# The Law Applicable to Cross Border Road Traffic Accidents

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**Abstract**

**This Thesis addresses the issue of which law should apply in cases concerning cross border road traffic accidents. From the perspective of English law it examines the changes which have been effected by the adoption of the EU Rome II Regulation, the likely outcomes of the rules of Rome II, the interaction of Rome II with the Motor Insurance Directives and the complex tripartite relationship between Rome II, the Directives and the Hague Convention on the law Applicable to Traffic Accidents. The conclusion is that Rome II represents a different and more rigid approach to choice of law than previously existed in England and Wales. The dominant aim of Rome II is that of certainty and uniformity. Nevertheless, the competing aim of achieving justice for the parties creates a residual amount of conflict and uncertainty. However, a major criticism of the drafting of Rome II, advanced by this Thesis, is that it failed to recognise the importance of insurance in the settlement of traffic accident claims and to reflect this fact in its rules. This Thesis offers some proposals for reform in this regard.**

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# 1. Introduction

Which law will govern a dispute arising out of a cross border road traffic accident? While traffic accidents may today appear to be a run of the mill, ordinary and possibly mundane subject at the domestic or national level, at the level of the cross border dispute the issues relating to applicable law are not only numerous but the potential methods for dealing with them, as well as the reasons behind those methods, can seem bewilderingly multifarious. This work seeks to mark out a path which can guide the reader through a number of potentially applicable, but conflicting, legislative provisions, which have diverse aims and objectives, to understand what the current choice-of-law situation is. Importantly, it also aims to give some indication of what ought to be done to improve the situation.

## 1.1. Road Accidents – The Choice-of-Law Issues.

A usual road accident scenario might involve two vehicles which collide, causing property damage and, potentially, some personal injury. The non-contractual claims which could arise from such a scenario might include a claim by the driver of one vehicle against the driver of the other. If both vehicles are registered in the country in which the accident occurs and both drivers are habitually resident there, the situation is a purely domestic one which does not give rise to any questions of choice-of-law. Any claims arising as a result of the accident would be dealt with in accordance with the law of the country concerned.

However, if this scenario takes on a cross border nature so that one of the vehicles is from a country foreign to the place where the accident occurs, a question arises as to which law should be applied. Is it, for example, the law of the place of the accident or is it the law of the country

of registration of the vehicle? The parties, or the court before which a claim is brought, will require a means of determining which law will govern the claim.

Being able to decipher the relevant legal rules in a relatively easy way is particularly important in traffic accident cases. Within the EU there is a high volume of traffic accidents, [1] however, a large percentage of claims arising from traffic accidents are settled before proceeding to a full trial in court.[2] Nevertheless, parties who suffer loss, particularly abroad, are likely to seek legal advice, it may be difficult to proceed at all otherwise. It is vital for parties trying to negotiate settlement of claims that disputes regarding applicable law are kept to a minimum so that costs are kept down and an appropriate amount of compensation is agreed upon as quickly as possible. This can only be achieved if it is clear which rules will determine the applicable law and what the outcome of those rules will be.

There are two main potential ways of achieving clarity in respect of applicable law. The first is to undertake substantive harmonisation of rules relating to traffic accidents. This could include rules on liability, procedure, limitation or prescription periods and the payment of compensation. Doing so would completely obviate the need for choice-of-law rules since the laws concerned would all be the same all over the world.

There are significant problems with this approach. Firstly, unless the rules in every country throughout the world were to be harmonised, there would always be a residual need for choice-

[1] The latest report from the European Transport Safety Council sets the figures of fatalities and serious injuries resulting from traffic accidents (domestic and cross border) at around 30,100 and 324,000, respectively, within the EU 27 for 2011. The report adds that there were many more who suffered slight injury. See 'A Challenging Start towards the EU 2020 Road Safety Target' 6th Road Safety PIN Report, available at <http://www.etsc.eu/documents/PIN_Report_6_web.pdf.> In the Commission Staff Working Document addressed to the European Parliament and to the Council on certain issues relating to Motor Insurance, (SEC 1777, 19.12.2005), it was acknowledged that it is: "very difficult to draw accurate statistics on the number of accidents occurring in Member States and falling under the scope of the [Motor Insurance] Directive". The cross border factor makes it "difficult to assess the exact number of accidents involving 'visiting victims' … Moreover, the collection of statistical data of this kind is not centralised at national or at Community level". However some data from Germany suggests that cross border accidents there made up around 2% of the total number of road accidents (9,200 out of a total of 450,000 accidents) in 2004. See A Renda and L Schrefler 'Full Compensation Of Victims Of Cross-Border Road Traffic Accidents In The EU: The Economic Impact Of Selected Options' (a study prepared for the European Parliament PE. 378.304, 2007) at p1.

[2] See in relation to the English system, R. Lewis 'Insurance and the Tort System' 25 LS (2005) 85 at 88.

of-law rules. Secondly, harmonisation, even in geographically limited areas such as the US or the EU, has so far proved elusive.[3]

Harmonisation within the EU has been achieved concerning one aspect of road accidents. The Rights of Passengers in Bus and Coach Transportation Regulation[4] provides harmonised rules on the rights of persons with reduced mobility issues, liability issues and compensation and assistance in the event of interrupted travel for those travelling long distances (potentially across borders) by bus or coach. The process of enacting the Regulation, however, only confirms the difficulty of achieving agreement for measures of harmonisation. In its original form the Regulation would have harmonised rules on liability arising out of a coach crash.[5] This would have meant changes for the substantive rules of many Member States.[6] The fact that the final form of the Regulation is so watered down that in the end no national rules on liability are affected at all,[7] is a prime example of how far away substantial harmonisation in this area is.

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[3] Teams of highly respected academic minds have worked tirelessly for many years to come up with proposals for substantive harmonisation in a variety of private law fields within Europe See in particular the work done under the auspices of the Study Group on a European Civil Code at <http://www.sgecc.net.> Also see The European Group on Tort Law*, Principles of European Tort Law. Text and Commentary (*Springer, 2005*)* for the work of another distinguished group of academics who are working towards '*.. the enhancement and harmonization of tort law in Europe through the framework provided by its Principles of European Tort Law (PETL) and its related and ongoing research, and in particular to provide a principled basis for rationalisation and innovation at national and EU level ...'* (mission statement of the group, available at www.egtl.org). One project in particular culminated in a large volume which aimed to expound general principles of non-contractual obligations which are common to all EU Member States. See C. Von Bar *Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another* (Sellier, 2009). But this effort, along with others, has gone unrewarded in terms of concrete legislative measures. More modest suggestions for the harmonisation of particular matters such as limitation periods and awards of damages also appear to flounder See for example the *Proposal for a Regulation Of The European Parliament And The Council On Limitation Periods For Compensation Claims Of Victims Of Cross-Border Road Traffic Accidents In The European Union* drawn up by the Pan European Organisation of Personal Injury Lawyers (PEOPIL) in this regard, available at< http://www.peopil.com/peopil/userfiles/file/Annex%201%20PEOPIL%20Proposal%20compClaimRTAxborder%20Oct12.pdf> Also see Ulrich Magnus (Ed.) *Unification of Tort Law: Damages* (Kluwer, 2001). Even when there is political will to back the schemes, finding agreement often proves just too difficult In its Communication From The Commission To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions *Strengthening Victims' Rights In The EU* (COM(2011) 274 final), The Commission states: "*The Commission will address this problem by proposing to harmonise the rules on limitation periods so that victims do not risk losing their right to compensation for procedural reasons."* However, there is no sign yet of any concrete proposal and agreement on its content is likely to be very difficult to achieve.

[4] Regulation No 181/2011 Of The European Parliament And Of The Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L55/1.

[5] Article 6 of the Commission Proposal for the Regulation (COM(2008) 817 final 4.12.2008) provided for a harmonised rule of strict liability for loss up to EUR 220,000, but subject to contributory negligence/ fault; as well fault based liability in respect of claims over and above EUR 220,000 which would be unlimited, for damage caused by an accident arising out of the operation of the vehicle.

[6] See Position (EU) No 4/2010 Of The Council At First Reading with a view to the adoption of a Regulation of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Adopted by the Council on 11 March 2010, OJ C122 E/01 at 15.

[7] The provision on liability in the final form of the Regulation is contained in Article 7 which provides for a right of right to be compensated for death, personal injury and/or loss or damage to luggage in accordance with national law. The amount of that

If harmonisation cannot be achieved, then we are really only left with the second option – choice-of-law rules. Changing the circumstances of the above example a little to reflect the possibility of, for example, hire cars, travel under contract, negligent repairers, uninsured drivers and multi-party accidents, begins to reveal the true level of complexity which must be accounted for in any method of deciding upon the appropriate applicable law. Added to this is the reality of motor accident litigation and the important role of third party liability insurance,[8] the potential for injustice to a victim from the application of foreign law[9] and the potential implications of this on the desire for a truly borderless European Union. The volume of traffic accidents is another important feature.[10] Any substantive injustice created as a result of a choice-of-law rule will be greatly magnified because the number of individuals affected is large. Furthermore, anticipating such injustices is of vital importance because they are likely to reverberate in an unknown way, as so many claims fall outside of the litigation process. [11]

Taking these factors into account, the choice-of-law equation suddenly exhibits a need to take account of a whole variety of policy considerations. But which should be dominant and is there room to accommodate more than one?

### 1.2. Scope of The Thesis

This Thesis is limited to the performance of two functions. Firstly and primarily, the current choice-of-law landscape in relation to traffic accidents is mapped from the perspective of the law

compensation is also to be in accordance with the applicable national law, although any limits are not to be less than EUR 220,000 per passenger for personal injury or death and EUR 1,200 per item of luggage.

[8] See Chapter 5.

[9] The possibility for a victim to be prejudiced by the application of foreign law was recognised in "Compensation of Victims of Cross-border Road Traffic Accidents in the EU: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross-border Victims", report prepared by law firm Demolin Brulard Barthélémy for the Commission and available at: <http://ec.europa.eu/internal_market/insurance/ docs/motor/20090129report_en.pdf.> See Chapter 4 at 4.9.

[10] See n 1 above.

[11] See Lewis (n2) at 88

in England and Wales.[12] However, as a result of the level of input into English rules on applicable law and compulsory motor insurance, from harmonised measures at the European Union level, the approach is simultaneously focused on European Union legislation. The main focus is those instruments which will most readily be applied in English courts, namely Part III of the Private International law (Miscellaneous Provisions) Act 1995,[13] Rome II[14] and the Motor Insurance Directives.[15] The Hague Convention on the Law Applicable to Traffic Accidents[16] is also examined as it provides an important comparator for the '95 Act and, in particular, Rome II.

Secondly, and to a lesser degree, since an evaluation of rules which apply at the level of the EU is necessary to assess the situation with regard to England, the position within the EU more generally is considered. There are some interesting questions to be addressed in respect of the relationship between Rome II, the MIDs and the Hague Convention. Just under half of all EU Member States will, by virtue of Article 28 of Rome II, continue to apply the Hague Convention to which they are signatories.[17] As such, consideration of the Convention and its relationship to Rome II completes the choice-of-law picture in this area.

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[12] Hereinafter reference will only be made to the law of England for the sake of brevity. It is hoped that no offence is taken at this decision. None was intended and could not have been in any event, since the author is partly of Welsh decent herself.

[13] Hereinafter referred to as the '95 Act.

[14] Regulation 864/2007 EC on the law applicable to non-contractual obligations [2007] OJ L199/40.

[15] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability[1972] OJ L103; Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L8/17; Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC Of The European Parliament And Of The Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [2000] OJ L181/65; Directive 2005/14/EC of The European Parliament And Of The Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14; Directive 2009/103/EC of The European Parliament And Of The Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability[2009] OJ L263/11.Hereinafter referred to as the "MIDs".

[16] Of 4 May 1971. Hereinafter referred to as the Hague Convention

[17]There are twelve EU Member States who are also signatories to the Hague Convention: Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Slovenia, Slovakia and Spain. These states were all signatories of the Convention at the time of adoption of Rome II.

### 1.2.1. Rules of Jurisdiction

This Thesis is limited to consideration of issues concerning applicable law. Although issues of jurisdiction are touched upon, particularly when the interaction of jurisdiction and choice-of-law is important for the combined result produced, there are far fewer issues to address with regard to jurisdiction. This is particularly so in relation to direct actions against insurers since the ruling of the CJEU in *Odenbreit,*[18] which effectively means that a victim is free to bring a direct action against a motor insurer in the courts of his or her residence. There is little to debate about this rule; it is simple, clear and unambiguous, unlike many of the choice-of-law rules which accompany it. Where the action is brought against the tortfeasor or the owner of the vehicle who is domiciled within the EU, Articles 2 and 5(3) of the Brussels I Regulation[19] direct that the defendant should be sued in the courts of his place of domicile or in the courts of the place where the harmful event occurred. In traffic accident cases this is unlikely to be a contentious issue.

### 1.2.2. Type of Obligations

This work is limited to consideration of non-contractual obligations which arise from traffic accidents. Although there might be contractual issues, as between a driver and a first party insurer, for example, or between a vehicle owner and a seller or repairer, the majority of conflict of laws issues, arising out of cross border traffic accidents, are going to be of a non-contractual nature and will concern third party claimants. It is these claims which are the focus of this work.

It should be noted that this work proceeds on the basis that a direct action against an insurer falls within this non-contractual category of case. Whilst there can be debate on this point,

[18] Case C-463/06 *FBTO Schadeverzekeringen NV v Odenbreit* [2007] ECR I-11321.
[19] Council Regulation (EC) No 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2001] OJ L12/1.

overall it looks likely that such claims will be classified as non-contractual for choice-of-law purposes. More discussion of this point can be found in chapters 2 and 3 [20]

## 1.3. The Aims and Approach of The Thesis

### 1.3.1. Aims

Cross border road traffic accidents have received very little in the way of academic attention in England. The reasons for this are unknown. With foreign travel, particularly to the near continent, easier and cheaper than ever and with more people taking advantage of that, there is a need to understand the likely choice-of-law outcome in the event of a cross border road accident. This Thesis takes on two distinct lines of enquiry.

The first aim is to discover what the choice-of-law outcome will be in a claim arising from a cross border road accident. Each instrument, mentioned above, is different in approach, scope and in the content of the rules contained therein. As such, a significant proportion of this work aims to explain: 1) to a limited extent, the methodological underpinning of the instruments, 2) when each might be applicable and 3) what the choice-of-law outcome will be.

As is highlighted in the chapters which follow, there is the potential for more than one choice-of-law regime to apply to a given scenario at the same time. Where there is a direct conflict, in as much as rules from different instruments apply to the same issue but point to differing applicable laws, we must be capable of determining which rule, from which instrument, will take precedence. The way in which the instruments currently interact with one another is examined by this work.

[20] See Chapter 2 at 2.3.1.2. and Chapter 3 at 3.5.3.1.

The second line of enquiry pursued by this Thesis is to consider which law ought to be the applicable law in the settlement of claims arising out of a cross border traffic accident. Here differentiation between the victim-tortfeasor relationship and the victim-insurer relationship is important because the balance of the relationship is different in each case.

In the victim/tortfeasor relationship, a typical traffic accident could involve two private vehicles which collide. In such a case, the parties meet each other on equal terms. Each party has accepted that they will be subject to the law of the place where the accident occurs; as much is implicit in the fact that the parties freely entered the territory of the state concerned. The parties are likely to be one time litigants with no, or limited, experience of legal procedures and rules. They are both likely to require specialist legal advice, which they may struggle to pay for. The relationship in the circumstance described is equal. There is nothing in such a scenario which would justify favouring one party, in choice-of-law terms, over the other. Accordingly, the applicable law rule should reflect the underlying aims and objectives of the relevant instrument and there is very little basis on which to argue for the rule to reflect any special policy.

This is not so for victim/insurer relationships. [21] Whilst the victim maintains the position outlined above of a one time, relatively naive litigant with limited resources at their disposal, as a result of the provisions of the MID, an insurer within the EU is already operating on an international stage, covering those it insures to drive in all EU Member States. Insurers have networks of claim handlers in all EU states, are more able to access legal advice and, importantly, are conducting a business with a view to making profit. Insurers deal with claims every day as part of that business and there is evidence to suggest that insurers exert a great deal of influence

[21] Although it might be said that insurers are instrumental in dealing with claims, even when brought against tortfeasors, it is argued that there is still insufficient basis on which to treat victim-tortfeasor claims as cases deserving of a special choice of law rule. See Chapter 4 at 4.9.1. for more discussion of this point.

over when claims are settled and for how much.[22] Despite this the victim protection emphasis of the MID is not reflected at the Private International Law (PIL) level.

Viewed in this way, the victim is not on an equal footing with the insurer, they are very much the weaker party. A central question posed by this Thesis is whether choice-of-law rules in the EU ought to reflect the realities of road accident litigation, where insurance is key to the compensation of victims. Ought choice-of-law rules to reflect the position of the victim as the weaker party in the proceedings, in line with the policy of victim protection prevalent in both the MIDs themselves and in the accompanying jurisprudence of the CJEU? The conclusion is that it should, and this work proposes changes to current rules in accordance with this view.

### 1.3.2. A Doctrinal Approach

This work is essentially doctrinal in nature. It is driven by consideration of a number of questions such as: what problems do the parties to the types of disputes under consideration encounter? What result is produced by the application of different legislative instruments to the same issue? Which outcome is the most appropriate for the parties? In addressing these questions primary sources of law, in the form of legislation and decided cases, are analysed, along with secondary sources such as explanatory reports, legislative preparatory materials and academic comment. This is built upon through the use of hypothetical scenarios which attempt to predict potential outcomes and problems. Where concerns are identified, recommendations are made for reform of the law on the particular issue.

This Thesis does not purport to be theoretical in nature.[23] However, reference is made, at times in this Thesis, to the apparent allegiance of an instrument or rule to a particular theory of

[22] See Lewis (n. 2), at 86.
[23] For an excellent overview of the various theories of private international law see P. Beaumont and P McEleavy *Private International law* (3rd edn, Green, 2011), Chapter 1.

conflict-of-laws. It can be helpful to contextualise, rationalise or criticise a choice-of-law provision, approach or outcome within the context of one theory or another. In fact, it is sometimes difficult not to draw out the features of an instrument as representing a particular set of theoretical assumptions, because in doing so it is possible to demonstrate how and why a particular value or policy has been accommodated.

#### 1.3.3. Comparative Aspects

The main comparative aspect of this work is manifested in the comparison of the four legal regimes relevant to the choice-of-law enquiry in the context of England and the EU, namely the Private International Law (Miscellaneous Provisions) Act 1995, Rome II, the Motor Insurance Directive and the Hague Convention on the Law Applicable to Traffic Accidents. This comparison is used to highlight different approaches to the resolution of choice-of-law problems and to consider which might work best in the context of the EU and, consequently, in England. In this work, brief reference is occasionally made to national, substantive rules on liability and compensation, with a view to better understanding the effects of any given choice-of-law rule.

### 1.4. Definitions

In this work there are some terms which are used in a particular way and these are explained below.

