not apply to a domestic arbitration agreement. Instead, section 86(2)(b) provided for a mandatory stay with some exceptions, one of which being the case where there were sufficient grounds for not requiring the parties to abide by the arbitration agreement. This exception was a blanket exception which would in effect have given a discretionary power to the courts. Lord & Salzedo even suggested¹¹³ that the authorities decided under the 1950 Act would give useful guidance as to what circumstances fell within that exception. But after the 1996 Act received the Royal Assent, the Court of Appeal decided¹¹⁴ that the distinction between domestic and non-domestic arbitration agreements amounted to a violation of the EC Treaty for discrimination based on nationality. After this decision and

¹¹² Private International Law Committee, *Recognition and Enforcement of Foreign Arbitral Awards*, Fifth report (1961) Cmnd. 1515, paras. 18-21.

¹¹³ P. 69.

¹¹⁴ *Philip Alexander Securities and Futures Ltd. v. Bamberger* [1997] ILPr 104 (CA).

the consultation that followed,¹¹⁵ it was decided not to bring section 86 into effect.¹¹⁶ For the only way to comply with both the EC Treaty and the New York Convention is to subject all arbitration agreements to the rule of a mandatory stay.

Under the rule of a mandatory stay, the only way the defendant can avoid the stay of the third party proceedings he seeks to bring against his proposed third party is to prove that their arbitration agreement was not intended to cover third party proceedings. This is what was attempted in *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others*,¹¹⁷ a case tried under the 1975 Act. In this case, the defendant argued that since resolving its claim against its proposed third party separately from the plaintiff's claim against it would expose it to a risk of adverse fact-findings in both proceedings and accordingly would not afford it an adequate remedy, this could not have been what it and its proposed third party had intended in their agreement. Their Lordships, however, were not persuaded by this argument. They saw no ground for construing what seemed a plain agreement to arbitrate as meaning that the proposed third party had impliedly accepted the jurisdiction of whatever court where the defendant happened to be sued by the plaintiff. It was, therefore, concluded that their arbitration agreement was apt to cover third party proceedings. This ruling suggests that the merits of third party procedure by themselves were not a sufficient ground for excluding third party proceedings from the scope of an arbitration agreement and this will remain to be the case under the 1996 Act.

¹¹⁵ Department of Trade and Industry, *A Consultation Document on Commencement of the Arbitration Act 1996* (July 1996) Part I, paras. 3-5.

¹¹⁶ S.I. 1996 No. 3146.

¹¹⁷ (CA) (1991) (Transcript available on Lexis) PART VI of the judgment by Mustill L.J.

5 Conclusion

The survey in this Sub-Chapter has revealed a dichotomy between the traditional English rules and the rules derived from international Convention when they deal with existing or possible parallel proceedings. The traditional English rules are discretionary, while the rules derived from international Convention are mandatory. Thus in dealing with *lis alibi pendens*, the principle of *forum (non) conveniens* allows English courts to exercise discretion to stay proceedings or set aside the leave while Article 21 of the Brussels or Lugano Convention imposes a mandatory obligation to decline jurisdiction on the court other than the court first seised. Similarly, in dealing with proceedings brought in breach of a jurisdiction agreement, *The El Amria* principle allows English courts to exercise discretion to stay proceedings or to refuse to grant leave, while Article 17 of the Brussels or Lugano Convention ousts jurisdiction of the courts other than the court chosen. In relation to proceedings brought in breach of an arbitration agreement, the discretion which English courts had long enjoyed has been replaced by the New York Convention with a mandatory obligation to stay proceedings.

This dichotomy can be explained by different aims with which the traditional rules and rules derived from international Convention approach parallel proceedings.

The aim of international Convention is to eliminate the possibility of parallel proceedings. Parallel proceedings are undesirable for many reasons. First, they create additional inconvenience and expense to the parties. Secondly, there may be an ugly rush by the parties to get one set of proceedings decided ahead of the other. Thirdly, there is a risk that irreconcilable decisions (judgments or arbitral awards) may result from parallel proceedings. Irreconcilable decisions are especially objectionable for an international

Convention, such as the Brussels and Lugano Convention and the New York Convention, whose objective is to facilitate the recognition and enforcement of foreign decisions. Such objective will be seriously impaired if the decision whose recognition is sought is irreconcilable with a judgment given in the recognising State or with a judgment granted in some other State whose judgments are also entitled to recognition.¹¹⁸ For the purpose of eliminating the possibility of parallel proceedings, hard-and-fast mandatory rules requiring the court to decline jurisdiction or to stay proceedings as provided in these Convention are appropriate.

The traditional rules of English law, on the other hand, approach parallel proceedings with the aim of ascertaining the appropriate forum. There is no doubt that the undesirability of parallel proceedings is also recognised under the traditional rules.¹¹⁹ But unlike international Convention, the English law cannot dictate the conduct of other forums. Consequently, the only way for an English court to eliminate parallel proceedings is to dismiss its proceedings. Since English courts cannot always concede to foreign proceedings, they do not always dismiss their proceedings. Instead, they do so only where England is not an appropriate forum. Discretionary rules are suitable for the purpose of ascertaining the appropriateness of the forum.

The implication of this dichotomy for third party procedure is that in the first place its merits may be taken into account in the traditional rules but are disregarded by the rules derived from international Convention. It can, therefore, be said that the traditional rules

¹¹⁸ The wider rules on recognition and enforcement are, the more of a problem parallel proceedings becomes: Fawcett, *Declining Jurisdiction in Private International Law* (1995) p. 28.

¹¹⁹ See e.g. *The Ibidin Daver* [1984] 2 WLR 196, 203 (HL).

are more apt to preserve third party procedure. But there is another implication. Since the traditional rules do not eliminate parallel proceedings, the consistency between the original proceedings and third party proceedings in England may be disturbed if the foreign proceedings have resulted in a decision earlier than the English corresponding proceedings. On the other hand, the rules deriving from international Convention eliminate parallel proceedings and consequently, if third party procedure has survived this elimination process, the consistency between the original proceedings and third party proceedings will not be disturbed by a decision arising out of foreign proceedings.

Sub-Chapter 4

Jurisdiction to issue an antisuit injunction to eliminate hindrances from foreign proceedings to English third party procedure

In this chapter we will consider whether English courts can issue an antisuit injunction to restrain proceedings in a foreign forum in which third party procedure is not available in order to eliminate hindrances from foreign proceedings to English third party procedure.

We will first examine whether proceedings in a non-Contracting State to the Brussels or Lugano Convention can be restrained and then examine whether proceedings in a Contracting State can be restrained.

1 Restraining proceedings in a non-Contracting State

As seen in Sub-Chapter 3, an English court is not prevented from trying third party proceedings by the fact that corresponding proceedings are pending in a non-Contracting State if it regards itself as being the *forum conveniens* or not being a *forum non conveniens*, as the case may be. Nevertheless, if the proceedings in that non-Contracting State are allowed to continue, they may hinder English third party procedure. The question thus arises whether English courts can issue an antisuit injunction to restrain corresponding proceedings in a non-Contracting State to prevent such repercussions.

We will first address the question whether foreign proceedings corresponding to the

English original proceedings brought by the same plaintiff against the same defendant can be restrained. We will then address the question whether foreign proceedings for a negative declaration corresponding to English third party proceedings brought by the third party to the English proceedings against the defendant to the English proceedings can be restrained.

1.1 Restraining foreign proceedings corresponding to the English original proceedings

Where two sets of corresponding proceedings are brought in England and in a non-Contracting State by the same plaintiff against the same defendant and the defendant can bring third party proceedings against his proposed third party in England but not in the non-Contracting State, if the proceedings in the non-Contracting State result in a judgment earlier than the corresponding English proceedings and the plaintiff discontinues the English proceedings, third party procedure in England will be precluded. Can the English court issue an antisuit injunction to restrain the proceedings in the non-Contracting State so that the plaintiff's claim against the defendant will proceed in England and the defendant can resort to third party procedure to claim against his proposed third party?

In *SNIAS*,¹ the Privy Council on appeal from Brunei laid down the principles that must be applied to decide whether or not to issue antisuit injunctions where a remedy for a particular wrong is available both in England (or Brunei) and in a foreign forum. Their

¹ [1987] AC 871 (Privy Council).

Lordships expressly stated that the principles were the same under the law of Brunei and the law of England.² They held³ that an English or Brunei court would only restrain the plaintiff from pursuing proceedings in a foreign court if such pursuit would be vexatious or oppressive. The showing that the foreign proceedings are vexatious or oppressive requires more than a showing that the English or Brunei court is the natural forum. Furthermore, an injunction, they held, would not be granted if it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

The facts of *SNIAS*, so far as material, are as follows: the widow (P) of the person killed in a helicopter crash brought actions in Texas and Brunei against the manufacturer of the helicopter (D). The helicopter service company (R) were prepared to accept the service by the manufacturer of third party proceedings in Brunei but were not so in Texas, contesting the jurisdiction of the Texas court over them apparently on well-founded grounds. The manufacturer applied in Brunei for an injunction restraining the widow from continuing with the proceedings in Texas.

Applying the principles to the facts, the Privy Council first confirmed that the natural forum for the trial of the widow's action against the manufacturer was Brunei and then went on to consider whether the Texas proceedings were vexatious or oppressive. If the widow was not restrained from continuing her proceedings in Texas and the manufacturer was held liable there, the latter might not be able to recover contribution from the servicing company in Texas. To recover contribution they might have to bring a separate

² P. 891. And the Court of Appeal in subsequent cases has applied the principles laid down by the Privy Council in this case accepting that they represent the law in this area. *EI du Pont de Nemours & Co and Endo Laboratories Inc v. Agnew (No 2)* [1988] 2 Lloyd's Rep. 240 (CA); *Hemain v. Hemain* [1988] 2 FLR 388 (CA).

³ P. 896.

action in Brunei in which they might have to establish their own liability to the widow independently from the Texan judgment, with all the attendant difficulties including the possibility of inconsistent conclusions.⁴ In these circumstances, it was concluded that the plaintiff's conduct in continuing with her proceedings in Texas was oppressive. As regards the advantages for the widow of pursuing Texas proceedings, the undertakings entered into by the manufacturer were held to be sufficient to ensure that any advantage in Texas would be available in Brunei. Accordingly, an injunction was granted.

Some observations can be made on the aspects of their Lordship's reasoning that relate to third party procedure.

First, this case may be seen as having given a wide interpretation to the concept of oppressiveness.⁵ But from the opposite point of view, we can see this case as having placed a high premium upon the merits of third party procedure in determining whether or not to issue an antisuit injunction. We may further be able to infer from this case that English courts will generally give significant weight to the merits of third party procedure in exercising such discretion as the *forum (non) conveniens* discretion.

Secondly, in the English proceedings the widow might have to cope with third party procedure and might get bogged down in the dispute between the manufacturer and the service company. If, on the other hand, the widow could continue with the Texas proceedings, she had an advantage of being able to concentrate on her case against the manufacturer without being bothered by the dispute between the manufacturer and the service company. The Privy Council, however, did not regard this as an advantage of

⁴ Examined in Chapter 2, § 4.1.1, above.

⁵ Dicey & Morris, p. 410.

which it would be unjust to deprive her.

Thirdly, in future similar cases, the defendant will presumably have to show his sincere desire to resort to third party procedure in England in order to procure an injunction restraining the plaintiff from continuing with foreign proceedings. In *SNIAS*, the Court of Appeal in Brunei declined to grant an injunction because, *inter alia*, they did not regard the expressed desire of the manufacturer to seek contribution from the service company as sincere. Although their Lordships in the Privy Council did not agree with the finding of the Court of Appeal as to the manufacturer's desire, they did not deny the necessity of such a showing.⁶

1.2 Restraining foreign proceedings for a negative declaration corresponding to English third party proceedings

Where third party proceeding are brought in England and corresponding proceedings for a negative declaration are brought in a non-Contracting State by the third party to the English proceedings against the defendant to the English proceedings, if the foreign proceedings result in a judgment earlier than the English third party proceedings, that judgment, if entitled to recognition in England, may give rise to *res judicata* which can preempt the English third party proceedings. In order to avoid such a result, can the English court issue an antisuit injunction to restrain the foreign proceedings?

Although neither "oppressive" nor "vexatious" was satisfactorily defined in the *SNIAS* case nor anywhere else, the foreign proceedings in this scenario may be as prejudicial to

⁶ P. 900.

English third party procedure as the Texas proceedings in *SNIAS* was to the Brunei third party procedure. Therefore, the English court in this scenario may regard the third party's conduct in continuing with his foreign proceedings against the defendant as being vexatious or oppressive.

In the English third party procedure the third party is involved in the dispute between the plaintiff and the defendant. In the foreign proceedings, he has the advantage of being able to concentrate on his dispute with the defendant. But as seen above, their Lordships in *SNIAS* showed no sympathy for the trouble arising from getting involved in third party procedure. Accordingly, English courts will not regard an advantage of this kind for the third party as an advantage of which it would be unjust to deprive him.

There are two material differences between the scenario addressed in the present question and the scenario addressed in the previous question whether foreign proceedings corresponding to the English original proceedings can be restrained.

First, in the previous scenario, proceedings are brought in the two forums by the same plaintiff against the same defendant. In the present scenario the roles of the parties are reversed in the two forums: the defendant is claiming against the third party in England while the third party is claiming as the plaintiff against the defendant in the foreign forum. The principles of the *SNIAS* case were applied in reversed-role cases in *EI Du Pont & Co v. IC Agnew (No 2)*⁷ and in *Hemain v. Hemain*.⁸ In these cases the plaintiff in the foreign proceedings was the defendant in the English proceedings and vice versa. The latter case quotes with approval the view of Scrutton L.J. expressed in *Cohen v.*

⁷ [1988] 2 Lloyd's Rep. 240 (CA).

⁸ [1988] 2 FLR 388 (CA).

*Rothfield*⁹ that the courts should be even more cautious about granting an injunction in reversed-role cases than in cases where proceedings in two forums were brought by the same plaintiff against the same defendant, on the ground that in reversed role cases the plaintiff to the foreign proceedings had been compelled to appear in the English proceedings. It follows that the English court in the present scenario would be more cautious about granting an injunction to restrain the third party than the English court in the previous scenario would in granting an injunction to restrain the plaintiff.

Secondly, in the present scenario, unlike the previous scenario, the foreign proceedings are for a negative declaration. In *Sohio Supply Co v. Gatoil (USA) Inc.*,¹⁰ the rival foreign proceedings were for a negative declaration which were commenced when the plaintiffs there were apprehensive that proceedings against them might be commenced in England. Staughton L.J. said that such proceedings ought not to be encouraged and relied upon this fact to strengthen the justification for granting an antisuit injunction restraining the foreign proceedings. The implication of this reasoning for the present scenario is that if the non-party commenced foreign proceedings for a negative declaration when he was apprehensive that the defendant might commence third party proceedings against him in England, this fact will militate in favour of granting an injunction.

It will be noticed that the two factors just examined pull in opposite directions in deciding whether to grant an injunction. It remains to be seen which factor will be given greater weight.

⁹ [1919] 1 KB 410, 414.

¹⁰ [1989] 1 Lloyd's Rep. 588 (CA).

2 Restraining proceedings in a Contracting State

As seen in Sub-Chapter 3, § 2.1.1, above, the defendant to English (original) proceedings cannot bring third party proceedings against a non-party if corresponding proceedings for a negative declaration have already been brought in another Contracting State by that non-party against the defendant, since Article 21 of the Convention deprives the English court of jurisdiction over the third party proceedings. Can the English court, then, issue an antisuit injunction to restrain the non-party from continuing with the proceedings in that other Contracting State so as to enable the defendant to bring third party proceedings in England?

According to the dominant view,¹¹ the courts of a Contracting State cannot steer around Article 21 by restraining proceedings brought earlier in another Contracting State. It is true that in *Continental Bank N.A. v. Aeakos Cia Naviera S.A.*¹² the English court granted an injunction to restrain proceedings brought earlier in Greece. But in this case the English court thought that it had exclusive jurisdiction under Article 17 by virtue of a jurisdiction clause selecting English courts and that Article 17 took precedence over Article 21.¹³ Accordingly, the antisuit injunction in this case was not used to avoid the application of Article 21. This being so, this case does not affect the dominant view. It follows that English courts will not be able to issue an antisuit injunction to restrain a

¹¹ Dicey & Morris, p. 401 and the materials cited in n. 27.

¹² [1994] 1 WLR 588 (CA).

¹³ It is still controversial whether English courts can impose its view as to the effectiveness of a jurisdiction agreement on the courts of another Contracting State by issuing an antisuit injunction. See e.g. Bell “Anti-Suit Injunctions and the Brussels Convention” (1994) 110 LQR 204, 208; Briggs [1994] LMCLQ 158; Hartley (1994) 19 ELRev. 549.

non-party from continuing with his proceedings in another Contracting State against the defendant to the English proceedings so that the defendant can bring third party proceedings against the non-party in England.

Dicey & Morris, however, suggests¹⁴ that English courts have a residual power to grant an injunction to restrain proceedings in another Contracting State to prevent injustice, e.g. where there is evidence that the plaintiff is improperly using the proceedings to oppress the defendant, or is guilty of unconscionable conduct. Granting this suggestion to be correct, it would seem unlikely that English courts will rely on such a residual power for the purpose of removing hindrance to English third party procedure notwithstanding that heavy weight was attached to the merits of third party procedure in the *SNIAS* case. However, supposing that such a residual power could be resorted to for this purpose, a remaining question is whether an English court can issue an injunction to restrain a non-party to the English proceedings from continuing with his foreign proceedings against the defendant to the English proceedings when that defendant has not commenced third party proceedings against the non-party in England. This question would be answered in the affirmative according to the suggestion by Cheshire & North¹⁵ that an English court can grant an antisuit injunction even if proceedings have not yet been commenced in England.

¹⁴ P. 401.

¹⁵ P. 247.

PART 3

OBSTACLES TO RECOVERY DUE TO A PLURALITY OF GOVERNING LAWS

In Part 2, we have examined the obstacles to recovery due to the determination of issues in D's claim against R independently from the determination of the same issues in P's claim against D. In this Part, we will examine obstacles of another type, those due to a plurality of governing laws.

In the situations where D who has become liable to pay P seeks from R restitution of all or part of the payment, there involved many different relationships not only as between different pairs of the parties but also as between the same pair of the parties. If they are governed by different laws (plurality of governing laws) D's recovery from R may be obstructed if there is a mismatch between the governing laws. This is the type of obstacle to be discussed in this Part.

CHAPTER 4

Obstacles to Recovery Due to a Mismatch Between Different Laws Governing Different Claims of Recovery

1 The purpose of this chapter

Where D who has become liable to pay P seeks from R restitution of all or part of the payment, D may have three different claims of recovery;¹ he may have a claim against R by way of subrogation to P's right against R; he may have a claim against R pursuant to R's preexisting contractual undertaking to him; or he may have a claim against R based on a right of recovery created *de novo* by operation of law such as the Civil Liability (Contribution) Act 1978.

The main purpose of this chapter is to consider choice-of-law rules for these different claims of recovery. They will be examined separately on the assumption that they form distinct issues for the purpose of choice of law. Some justifications for that assumption will be offered after establishing separate choice-of-law rules for each of them. Since different choice-of-law rules are likely to designate different governing laws for different claims of recovery, its consequences will also be considered. Among them is an obstacle to recovery caused by a mismatch between different governing laws. This chapter is placed within the overall theme of the thesis by reason of this obstacle, although its

¹ See Part 1.

discussion is not a major purpose of this chapter.

2 Non-merger of the three different claims of recovery in substantive law

Before addressing the choice-of-law problem, it is useful to confirm at the outset that the three different claims of recovery do not merge into each other at the substantive law level because they have different characters and therefore, they are available in addition to, or alternatively to each other.

Subrogation is an assignment of a right by operation of law which in effect substitutes one party for another as a creditor. While subrogation enables D to claim against R via P, D's claim against R takes a direct route when he relies upon R's preexisting contractual undertaking to him or upon a right of recovery created by operation of law.²

While both a claim by way of subrogation and a claim pursuant to a preexisting contractual undertaking require a preexisting right, a claim based on a right of recovery created by operation of law is based upon a *sui generis* right imposed by law. For example, where an insurer (D) under an indemnity insurance policy brings a claim for recovery against the tortfeasor (R), "in the pleadings in a contribution action, the rights litigated are the rights of the insurer-parties themselves; in the pleadings in a subrogation action, they are those of the insured."³

A claim pursuant to R's preexisting contractual undertaking and a claim based on a

² See Goff & Jones, p. 303, n. 30 which says although there is an affinity, recoupment and subrogation are distinct.

³ Per Sholl J. in *Dawson v. Bankers & Traders Insurance Co. Ltd.* [1957] VR 491, 503. See also *Ronex Properties Ltd v. John Laing Construction* [1983] 1 QB 398, 407 per Donaldson L.J.

right of recovery created by operation of law may be concurrently available. Thus under English law a claim for contribution (indemnity) created by the Civil Liability (Contribution) Act 1978 does not affect any express or implied contractual right to indemnity or any express contractual provision regulating contribution.⁴

In some cases subrogation may provide the sole means of recovery. For example, where D's payment to P is not regarded as having discharged R's debt to P, D would not have a right to claim contribution (indemnity) from R because R has received no benefit from the payment.⁵ But D may be entitled to subrogation to P's right so as to prevent P from obtaining a double recovery out of a single debt. In other cases, subrogation may be available in addition to the other two types of claim of recovery.⁶ Thus in the cases of *obligation solidaire* under French law, the payer (D) is said to have a right of contribution by virtue of Articles 1213 and 1214 of the Civil Code in addition to subrogation based upon paragraph 3 of Article 1251.⁷ In other cases, the other two types of claim of recovery may provide the sole means of recovery since the right to subrogation arises in only a limited number of categories. Most obviously, subrogation is not available where P has no right of action against R.

3 Recovery by way of subrogation

We will begin with subrogation in the deliberation of choice-of-law rules for the

⁴ S. 7(3).

⁵ Mitchell, p. 5; Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 20.

⁶ Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 6.

⁷ Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 11.

different claims of recovery.

3.1 Where P has “a contractual claim” upon R

Article 13 of the Rome Convention reads:

1. Where a person (“the creditor”) has a contractual claim upon another (“the debtor”), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.
2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

It follows that where P has “a contractual claim” upon R, D is entitled to subrogation to P's claim against R if the law which governs D's duty to satisfy P so permits.

The Giuliano-Lagarde Report indicates⁸ that the words “several persons ... subject to the same contractual claim” in Article 13(2) refer to co-debtors. Thus claims of recovery by one surety against his fellow co-surety will be dealt with by paragraph 2 while a claim of recovery by a surety against the principle debtor will be dealt with by paragraph 1.

Not all the issues associated with subrogation are, however, determined by the law governing D's duty to satisfy P. Only the issues whether and to what extent D is entitled

⁸ Para. 3 of the comment to Art. 13.

to take over P's right against R are referred by Article 13 to the law governing D's duty to satisfy P. The issue of what right D acquires is to be determined by the law governing the relationship between P and R.⁹

By so dividing the issues, Article 13 can be seen as seeking to protect both D's interests and R's interests; D can assume the duty to satisfy P, relying upon such rules of subrogation as exist in the law which will govern his duty towards P and R can assume that his debt will continue to be regulated by the law to the choice of which he was a party.¹⁰

However, the scope of the specific issues divided between the two laws raises a question. On a literal interpretation, the issues which will be referred to the law governing the relationship between P and R would be the existence of the debt, date of maturity and other issues R can raise as his defense. On the other hand, the law which governs D's duty to satisfy P will determine the assignability of the debt,¹¹ whether D is able to sue upon the debt, and the conditions under which D can invoke subrogation against R. However, a different way of dividing issues is found in Article 12 of the Rome

⁹ See also Lagarde, "Le nouveau droit internationale privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980," 80 Rev. Crit. (1991) 287, para. 60; Foyer, "Entrée en vigueur de la Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles" (1991) Clunet 601, 625; Koppenol-Laforce, p. 150.

¹⁰ The same philosophy can be observed in Article 146 of Swiss Private International Law Statute 1987 which reads (translation by Karrer & Arnold):

1. The transfer of a claim by operation of law is subject to the law governing the underlying legal relationship between the old and the new creditor or, if there is none, to the law governing the claim.
2. The provisions of the law governing the claim which protect the debtor are reserved.