#### 1.4.1. Defendant

The term 'defendant' is used throughout this work to refer to any party to which a non-contractual claim is made in respect of loss arising out of a traffic accident. Many claims are settled outside of the litigation process and the claim may not be contested. The party who pays

any compensation may not, therefore, be accurately described as a defendant. However, 'defendant' is a useful term to use since there are a multitude of different parties to whom a claim might be put, including the driver, owner or insurer of a vehicle.

Moreover, use of the term 'defendant' is meant to convey a party's potential responsibility and liability in law, for the damage arising from the accident, but not necessarily any fault on that party's behalf.

### 1.4.2. The Motor Insurance Directives

The Motor Insurance Directives are referred to throughout this work and it is important to note why the reference is sometimes to the Directives and at other times only to the Directive. Five Motor Insurance Directives were adopted between 1972 and 2005. The provisions of each of these instruments have now been consolidated into a sixth Directive, which repeals each of the earlier ones. An attempt is made to minimise complexity in the discussion of these instruments, and so, wherever possible, reference is made to the provisions of the sixth Directive. This is referred to as the MID. However, at times, it is necessary to show the development of the rules and policies in this area over time, or to demonstrate the origins of a particular provision. Here the relevant Directive will be identified (e.g. the fourth MID) or the reference will be to the Directives collectively demonstrated by the acronym: MIDs.

### 1.4.3. Traffic Accident

An archetypal traffic accident would involve a motorised vehicle, such as a car, being driven on a public road, which collides with something or someone, potentially causing damage. However, the term 'traffic accident' can be a much broader concept than this. It might include accidents involving horse drawn carriages or accidents on private land. These incidents will still give rise to

non-contractual claims. This was understood by the drafters of the Hague Convention, who drew the scope of the Convention widely to cover any accident between one or more vehicles, whether motorised or not, and occurring on public or private ground. This is different from the MID, which, for the purposes of the regulation of compulsory motor insurance, only relates to motorised vehicles.

Whilst most traffic accidents will occur on public roads and involve motorised vehicles, for the purposes of this work the term 'traffic accident' follows the broader usage made of it in the Hague Convention. It was decided that it was not necessary to restrict the understanding of the term in any way, since this Thesis addresses issues concerning non-contractual obligations arising from any type of traffic accident, not only those to which motor insurance is relevant.

#### 1.4.4. Cross Border Traffic Accident

For the purposes of this work an accident will be considered to be cross border in nature when it is possessed of at least one element which is derived from a different country to the rest. This could mean that the parties to the accident are from different countries or that one of the cars is usually registered in a different country to that where the accident occurs. It would also be the case where a negligent repairer is based in a country different to that where the accident occurred, or where a coach or taxi operator is established in a country other than that of where the accident occurred or of where the victim is usually resident. An unrestrictive view of 'cross border' has been employed in this Thesis.

#### 1.4.5. Intra-Community Cross Border Traffic Accidents

The phrase 'intra-Community cross border traffic accidents' is designed to describe those situations which occur in the territory of the EU and concern the application of a law of one or

more of the states of the EU. The purpose of marking out such cases is to simplify the discussions that follow, to obviate the need to inform the reader repeatedly that the MID or Rome II will be applicable. From a legal perspective, these cases are concerned only with the laws of either the EU or of one of its Member States. In these scenarios there is no doubt about the applicability of Rome II or of the MID. Furthermore, it is useful to demarcate such cases in order to facilitate discussion of European wide policies or aims and objectives, which may have no relevance to situations outside of this class of case. [24]

## 1.5. Structure

This Thesis is divided into six further chapters. Following on from this introductory chapter, Chapter 2 examines the pre-Rome II position in respect of choice-of-law for cross border traffic accidents in England. Not only is it important to understand the changes that have been made to the law in England following the entry into force of Rome II, but it remains the case that some cases continue to be pursued under these rules, mainly where a particularly lengthy foreign limitation period is applicable under the Foreign Limitation Periods Act 1984.[25] Of more continuing relevance is the possibility of English national rules maintaining a sphere of application in relation to matters falling outside of the scope of Rome II. Most notable in this regard is the possibility for accidents involving military vehicles to continue to be governed by the pre-Rome II rules.

Chapter 3 begins the evaluation of Rome II as it applies to traffic accidents. Since this is the instrument of most relevance to questions of applicable law, considerable time and space is given over to consideration of its provisions. Chapter 3 examines the legislative process of the

[24] It should be noted that it is not necessary that all the parties to an intra-Community accident be resident within the European Union, only that the accident occurs there and the court hearing the cases belongs to a Union state. For example if an Albanian man is injured whilst walking down the street in England by a car driven by a English man, in an action before the English court the Albanian man would face the application of Rome II and the MID. If the action is brought before the court of Albania then that court would apply its own rules on insurance and choice-of-law, neither of which is of concern in this work.
[25] See Chapter 2 at 2.3.3.2..

regulation in light of the controversy caused by the issue of traffic accidents, before addressing those provisions dealing with the scope of the instrument.

Chapter 4 continues to reflect on Rome II's application to traffic accidents, moving on to look at the applicable law rules themselves, as well as whether there is a need for traffic specific rules.

Chapter 5 marks the move from consideration of applicable law rules in isolation to a more nuanced view of the traffic accident situation which takes account of the reality that insurers play a vital role in the compensation of victims. The chapter looks in detail at the Motor Insurance Directive, analysing its provisions and assessing their implications for cross border scenarios. The provisions of Rome II in respect of actions against insurers are then considered, before the relationship between the Directive and the Rome II Regulation is assessed.

Chapter 6 adds the final layer of detail to the overall picture. It is here that the Hague Convention is addressed. The scope and choice-of-law provisions are examined and are compared to the provisions of the '95 Act, Rome II and the MID. The relationship between the Convention, Rome II and the MID is then considered.

The Thesis is concluded in Chapter 7.

# 2. English Choice-of-Law Rules

## 2.1. Introduction

This chapter considers the English choice-of-law rules that pre-date the Rome II Regulation.[1] The reasons for this are two-fold. Firstly, the possibility remains open that, despite the adoption of Rome II, the applicable law for certain cross border road traffic cases will still fall to be determined under the national rules. In particular, cases relating to accidents which occurred prior to the entry into force of the Regulation will still be subject to the pre-Rome II rules.[2] Furthermore, there are some cases which may fall outside of the scope of the Regulation, by virtue of its Article 1. The example is given in Chapter 3 of accidents concerning military vehicles which could be viewed as an act of state authority. In accordance with Article 1(1) of Rome II such a claim might be excluded from the scope of the Regulation.[3] Although such a situation will be very rare, it is conceivable nonetheless.

The second reason for examining the English rules is in order that the change which has been effected by Rome II can be fully appreciated. English choice-of-law rules for claims in tort were subject to significant change when the common law double actionability rule was replaced by a statutory scheme in 1995. Arguably, the change realised by Rome II is substantially deeper and

[1] Regulation 864/2007 EC on the law applicable to non-contractual obligations [2007] OJ L199/40. Hereinafter referred to as Rome II.
[2] This is demonstrated by the recent English case of *Knight v. Axa Assurances* [2009] EWHC 1900 (QB); [2009] Lloyd's Rep. I.R. 667. In this case an accident occurring in France in 2005 was brought before the court in 2009. This was possible on the basis of the French limitation period of 10 years which applies in accordance with s1(1) of the Foreign Limitation Periods Act 1984. This, of course, is a limited and ever decreasing class of cases. Naturally this class of cases will diminish over time and will eventually cease to exist at all, but for the present the possibility remains.
[3] See Chapter 3 at 3.5.3.3.

more far reaching. In order to understand this impact however, the pre-existing national rules must firstly be examined.

It appears that elements of the reasoning process under the common law rules were imported into the statutory enquiry. Therefore, the main elements of the common law rules will be explored along with key issues which arose during the reform process. The statutory scheme will itself be examined and the appropriateness of its rules evaluated against the peculiarities of cross border traffic accidents, most notably, the impact of compulsory third party insurance.[4]

## 2.2. Choice-of-Law At Common Law

### 2.2.1. Double Actionability

The common law rule in respect of choice-of-law for torts is usually traced back to the well known judgment in the case of *Phillips v Eyre*.[5] The rule is summed up in the familiar passage from Willes' J judgment:

*"As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done."* [6]

Accordingly there are two limbs to the rule, hence the title, double actionability. Firstly, the action must constitute a tort under the *lex fori* and secondly, it must be not be justifiable under the *lex loci delicti*. The rule was subject to heavy criticism on the basis that it was unduly onerous

[4] On the matter of insurance, there are a unique set of issues relating to claims which are brought directly against a third party insurer. Chapter 5 is dedicated to consideration of this issue and therefore the matter will not be covered in detail here.
[5] (1870) L.R. 6 QB 1.
[6] Ibid 28-29.

for claimants, who had to prove a case under two systems of law,[7] and because many felt it to be parochial, since English law would apply regardless of whether or not there was any connection between the parties, the circumstances and England.[8]

The rule in *Phillips v. Eyre* was subject to detailed discussion in the later case of *Boys v. Chaplin*[9] where it was both refined[10] and developed. It was held that the rule should be subject to an exception. Whilst the case provided refinement and clarity on a number of issues, it is the acceptance of an exception to the double actionability rule which is of most significance.

### 2.2.2. The Exception

*Boys v Chaplin* concerned a road traffic accident which occurred between two English residents who were stationed in Malta on military postings. The first caused the second serious injury as a result of his negligent driving. Whilst there was no question that civil liability would arise under both English and Maltese law, there were significant differences in the amount of damages which would be paid.[11] The decision of the court was clear; the applicable law was English law. However, the means of the five Lords in reaching that conclusion were disparate and it has been recognised that it is not possible to extract a clear *ratio decidendi* from the case as a whole.[12]

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[7] See for example J. Blaikie 'Choice of Law in Delict and Tort: Reform at Last' (1997) Ed LR 361, at 362.

[8] Lord Wilberforce in his judgment in *Boys v. Chaplin*, recognised that: *'It may be admitted that it bears a parochial appearance: that it rests on no secure doctrinal principle: that outside the world of the English speaking common law it is hardly to be found. But can any better general rule be devised, or is the existing rule, with perhaps some adjustment, the best suited to our system?' Boys v. Chaplin* (1971) A.C. 356, 387.

[9] Ibid.

[10] Initially there was also doubt as to the exact nature of the rule which it was possible to interpret as either a rule of jurisdiction or of choice of law. This case confirmed that the rule was one relating to choice of law. Although the judgments in this case are not easy to rationalise but in the subsequent case of *Red Sea Insurance Co Ltd v. Bouygnes S.A and Others* [1995] 1 A.C.190 the opportunity was taken to make clear that the rule was indeed one of choice of law with the Privy Council stating: *"It seems to their Lordships that all the members of the House of Lords in Chaplin v. Boys indorsed r. 158(1) of Dicey and Morris in the eighth edition as a starting point in the exercise, not of deciding whether English courts should have jurisdiction, but of deciding which law should be chosen to determine the relevant issue or issues."* The case also confirmed that the action complained of must have given rise to civil liability under the law of the place where it was done (*Boys v. Chaplin* (n8) 377, 389).

[11] Maltese law did not allow recovery for pain and suffering.

[12] See the Law Commission *Private International Law Choice of Law in Tort and Delict* (Law Com W.P. No. 87, 1984) at p21. This was a joint paper prepared on behalf of both the Law Commission for England and Wales as well as the Law Commission for Scotland. Since Elements of Scottish law are not under consideration no further reference is made to this fact. Also see P. North and P. Webb *'Foreign Torts and English Courts'* (1970) ICLQ 24; A. Briggs *'What Did Boys v. Chaplin Decide?'* (1983) Anglo-Am L. Rev. 237.

Despite this, the following propositions may be made about the judgments:

i) A majority agreed that the rule in *Phillips v Eyre* applied and that this required double actionability. (Lords Hodson,[13] Wilberforce[14] and Guest[15])

ii) A differently constituted majority agreed that the double actionability rule required some flexibility in order that justice could be done in those cases where injustice would otherwise be carried out. (Lords Hodson,[16] Wilberforce[17] and Pearson[18])

However, it is difficult is to discern the basis on which that exception is to apply.

Lord Hodson, initially expressed some reservations about using a US-inspired 'proper law' approach.[19] However, he concluded that, in accordance with the American Law Institute, *Restatement (Second) Of Conflict of Laws* (1969), controlling effect should be given to the law which has the more significant relationship with the occurrence and the parties.[20]

Lord Wilberforce also favoured a US-style approach. But in contrast to Lord Hodson he appeared to make the type of enquiries made by a court undertaking interest analysis:[21]

*"Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to*

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13 See (n.8) 374-376.
14. Ibid, 384.
15 Ibid, 381
16 Ibid, 378.
17 Ibid, 391.
18 Ibid, 406.
19 Ibid. He stated at 378: *"No doubt if the proper law of the tort were to be adopted as the solution of those cases which arise from transitory torts, it is not easy to improve on the test chosen by the Master of the Rolls from the American Restatement, namely, the place with which the parties had the most significant connection. The [*claimant*] respondent did not seek to argue that the American theory of the proper law of the tort should be adopted but he submitted, and I think submitted rightly, that the words "As a general rule" should be interpreted so as to leave some latitude in cases where it would be against public policy to admit or to exclude claims. I am conscious that to resort to public policy is to mount an "unruly horse." It appears to me, however, to be in the interests of public policy to discourage "forum shopping" expeditions by the inhabitants of other countries."*
20 Ibid, 380.
21 Interest analysis requires the court to enquire into the policies of the potentially applicable laws in an attempt to decipher which has the most interest in being applied. It is a very flexible approach to solving choice of law questions leaving a wide discretion to the forum court. The method was first propounded in the US by Brainerd Currie, see 'Comments on Babcock v. Jackson, a recent development in conflict of laws' 63 (1963) Col L. R. 1233. For a critique of interest analysis see F. K. Juenger 'Conflict of Laws: A Critique of Interest Analysis' 32 Am J Comp L (1984) 1.

*that issue, the relevant foreign rule ought, as a matter of policy ... to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet."* [22]

In applying this to the case, he held that the Maltese rule could not be disapplied on the grounds of public policy or for the sake of 'justice', but rather an assessment had to be made as to whether the respective states had any interest in the application of their own rule. It was ruled that Malta had no interest in having its rule applied as between two British subjects neither of whom were permanently based in Malta. Conversely, there was no reason why the English court should renounce its own rule.[23]

The judgments of this case are undoubtedly difficult. However, the significance attached to the case in the years that followed it was very much focused on the creation of an exception to the *Phillips v. Eyre* 'general rule'.[24] The position that it would be where a particular law had the most significant connection with the parties and the occurrences, was greatly strengthened in *Red Sea Insurance.*[25] In this case, the Privy Council[26] ruled that an exception, formulated in these exact terms, also applied to the first limb of the double actionability rule.[27] The *lex fori* could be displaced where a third country had the most significant connection to the occurrences and the parties.

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[22] Ibid, 391-392.
[23] Ibid, 390-392. Lord Pearson, in disagreement with a majority of the House had ruled that double actionability was not required under the rule in *Phillips v Eyre.* He did however concede that, if he was wrong on this point, an exception would be required to ensure that the claimant succeeded. He gave no further reasoning on the basis or operation of such an exception.
[24] It was felt that the decision had permitted the courts to diverge from the second limb of the double actionability rule, although the differing bases for this conclusion left some lingering doubts about when and how it would be used. See for example P. North and P. Webb 'Foreign Torts and English Courts' (1970) ICLQ 24, at 34.
[25] See n. 10 above.
[26] While presiding as the highest appeal court for Hong Kong.
[27] The rule that was endorsed was that formulated by the editors of the 12th ed of Dicey and Morris (1993) as rule 203. Subsection 2 of the rule stated: *"But a particular issue between the parties may be governed by the j) law of the country which, with respect to that issue, has the* **most significant relationship with the occurrence and the parties***"* (emphasis added). L. Collins et al (eds) *Dicey and Morris on the Conflict of Laws* (12th ed, Sweet and Maxwell, 1993).

The case concerned claims against an insurance company, incorporated in Hong Kong, relating to construction being carried out in Saudi Arabia. When the works went awry, the plaintiffs sought to recover the cost of rectification from their insurer, Red Sea Insurance Co Ltd. Red Sea counterclaimed that the damage was caused by the negligence of some of the plaintiffs. Lord Slynn, delivering the judgment, considered that an exception to the general rule in *Phillips v Eyre* had been created in *Boys v Chaplin*. In particular, Lord Slynn quoted Lord Wilberforce's statements regarding the existence of the exception with approval.[28] He concluded by stating:

*"...the policy of insurance was subject to Saudi Arabian law, the project was to be carried out in Saudi Arabia and the property was owned by the government. The main contract, the supply contract and the consortium's service contract are all subject to the law of Saudi Arabia and were to be performed there. The breaches and the alleged damage occurred in Saudi Arabia. The expense of repairing alleged damage occurred in Saudi Arabia. The defendant, though incorporated in Hong Kong, had its head office in Saudi Arabia. ...*
[these factors] *all point to the exception being applied in this case. The arguments in favour of the lex loci delicti are indeed overwhelming."* [29]

The reasoning process of the court consists of a fairly mechanical weighing up of the connecting factors, which is indicative of a proper law approach.

It would be natural to question the significance of any of this, bearing in mind that the common law regime was abolished by Legislation in 1995. The 1995 Act does, however, contain an exception to the general rule or a rule of displacement which is framed in terms of the law of a country which is substantially more appropriate because of the factors which connect the tort to that country.[30] The factors to be taken into account are those relating to the parties and those

[28] (n10) at 200.
[29] Ibid at 207.
[30] Private International Law (Miscellaneous Provisions) Act 1995 Part III(hereinafter referred to as the '95 Act), s12.

relating to the events constituting the tort.[31] This has definite echoes of the common law test of most significant connection to the occurrences and the parties and a very similar, if not identical, weighing process as used in *Red Sea* has been used by the courts applying the statutory exception.[32]

### 2.3. The 1995 Act

*"[T]he uncertainty of the law disclosed by the history of [Boys v. Chaplin] is unlikely to escape the attention of the Law Commission."* [33]

Indeed, the Law Commission took up the challenge and began a project to reform choice-of-law rules for torts. In 1984 a Working Group published a consultation paper[34] in which it set out the case for reform of the law and possible options for such reform, including its preferred options.

In respect of traffic accidents the consultation paper found that in such cases identifying the *lex loci delicti* would not be difficult, since it would be the place where the collision occurred and that there was therefore no need to consider a more complex scheme like the one laid down by the Hague Convention to Traffic Accidents.[35] The Law Commission report which followed the consultation paper[36] confirmed this view.

The eventual result of the consultation on reform was the Private International law (Miscellaneous Provisions) Act 1995 Part III (the '95 Act). This constituted a new choice-of-law regime for most torts.[37]

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[31] '95 Act, s12(2).
[32] See below at 2.3.2.2.
[33] R. Graveson 'Towards a Modern Applicable Law in Tort' (1969) 85 LQR 505 at 515.
[34] Law Commission Working Paper (n 12).
[35] Hague Convention on the Law Applicable to Cross Border Traffic Accidents, 4 May 1971.
[36] Law Commission *Private international law: Choice of Law in Tort and Delict* (Law Com No 193, 1985)
[37] Part III of the Act only applies to those claims previously covered by the common law rules abolished by s10, namely the rules in *Phillips v Eyre* and *Boys v Chaplin*. Primarily this means that torts relating to maritime or aerial incidents, which were covered by other specific common law rules do not fall within the Act. See Morse 'Torts in Private International Law: A New Statutory Framework' (1996) ICLQ 888, at 889; Briggs 'Choice of Law in Tort and Delict' (1995) LMCLQ 519, at 521.

### 2.3.1. The Scope of the Act

The Act, in accordance with s14(1), applies only to those acts and omissions occurring after the commencement of Part III of the Act. The date of commencement was 1 May 1996.[38] The Act will apply to traffic accidents occurring after this date.

#### *2.3.1.1. Accidents Occurring in England*

In order for the common law rules of choice-of-law to apply, the act had to have been committed outside of the England.[39] With regard to the application of the Act s9(6) states:

*"For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country."*

It is consequently beyond question that the statutory scheme would apply to a road traffic accident having a cross border element, regardless of whether it occurred in England or on foreign soil.

#### *2.3.1.2. Tort and Issues in Tort*

Of central importance in the interpretation of the '95 Act is an understanding of which incidents and issues it will apply to. The Act provides in s9(1) that the rules in Part III of the Act apply to

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[38] Private International Law (Miscellaneous Provisions) Act 1995 (Commencement Order ) 1996, SI 1996 No 995.This meant that there were some claims brought in the early days of the legislation which concerned actions occurring before this date and to which the common law rules still applied. Clearly there can be no doubt that now, in 2013, there can no longer be any claim brought to which the common law rules would apply. Just to be sure of the affect of s14(1), s10 provides for the express abolition of the common law double actionability rules. It states:
*The rules of the common law, in so far as they—*
*(a) require actionability under both the law of the forum and the law of another country*
*for the purpose of determining whether a tort or delict is actionable; or*
*(b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question,*
*are hereby abolished so far as they apply to any claim in tort or delict*
This provision has to be read together with s14(2) which states that: *Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.*

[39] This was logical since the rule required English law to apply as the *lex fori* alongside the *lex loci delicti,* whatever that might be. If England is the *lex loci delicti* then there is no foreign element to consider.

determine the applicable law to issues relating to tort. Establishing an action as tortious or an issue as one relating to a tortious incident, is a matter of characterisation. In respect of this s9(2) states that characterisation is a matter for the courts of the forum. The Act omits to provide any further guidance on the matter.

In the main, third party claims arising out of traffic accidents will of course be thought of as tortious. What was less clear following the commencement of the Act was how direct actions against an insurer would be characterised.[40] An answer was not conclusively given until 2009, which is ironic, since by then Rome II had already entered into force, arguably changing the position again anyway.

The case of *Maher and Maher v. Groupama Grand Est.*[41] concerned an incident which, because of when it occurred, was still governed by national choice-of-law rules. The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by a French resident, M. Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M. Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The issues to be determined by the court were: (1) whether damages should be assessed in accordance with French law or English law and (2) whether pre-judgment interest on damages should be determined in accordance with French law or English law.

[40] Direct actions have been known to English law since the enactment of the Third Parties (Rights Against Insurers) Act 1930, which provides for a statutory transfer of rights against an insurer to a third party to whom the insured is liable and where that insured is subject to insolvency proceedings. This is due to be replaced by the Third Parties (Rights Against Insurers) Act 2010. However, a much broader right of direct action against motor insurers was incorporated into English law by the European Communities (Rights Against Insurers) Regulations 2002, in accordance with the requirements of Directive 2000/26/EC, the fourth Motor Insurance Directive.

[41] [2009] EWCA Civ 1191; [2010] 1 W.L.R. 1564.

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue.[42] The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law, as stipulated in both the Rome Convention[43]and Rome I.[44] Despite the defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that, therefore, the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3)*[45], held that it was not the claim that fell to be characterised, but each individual issue.

In the High Court, Blair J held that in a direct action against a third party insurer there may be issues regarding the breach of a duty by the wrongdoer (stage1), which he deemed to sound in tort. Alternatively, if the issue related to whether the insured is entitled to be indemnified by the insurer, then the issue would sound in contract (stage 2).[46] He stated:

*"At stage (1), the insurer is in reality no more than a surrogate for the tortfeasor, and it would be artificial for such questions as the law governing the tortfeasors liability to turn on the question of the law governing the contract of liability insurance which he took out. The question of the assessment of the damages in respect of which the indemnity is given arises at stage (1), and should be viewed as a matter arising in tort."* [47]

Because liability was admitted in the case the only remaining issue was assessment of damages, which related directly to the wrongdoer's actions, and was consequently characterised as

[42] See *Harding v. Wealands* [2007] 2 AC 1.
[43] Rome Convention on the law Applicable to Contractual Obligations [1980] OJ L266/1, implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Article .10(1)(c).
[44] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations [2008] OJ L177/6, Article 12 (c). This Regulatin is hereinafter referred to as Rome I.
[45] [1996]1 WLR 387.
[46] *Maher and Maher v Groupama Grand Est* [2009] EWHC 38 (QB), [2009] 1 W.L.R. 1752 [19].
[47] Ibid [20].

tortious.[48] Therefore, regardless of the applicable law, under English choice-of-law rules relating to tort it was the *lex fori* which was to determine the assessment of damages. Interestingly, Blair J made a further statement to the effect that the existence of a right of direct action was to be determined by the law applicable to the insurance contract.[49] This view was repeated in the Court of Appeal, where Moore-Bick L.J. stated:

*"If, in July 2005 a Dutch motorist insured by a German insurer had run down a British pedestrian in Strasbourg, resulting in an action in this country by the injured pedestrian against the insurer, one would expect issues relating to the driver's liability to be determined by reference to French law as the law of the place where the tort was committed (see section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 ), but issues relating to the insurer's liability under the policy of insurance to be determined by reference to German law as the proper law of the contract. For the same reason German law would also determine whether the injured pedestrian had a direct right of action against the insurer."* [50]

This example, illustrates, in fairly clear terms, the position in English law as regards direct actions against insurers, but in general has the potential to make life very complex and difficult for any future claimant trying to rely on English choice-of-law rules. In the example given by the Court of Appeal, the completely innocent victim would have to show that a right of direct action exists and argue about any issue of the insurer's liability under the law of the contract, which is not even the law of the defendant's habitual residence, whilst then making out a successful claim under a separate applicable law in relation to the driver's liability.[51] Damages will of course fall to be decided by English standards. The legal hurdles to be cleared are many and the potential for difficulty on the part of the claimant obvious. The issues relating to insurance are dealt with in

[48] Ibid.
[49] Ibid.
[50] *Maher and another v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] 1 W.L.R. 1564, [11].
[51] The applicable law in relation to the drivers liability is likely to be the law of the place of the accident under the rule in s11. See below under section 2.3.2. for discussion on the choice of law rules of the Act.

much more depth in Chapter 5, but suffice it to say here that generally it can be said that it is the insurer who is better able to absorb the cost of cross border litigation and who has at his disposal the resources to deal with the application of (even numerous) foreign laws.[52] The ruling of the English court in respect of direct actions tips the scales in favour of the party who already has the upper hand, and to whom any loss equates only to a business expense, rather than potentially a matter of concerning the quality of the victim's life. As will be seen, the position under Rome II is markedly different, although it remains uncertain whether the level of complexity of such cases has been adequately dealt with.

### 2.3.2. Choice-of-Law Rules

Having established that the Act is applicable to cross border traffic accidents attention now turns to the determination of the likely choice-of-law outcome. Choice-of-law in respect of torts is governed by s11, which provides a general rule, and s12, which provides a rule of displacement.

#### *2.3.2.1. The General Rule*

In respect of traffic accidents, the application of the general rule is in fact quite straightforward. Subsection (1) is of most relevance. The provision is worded as follows:

*"(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur."*

In a traffic accident, the collision and the damage usually occur in one place. Accordingly, it is the law of this place which will govern the claim. Section 11(2) provides for situations where the events giving rise to the claim occur in more than one country. It provides:

[52] See Chapter 5 at 5.4.

*"(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—*

*(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;*

*(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and*

*(c) in any other case, the law of the country in which the most significant element or elements of those events occurred."*

This could be used to allocate the applicable law when, for example, the collision occurs in one country but personal injury does not develop immediately but becomes apparent at a later time and when the victim is in a different country. In such a situation s11(2)(a) ensures that it will still be the law of the place of the collision which will apply, since this is the law of the place where the injury was sustained, even though it was not immediately apparent that this was so.[53]

#### *2.3.2.2. The Rule of Displacement*

Acceptance of an exception to the general common law rule firstly in *Boys v Chaplin* and then in *Red Sea Insurance* appears to mark the beginning, in England, of a new outlook where the wisdom of allowing a certain amount of flexibility in an effort to ensure justice in each particular case attained an orthodoxy. A rule of displacement, in the form of s12, also found its way into the '95 Act. The section provides as follows:

*"(1) If it appears, in all the circumstances, from a comparison of—*

[53] This has implications for the way in which claims by indirect victims are treated. For discussion on this point see Chapter 4 at 4.2.

*(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and*

*(b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.*

*(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."*

It is the issue to which the rule of displacement may apply, and not necessarily the whole tort. However, as was made clear in *Roerig v Valiant Trawlers*[54], this still requires a consideration of all the factors which connect the tort to a country before considering whether it is substantially more appropriate to try the issue by reference to a different law.

In accordance with s12(2) the factors to be taken into account are those relating to the parties, to any of the events constituting the tort or to the circumstances or consequences of those events. However the section is permissive. It refers to *'the factors which* ***may*** *be taken into account'*. This would suggest that the court is given a wide discretion as to which factors are relevant, but more importantly, there is no guidance at all as regards the weight to be given to those factors. It is this which gives rise to uncertainty in the operation of the rule of displacement. The decided cases suggest that the courts enter into a proper law process and have not displayed any desire to

[54] [2002] EWCA Civ 21; [2002] WLR 2304, [12]. This case is discussed further immediately below.

attempt to decipher the policy behind a particular rule for the purposes of determining which state has an interest in having the rule applied.

The phrase *'substantially more appropriate'* has been held to equate to a reasonably high threshold. In *Glencore v Metro Trading*[55] a number of claims arose out of the financial collapse of an oil storage facility. The facility was located at Fujairah in the United Arab Emirates. Whilst the contractual claims which arose were held to be governed by English law, it was held that claims arising in tort were not. The only connection to England was the fact that the contractual claims were governed by its law. In all other respects the tortious claims were connected to Fujairah, the place where all the events had taken place. The court found that there were insufficient grounds for the displacement of the general rule in s11.

In *Roerig v Valiant Trawlers*[56] Waller LJ stated: *'In my view the word "substantially" is the key word. The general rule is not to be dislodged easily."*[57]In that case a, Dutchman had been killed while working on an English registered trawler. The fact that the trawler was owned by the English defendant and that the tort took place in England (on an English registered trawler) meant that it could not be said that the law of the country of residence of the claimant was more appropriate.

In *Edmunds v Simmonds,*[58] an English victim sued an English defendant following a road accident in Spain. The defendant had been the driver of a car which collided with a lorry coming in the opposite direction. The claimant had been a passenger in the car. The court, upon weighing all the factors, held that s11 of the'95 Act should be displaced since, in much the same way as in *Boys v Chaplin,* both the claimant and the defendant were English, usually resident in England and that the claimant's damages arose in England. However, there was a significant difference in this

[55] *Glencore Int A-G v Metro Trading (No.2)* [2001] CLC 1732.
[56] [2002] EWCA Civ 21; [2002] WLR 2304.
[57] Ibid.
[58] [2001] 1WLR 1003.

case, as compared to *Boys v Chaplin*. The car the parties were travelling in was a hire car owned by a Spanish company and insured by a Spanish insurer. The defendant had issued Part 20 proceedings[59] against the insurer. In effect the claimant was not seeking to recover from the defendant, but from the insurer. Had the claim been brought directly against the insurer, the applicable law would undoubtedly have been Spanish law. By bringing the claim against the defendant the claimant was able to have s11 displaced in favour of the law of England, which provided for substantially higher damages.[60] Counsel for the claimant had submitted to the court that:

*"...once it is determined that the events constituting the tort arose from the defendant's loss of control, the involvement of the lorry is, so far as section 12 is concerned, irrelevant, and the tort is indeed a domestic one, save only that the insurers are Spanish. However, insurers of hire cars in tourist areas, a fortiori those who provide fly-drive services, must contemplate that the majority of the hirers will be foreign and that accidents will occur involving not only nationals but other foreigners with the consequent possibility of damages being quantified according to some other system of law."* [61]

The court accepted this submission.[62] The question is why are the circumstances in *Edmunds* so different to those in *Roerig* that the general rule should have been dislodged? In both cases the tort occurred in the country of residence of the party on whom the obligation to compensate resided. Yet in one case it was held that the general rule could not easily be dislodged and in the other the location of a key party, which accorded with the place of the tort, appears to have been tossed aside in the name of justice for the victim. The Court of Appeal in *Roerig*, despite making

[59] Civil Procedure Rules (1998) Part 20. Under rule 20.5 a defendant may make, with the permission of the court, a counterclaim against a party, other than the claimant.
[60] This point is made on the basis that a direct action was available to the claimant. In fact direct actions were not permitted in England at the time of this decision. But if they had been and the claimant had availed herself of that possibility the applicable law would have been Spanish law.
[61] *Edmunds v. Simmonds* (n58), 1010.
[62] Ibid.

mention of the decision in *Edmunds* in respect of the substance/procedure divide, failed to make any comment on the appropriateness of the weighing up of factors in that case. In *Harding v Wealands,*[63] the Court of Appeal held that the strongest connection between the defendant and the law of the place of the accident was the fact of her insurance there.

In terms of predicting outcomes, if the claimant and the defendant are both English, normally resident in England, then the law of England is most likely to be held as the applicable law. This will be so even though there is a foreign insurer involved, as long as the accident occurred in a place where tourism levels are high. Outside of this fact pattern the operation of s12 becomes far more difficult to predict. However, the general rule should only be displaced where the factors connecting an accident to a country other than that of the place where the accident occurred should, in practice, be overwhelming.

### 2.3.3. The Scope of the Applicable Law

Following the decision in *Maher* it can be said with confidence that the applicable law for issues arising out of cross border road traffic accidents (other than issues relating to an insurer's liability under a policy of insurance) will fall to be determined as '*issues relating to tort*'[64] under the '95 Act. However, further discussion is required in order to establish which issues will fall within the scope of the applicable law.

#### *2.3.3.1. Rules Relating to Liability*

The change from a system of double actionability, where the law of the forum always has a role to play, to a scheme which puts, at its heart, the law of the place where the incident occurred,

[63] [2006] UKHL 32 [2007] 2 AC 1 HL. This case is discussed fully below at 2.3.3.3.
[64] See s 9(1) of the Act.

must indicate a willingness to admit claims for actions which would not constitute tortious behaviour under English law. This is displayed in the Act by s9(4), which states that the applicable law should determine whether an actionable tort has occurred. Although this must mean that actions can be founded on causes of action not known to English law, it must also include those rules of a foreign legal system which determine liability. Should a French victim of an accident in France bring a claim against an English defendant in the courts in England for example, this might mean that the claim could be brought against the owner of the car under the strict liability scheme which operates in French law,[65] instead of having to bring the action against the driver as English law would require.

#### *2.3.3.2. Limitation Periods*

In respect of limitation periods, since the commencement of the Foreign Limitation Periods Act 1984, the law relating to limitation is to be considered as substantive and the relevant rule of the applicable law should be applied. Section 1(1) of that Act states:

*"(1) ... where in any action or proceedings in a court in England and Wales the law of any other country ... to be taken into account in the determination of any matter*
*(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings."*

Accordingly, claims which might be time barred under English law can still be brought under longer foreign limitation periods. As noted in the introduction to this Chapter, this explains, in

[65] France imposes such liability under Loi no. 85-677 of 5 July 1985, often referred to as the loi Badinter. See G. Viney and A Guégan-Lécuyer 'The Development of Traffic Liability in France' in W Ernst (ed) *The Development of Traffic Liability* (Cambridge University Press, 2010) p60-69.

part, the continued relevance of the pre-Rome II English rules, even though more than three years have elapsed since the entry into force of the Regulation.[66]

#### *2.3.3.3. Substance and procedure and the Quantification of Damages*

With regard to procedural matters, s14(3)(b) of the Act states:

*"... nothing in this part*

*(b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum."*

Any issue which is characterised as procedural shall be governed by the *lex* fori. It has long been the position at common law that the type of damages which are recoverable is a matter of substantive law for the applicable law.[67] However, the quantification of damage is considered to be a matter of procedure, to be governed by the law of the forum.[68] While settled at common law, questions arose upon the commencement of the 1995 Act as to whether the common law position was retained or whether a new scheme was created by the Act where assessment of damages could now be characterised as substantive.

In *Edmunds v Simmonds,*[69] an accident in Spain was held to be governed by English law.[70] However, the High Court also noted that had Spanish law applied the quantification of damages,

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[66] Under English law there is a standard limitation period of three years in force in respect of claims which consist of or include a claim in respect of personal injury (s11 Limitation Act 1980). Claims founded on tort which do not include an element of personal injury are subject to a six year limitation period (s2 Limitation act 1980) and time does not start to run on claims brought by minors until the claimant reaches the age of majority. Since many traffic accident claims will include a claim for personal injury any claim which occurred more than three years ago, before the entry into force of Rome II, will now be time barred. But as stated above under the Foreign Limitation Periods Act 1984 it is the limitation period under the applicable law which is relevant. This could be a much longer period, as in the case of *Jones v Assurances Generales de France (AGF) SA* [2010] I.L.Pr. 4, where the French 10 year limitation period applied.

[67] It is this fact that gave rise to the need to develop an exception in the case of *Boys v. Chaplin,* for if the matter had been seen as procedural English law would have determined it and the need for litigation would not have existed at all.

[68] See Lord Pearson in *Boys v. Chaplin* [1971] AC 356, 394.

[69] [2001] 1WLR 1003.

as a procedural matter, would have been governed by English law in any event.[71] In *Roerig v Valiant Trawlers,*[72] a question arose as to whether Dutch rules governing the recovery of certain benefits from any compensation awarded should apply. The applicable law was held to be English, but the court ruled that in any event the matter would have been one of quantification and, thus, of procedure for the *lex fori.*[73]In *Hulse v Chambers,*[74] it was accepted by the parties that the law applicable to a road traffic accident in Greece, was Greek law. After surveying the authority on the point, both pre and post 1995, Holland J, taking the conventional line, concluded that assessment of damages was a procedural matter for the *lex fori.*[75]

It seems, however, that the matter would not rest and the case of *Harding and Wealands*[76] raised the matter again. This case concerned a car accident in New South Wales, Australia. The claimant was an English national living in England. The Defendant was an Australian national who had been resident in New South Wales prior to meeting and beginning a relationship with the claimant, whereupon she moved to London to live with him. During a trip to Australia and whilst travelling in the defendant's car, which was registered and insured in New South Wales, the defendant lost control of the vehicle causing it to leave the road. The claimant suffered very serious injuries and was rendered tetraplegic.