¹¹ E.g. personal contracts under English law are not assignable.

Convention which reads:

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
2. The law governing the right to which the assignment relates shall determine *its assignability*, the relationship between the assignee and the debtor, *the conditions under which the assignment can be invoked against the debtor* and any question whether the debtor's obligations have been discharged. (Emphasis supplied)

Article 12 regulates a voluntary assignment of a right while Article 13 regulates an assignment by the operation of law (subrogation). There is a parallel between Article 12 and 13 in so far as they both separate the issues associated with assignment of a right into two different governing laws. However, the scope of the issues referred by Article 12 to each governing law is different from that under Article 13. The assignability of the debt and the conditions under which D can invoke the assignment against R will be governed by the law governing the relationship between P and R under Article 12(2) while the corresponding issues will be governed by the law governing D's duty to satisfy P under Article 13. Under Article 12, R can rest assured that if his debt is non-assignable under the law governing the relationship between P and R, it remains non-assignable. If it is assignable, R can continue to treat P as his creditor until somebody else appears who satisfies the requirements for invoking the assignment of the debt as determined by the law governing the relationship between P and R. Under Article 13, however, R faces the risk that his position in relation to these issues may be altered, sometimes to his

disadvantage, by subrogation, something which is beyond his control. For example, a non-assignable debt may suddenly become assignable. It is submitted that the division of the issues in Article 12 is preferable to that in Article 13.¹²

A difficult question is involved in the issue of discharge of R's debt to P. Where this issue is raised by R as his defense, it will be determined by the law governing the contract between P and R.¹³ R may raise this defense against P's claim on the debt where D has paid P but does not have a right of subrogation to the debt under the law governing D's duty to satisfy P. R may also raise this defense against D who asserts that he has been subrogated to P's claim against R on the debt despite the fact that R has already paid to P.

Yet for the purpose of determining whether D is entitled to subrogation to P's claim against R, the issue of discharge should be regarded as part of the larger issue whether D is entitled to subrogation and accordingly should be determined by the law governing D's duty to satisfy P. Certain rules of subrogation may not be invoked unless R's debt to P survives after D's payment to P. Where such a rule forms part of the law governing the entitlement to subrogation which, in the circumstances, would treat the debt as surviving, its operation would be unduly prevented if the debt is deemed to have been discharged by another law. Where, for example, indemnity insurance is paid to a mortgagee (P) by an insurance company (D), the payment is regarded under English law as being for the benefit of the mortgagee and accordingly the mortgagor (R) cannot credit any sums paid towards the discharge of the mortgage debt but remains liable for the full sum owed.

¹² See also Stevens, p. 208.

¹³ Giuliano-Lagarde Report, para. 2 of the comment to Article 10. Bennett, p. 162.

Consequently, the insurance company is entitled to subrogation to the subsisting mortgage debt.¹⁴ If, however, a foreign law were applied according to which the mortgage debt were deemed to have been discharged, English law could not, in strict theory, enable the insurance company to be subrogated to the extinguished right. It is true that in certain cases English law does allow subrogation to a discharged debt by fictionally reviving it,¹⁵ e.g. a surety (D) who pays the creditor (P) can be subrogated to the principle debt against the debtor (R) despite the fact that the principle debt is regarded as having been discharged by the surety's payment. But the fictional reviving debt is not intended for use under English law in the case of subrogation by insurer to the insured's right.¹⁶

3.2 Where P does not have “a contractual claim” upon R

The application of Article 13 of the Rome Convention is limited to the cases where P has “a contractual claim” upon R. Consequently, where R is liable to P in tort, Article 13 does not apply. Whether it applies in the cases where R is liable to P for breach of a contract is not clear. A clue may be obtained from Article 10(1)(c) which provides that the law applicable to a contract under the rules of the Convention shall also govern the consequences of breach only within the limits of the powers conferred on the court by its procedural law. It may be possible to infer from this provision that in the scheme of the Rome Convention the words “a contractual claim” only mean a claim for the performance

¹⁴ *Woolwich Building Society v. Brown*, Independent, 22 January 1996 (QB).

¹⁵ Mitchell, p. 5, labels this type of subrogation as reviving subrogation.

¹⁶ Mitchell, p. 6.

of contractual obligations and do not extend to cover a claim for liability for breach of contract.¹⁷

This interpretation of Article 13 leaves open the question what law governs the issues associated with subrogation to a claim for liability in tort or for breach of contract.

It is submitted that the issues such as the existence of liability and discharge of liability should be determined by the law governing tort or contract, as the case may be. A more difficult question is what law should govern the assignability of the right, whether D is able to sue upon the right, and the conditions under which D can invoke subrogation against R.

Where D owes a contractual duty to satisfy P, e.g. D provides P an insurance cover over P's property against damage, there is a need to enable D to enter into the contract with P in the knowledge whether and to what extent he will be entitled to subrogation to P's right upon the discharge of his duty. Unlike the cases where R is already under a contractual obligation to pay a debt to P, where P's right is based upon a tort that may be committed in the future, D knows neither who is going to come in the position of R nor where the tort will be committed. This means D cannot predict what law will govern the relationship between P and R. It is, therefore, submitted that where D owes a contractual duty to satisfy P, the assignability of the right, whether D is able to sue upon the right, and the conditions under which D can invoke subrogation against R should be decided by the law governing D's duty to satisfy P. R's position is sufficiently protected by allowing him to dispute his liability based on the law governing tort or contract. No assistance is necessary to enable R to make an informed decision whether to commit a tort or breach

¹⁷ For an indication of the contrary view, see Stevens, p. 210.

his contractual obligation.

The proposed rules coincidentally accord with the rules provided for by Article 13 of the Rome Convention for the cases where P has “a contractual claim” upon R. It is said that the rules in Article 13 are in practice frequently applied to subrogation to non-contractual claims.¹⁸ Furthermore, the Rome Convention does not prevent the Contracting States from adopting the rules in Article 13 as the choice-of-law rules for subrogation to the rights arising out of tort or breach of contract. The reason why the scope of Article 13 is limited to the cases where the creditor has a contractual claim upon the debtor is merely that the Rome Convention is intended to regulate contractual obligations.¹⁹ It is to be noted that German private international law²⁰ does not have different choice-of-law rules for subrogation in the case where R owes a contractual debt to P and the case where R is liable to P in tort or for breach of contract.

Then, should the same proposed rules apply where D’s duty to satisfy P is based upon his liability to P in tort or for breach of contract, e.g. D and R concurrently committed a tort against P? In these cases, D is no more entitled to make an informed decision whether to commit a tort or breach his contractual obligation than R is. On balance, the consideration that R’s position should not be altered by subrogation should prevail. It is accordingly submitted that the law governing the relationship between P and R should

¹⁸ Koppenol-Laforce, p. 151. However, no case is cited in support.

¹⁹ Giuliano-Lagarde Report, para. 1 of the comment to Article 13 at p. 35. Kaye does not appear to be convinced by this reason. He asks “Why, therefore, is Article 12 not also so limited to voluntary assignment of contractual rights?” Kaye, *The New Private International Law of Contract of the European Community*, p. 328.

²⁰ Art. 33III of Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch/ EGBGB).

determine the assignability of the right, whether D is able to sue upon the right, and the conditions under which D can invoke subrogation against R. The law governing D's duty to satisfy P should be confined to determine the rights and liabilities between P and D *inter se*.

The proposed distinction between the cases where D owes a contractual duty to satisfy P and the cases where D is liable to P in tort or for breach of a contract also partially conforms to a suggestion by Dicey & Morris which says:²¹

... it should be the case that whether rights in tort are assignable should depend on whatever law is applicable to the tort... On the other hand, the subrogation of an insurer to the rights of the insured is not normally an assignment and is governed by the law applicable to the contract of insurance.²²

The second sentence of this passage accords with my proposed rules if the words "the subrogation of an insurer to the rights of the insured" refer to such issues as the assignability of the right against the tortfeasor, whether the insurer is able to sue upon that right, and the conditions under which the insurer can invoke subrogation against the tortfeasor. The second sentence suggests that the first sentence deals only with voluntary assignment as distinguished from assignment by operation of law (subrogation). If, however, the same suggestion were to be made in relation to subrogation, it would accord

²¹ The part of Fourth Supplement (1997) corresponding to p. 1522 of the main volume (12th ed.).

²² It is said this suggestion emerges clearly from the classical definition of the right of subrogation in *Burnand v. Rodocanachi* (1882) 7 App.Cas. 333, 339 and in *Castellan v. Preston* (1883) 11 QBD 380, 402 (CA).

with my proposed rule that where D is liable to P in tort, the law governing the relationship between P and R should determine the assignability of the right.

4 A claim of recovery pursuant to R's preexisting contractual undertaking

Where there is a contract between D and R, D can claim recovery from R pursuant to R's contractual undertaking, express or implied. It goes without saying that the contract is to be interpreted by its governing law which is determined by the ordinary choice-of-law rules for contract, the most obvious example being the provisions of the Rome Convention.

Even where D and R are tortfeasors as against P, there may be a contract between them if they acted in concert or on the basis of their preexisting relations. Dicey & Morris says:²³

If ... one tortfeasor can claim an indemnity or contribution from another by virtue of a contract express or implied, his right to do so would be determined by the law applicable to the contract. That law will determine, e.g. the scope and effect of a warranty given by an author to his publisher that his work contains no libellous material, or of an implied undertaking given by an employee to his employer to use reasonable care and skill.

A difficult question arises where D has paid P in accordance with his obligation under the contract between D and R but subsequently finds out that the contract was void *ab*

²³ P. 1534.

initio under its governing law, e.g. D buys a house from R and pays R's debt in relation to the house to P in accordance with a term of the contract of sale and subsequently discovers that the contract was void. It is said that the generally accepted solution in Germany²⁴ is to apply the law that governs the main contract - the contract of the house sale in the example - to decide D's right of recovery from R on the ground that this law regulates the method of discharging the contract and the effect of payment. It is not clear whether these reasons reflect the provisions of the German code of private international law²⁵ as in force after 1986 following the adaption to the provisions of the Rome Convention. Article 10(1)(e) of the Rome Convention²⁶ provides that the law applicable to the contract under the rules of the Convention shall govern "the consequences of nullity of the contract." It follows from this provision that the law applicable to the contract should also determine D's right of recovery from R.

This provision, however, has no application in the United Kingdom which made a reservation²⁷ in accordance with Article 22(1) of the Rome Convention. The exclusion of Article 10(1)(e) is founded upon the view that the law applicable to the contract should not, as such, determine the obligation to restore an unjust enrichment which arises in the consequence of nullity of the contract. In the legal systems of the United Kingdom, such an unjust enrichment arises *in connection with* a contract and does not arise *from* it.²⁸ The

²⁴ E.g. Von Caemmerer as introduced by Bennett, p. 162.

²⁵ Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch/ EGBGB).

²⁶ Implemented in Germany by Article 32 I (5) of the Introductory Act to the Civil Code.

²⁷ S. 2(2) of the Contracts (Applicable Law) Act 1990.

²⁸ Dicey & Morris, p. 1472 and the cases listed in nn. 12-15.

effect of this reservation is that in a case before English courts, where D has paid P in accordance with his obligation under the contract between them which he subsequently finds void *ab initio* under its governing law, D has no right of indemnity based upon the contract but has to rely upon other means of recovery; either subrogation or a claim for indemnity created by operation of law.

5 A claim based on a right of recovery created by operation of law

In this part of the chapter, a claim based on a right of recovery created by operation of law will simply be referred to as a claim for contribution (indemnity) for the sake of brevity.

5.1 Present law

In *Arab Monetary Fund v. Hashim (No. 9)*,²⁹ Chadwick J. applied the Civil Liability (Contribution) Act 1978 to the contribution claim brought by one tortfeasor (D) against another (R). He rejected a submission that the 1978 Act would apply only when English law governed a contribution claim according to ordinary choice-of-law rules. It was observed that in neither of the earlier cases, *The Benarty*³⁰ and *The Kapetan Georgis*,³¹ did the court examine what law governed the claim for contribution as a preliminary

²⁹ The Times 11 October 1994 (Transcript available on Lexis).

³⁰ [1987] 1 WLR 1614.

³¹ [1988] 1 Lloyd's Rep. 352.

question but instead applied the 1978 Act merely by construing it.³² He concluded, for the reasons to be analysed below in § 5.2.1, that the 1978 Act would always apply in the cases within its scope. He also held, *obiter*, that in other cases a claim for contribution was governed by the law of the place with which the circumstances giving rise to the contribution claim had the most real connection.

Consequently, the scope of the 1978 Act determines its application. Under section 1(1) of the Act “any person liable in respect of any *damage* suffered by another person may recover contribution from any other person liable in respect of the same *damage*” (emphasis added). The 1978 Act does not, therefore, cover a situation where D or R is under an obligation to pay a debt to P. In *Commerciale de Réassurance v. ERAS International (formerly ERAS (U.K.))*,³³ it was held that D could recover contribution under the 1978 Act where he was liable both in contract and tort but R would only be liable in tort. It is not, however, clear whether the 1978 Act covers instances in which D is liable to pay P, not because he is responsible for causing the damage but because he is either contractually bound to make the payment (e.g. an insurer who covered the loss) or because he is required to do so by virtue of a statutory provision.³⁴ The examples of such statutory provisions include the ones which oblige the employer (D) to pay workers’

³² He also distinguished an Australian case *Nominal Defendant v. Bagots Executor & Trustee Company Limited* [1971] SASR 346 on the ground that Bray CJ in that case was concerned to decide whether or not the domestic court should enforce a statutory right of contribution which arose under a foreign statute rather than to decide whether a statutory right of contribution conferred by a local statute ought to be given effect in a case where the facts which are said to give rise to the right occurred abroad.

³³ [1992] 1 Lloyd’s Rep. 570.

³⁴ Friedmann & Cohen *Adjustment among Multiple Debtors*, para. 14 suggests that the Act did not intend to deal with the right of contribution in these contexts.

compensation to dependants of the worker (P) killed during the course of his work by a tortious act committed by a third person (R) and the ones which enable a person (P) who is injured as a result of a motor vehicle accident involving a tortious act of another (R) to sue the insurer of the vehicle concerned or a nominated governmental institution (D).³⁵

5.2 What the law should be

We will first examine the reasoning of Chadwick J. and then consider what choice-of-law rules should be established for a claim for contribution (indemnity) through discussing the alternative ways of characterisation.

5.2.1 Examination of the reasoning of Chadwick J.

As already seen, Chadwick J. applied the 1978 Act directly as the *lex fori* without a reference to choice-of-law rules. He did not, however, base his decision merely upon the fact that the 1978 Act formed part of the *lex fori* but also upon its peremptory character and his preference for rules which enabled the apportioning of damages between wrongdoers. Following the examination of these reasons in turn, we will reach the conclusion that, contrary to the decision by Chadwick J., the application of the 1978 Act should be limited to the cases where the governing law selected by ordinary choice-of-law rules is English law.

³⁵ Sykes & Pyles, para. 2.6.

5.2.1.1 The *lex fori*

The direct application of the 1978 Act does not mean that D can obtain the benefit of a statutory right of contribution merely by coming before an English court. Under section 1(6) of the Act, D needs to establish that both he and R were, or would have been, liable to P in respect of the same damage according to the law governing their respective torts selected by the English choice-of-law rules.³⁶ This point would weaken, in the context of a claim for contribution (indemnity), the usual objection to the *lex fori* founded on the ground that it invites forum shopping.

Yet it would not make the objection to the *lex fori* surmountable.³⁷ The application of the *lex fori* defeats any possibility of uniformity between different forums as to the choice of governing law. Consequently, the parties or their legal advisers will not be able to predict the results until after the plaintiff has commenced litigation.

Furthermore, if D's claim for contribution against R is made in third party proceedings, R may be subject to the jurisdiction of a State which would not otherwise have jurisdiction over him. Such a wider-than-usual jurisdiction should lead to a greater-than-usual sensitivity to the choice-of-law problem.³⁸ Thus in *Cooney v. Osgood Mach. Inc.*,³⁹ a worker (P) who was injured in Missouri while using a machine brought a

³⁶ The same point was made by Chadwick J. in his judgment. His argument was based upon the double actionability rule under *Boys v. Chaplin* [1971] AC 356 but the fact that the choice-of-law rules for tort was subsequently altered by the Part III of the Private International Law (Miscellaneous Provisions) Act 1995 does not invalidate his argument.

³⁷ For criticisms of the application of the *lex fori* to the issues of unjust enrichment in general, see Bird, p. 102.

³⁸ Briggs [1995] LMCLQ 437, 442.

³⁹ (1993) 81 NY2d 66.

products liability action in New York against a seller of the machine, a New York domiciliary (D), who brought a third party action against the employer of the worker, a Missouri domiciliary (R), seeking contribution in the event it was found liable to the worker. Missouri law in the circumstances would bar the contribution claims while New York law would permit such claims. The Court of Appeals of New York applied Missouri law on the ground, *inter alia*,⁴⁰ that it would protect reasonable expectations of the Missouri third party in conducting their business affairs who could not have expected to be haled before a New York court to respond to Missouri accident.

For these reasons, as with other branches of the conflict of laws except for mandatory rules, the *lex fori* is an inappropriate choice-of-law rule for claims for contribution (indemnity).

5.2.1.2 Peremptory character of the 1978 Act

One of the grounds on which Chadwick J. based his decision to directly apply the 1978 Act was its peremptory character. He said:

... s. 7 (3) of the Act provides that the statutory right to contribution supersedes any right (other than an express contractual right) which might arise or exist otherwise than under the Act.

⁴⁰ Another ground was that since Missouri was the place of injury, the application of Missouri law would prevent forum shopping. The court also added that New York defendant had no reasonable expectation that contribution would be available given the fact that its activity with regard to product occurred some 14 years before principles of contribution were introduced into New York law.

It would be strange, therefore, if - before it came to construe the 1978 Act at all - the Court were required to answer a preliminary question which was unrelated to and inconsistent with the basis upon which the statutory right of contribution arises under English law. To ask whether a right of contribution arising out of any relationship between B and C other than their relationship as persons each of whom is liable to A in respect of the same damage ought to be determined by English domestic law would be to ignore the basis upon which the right arises under that law. To ask whether a right of contribution arising out of the relationship between B and C as persons who are each liable to A in respect of the same damage would be to ask the very question to which the 1978 Act provides the answer.

In another part he said:

... in order to decide whether a claim is properly brought under that Act it is necessary to construe the statutory language. If B and C are each persons against whom liability has been or could be established in an action brought against them by A in an English court (applying the appropriate law in accordance with English private international law rules) then the 1978 Act confers on B a right of contribution against C to which the Court must give effect. There is no preliminary question as to proper law the answer to which determines (independently of the 1978 Act) whether the Act applies.

The reasoning of Chadwick J. is reminiscent of that used in *Hollandia*.⁴¹ In that case, the House of Lords applied the United Kingdom Carriage of Goods by Sea Act 1971 to

⁴¹ [1983] AC 565.

the contract of carriage. The clause in the bill of lading which provided that the proper law of the contract was to be Dutch law was deprived of its effect by Article III(8) of the Hague-Visby Rules which was scheduled to the Carriage of Goods by Sea Act 1971. Article III(8) provided that any clause in a contract of carriage lessening the carrier's liability for loss or damage to goods otherwise than as provided in the Hague-Visby Rules would be null and void. Dutch law at the material time only adopted the original Hague Rules under which the extent of the carriers' liability was less than under the Hague-Visby Rules. It was held that Article III(8) of the Hague-Visby Rules embraced every provision in a contract of carriage which, if it were applied, would have the effect of lessening liability otherwise than as provided by those rules, including a choice-of-law clause and a forum selection clause.

This reasoning is by no means free from controversy. Before the House of Lords decision, academic opinions were in conflict over the question whether the carrier could contract out of the Hague-Visby Rules by choosing some other law as the proper law of the contract.⁴² Also, over the question whether the Carriage of Goods by Sea Act 1971 can be invoked without first establishing that the governing law is the law of some part of the United Kingdom, Mann and Morris vigorously disagreed.⁴³

We will not get involved in these discussions here. For the present purpose, suffice it to say that the principle of the choice-of-law process is to ask the preliminary general

⁴² For the view that there can be no such contracting out, see *Scrutton on Charterparties*, pp. 404, 413; Dicey & Morris, *The Conflict of Laws* (10th ed., 1980), pp. 754, 821. For a contrary view, see Carver, paras. 310-311.

⁴³ See Mann (1972-73) 46 British Year Book of International Law, 117; Mann (1979) 95 LQR 346; Mann (1983) 99 LQR 376, 392; Mann (1987) 103 LQR 523; Morris (1979) 95 LQR 59.

question, “What legal system is the governing law?” This question should not be easily short-circuited by asking the different and logically subsequent question, “Does this statute say it applies?” It must, therefore, be concluded that the peremptory language of a statute by itself should not be taken to justify its direct application without regard to the applicable choice-of-law rules.

5.2.1.3 The application of the 1978 Act as the better law

Another ground on which Chadwick J. rested his decision to directly apply the 1978 Act was his preference for the rule which enabled apportioning of damages between wrongdoers. His terms are as follows:

It would be a surprising defect in the law if the English court, having decided in an action to which A, B and C were party that B and C were each liable to A in respect of the same damage - suffered in, say, a collision between motor vehicles in Ruritania in which the three were involved - and having assessed that damage, were precluded by the absence of any law of contribution in Ruritania from deciding also how its judgment for that sum against each of B and C should be apportioned *inter se*. I am satisfied that, following the enactment of the 1978 Act, that defect is not a feature of English law.

The laws of different States vary as to whether and under what circumstances a wrongdoer is entitled to contribution or indemnity from his fellow-wrongdoer; civil law systems generally recognise a right to contribution in a wide variety of situations, whilst common law systems, to varying degrees, do not recognise a right to contribution in

certain circumstances.⁴⁴

In *Merryweather v. Mixan*,⁴⁵ decided in England at the end of the 18th century, it was held that there could be no contribution among joint tortfeasors. The decision was founded upon the *ex turpi causa* principle. Since then, the no-contribution rule⁴⁶ dominated in relation to torts and some other areas in almost every common law jurisdiction. In the typical common law system, not only where a number of persons were liable in tort for the same damage, but also where the parties were liable for breach of separate contracts⁴⁷ or where one party was liable in tort and the other for breach of contract,⁴⁸ the party who discharged liability had no right of recovery against the other party liable for the same wrong.⁴⁹

The effect of the no-contribution rule is that the creditor is allowed to select according to his whim the person upon whom the final burden will be imposed and to exonerate all

⁴⁴ For detailed historic development and comparative account of the right to contribution, see Friedmann & Cohen, *Adjustment among Multiple Debtors* .

⁴⁵ (1799) 8 TR. 186, 101 E.R. 1337.

⁴⁶ This rule was not ordinarily regarded as preventing one party who was not at fault from claiming *indemnity* from another party primarily responsible.

⁴⁷ For example, P, seeking to build a house, contracts with D to be his architect and with R to be his builder. Due to the breach by D and R of their respective contracts, the house is poorly constructed. These are the facts of a Northern Irish case, *McConnell v. Lynch--robinson; Coulter & Son (Third Party)* [1957] N.Ire.L.Rep. 70 (CA). The court, however, thought D might be liable to P in tort rather than in contract. Without deciding this point, it was held that the right to contribution under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 arose only if D and R were both tortfeasors.

⁴⁸ For example, P buys a car from D which has a latent defect in its headlights. As he is driving it one night the headlights goes out and runs into an obstruction in the highway that R has negligently left unlit. (An example taken from The Law Commission, *Contribution*, Working Paper No 59 (1975), para. 22.)

⁴⁹ Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 3.

the others, even if the latter were more responsible for the damage. In *Kohr v. Allegheny Airlines Inc.*,⁵⁰ Swygert Chief Judge said:

... we reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of "no contribution." We agree that "there is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiffs' whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Law of Torts, § 50 (4th ed. 1971).

In some States the no-contribution rule has been rejected by the courts. In many others it has been repudiated in whole or in part by the legislature. Thus in England⁵¹ section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 implemented the recommendation by the Law Revision Committee to alter the doctrine of no contribution between tortfeasors.⁵² Later, the Civil Liability (Contribution) Act 1978 replacing the 1935 Act, extended the right to contribution from contribution among tortfeasors to contribution among all wrongdoers.

Yet, there remain States where the no-contribution rule retains vitality.⁵³ Some other States do not have legislation which apply as widely as the 1978 Act.