The relevant statute of New South Wales would have imposed a cap on the amount of general damages recoverable, rendering the amount recoverable substantially less than was available under English law. The Court of Appeal held that there was no basis for a finding that the law of England was substantially more appropriate than the law of the place where the accident occurred, when this was also the national law of the defendant, as well as being the place where

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[70] On account of the fact that both the claimant and the defendant were English, normally resident in England, which was also where the majority of the damage arose.
[71] *Edmunds v. Simmonds* (n58), 1011.
[72] [2002] EWCA Civ 21; [2002] WLR 2304.
[73] Ibid, [27].
[74] [2001] 1 WLR 2386.
[75] See in particular para 9.
[76] [2006] UKHL 32 [2007]2 AC 1, HL.

the vehicle was insured. The strongest connection for the defendant was to the law of New South Wales and this had to be the applicable law.

With regard to the substance/procedure divide, the Court of Appeal took a more unexpected approach. The majority concluded that the Act, in giving precedence to the law of the place of the accident, meant that application of the law of the forum required an imperative which justified its application over that of the proper law. [77] Questions relating to the quantification of damages were held to be substantive since they affected the substantive rights and obligations of the parties.

The House of Lords reversed this decision, reaffirming traditional understanding. Lord Hoffman expressed the view that there was no uncertainty regarding the rule on substance / procedure and that the principle was a settled rule of English law. He stated:

*"Of course, taken out of context, the word "procedure" is ambiguous. In its narrow and perhaps most usual sense it means, as La Forest J expressed it in Tolofson v Jensen [1994] 3 SCR 1022 , 1072 those rules which "make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties". Or it can have a wider meaning which embraces what Mason CJ in Stevens v Head (1993) 176 CLR 433 , 445 called "the traditional equation drawn between matters relating to a remedy and matters of procedure". This is the sense in which the term has always been used in English private international law. If section 14 is read in its context, against the background of the existing rules of common law and the report of the Law Commission, there can be no doubt that the latter meaning was intended."* [78]

[77] Ibid [49] – [52].
[78] Ibid [36].

Any provision which goes to the measurement of remedy as opposed to the scope of liability will therefore be deemed procedural, in line with the common understanding of that term as used within private international law. [79]

This outcome has been heavily criticised, because the automatic selection of the law of the forum on this matter means that it will apply to cases where there is little or no connection to England, rendering application of English rules inappropriate.[80] It has also been argued that the outcome would disconnect issues of liability that were meant to go together with particular rules on damage, such as where a strict liability scheme only awarded limited damages due to ease with which liability could be established.[81] However, it seems that the law is now clear: the assessment of damages will be performed under the law of the forum – English law and the role of the applicable law is curtailed in this regard.

### 2.4. Conclusion

The English choice-of-law rules contained in the '95 Act, are characterised by a rigid general rule which is supplemented by a flexible rule of displacement, which utilises issue-by-issue analysis to enhance that flexibility. Discretion is afforded to the judge, who will weigh up all the factors of the case to arrive at the 'proper' law of the tort. This can make the outcome of the process uncertain to an extent. The Act, as interpreted by the courts, is reasonably clear in its scope. It is quite clear that traffic accidents fall under the ambit of the Act. The caveat here is, of course, direct actions against insurers. Depending on the issue at stake, direct actions might be categorised as tortious or contractual. But, in accordance with the decisions of the courts it is submitted that the characterisation should be easily predicted.

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[79] [2006] UKHL 32; [2007] 2 AC 1, [49] – [53].

[80] See for example A. Scott 'Substance and Procedure and choice of law in torts' (2007) LMCLQ 44, who states at 62: *'... one cannot help but lament the enactment of a choice of law scheme that ... unthinkingly selects the law of the forum irrespective of how inappropriate that selection may be. One cannot help but lament legislative drafting that requires preliminary resolution of difficult questions of common law in order to ascertain Parliament's intentions.*

[81] C. Dougherty and L. Wyles 'Case Comment: Harding v. Wealands' (2007) ICLQ 443, at 451.

As stated above, under the English rules the choice-of-law outcome is dependent on a somewhat uncertain weighing-up of the connecting factors. However, the strength of the connection created by insurance coverage does not appear to have been judged consistently. The correlation of the issue of insurance to the law of a particular country seems to depend on other factors, such as nationality. The strength of the insurer's position in relation to that of the victim has not been acknowledged and the reality of the insurer as being the one who provides the compensation has, at times, been disregarded. It is a striking feature of the English position on choice-of-law in torts, that, in spite of the prevalence of claims concerning road traffic accidents, the peculiarities of those claims, in terms of the relationship they have to insurance coverage, do not appear to have been instrumental in the approach to choice-of-law. The rules in respect of direct actions create undue, over-burdensome complexity for claimants who, under English rules have multiple hurdles to clear. This thesis, eventually reaches the conclusion that, in fact, the burden ought to swing the other way. It is insurers who ought to take the larger proportion of the burden in choice-of-law terms.

# 3. Rome II: Background and Scope

## 3.1. Introduction

For incidents occurring after its date of application, Rome II is of central importance in determining the law applicable to non-contractual obligations.[1] This includes the majority of claims which arise out of cross border traffic accidents. The subject of choice-of-law for cross border traffic accidents had, prior to Rome II, received relatively little consideration by academics. A small flurry of articles on the matter was, however, sparked by the legislative process of Rome II, where the issue of road accidents was raised by the European Parliament. [2] The issue was a source of debate between the European Parliament and the Council. It is worth recounting that debate, not only because it represents, in many ways, the beginning of the current debate on applicable law for traffic accidents, but also because understanding the positions of the various actors during the legislative process can aid our understanding of the direction the Regulation is travelling in when difficult issues of interpretation arise. It also provides a stark illustration of how, at the highest levels, the issues which are the most important in traffic accidents claims, that is to say, those concerning the part played by insurers in the settlement of claims, have not been fully appreciated.

[1] In those countries which will apply it. Rome II is applicable in all of the EU Member States apart from Denmark who opted out of the Regulation. See Article 1(4) and Recital 40 of Rome II. However, by virtue of Article 28 of Rome II a number of EU Member States, who are also signatories of the Hague Convention on the Law Applicable to Traffic Accidents of 1971 will continue to apply that Convention in place of Rome II to cross border road traffic accidents. This issue is discussed at length in Chapter 6.

[2] See for example A. Staudinger ' Rome II and traffic Accidents' Eu L. F. 2 (2005) 61; P. Hay ' Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's Rome II Regulation' EU L. F. 4 (2007) 137 at 144-145; J. von Hein 'Article 4 and Traffic Accidents' in A. Malatesta (ed) *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM, 2006); C. István Nagy 'The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping - How So?' (2010) 6 JPIL 93.

This chapter begins by discussing the methodology of Rome II. How the issue of cross border traffic accidents arose during the legislative process of Rome II is then examined. This chapter then attempts to draw the boundaries of the application of Rome II.

## 3.2. Methodology

Before discussing the legislative process of Rome II it is useful to say a few words about the conflict of laws methodology which is commonly followed in Europe, and which Rome II also came to reflect.

The majority of European private international law stems largely from the ideas of Savigny.[3] His theories promoted legal certainty, through value neutral, jurisdiction selecting choice-of-law rules. Rules following in this tradition do not pursue particular substantive outcomes in terms of applicable law, but determine the law to be applied on the basis of objectively ascertainable contacts with a state. These contacts demonstrate that that is the state to which the dispute is most closely connected.[4] The traditional approach seeks conflicts justice, that is justice between the parties at the conflict of laws level, as opposed to the substantive law level.

This is very different to the numerous approaches which were proposed under what is commonly referred to as the 'American conflicts revolution',[5] which, broadly speaking, pursue the aim of achieving substantive justice[6] The American approaches are characterised by

[3] Savigny's conflict of laws methodology was innovative in comparison to what had gone before it. It sought to locate the legal seat of the jural relationship. The ultimate goal was international decisional harmony and minimisation of forum shopping to increase legal certainty and thereby reduce transactional costs. See F.C Von Savigny *A Treatise on Conflict of Laws* (trans by W. Guthrie, T &T Clark, 1869). For a succinct overview see J. von Hein 'Something Old and Something Borrowed But Nothing New? Rome II and the European Choice of law Evolution' 82 Tul. L. Rev (2007-2008) 1663.

[4] S. Symeonides 'Material Justice and Conflicts Justice in Choice of Law' in P. Borchers & J. Zekoll, eds. *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers, 2001), at 127.

[5] Discontentment with jurisdiction selecting methods of deciding on choice-of-law issues grew during the 1950's and 60's in the US, where result-orientated methods for selecting the applicable law developed. Many scholars felt that the application of mechanical contacts, which were blind as to the substantive outcome achieved, could not be justified because:
*The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?* D. Cavers 'A Critique of the Choice-of-Law Problem' (1933).47 Harv. L. Rev. 173, 189.

[6] See for example: B. Currie *Selected Essays on the Conflict of Laws* (Duke University Press, 1963), A Ehrenzweig 'The *Lex Fori*' (1960) 58 Mich. L.R. 637; D. Cavers, ibid.

flexibility. Some also employ issue-by-issue analysis[7] and dépeçage.[8] The judge is afforded discretion when deciding which law would produce the most appropriate outcome. The main criticisms of the approaches are that they are unpredictable, uncertain and confusing.[9] This stems from the abandonment of hard and fast rules in favour of an open textured approach.[10]

However, Rome II can be said to be firmly rooted in the traditions of European conflicts thinking. It is jurisdiction selecting and does not enquire into the substantive approach a particular choice will give rise to. Commentators see Rome II as a refinement of the classical approach, it remains blindly jurisdiction selecting, although the inherent *'...rigidity is softened by special rules for various subcategories and exceptional situations, and by the availability of fact-oriented escape clauses."*[11]

Rome II does not embrace dépeçage (although it may occur under the Regulation in a limited way on occasion[12]) and the author is in agreement with this. The view of Mills, that the fragmentation of the applicable law will lead to an unbalanced result because a system of tort law

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7 Flexibility to achieve substantive justice is further enhanced if a case can be fragmented so that each legal issue is afforded a separate choice-of-law analysis, under what is termed issue-by-issue analysis. Such an approach more naturally accompanies the US approaches, but it also gives rise to a greater level of complexity and uncertainty. See A. Mills 'The Application of Multiple Laws Under the Rome II Regulation' in J. Ahern and W. Binchy *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations A New International Litigation Regime* (Martinus Nijhoff Publishers, 2009) 139-147.

8 Whereby the laws of different states are applied to different issues in the same case. The mere suggestion of dépeçage in European law has sparked criticism from European scholars, some of it fierce. Kreuzer, in a forceful statement states that it is: *"...extremely dangerous for a consistent and homogenous appreciation of a case."* K Kreuzer 'Tort Liability in General' in A. Malatesta (ed) *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (PADOVA, 2006), 68. Kozyris states: *"I am uncomfortable with dépeçage because I believe that the law in particular areas is a cohesive whole that cannot be easily cannibalized. I am particularly unhappy with the idea that the judge should be encouraged to concoct and apply a crazy-quilt set of provisions on an ad hoc basis."* P. Kozyris 'Rome II: Tort Conflicts On The Right Track! A Postscript To Symeon Symeonides' "Missed Opportunity" 56 (2008

9 See G Kegel 'Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers' (1979) 27 Am. J. Comp. L. 615 at 620-625.

10 See generally F. K. Juenger 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 Am. J. Comp. L. 1.

11 Th. De Boer 'The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation' (2009) Netherlands International Law Review 295, 331.

12 It seems that adherence to European tradition will likely guide the future application of the Regulation. In particular, the question whether dépeçage is encouraged or indeed accommodated at all under the Rome II will be guided by its legislative history and its methodological roots. There is some scope under Rome II for the application of different laws to particular issues, such as where a court, when applying foreign law, finds that there are certain provisions of domestic or EU law which are mandatory and overriding in nature. Here Article 16 of Rome II permits these provisions precedence over the otherwise applicable law. The same is true for matters of public policy under Article 26. However, the rejection of any provision explicitly referring to issue-by-issue analysis, along with the inclusion in Article 15 of a comprehensive list of aspects of a case which are to be governed by the law designated by the Regulation, strongly suggests that, true to European tradition, Rome II will not engage in any meaningful way with dépeçage, rather it will be accommodated to the extent necessary to avoid obscure or unjust results, such as through the application of Article 17, which ensures the application of rules of safety and conduct of the place of the incident. It would be ridiculous, for example, if liability were to be based on the fact that a liable driver were driving on the right when in France because English law requires him to drive on the left. See Chapter 4 generally.

exist as coherent whole, each part of it (rules of procedure, damages, liability) related to the others, is shared. Breaking up the applicable law, so that parts of one law are applied along with parts of other systems, is a pick and mix process that can lead to injustice and bias.[13]

A noticeable change from the English lawyer's perspective is now apparent. The English rule of displacement, contained in s12 of the '95 Act, is characterised by flexibility. The court is afforded discretion to arrive at a fair and just outcome in cases where the rigidity of the general rule is thought inappropriate. Although this tends to manifest as a weighing up of territorial connections, judicial support has been voiced for the flexible US approaches and issue by issue analysis is an accepted way of proceeding in England. This can no longer be under Rome II. English courts will find that they are more constrained than they are used to. It will be interesting to see how much use is made of the escape clause in Rome II.

## 3.3. The Legislative Process

The Commission presented an initial proposal for Rome II on 22 July 2003.[14]

### 3.3.1. The Commission Proposal

In its proposal the Commission presented Article 3, a general rule applicable to all torts not covered by any of the derogations listed under subsequent Articles. Article 3(1) ensured that the applicable law was that of the place where the damage arose, or was likely to arise. Article 3(2) provided an exception, in the form of the law of the place where both parties are habitually resident. Article 3(3) provided a further exception, enabling the court to apply the law of a country which is manifestly more closely connected to the non-contractual obligation. The only

[13] See Mills (n7).

[14] European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final. The journey towards harmonization of applicable law rules for non-contractual obligations actually began some 30 years earlier. However the historical background of Rome II is dealt with in detail elsewhere (see A. Dickinson *The Rome II Regulation The Law Applicable to Non –Contractual Obligations* (OUP, 2008), 23 – 44).

difference between the proposed Article 3 and the adopted Article 4 is that the wording of Article 4(1) has been adjusted so that the applicable law is that of the country where the damage occurs, instead of where it arises.

The Commission was eager to suggest that the general rule struck an appropriate balance between the parties stating that:

*"The rule ...reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim's legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation." '*[15]

### 3.3.2. Proposed Amendments From the European Parliament

At the first reading by the European Parliament[16] significant amendments were proposed to Article 3. The Parliament took the position that the fairly rigid rule adopted in Article 3(1) should be supplemented by a flexible 'interest analysis' inspired exception that would operate when a law that was manifestly more closely connected to the tort could be identified, in accordance with a non-exhaustive list of factors. One of the factors cited as creating a manifestly closer connection to another country was common habitual residence, thereby doing away with a separate common residence rule. Interestingly, factor (c) is the need for certainty, predictability and uniformity of result; while factor (e) instructs that the policies underlying the foreign law and the consequences of applying that law should be taken into account. In a new Article 3(3) the

[15] COM (2003) 427 Final, 11-12.
[16] European Parliament 'Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")' 27.6.2005, A6-0211/2005 FINAL.

Parliament's proposal instructs the court seised to subject each issue of a case to separate analysis when resolving choice-of-law questions.

Achieving a balance between the aims of the various factors in the proposed Article 3(3) exception would have been rife with difficulty. It is submitted that quite how factors (c) and (e) could have been balanced, in any meaningful way, is somewhat of a mystery. The introduction of issue-by-issue analysis would have resulted in the routine application of dépeçage, which would have increased the lack of uniformity. This, as discussed above, was rejected by most scholars as the way forward.

Diana Wallis, the rapporteur, claimed to be striving for maximum legal certainty, but appeared to have the victim's position most clearly in focus, stating:

*"This approach is designed to maximise legal certainty while allowing the courts to use their discretion in choosing the solution which best accords with the need to do* ***justice to the victim***[17] *and with the reasonable expectations of the parties..."* [18]

Concern for the position of victims also emerged from the Parliament report in the form of a proposed Article 3(1a), a provision specific to traffic accidents.[19] Under this provision the law of the victim's place of habitual residence would apply to the determination of the type and quantification of damages for those suffering personal injuries arising out of traffic accidents. The justification given for this position was linked to the provisions of the MID, where an injured party can bring a direct claim against the tortfeasor's third party liability insurer, in the court of that victim's country of habitual residence. [20] In light of this the Parliament argued that

[17] Emphasis added.
[18] EP Report (n.16), 19.
[19] Ibid, 18.
[20] Directive 2009/103/EC of The European Parliament And Of The Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11 (Hereinafter referred to as the sixth MID), Article 18 and Recital 34.

it would be more practicable for both insurers and courts if the law of that court also applied to the case.

There was initially doubt regarding the effect of the provisions of the MID on the jurisdiction rules contained within Regulation EC 44/2001,[21] with regard to direct actions against insurers. The case of *Odenbreit*[22] confirmed that in such cases the claimant may choose to bring his claim before the courts of his state of habitual residence. However, in its proposal, the Parliament did not draw a distinction between claims against tortfeasors and those brought directly against insurers. Here the justification completely breaks down. How can rules relating to insurance justify a choice-of-law outcome, in a dispute where none of the parties is an insurance company? Furthermore, the justification does not acknowledge that the courts of the victim's habitual residence would still have to apply a foreign law to all other matters and importantly to the issue of liability. Indeed, this would have introduced further noticeable complexity. Those who suffered both personal injury and property damage would need to have their claim dealt with under two different systems of law, without a sound rationale as to why. In addition, the explanation does not expound a complete or sound theory for why traffic accidents should be treated differently from any other type of tort, and why, therefore, traffic accidents require separate applicable law rules.

The rapporteur was clearly influenced by scholars from further afield. She had organised an internal working group which was attended by academic commentators from countries including Canada and the USA.[23] Papers written by those who attended the working group made suggestions, including reference in Article 3(3) to the law of the country which would experience

[21] Council Regulation (EC) No 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2001] OJ L12/1, hereinafter referred to as 'Brussels I'.
[22] Case C- 463/06 *FBTO Schadeverzekeringen NV v. Odenbreit* [2007] ECR I-11321.
[23] 'Rome II: an International Perspective' held on March 14 2005. Papers by speakers are available at <http://dianawallismep.org.uk/en/document/seminar-14-march>, accessed on 24 August 2013.

the consequences of the wrong doing, as oppose to the country of closest connection,[24] and the inclusion of issue-by-issue analysis.[25] The suggestions from those attending the working group, and the adoption by the Parliament of connecting factors based on the policies and consequences of potentially applicable laws, are out of step with tradition because they begin an enquiry into the substantive outcome of possibly applicable laws, before a choice-of-law is made.