⁵⁰ 504 F.2d 400.(7th Cir. 1974), cert. denied, 421 U.S. 978 (1975).

⁵¹ For the situation in the US, see Moore's Federal practice 14/03 [3].

⁵² Law Com. No.79, p. 5.

⁵³ See Moore's Federal Practice 14/03[3].

Although generally speaking the older law need not be the worse law and a clear evaluation as to which is the better law is difficult, in so far as the right to contribution is concerned, a steady and widespread consensus appears to be emerging in favour of the rules which uphold the right. There is, therefore, an immediate attraction to the decision by Chadwick J.

But inasmuch as his decision to directly apply the 1978 Act rested on his preference for rules which enabled apportioning of damages between wrongdoers, he adopted a better law approach akin to that advocated by Leflar.⁵⁴ Hence some of the criticism of Leflar's better law approach also apply to Chadwick J.'s reasoning.⁵⁵

From the methodological point of view, the selection of the better law is the negation of the traditional European method of choosing the governing law. Under the traditional method, the substantive contents of the laws in contest are disregarded in the choice-of-law process (blindfold choice). The only exception is provided by public policy, which excludes the application of a foreign law which outrages the notions of substantive justice of the forum. To apply generally what is thought of as the better law would amount to replacing conflict of laws by comparative law and by legal policy.

From a more substantive point of view, the choice of the better law is based on a system of awarding marks and if one's own law is preferred as the better law, it indicates an unpleasant criticism of foreign law. It is sufficient to rely on public policy to exclude

⁵⁴ It must be noted, however, that although Leflar obtained prominence as the most energetic protagonist of the better law, it is just one of five choice-influencing considerations he offered without assigning a priority to any of them. See Leflar & McDougal, p. 278.

⁵⁵ Kegel, *Fundamental Approaches*, para. 51.

foreign law on the basis of a value judgment.⁵⁶ With regard to the rules which deny the right of contribution, it is doubtful whether their application offends the English public policy to such an intolerable extent, bearing in mind that English law until as recently as the enactment of the 1978 Act was giving a considerably smaller protection to the right of contribution and also that 1978 Act itself is not watertight.

It must therefore be concluded that however attractive it may be to apportion damages among wrongdoers, such a result should not be obtained by distorting the ordinary choice-of-law process but should be left for the legislatures of the relevant States to achieve through amending the substantive rules. In *Builders Supply Co. v McCabe*,⁵⁷ the Pennsylvania court applied the law of Ohio on the ground that the accident had occurred in Ohio under which no right of contribution existed despite the fact that the law of the forum would have conferred a right to contribution. The court said:

“If it seem inequitable that plaintiff should be burdened with the payment of the damages arising from the accident without recourse to contribution from defendant, the denial to plaintiff of such relief must be charged solely to the Ohio law which precludes the right of contribution in such cases.”

Is it, then, possible to justify the direct application by the *way* the 1978 Act apportions damages? Where entitlement to contribution is established, the amount of the contribution recoverable under the 1978 Act is “such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the

⁵⁶ Kegel, *Fundamental Approaches*, para. 32.

⁵⁷ (1951) 366 Pa 322.

damage in question.”⁵⁸ Other legal systems adopt different ways of apportioning damages. While just and equitable apportionment under the 1978 Act is a flexible rule, some legal systems opt for rigid but clear rules. The new Austrian product liability law, for example, confers a right to full recourse on such persons as the importer who have become liable without having caused the defect of the product as distinguished from such persons as producers who are responsible for the defect.⁵⁹ Also in the United States,⁶⁰ the doctrine of indemnity based on the concepts of active and passive negligence, whatever their meanings, has traditionally been used under which the seller, if only passively negligent, is held entitled to indemnity from the manufacturer whose active negligence resulted in injury which gave rise to the underlying products liability action. Another type of rigid rule is the equal-share rule under which all tortfeasors contribute equal parts of the judgment, regardless of their relative fault. But some States have opted for more flexible rules based upon comparative fault under which the liability of each tortfeasor is commensurate with his relative culpability. For example, in *Tolbert v. Gerber Industries Inc.*,⁶¹ the court said that the legislature had abandoned the all-or-nothing approach based on the concepts of active and passive negligence by adopting a comparative negligence statute.

In *Re Air Crash Disaster at Washington D.C.*,⁶² the United States District Court for

⁵⁸ S. 2(1).

⁵⁹ Campbell, p. 15, n. 93.

⁶⁰ See Landis, “Products Liability: Seller’s Right to Indemnity From Manufacturer” 79 A.L.R.4th 278.

⁶¹ (1977, Minn) 255 NW2d 362.

⁶² (1983) 559 F. Supp. 333.

the District of Columbia applied the law of the State adopting a comparative fault rule on the ground that the comparative fault rule was better capable of serving the interests of the relevant States including those adopting the equal-share rule. It held:

... applying [a comparative fault rule] will not contravene the purposes of the rules of the other interested jurisdictions, the District of Columbia and Virginia [both of which follow an equal-share rule], in that by apportioning responsibility in accordance with fault this rule, like the equal-share rule, serves the purpose of ensuring that parties act in conformance with a standard of due care. Indeed, by making sure that a highly-culpable defendant pays its fair share, rather than a per capita portion, which might be less, the comparative fault rule effectuates this policy even more completely and accurately than the older rule. ... Finally, and most importantly, while applying the comparative fault rule in the instant case would not contravene the policies of the District of Columbia and Virginia, application of the equal-share rule would most certainly offend the legitimate and profound interests of the defendants' home states.

The effects of relevant rules for apportioning damages must be taken into account under the governmental interests analysis as used in this case. It is, however, submitted that applying the 1978 Act by stressing the merits of the flexibility of its rules for apportionment is not compatible with the English choice-of-law approach which is largely based upon the traditional European method.

In respect of the apportionment of liability, a close analogy between the 1978 Act and the Law Reform (Contributory Negligence) Act 1945 has been pointed out. Section 1(1) of the 1945 Act provides "Where any person suffers damage as the result partly of his own fault ... the damages recoverable in respect thereof shall be reduced to such extent

as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Briggs says:⁶³

Suppose that the plaintiff has been injured in the circumstances in which an English court, left to its own devices, would reduce damages on account of contributory negligence. But suppose that the tort took place in Ruritania. And suppose that the Ruritanian law on contributory negligence was different: a different fractional apportionment, or a last opportunity rule to bar recovery altogether. ... [W]ould an English court ... apply its own provisions of contributory negligence? Almost certainly not. It would apply those of the *lex loci delicti*.

It should be concluded from the foregoing analysis that neither the question whether contribution should be awarded or not, nor the question whether contribution should be assessed on the basis of flexible or rigid criteria should influence the application of a particular statute under the English choice-of-law approach.

5.2.2 Characterisation as equity

In *American Surety of New York v. Wrightson*,⁶⁴ an American bank (P) took out insurance policies covering substantially the same risk at an American insurance company (D) and at Lloyd's. When the loss occurred the bank claimed from the American insurance company the full amount of the insurance. The latter, upon payment of the

⁶³ Briggs [1995] LMCLQ 437, 439.

⁶⁴ (1910) 16 Com.Cas 37.

insurance, claimed contribution from one of the underwriters (R) on the Lloyd's policy. Hamilton J. held⁶⁵ that as contribution between the co-insurers depended not upon contract, but upon equity, the law governing the matter must be the law of the tribunal to which the party who was required to do equity was subject, and not the law of the country in which the party seeking to have equity done to him was domiciled, or the law of the country which governed the contract under which the party seeking equity from the other party had become liable to the assured.

A different issue was characterised as equity in *Nissenberg v. Felleman*.⁶⁶ In this case the Massachusetts court applied New York law, the law governing the suretyship, to determine whether a surety was entitled to contribution from his fellow co-surety. But the court went on to hold that once the substantive obligations of the parties were determined under New York law, the extent to which those obligations could be protected under available Massachusetts equitable remedies and procedures was to be determined by the Massachusetts forum by Massachusetts law. The latter law, therefore, determined whether a surety had a right of exoneration against the co-sureties in the form of an order that each of the sureties simultaneously pay his share of the principal obligation to the creditor.

Although the issue of exoneration is beyond the scope of the present discussion, generally speaking, equity should not be used as a term of characterisation for the purpose of conflict-of-laws. The issues ought to be characterised by generic terms capable of accommodating the concepts of all legal systems. The division between common law and equity is unique to common law systems.

⁶⁵ At p. 49.

⁶⁶ (1959) 162 NE 2d 304.

Even if, the word “equity” is not used as a term of art but only in the sense of considerations of justice, as it probably was in *American Surety of New York v. Wrightson*, it is hard to see why it merits a special treatment for the purpose of conflict-of-laws. It is axiomatic that all areas of law are founded on the concept of justice of each jurisdiction. It is an antiquated idea to think that apportionment of liability in a contribution claim depends upon a vague notion of justice since concrete method of apportionment may well be provided by rules of law.

5.2.3 Characterisation as tort

Where D and R are liable to P in tort, there are Australian cases which characterised a claim for contribution between joint tortfeasors as tort and applied the law governing tort.⁶⁷ Under Australian choice-of-law rules, this means that in order for D to be able to recover from R, the right has to exist under both the *lex fori* and the *lex loci delicti*.⁶⁸ Also section 173 of the Restatement of the Law, Second, Conflict of Laws states that whether one tortfeasor has a right to contribution or indemnity against another tortfeasor is determined by the law selected by application of the rule of section 145, which provides for a choice-of-law rule for tort. Comment a. to section 173 further states that most cases to date⁶⁹ have held that the question of contribution between joint tortfeasors is determined by the local law of the state of conduct and injury.

⁶⁷ *Wilson Electric Transformers Co. Pty Ltd v. Electricity Commission (N.S.W.)* [1968] VR 330; *Baldry v. Jackson (No. 2)* [1977] 1 NSWLR 494.

⁶⁸ Sykes & Pryles, para. 2.7.

⁶⁹ The Second Restatement was made in 1971.

However, unlike action in tort, obligation to make contribution does not arise directly from R's tortious act but from R's enrichment at D's expense. Therefore, the justification for characterising a contribution claim as tort is weak. Dicey & Morris holds the same view:⁷⁰

... if A is injured by the joint negligence of B and C, and recovers judgment against B, B and C have each committed a tort against A, but C has not committed a tort against B. Hence B's right of contribution from C cannot be delictual.

Comment a. to section 173 of the Second Restatement also acknowledges that the state where conduct and injury occurred will not by reason of these contacts alone be the state that is primarily concerned with the question whether one tortfeasor may obtain contribution from another. In *Caterpillar Tractor Co. v Teledyne Industries Inc.*,⁷¹ an action for contribution by a California company which paid the entire judgment entered in favour of a Florida company in a court in Florida applying Florida law against it and another California company as joint tortfeasors, was held by the California court to be governed by California law. Based upon the governmental interests analysis, it was held that while Florida had an interest in insuring that the injured party received just compensation from tortfeasors, it had no interest in the application of the rule of contribution as between two California corporations.

This case, decided later than the Second Restatement, vindicates the prediction made in the comment a. to section 173 that future cases may give contribution a different

⁷⁰ P. 1534.

⁷¹ (1975) 53 Cal App 3d 693; 126 Cal Rptr 455.

choice-of-law treatment from tort liability. More cases can be found which indicates that the support for the characterisation as tort is waning. In *Re Air Crash Disaster at Washington D.C.*,⁷² the law of the District of Columbia, the place of the accident, was applied to permit the victims to recover damages but the laws of the States where the tortfeasors had their principal places of business, which were outside the District of Columbia, were applied to provide contribution between them. The discussion on choice of law in the ruling by the Supreme Court of the United States in *Asahi Metal Indus. Co. v. Superior Court of California*⁷³ also suggests a distinction between the law that determines the manufacturers' liability to the injured California users and the law that determines whether the Taiwanese manufacturers should be entitled to claim contribution from the Japanese component part manufacturers. Justice O'Connor said:

... it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan.

Commenting on this case, Weintraub says California law should determine whether there is the joint liability necessary for contribution, although Japanese or Taiwanese law should determine the contribution issue.⁷⁴

Also in Australia the case law is not unanimously in favour of characterising a claim

⁷² (1983) 559 F. Supp. 333 (District Court for the District of Columbia)

⁷³ (1987) 480 U.S. 102; 107 S. Ct. 1026.

⁷⁴ Weintraub, "Methods for Resolving Conflict-of-laws Problems in Mass Tort Litigation" [1989] U. Ill. L. Rev. 129.

for contribution between joint tortfeasors as tort. In *Stewart v. Honey*,⁷⁵ for example, the Supreme Court of South Australia applied a South Australian statute to decide the recovery by a tortfeasor against the insurer of another tortfeasor despite the fact that the tort had taken place in Queensland.

In England, the Law Commission expressly stated that they did not recommend that rights of indemnity should be governed by the choice-of-law rules for torts and delicts which they proposed.⁷⁶

5.2.4 Characterisation as restitution of unjust enrichment

According to the classification usually made at the level of substantive law, claims for contribution (indemnity) are regarded as belonging to restitution of unjust enrichment (quasi-contract). Restitution is a vast concept embracing a wide variety of situations involving obligation to restore the unjust enrichment or unjust benefit. Since the majority of them relate to two-party situations, a claim for contribution (indemnity), involving tripartite relations, forms a rather special category of restitution. For this reason, claims for contribution (indemnity) either do not appear to be contemplated or cannot properly be catered for by the choice-of-law rules for unjust enrichment so far proposed.

For example, Rule 201 of Dicey & Morris⁷⁷ provides:

⁷⁵ [1972] 2 SASR 585, 594.

⁷⁶ Law Com. No. 193 (1990), para. 3.48. The Private International Law (Miscellaneous Provisions) Act 1995, the act enacted on the basis of this recommendation, does not mention the rights of indemnity.

⁷⁷ It is said at p. 1472 that the authorities which support its suggestion are scanty.

- (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
- (2) The proper law of the obligation is (*semble*) determined as follows:
 - (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
 - (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
 - (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

As a preliminary point, there are certain ambiguities about this Rule. The words "If it arises in any other circumstances" in sub-clause (c) indicate that clause (2) is an exhaustive list. However, if the clause (2) is all-inclusive, there is no need for clause (1). The comment to the Rule⁷⁸ defines the "proper law" in clause (1) as the law with which the obligation has the closest and most real connection and explains that clause (2) constitutes examples of the general principle provided for in clause (1). Clause (2) should, therefore, be regarded as a non-exhaustive list. Blaikie also suggested⁷⁹ that the choice should not be thought to lie between the proper law of a preceding contract, or the *lex situs* of an immovable, and, in all other circumstances, the law of the country where the enrichment occurs. He further suggests clause (2) should be treated as listing merely indications rather than as determinants of the proper law.

Quite apart from these ambiguities, whether and how Rule 201 will be applied to

⁷⁸ P. 1474.

⁷⁹ Blaikie [1984] JR 112, 125.

claims for contribution (indemnity) are not clear since it purports to cover wide-ranging cases of restitution or quasi-contract.

There is a passage in the comment that refers⁸⁰ readers to the chapter on torts for the question of choice-of-law in claims for contribution between tortfeasors. This may be taken as an indication that this question is outside the scope of Rule 201. In that chapter, however, it is suggested⁸¹ that an obligation to provide contribution between tortfeasors would be characterised as quasi-contractual and would accordingly be governed by the proper law of the obligation in accordance with Rule 201. On this basis a further suggestion is made that the proper law of the obligation to make contribution will *prima facie* be the *lex loci delicti*. This proposal is a sound one in isolation but by characterising the obligation as quasi-contract, it becomes necessary to fit this proposal within Rule 201. It is to be wondered whether another way of characterisation would not provide a simpler solution by dispensing with the need for finding a place within the provisions which have already been made ambiguous in order to capture the wide variety of unjust enrichment cases.

Where R owes P a debt arising out of a contract, Dicey & Morris puts the following illustration to show how Rule 201 operates:⁸²

E in England is indebted to F in France under a contract governed by English law. A in Belgium and X in Holland are his sureties under a contract of suretyship governed by French law. A pays the debt in Belgium and tries to obtain contribution from X.

⁸⁰ P. 1478.

⁸¹ P. 1534.

⁸² Illustration 2 at p. 1479.

(*Sembler*) French law applies. It is the law applicable to the antecedent contract.⁸³

This illustration appears to follow the guidance of clause (2)(a). However, Dicey & Morris gives no indication what the position would be if different contracts of suretyship between the creditor and different sureties were subject to different governing laws, as may sometimes be the case where the contracts of suretyship are concluded by different instruments.⁸⁴ In such a case clause (2)(a) is incapable of giving guidance as it is a rule formulated to cope primarily with two-party situations.

A more recent attempt to formulate comprehensive choice-of-law rules for unjust enrichment was made by Bird.⁸⁵ A claim for contribution (indemnity) does not, however, appear to be contemplated by her otherwise excellent proposed rules. Only one case⁸⁶ concerning a claim for contribution (indemnity) is mentioned in passing in her discussion. Also, the hypothetical cases presented to illustrate how the proposed rules operate does not contain a case on a claim for contribution (indemnity).

⁸³ A similar idea seems to be behind an American case, *Nissenberg v. Felleman* (1959) 162 NE 2d 304, which involved an action for contribution between co-sureties, all of whom were resident in Massachusetts, who jointly and severally guaranteed the debt owed by a Massachusetts corporation to a New York corporation. The principal debt and the contracts of suretyship were all made subject to New York law. The Massachusetts court held that, although the action for contribution was not based on the contract of suretyship, the action should be determined according to the law which governed the suretyship, i.e. the New York law, at least in a case where the parties have stipulated the applicable law in the contract of suretyship itself.

⁸⁴ As in the leading English case, *Deering v. Winchelsea (Earl)* (1787) 1 Cox.Eq.Cas. 318, in which it was held that a surety who paid more than his share was entitled to contribution from other sureties not only where they were jointly bound in the same instrument but also where they were severally bound in different instruments.

⁸⁵ Bird, p. 102.

⁸⁶ *Nissenberg v. Felleman* (1959) 162 NE 2d 304.

5.2.5 Characterisation as a *sui generis* category

From the foregoing discussion, it is submitted that claims for contribution (indemnity) should be characterised as a *sui generis* category. There remains the task of determining what choice-of-law rule is appropriate.

If a hard-and-fast rule can be devised, it would enable D to know what right of contribution (indemnity) he is to have upon payment to P. The need to provide such information to D must be acknowledged where he assumes a contractual duty to satisfy P. However, the situations from which claims for contribution (indemnity) arise are too diverse to be adequately catered for by a single hard-and-fast rule or a set of such rules. This is so even after eliminating the rest of the unjust enrichment cases, leaving claims for contribution (indemnity) alone to be covered by a *sui generis* category. The multiparty nature of the circumstances from which a claim for contribution (indemnity) arises creates diverse situations.

Consequently, the choice-of-law rule is bound to be a flexible one as suggested in dicta by Chadwick J. in *Arab Monetary Fund v. Dr Hashim & Others (No. 9)*.⁸⁷ It is submitted that a claim for contribution (indemnity) should be governed by the law with which the claim has its closest and most real connection. And this should be so, unlike the dicta by Chadwick J., irrespective of whether the case falls within the scope of the 1978 Act.⁸⁸

It must, however, be conceded that this rule is so nebulous that it would be difficult to apply. Without further elucidation, litigation will be promoted and prolonged leading

⁸⁷ The Times 11 October 1994 (Transcript available on Lexis).

⁸⁸ See also Briggs [1995] LMCLQ 437, 442.

to unpredictable and inconsistent results. With a view to providing some guidance as to how to apply this rule, some significant contacts to be taken into account will be examined below.

5.2.5.1 Where both D's liability to P and R's liability to P arise out of a tort

Where both D's liability to P and R's liability to P arise out of a tort, the *locus delicti* will be the most important territorial connection in ascertaining the law with which the claim for contribution (indemnity) has its closest and most real connection. However, the *locus delicti* is insignificant in cases where it is trivial or transitory as in some traffic accident cases. In *Kohr v. Allegheny Airlines Inc.*,⁸⁹ a US case resulting from a midair collision of airplanes, it was held that the interest of the State wherein the fortuitous event of the collision occurred was slight and for this reason the court proceeded to devise and apply the federal common law rule for contribution and indemnity among tortfeasors.

Wade suggested⁹⁰ that as between the *lex loci delicti* and the law of the place of the

⁸⁹ 504 F.2d 400, 405 (7th Cir. 1974).

⁹⁰ Wade (1953) 6 Vanderbilt L Rev 464, 474-476. However, he was not a proponent of the *sui generis* characterisation. In support of his suggestion, he referred to s. 453 of the First Restatement, Conflict of Laws which provided for a choice-of-law rule for unjust enrichment. Unlike s. 173 of the Second Restatement, the First Restatement did not deal with contribution and indemnity among tortfeasors separately from unjust enrichment in general. S. 453 provides for a hard-and-fast rule that reads "when a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched." The rigidity of the rule is characteristic of the First Restatement which stands in a sharp contrast with the Second Restatement. S. 221(2) of the Second Restatement provides for a flexible choice-of-law rule for unjust enrichment under which other factors are also taken into account as well as the place where the benefit or enrichment was received and the place where the act conferring the benefit or enrichment was done.

payment by one of the joint tortfeasors, the latter law should control the right to contribution (indemnity) between tortfeasors. It is the place where one tortfeasor discharged the whole of a debt due and thereby enriched his fellow tortfeasor. But the law of the place of the payment would not always be the most appropriate law to govern a claim for contribution (indemnity). Unlike the place of payment by a debtor, which may have been fixed in the preexisting contract, the place of payment by a tortfeasor would often be fortuitous and might otherwise have no connection whatsoever with the parties and the situation giving rise to the claim for contribution. Furthermore, in the case where the place where the payment is sent and the place where the payment is received are different, it is generally difficult to give more emphasis upon one place than another. The right approach would be to take them into account, together with all other factors, to ascertain the law with which the claim for contribution (indemnity) has its closest and most real connection.

Other territorial contacts to be taken into account would include the domicile, residence, nationality, place of incorporation and place of business of P, D and R. Residence, for example, would assume some weight, especially where D and R are resident in the same country. In other cases their importance would depend upon the extent to which these contacts are grouped together with other factors.

However, none of these territorial contacts would be weightier, as a single factor, than the preceding relationship, if any, between D and R, e.g. an employment contract. Although all the three bilateral relations between P, D and R are essential elements for a contribution claim to arise, it cannot be denied that the relation between D and R counts more than the other relations in ascertaining the law with which the claim for contribution (indemnity) has its closest and most real connection.

Both Dicey & Morris⁹¹ and the Second Restatement⁹² suggest that where the joint tortfeasors are both resident in a country and there is some special relationship between them which is centred in that country, the law of that country should govern the claim for contribution between them even if the tort took place elsewhere. Although the rules they propose are different from the rule presently proposed, their conclusion for such scenario must be concurred with. The Second Restatement illustrates such scenario as follows:⁹³

A lends his car to B in state X. A and B are both domiciled in X. B drives the car into state Y where he negligently runs over C. C recovers damages from A. A now sues B for indemnity in state Z. The Z court, in the absence of strong countervailing considerations, should apply X local law to determine A's right to indemnity.

5.2.5.2 Where D and R owe P a debt arising out of their respective contract

According to Bennett,⁹⁴ Martiny thinks⁹⁵ that a claim for indemnity against the principle debtor (R) by the surety (D) who has paid the debt to the creditor (P) should be governed by the law governing the contract of suretyship, although where the surety is entitled to indemnity only under the law governing the contract of the principle debt, the

⁹¹ P. 1534.

⁹² Comment a. and b. to § 173.

⁹³ Illustration 1 to § 173.

⁹⁴ Bennett (1990) 139 ICLQ 136, 162.

⁹⁵ Martiny, Referententwurf (1987) Ministry of Justice BRD s. 251.

latter law should apply by way of exception. But it is hard to see the ground for this proposal and Martiny himself is said to be aware that his proposal is controversial. The right approach would be to take into account both the contract between P and D and the contract between P and R in ascertaining the law with which the claim has its closest and most real connection.

Consideration should also be given to the domicile, residence, nationality, place of incorporation and place of business of P, D and R in the same way as where both D's liability to P and R's liability to P arise out of a tort.

Are there other factors to be considered? Goff presented the following illustration:⁹⁶

D and R are several sureties of the principal debtor Z; all the parties are domiciled in England. The creditor P is, however, domiciled in France and that law is the proper law of the debt. D pays P in France. (The original alphabetical denominations X, Y and A have been replaced with D, R and P)

Upon this illustration, he suggested D's right of contribution should be governed by French law on the ground that it was the discharge of a French debt in France which enriched R. Since he did not formulate a general choice-of-law rule for a claim for contribution (indemnity), it is not clear how much weight he would attribute to the place of payment if, in the illustration, the proper law of the debt were English law. But this illustration is sufficient to show the need to take into account the place of payment and related contracts (e.g. the contract between P and Z in the illustration) in appropriate cases to ascertain the law with which the claim for contribution (indemnity) has its closest

⁹⁶ Goff, *The Law of Restitution* (1966, 1st ed.), p. 506.

and most real connection. The place of payment by a debtor may be predetermined in the contract, which would make it less fortuitous than the place of payment by a tortfeasor.

It is accordingly submitted that D's claims for contribution and indemnity against R should be governed by the law with which the claim has the closest and most real connection, having regard in particular to the contract between P and D, the contract between P and R, other related contracts, the place of payment and the domicil, residence, nationality, place of incorporation and place of business of P, D and R.

6 Justification for separate choice-of-law rules for different claims of recovery

The foregoing discussions are based upon the assumption that three different claims of recovery, i.e. a claim by way of subrogation, a claim pursuant to R's preexisting contractual undertaking, and a claim based on a right of recovery created by operation of law, are subject to different choice-of-law rules. Some justifications for this assumption will now be offered.

The Giuliano-Lagarde Report describes the relationship between a claim by way of subrogation and a claim pursuant to a preexisting contractual undertaking in these terms:⁹⁷

... when formulating article 13 the group envisaged the possibility that the legal relationship between the third party [D] and the debtor [R] was governed by a contract. This contract will obviously be governed by the law which is applicable to it by the terms of this convention. Article 13 *in no way affects* this aspect of the relationship

⁹⁷ Para. 2 of the comment on Art. 13.

between the third party and the debtor. (Emphasis supplied)

It follows that where there is a contract between D and R, D can claim recovery both by way of subrogation, the governing law of which will be determined by Article 13, and by way of a claim pursuant to R's contractual undertaking, the governing law of which will be determined by the other provisions of the Rome Convention.

On the other hand, a claim based on a right of recovery created by operation of law does not fit the choice-of-law rule provided by Article 13. For the provision of Article 13 reflects the nature of subrogation which assigns the existing rights between P and R by referring some issues to the law governing the relationship between them while a claim based on a right of recovery created by operation of law arises independently of any existing rights. Dicey & Morris also suggests⁹⁸ a limited scope for Article 13 on the ground of its heading "subrogation."⁹⁹ In this connection, it is interesting to see that Article 144(1) of Swiss Private International Law Statute 1987 appears to refer subrogation and direct claims of recovery to a single choice-of-law rule. It reads:¹⁰⁰

A debtor can recover from another debtor, either directly or through subrogation into the legal position of the creditor, only to the extent permitted by the laws governing both debts.

⁹⁸ P. 218. Concurred by Stevens, p. 210 n. 183.

⁹⁹ Dicey & Morris, however, does not appear to regard the application of the rule in the article to other types of claim as being necessarily excluded.

¹⁰⁰ Translation by Karrer & Arnold.

However, Article 146 is similar to Article 13 of the Rome Convention. It reads:

1. The transfer of a claim by operation of law is subject to the law governing the underlying legal relationship between the old and the new creditor or, if there is none, to the law governing the claim.
2. The provisions of the law governing the claim which protect the debtor are reserved.

It is not clear from the text how the two articles are reconciled. Presumably, Article 146 would have no application to a direct claim of recovery. The latter would simply be subject cumulatively to the law governing D's debt and the law governing R's debt in accordance with Article 144(1).

Also as between a claim pursuant to R's preexisting contractual undertaking and a claim based on a right of recovery created by operation of law, it is inevitable that different choice-of-law rules should apply. While a claim pursuant to R's contractual undertaking is obviously subject to the law governing the contract, the choice-of-law rule for a claim based on a right of recovery created by operation of law must also cater for the cases where there is no contractual relationship between D and R. In this connection, the author of the annotation "What law governs right to contribution or indemnity between tortfeasors"¹⁰¹ collected only those cases concerning the right arising from operation of law or from implied contracts, excluding the cases concerning the right predicated upon an express contract. Such a distinction was probably made in the anticipation of different choice-of-law rules between them. I respectfully regard that approach as correct, except that the proper dividing line should have been between the

¹⁰¹ 95 A.L.R.2d 1096.

rights arising from operation of law and the rights arising from a contract, express or implied.

7 The consequences of different laws governing different claims of recovery

As a result of the application of different choice-of-law rules, different claims of recovery may be governed by different laws, although in some cases the governing laws are likely to coincide, e.g. where there is a preexisting contract between D and R, the law governing the contract will govern, not only a claim pursuant to R's contractual undertaking, but also a claim based upon a right of recovery created by operation of law, as it is likely to be the law with which the latter claim has the closest and most real connection. We will examine the consequences of different laws governing different claims of recovery below.

First of all, it must be borne in mind that the kind of cases in which each claim of recovery can be used varies in different legal systems. Thus it is said that subrogation cannot be used in as many cases under English and Commonwealth law as under US law.¹⁰² Differences would be greater as between common law and civil law legal systems. For example, if D, freely and without request from R, contracts with P to assume the obligation to pay R's debt to P, he generally has no right of recovery from R under common law systems, even though R has benefited from D's payment. A good illustration is provided by the English case, *Owen v. Tate*¹⁰³ in which the Court of Appeal

¹⁰² Cranston, p. 160. For a comparison of Common law with other continental legal systems, see Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 20.

¹⁰³ [1976] QB 402.

held that D, who had become a surety of R's debt to P in place of another surety without R's consent, was not entitled to recover from R upon payment to P. Although only a claim for indemnity was invoked in this case, it is regarded as implying that D cannot be subrogated to P's rights against R, either.¹⁰⁴ The very opposite result is provided by Article 2028 of the French Civil Code which expressly provides that the right of recourse against the principal debtor exists irrespective of whether the guarantee was given with the knowledge of the principal debtor. In addition to the direct claim provided by this provision, Article 2029 provides for the right of subrogation. Consequently, a surety (D) who discharged the principle debtor's (R) debt to the creditor (P) will be entitled to recover from the principle debtor if either subrogation or the claim for indemnity is governed by French law.

Where, as a result of the application of different governing laws, there turn out to be more than one claim of recovery, they should be treated as being concurrently available, unless the substantive rules of their governing laws otherwise provide. Stevens, however, suggests¹⁰⁵ that insofar as the 1978 Act as the *lex fori* applied, in accordance with the Chadwick J.'s decision, to contribution claims arising out of breach of contract, it has been overturned by Article 13(2) of the Rome Convention. However, he does not give the ground for thinking that subrogation supersedes a claim based upon a right of recovery created by operation of law.

Some substantive rules provide for the adjustment of different claims of recovery. Section 7(3) of the 1978 Act states that the right to recover contribution conferred by the

¹⁰⁴ See Goff & Jones, p. 300, n. 2.

¹⁰⁵ E.g. Stevens, p. 210.

Act supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under the Act. This provision should be given effect even if the right of recovery otherwise than under the Act is based upon a law other than English law. Whether the right of recovery under their contractual arrangements takes precedence over or coexists with any statutory rights of recovery depends upon the governing law of the relationship between D and R. Thus section 7(3) of the 1978 Act provides that the right to recover contribution in accordance with the provisions of the Act does not affect certain contractual right of recovery.

In some transactions statutory requirements for recovery will prevail over the parties' contractual arrangement. In a recourse claim on a bill of exchange, for example, the holder of the bill will have to prove by the way stipulated by the applicable statute the fact that the bill was not accepted or paid as well as the liability of the parties against whom recourse is sought.

Among the cases where no claim of recovery is available, there may be an anomalous situation where the law governing subrogation only allows a claim based upon a right created by operation of law and the law governing a claim based upon a right created by operation of law only allows subrogation. Here is an illustration of one such situation.

In the case where R damages P's property and the insurer (D) who covered the property against such damage becomes liable to P to pay insurance, or in the case where R injures P and P's employer (D) becomes liable under his contract of employment to pay the salary or provide other benefits to P while he is absent from work, French law is said to allow D to take a direct action against R by regarding R's act not only as a breach of duty

towards P, but also as a breach of duty towards D, who becomes liable to P by such act.¹⁰⁶ But it is said that most legal systems do not recognise a direct action in those cases.¹⁰⁷ In England the Law Commission recommended¹⁰⁸ that the employer (D) in the illustrated situation should have a direct action against the tortfeasor (R) for reimbursement, but this proposal has not been implemented.¹⁰⁹ However, instead of a direct action, D may be entitled to subrogation to P's right against R in some legal systems. Thus in English law an insurer is entitled, upon indemnifying the insured, to subrogation to the insured's right against the tortfeasor.¹¹⁰ Now suppose, for the sake of argument, that English law also allows the employer to be subrogated to the employee's right against the tortfeasor and French law does not. In these circumstances, if subrogation is governed by French law and a direct action is governed by English law, the employer will not be equipped with a right to recover from the tortfeasor despite the fact that both English law and French law grant the employer a right of recovery one way or another.

This is an example of so-called the problem of adaptation (*angleichung, anpassung*). It arises where different aspects of what may be seen as essentially a single issue are governed by different laws whose operation requires a reconciliation to prevent hardships or material injustice. Its oft-quoted¹¹¹ example arises in relation to succession and

¹⁰⁶ Friedmann & Cohen, *Adjustment among Multiple Debtors*, para. 9.

¹⁰⁷ Friedmann & Cohen, *Adjustment among Multiple Debtors*, n. 22.

¹⁰⁸ 11th Report, Cmnd. 2017.

¹⁰⁹ Goff & Jones, p. 360.

¹¹⁰ Mitchell, p. 6.

¹¹¹ E.g. Lipstein, para. 63 which illustrates the same scenario by substituting a common law country for State A and California for State B.

matrimonial property. Suppose that spouses who are domiciled in State A at the time of the marriage later acquire a domicile in State B, where one of them dies. According to the law of State A, the matrimonial regime is separation of goods, but the surviving spouse is accorded a share in the other's estate on the latter's death. According to the law of State B, spouses live according to a regime of community of goods, but the surviving spouse is not entitled to a share in the other's estate by virtue of the law of succession. In these circumstances, if matrimonial property relations between spouses while both of them are alive are governed by the law of their domicile at the time of the marriage (the law of State A) and if succession between spouses is governed by the law of their last domicile (the law of State B), the surviving spouse will be left with empty hands. This is the result, notwithstanding that both the law of State A and the law of State B grant a spouse some share in the assets of the other. This anomaly is caused because each legal system as a coherent whole is split by the application of different laws to different aspects of essentially a single issue.

The solution to this type of problem lies either in applying a single governing law to different aspects of the case, or in adapting the substantive rules of the governing law to the substantive rules of other governing laws. In respect of the scenario just illustrated, Lipstein thinks the result is not due to a faulty technique of the conflict of laws but is for the substantive rules of succession to redress by a process of adaptation.¹¹² Then what solution should be prescribed to the case involving the employer's right of recovery from the tortfeasor? It has already been concluded that it is reasonable to have different choice-of-law rules for subrogation and indemnity. The problem should, therefore, be solved

¹¹² Lipstein, para. 63.

through adaptation of substantive rules either by conveniently recognising a direct action under English law or by conveniently giving the right to subrogation under French law.

CHAPTER 5

Obstacles to recovery in chain transactions due to a mismatch between the governing law of D's liability to P and the governing law of R's liability to D

1 The purpose of this chapter

Obstacles to D's satisfactory recovery from R dealt with in this chapter are those which are caused by an imbalance in the liability regime of different laws governing D's liability to P and R's liability to D where they arise from two adjacent contracts in a chain transaction such as bill of exchange transactions, letter of credit transactions, credit transfers, multimodal transports commissioned to subcarriers and so forth.

Adjacent contracts in a chain transaction share the same objective and are in the same terms in material respects. Since D is a party to both contracts, D may well have an expectation that if he becomes liable to P, his liability will be covered back-to-back by R's liability to him. Such an expectation may, however, be defeated if D's liability to P and R's liability to D are governed by different laws and D's liability to P is subject to a stricter liability regime in respect of the existence or the extent of liability than the liability regime which controls R's liability to D. For example, certain words in the contract between P and D as interpreted under its governing law may impose liability upon D but the same words appearing in the contract between D and R as interpreted under its governing law may not render R liable to D.

The purpose of this chapter is to illustrate how unsatisfactory recovery is caused by

such an imbalance in the liability regime of different laws governing adjacent contracts and to consider whether, in what circumstances and how adjacent contracts should be referred to a single governing law in order to ensure the correspondence of liability.

2 How unsatisfactory recovery is caused by an imbalance in the liability regime of different governing laws

I will illustrate below how unsatisfactory recovery is caused by an imbalance in the liability regime of different laws governing adjacent contracts in chain transactions such as insurance-reinsurance transactions, bill of exchange transactions, credit transfers, letters of credit transactions, and multimodal transports commissioned to subcarriers.

2.1 Insurance-reinsurance transactions

Where an insurer (D) concludes a reinsurance contract, he may be expecting his liability to the insured (P) under the original insurance contract to be covered back-to-back by the reinsurer's (R's) liability to him under the reinsurance contract. Such an expectation may, however, be defeated if the original insurance contract and the reinsurance contract are governed by different laws.

Monachos paints the following scenario:¹

... [Suppose] a German insurer reinsures with an English reinsurer. The reinsurance

¹ Monachos, "Reinsurance in English Private International Law" [1972] JBL 206, 219.

contract contains the clause: "to pay as may be paid thereon". A loss occurs for which the German insurer is not legally liable under German law to his assured, but for which, on business considerations, he decides to pay. If his reinsurance contract will be governed by English law - the law of his reinsurer - he will be unable to recover from him, because English law does not recognise *ex gratia* payments even though German law does.

On this scenario, Butler & Merkin says² that the plight of the German insurer does not arise from the fact that the different laws govern the insurance contract and the reinsurance contract, but from the narrower fact that the governing law of the reinsurance contract is English law. This comment is, with respect, quite right if we look at this particular incident of failure to recover in isolation. However, there may be a number of issues in respect of which there is a mismatch between the law governing the original insurance contract and the law governing reinsurance contract. The mismatch in respect of such issues does not manifest itself unless and until the event relevant to such issues takes place. Therefore, even if, in the Monachos's scenario, the reinsurance contract were governed by a law which would recognise *ex gratia* payment, there might be a mismatch between that law and German law in respect of other issues which would, if a certain event took place, upset the correspondence of liability. Since the present discussion is not confined to any particular issue to which a mismatch between different governing laws relates, such a mismatch must be regarded as arising from the fact that the two contracts are governed by different laws rather than from the narrower fact that there happens to be a difference between the rules of those governing laws in respect of a particular issue.

² Para. D.4.2-28.

Another example of issues in respect of which there was a mismatch between the law governing the original insurance contract and the law governing the reinsurance contract can be found in *Vesta v. Butcher*.³ In this case, the insurer (D) was exposed to a risk of non-recovery from the reinsurer (R) due to a mismatch between Norwegian law governing the original insurance contract and English law governing the reinsurance contract in respect of the effect given to the breach of a clause of warranty. That clause, under which the insured (P) undertook to do certain things, was contained in the original insurance contract. The reinsurance contract purported to incorporate by reference the terms of the original insurance contract. The loss of the subject matter insured under the original insurance contract occurred and the insured, despite having breached the clause of warranty, claimed against the insurer. The original insurance was governed by Norwegian law and according to that law the breach of the clause of warranty did not render the original insurance contract null and void because the breach did not contribute to the occurrence of the particular loss which took place. The insurer settled with the insured and brought an action against the reinsurer for indemnity against the settlement. The reinsurance contract was governed by English law. The reinsurer alleged that the insurer was not entitled to indemnity under the reinsurance contract because of the breach of the clause of warranty by the insured, contending that the breach would render the reinsurance contract null and void under English law irrespective of whether it contributed to the occurrence of the particular loss which took place.

The House of Lords, however, allowed the insurer to claim on the reinsurance contract by holding that the parties to the reinsurance contract were deemed under English law to

³ [1989] 2 WLR 290 (H.L.)

have “used … a Norwegian legal dictionary” to ascertain the meaning of the clause of warranty.⁴ In other words, the House of Lords determined the meaning of the clause of warranty in the reinsurance contract according to the principle of construction under English law by copying the meaning of the same clause in the original insurance contract as determined by Norwegian law. Lord Lowry distinguished this reasoning from having Norwegian law govern the meaning of that clause in the reinsurance contract separately from other issues of that contract (*dépeçage*) as follows:

There is, in my view, no need to treat the reinsurance contract as partly governed by Norwegian law, except in the special sense that one must resort to Norwegian law in order to interpret and understand the meaning and effect of the [clause of warranty] in both contracts. That is a different concept from “the proper law of the contract” (or of part of the contract) which is discussed in the authorities on that subject.

By this approach, however, the extent to which the correspondence of liability under the original insurance contract and reinsurance contract can be achieved depends upon the principle of construction under the law governing the reinsurance contract.⁵

Another way of avoiding imbalance of liability is to deny the incorporation of a term that would upset the correspondence of liability. In *Vesta v. Butcher*, the insurer argued that the clause of warranty in the original insurance contract was not incorporated into the

⁴ [1989] 2 WLR 290, 313.

⁵ Dicey & Morris, p. 1378. Carter suggests that the circumstances in which the law governing a reinsurance contract does not permit reasonable reference to the rules of the law governing the original insurance contract will be rare: 59 (1988) British Yearbook of International Law 353, 356.

reinsurance contract. If this argument had been accepted, the reinsurer's liability as determined by English law would have been merely to indemnify the insurer against its liabilities to the insured as determined by Norwegian law. And there would have been no need to consider whether the two contracts should be referred to a single governing law in order to achieve the correspondence of liability.⁶ However, Hobhouse J. did not grant leave to amend the pleadings to adduce this argument and consequently the House of Lords' ruling was also based on the assumption that the clause of warranty had been incorporated into the reinsurance contract. Lord Griffiths, however, said that he was reluctant to read the terms of the original insurance contract as the terms of the reinsurance contract.⁷ He said:

A contract of insurance will almost inevitably contain terms that are wholly inappropriate in a contract of reinsurance. The two contracts are dealing with entirely different subject matter. The original policy is concerned to define the risk that the insurer is prepared to accept. The contract of reinsurance is concerned with the degree of that risk as defined in the policy that the reinsurer is prepared to accept.

It could have been said that the clause of warranty was an inappropriate term to be incorporated in a reinsurance contract since it was concerning the obligations to be performed by the insured.

⁶ McLachlan, "Splitting the Proper Law in Private International Law" 51 (1990) British Yearbook of International Law 311, 331; Merkin, "The Proper Law of Insurance and Reinsurance Contracts" in Rose (ed.), *New Foundations for Insurance Law Current Legal Problems* (1987) p. 61.

⁷ At p. 298.

There is a case in which the incorporation of a term that would upset the correspondence of liability was denied. In *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.*,⁸ the reinsurer contested their liability under the reinsurance contract alleging that conditions in the original insurance contract had been incorporated into the reinsurance contract and resulted in the reinsurance claim being time barred. The time clause in the original insurance contract provided that no claim could be brought unless commenced within 12 months after the occurrence of fire. It took time to investigate and settle the claim under the original insurance contract and consequently the claim against the reinsurer was not made until more than 12 months after the fire. In rejecting the reinsurer's defense, Lord Macnaghten in the Privy Council said:⁹

It is difficult to suppose that the contract of re-insurance was engrafted on an ordinary printed form of policy for any purpose beyond the purpose of indicating the origin of the direct liability on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to it.

This case suggests that even if there is a clause in a reinsurance contract that purports to generally incorporate the terms of the original insurance contract, each term may be examined individually to see whether its incorporation is really appropriate. If the purpose of the clause purporting to incorporate the terms of the original insurance contract is to ensure a back-to-back cover, it does not make sense to incorporate the terms

⁸ [1907] AC 59 (Privy Council).

⁹ At p. 64.

which, if interpreted by different laws governing the two contracts, would upset the correspondence of liability.

However, denying the incorporation of inappropriate terms is effective for avoiding an imbalance of liability only in certain cases. A mismatch of governing laws may arise from the interpretation of terms expressly stated in both contracts. A mismatch may also arise from other events such as an *ex gratia* payment in Monachos's scenario. Therefore, there remain cases in which reference to a single governing law must be considered in order to avoid unsatisfactory recovery caused by a mismatch of different laws governing the original insurance contract and the reinsurance contract.

2.2 Bill of exchange transaction

When the drawee or the acceptor of a bill of exchange fails to accept or pay, as the case may be, the holder of the bill (P) acquires rights of recourse against the drawer and all the indorsers (together hereafter referred to as signatories). Those indorsers (D), too, upon discharging their obligation to reimburse, obtain rights of recourse, this time in the capacity of an indorsee, against all the indorsers prior to them (R).

Bills of exchange often assume an international character by, for example, being drawn in one State, indorsed in a second and payable in a third. Consequently, different laws may determine with respect to different signatories the steps that must be taken to claim recourse such as the presentment of a bill for acceptance or payment, notice of dishonour,

and protest.¹⁰ Since different laws may require different steps,¹¹ it is possible that one indorser becomes liable without having a right of recourse against the prior signatories.

Thus assume that a bill was drawn in the State of X and was indorsed in the State of Y. The law of the State of X requires the bill to be protested but the law of Y has no such requirement. The holder of the bill (P) does not need to take steps to claim recourse other than those required by the law governing the liability of the signatory against whom he intends to claim. Accordingly, if the holder should care to claim recourse only against the indorser (D) who indorsed the bill in the State of Y, he may do so without protesting the bill. However, unless a protest is made, the indorser cannot claim recourse against the drawer of the bill (R).¹²

Similarly, suppose that the amount of liability is governed by different laws with respect to different signatories, an indorser may become liable to pay a higher rate of interest than he can recover from any of his prior signatories.¹³

In *Re Gillespie*,¹⁴ there was an apparent mismatch between a foreign law governing the drawer's (D) liability to the holder (P) and English law governing the acceptor's (R's) liability to the drawer but English law was interpreted flexibly so that an imbalance of liability could be avoided. In this case, the drawer who had paid the holder what was called re-exchange according to the foreign governing law sought to recover the amount of the payment from the acceptor. The acceptor's liability was governed by English law.

¹⁰ Lorenzen, p. 124.

¹¹ Chalmers and Guest on *Bills of Exchange, Cheques and Promissory Notes*, p. 564, 566.

¹² Lorenzen, p.133.

¹³ Ryder & Bueno, p. 361.

¹⁴ (1886) 18 QBD 286 (CA).

However, section 57 of the United Kingdom Bills of Exchange Act 1882 listed only the amount of the bill, interest thereon and notarial charges as the items recoverable from the acceptor. The Court of Appeal overcame the apparent omission of re-exchange by relying upon section 97 which preserved the rules of common law. That section preserved the rules of common law only in so far as they were not inconsistent with the express provisions of the Act. Therefore, although the court did not expressly said, only by interpreting the list of recoverable items in section 57 as a non-exhaustive list, could the court allow the recovery of the amount of re-exchange.

It is not always possible to give D such an extensive right of recovery from R by interpreting rules of the governing law flexibly.

2.3 Credit transfers

In a credit transfer (also sometimes called a fund transfer), the originator of a payment order instructs his bank to credit the beneficiary's account with the beneficiary's bank. If the beneficiary's bank is not a correspondence bank of the originator's bank, the payment order will be sent from the originator's bank to the beneficiary's bank via an intermediary bank which is chosen from the mutual correspondence banks. If there is no immediate mutual correspondence bank, more than one intermediary bank will be used until a mutual correspondence bank is found. Each pair of banks in the chain of credit transfer operation is called the sender and the receiving bank as against each other. If the originator's bank or an intermediary bank commits an error, the credit transfer may not be completed.