### 3.3.3. Conflict Between The Parliament and The Council

The Council rejected the amended Article 3, stating that it would result in the application of one law to issues of liability and another to the issue of damages.[26] This was felt to be divergent from the position in Member States and, as such, it could not be undertaken without further study and consultation.[27] Ignoring the fact that European Private International Law is deeply rooted in the ideas of Savigny resulted in the Parliament's efforts being somewhat misguided. [28]

### 3.3.4. The Compromise

Upon the rejection of its proposal, the Parliament remained unhappy about the treatment of what its rapporteur saw as an issue which touched so directly on the daily lives of citizens. The Parliament persisted with its amendment following the second reading.[29] With the Council unable to accept the Parliament's position it became necessary to convene the conciliation

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[24] R. Weintraub 'The Choice of Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable , Consequences – Based, Or Neither?' 43 Tex. Int'l L. J. (2007-2008) 401 at 412- 413

[25] See S. Symeonidies 'Tort Conflicts and Rome II: A View From Across' in Mansel et al (eds) *Festschrift Fur Erik Jayme* (Sellier European Law Publishers, 2004).

[26] European Council 'Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (ROME II)' OJ C289E/68 [28.11.2006], 78.

[27] See Commission 'Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (Rome II)' COM (2006) 83 Final, 4.

[28] Symeonides expressed disappointment that more was not achieved by way of modernising the applicable law approach (largely in line with modern American approaches) which he argues would have been achieved by the acceptance of the Parliament's proposed amendments. However, he also acknowledges the practical realities of law making within the EU where traditions in private international law are heavily influenced by Savignian principles. See S. Symeonides 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 Am. J. Comp. L. 173, at 216-218.

[29] EP Report (n16).

committee. Agreement was eventually reached on 15 May 2007. The text finally adopted contains no rule specific to traffic accidents, which fall under the general rule, contained in what is now Article 4. A compromise however ensured the following: Article 30, a review clause which provides an undertaking to produce an implementation report on the operation of the Regulation on a number of issues, including the application of foreign law by the courts of Member States and the effects of Article 28 of Rome II, with respect to the Hague Convention on the Law Applicable to Traffic Accidents; a statement from the Commission which provides an undertaking to examine the specific problems faced by the victims of cross border traffic accidents and to provide options for improving the situation which would pave the way for a green paper; a curiously worded Recital (33) which directs the courts to consider, as a point of fact, the actual cost of treatment and aftercare, which the victims of traffic accidents will face in their country of habitual residence, when quantifying damages.[30]

In line with these undertakings a report has now been published on behalf of the Commission.[31] However, it produced no definitive answers as to what, if any, action should be taken.[32] As a result the Commission launched a public consultation[33] whereby it requested contributions from interested parties on a number of possible ways forward. 46 responses were received by the Commission, the vast majority from parties based in the UK. The responses were typically split according to whether they came from a party with an interest in the outcome for victims (in the main Claimant lawyers), or tortfeasors (in the main the insurance industry). A few responses from impartial respondents advocated a wait and see approach on the basis that the practical effect of Recital 33 ought to be assessed before any further action is contemplated. A summary

[30] For methodological consistency an approach which is founded on jurisdiction selection in the pursuit of certainty and predictability would not begin to enquire into the substantive outcome of a particular applicable law.

[31] Report, prepared by law firm Demolin Brulard Barthélémy for the Commission *Compensation of victims of cross-border road traffic accidents in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims* <http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf> accessed on 5 October 2011. Hereinafter referred to as the Commission Report.

[32] See Chapter 4 at 4.9. where this matter is discussed fully.

[33] Information on the consultation along with all the contributions received is available at <http://ec.europa.eu/internal_market/consultations/2009/cross-border-accidents_en.htm>.

of the responses was produced by the Commission, but as yet it is unclear if any further action is to be taken in response to the report and the consultation.

### 3.3.5. Concluding Remarks on the Legislative Process

The legislative history of Rome II is significant in highlighting the issues surrounding cross border traffic accidents. Nevertheless, in the English language at least, the subject remains largely untouched upon by scholars.[34] The legislative process itself may point to why. At no point during the debate about the plight of cross border traffic accident victims is the matter of insurance considered in detail.[35] Thus the subject remains one concerned with the age old jostle, in conflict-of-laws, between certainty of outcome and flexibility to achieve substantive justice in individual cases, in a subject area which is considered to represent the very epitome of a non-contractual obligation. The lack of interest can be forgiven.

It is only once the full implications of the scheme of compulsory third party insurance are appreciated, through an in depth look at the MID, that the subject can be revived as one having intellectual appeal. It is regrettable that the Parliament, despite making a brief reference to the MID, failed to recognise the role that insurers play in traffic accident litigation. There is evidence to suggest, in the UK at least, that insurers hold the power to directly impact upon tort litigation.[36] It is they who decide which cases will go to trial, which will receive compensation and sometimes how much.[37] Further, claims arising out of traffic accidents account for the majority of all tort litigation and of insurance claims.[38] Whilst in other areas weaker parties have received

[34] Although, see n. 2 above.
[35] It is highlighted in the Commission report, but then only by way of providing alternatives to a change in choice-of-law rules. Commission report (n.30), 44-46.
[36] See the very illuminating Article written by Richard Lewis: 'Insurance and the Tort System' 25 LS (2005) 85.
[37] See D. Harris, *Compensation for Illness and Injury* (Oxford: Clarendon Press, 1984); H. Genn *Hard Bargaining* (Oxford: Clarendon Press, 1987).
[38] See Lewis (n.36), 90.

protection from choice-of-law rules,[39] traffic accident victims have not even had their position as a weaker party acknowledged.

The legislative process is also important because it reaffirms the traditional methodology of the Regulation as jurisdiction selecting and value neutral. This will surely be reflected in the interpretation of Rome II.

## 3.4. Interpretation

### 3.4.1. The Need to develop Autonomous Meanings

Since CILFIT[40] it has been clear that the court must take account of the different language versions of a measure of Community law, which all possess parity of authenticity, and that the objectives and overall scheme of the measure must be considered.[41] It is also clear that measures of Community Law, which fall to be interpreted, will not be affected by interpretations given to national law concepts by the internal systems of Member States.[42] In order to ensure uniformity of application, provisions will be given autonomous meanings.

Moreover, it is likely that the provisions of Rome II will have to attain consistent meanings with the provisions of the Rome I, and Brussels I Regulations as well. The three instruments have been described as:

[39] Such as in relation to consumer contracts concluded by distance means (Article 6 of Rome I), or consumer insurance contracts (Article 7 of Rome I). See J. Hill *Cross Border Consumer Contracts* (OUP, 2008), chapter 12.
[40] Case 283/81 *CILFIT Srl v. Ministry of Health* [1982] ECR 3415.
[41] Ibid at 3430.
[42] See D. Lasok and T. Millet *Judicial Control in the EU* (Richmond Law , 2004), 375.

*"... a 'trilogy' of community law .. intended to create a uniform private international law of civil and commercial obligations ... characterised by a common concern: to favour the predictability of law, judicial certainty within the European legal space and transparency."* [43]

Lein considers that this gives rise to a synergy between the respective instruments, whereby they each employ freedom of choice, the principle of closest connection and the principle of protection of the weaker party, in furtherance of the fundamental objectives of uniformity of outcome, certainty and predictability.[44] If the instruments are designed to act in unison, for common primary purposes, then it is natural that the terms they employ should achieve uniformity of interpretation as well. Briggs and Rees put it another way:

*"It is inherently unlikely that those who drafted these instruments intended the central definitional terms to have divergent meanings: they were all drafted in Brussels, and comprise the jigsaw parts of what will one day soon be a private international legal code for the Member States."*[45]

Indeed, Recital 7 of Rome II requires that its provisions and scope be consistent with that of Brussels I and Rome I, stating:

*"The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and the instrument dealing with the law applicable to contractual obligations."*

Recital 7 of Rome I contains almost identical wording.[46] Furthermore, since Brussels I is a derivative of the Brussels Convention and Rome I is a derivative of the Rome Convention, and

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[43] E Lein 'The New Rome I/Rome II/Brussels I Synergy' 10 (2008) YBPIL 177, at 178.
[44] Ibid, 179.
[45] A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (London, Informa, 4th edn, 2005), 2.214.
[46] Referring however to Rome II, instead of to the instruments dealing with the law applicable to contractual obligations. Also see Rectial 17 of Rome I which requires a particular interpretation of the phrases 'provision of services' and 'sale of goods' in line with Article 5 of Brussels I. For comment on this see Z. Tang 'The Interrelationship Of European Jurisdiction And Choice Of Law In Contract' (2008) JPIL 35.

the Regulations will often follow their predecessor Conventions on matters of interpretation, the interpretation of the Conventions may also have relevance for Rome II. Decisions of the CJEU also provide evidence of uniformity of interpretation between the Rome and Brussels Conventions, where the interpretation and meaning of the Rome Convention has been used to influence the interpretation given to Article 5 of the Brussels Convention.[47]

The detrimental consequences of the complexity that would be caused by attributing different 'autonomous' meanings to the same words or phrases, depending on which instrument they are contained in, should be obvious. However, the method of achieving the underlying goal of certainty and predictability sometimes diverges, depending on whether the question relates to jurisdiction or choice-of-law. As Lein documents, Brussels I is based on protection of the defendant from unfairly being sued in a jurisdiction he could not have anticipated, through the defendant domicile principle. Conversely, Rome I puts more emphasis on the law which is most closely connected to the circumstances.[48] What is being suggested here is that, when interpreting Rome II, the interpretation of terms which have gone before, in relation to other instruments of European private international law, cannot simply be ignored. There may be a reason why they are not to be followed, but the discussion must be had, and often the answer will come from a consideration of the instruments together, rather than one in isolation.

### 3.4.2. The Role of Recitals

Within Rome II itself, the Recitals will be important in the discovery of the objectives of the Regulation, but it must always be remembered that the Recitals do not bear the weight of legal rules and cannot be relied upon in this manner.[49] However, in the *Dumez* and *Marinari*[50] cases,

[47] See for example case C9/87 *Arcado v. Hailand* SV [1988] ECR 1539, at 15 and Case C133/81 *Ivenel v. Schwab* [1982] ECR 1891, at 13-14.
[48] Lein. (n43), 196. Also on the subject of the interrelation of rules on jurisdiction and choice of law see Z. Tang (n46).
[49] Case C215/88 *Casa Fleischhandel v. BALM* [1989] ECR 2789, [31].

decisions of the CJEU were founded on the objectives of Brussels I, as expressed in Recitals 11 and 15, that the allocation of jurisdiction should promote the sound operation of the internal market by providing rules which are highly predictable and minimise concurrent proceedings, which could produce irreconcilable judgments.

The objectives pursued by Rome II can be said to be both numerous and somewhat utopian.[51] Set out in the Recitals to Rome II, they are in keeping with the certain and predictable outcomes necessary under the traditional approach to conflict of laws, closely followed in Europe. Recital 6, for example, calls for predictability, certainty and uniformity, for the facilitation of the internal market. These aims are repeated in Recital 16. However, other Recitals are more reminiscent of the modern approaches which have been preferred in the last 50 years in the U.S. of treating individual cases in an appropriate manner, such as Recital 14 which states that doing justice in the individual case is essential.

However, for Rome II the fundamental justification remains the sound operation of the internal market. If the objectives set out in the Recitals of Rome II, of objective certainty and predictability, are thought to support the tenuous connections that Rome II has to the proper functioning of the internal market, they will likely be the foundation on which interpretation of the Regulation will stand.[52] In this way any balancing of the various and potentially competing

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[50] Case C-220/88 *Dumez France SA v. Hessische Landesbank* [1990] ECR I-49; Case C364/93 *Marinari v. Lloyds Bank Plc* [1995] ECR I-2719. Discussed fully in Chapter 4 at 4.2. .

[51] The objectives of Rome II are comprehensively catalogues by de Boer (n.11) where their chances of realisation are also assessed.

[52] In the opening sentence of the preamble of Rome II the basis for it is identified as being: *'... in particular Articles 61 (c) and 67* [of the Treaty establishing the European Community]' Article 61 EC provides: *In order to establish progressively an area of freedom, security and justice, the Council shall adopt: ... (c) measures in the field of judicial cooperation in civil matters as provided for in Art 65.* Article 65 EC provides: *Measures in the field of judicial cooperation in civil matters having cross border implications, to be taken in accordance with Art 67 and insofar as necessary for the proper functioning of the internal market, shall include: (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.* What is clear from Article 65 is that to fall within its scope a measure must be necessary for the proper functioning of the internal market. During the legislative process of the Regulation the UK House of Lords was highly critical of the proposed measure stating: *'Any measure under Articles 61 and 65 has to be justified by reference to the internal market and in particular one or more of its four freedoms. ... There is no explanation in the Commission's text as to how the proposal would facilitate the exercise of any of the four freedoms on which the internal market is based.'* The House considered in particular two of the proposed provisions as being problematic: Article 2 on universal application (now Article 3) and Article 25, which contained a prohibition on non-compensatory damages (this no longer forms a part of the text of the Regulation). In respect of the then Article 2 the House concluded that: *'Article 2 provides that the Regulation is to have universal application. Rome II is not restricted to cross*

aims and objectives of the Regulation might be tipped in favour of uniformity and certainty. To do otherwise might be to stray too far from the purported legal basis of the Regulation.

Indeed, in the recent decision of the CJEU in *Homawoo*[53] the court's decision on the interpretation of Rome II was founded on the need to achieve an interpretation which ensured:

*"... in accordance with Recitals 6, 13, 14 and 16 of the Regulation, the full attainment of the Regulation's objectives, that is to say the predictability of the outcome of litigation, legal certainty as to the law applicable and the uniform application of that regulation in all the Member States."* [54]

It is submitted that the objectives of certainty, predictability and uniformity of application will be the primary guiding influence on the interpretation of Rome II.

### 3.5. The Scope of Rome II

Through a number of its Articles, Rome II is limited in scope. Although for the most part third party claims arising out of traffic accidents fall squarely within the Rome II ambit, there are, at the edges, some cases which give rise to the need for discussion. The main Articles dealing with the scope of Rome II are Article 1, which determines the material scope of Rome II, Article 15, which provides a non-exhaustive list of the aspects of an obligation the law designated by the Regulation will apply to, Article 3, which together with Article 1(4), 25 and 28, determines territorial scope and Articles 31 and 32, which together with Article 297 TFEU, determine the temporal scope of Rome II. Article 15 deals with, what can be described as, the scope of the

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*border or intra Community disputes. The Regulation would apply in a case where all the circumstances giving rise to the action occurred outside the Union. Its rules could lead to the application of the law of a third State. One might ask why the choice of law rules in the Regulation should apply, for example, to a traffic accident in the USA where the defendant is domiciled in England. What connection does the traffic accident and the resultant civil litigation have with the functioning of the internal market? We do not believe that the mere fact that a party may be sued in a Member State or that the circumstances of the case may involve an EU citizen is sufficient to give the Union legislative competence to determine the relevant conflict rule and, consequently, remove domestic legislative competence. Some connection or relationship between the matter and the functioning of the internal market must be established.'* House of Lords' European Committee, 'The Rome II Regulation', 8th Report of Session 2003-2004 (HL Paper 66), [67] – [70].

[53] C-412/10 *Homawoo v. GMF Assurances SA* [2011] ECR I-00000. This was a traffic accident case where the issue concerned which system of law should govern the quantification of damages

[54] Ibid, [34].

applicable law, whilst the other Articles mentioned deal with the question of whether the Regulation applies at all. It is the latter category of provisions that will be dealt with here. Article 15 is dealt with in Chapter 4 along with the rules of applicable law themselves.

### 3.5.1. Territorial Scope

The final clause of Rome II states:

*"This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community."*

This, however, has to be read together with Article 1(4), which makes clear that for Rome II 'Member State' refers to all the EU Member States apart from Denmark. Accordingly, Rome II is applicable in all the courts of the EU Member States apart from Denmark. [55]

#### *3.5.1.1. Article 25*

In respect of territorial application, a brief note should to be made of Article 25. The Article states:

*"1. Where a state comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.*

[55] Denmark opted out of Rome II and so will continue to apply its own national rules of the law applicable to non-contractual obligations.

*2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units."*

Article 25 mirrors Article 19 of the Rome Convention. It is significant that in both the Giuliano – Lagarde report on the Rome Convention[56] and the original proposal of the European Commission for Rome II,[57] special mention was made of the United Kingdom in relation to this measure. It seems that the UK is considered to be such a state with several territorial units each having its own rules of law in respect of non-contractual obligations. Thus, under Article 25(1) should an accident occur in Scotland between a Scottish motorist and a French motorist the relevant applicable law will be Scots law rather than English law. Under Article 25(2) the UK is not required to apply Rome II to accidents involving for example a Scottish motorist and an English motorist, although the wording '*shall not be required to apply'* suggests that the Regulation may be applied if that is desired.[58]

#### *3.5.1.2. Article 28*

Probably most importantly with regard to traffic accidents and the territorial application of Rome II, is Article 28. Article 28 (1) states:

*"This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations."*

[56] M. Guliano and P. Lagrde 'Report on the Convention on the law applicable to contractual obligations' (1980) OJ C282/1, 42.
[57] Commission proposal (n.14), 28.
[58] On this point note Dickinson(n.14), 3.293.

Twelve EU Member States[59] are signatories to the Hague Convention on the Law Applicable to Traffic Accidents.[60] Under Article 28 of Rome II these countries can continue to apply the Hague Convention to claims arising out of cross border traffic accidents, in place of Rome II. Indeed, the signatory states notified the European Commission that they intended to continue to apply the Hague Convention in derogation from Rome II.[61] This is a severe blow to the goal of uniformity being attempted by Rome II. It means that whilst Rome II does apply to every EU Member State (apart from Denmark) in relation to traffic accidents it has no general application in almost half of those countries. The scheme of the Hague Convention and its relationship to Rome II is considered in full in Chapter 6.

#### *3.5.1.3. Article 3*

Under Article 3 Rome II enjoys universal application so that the law specified under it shall be applied whether or not it is the law of a Member State. At present it might be said that Article 3 would be unable to accommodate a choice-of-law rule which only applied to intra-community situations. Such a rule might cut across Article 3 because it would only concern those situations where all of the relevant parties, events and factors where situated within one or more EU Member State. Peter Stone has said of Article 3 that it:

*"...avoids the entirely perverse complexity which would arise from any attempt to distinguish between intra-Community and extra-Community disputes."*[62]

Article 3 requires complete freedom as to the choice-of-law outcome and choice-of-law rules cannot be restricted by the definition of a rule as concerning only intra-community situations.

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[59] Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Slovenia, Slovakia and Spain.
[60] 4 May 1971.
[61] See Notifications under Article 29(1) of Regulation (EC) No 864/2007 on the law applicable to non- contractual obligations (Rome II) (2007) OJ C 343/7.
[62] P. Stone 'The Rome II Regulation On Choice Of Law In Tort' Vol.4 No.2 (2007), Ankara Law Review 95, at 100.