If an intermediary bank's error prevented the completion of a credit transfer, there are

broadly two approaches to determining the liability of the originator's bank towards the originator.¹⁵ Under the first approach, the originator's bank is not liable for the loss caused by an intermediary's error provided that it properly chose its receiving bank. This is the solution which appears to be followed, for example, in Switzerland.¹⁶ Under the second approach, the originator's bank must assume responsibility for an intermediary's error ("network liability") and is accordingly obliged to refund the amount of the payment order (money-back guarantee). The cases and legislation adopting this approach include Article 4A-402 of the Uniform Commercial Code (UCC), the decision of the French Cour de Cassation of 13 November 1983,¹⁷ the English case *Royal Products Ltd v. Midland Bank Ltd*,¹⁸ Article 8 of the EC Directive on Cross-border Credit Transfers¹⁹ and Article 14 of the UNCITRAL Model Law on International Credit Transfers.

Upon close examination, however, the obligation of refund under a money-back guarantee is not uniform in details. There are two major differences.

First, while Article 4A-402 of the UCC and Article 14 of the UNCITRAL Model Law set no ceiling on the amount of refund, Article 8 of the EC Directive limits the obligation to refund to the sum of ECU 12500. This figure represents a compromise between, on the one hand, the banking industry and, on the other, consumer groups and business enterprises who will find themselves in the position of the originators of payment

¹⁵ Wood, para. 29-11.

¹⁶ Wood, para. 29-17.

¹⁷ Wood, para. 29-16.

¹⁸ [1981] 2 Lloyd's Rep. 194.

¹⁹ Any decisions or legislation in the Member States which are inconsistent with this Directive will be superseded by this Directive when it is implemented in each State.

orders.²⁰ Bearing in mind that the conflict of interests between these groups is a universal phenomenon, it is quite possible that other States have legislation that sets a different ceiling.

The second major difference relates to the question whether the originator's bank is allowed to derogate from the obligation under a money-back guarantee by otherwise stipulating in the contract with the originator. Article 4A-402(f) of the UCC expressly prohibits such a derogation. The EC Directive does not appear to permit such a derogation, either. The UNCITRAL Model Law, however, takes a compromise position, making the money-back guarantee a mandatory obligation except when a prudent originator's bank would not have otherwise accepted to execute a particular payment order because of a significant risk involved in the credit transfer.²¹

Under Article 4A-402 of the UCC, the EC Directive, and the UNCITRAL Model Law, the money-back guarantee does not operate just between the originator and the originator's bank but operate also between the originator's bank and its receiving bank and between each pair of subsequent intervening banks. Thus Article 14(1) of the UNCITRAL Model Law provides that the originator's bank and the intervening banks are entitled to the return of any funds it has paid to their respective receiving banks. The operation of refund continues up to the bank that committed the error which prevented the completion of the credit transfer.

This operation of refund in a chain works smoothly so long as all the bilateral relationships of the parties involved in a credit transfer are subject to the same rule on

²⁰ For the discussion in the drafting stage, see the report by Tucker in the Financial Times on Tuesday, 19 September 1995.

²¹ Art. 14(2).

money-back guarantee. However, since credit transfers are typically international in character, different bilateral relationships may be governed by different laws containing different rules on money-back guarantee. Consequently, the bank which has made a refund to its sender pursuant to its obligation under a money-back guarantee may not be able to obtain satisfactory refund from its receiving bank. Thus the originator's bank (D) which has made a refund to the originator (P) under the UNCITRAL Model Law may not be able to recover a refund from its receiving bank (R) if the latter relationship is governed by a law which does not impose a money-back guarantee. If, instead, the latter relationship is governed by a law which imposes a money-back guarantee but sets a lower ceiling on the amount of refund, the originator's bank may not be able to recover all the payment made to the originator. Even if the originator's bank inserts a clause disclaiming its obligation to refund in the contract with the originator, it will still be obliged to refund to the originator if their contract is governed by a law providing for a mandatory money-back guarantee, while the effect of a similar disclaimer clause inserted in the contract with its receiving bank may be upheld by the law governing the latter contract.

The possibility that refund pursuant to money-back guarantee could break down in the middle of an international operation of a credit transfer was recognised when the UNCITRAL Model Law was in preparation. Thus the Permanent Bureau of the Hague Conference pointed out:²²

... the Model Law ... had ... established a duty incumbent upon the various banks

²² Preliminary Document No. 1 of November 1991, *Note on the Problem of the Law Applicable to International Credit Transfers* contained as an annex in the *Questionnaire on the Law Applicable to International Credit Transfers* p. 19.

involved in a credit transfer to refund; [this provision is] only conceivable if one and the same law is applied to the entire credit transfer, and they accordingly do not seem to fit into the system of segmentation...

The UNCITRAL on its part could only hope that the Model Law would be widely adopted so that the different stages in a credit transfer would be subject to a consistent legal regime.²³

2.4 Letters of credit transactions

In the field of letters of credit transactions a large measure of uniformity is introduced by the Uniform Customs and Practice for Documentary Credits (UCP) which is almost universally adopted as the terms of letters of credit. But national laws retain some roles because the UCP does not regulate all the aspects of a letter of credit transaction and also because the interpretation of the provisions of the UCP must be done by the governing law. As a result, it is possible that an imbalance of liability arises due to a mismatch of different laws governing different stages of a letter of credit transaction.

Thus suppose that the applicant of a letter of credit (R) requests an amendment to the terms of the credit and the issuing bank (D) consents to it but the beneficiary (P), without replying expressly whether it has accepted or rejected the amendment, presents documents which conform to the unamended terms of the credit but which do not conform to the amendment. Under the law governing the contract between the issuing bank and the beneficiary an express consent of the beneficiary is necessary for an

²³ UNCITRAL Secretariat, para. 16.

amendment to a credit to take effect. Accordingly, the issuing bank pays out to the beneficiary. But it may not be able to obtain reimbursement from the applicant if the law governing their contract deems, in the circumstances of the case, the credit to have been amended without an express consent of the beneficiary.²⁴

The UCP 500²⁵ makes provisions concerning amendments to the terms of a credit.

Article 9d provides:

- I. Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary.
- iii. The terms of the original Credit will remain in force for the beneficiary until the beneficiary communicates his acceptance to the bank that advised such amendment. The Beneficiary should give notification of acceptance or rejection of amendment(s)....

²⁴ This illustration is adapted from the case of Tokyo District Court on 18 April 1977. The facts of the case, so far as material, are as follows: the applicant of a letter of credit in Japan requested an amendment to the terms of the credit to the issuing bank in Japan. The issuing bank notified this to the beneficiary in Egypt. The issuing bank paid out but the applicant refused to make reimbursement contending that the terms of the credit had been amended by virtue of Article 509 of the Japanese Commercial Code as Japanese law was, in their view, the law relevant to their obligation towards the issuing bank. Article 509 of the Commercial Code provided:

When a merchant has received an offer to enter into a contract concerning his business from a person with whom he has regular business relations, he shall without delay dispatch notice of acceptance or rejection, failing which he shall be deemed to have accepted the offer.

In the event, the case turned upon issues irrelevant to the present discussion.

²⁵ (1993) ICC Publication No. 500.

The official commentary on these provisions says:²⁶

Presumption that a beneficiary's silence amounts to his acceptance of any amendment(s) is contrary to most national laws. Therefore, the governing principle regarding amendments should be that acceptance or rejection of an amendment *must be communicated* by the beneficiary to the bank.

... Fairness requires that the beneficiary be allowed to reject amendments at the time of tender of conforming documents *provided he gives notice to that effect.* (Emphasis added.)

Neither the provision of the UCP nor the commentary make clear the position in cases where the beneficiary does not give notice when he tenders documents. In such circumstances it would be for the courts seised of the case to interpret the UCP in accordance with the governing law.

Another scenario in which recovery fails due to a mismatch of governing laws is as follows: where the applicant (R) of a letter of credit alleges or proves that a fraud has been committed by the beneficiary with respect to the goods to which the credit relates or to the documents presented thereunder, the UCP does not address the question whether the issuing bank is obliged to pay out to the beneficiary (P).²⁷ It is a question left for the law governing the contract between them to decide. Under that law the issuing bank (D)

²⁶ Del Busto (ed), *the UCP 500 & 400 Compared* (ICC Publication No. 511, 1993), p. 25. However, this book is merely a report on the activities of the Working Group and the comments contained therein do not necessarily reflect the collective opinions of the members of the Working Group: p. V.

²⁷ The Working Group of the UCP decided that the UCP should not attempt to regulate the attitude of banks in such cases. See Del Busto, comments to Article 15.

may be so obliged but it may not, in such circumstances, be entitled to reimbursement from the applicant under the law governing their contract.²⁸ This result is unlikely if the contract between the issuing bank and the applicant is governed by certain legal systems. Thus, section 114 of Article 5 of the UCC provides for the issuing bank's duty and privilege to honour the demand for payment as follows:²⁹

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document ... is forged or fraudulent or there is fraud in the transaction:

- (a) the issuer must honor the draft or demand for payment if ... ; and
- (b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents....

The wide scope of duty and privilege to honour provided in this section means that the issuing bank is entitled to recover from the applicant (customer) in a wide range of situations. The same appears to be the case also under English law.³⁰ It follows that where the applicant alleges or proves fraud on the part of the beneficiary, if the claim for

²⁸ Article 15 of the UCP provides that the issuing bank can disclaim liability for the effectiveness of documents presented under the letter of credit. When this clause is incorporated in the contract between the issuing bank and the applicant, it operates as a contractual term. It will, therefore, enable the issuing bank to claim reimbursement from the applicant unless it is contrary to any mandatory rules of the law governing their contract.

²⁹ § 5-109 of the UCC (1996-97 edition) is to the same effect.

³⁰ Ellinger says, based upon a survey of English case law, that a loss occasioned by fraud will usually be borne by the applicant and not by the issuing bank: Ellinger, p. 151.

reimbursement against the applicant is governed by English law or the law of a State adopting Article 5 of the UCC,³¹ the issuing bank is not likely to be left without a right of reimbursement. However, other laws may not give the issuing bank right of recovery from the applicant in such a wide range of situations.

2.5 Multimodal transports commissioned to subcarriers

A contract for carriage of goods by a combination of different means of transport is called a contract of combined or multimodal transport. The person who undertakes to carry goods under a contract of multimodal transport is called a multimodal transport operator. Multimodal transport operators, in performing their contractual duty to carry goods to the final destination as specified in the contract, frequently commission successive carriage of different modes to other carriers by entering into subsidiary contracts with them. Even if he does so, the multimodal transport operator remains liable under the multimodal transport contract to the cargo interest for loss, damage or delay to the goods which takes place before the final destination.

Where the multimodal transport operator pays compensation to the cargo interest for the damage caused while a subcarrier is in charge of the goods, he has a right of recourse against the subcarrier in accordance with the law governing their contract. It is in many cases subject to a unimodal transport convention applicable to the mode of carriage performed by that subcarrier, such as the Hague-Visby Rules or the Hamburg Rules regulating carriage by sea, the Warsaw and Guadalajara Conventions regulating carriage

³¹ E.g. New York.

by air, the CIM regulating carriage by rail and the CMR regulating carriage by road.

The multimodal transport contract, on the other hand, is not necessarily governed by the same legal regime as that which governs the contract between the multimodal transport operator and the subcarrier in whose leg of carriage the loss, damage or delay has occurred.³² The Hamburg Rules, for example, limit its regime to sea carriage when the sea carriage forms part of a multimodal transport.³³

Consequently, the multimodal transport operator (D) may become liable to the cargo interest (P) under the governing law of their contract without having a corresponding right of recovery from the subcarrier (R) in whose leg of carriage the loss, damage or delay has occurred under the governing law of their contract. This is because the liability regime of the two governing laws may differ as to available defenses, the basis of liability (e.g. whether it is more or less strict liability or liability for negligence) or the period required for notifying the claims. Thus if the loss or damage arose from neglect of the master in the navigation or in the management of the ship, the subcarrier in charge of that sea leg of carriage may be able to rely on a defense available under the Hague Rules or the Hague-Visby Rules³⁴ against the multimodal transport operator, while the same defense may not be available under the law governing the multimodal transport contract to protect the multimodal transport operator from the cargo interest's claim.³⁵

In other cases, the amount of liability of a multimodal transport operator (D) to the cargo interest (P) may become greater than the amount of liability of the subcarrier in

³² *Benjamin's Sale of Goods* (4th ed. 1992), para. 25-024, n.36.

³³ Art. 1(6).

³⁴ Art. IV2(a) of the Hague-Visby Rules.

³⁵ De Wit, para. 10.15.

whose leg of carriage the loss, damage or delay has occurred (R) towards the multimodal transport operator. This is because the liability regime of the laws governing respective contracts may differ as to the scope of liability (e.g. whether delay or consequential loss is covered) or the schemes and amounts regarding the limitation of liability. Thus the United Nations Convention on International Multimodal Transport of Goods 1980³⁶ prescribes a uniform limit of a multimodal transport operator's liability to the cargo interest irrespective of the mode in which the loss or damage occurred (uniform liability system)³⁷ except that where the loss or damage occurred during an identifiable stage of transport in respect of which an applicable international convention or mandatory national law prescribes a higher limit of liability, then the limit of the multimodal transport operator's liability to the cargo interest will be determined by reference to the provisions of such convention or mandatory national law.³⁸ Conversely however, if the limitation of liability prescribed by the Multimodal Convention is higher than that applicable to the leg of carriage in which the loss or damage has occurred, the multimodal transport operator may not be able to recover from the subcarrier all the compensation he has become liable to pay to the cargo interest.

There is a provision in the CMR which is designed to prevent an imbalance between liability under a multimodal transport contract and liability under a subcarriage contract. If a road carrier (D) contracts with carriers in other modes (R) to perform a multimodal

³⁶ Some say that this Convention is unlikely to come into force: e.g. Smeele, 'International Carriage' in Koppenol-Laforce *et al.* (eds), *International Contracts* (1996), p. 213, 236 para. 14-7.1. But the small likelihood of its entry into effect does not affect the present analysis since some existing national laws may well create a similar problem.

³⁷ Paras. 1 to 3 of Art. 18.

³⁸ Art. 19.

transport, their relations are in most cases governed by a different legal regime from the CMR. In such cases, if the relations between the road carrier and the cargo interest (sender) (P) fall within the scope of the CMR, Article 2(1) of the CMR provides for the legal regime controlling their relations as follows:

Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, *the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined* if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention. (Emphasis supplied)

Under the proviso, the road carrier's liability to the sender is determined simply by copying the subcarrier's liability to the road carrier as determined by the legal regime regulating between their contract. It aligns the legal regime of the contract between the

sender and the road carrier with that between the road carrier and the subcarrier.³⁹ It is said that the purpose of this proviso is to provide the road carrier with the same defense against the shipper's claim as the defence enjoyed by the subcarrier against the road carrier's claim because the subcarrier may have a defense peculiar to the subcarrier's mode of transport.⁴⁰ However, the rules like this, which prevent an imbalance between the multimodal transport operator's liability and the subcarriers' liability by copying either's liability on the other's liability, appear to be rare.

In some circumstances the multimodal transport operator may be able to prevent an imbalance of liability by agreeing on appropriate contractual terms with the cargo interest or the subcarrier.⁴¹ Thus if the Multimodal Transport Convention comes into force and is ratified by the United Kingdom, it will apply as the *lex fori* to a multimodal transport contract. The contract between the multimodal transport operator and his subcarriers may be subject to some unimodal transport convention which also applies as the *lex fori*. In such circumstances, although the Multimodal Transport Convention does not allow the multimodal transport operator (D) to agree with the cargo interest (P) on a lower limit of liability than the amounts prescribed by the Convention,⁴² the applicable unimodal

³⁹ Yates & Todd, para. 3.1.2.2.2.

⁴⁰ Hill & Messent, p. 45.

⁴¹ For the discussion of a similar problem arising out of a motor carrier's liability under United States Interstate Commerce Act, 49 USC § 11707 (1982) and his recourse claim against the subcontracting rail carrier, see Sorkin "Limited Liability in Multimodal Transport and the Effect of Deregulation" (1989) 13 Mar. Law. 285, 290. The author of this article says many of these problems can presumably be resolved by prior agreement between the railroad and motor carrier.

⁴² Art. 18 of the Multimodal Transport Convention permits an agreement on a limit of liability exceeding the amounts stipulated in the Convention. As a corollary, an agreement on a limit lower than the amounts stipulated is not permitted.

transport convention may allow him to agree with his subcarriers (R) to lift the limit of the latter's liability to him prescribed by that convention up to the level of the Multimodal Transport Convention. Article V of the Hague-Visby Rules, for example, provides that a carrier is free to increase any of his responsibilities. However, this way of adjusting liability may not always be open to multimodal transport operators.

2.6 Other transactions

Not many reported cases were found in which an imbalance between liability under one contract and liability under its adjacent contract in a chain transaction caused by a mismatch of governing laws was discussed. Claims for recovery in a chain transaction are usually made between enterprises of the same business sector such as carriers, banks, and insurance companies. Yates & Todd says that railway companies do not usually air their differences in the courts although disputes do arise between them.⁴³ Presumably, the same can be said of the enterprises of other business sectors. If so, the small number of reported cases should not be taken as reflecting the size of the problem.

Furthermore, it is believed that a similar problem can also arise in other chain transactions such as a string sale transaction and demand guarantee (performance bond) and its counter-guarantee,⁴⁴ although concrete illustrations of the problem is difficult

⁴³ Para. 4.1.2.59.2.

⁴⁴ In return for a bank's agreement to issue a demand guarantee on behalf of the exporter, the exporter is usually required to provide a counter-guarantee committing him to reimburse the bank's payment in the event of a claim. There are often more than one counter-guarantee in the chain of transaction, as the buyer may require a demand guarantee to be issued by his local bank. If so, this will require an instruction and a counter-guarantee from the exporter's bank. The exporter's bank will, in turn, require a

without the benefit of actual cases.

This paper, however, is not concerned with the type of problem presented by *Power Curber International v. National Bank of Kuwait*.⁴⁵ In that case the defendant Kuwaiti bank (D) at the request of the buyers in Kuwait (R) issued a letter of credit in favour of the plaintiffs, American sellers (P). On the application of the buyers, a Kuwaiti court made an order of provisional attachment of the sums due to the sellers payable by the issuing bank under the letter of credit. The English court held that the issuing bank were nevertheless obliged to honour their credit on the ground, *inter alia*, that the Kuwaiti order of provisional attachment was not entitled to recognition because the proper law of the letter of credit was not the law of Kuwait. Consequently, the issuing bank became liable to pay on the credit notwithstanding that they might not be able to obtain reimbursement from the buyer. This case thus presents a factually similar situation to the situations we are presently concerned: D's failure to recover from R the payment which he is obliged to make to P. But this case involves a theoretically different question since the failure to obtain recovery was not due to a mismatch between the law governing the letter of credit and the Kuwaiti law governing the provisional order. It was due to the simple fact that the law governing the letter of credit was not the same law as the law governing the provisional order. The governing law was used merely as a criterion for deciding whether or not the foreign order should be recognised. This chapter is, however, concerned with an imbalance in the liability regime of different laws governing adjacent contracts.

counter-guarantee from the exporter. See Pierce, p. 28.

⁴⁵ [1981] 1 WLR 1233 (CA).

3 Grounds for reference to a single governing law

As explained earlier, the question with which we are concerned in the present chapter is whether adjacent contracts in a chain transaction should be referred to a single governing law for the purpose of ensuring the correspondence of liability under the two contracts to prevent unsatisfactory recovery. There are, however, some other grounds which are sometimes put forward to support reference to a single governing law. Those other grounds will be set out and appraised below before addressing the question we are presently concerned.

3.1 Perception of the transaction as one single operation

The reference of contracts involved in a chain transaction to a single governing law is often supported by perceiving the transaction as one single operation rather than as a series of separate operations.

Thus while the UNCITRAL Model Law was in preparation, the Banking Federation of the European Community, in accord with the Permanent Bureau of the Hague Conference, urged efforts to be made to devise a way to ascertain a single governing law for the entire operation of a credit transfer by regarding it as a single operation.⁴⁶

Similarly, reference to a single governing law of contracts involved in a letter of credit transaction may be supported by perceiving the transaction as one single operation rather

⁴⁶ A/CN.9/SR 474 para. 60.

than a congeries of contracts.⁴⁷

In relation to a transaction of demand guarantee and its counter-guarantee, it was held in *Turkiye Is Bankasi AS v. Bank of China*⁴⁸ that in the absence of an express choice by the parties of the law governing the counter-guarantee, it was governed by the law of the State of the bank to be indemnified, which was also the law governing the demand guarantee. In reaching this conclusion, the court emphasised a close connection between the counter-guarantee and the demand guarantee, pointing out that the issuing of the demand guarantee was the *quid pro quo* for the counter-guarantee.

In spite of all this, it is equally possible to emphasise the separation of contracts involved in these transactions.

Thus Article 27 of the Uniform Rules For Demand Guarantees⁴⁹ provides:

Unless otherwise provided in the Guarantee or Counter-Guarantee, its governing law shall be that of the place of business of the Guarantor or Instructing Party (as the case may be) or, if the Guarantor or Instructing Party has more than one place of business, that of the branch which issued the Guarantee or Counter-Guarantee.

As the guarantor and the instructing party are usually in different States, this provision is likely to lead to the situation where a demand guarantee and its counter-guarantee are

⁴⁷ Morse, “Letters of credit and the Rome Convention” (1994) LMCLQ 560.

⁴⁸ [1993] 1 Lloyd’s Rep. 132.

⁴⁹ (1992) ICC Publication No. 458.

governed by different laws. The Guide to the Rules says⁵⁰ that this is a natural consequence of the principle⁵¹ that the counter-guarantee is separate from the guarantee, so that the rights of the parties under the former stand on their own and are not connected to the rights of the different parties to the latter.

As regards credit transfers, the UNCITRAL in the end did not devise a way to determine a single governing law. Article Y of the UNCITRAL Model Law provides that the rights and obligations arising out of a payment order will be governed by the law chosen by the parties and in the absence of a choice by the parties, the law of the State of the receiving bank will apply. The parties in this Article mean each pair of a sender and its receiving bank. This solution was sought to be justified by saying that a credit transfer was a transaction resulting from a series of distinct bilateral operations.⁵²

Turning to bill of exchange transactions, Dicey & Morris says:⁵³

A bill of exchange and a promissory note may, perhaps, be described as a congeries of contracts dependent on one original contract, which always has a certain effect on the others. It exists for one object, namely to secure to the holder the payment in due course of the sum for which the bill is drawn or the note is made. Nevertheless the several contracts entered into for this purpose by the drawer, the acceptor, and the indorser of

⁵⁰ Goode, *Guide to the ICC Uniform Rules for Demand Guarantees* (ICC Publication No. 510) p. 116.

⁵¹ Enshrined in Art. 2(c) of the Rules which provides: Counter-Guarantees are by their nature separate transactions from the Guarantees to which they relate ... despite the inclusion of a reference to them in the Counter-Guarantees.

⁵² A/CN.9/SR 474, para. 60.

⁵³ P. 1423.

a bill, or by the maker and the indorser of a note, and therefore the several rights and liabilities of each of these parties, are distinct and different. Many difficulties in reference to the conflict of laws relating to bills and notes have arisen from the habit of regarding the instrument as a single contract, instead of regarding it as what it really is - a document embodying several distinct contracts.

It is submitted, however, irrespective of whether the transaction in question is a credit transfer or a demand guarantee or a bill of exchange, neither the perception of the transaction as a single operation nor the perception of the transaction as comprising of distinct contracts is wrong. These views are just two sides of the same coin and neither view can provide an answer to the question whether reference to a single governing law should be made.

3.2 The simplification of bill of exchange transactions

The Permanent Bureau of the Hague Conference on Private International Law proposed in 1976 that, if a new convention on choice-of-law rules in the field of negotiable instruments was to be drafted under the auspices of the Conference, the principle of the unitary connecting factor (i.e. reference to a single governing law) should be adopted. One reason for this suggestion runs as follows:⁵⁴

[The] principle of the plurality of connecting factors ... could be justified at a time when

⁵⁴ The Permanent Bureau, "Note on the law applicable to negotiable instruments" in the Hague Conference on Private International Law, *Actes et Documents de la Treizieme session* (1976) Tome I, *Miscellaneous matters*, p. 131, 132.

the bill of exchange had a function as an instrument of payment. An issued instrument facilitated international commercial transactions and permitted in fact several transactions, i.e. several payments, thanks to the different indorsements.

Now, at the present time, by reason of much more rapid means of payment which are available to businessmen through bank transfers effected by telephone or by telex, negotiable instruments have given up their role as an instrument of payment, to take on instead the role of an instrument of credit. The result is that it is now very rare to see bills of exchange bearing more than one indorsement, and this indorsement being an indorsement to a bank for collection. This simplification of negotiable instruments, from the practical point of view, could justify adoption of ... the principle of unity of the connecting factors, a unity consisting of applying to the effects of all obligations resulting from a negotiable instrument a single law...

If the drawer of a bill indorses it to a bank for collection and the drawee does not accept it, the drawer would be the only person liable to the bank on the bill. However, the words "*all obligations resulting from a negotiable instrument*" in the last sentence would presumably refer to the obligation of the indorsee (bank) and the drawee as well as that of the drawer. But it is hard to see why such simplification of bill of exchange transactions as described in the passage can support the application of a single law to the obligation of these different parties.

3.3 Rapidity of the transaction

While the UNCITRAL Model Law on International Credit Transfers was in preparation, the Permanent Bureau of the Hague Conference proffered the following

argument:⁵⁵

If, in the case of paper credit transfers, it is conceivable (though even in this case, it does not seem desirable) to segment an overall international credit transfer into a succession of distinct bilateral operations, each of which would be governed by a different law, that would appear to be unfeasible in the case of an electronic credit transfer. The extreme rapidity of such a transfer, the quasi-instantaneous nature of its actual execution, makes it practically impossible to segment the overall credit transfer into various bilateral operations.

It would seem nowhere else in the history of private international law has a choice-of-law rule been influenced by the rapidity of the transaction. The soundness of such an argument is doubtful since no matter how rapidly a transaction takes place, rights and obligations arise in just the same way as in slower transactions.

3.4 To foster clarity and simplicity in the operation of transactions

While the grounds examined above are of somewhat doubtful foundation, the desirability of fostering clarity and simplicity in the operation of transactions is a well-founded ground for reference of contracts involved to a single governing law.

In many cases this ground has been relied upon for the purpose of referring parallel contracts, such as the contract between P and D and the contract between P and R, rather

⁵⁵ *Note on the Problem of the Law Applicable to International Credit Transfers* contained as an annex in the *Questionnaire on the Law Applicable to International Credit Transfers*, Preliminary Document No. 1 of November 1991, p. 19.

than adjacent contracts, to a single governing law.

Thus in *Bank of Baroda v. Vysya Bank*⁵⁶ Mance J. found it very important that there should be clarity and simplicity regarding the rights and obligations of the beneficiary and the banks involved in a letter of credit transaction. He, therefore, described it as “irregular” if the governing law varied depending on whether it was the confirming bank (D) or the issuing bank (R) against which the beneficiary (P) decided to enforce the credit.

Similarly, also in a bill of exchange transaction, a reference to a single governing law can be supported to enable the holder of a bill (P) to rely upon some clear and simple rule to see what the liability of each signatory (D, R) is and what steps he must take to enforce his right against them.⁵⁷

However, it is not only for the purpose of referring parallel contracts to a single governing law that this ground can be relied upon. Clarity and simplicity are important with respect to all the relationships involved in a transaction including the relationship between adjacent contracts (contract between P and D and contract between D and R) as well as the relationship between parallel contracts. This ground can, therefore, be equally relied upon for the purpose of referring adjacent contracts to a single governing law.

In the first place, it is often the objective of substantive rules regulating chain transactions to foster clarity and simplicity of the relationships between adjacent contracts in such transactions. Taking as an example credit transfers, each set of substantive rules in Article 4A of the UCC, the EC Directive on Cross-border Credit Transfers, and the

⁵⁶ [1994] 2 Lloyd's Rep. 87.

⁵⁷ Minor, p. 396; Castel, para. 479.

UNCITRAL Model Law provides for an integrated regime which coherently regulates the entire operation of a credit transfer from the originator through to the beneficiary. If each regime is applied to the entire transaction, the operation of a credit transfer will be clear and simple. If, however, part of a credit transfer is governed by one regime and another part is governed by another regime, the integrity of each regime will be upset and consequently rights and obligations of the parties involved will become unclear, especially if something goes wrong in the transfer.⁵⁸

In relation to a string sale transaction, Lord Diplock said in *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* as follows:⁵⁹

In international transactions, particularly on commodity markets where the same shipment of goods may be bought and sold many times before delivery of the actual goods to the last buyer, it is of great commercial convenience that all the contracts relating to such sales should be subject to the same proper law irrespective of the place of shipment or discharge, the residence or nationality of the parties, or the place where the contract was made. This is the basis on which commodity markets operate.

3.5 For the purpose of ensuring a back-to-back cover

Now we return to the main question of this chapter: whether adjacent contracts in a chain transaction should be referred to a single governing law for the purpose of ensuring

⁵⁸ Official Comments to 4A-507 of the UCC.

⁵⁹ [1971] AC 572, 609.

the correspondence of liability under the two contracts to prevent unsatisfactory recovery.

In the earlier illustrations, three factors have been observed which help avoid an imbalance of liability where adjacent contracts are governed by different laws. First, as seen in relation to insurance-reinsurance transactions, it may be possible to deny the incorporation in a contract from its adjacent contract of certain terms which would, if different laws are applied, give rise to an imbalance of liability. Secondly, as seen in relation to insurance-reinsurance transactions and Multimodal transports commissioned to subcarriers, the law governing a contract may determine the liability under that contract by simply copying the liability arising under its adjacent contract as determined by the law governing that contract. Thirdly, as seen in relation to letters of credit transaction and bill of exchange transaction, D's claim for recovery from R may be governed by a law which gives D a right of recovery from R in a wide range of situations. In cases where these factors are present, there is no or little need for referring adjacent contracts to a single governing law to make the liability correspond. However, the fact that these factors are not present in all cases makes it necessary to consider whether adjacent contracts should be referred to a single governing law to avoid an imbalance of liability.

In the following discussions, we will first consider whether, in what circumstances and how reference to a single governing law should be made where the Rome Convention applies to either or both of two adjacent contracts and then consider the same questions where the Rome Convention applies to neither of the adjacent contracts.

4 Where the Rome Convention applies to either or both of two adjacent contracts

Most contracts involved in chain transactions come within the scope of the Rome

Convention. Exceptions include some types of original insurance contracts⁶⁰ and unimodal carriage contracts regulated by international conventions to which the United Kingdom is a party such as the Hague-Visby Rules, Warsaw Convention and so forth.⁶¹ But reinsurance contracts are within the scope of the Rome Convention and so are multimodal transport contracts not subject to an international convention such as the CMR. Consequently, the Rome Convention applies in most cases to either or both of two adjacent contracts involved in all but bill of exchange transactions⁶² amongst the transactions examined in § 2 above.

We will first examine the application of the Rome Convention to contracts involved in chain transactions. After confirming that plurality of governing laws is the likely result, I will propose a principle regarding the question whether, in what circumstances and how adjacent contracts in a chain transaction should be referred to a single governing law. Finally, we will examine whether the proposed principle can be applied through a provision of the Rome Convention.

4.1 Application of the Rome Convention to contracts involved in chain transactions

There are no special choice-of-law rules in the Rome Convention designed to deal with adjacent contracts in a chain transaction. The governing law of such contracts is

⁶⁰ Art. 1, para. 3.

⁶¹ By virtue of Art. 21, the Convention does not prejudice the application of other international conventions to which the United Kingdom is a party, or becomes party.

⁶² Obligations arising under bill of exchange transactions are outside the Rome Convention: Art. 1, para. 2(c).

determined in accordance with ordinary choice-of-law rules on a contract-by-contract basis.

Thus under Article 3(1), each pair of parties to contracts in a chain transaction are allowed to choose, expressly or impliedly, the law governing their contract.

In the absence of the parties' choice, Article 4(1) provides that a contract is governed by the law of the country with which it is most closely connected. The country whose law is to govern a contract in a chain transaction must be the one which has the closest connection with that contract and not necessarily the one which has the closest connection with the whole transaction. Article 4(1) can be contrasted with Article 3(3) which provides that where all the elements relevant to the situation are connected with one country only, mandatory rules of the law of that country are applicable even if the parties have chosen a different law. The word "situation" used in this provision is a wider concept than "contract." This provision does not apply if the "contract" is apparently connected with one country only but there are in fact other elements relevant to the "situation" which are connected with more than one country. Dicey & Morris suggests that this provision does not apply if a contract in a chain transaction is connected with one country only but the transaction is transnational.⁶³

Article 4(2) provides for a presumption for ascertaining the law of the country with which the contract is most closely connected. This rule also operates on a contract-by-contract basis. And the same is true of Article 4(5) which rebuts the presumption established by Articles 4(2) if it appears from the circumstances as a whole that the contract is more closely connected with another country. Thus when Mance J. applied

⁶³ Dicey & Morris, p. 1215.

Article 4(5) in *Bank of Baroda v. Vysya Bank*, he sought to find out whether there was a country which had a closer connection with the contract between the beneficiary and the issuing bank and not with the letter of credit transaction as a whole.

There are merits to this contract-by-contract determination of governing laws. Otherwise, the parties' choice of law would be given effect to only where the choices of all the parties involved in a chain transaction coincided. This would rarely activate Article 3(1) in the case of a long chain transaction and frustrate the purpose of this article, namely to enhance the predictability and certainty of transactions through giving effect to the parties' intention. Where, on the other hand, no choice of law is made by the parties, it will still be consistent with the parties' expectation to have the contract of each pair of parties governed by the law most closely connected with it. If, instead, the law of the country most closely connected with the totality of a chain transaction were to govern its constituent contracts, that law might have only a remote relevance to a particular contract in the chain especially in cases where the chain is long. The application of such a law might take the parties to that contract by surprise and impair the predictability and certainty of the transaction.

However, there is a drawback to the determination of governing laws on a contract-by-contract basis in that it is likely to result in a plurality of governing laws of the contracts involved in a chain transaction.

Thus, if Article 4(2) is applied, for example, to a contract of sale, it establishes a presumption that the governing law is the law on the seller's side. Accordingly, the application of Article 4(2) to string contracts of sale which involve sellers in different

countries would result in a plurality of governing laws.⁶⁴ Again, Article 4(2) would, when applied to a credit transfer, establish a presumption that the governing law is the law on the side of the originator's bank *vis-à-vis* the originator and receiving banks *vis-à-vis* their respective senders⁶⁵ and, consequently, the likely result would be a plurality of governing laws.

An exception can be found in the letter of credit transaction. Mance J. in *Bank of Baroda v. Vysya Bank* held that the contract between the confirming bank and the beneficiary was clearly governed by the law of the place of business of the confirming bank under Article 4(2). He also held that the characteristic performance of the contract between the issuing bank and the confirming bank was the adding of a confirmation and its honouring by the confirming bank. Accordingly, Article 4(2) will refer both the contract between the beneficiary and the confirming bank and the contract between the confirming bank and the issuing bank to the law of the place of the business of the confirming bank.

Mance J. in the same case further avoided a plurality of governing laws of some other contracts in the letter of credit by relying on Article 4(5). He pointed out that under the presumption established by Article 4(2), the contract between the beneficiary and the issuing bank and the contract between the beneficiary and the confirming bank would be governed by different laws. As for the contract between the issuing bank and the beneficiary, the issuing bank was thought to be the party who was to effect the characteristic performance for the purpose of Article 4(2). But the place of business of

⁶⁴ *Benjamin's Sale of Goods*, para. 25-074.

⁶⁵ *Wood*, para. 29-22.

the issuing bank was different from the place of its performance of the contract, which was at the place of business of the confirming bank. Therefore, the contract was found to be more closely connected with the place of business of the confirming bank and accordingly the presumption established by Article 4(2) was rebutted by Article 4(5). It followed that both the contract between the beneficiary and the confirming bank and the contract between the beneficiary and the issuing bank were referred to the law of the place of business of the confirming bank.⁶⁶ It must, however, be observed that these two contracts were parallel contracts rather than adjacent contracts. The reasoning used in this case to refer the parallel contracts to a single governing law is not apt to refer adjacent contracts in a chain transaction to a single governing law. It is, therefore, wrong to think that this case showed that Article 4(5) could be relied upon to refer adjacent contracts in chain transactions such as string sale contracts and credit transfers to a single governing law.

4.2 Whether, in what circumstances and how adjacent contracts should be referred to a single governing law

It can safely be said that in so far as the parties to a contract are allowed to decide their rights and obligations by their agreement, it is up to each of them to obtain, through negotiations with the other, the deals, including the deal on the governing law of their contract, that best serve his interests. Accordingly, if D wishes to avoid being prejudiced by an imbalance between his liability to P and R's liability to him, D should try to refer

⁶⁶ [1994] 2 Lloyd's Rep. 87, 93.

his contract with P and his contract with R to a single governing law.

Article 3 of the Rome Convention confers on D a flexible power to procure agreement on a single governing law.

Thus, D may be able to include the same choice-of-law clause or the same arbitration clause specifying a forum for arbitration in both the contract with P and the contract with R. In the case of string sales contracts, if they are all made subject to the standard terms of the same commodity association, the same choice-of-law clause or arbitration clause is likely to appear in all of them.⁶⁷

The range of laws from which D can choose the governing laws is unrestricted. It is apparent from Article 3(3) that the Convention contemplates that even if all the relevant elements are connected with one country only, the law of another country may be chosen. As a corollary, there is no requirement that the chosen law should have a connection with the contract.⁶⁸

⁶⁷ Morse in *Benjamin's Sale of Goods*, para. 25-018.

⁶⁸ Dicey & Morris, p. 1214. Wolff, however, thinks that the proper law of a contract ought to have some connection with the contract. But he argues that the legal or economic connection of a contract with its adjacent contract is sufficient to make the law governing the contract the proper law of its adjacent contract. He illustrates his point as follows:

A German importer of American corn resells the goods bought under the La Plata Grain Contract (which is subject to English law) to a German in Germany; the goods are also in Germany, all material facts being thus related to Germany. And yet the importer must be enabled to agree that English law, the law governing his purchase, shall also govern his contract of resale, in order to ensure that, should the goods be defective, he will only become liable to his sub-purchaser to the same degree as his vendor is liable to him. Some eminent jurists contest the admissibility of such argument on the ground that in that case there is no legal connection between the purchase by the importer and the resale. But it seems to me that the economic connection must suffice.

He adds that the choice of the law governing the original insurance contract as the governing law of the reinsurance contract should also be valid for the same reason. Wolff, "Choice of Law in International Contracts" (1937) 49 Juridical Review 110, 120.

D can refer to a single law only such issues in respect of which a mismatch between different governing laws may arise, leaving the rest of the issues to the principal governing law. The provision of Article 3(1) literally allows only two possibilities: the choice of one law to govern the whole contract or the choice of one law to govern a part. But presumably, the choice of more than one law to govern different parts of a contract would also be allowed.⁶⁹

In this way, D has a flexible power to refer the contract between P and D and the contract between D and R to a single governing law, if the Rome Convention applies to either or both of them. Even where D does not have such a flexible power to choose the governing law of either contract, if the other contract is subject to the Rome Convention, D may still be able to refer that contract to the law governing the first-mentioned contract.

Thus where an insurance contract covers risks situated in a Member State of the EC, the Rome Convention does not apply to it⁷⁰ and the power of an insurer (D) to choose, with the insured's (P's) consent, the law applicable to it is restricted.⁷¹ However, since the reinsurance contract is within the scope of the Rome Convention,⁷² the insurer has a flexible power to refer, with the reinsurer's (R's) consent, the reinsurance contract to the law which is to govern the original insurance contract.

Similarly, where the contract between a multimodal transport operator (D) and his

⁶⁹ See also Lagarde "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980" 80 Rev. Crit. (1991) 287, 302; Morse in *Benjamin's Sale of Goods*, para. 25-007.

⁷⁰ Art. 1, para. 3 of the Rome Convention.

⁷¹ Art. 7 of the EC Second Insurance Directive. This is for the purpose of protecting the insured, who is assumed to be in a weaker bargaining position *vis-à-vis* the insurer.

⁷² Art. 1(4) of the Rome Convention.

subcarrier (R) falls within the scope of one of the unimodal transport conventions to which the United Kingdom is a party, the unimodal transport convention is mandatorily applied as the *lex fori* under the English choice-of-law rules⁷³ and the Rome Convention does not apply.⁷⁴ Consequently, the multimodal transport operator cannot refer the subcarriage contract to the law which is to govern the multimodal transport contract. However, where the Rome Convention applies to the multimodal transport contract, the multimodal transport operator has a flexible power to refer, with the cargo interest's (P's) consent, the multimodal transport contract to the legal regime⁷⁵ which controls the subcarriage contract.

In view of this flexible power conferred on D by the Rome Convention, where D chooses or decides not to choose the law(s) governing his contract with P or his contract with R, being fully aware that his choice(s) or non-choice will result in different laws governing the two contracts which will give rise to an imbalance of liability, there is no need to devise any choice-of-law principle to prevent D's choice or non-choice of governing laws from resulting in different governing laws. This is so even if D's choice or non-choice is the result of his failure to obtain consent from P or R to the choice of law to which he wished to refer the whole or part of the two contracts.

⁷³ See *The Hollandia* [1983] 1 AC 565; Rule 53 of Dicey & Morris.

⁷⁴ Art. 21.

⁷⁵ However, under the view that only national legal systems (e.g. English law, French law and so on) as distinguished from particular legal regimes (e.g. those of the Hague Rules, Warsaw Convention and so on) can be the subject of choice of law in the conflict-of-laws sense, the multimodal transport can only incorporate the legal regime controlling the subcarriage contract into the multimodal transport contract as contractual terms, which would then be subject to the governing law of the multimodal transport contract otherwise ascertained.

Where D's lack of awareness that his choice or non-choice will result in an imbalance of liability is due to his gross negligence, the position should be the same.⁷⁶ In *Princes Buitoni v. Hapag-Lloyd AG*,⁷⁷ a multimodal transport contract was concluded in respect of a transport from Vancouver, Canada, to Liverpool, England. The cargo was carried by sea from Vancouver to Felixstowe, England and was then transhipped by road to Liverpool. The cargo was lost between Felixstowe and Liverpool. The cargo interest (P) sued the multimodal transport operator (D) for damages. A clause in the bill of lading which embodied the multimodal transport contract provided for limitation of liability. Sub-clause (5) provided that the multimodal transport operator was liable only to the extent that a subcarrier performing inland transportation would be liable, but this sub-clause was subject to the exceptions provided in sub-clauses (1) to (4). Sub-clause (3) provided that during road carriage in Europe the CMR was to apply to the liability of the multimodal transoprt operator. However, with respect to the liability to the multimodal transport operator of the subcarrier (R) who performed the carriage from Felixstowe, the CMR would not be applicable since it was only applicable mandatorily to carriage between different States.⁷⁸ Instead, that liability would be controlled by certain standard terms and conditions which would impose lesser liability on the subcarrier than the CMR. The multimodal transport operator argued that their liability to the cargo interest under the multimodal transport contract should fall to be decided under sub-clause (5) rather

⁷⁶ For an argument to the same effect in the context of insurance and reinsurance contracts, see Butler & Merkin, para. D. 4.2-28.

⁷⁷ [1991] 2 Lloyd's Rep. 383 (CA). The judgment of the Queen's Bench Division on 21 December 1989 is unreported.

⁷⁸ Art. 1.

than sub-clause (3) on the ground that it would obviously make commercial sense to have correspondence in liability. Saville J., however, dismissed this argument saying:⁷⁹

... his argument necessarily depends on the premise or assumption that sub-clauses (1) to (5) were designed to produce a back to back situation. If indeed that objective could be gleaned from the words used by the parties, then there would be much to be said for his arguments...

If the carriers wish to limit their liability to that of their sub-contractors, then they must either make similar contracts with those sub-contractors or change the terms of the bill of lading, which I should note in conclusion is a form of their making and not that of the plaintiffs.

Since it was the multimodal transport operator who made the terms in the bill of lading which contained the exceptions to the back-to-back liability, they could only blame themselves for their gross negligence in failing to prevent a mismatch between the CMR and the standard terms and conditions applicable to the sub-carrier's liability.

In the majority of cases, however, it would be difficult even for sophisticated enterprises such as insurance companies and banks to be fully aware at the time of contract that their choice(s) or non-choice of governing law(s) will result in different laws governing the two contracts to which they are a party and that an imbalance of liability will be caused thereby.

Thus if the insurer in *Vesta v. Butcher* were to become aware that an imbalance of liability would arise due to a mismatch of Norwegian law governing the original

⁷⁹ Affirmed by the Court of Appeal on the same grounds.

insurance contract and English law governing the reinsurance contract, they would not only have had to be able to predict that a breach of the clause of warranty would take place but also have had to know the effects of the breach under both Norwegian law and English law. They could hardly be expected to do this at the time of concluding the original insurance contract or the reinsurance contract. It is true that the breach of the clause of warranty is just one of a number of issues in respect of which a mismatch of different governing laws may arise and, therefore, it would not be unreasonable to expect an insurer to try to refer the original insurance contract and the reinsurance contract to a single governing law if it is not unreasonable to expect them to become aware that an imbalance of liability will arise in respect of one of those issues. It must, however, be borne in mind that when parties conclude a contract, they normally choose or decide not to choose the governing law with reference to that particular contract rather than with reference to its relationships with its adjacent contracts. It would, therefore, often be unrealistic to expect them to become aware at the time of contract that an imbalance of liability will arise as a result of their choice or non-choice.

Since parties in individual situations cannot be expected to have sufficient foresight, some standard terms and conditions take care to prevent a mismatch of different governing laws by choosing a single governing law. Thus multimodal transport contracts often incorporate standard terms and conditions made by international organisations such as UNCTAD and ICC which stipulate that where loss or damage can be attributed to a particular stage of transport, the multimodal transport operator's liability to the cargo interest is to be determined in accordance with the treaty, convention or statute applicable

to that stage of transport.⁸⁰ For example, Rule 6.4 of the UNCTAD/ICC Rules for Multimodal Transport Documents 1991 reads:

When the loss of or damage to the goods occurred during one particular stage of multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the [multimodal transport operator's] liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

However, some other standard terms and conditions produce the contrary effect. Thus as already seen in § 2.6, above, the Uniform Rules For Demand Guarantees, which operate by contractual incorporation, have a choice-of-law provision⁸¹ which is likely to result in the situation where a guarantee and its counter-guarantee are governed by different laws. The Guide to the Rules says that in cases where this provision is considered to lead to inconvenience, the parties can opt to choose the same governing law for guarantee and counter-guarantee.⁸² However, since the choice-of-law provision is one of a number of provisions in the Rules and in most cases parties who use standard terms and conditions as the terms of their contract would not review the provisions therein with

⁸⁰ This is called the network liability system, since the multimodal transport contract depends upon the underlying network of rules governing the specific modes of transport: UNCTAD secretariat, p. 48. The meaning of the network liability system used in this context is different from that used in the context of credit transfers.

⁸¹ Art. 27.

⁸² Goode, *Guide to the ICC Uniform Rules for Demand Guarantees* (ICC Publication No. 510), p. 116.

a fine-tooth comb, the parties incorporating the Rules can hardly be expected to become aware that the choice-of-law provision will result in the situation where the guarantee and the counter-guarantee are governed by different laws, let alone whether and how the two laws will give rise to an imbalance of liability. Therefore, it is not realistic to expect the parties to choose the same governing law as suggested by the Guide.

Where D chooses or decides not to choose the law(s) governing his contract with P or his contract with R, without being fully aware (not due to gross negligence) that his choice(s) or non-choice will result in different laws governing the two contracts which will give rise to an imbalance of liability, it is a question of policy whether any choice-of-law principle should be devised to prevent D's choice or non-choice from resulting in different governing laws.