However, it is argued in Chapter 5 that the scheme of the MID can provide, through its policies and structure, justification for the proposition that in intra-community cross border traffic accidents, the law of the victim's home state should be applied to claims brought directly against the insurer. Such a rule would amount to one dealing with intra–community situations separately from those involving factors outside of the Union. The proposition is only made possible because of the specific polices enshrined in the MID. Here Article 3, simple though its application may be, appears as a somewhat blunt instrument, unable to take account of Community schemes and policies.

Whilst many situations may give rise to *'perverse complexity'* in trying to distinguish 'intra' and 'extra' community disputes, it is relatively straightforward to predict when the MID is operative. The rules of the MIDs require each EU Member State to ensure that every vehicle based in its territory is covered by insurance.[63] From this we can determine that if a vehicle is based in an EU Member State then the MIDs are operative. Furthermore, the victim protection measures of the MIDs cover victims who suffer loss outside their normal Member State of residence.[64] Thus, only victims of loss caused by vehicles normally based within the EU can take advantage of the more favourable provisions. This gives a firm and clear basis for limiting, territorially, a traffic specific choice-of-law rule, without causing unwarranted difficulty.

It is submitted that a restrictive view of Article 3 should not be allowed to stand in the way of the development of rules designed for specific intra community purposes, in support of community policies. It is in fact possible that the amendment suggested in Chapter 5 would not cut across Article 3 at all. Because the proposed measure is limited by reference to the applicability of the MID there is no need to define an intra–community accident as distinct from an extra-community one. Rome II would still be applicable in all cases, regardless of the details

[63] The sixth MID, Article 3.
[64] Ibid, Article 20.

of the incident, but in some cases (i.e. direct actions to which the MID is applicable) one choice-of-law rule would be applicable and in others a different rule would govern the question. This is similar to the current situation, where some of the rules of Rome II are subject specific.

### 3.5.2. Temporal Application

By virtue of Article 32, Rome II applies to all traffic accidents occurring after the date of application of the Regulation, which is 11 January 2009. What was rather less clear was whether it also applied to accidents occurring on or after 20 August 2007. The uncertainty arose because of the combination of Article 31 and Article 32 of Rome II.

Article 31 states:

*"Application in Time*

*This Regulation shall apply to events giving rise to damage which occur after its entry into force."*

Article 32 states:

*"Date of application*

*This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008."*

Article 297 TFEU provides that

*"Legislative acts shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication."*

Was there an effective date of entry into force to be found in the Regulation under Article 32, despite the reference being to 'date of application'? Certainly at least one commentator felt that

there was nothing to distinguish *'Application in Time'* from *'Date of Application'* other than the name.[65] The converse view was that there was no date of entry into force to be found in the Regulation so that, in accordance with Article 297 TFEU, it would enter into force 20 days after its publication in the Official Journal, on the 20 August 2007.[66] This view gave rise to a further question of whether this also resulted in retrospective effect being given to the rules of Rome II, so that they would apply to damage sustained after the entry in force (20 August 2007) in proceedings brought after the date of application of the Regulation (11 January 2009).

Unsurprisingly, this issue was quickly referred to the CJEU by the English court in *Homawoo v. GMF Assurances SA*[67], a cross border traffic accident case. The case concerned a direct action against the insurer of the liable driver. The question was whether under the previous English conflict of laws rules, which distinguish between substantive and procedural rules, the *lex fori* should apply to the quantification of damages, or whether under Rome II, French law should determine compensation. The court found that Rome II did not contain any date of its entry into force and that accordingly the date of entry into force, as determined by Article 297 TFEU was 20 August 2007. This, the court found, was congruent with the fact that Rome II required certain measures to be taken before its date of application, such as the requirement under Article 29 that Member States notify the Commission of any international Conventions to which they are a party and which also lay down choice-of-law rules, by 11 July 2008. The Commission was also required to publish a list of such treaties in the Official Journal of the EU within six months of receipt.[68]

[65] See F. Garcimartin Alférez 'The Rome II Regulation: On the way towards a European Private International Law Code' [2007] Eu LF 136.
[66] See for example M. Wilderspin 'The Rome II Regulation; Some Policy Observations' (2008) 4 NiPR 408 at 411.
[67] C-412/10, ECR [2011] 00000.
[68] Ibid [30[-[33].

Despite this finding the court went on to consider that, if this resulted in the retrospective application of the rules of Rome II, to incidents occurring between the date of entry into force and the date of application, disparity of outcome was likely. The court stated:

*"By contrast, those objectives are likely to be compromised if the Regulation were applied to events occurring between its entry into force and the date set by Article 32. Indeed, as noted by the applicant in the main proceedings, the United Kingdom Government and the Commission, it cannot be ruled out that two events occurring on the same day, before 11 January 2009, might then be governed by different laws depending on the date on which the proceedings seeking compensation for damage were brought and that on which the applicable law was determined by the court seised. Furthermore, the obligations arising from an event occurring in the same place giving rise to damage to several people might be governed by different laws depending on the outcome of different legal proceedings."* [69]

The court concluded that Rome II could only apply to events giving rise to damage, which occurred after its date of application: 11 January 2009.[70]

### 3.5.3. Material Scope - Article 1 (1)

Article 1 has been described as setting the horizontal limits of the scope of Rome II.[71] Article 1(1) provides:

*"This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters..."*

[69] Ibid [35].
[70] Ibid [37].
[71] Dickinson (n. 14), 3.59

#### *3.5.3.1. Non-contractual Obligations*

To fall within the scope of Rome II a matter must be one characterised as non-contractual.[72] This is likely to be a term which requires autonomous definition. Recital 7 of Rome II provides that the substantive scope of the Regulation shall be consistent with the provisions of Brussels I, the Rome Convention and Rome I Regulation. Effectively, a claim which could be characterised as either contractual or non-contractual must be one or the other for the purposes of these instruments.

There is an important category of claim considered by this Thesis, the characterisation of which is not entirely certain. This work proceeds on the basis that direct actions against insurers will fall within the scope of Rome II. This seems most likely, since Rome I contains no provision on direct actions at all, whilst Rome II does.

Without being able to survey the position in each Member State in an attempt to second guess which way the CJEU might rule on this matter, firmer footing for the assumption is elusive. But, a basis on which to proceed was required and for the time being this seems the most logical. For the purposes of this work a direct action is thought of as a non-contractual obligation falling within the scope of Rome II. It is possible that Article 18 of Rome II could relate only to whether a direct action is permitted, leaving the claim itself to be characterised as contractual, whereby Rome I would designate the applicable law.[73] However, if correct, this would be a very awkward approach to the matter, unnecessarily complex and gauche.

If the assumption is correct then there will be a marked difference between the approach to direct actions under Rome II from that under the English pre-Rome II provisions, where the courts expressed a preference for viewing the right to a direct action, as well as the liability of an

[72] At the level of Private International Law at the very least.
[73] See chapter 5 at 5.3.1.

insurer under a policy of insurance, as contractual issues to be determined by the law as designated by the Rome Convention or Rome I.

#### *3.5.3.2. Situations Involving a Conflict of Laws*

With regard to '*situations involving a conflict of laws'* the Commission, in its original proposal, clarified that this refers to:

*"...situations in which there are one or more elements that are alien to the domestic social life of a country that entail applying several systems of law."* [74]

So long as one of the parties involved in a traffic accident is not usually resident in the country of occurrence, then it is submitted that this requirement will usually be satisfied.[75]

However, the recent case of *Jacobs*[76] raises a question with regard to this provision and traffic accidents. The Court of Appeal found that the case did not give rise to a situation involving a conflict of laws, despite the fact that the claimant was English but the accident occurred in Spain, with the uninsured tortfeasor being of German nationality. Whilst the High Court applied Rome II unquestioningly to answer the question of which law should apply to the quantification of damages, in a claim brought against the English Motor Insurance Bureau,[77] the Court of Appeal was persuaded by arguments from Counsel for the claimant that the situation in fact raised no question of conflict of laws at all.

The right to bring an action, against the MIB of the country of residence of the victim of an uninsured driver, stems from the MID where the relevant provision states:

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[74] Commission proposal (n.14), 8.

[75] It will at times be important to distinguish between the liable driver and the owner or registered keeper of a vehicle, in order to take account of those systems of law which impose strict liability on the owner or keeper of the vehicle, who do not have to also be the driver at the time of the accident. This is so in France, for example, where such liability is imposed under Loi no. 85-677 of 5 July 1985, often referred to as the loi Badinter.

[76] *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208; [2011] 1 WLR 2609.

[77] For an explanation of why and how the claimant brought a claim against the Motor Insurance Bureau, which acts as the compensation body in the UK for the purposes of the MIDs, see Chapter 5 at 5.5.

*"...each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."* [78]

However at the national level this provision was implemented into UK national law by Regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003,[79] which provides:

*"(2) Where this regulation applies—*

*(a)the injured party may make a claim for compensation from the compensation body, and*

*(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Directive] as if it were the body authorised under paragraph 4 of that Article* ***and the accident had occurred in Great Britain."*** [80]

Effectively, once transposed to the national level the provision becomes domesticated. It concerns the application of domestic law to a domestic body and it can be understood why the English court concurred with the position agreed upon by the parties, that the situation did not concern a conflict of laws. It is not entirely clear that the CJEU would take the same view of the matter. However, this issue is set out in much further detail in Chapter 5, where the full scheme of the MIDs is laid out and the rationale behind it made clear. Suffice it to say here, that there is at least one type of claim, which can arise out of a cross border road traffic accident, where Rome II may not be applicable.

[78] Article 10(4), sixth MID.
[79] SI 2003/37.
[80] Emphasis added.

### *3.5.3.3. Acta Iure Imperii*

An issue of some interest arising out of Article 1(1) is that of State Immunity. The last sentence of the Article states:

*"It shall not apply, in particular, to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)."* [81]

The uncertainty is whether the Regulation would apply to accidents involving military or police vehicles, or those vehicles used to transport foreign diplomats? For example, would an action for damages resulting from a collision in England, between a French tourist and an English police vehicle, which had been travelling in excess of the speed limit in pursuit of a suspect, fall within the scope of Rome II? Alternatively, would Rome II apply to a collision in Cyprus, between a Dutch pedestrian and an English military vehicle, which was not travelling within one of the UK Sovereign Base Areas in Cyprus?[82]

Although Article 1 of the Brussels Convention (and subsequently the Brussels Regulation) did not specifically exclude *acta iure imperii,* a number of cases fell to be decided where the court was asked to consider whether the proceedings of the case concerned an act of a public nature, such that it did not fall within the term *'civil and commercial matter'*. The first notable case was that of *Eurocontrol*[83] With regard to acts of state authority the court stated:

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[81] The provision in Article 1(1) mirrors the generally recognised principle of international law that a state cannot be sued in the courts of another state for acts which were done in the exercise of public authority. This principle was enshrined in the European Convention on State Immunity of 16 May 1972. Although it should be noted that only 8 states are thus far signatories to the Convention. It is also contained in the United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004. Article 11 of the European Convention excludes immunity in proceedings relating to personal injury or damage to tangible property. This is enacted in English law by s5 of the State Immunity Act 1978. However, despite this it is still necessary to consider whether under Rome II a claim arising out of an act in the exercise of state authority in certain circumstances would fall within the Regulation's scope.

[82] This scenario and the reasons it could arise are explained in detail below.

[83] Case C-29/76 *Luftitransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541. This case involved a dispute over payment of route charges for the use of air safety services provided by Eurocontrol (the European Organisation for the Safety of Air Navigation) to LTU as the owners of aircraft, was held to concern the exercise of public power by a public authority.

*"Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers. Such is the case in a dispute which, like that between the parties to the main action, concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive."* [84]

Actions by officials of a bank were subsequently held, by the English court, to fall outside of Brussels I in *Grovit.*[85] The actions of bank officials could not be deprived of their public law nature because they constituted the performance of governmental supervisory function, which had been delegated to the bank by the Dutch Government.

However, this does not entirely preclude actions by private individuals against the state from the term '*civil and commercial matter'*. The CJEU has ruled that certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention. What is key is that the public authority must not be acting in the exercise of its public powers. In *Sonntag*[86] The CJEU held that a teacher-pupil relationship was essentially private in nature, since in most Member States the acts of a school teacher are not manifestations of public authority power. The duty owed to pupils is the same whether the teacher is employed by the State or by a private school. The case did, therefore, fall within the term *civil and commercial matters*.

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84 Ibid, [4].

85 *Grovit v De Nederlandsche Bank* [2007] EWCA Civ 953; [2008] 1 WLR 51. Here, in exercise of regulatory and supervisory functions delegated by the Dutch Government, officials of a bank refused to grant a request for registration in the Netherlands by a group of companies operating money transaction offices. A letter was sent stating the reasons for the refusal, including that the Directors and Executives of the group of companies were untrustworthy in a number of regards. The claimant began proceedings for libel.

86 Case C- 172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* [1993] ECR *I*-1963. In this case a school teacher tried to argue that a case against him for negligence following the death of a pupil under his care on a school trip did not fall within the meaning of '*civil or commercial matter'* because he was the holder of a public office and his supervision of pupils was, as such, governed by administrative law.

### *I. Vehicles Driven By Those Holding Public Office*

How does this impact on the cross border police chase, described above? Would any claim arising out of an accident, which resulted from the excessive speed which the police officer was travelling at, be decided under the law chosen by Rome II? The answer is difficult because, whilst on one hand it is the status of the police officer as an official of the state which permits him to travel at speed in pursuit of a suspect, on the other hand, this could be a matter of private law where it is open to the victim to prove that the defendant is liable to her under the normal rules of civil law.

In England for example, in the case of *Gaynor v. Allen,*[87] it was held that regardless of s3 of the Road Traffic Act of 1934, which exempted police officers from observing the speed limit in certain cases, the officer in question was in exactly the same position as any "civilian" driver, and owed the same duty to a pedestrian whom he had knocked down whilst riding his motorcycle at 60mph in an area where the limit was 40mph, in the exercise of his duties. More than this, in the case of *Marshall v. Osmond,*[88] it was held that not only did the police owe a duty of care to other road users in a general sense, but that this also included a duty towards the suspect they were pursuing at high speed. In the case, when the vehicle being pursued stopped and the suspect tried to evade capture by running away, the police car negligently hit the claimant causing him injury. In the leading judgement Sir John Donaldson MR held that:

*"I think that the duty owed by a police driver to the suspect is, ... the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in all the circumstances."* [89]

[87] [1959] 2 Q.B. 403. It has however been held that the fact that an emergency vehicle is speeding is not in and of itself evidence of negligence. See *S (A child) v. Keyse* [2001] EWCA Civ 715; (2001) 151 N.L.J. 817.
[88] [1983] Q.B. 1034.
[89] Ibid, 1037.

To this can be added consideration of the requirements of the MID. Article 5[90] states, in relation to the obligation placed on EU Member States to ensure that every vehicle in its territory is covered by third party insurance, that:

*"1.A Member State may derogate from Article 3 in respect of certain natural or legal persons, public or private; a list of such persons shall be drawn up by the State concerned and communicated to the other Member States and to the Commission.*

*A Member State so derogating shall take the appropriate measures to ensure that compensation is paid in respect of any loss or injury caused in its territory and in the territory of other Member States by vehicles belonging to such persons."*

This provision demonstrates, at the level of the EU, a desire to ensure that all victims of road traffic accidents receive compensation, regardless of who causes the accident and whether or not the vehicle is exempt from the scheme of compulsory third party insurance. It can be reasoned that, the requirement to pay compensation, together with the fact that in England public office holders are subject to the same rules on liability as other road users, suggests that driving is an activity whereby the driver undertakes a duty of care to other road users, regardless of whether he is present on the road in a private or public capacity. Consequently, it may be said that, in the main, it should matter not whether a driver is a private person, or acting on behalf of the state when he causes an accident for the purposes of Rome II. Any cross border claim should be governed by the law designated by Rome II.

However, the phrase *'civil and commercial matter'* is one which, as demonstrated by the cases concerning the Brussels Convention, requires uniform and autonomous interpretation. In coming to a position on this point the CJEU would likely take into account the situation in a number of the Member States. If the matter were dealt with in a radically different way in other

[90] This provision originally appeared in a slightly different form in Dir 72/166/EEC, (hereinafter 'the first MID'), Article 4.

states it is not inconceivable that accidents, caused by those acting in the capacity of a public office holder, could be ruled to fall outside of the scope of Rome II.

### *II. Military Vehicles*

In the case of *Lechouritou,*[91] the CJEU found that the operation of armed forces is a characteristic emanation of state sovereignty. Here claims in respect of wrongful actions committed by German forces against Greek citizens in Greece, during WWII, were held to fall outside the scope of the Brussels Convention. The court stated:

*"there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy. ...*

*... a legal action such as that brought before the referring court therefore does not fall within the scope ratione materiae of the Brussels Convention as defined in the first sentence of the first paragraph of Article 1 thereof."* [92]

In terms of Rome II the case of *Lechouritou* points strongly to the view that all military operations, whether in times of peace or conflict, are the very essence of the exercise of public authority and state sovereignty. The example given above of a member of the British armed forces injuring a Danish resident in Cyprus, whilst on official duties but not within the sovereign base area, provides interesting food for thought.

A former British colony, Cyprus attained independence from the UK following agreement between the UK, Greece, Turkey and the two communities of Cyprus (Greek and Turkish Cypriots). Agreements were reached in London and Zurich in 1959 and 1960 respectively, and

[91] C-292/05 [2007] ECR I-1519.
[92] Ibid [37]-[39].

formed the basis for the Treaty Concerning the Establishment of the Republic of Cyprus.[93] Signed in Nicosia, on 16 August 1960, the Treaty established the Republic of Cyprus as an independent state, but with the retention of two areas referred to as sovereign base areas (SBA), which remained under the sovereignty of the UK.[94] The SBAs were retained for military purposes, but under Section 4 of Annex B of the Treaty, it was agreed that the UK authorities would have the right to use:

*"...roads, ports and other facilities freely for the movement of formed bodies of troops, and convoys of vehicles, of the land, sea and air armed services of the United Kingdom, to and from and between the Akrotiri Sovereign Base Area, the Dhekelia Sovereign Base Area..."*

There was an understanding of the potential for damage to be caused to third party civilians by members of the armed forces, who were acting in the performance of official duty outside of the SBA, because of the freedom to move around the island granted by Section 4 of Annex B. Section 9 of Annex C provides, specifically in sub-paragraph 6, that any claim, other than a contractual claim, arising out of an act or omission of members of a force or civilian component, done in the performance of their duties, should be submitted to an appropriate officer appointed by the Republic of Cyprus. This officer, after concluding an investigation, should send to the UK authorities the particulars of the claim along with results of his investigation, his opinion and any relevant expert reports or other documentary evidence obtained by him or submitted by the claimant. At this point the UK Authorities are to consider the claim and decide whether to make an offer of compensation, and if so, the amount of that offer. Any dispute arising out of the decision of the UK Authorities is, under Section 9 (6)(e), to be determined by an arbitrator. The Arbitrator is to be appointed in accordance with Section 9 (2)(b) of Annex C, which provides that the Contracting parties should agree on the selection of a suitable party from the nationals

[93] Hereinafter referred to as the 'Cyprus Treaty'.
[94] Article 1 of the Cyprus Treaty.

of the Republic of Cyprus who hold or have held High judicial office. Where agreement cannot be reached within 2 months either party may request that the President of the High Court of the Republic of Cyprus should make the selection.