It is, of course, possible to say in a blanket manner that the parties have to accept the consequences of their contract even if they are not aware, without gross negligence, of some disadvantageous consequences at the time of contract. After all, one party's disadvantage is the other party's advantage. In *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others*,⁸³ the parties' responsibility for their agreement was emphasised. Although this case was not concerned with choice of governing laws of adjacent contracts in a chain transaction, the ruling is indicative of the basic philosophy of English courts. The facts were as follows: D brought a claim for contribution against R before an English court. R moved to stay the action on the ground that the contract between D and R provided for an arbitration in Illinois. D's right of contribution would exist if the action proceeded in the English court but would not be

⁸³ Partly reported in [1992] 2 All ER 82. The relevant part to the present discussion is, however, only available on Lexis in transcript form (21 November 1991).

available in an Illinois arbitration. D argued that the parties could not have intended to submit claims to arbitration which would be bound to fail. The Court of Appeal disagreed and stayed the action. The ground was stated as follows:

Parties not infrequently find that by choosing a foreign substantive or procedural law their rights are less than they would have been if they had made a different choice or had allowed the contract to remain silent. This does not mean that the words which express their choice do not mean what they say, but merely that the parties had not worked out in advance the full consequences of an election to have the issues resolved otherwise than in England. By including an Illinois arbitration clause [D] acquired all the advantages and assumed all the disadvantages of Illinois law, both substantive and procedural. If they had wanted a different set of advantages and disadvantages they should have chosen some other forum, or chosen none at all and waited to be sued in England. ...

At first sight this result appears harsh, but the impression is misleading. It is not a question of [D] being deprived of a right by the grant of a stay. On the contrary, the parties have agreed that all their rights shall be fixed in Illinois according to the procedures (and by implication the substantive law) in force in that state. If the stay is refused the consequence will be that by acting in breach of their agreement, in pursuing their claim against [R] in the English court, [D] have obtained for themselves the possibility of a right and remedy which they would not have possessed if they had acted as their agreement required. In the face of this we can see nothing unjust in holding [D] to their agreement....

There is obviously much to be said for this view. However, it is submitted, with some

hesitation, that this view should not be applied to every case in a blanket manner, bearing in mind that it would be difficult even for sophisticated enterprises to be fully aware at the time of contract that their choice(s) or non-choice of governing law(s) will result in different laws governing two contracts to which they are a party and that an imbalance of liability will be caused thereby.

Then, should a new choice-of-law principle be proposed to refer the whole or part of the contract between P and D and the contract between D and R to a single governing law whenever D failed, without gross negligence, to foresee that his choice or non-choice of governing laws would lead to an imbalance of liability? Such a remedy would be an overprotection of D's interest at the sacrifice of the interest of P or R. For even where D is fully aware of the consequence of his choice or non-choice of governing law(s), D is not always able to obtain consent from P or R to the choice of law to which he wishes to refer the whole or part of both contracts. Therefore, any proposed choice-of-law principle must be consistent with both parties' intention. However, the intention can be inferred by inquiring what reasonable persons would have intended in certain circumstances which did not actually exist.

Therefore, it is proposed that if both D and R, as reasonable persons, would have intended to refer certain issues of their contract to the law governing the contract between P and D, had their attention been drawn at the time of concluding the contract to the possibility of an imbalance of liability resulting from the application of different laws to those issues, such an intention should be given effect.

Thus both the issuing bank of a letters of credit (D) and the applicant (R), as reasonable persons, would have intended to refer the issue of amendments to the credit to the law governing the contract between the beneficiary (P) and the issuing bank, had

their attention been drawn at the time of concluding their own contract to the possibility of an imbalance between the issuing bank's liability to the beneficiary and the applicant's liability to the issuing bank which would result from the application of different laws to amendments to the credit for the purpose of their respective contracts.

It is also proposed that if both P and D, as reasonable persons, would have intended to refer certain issues of their contract to the law governing the contract between D and R, had their attention been drawn at the time of concluding the contract to the possibility of an imbalance of liability resulting from the application of different laws to those issues, such an intention should be given effect.

Where such an intention can be inferred in respect of both pairs of the parties (i.e. both the pair P and D and the pair D and R), to which law should the relevant issues in both contracts be referred - the law governing the contract between P and D or the law governing the contract between D and R? This question must again be answered by inquiring what intention P, D, and R as reasonable persons would have had in such a situation. Where either pair of the parties has made an express choice of law but the other pair made no choice, it may more often than not be consistent with the intention of all three parties to refer to the chosen law as the single governing law.

It is to be noticed that this proposed principle involves the use of *dépeçage*. It is neither necessary for the purpose of achieving the correspondence of liability nor appropriate to refer to the law governing the adjacent contract issues other than those which, if different laws were applied, would give rise to an imbalance of liability. The other issues should remain to be determined by the law ascertained by the otherwise applicable choice-of-law rules. In *Vesta v. Butcher*, Hobhouse J. said that he was prepared to hold, albeit as his less preferred solution, that the proper law of the

reinsurance contract was the same law as the law governing the original insurance contract (Norwegian law). But Neill L.J. described such a solution as quite unrealistic since the fact that the reinsurance had been placed on the London market, in conjunction with other facts, strongly suggested that the reinsurance contract was governed by English law. Neill L.J., “by seeking to ascertain the presumed intention of the parties,”⁸⁴ resorted to the technique of *dépeçage*, holding that, although the reinsurance contract was principally governed by English law, the clause of warranty was governed by Norwegian law.⁸⁵

The purpose of using *dépeçage* in the proposed principle is to obtain harmony between adjacent contracts. But *dépeçage* is, on the other hand, prone to create discord within a contract because it may split up related issues. It is this latter aspect which is usually highlighted by those who take a generally cautious attitude towards the use of *dépeçage*.⁸⁶ It is submitted that logical consistency within a contract should not be sacrificed for the sake of obtaining harmony between adjacent contracts. Accordingly, care ought to be taken not to split up closely intertwined issues such as interpretation and performance.

4.3 Pointers that indicate the existence or non-existence of the intention as defined in the proposed principle

⁸⁴ It is not, however, clear whether “by seeking to ascertain the presumed intention of the parties” Neil L.J. followed the same principle as proposed here since Neil L.J. may have presumed the actual intention of the parties.

⁸⁵ [1988] 3 WLR 565, 585 (CA). Dicey & Morris, p. 1345, n. 34, also indicates support for the use of *dépeçage* to solve the type of problem posed by *Vesta v. Butcher*.

⁸⁶ Giuliano-Lagarde Report, para. 4 of comment to Art. 3.

The parties' intention as defined in the proposed principle has to be inferred on a case-by-case basis since the existence of such an intention depends upon all the circumstances of the case. It is, however, possible to identify some pointers that indicate the existence or non-existence of such an intention. They are: the extent to which the transaction has a back-to-back nature; the extent to which D can be regarded as having accepted the risk of inadequate recovery; and the degree of seriousness of the obstacle to recovery. They will be explained in turn below.

4.3.1 The extent to which the transaction has a back-to-back nature

The stronger back-to-back nature the transaction has, the easier it would be to infer the parties' intention to refer the relevant issues to the law governing the adjacent contract in order to ensure the correspondence of liability. The strength of the back-to-back nature of a transaction depends on the nature of the transaction as well as the terms of the contracts involved in the transaction. The perception of the nature of a particular transaction may change over the years although the change may not be a deliberate one. The insurance-reinsurance transaction may be such an example.

In *Nelson v. The Empress etc. corp., Faber (third party)*,⁸⁷ decided in 1905, the Court of Appeal held that the insurer (D) was not entitled to bring third party proceedings against the reinsurer (R) in the insured's (P's) action against him. The court based this decision on the ground that the original insurance contract and the reinsurance contract

⁸⁷ [1905] 2 KB 281 (CA).

were, in their view, independent of each other. Mathew L.J. said:⁸⁸

The condition that the underwriter of the policy of reinsurance is to pay as may be paid on the original policy does not in my opinion import, as suggested, that the contract is one of indemnity. The insured under a policy of reinsurance must, like any other insured, shew that there has been a loss of the subject-matter of insurance by a peril insured against by the policy of reinsurance.

This view finds an echo in a case decided a year later, *St. Paul Fire and Marine Insurance Co. v. Morice*.⁸⁹ In this case an insurer (D) brought an action against their reinsurer (R), claiming to be indemnified against the payment made to the insured (P). The original insurance contract, governed by New York law, was issued against the “mortality” of a bull. The bull was destroyed as a result of its having been in contact with disease. The insurer paid the loss to the insured as they were obliged to do in the light of the meaning of “mortality” under New York law. “Mortality” was also stated in the reinsurance contract as one of the risks. But the reinsurance contract was governed by English law. The insurer’s action on the reinsurance policy failed on the ground that the definition of “mortality” as interpreted by English law was not wide enough to cover the event which had taken place. Instead of making an effort to bridge the gap caused by this mismatch of governing laws, Kennedy J. sought to justify the gap by stressing the independence of reinsurance contract from the original insurance contract. He said:⁹⁰

⁸⁸ At p. 285.

⁸⁹ (1906) 11 Com. Cas. 153.

⁹⁰ At p. 165.

... it is not sufficient merely to show that the original insurer has paid in good faith. It is necessary ... in order to bring upon the re-insurers the liability to pay as may be paid on the original policy, to show the existence of liability proved or admitted in respect of the loss reinsured.

He continued:

... the present defendants are under no liability to pay unless the plaintiffs can prove not merely that they were legally liable to the insured under the original policy, but also that they are entitled to recover from the defendants under the terms and conditions and subject to the warranties contained in the policy of reinsurance....

By contrast, in the recent case, *Vesta v. Butcher*, efforts were made, as already seen in § 2.1, above, to reconcile the cover of the original insurance contract and the reinsurance contract. Those efforts were prompted partly by the existence of the following terms in the reinsurance policy:

“... the underwriters hereby agree to reinsure against loss to the extent and in the manner hereinafter provided. Being a reinsurance of and warranted same gross rate, terms and conditions as and to follow the settlements of the company”

Merkin says that there are two forms that a reinsurance contract may take: the form which defines the reinsurer's liability independently of the original insurance contract; and the form which simply obliges the reinsurer to indemnify the insurer against its

liability under the original insurance contract.⁹¹ The reinsurance contracts that incorporate the terms of the original insurance contract presumably belong to the latter category.⁹² The clause quoted above, although ungrammatical, was taken as indicating the parties' intention to oblige the reinsurer to indemnify the insurer against the latter's liability under the original insurance contract.

However, even in the absence of that clause, their Lordships would nonetheless have sought to reconcile the cover of the original insurance contract and the reinsurance contract. Their rulings suggest that they are in general ready to regard the cover of the reinsurance contract as corresponding to that of the original insurance contract. Thus Lord Templeman said:

... Any such limitation [on the liability under the reinsurance] would, however, have been inconsistent with the concept of reinsurance, unacceptable as a basis for the business relationships between brokers, insurers and reinsurers ...

Lord Griffiths also said:

In the ordinary course of business reinsurance is referred to as "back-to-back" with the insurance, which means that the reinsurer agrees that if the insurer is liable under the policy the reinsurer will accept liability to pay whatever percentage of the claim he has

⁹¹ Merkin, "The Proper Law of Insurance and Reinsurance Contracts" in Rose (ed.), *New Foundations for Insurance Law: Current Legal Problems*, p. 71. The author classifies the contract in *St. Paul Fire and Marine Insurance Co. v. Morice* in the former form and the contract in *Vesta v. Butcher* in the latter.

⁹² Birds, "United Kingdom" in Fredericq and Cousy (eds.), *Insurance Law* (one of a series of Blanpain (ed.), *International Encyclopaedia of Laws*), para. 360.

agreed to reinsure. A reinsurer could, of course, make a special contract with an insurer and agree only to reinsure some of the risks covered by the policy of insurance, leaving the insurer to bear the full cost of the other risks. Such a contract would I believe be wholly exceptional, a departure from the normal understanding of the back-to-back nature of reinsurance and would require to be spelt out in clear terms. I doubt if there is any market for such a reinsurance.

If these rulings are followed in future cases, a strong back-to-back nature will be ascribed to the insurance-reinsurance transactions, unless the parties' intention to separate the cover of the two contracts is clearly shown.

4.3.2 The extent to which D can be regarded as having accepted the risk of inadequate recovery

The higher the risk of inadequate recovery that D can be regarded as having accepted, the more difficult it would be to infer the intention to refer the relevant issues to the law governing the adjacent contract in order to ensure the correspondence of liability.

Where loss or damage to the cargo has occurred during a multimodal transport, the stage of the transport at which it has occurred and the mode of transport of that stage are often difficult to tell since loss or damage is not ordinarily ascertained before the cargo arrives at the final destination. The cargo interest can still obtain compensation from the multimodal transport operator in accordance with their contract.⁹³ However, the

⁹³ See, e.g. rules 11 and 12 of the 1975 ICC Uniform Rules for a Combined Transport Document.

multimodal transport operator would not be able to recover the compensation paid to the cargo interest from his subcontractors because at which carrier's leg of transport the loss or damage has occurred is not known. This type of failure of recovery is said to represent by far the greatest risk for the multimodal transport operator.⁹⁴ It exists irrespective of whether the multimodal transport contract and subcontract of carriage are governed by a single law or different laws. Therefore, a multimodal transport operator, when he opted for a multimodal transport in preference to a segmented transport, can be deemed to have accepted a certain degree of risk of failure to recover the compensation paid to the cargo interests from the subcarrier at fault.

4.3.3 The degree of seriousness of the obstacle to recovery

The less serious the obstacle to recovery is, the more difficult it would be to infer the intention to refer the relevant issues to the law governing the adjacent contract in order to ensure the correspondence of liability.

In a credit transfer, as previously illustrated in § 2.3, above, a bank (D) may be under an obligation to give a refund to its sender (P) in accordance with the money-back guarantee imposed by the law governing their contract, despite the fact that it may not be able to claim refund from its receiving bank (R) if a money-back guarantee is absent in the law governing their contract. The gravity of the bank's dilemma in this situation is, however, mitigated by the fact that it may well have a separate remedy of direct claim against the bank further down the chain whose error has prevented the completion of the

⁹⁴ UNCTAD secretariat, para. 88.

credit transfer. If the relationship with that bank is governed by English law, for example, a tort remedy would be available.⁹⁵ Paragraph (12) of Preamble to the EC Directive on Cross-border Credit Transfers⁹⁶ suggests that the remedy based upon the money-back guarantee provided by the Directive does not extinguish other remedies under the national law. It states:

Whereas Article 8 [the provision for money-back guarantee] does not affect the general provisions of national law whereby an institution [bank] has responsibility towards the originator when a cross-border credit transfer has not been completed because of an error committed by that institution; ...

Although this passage only mentions the originator's remedy, the banks which have discharged their liability under the money-back guarantee would presumably also have the same remedy against the bank which committed the error. Where the remedy of a direct claim is available, the money-back guarantee is merely a ground for an easier remedy which makes it possible to get around a possibly complicated and expensive process involved in a direct claim. Therefore, the unavailability of the right to obtain a refund under a money-back guarantee would be a less serious obstacle to recovery compared to a total failure of recovery.

⁹⁵ Even where there is no privity of contract between the victim and the tortfeasor, as in the product liability case of *Donoghue v. Stevenson* [1932] AC 562. See Wood, para. 29-15.

⁹⁶ For the same view expressed in relation to the UNCITRAL Model Law, see the observation by Gregory (representing UK) in A/CN.9/SR 460, para. 23 although it was disputed by Felsenfeld (representing US) at para. 26.

4.4 Can the proposed principle be applied through a provision of the Rome Convention?

Under the proposed principle, certain issues of a contract are referred to the law governing the adjacent contract. It is, therefore, obvious that it cannot be applied through Article 4 which in essence selects the law of the country with which the contract is most closely connected. Under Article 3(1), the choice of law must be either express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. Therefore, for the proposed principle to be applied through Article 3(1), one must be able to say that if both parties to a contract, as reasonable persons, would have intended to choose, as the law governing certain issues of their contract, the law governing its adjacent contract, had their attention been drawn at the time of concluding the contract to the possibility of an imbalance of liability resulting from the application of different laws to those issues, then the circumstances of the case demonstrate with reasonable certainty that the parties made such a choice of law.

However, this interpretation of Article 3(1) involves a difficulty. According to the Giuliano-Lagarde Report,⁹⁷ Article 3(1) “recognises the possibility that the court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract” but it “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.” The proposed principle requires an inquiry into what the parties, as reasonable persons, would have intended, had their attention been brought to something of which

⁹⁷ Para. 3 of the comment to Art. 3.

they were not actually aware, rather than an inquiry into the parties' "real choice" which they had a "clear intention of making."

Lagarde, however, in his later article points out that the quoted suggestion of the Giuliano-Lagarde Report will not prevent certain divergences in the interpretation of Article 3(1) from emerging among the Contracting States. Thus German legal writers, he says, appear to give Article 3(1) a wider scope in line with German case law under the preexisting choice-of-law rules.⁹⁸ If Article 3(1) can be interpreted more flexibly than the Giuliano-Lagarde Report suggests, it would seem possible for the proposed principle to operate through Article 3(1).

If so, then the Rome Convention would pose no difficulties for the use of *dépeçage*. Thus where the parties did not make a choice of law, the principal governing law will be determined in accordance with Article 4, while the issues in respect of which an imbalance of liability arises can be separately referred to the law governing the adjacent contract in accordance with the proposed principle as applied through Article 3(1), since the latter provision allows parties to choose a law governing part of a contract. Where, on the other hand, the parties made a choice of law in accordance with Article 3(1), again the issues in respect of which an imbalance of liability arises can be separately referred to the law governing the adjacent contract in accordance with the proposed principle as applied through Article 3(1), since presumably the latter provision also allows parties to make more than one choice of laws governing different issues of the same contract.

5 Where the Rome Convention applies to neither of two adjacent contracts

⁹⁸ Lagarde, "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980," (1991) 80 Rev. Crit. 287, 304.

The Rome Convention is not applicable to obligations arising under bills of exchange.⁹⁹ Also the Convention is not applicable where an international convention to which the United Kingdom is a party applies.¹⁰⁰ Thus where both the multimodal transport contract and the subcarriage contract are subject to international conventions to which the United Kingdom is a party, the Convention applies to neither of them.

Concern for an imbalance of liability caused by a mismatch of governing laws should also be properly dealt with by the choice-of-law rules applicable in these cases. After briefly examining the choice-of-law rules for credit transfers, we will examine the choice-of-law rules for bill of exchange transactions.

5.1 Choice-of-law rules for credit transfers

Article Y (1) of the UNCITRAL Model Law on International Credit Transfers provides:

The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

This provision can be adopted as part of English choice-of-law rules by following the

⁹⁹ Art. 1, para. 2(c).

¹⁰⁰ Art. 21.

procedure such as consultations provided by Article 23 of the Rome Convention.¹⁰¹ If that happens, the Convention does not apply to the contracts involved in a credit transfer.

Article Y was excluded from the main body of the Model Law and instead included in a footnote “for States that might wish to adopt it.” This means that the rules provided in Article Y are not as strongly recommended by the UNCITRAL as the text in the main body of the Model Law. It reflects the acknowledgment that Article Y may produce a plurality of governing laws with attendant unsatisfactory results and, therefore, the choice-of-law problem needs to be more fully discussed in the future.

However, there were some discussions on how to prevent a plurality of governing laws while the UNCITRAL Model was in preparation.

On one occasion it was proposed to make the Model Law applicable only where all the parties concerned were subject to it.¹⁰² It was felt desirable that the Model Law should apply to an entire international credit transfer but in the end such a solution was thought technically and politically unfeasible.¹⁰³

The Hague Conference for its part asked the following question in its questionnaire:¹⁰⁴

Is it desirable and is it possible to make a distinction, in formulating the conflict of laws

¹⁰¹ This article provides for procedure for a Contracting State to follow if it wishes to adopt a new choice of law rule unilaterally.

¹⁰² By Mr. Gregory (the UK representative), A/CN.9/SR 475, para. 4.

¹⁰³ UNCITRAL Secretariat, para. 16. Although it is not clear what is meant by “technically and politically unfeasible,” such a solution would surely reduce the applicability of the Model Law.

¹⁰⁴ Pelichet, “Questionnaire on the Law Applicable to International Credit Transfers - the Synthesis of Replies” The Hague Conference on Private International Law, Preliminary Document No 20 of March 1993, p. 13, Question 3. The Hague Conference later decided not to undertake any specific work on the law applicable to credit transfers.

rule, between the legal aspects of a funds transfer and its purely functional aspects? In other words, can the coverage of a single law be employed for the purely legal aspects of an international credit transfer and at the same time can there be adopted, for the functional aspects, the system of segmenting the funds transfer into a succession of distinct bilateral operations, to each of which a different law should apply?

It is not clear what issues were meant to be legal aspects and functional aspects respectively. Literally, “legal aspects” would cover a wider range of issues than the sole issues relating to the obligation to refund under a money-back guarantee. However, it might be sensible to separately refer at least the latter issues to a single governing law since they may, if different laws apply, give rise to an imbalance of liability.

5.2 Choice-of-law rules for bill of exchange transactions

Many of the English choice-of-law rules for bill of exchange transactions are contained in section 72 of the Bills of Exchange Act 1882. The principle of party autonomy is presumably, although not expressly stated, not recognised in the scheme of the Act since if signatories are free to alter their rights and liabilities on the bill, the bill’s character as a simple and abstract instrument would be impaired. This has two implications for the present discussion.

First, even if a signatory stipulates a governing law on a bill, the subsequent signatories cannot be deemed to have impliedly consented to the choice of that law.¹⁰⁵ At

¹⁰⁵ There are largely three systems of choice-of-law rules for the bill of exchange transaction in the international community. Each system is adopted by a number of States. On the one hand, a large number of civil law States have become parties either to Geneva

any rate, such a stipulation is rarely, if ever, encountered. Therefore, signatories cannot be expected to ensure correspondence of their right and liability by referring them to a single governing law.

Secondly, the principle proposed in relation to the transactions in which are involved adjacent contracts either or both of which are subject to the Rome Convention cannot be proposed in relation to bill of exchange transactions. Since the proposed principle operates by giving effect to the parties' inferred intention, it cannot be applied through choice-of-law rules which do not give effect to parties' intention to choose the governing law of their contract.

Issues concerning bills of exchange will be divided below into three categories: issues relating to the creation and scope of liability; issues relating to steps that must be taken to exercise or preserve the right of recourse; and issues relating to formal requirements. For each category of issues, we will consider the policies in favour or against the reference of those issues to a single governing law and examine in this light some of the English choice-of-law rules as represented by section 72 of the Bills of Exchange Act

Convention of June 7, 1930, for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes or the Inter-American Convention signed in Panama on 30 January 1975. On the common law side, a similar harmonization had flowed from the issuance of the Bills of Exchange Act 1882 of the United Kingdom, on which the United States Negotiable Instruments Law (superseded by Article 3 of the Uniform Commercial Code) and the various Bills of Exchange Acts of the Commonwealth countries had been modelled.

Pelichet, based upon a survey of the legal writings, concludes that neither the 1930 Geneva Convention nor the 1975 Panama Convention nor the codified laws in the common law States modeled after the Bills of Exchange Act 1882 indorse the principle of party autonomy enabling a signatory to determine the overall legal regime of a bill: Pelichet, "Report on the law applicable to negotiable instruments for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference" The Hague Conference on Private International Law, Preliminary Document No 8 of April 1992, paras. 26-47.

1882 and case law as well as the choice-of-law rules of some other legal systems.

5.3 Issues relating to the creation and scope of liability

Issues relating to the creation of liability include the need for, and the meaning of, consideration, the effect of a forged signature, and the requirements for an effective transfer. Issues relating to the scope of liability include the effect of excluding the right of recourse, the effect of guaranteeing payment, defenses available against holder, and the amount of liability that can be recovered.

5.3.1 Policy considerations

Three policy considerations militate in favour of referring issues relating to the creation and scope of liability to a single governing law. First, a bill of exchange transaction possesses a strong back-to-back nature since each signatory is offering a guarantee of payment to subsequent signatories. Secondly, as neither at choice-of-law level nor at substantive law level is the principle of party autonomy recognised, signatories are not empowered to ensure the correspondence of their liability to their respective indorsees and their right of recourse against their respective indorsers. Thirdly, it is essential for a bill to maintain a simple character so that its negotiability is not impaired.

However, three policy considerations militate against referring issues relating to the creation and scope of liability to a single governing law. First, each signatory at the time of affixing his signature usually has in contemplation the law of the State in which he is

acting since that is usually the law which he feels most familiar with.¹⁰⁶ Secondly, by indorsing a bill in a different State to the State in which the bill was indorsed to them, signatories can perhaps be deemed to have accepted a possible imbalance between their liability and their right caused by different governing laws. Thirdly, since different forums may have different choice-of-law rules, reference to a single governing law is effective to prevent an imbalance between liability and right only if they are tried in the same forum which makes such reference or if the relevant signatories act in accordance with the same choice-of-law rule which makes such reference.

5.3.2 The present law

The English choice-of-law rules do not refer the issues relating to the creation and scope of liability to a single law.