No figures are readily available, but logic would dictate that as a percentage of the total number of road traffic accidents, those involving military vehicles must be very low indeed. However, the situation in Cyprus demonstrates quite clearly the potential for cross border traffic accidents to occur in which military vehicles are involved. Under Article 5(2) of the MID Member States may act in derogation of the obligation in Article 3 to ensure that all vehicles normally based in its territory should be covered by compulsory third party insurance in relation to:

"*certain types of vehicle or certain vehicles having a special plate ; the list of such types or of such vehicles*

*shall be drawn up by the State concerned and communicated to the other Member States and to the Commission."*

The presumption is that military vehicles could fall within this class of vehicles eligible for exemption and if so need not be covered by insurance. In these circumstances the Member State concerned should ensure that:

*"...vehicles referred to in the first subparagraph are treated in the same way as vehicles for which the insurance obligation provided for in Article 3 has not been satisfied."*

Under Article 10 of the MID Member States are required to establish a body responsible for the payment of compensation to victims of traffic accidents, where the duty to insure has not been met. Thus when the armed forces decide not to provide compensation following a traffic accident, claims arising out of damage caused by military vehicles should be met by this body. What is striking, therefore, is that, again, regardless of the type of vehicle, or whether the driver is performing state duties or not, the EU has determined that all victims should be treated in the same way and be guaranteed the payment of compensation, either by means of insurance or,

where there is no insurance, by payment from a compensation body. Of course rather different arrangements were put in place by the Cyprus Treaty, which would have seen the matter decided ultimately by arbitration. It is questionable whether Rome II would have applied to the envisaged arbitration,[95] but the arrangements in the Cyprus Treaty were concluded before the first MID was adopted and, since the MIDs are mandatory rules of Community law, the Cyprus Treaty must be read and modified accordingly.[96] Any victim should now have the opportunity to bring a claim before the relevant compensation body in accordance with Article 10 of the MID.

However, despite the guarantee of compensation, the question being dealt with here is not whether a victim is entitled to be compensated but rather, which choice-of-law regime should apply to any dispute arising out of accidents involving military vehicles. It is difficult to escape the conclusion that the presence of military vehicles and the operation of those vehicles within a state which is foreign to the country where the vehicle is normally based, is the very personification of an exercise of state authority. Either the vehicle is there in the capacity of the aggressor, in times of war or occupation, or the vehicle is there, as in Cyprus, through the conclusion of a multi-lateral Treaty, which only a state has the power to conclude. Either way the presence of the vehicle is itself evidence of state authority. As such it is very difficult to see how a dispute which arises following an accident caused by such a vehicle, whilst on operational duty, could fall outside of the exclusion in Article 1 of Rome II. It is submitted that Rome II should not apply to these types of incidents. On the basis of s5 of the English State Immunity Act 1978 however, if immunity is excluded from actions for personal injury and property damage then presumably an English court would apply the law designated by the '95 Act to resolve the dispute.

[95] See Dickenson (n14), 3.78-3.81.
[96] The relationship between the MID and international treaties is set out in Chapter 6 at 6.6 and 6.7.

### 3.5.4. Article 1(2) and 1(3)

Articles 1(2) and 1(3) further define the scope of the Regulation, by setting out a number of matters which are excluded from its application. These include non-contractual obligations arising out of family relationships, or between settlors, trustees and beneficiaries of a trust (Article 1(2)) and to evidence and procedure (without prejudice to Articles 21 and 22) (Article 1(3)). None of the excluded matters have a particular bearing on the issue of traffic accidents.

## 3.6. Conclusion

The legislative process of Rome II was effective in bringing traffic accidents, as a specific issue in choice-of-law, to the fore. What was not achieved was a full understanding of the way in which traffic accident claims are usually settled and the rules under which insurers have to operate. Understanding this may have led to stronger, more nuanced reasoning in support of a traffic specific provision for Rome II.

Rome II achieves reasonable success in terms of its scope for traffic accidents. Choice-of-law questions arising from most traffic accidents will fall to be decided under the Regulation. Temporal uncertainties have now been settled and it is reasonably clear to which disputes Rome II will apply materially. There is only one type of claim which is currently seen as not involving any conflict of laws, along with the issue of military vehicles, which may not fall within the scope of Rome II in accordance with Article 1(1). What is most notable from the discussion regarding the interpretation of Rome II is that the objectives of certainty, predictability and uniformity of choice-of-law outcome are of vital importance in the application of Rome II. For this reason it is unfortunate in the area of traffic accidents that barely half of the states where Rome II is applicable will actually use the instrument to determine applicable law, as a result of Article 28 which permits the remaining countries to apply the Hague Convention instead. This is a direct

blow to the pursuit of the Regulation's objectives. Suggestions for the amendment of this situation are made in Chapter 6.

# 4. Choice-of-Law Under Rome II

## 4.1. Introduction

Since the entry into force of Rome II, national choice-of-law rules are left with a minor, residual role in the determination of applicable law for cross border traffic accidents. This chapter will attempt to ascertain what the applicable law outcome is most likely to be under Rome II. Consideration is given to Article 4(1), the general rule, Article 4(2), the rule relating to shared habitual residence and Article 4(3), the escape clause. The issue of concurrent actions is examined along with the impact of party choice under Article 14.

The scope of the applicable law as set out in Article 15 is considered. Attention is then given to matters which may affect the applicability of the designated law, such as rules of safety and conduct under Article 17. Finally, the need for traffic specific choice-of-law rules is considered. This discussion takes account of the report produced into the effects on victims of a cross border road traffic accident, on behalf of the European Commission and the subsequent consultation that took place on the same matter.

Chapter 5 is dedicated to consideration of the issues which arise under claims against insurers. Consequently no mention is made here of Article 18 of Rome II which deals with direct actions against insurers. Discussion of Article 16, on overriding mandatory provisions of the forum, is also reserved for Chapter 5, since rules which are likely to be overriding in respect of traffic accidents relate to insurance and so it is more appropriate that they are dealt with there.

## 4.2. The General Rule – Article 4(1)

Article 4(1) states:

*"Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."*

Whilst it is referred to as the 'general rule', Article 4 (1) is actually somewhat of a default position, only relevant if there are no other applicable provisions. It will be displaced if, for example, the parties validly agree to the application of a particular law (Article 14) or share a common habitual residence (Article 4(2)). This being said, it is submitted that, owing to the haphazard and unexpected nature of traffic accidents, the rule in Article 4(1) will have much practical significance.

The application of Article 4(1) causes very little interpretative difficulty. Whilst it makes a distinction between the place where the event giving rise to the damage occurs and the place where the damage actually occurs, and plumps for the latter, the Commission, in its original proposal, specifically mentioned traffic accidents, stating that here the country in which the damage occurs is the place of the collision.[1] This is further underscored by Recital 16, where the importance of foreseeability of court decisions and the need to strike a fair balance between the parties is reiterated. This, it is claimed, is achieved by the application of the *lex loci damni.* Indeed it is easy to see that, unlike torts such as environmental damage where the harmful conduct can take place in one country while the effects of that conduct felt in another, the damage that arises from a traffic accident is immediate and occurs at the place of the accident. In this way the result

[1] European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final, 5.

is the same as under s11(1) of the English '95 Act. Although in the Act the rule is expressed as *lex loci delicti,* the result in straightforward traffic accident cases is the same.[2]

However an issue remains concerning indirect damage. This is highly relevant to traffic accidents since the inconvenience and delay caused by such incidents have the potential to cause indirect damage virtually anywhere. Debate centres on where the line is to be drawn between indirect damage[3] and indirect victims.[4] The jurisprudence of the CJEU in relation to Article 5(3) of the Brussels Convention[5] and Regulation (EC) 44/2001[6] has already addressed this issue in relation to issues of jurisdiction. The decisions of the court can operate as a guide to the way the issue may be dealt with under Rome II. [7]

In *Dumez,*[8] a parent company located in France tried to bring proceedings in the French courts for damage it suffered when a German bank suspended a loan, which was funding a property development scheme, leaving the subsidiary company (located in Germany) insolvent. The claimant argued that it had suffered damage directly in its place of business, i.e. France, but the CJEU ruled that the choice of jurisdiction, of either the place of the event giving rise to the damage, or the place of the damage, allowed in the case of *Bier,*[9] was only permitted in special cases where there was a particularly close connection to the courts of a country other than that of the Defendant's domicile which:

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[2] See chapter 2 at 2.3.2.1..

[3] That is damage which is consequential to the initial damage caused by an action. For example, if a car accident causes personal injury this is direct damage. However, if the victim has to seek medical treatment and this causes him to miss an important business meeting and the loss of a lucrative contract, this would be indirect damage.

[4] Being persons who are not involved in an incident directly but suffer loss or harm through their association with someone who is. For example, if the pregnant wife of a man who is killed in a car accident suffers a miscarriage because of the distress caused by the bad news, the wife would be an indirect victim of the accident.

[5] Convention of 27 September 1968 on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters.

[6] Council Regulation (EC) No 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2001] OJ L12/1 Hereafter referred to as Brussels I.

[7] See for example *Modus Vivendi Ltd v British Products Sanmex Co Ltd* [1996] F.S.R. 790; Case C-68/93 *Shevill v Presse Alliance SA* ; [1995] ECR I-415; Case C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] E.C.R. I-6511; Case C-18/02 *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation* [2004] E.C.R I-1417; Case C-168/02 *Rudolf Kronhofer v Marianne Maier and Others* [2004] E.C.R. I-6009.

[8] Case C-220/88 *Dumez France SA v. Hessische Landesbank* [1990] ECR I-49.

[9] Case C68/93 *Handelskwekerij GJ Bier BV v. Mines de Potasse d'Alsace* [1976] ECR 1735.

*"... justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings."* [10]

In *Marinari,*[11] an Italian national deposited promissory notes with a branch of Lloyds bank in Manchester. When the staff suspected the origin of the notes, they called the police and the claimant was arrested. Mr. Marinari brought an action in the Italian courts for the value of the promissory notes, compensation for his arrest, and damage to his reputation, as well as for breach of contract, on the basis that that was where his assets were and that was therefore, where he had suffered damage. The Italian court made a reference to the CJEU, asking whether indirect damage was also subject to the rule in *Bier*. The court, using very similar language to that which had been used in *Dumez,* held that it was not in accordance with the objectives of the Convention to allow cases other than those specifically provided for to be subject to the special jurisdiction rule in *Bier.*[12]

These two cases are concerned with technically different points. The latter case concerns indirect damage to a direct victim, and the former, direct damage to an indirect victim. Rushworth and Scott[13] rightly point out that the wording of Article 4(1) of Rome II precludes any attempt by a direct victim to claim in accordance with the law of the place of indirect damage.[14] With regard to indirect victims, however, they submit that Article 4(1) should apply to any direct damage suffered.[15] They point to two factors: the lack of reference to the case of *Dumez* in the Commission's proposal for Rome II, and the fact that it will on occasion be difficult to characterise a victim as direct or indirect. Further, since the exception in Article 4(3) can be used to achieve an alternative result if required (unlike the Brussels regime where no flexible exception

[10] *Dumez* (n8) [17].
[11] Case C-364/93 *Marinari v. Lloyds Bank Plc* [1995] ECR 2719.
[12] *Marinari* (n11), [11]-[14].
[13] A. Rushworth and A. Scott 'Rome II: Choice of Law for Non-Contractual Obligations' [2008] LMCLQ 274 at 278.
[14] Ibid.
[15] Ibid, 279.

is available), there is no reason to replicate the *Dumez* decision under Rome II, to exclude direct damage suffered by indirect victims.[16] With all due respect, the reasoning employed by Scott and Rushworth with regard to Article 4(3) is surely back to front. Bearing in mind the exceptional nature of Article 4(3),[17] it must be that if the law of an indirect victim's place of damage is more closely connected to a tortious incident, this would be an exceptional circumstance to be dealt with by Article 4(3), rather than being an accepted part of the general rule.

Bearing in mind the definition of 'Damage' given in Article 2 (1) of Rome II, which states that damage is to include '*any consequence arising out of tort/delict,...*' and also Recital 17 which states that '*The law applicable should be determined on the basis of where the damage occurs*', it can be argued that, for example, the psychiatric harm suffered by a mother who witnesses a traffic collision involving her son on the television is direct harm, which occurs at the place where she was watching the incident take place. If this is in a different State to that of the collision, the law applicable to the mother's claim is that where the damage arose, and not that of the place of the collision.

In both of the above cases the Court referred to the objectives of the Brussels Convention in securing recognition and enforcement of judgements amongst Contracting States and felt that this would be thwarted if there was a multiplication in the number of courts competent to hear a case since it would lead to increased risk of irreconcilable judgements, which need not be recognised. The Court also referred to the policy decision to have as the central principle for jurisdiction selection the defendant domicile rule. The view was that if special jurisdiction was widened to cover indirect victims there would be more instances where the jurisdiction of the claimant's domicile would apply, leaving it open for the claimant to determine jurisdiction by his domicile.[18]

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[16] Ibid.
[17] See the discussion below on Article 4(3) at 4.4.
[18] See *Dumez* (n.8), [19] and *Marinari* (n11), [17].

When the method of reasoning used by the court and the reliance on the Recitals as indicators of the objectives of the Brussels I Regulation is transposed onto Rome II, it can be argued that allowing damage to indirect victims to determine the applicable law would thwart the objective of Rome II to ensure predictability and objectively ascertainable results for the direct parties involved in a traffic incident.[19] Were indirect victims able to bring claims in a way which is unrelated to the physical event which gave rise to the damage, the fundamental intention of creating objective certainty, expressed in Recital 6,[20] would be undermined.

Dickinson argues that the issue of characterisation of a victim as direct or indirect should be resolved by linking direct damage to the tangible, recordable fact of the accident, the place of which is easily identifiable by the direct parties after the event, and the applicable law of which is foreseeable to those directly involved in the accident. The applicable law should be that of the place of damage to those directly involved in the collision only. [21] For the majority of situations, this would be a sensible way to proceed, one that supports the objectives of Rome II of producing certain, predictable choice-of-law outcomes.

However, decisions about the status of indirect victims for the purposes of choice-of-law could be thought of as belonging to a category of difficult cases, where it is not immediately clear which law should be applied. It is submitted that these types of case might also be dealt with under Article 4(3), where the court is allowed a limited amount of discretion as to the most appropriate law to apply. Application of the law of the place of the accident under Article 4(1), unless the law of the place of injury is manifestly more closely connected to the tort under Article 4(3), would increase certainty and avoid the risk of claimants determining the applicable

[19]It is accepted that the objectives of the Brussels regime are different from those of Rome II. Rome II does not, for example, aim to minimise concurrent proceedings thereby reducing the risk of irreconcilable judgements. The point which is being made is a general one regarding the method utilised by the CJEU when interpreting provisions of Regulations whereby use is often made of the Recitals and broad policy objectives of a given instrument.

[20] See chapter 3 at 3.2. and 3.4.

[21] A. Dickinson *The Rome II Regulation The Law Applicable to Non-Contractual Obligations* (OUP, 2008), 4.40 -4.45.

law by their residence, whilst ensuring an appropriate outcome for those rare instances when the law of the place of the accident does not amount to the most suitable applicable law.

A difference between English law and Rome II is apparent here. Section 11(1) of the '95 Act designates the *lex loci delicti,* unless the injury is sustained in a another state, when s11(2) would then designate the *lex loci damni.*[22] If, as suggested, Rome II takes the view that damage to a secondary victim is too far removed from the occurrence of the accident to form a connecting factor for choice-of-law purposes, the Regulation will start with the *lex loci damni,* but would revert to the *lex loci delicti* in the case of indirect victims.

### 4.3. Common Habitual Residency – Article 4(2)

Article 4(2) will oust the application of Article 4(1) when the parties are habitually resident in the same country, which is a different state from that of the accident. Article 4(2) states:

*"However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."*

The only justification given for the rule was that this was already a rule in most Member States and that it reflects the legitimate expectations of both parties.[23] This does not do justice to the strength of common residency as a connecting factor, which often equates to the place where the consequences of an incident are felt. In a traffic accident where the parties share common residency, the place of the accident can be seen as secondary in importance because the country of residence will be the location where the claimant will receive the majority of medical and other care, will feel the economic effects of his losses and will also often be where the defendant has purchased insurance with an insurer, who is also resident in that State.[24] Whilst it could be

[22] See chapter 2 at 2.3.2.1.
[23] Commission Proposal (n1), 12.
[24] Ibid, 96.

argued that common residency ignores the interests of the State in which the incident occurred, to have its 'conduct regulating' rules enforced,[25] it should be noted that Rome II does not engage in an inquiry into the policies of national substantive rules, but seeks a predictable and uniform result based on closest connection, as discussed in Chapter 3.[26]

### 4.3.1. The Meaning of Habitual Residency

Despite a rule of shared habitual residence having the appearance of simplicity, it is in fact complicated by a number of factors. The first is the meaning of habitual residency. A partial definition for this term is provided by Article 23 of Rome II which states:

*"1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.*

*Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.*

*2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business."*

#### *4.3.1.1. Natural Persons*

Interestingly, Article 23 does not refer to natural persons who are not acting in the course of professional or business activities. This is not unusual. Since the rise of habitual residence as a connecting factor in international disputes, sparked by its use in a number of Hague Conventions, and most notably as the connecting factor in the principal choice-of-law rule in

[25] See S. Symeonides 'Rome II and Tort conflicts: A Missed Opportunity' 56 Am J Comp L (2008) 173, 217-218.
[26] See Chapter 3 at 3.4.

The Hague Convention on Maintenance Obligations regarding Children (1956), definition of the term has been thought to be mostly unnecessary in many instruments which employ it. Habitual residence was considered to be a common sense, factual matter and its lack of definition held the allure of preventing the unsatisfactory, and sometimes absurd, results, produced when nationality or domicile were used as principal connecting factors.[27] It appears that detailed and comprehensive definition in Rome II has likewise been viewed as unnecessary. Hohloch, in particular, claims that it is entirely correct that Rome II should have refrained from defining habitual residence, since this should be judged as a matter of fact on the basis of where the centre of gravity of the parties' lives is. He further submits that any legal definition would have had an assisting function only, because the term is in essence self explanatory and statutory definition is unnecessary. [28]

To consider habitual residence as a factual matter without need of any legal definition whatever is too simplistic. Rogerson gives an interesting and more convincing analysis of the term, to reveal both a subjective and objective element which, when combined, demonstrate that some definition becomes inevitable. Rogerson refers to English case law which requires the elapse of an appreciable period of time before habitual residency can be established and to the requirement that there be a 'settled intention', before going on to state:

*"'This qualitative, subjective notion of a home has to be circumscribed by legal rules in order to give the rules some stability and certainty. Without the legal rules the uncertainty requires more judicial decisions as each case would*

[27]We can recall here the often quoted passage of Lord Scarman in *R.* v. *Barnet London Borough Council, ex p. Shah* [1983] 2 W.L.R. 16 where he noted (at 345E) in respect of the concept of domicile, that "The long and notorious existence of this difficult concept in our law, dependent upon a refined, subtle, and frequently very expensive judicial investigation of the devious twists and turns of the mind of man.". See Collins et al (eds) *Dicey, Morris and Collins The Conflict of Laws* (Sweet and Maxwell, 14th ed, 2010) [6-002] – [6-008]; P. Rogerson *'Habitual Residence: the new domicile?'* ICLQ (2000) 86 at 100; G.Zohar '*Habitual Residence: An Alternative to the Common Law Concept of Domicile'* Whittier Journal of Child and Family Advocacy (2009) 169.