As regards the measure of damages, Ryder & Bueno suggests that the law of the place where each signatory affixed his signature is the governing law. Consequently, it points out, an indorser may become liable for a higher rate of interest than he can recover from the drawer, or the drawer may become liable for a higher rate of interest than he can recover from the acceptor.¹⁰⁷

Under section 72(2) of the Bills of Exchange Act 1882, the “interpretation” of the drawing, indorsement, acceptance, or acceptance supra protest of a bill is determined by

¹⁰⁶ Pelichet “Report on the law applicable to negotiable instruments for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference” the Hague Conference on Private International Law, Preliminary Document No 8 of April 1992, para. 55

¹⁰⁷ Ryder & Bueno (eds.), p. 361.

the law of the place where such contract is made. Some commentators distinguish the construction of the words used in a bill (e.g. the question whether an acceptance is general or qualified) from their validity and effect (e.g. the effect of a stipulation in a bill to pay interest) and argue that the meaning of “interpretation” is limited to the construction of the words.¹⁰⁸ They refer the validity and effect to a single governing law, the law of the place where the bill is payable.¹⁰⁹ Despite such scholarly arguments, it has now been almost established by authorities¹¹⁰ that the word “interpretation” in this section bears a wide meaning and embraces the respective obligations created by the acts of drawing, indorsing and accepting the bill.¹¹¹

5.4 Issues relating to steps that must be taken to exercise or preserve the right of recourse

The issues in this category fall into two groups: issues relating to the steps the last holder must take to preserve his and the prior indorsees’ right of recourse and issues relating to the steps that must be taken by each indorsee to exercise his right of recourse.

Issues relating to the steps the last holder must take to preserve his and the prior indorsees’ right of recourse include the necessity for the presentment of the bill, protest

¹⁰⁸ Ryder & Bueno, p. 358.

¹⁰⁹ Dicey & Morris, p. 1433.

¹¹⁰ *G. & H. Montage GmbH v. Irvani* [1990] 1 WLR 667, 675 (CA); *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH* [1977] 1 WLR 713, 718 (HL).

¹¹¹ Art. 4 of the Geneva Convention also refers the obligations of drawers, indorsers, and acceptors to plurality of laws. So do § 214 and § 215 of the Restatement Second, Conflict of Laws.

and other steps relevant to dishonour. Although section 72(3) of the Bills of Exchange Act 1882 uses the term “duties” to present and to protest, they are not obligations which can be enforced against the holder, but preconditions for the exercise of his and the prior indorsees’ right of recourse.¹¹² Other issues relating to those steps include the date of maturity of a bill, the duty of the holder to accept partial acceptance or payment of a bill, the duty of the holder to accept payment for honour supra protest, the time within which these steps must be taken and the effect of *vis major* preventing these steps.

Issues relating to the steps that must be taken by each indorsee to exercise his right of recourse include the necessity for indorsees to give notice of dishonour and the sufficiency of such steps including the time within which such steps must be taken.

5.4.1 Steps the last holder must take to preserve his and the prior indorsees’ right of recourse

5.4.1.1 Policy considerations

Since the steps that must be taken by the last holder to preserve his and the prior indorsees’ right of recourse are beyond the control of the prior indorsees, if the last holder fails to take those steps, the prior indorsees lose the right of recourse without any fault of their own. In a purely domestic situation, there is no risk of those indorsees being prejudiced because they are not themselves liable to their respective indorsees (including the last holder) unless the same steps have been taken by the last holder. But in cases with

¹¹² Dicey & Morris, p. 1424, n. 22.

international elements, if different laws govern different indorser-indorsee relationships and require different steps to be taken by the last holder, an indorsee somewhere along the chain of recourse may be obliged to pay to his indorsee despite having no right to claim recourse from his indorser.

One way to avoid such a situation is to apply cumulatively the law of each place where an indorsement has taken place to determine the steps the last holder must take in order to claim recourse against his indorser.¹¹³ This view, however, would place an unreasonably heavy burden on the last holder because he would have to ascertain and comply with a number of different laws as to protest, notice of dishonour, and other steps. He usually does not know where each prior indorsement has taken place and the notary preparing the protest probably also does not know the law of all these places. The burden would be even more onerous where the last holder has taken the bill mainly in reliance upon his immediate indorser's credit.¹¹⁴

The remaining way to prevent an indorsee from being prejudiced by the last holder's failure to take the necessary steps is to determine the steps that must be taken by the last holder to preserve prior indorsees' right of recourse by a single law with respect to all prior indorsees.

There is, however, a drawback to the reference of this issue to a single law: it may take signatories by surprise as they may be expecting the law of the place where they drew or indorsed the bill to apply to determine the steps the last holder must take to preserve their respective indorsees' right of recourse against them. Such a danger was illustrated by the

¹¹³ Surville & Arthuys, p. 737.

¹¹⁴ Lorenzen, pp. 128-134.

facts of *Allen v. Merchants' Bank of New York*¹¹⁵ A bill drawn on a Pennsylvania mercantile house was indorsed in New York and was eventually sent to a Pennsylvania bank for collection. The acceptance of the bill was refused. By the law of Pennsylvania, notice of non-acceptance was unnecessary and accordingly no notice was given to the New York indorser. By New York law, however, notice of non-acceptance had to be given to the drawer and indorsers. The New York indorser believed that the bill had been accepted since he had not received notice of non-acceptance within a reasonable period of time, and consequently surrendered certain securities for the payment of the bill, which had been deposited with them by the drawer. As the drawer later became insolvent, if the law of Pennsylvania had been applied to determine the necessity for notice of non-acceptance, the indorser, who did not act unreasonably under New York law, would have suffered a financial loss.¹¹⁶

5.4.1.2 The present law

There is general agreement among the legislation of different States that the date of maturity of a bill should be determined uniformly according to the law of the place where it is payable, and it is so provided by section 72(5) of the Bills of Exchange Act 1882.

The necessity for presentment, however, is not in general referred to a single law.

Thus section 72(3) of the Bills of Exchange Act 1882 provides:

¹¹⁵ [1839] 22 Wendell 215.

¹¹⁶ The actual case turned upon an issue immaterial to the present discussion.

Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

...

The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

It may be thought that the “duties of the holder” embraces more than a question of form. But if so and it covers not only the sufficiency of presentment but also the necessity for presentment, the words “act is done” would have to be read “act is done or to be done.” The decisions in *Banku Polskiego v. K. J. Mulder*¹¹⁷ and *Cornelius v. Banque Franco-Serbe*¹¹⁸ take the view that section 72(3) does not cover the necessity for presentment.¹¹⁹ Dicey & Morris suggests that the necessity for presentment is determined by the law of the State of each contract.¹²⁰

Under the Geneva Convention, this issue appears to be included in the legal effect in Article 4 which points to the law of the State of each contract. The Restatement Second also takes the same position. The comment to section 217 states:

... the necessity of making presentment and protest and of giving notice of dishonour and

¹¹⁷ [1941] 2 KB 266.

¹¹⁸ [1941] 2 All ER 728. The report of this case in [1942] 1 KB 29 is incomplete.

¹¹⁹ For a detailed discussion on the interpretation of these cases, see Mann “Bills of Exchange and the Conflict of Laws” in his *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (1992), p. 99.

¹²⁰ Dicey & Morris, Rule 195; Sykes & Pryles, p. 628.

the state, or states, in which presentment may be made are determined by the law which governs the obligations of the particular obligor.

5.4.2 Steps each indorsee must take to exercise his right of recourse

In *Horne v. Rouquette*¹²¹ a bill of exchange drawn in England and payable in Spain, was indorsed in England by the defendant (R) to the plaintiff (D), who indorsed it to the last holder (P) in Spain. It did not until twelve days after acceptance of the bill was refused that the last holder wrote to inform the plaintiff of the dishonour. On receipt from the last holder of the notice of dishonour, the plaintiff gave immediate notice to the defendant. No notice of dishonour by non-acceptance was required by Spanish law while due notice was required by English law. The Court of Appeal applied Spanish law to the last holder's notice to the plaintiff and English law to the plaintiff's notice to the defendant and held that the plaintiff was entitled to claim recourse from the defendant.

It is to be observed that the court in this case separated the issue of notice given by one indorsee from the issue of notice given by another indorsee. It is submitted that this is the correct approach to the issues relating to the steps each indorsee must take to exercise his right of recourse.

Dicey & Morris, however, takes a different approach by treating the time for notice given by an indorsee as meaning the time within which the indorsee must receive notice from the last holder and forward it to his indorser rather than the time within which the

¹²¹ (1878) 3 QBD 514 (CA).

notice which has already been received must be forwarded. Commenting on *Horne v. Rouquette* from this angle, Dicey & Morris asks, “How could the English indorsee have given what would have been timely notice from the point of view of English domestic law, if his own knowledge of the dishonour depended on the compliance with Spanish law by his successor in title?”¹²² It supports the ruling of this case by misinterpreting it as having applied Spanish law to the time within which the indorsee must receive notice from the last holder and forward it to his indorser. Dicey & Morris further uses this case as it (mis)interprets it to fortify the interpretation it gives to section 72(3) of the Bills of Exchange Act 1882.¹²³ From the wording of the provision, it construes that under this section the indorsees prior to the last holder must give notice within the time provided by the law of the place where the bill is dishonoured. Fortifying this construction, it says if the time for each notice depends on the law governing each indorsement, in *Horne v. Rouquette* the plaintiff’s notice would have been out of time under English law due to the delay in receiving notice from the last holder.

However, if the issue of notice given by one indorsee is separated from the issue of notice given by another indorsee, which the court in *Horne v. Rouquette* actually did, the type of obstacle to recourse hinted by Dicey & Morris would not arise irrespective of whether the time for each notice is determined uniformly by the law of the place where the bill is dishonoured or whether it is determined by the law governing each indorsement.

¹²² Dicey & Morris, p. 1440.

¹²³ The court did not discuss this provision.

5.5 Issues relating to formal requirements

The issues relating to formal requirements include the form of a bill of exchange, mode of presentment, mode of protest and mode of notice of dishonour.

In relation to formal requirements it would be appropriate to stay with the maxim *locus regit actum*. Under this age-old maxim, the law of the State in which the act takes place is applied to determine the formal requirements of the act. This is a widely recognised principle¹²⁴ and is based on the notion that the parties will naturally be guided by the form of acts recognised or required by the law of the State where they act.

Pursuant to this maxim, there is universal agreement in the present law that the manner in which an act is performed in connection with a bill of exchange must be determined by the law of the State in which such act is to take place. Consequently, the manner of performance of the same act by different signatories is referred to different laws.

Thus under section 72(1) of the Bills of Exchange Act 1882, the formal validity of supervening contracts, such as acceptance, indorsement, or acceptance supra protest, is determined by the law of the place where such contract is made.

Although the formal validity of a bill itself is under section 72(1) in principle determined uniformly by the law of the place of issue, subsection (1)(b) provides that, as between all persons who negotiate, hold, or become parties to it in the United Kingdom, a bill may be treated as valid if it conforms to the law of the United Kingdom, even if it is issued outside the United Kingdom. This subsection thus embodies the principle of *locus regit actum* by protecting the parties' reliance, as regards the formality of a bill,

¹²⁴ Giuliano & Lagarde Report, B. 3 of comment to Art. 9.

upon the law of the United Kingdom, when they act there. One upshot of this provision is that a recourse claim upon a bill whose form conforms to the law of the United Kingdom, but does not conform to the law of the place of issue, may be made against the person who became the first party to indorse the bill in the United Kingdom even though he does not have a right of recourse against his indorser who indorsed it in another State.

The Geneva Convention also adheres to the principle of *locus regit actum*. Article 3 provides that the form of any contract arising from a bill of exchange is regulated by the laws of the territory in which the contract has been signed.

As regards the mode of presentment, protest or notice of dishonour, or the other measures necessary for the exercise or preservation of the right of recourse, section 72(3) of the Bills of Exchange Act 1882, article 8 of Geneva Convention, section 217 of the Restatement Second, Conflict of Laws all refer to the law of the State in which the act in question is to take place.

5.6 A brief comment

The choice-of-law rules for bill of exchange transactions provide a good example of the effective use of *dépeçage* because the need for reference to a single governing law with respect of different signatories on a bill differs from one category of issues to another. Such a need seems to be strong with respect to the issues relating to the steps the last holder must take to preserve his or prior indorsees' right of recourse while such a need is outweighed by another policy consideration represented by the maxim *locus regit actum* in respect of the formal requirements. The need to refer the issues relating to the creation and scope of liability to a single governing law would be somewhere in the

middle of those two categories.

CHAPTER 6

Obstacles to recovery under the 1978 Act due to a mismatch between the law governing D's liability to P and the law governing R's liability to P

1 Purposes of this chapter

Where D claims against R under the Civil Liability (Contribution) Act 1978, D may face two types of obstacles to recovery inherent in the 1978 Act. First, where he was held liable to P in a foreign forum, his liability to P may have to be reestablished in England according to the governing law specified by the English choice-of-law rules. If, consequently, his liability to P is denied or its amount is reduced, he may not be able to obtain satisfactory recovery from R. This type of obstacle was examined in Part 2. A second type of obstacle will be analysed in this chapter.

Where D claims against R under the 1978 Act, R's liability to P as well as D's liability to P must be established under section 1(1).¹ Section 1(6) contemplates that they must be established by reference to the law specified by the English choice-of-law rules.² If,

¹ See also Law Com. No.79, para. 51; the judgment of Mustill L.J. in PART I, F. "The Derivative Claims" in *Commerciale de Réassurance v. ERAS (International) Limited (formerly ERAS (UK)) and Others*, 21 November 1991 (CA) (Transcript available on Lexis).

² *R. A. Lister & Co. Ltd. and Others v. E. G. Thomson (Shipping) Ltd. and Another (No. 2)* [1987] 1 WLR 1614, 1620. Where they were already determined in a foreign forum under different governing laws, the question whether they have to be reassessed for the purpose of D's claim against R depends upon whether they are conclusive in D's claim against R. This question has been discussed in Chapter 2, § 4.1.

however, different laws govern D's liability to P and R's liability to P, there may be imbalances in the liability regimes of the governing laws regarding the existence of the liability and its amount. If R's liability to P is subject to a more lenient liability regime than the liability regime applicable to D's liability to P, D may not be able to obtain satisfactory recovery.

The purposes of this chapter are to confirm that the English choice-of-law rules may specify different governing laws for D's liability to P and R's liability to P, to illustrate obstacles to satisfactory recovery due to imbalances between liability regime applicable to D's liability to P and liability regime applicable to R's liability to P, and to consider whether D's liability to P and R's liability to P should be determined by a single governing law in order to ensure D's satisfactory recovery.

2 Possibility of different laws governing D's liability to P and R's liability to P

Where D claims against R under the 1978 Act, D's liability to P and R's liability to P have to be established by reference to the governing law specified by the English choice-of-law rules.

Under the English choice-of-law rules, it is possible that different governing laws are specified for R's liability to P and D's liability to P.

Most obviously so where there are contracts between P and D and between P and R and both contracts contain an choice-of-law clause, effective under Article 3 of the Rome Convention, choosing different laws. Where, on the other hand, the parties made an effective choice of law in respect of neither of these contracts, it may be possible to look at the case as a whole to ascertain a single law governing both contracts by relying on

Article 4(5),³ but the governing law for each contract is more likely to be ascertained separately. Thus where D and R are the parties who are to effect the characteristic performance of their respective contracts with P and they have their habitual residence in different countries, the separate application of Article 4(2) to each contract will lead to different governing laws, the laws of the countries where they have their respective habitual residences.

Where D and R are alleged to have committed a tort vis-à-vis P, their respective liability to P will be governed by the law specified by the Private International Law (Miscellaneous Provisions) Act 1995. Section 11 provides that the applicable law is in general the law of the country in which the events constituting the tort in question occur. This provision is likely to lead to a single governing law for D's liability to P and for R's liability to P. This general rule is, however, subject to a rule of displacement. Section 12 provides that if it appears, in all the circumstances, from a comparison of the significance of the factors which connect the tort with the country whose law is applicable under the general rule and the significance of any factors connecting the tort with another country, that it is substantially more appropriate for the applicable law to be the law of the other country, the general rule is displaced and the applicable law is the law of the other country. The factors that may be taken into account as connecting a tort with countries are also listed. Among them are the factors relating to the events which constitute the tort in question and the factors relating to the parties. To the extent that the factors relating to the events which constitute the tort are shared by D and R, this section will lead to a

³ See discussion in Chapter 5, § 4.1 on *Bank of Baroda v. Vysya Bank* [1994] 2 Lloyd's Rep. 87. See also Fawcett, "Multi-party Litigation in Private International Law" (1995) 44 ICLQ 744, 767.

single governing law. But the factors relating to the parties may be taken into account separately for each party. The approach to a multi-party tort case taken by English law as existed before the Act was, according to the Law Commissions, that of ascertaining the governing law separately for each pair of opponents.⁴ If the silence on this point in the Act can be taken as the tacit endorsement of that previous approach, it is possible that different laws govern D's liability to P and R's liability to P.

Similarly, different governing laws may also be ascertained where D is alleged to be in breach of contract with P and R is alleged to be liable in tort to P.

3 Illustrations of obstacles to recovery due to imbalances in liability regime

If, as between the two different laws that govern D's liability to P and R's liability to P, there is an imbalance in liability regime regarding the existence of liability or the amount thereof, D may not be able to make satisfactory recovery from R. I will illustrate such situations below.

3.1 Imbalances in liability regime regarding the existence of liability

Where R's liability to P is determined by the law providing for a more lenient liability regime (e.g. liability based on negligence) than the law governing D's liability to P (e.g. strict liability), D may be liable to P whereas R may not be liable to P when R was actually more to be blamed for the damage to P than D.

⁴ Law Com. No. 193 (1990), para. 3.53. See also Law Commission Working Paper No.87 (1984), paras.6.82-6.85.

Thus the manufacturer (D) of a defective product may be liable to a person (P) who suffered injury using the product under the law governing his liability even if the state of scientific knowledge at the time of manufacture was not such as to enable the existence of a defect to be discovered.⁵ But the supplier (R) of the defective component may not be liable to the injured person under the law governing his liability if that law exempts a producer of a defective product from liability if the state of scientific knowledge at the time of manufacture was not such as to enable the existence of a defect to be discovered. Consequently, the manufacturer may not be able to recover indemnity from the supplier under the 1978 Act⁶ even if the defect of the product was actually caused by the component made by his supplier.

3.2 Imbalances in liability regime regarding the amount of liability

Where both D and R are liable to P under the law governing each liability, section 2(1) of the 1978 Act provides that the amount of the contribution recoverable from R will be "such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."⁷ This obviously involves the

⁵ Incidentally, Art. 15, para. 1(b) of the EC Product Liability Directive leaves the member states with a choice whether or not to allow this state-of-the-art defence.

⁶ Incidentally, Art. 5 of the EC Product Liability Directive leaves the rights of contribution or recourse between persons liable under the provisions of the Directive to national law.

⁷ The amount of "just and equitable" contribution will not have to be ascertained by an exact mathematical calculation. Thus in *Arab Monetary Fund v. Hashim*, an organisation (P) sought damages against its former Director-General (R) alleging that he had misappropriated its money. It also sought damages from certain banks (D) on the ground that they had assisted the former Director-General with his misappropriation of the

dividing up of the amount of common liability between D and R. But it is difficult to see how the amount of “common liability” can be ascertained where D’s liability to P and R’s liability to P are governed by different laws providing for different liability regimes regarding the amount of liability (heads or quantification of damages).⁸

Another effect of an imbalance in liability regime regarding the amount of liability between the law governing D’s liability to P and the law governing R’s liability to P is an obstruction to D’s satisfactory recovery from R.⁹ Section 2(3) of the 1978 Act provides:

Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it [P] against the person from whom the contribution is sought [R] was or would have been subject to--

- (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;
- (b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence)

money. In an action brought by the banks against the former Director-General for a contribution in respect of the organisation’s claims against them, Chadwick J. thought it to be just and equitable to order the former Director-General to make a contribution of \$10 million to the banks, so that the banks would end up bearing approximately 12.5% of the total amount of the common liability. He did not, however, reach that figure from an exact calculation but from the fact that the former Director-General was the person primarily responsible for the fraudulent scheme.

⁸ In *Arab Monetary Fund v. Hashim*, Chadwick J. treated the total amount misappropriated and interest thereon as the amount of the common liability. But this could not be done in a case of unliquidated damages.

⁹ Rabel, p.275 says “the assessment of indemnity and contribution between the codebtors will be facilitated” by deciding the obligations of different defendants under one law. However, this remark is not made in the context of the 1978 Act and what precisely is meant is not clear.

Act 1945 or section 5 of the Fatal Accidents Act 1976; or

(c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

Thus where a carrier [D] contracts with the owner [P] of cargo to carry the cargo but the loss of the cargo takes place while it is in charge of the actual carrier [R], the contracting carrier may not be able to obtain satisfactory recovery from the actual carrier under this section if the contracting carrier's liability to the owner is governed by a law which imposes no limit on the amount of damages recoverable but the actual carrier's liability to the owner is governed by a law which imposes certain limit on the amount of damages recoverable.

4 Should a single governing law be ascertained for D's liability to P and R's liability to P?

Considering that imbalances in the liability regimes of different laws governing D's liability to P and R's liability to P may obstruct D's satisfactory recovery from R, the question arises whether a single governing law should be ascertained for D's liability to P and R's liability to P.

Fawcett suggests,¹⁰ albeit not in the context of the 1978 Act, the use of whatever flexibility there is in the ordinary choice-of-law rules, such as Article 4(5) of the Rome Convention and section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, to ensure, as far as possible, that a single law is applied to all parties in the cases of joinder of parties.

He reaches his conclusion by weighing up various factors. First of all, ascertaining governing laws separately for each pair of parties can result in a lack of evenhandedness in the treatment of the parties. Also in a complex case, ascertaining governing laws in such a way can be a tremendous burden on the court and impose expense, inconvenience and delay on the parties. But ascertaining a single governing law for all parties, on the other hand, has the disadvantage of being prone to manipulation by adding additional parties to the litigation so as to produce a particular governing law.

It is not proposed for us to discuss all these factors. The most relevant factor to the present discussion is the fact that the separate ascertainment of the governing laws for each pair of parties can result in a lack of evenhandedness in the treatment of the parties. Is such a consequence really unjust?

Suppose that a person (P) suffered injury in using a defective product in a State which does not otherwise have any connection with him, the manufacturer of the product (D) or the supplier of the defective component (R). It may, then, in appropriate cases, make sense to determine the manufacturer's liability to the injured person under the law of the manufacturer's place of business while determining the supplier's liability to injured person under the law of the supplier's place of business. Consequently, the manufacturer

¹⁰ Fawcett, "Multi-party Litigation in Private International Law" (1995) 44 ICLQ 744, 762 et al.

may be subject to strict liability whereas the supplier may be subject to liability based upon negligence. Such a lack of evenhandedness can be justified because the manufacturer and the supplier may have been planning their operations and expenses according to the law of their respective places of business.

The Law Commission also saw no reason in principle why several wrongdoers who acted in concert should not be liable according to different laws, citing the following example:¹¹

... where a person in England conspires with a person in France to do acts respectively in England and France which injure an English claimant's interests in those respective places, and the acts would be lawful in France but not in England, it seems appropriate that the liability of the conspirator in England should be decided according to English law, but it does not seem self-evident that the liability of the conspirator in France should also be so decided.

Obstacles to D's recovery from R due to different governing laws are simply a reflection of a lack of evenhandedness in the treatment of D and R vis-à-vis P. If it is accepted that a lack of evenhandedness in the treatment of D and R vis-à-vis P due to different governing laws is not unjust, obstacles to D's recovery from R due to different governing laws must also be accepted as inevitable. The manufacturer liable to the consumer on strict liability must accept it as inevitable that he cannot obtain indemnity from the supplier who is liable to the consumer only for negligence. One of the

¹¹ The Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No. 87), para. 6.85.

conspirators who acted in England and is liable to the victim under English law must accept it as inevitable that he cannot obtain contribution from the other conspirator who acted in France and is not liable to the victim under French law.

It follows that the fact that imbalances in the liability regimes of different laws governing D's liability to P and R's liability to P may obstruct D's satisfactory recovery from R should not be taken into account as a factor which militates in favour of ascertaining a single governing law for D's liability to P and R's liability to P.

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