[28]. G. Hohloch 'The Rome II Regulation an Overview. Place of Injury, Habitual Residence, Closer Connection and Substantive Scope: Basic Principles' (2007) IX YBPIL 1, 11-12.

*have to be decided ad hoc on its particular facts. It is for these reasons that the earnest desire to keep the concept of habitual residence free of judicial intervention is misplaced and impossible in practice."* [29]

In the absence of a legislative definition, a two stage enquiry is apparent in the jurisprudence of the CJEU. Repeatedly, in cases concerning a wide variety of subject matters, the court has referred to the need to demonstrate that residence is established with the intention that it should be of a lasting character and that it constitutes the permanent or habitual centre of the person's interests.[30] This is to be established in light of all of the circumstances of the particular case in question. This mix of objective fact and subjective intention is underpinned by further requirements that the term 'habitual residence' should acquire an autonomous and uniform interpretation, which applies Community wide,[31] but that in each case this interpretation must take account of the aims and objectives of the instrument in question. When called upon for interpretation with regard to Regulation EC No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,[32] the CJEU stated:

*"..it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community, having regard to the context of the provision and the objective pursued by the legislation in question."* [33]

This gives rise to a complex enquiry which is in truth not entirely factual, but nor are there elements which are explicitly legal either. Some legal framework is arguably put in place by the

[29] Rogerson, (n27), 96.
[30] See for example C-90/97 *Swaddling* v. *Adjudication Officer* [1999] ECR I-01075, [29] ; C-452/93 *Pedro Magdalena Fernández v Commission* [1994] ECR I-04295, [22].
[31] In relation to the need, under Rome II for autonomous definitions, see Chapter 3 at 3.4.
[32] Regulation EC No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II) [2003] OJ L338/1.
[33] C523/07 *A* [2009] ECR I-02805 at [34].

requirement that the centre of a person's interests must be demonstrated, along with the need to develop an autonomous interpretation. However the fact that this interpretation will undergo a transmutation depending on the aims and objectives of the legislation in question gives rise to level of uncertainty.

We are left in Rome II with the situation that habitual residence, for natural persons not acting in the course of their business, will be judged on the basis of a demonstrable intention that residence is to be of a lasting character and that the residence coincides with the centre of the person's interests. There does not need to have been a lapse of an appreciable amount of time in order for habitual residence to be established, in contrast to the English law requirements.[34]

Of concern in this regard will be the more unusual circumstances where a person has either two concurrent habitual residences or indeed where a person has no habitual residence. Having no habitual residence is less of a problem in terms of Article 4(2) because here the person is not capable of having a shared habitual residence with the victim and as such Article 4(1) should determine the applicable law. Multiple habitual residencies cause more concern. As much is demonstrated in a situation, for example, where a Swiss man works in Zurich but due to the high cost of living he lives across the German border in Konstanz. He commutes each day to his job in Switzerland, although he regularly stays over with family in Zurich when it is more convenient. His salary is paid into a Swiss bank account. He has use of a company car which is registered and insured in Switzerland and which is based in Zurich during the day and in Konstanz during the evening and at night. He has a German bank account from which to pay household bills and his mortgage.

There are parts of Europe (particularly in border regions) where it is common for people live and work in different countries and it is submitted that the above scenario is not as farfetched as

[34] See *Nessa* v. *Adjudication Officer* [1998] 2 All E.R. 728.

might at first be imagined by an Englishman, who is far more confined to the shores of his island. Should such a person be involved in a cross border road accident, it will be very much more difficult to establish the place where the centre of gravity of this man's life is. All of the indicators one might look for as signs of stronger connection to one place, rather than another, are more difficult to find. He has an abode in one country, but family and work in another. He does not spend more time in one place than the other. His finances are split between the two countries. He himself may find it difficult to express where he is habitually resident. Having said this it is acknowledged that the circumstances where a person may be said to genuinely have multiple habitual residences will be very rare.

Difficult questions of interpretation will be decided by reference to the aims and objectives of the relevant legislation, as directed by the CJEU in the cases discussed above. [35] As set out in Chapter 3, the likely overriding objective of Rome II will be to provide certainty and predictability of choice-of-law outcomes.[36] Here the problem becomes circular. For Regulation No 2201/2003[37] the CJEU was able to point to the objective of ensuring the best outcome for the child and use this to guide its decision.[38] Not so for Rome II because the problem is uncertainty yet the objective of the legislation is to provide certainty, there is no other external reference point.

Overall, it is submitted that habitual residence will work well as a connecting factor in most circumstances. Quite how the courts will approach questions of multiple habitual residency remains to be seen. The obvious approach might be to leave it to the courts discretion as arbiter of fact. However, since Rome II seeks to increase legal certainty such an approach might be counter-productive. A logical option would be to consider that in such circumstances the party

[35] *A* (n.33) [34]-[35].
[36] See Chapter 3 at 3.2 and 3.4.
[37] N.33 above.
[38] N.32 above.

in question has no habitual residence and then resort to the remaining rules of Article 4 (preferably Article 4(1)). This may be considered somewhat artificial since the person will clearly not be homeless, but if the purpose of Article 4(2) is to conform to party expectations and to keep transaction costs low, this is arguably not going to be achieved by protracted and similarly artificial debate on the place of habitual residence, if no such place really exists because there are two places that a person calls 'home'.

#### *4.3.1.2. Acting In The Course Of Business*

As stated above, Article 23 provides a definition of what will amount to habitual residence for legal persons, or for natural persons acting in the course of business. There are a number of scenarios which are covered by this definition. It covers the operation of vehicles which are under the control of the headquarters of a company. This would be so where a heavy goods vehicle left the English headquarters of a haulage company, to which the vehicle belonged and where the driver was employed and based, in order to make a delivery in France. If the vehicle caused an accident in France in which an English holidaymaker was injured the relevant habitual residence in a claim against the company will be England, that of the central administration of the company.

The definition also covers accidents caused by vehicles which are operated out of a branch, agency or other establishment of a company. This phrase also appears in both the Brussels Convention and Brussels I[39] where it has been held that the terms *'branch, agency or other establishment'* imply a place of business with a appearance of permanency so that third parties may transact at that place of business and do not have to transact with the parent body.[40] It is reasonable to assume that this reasoning will be followed for Article 23 of Rome II. So, for

[39] Article 5(5) in both instruments.
[40] Case C-33/78*Somafer v. Saar Fern Gas AG*, [1978] ECR 2183, [12].

example, where an English holiday representative, working for an English holiday company is based at a Spanish office and is required to drive a Spanish registered company car from resort to resort, the relevant habitual residence is likely to be that of the place of the branch i.e. Spain. However, whether the habitual residence is that of the central administration, or of another place of business, will depend on whether the vehicle which is liable can be considered to be under the control of a branch, agency or other establishment so that the accident occurs out of the operation of that place of business.

This distinction was considered in relation to Article 5(5) of Brussels I in the case of *Durbeck,*[41] where it was held that there needed to be a nexus between the dispute and the operations of the branch, so that it would be natural to describe the dispute as arising out of the operations of a branch. In the case of vehicles it has been suggested that this could be the place of business which has operational control over those vehicles.[42] This seems like a sensible way in which to approach the matter, particularly since the Commission, in its original proposal, stated that the mention in the rule of branch, agency or other establishment was made in order that the legitimate expectations of the parties could be respected. If a company operates from a base in a particular country, and in compliance with the requirements for conducting that business in force in that country, the company's expectation would surely be that the law of that state will govern those operations. In the case of vehicles which operate out of a particular office or branch, where those vehicles are registered, insured and maintained in accordance with local standards, the case for that state being designated for the purposes of habitual residence is strong.

The final element covered by the Article 23 definition relates to natural persons acting in the course of business. This will cover any self employed person who uses a vehicle to travel for the

[41] *Anton Durbeck GmbH v. Den Norske Bank ASA* [2003] EWCA Civ 147; [2003] QB 1160.
[42] A. Dickinson (n21), 3.58.

purposes of their trade or profession. In cross border terms an obvious situation in respect of traffic accidents would be in relation to the owner/driver of a taxi, who operated across national boundaries. Here, the rule states that the habitual residence will be the principle place of business of that person. In most cases such a business will be based in one particular country, with insurance provision having been secured in that country and with the driver being subject to the regulations in respect of carriage for hire or conduct of business of that country. All of these factual circumstances will point to the territory of one state, which is the principle place of business. However, if a taxi driver solicited customers in both countries either side of a border for transport both ways, whilst having no permanent office base, it could be difficult to say which state is the principle place of business. The European Commission has referred to the actual place where the occupation is exercised,[43] but, as discussed by Plender and Wilderspin, this could mean the place of administration of the business or the place where business activities are carried out and as such the authors conclude that in real terms we are no further forward.[44] The Commission however did state:

*"Amendment 49 seeks to clarify the place where a natural person working from home has his habitual residence. The Commission can accept the principle of this clarification, but it prefers a form of words that is closer to what emerged from the Council, whereby the court would prefer the actual place where an occupation is exercised rather than an official address which might turn out to be purely fictitious."*[45]

This is more suggestive of the place where business activities are carried out rather than a place of administration, that being more in line with the phrase *'actual place where an occupation is exercised'*. If the occupation is exercised in more than one state, then as with the example of the taxi driver, it may have to be accepted that in some circumstances it will not be possible to pin point one

[43] Commission 'Amended Proposal For A European Parliament And Council Regulation On The Law Applicable To Non-Contractual Obligations ("Rome II")' COM (2006) 83 final, 4.
[44] R. Plender, M. Winlderspin *The European Private Law of Obligations* (Sweet and Maxwell, 2009), 3-020 – 3-023.
[45] Commission Amended Proposal (n43), 4.

habitual residence in this regard. As stated earlier however, having no habitual residence is less of a problem than having multiple residencies. In this situation it could be argued, as has been suggested in relation to natural persons above, that the business person had no principle place of business which would leave the remaining rules of Rome II to determine the applicable law.[46]

### 4.3.2. The Operation of Article 4(2)

Apart from the sometimes obscure meaning of habitual residence, Article 4(2) has had a number of other criticisms levelled at it. Firstly, in an example where a collision occurs in Spain involving two British nationals, both habitually resident in England, one of whom was operating a vehicle hired in Spain and covered by an insurer situated in Spain, the appropriateness of the application of Article 4(2) could be called into question. This is particularly so where the insurance coverage does not match the requirements of the applicable law, for either type or amount of liability. Commenting on the original Commission proposal, Staudinger suggests that this is a situation which could be dealt with by Article 4(3).[47] The location of the insurer and the law applicable to the contract of insurance would create a manifestly closer connection to the law of, in the example given above, Spain. However the scenario above is what occurred in the English case of *Edmunds v. Simmonds*.[48] The English court decided that the place of registration and insurance of a vehicle was not *'of overwhelming weight'*[49] since in areas where there are high volumes of tourists the insurer should have within their contemplation the application of foreign law, to cases involving such persons.[50]

Of course the decision of the English court in *Edmunds v, Simmonds,* applying the '95 Act, will hold little or no weight in the interpretation of Rome II. However, it can be noted that, for those

[46] See above at 4.3.1.1.
[47] A. Staudinger ' Rome II and traffic Accidents' Eu L. F. 2 (2005) 61 at 61.
[48] [2001] 1 WLR 1003 (QB).
[49] Ibid, 1011.
[50] Ibid, 1010.

accidents occurring in the EU between citizens and vehicles normally based in the EU, the rules of the MID[51] require liability insurers to cover victims in accordance with the law in force in other EU Member States. Effectively to cover a victim in accordance with the law of the State in which the accident occurred.[52] This fact acts as a significant dampener on the argument that the location of the insurer and the law of the insurance contract act to create a greater connection than the law of the shared habitual residence as between the parties to the dispute. An insurer in the EU already faces the prospect of the application of foreign law under the MID.

Whether the potential assurance created for insurers in applying the law of the place of insurance, via the Article 4(3) mechanism, for incidents occurring outside of the EU, will be enough to establish a closer connection than that established by the common habitual residence of the parties, is uncertain.

Secondly, common habitual residence can give rise to problems where the rights or duties of third parties become involved, such as the duty in tort of a vehicle owner under a scheme of strict liability, or the right of the victim's estate should the accident result in a fatality. The use of the wording in Article 4(2) 'person claimed to be liable' and 'person sustaining the damage' could accommodate such concerns, so that the rule would only operate when the parties to the dispute share residency.[53] The wording of Article 4(2) appears wide enough to cover any party who sustains damage (whether a direct or indirect victim or a successor to the original victim) as well as any party who is liable to compensate for that damage (which would include those liable for damage under schemes of strict liability, as well as liability insurers who are liable for the compensation of victims). This makes it more coherent that the wording of the Article should be seen as referring to the parties to the action rather than the parties to the original incident. If it is a company, under rules of vicarious liability then it will be the company's habitual residence

[51] The rules of the Motor Insurance Directives are dealt with in detail in Chapter 5.
[52] This is the effect of Article 2 of Dir 90/232/EEC (the third Motor Insurance Directive). See Chapter 5 at 5.2.1.3.
[53] See Dickinson (n.21) at 4.83 for full discussion on possible alternatives for interpretation of the wording of Article 4(2).

which will be determinative. If the action is alternatively brought directly against the insurer then it will be the habitual residence of the insurance company that will be decisive.

However, in the recent English case of *Jacobs*[54] the Queen's Bench held obiter, that the phrase 'person claimed to be liable' was a clear reference to the tortfeasor , so that only where the direct victim and the person who actually causes the damage share a common habitual residence will Article 4(2) be applicable.[55]

In *Jacobs* an English resident was seriously injured in Spain by a German national, resident in Spain. The car he was driving was uninsured and so Mr. Jacobs brought a claim against the English Motor Insurance Bureau (MIB) as he was entitled to do under Article 7 of the fourth MID.[56] The MIB was held to be acting as an intermediary when providing compensation, acting as a safety net to ensure the compensation of the injured party in the event that no other form of compensation is available. In circumstances such as these the MIB is able to seek indemnification from the Spanish MIB who in turn has a subrogated right to claim against the uninsured driver.

If the victim in this case had been able to bring a claim against the party directly liable for his damage, the applicable law would have been Spanish law in accordance with Article 4(1), since the parties would not have had a shared habitual residency. However, Mr Jacobs argued that he did share habitual residency with the MIB who constituted a liable party for the purposes of Article 4(2). As stated above, the court rejected this on the basis that Article 4(2) should be applicable only to the parties directly involved in the incident giving rise to the claim. It is submitted that Article 4(2) must have a wider meaning than was suggested by the English court,

54 *Jacobs v. Motor Insurers Bureau* [2010] EWHC 231 (QB) [2010] 1 All E.R. (Comm) 1128. This decision has now been reversed by the Court of Appeal: *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609. However, the appeal court did not address this issue in its ruling.

55 Ibid, High Court, [43].

56 For discussion of this case as well as an explanation of the operation of this provision of the MID see Chapter 5 at 5.5.

whose interpretation would exclude, for example, those liable under schemes of strict liability, even though on a plain reading of the provision such parties could be included. As a connecting factor shared habitual residency does not lose its potency simply because the defendant was not a party to the tortious incident, if the effects of the incident will still be felt in the State of residence. It is arguable that the wording of Article 4(2) reflects this. However, whilst the approach of the English court can be criticised for being too narrow, its conclusion with regard to the MIB was probably correct.

Because the MIB acts as an intermediary, ultimately recovering any award of damages paid from the Guarantee Fund in the country where the accident occurs, arguably it should only have to meet the claim on the same basis. It does not make sense to suggest that a shared residency between the victim and such a body should form a connection for choice-of-law purposes. Although the effects of the damage are felt in England, the wrongdoer is connected to the wrong doing in Spanish law and calculation of damages ultimately occurs in Spanish law, leaving the English MIB to cover any shortfall between the calculations if the compensation is to be provided by them under English law.

As already noted, the decision of the High Court in *Jacobs* has been overturned by the Court of Appeal on the grounds that no Rome II issue was engaged. However, these facts demonstrate that a distinction can and should be drawn between parties which can be held directly liable and those which merely act in an intermediary role. Where intermediaries are concerned liability is passed back to a party which can be held directly liable. Where neither party acts in such an intermediary position, so that the defendant is the party liable under a scheme of strict liability, or is a liability insurer, the common residency rule should apply because liability ultimately comes to rest under the law designated by the relevant rule. Where this is not true, because the body

paying the compensation merely acts as an intermediary, it does not achieve a fair balance between the parties to take account of common habitual residency.

Thirdly, the application of Article 4(2) can give rise to different outcomes for different victims, or tortfeasors, of the same incident, merely because of the fact of the shared residency of some of those involved.[57] In support of this point the US case of *Tooker*[58] has been cited. Here two passengers of a car suffered damage in an accident. One was able to recover upon the application of the law of his residency which was shared with the defendant driver. The other passenger, who was resident in the state of the accident, was unable to recover at all due to a local guest passenger statute. Such scenarios can invoke feelings of injustice and have led Peter Stone to argue that Article 4(2) should only apply when all parties share a common habitual residence.[59] However, as already stated, the objectives of Rome II are not to enquire into the substantive outcome of a particular fact pattern but to employ rules that focus on closest connection. As such, the potential injustice for one victim does not feature in the choice-of-law decision.

Furthermore, Dornis provides strong argument in favour of Article 4(2).[60] Applicable law which accords with shared common residency promotes compensation in line with the claimant's legal, social and economic position. Since the state of residency is, at least indirectly, affected by the outcome of the claim, he argues that the common residency rule is both socially and economically sound. As such, the practical benefits outweigh the potential downsides of situations involving multiple victims or multiple tortfeasors.[61] Furthermore, it is submitted that shared residency places the law of that state within the field of expectation of the parties. A field of expectation could constitute a number of laws, which, based on the factual circumstances of

[57] See for example A. Malatesta 'The Law Applicable to Traffic Accidents' in A. Malatesta (ed) *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM, 2006) 90 and Dickinson (n.21), 4.83.
[58] *Tooker v. Lopes* 249 NE2d 394 (New York, 1969).
[59] P. Stone *EU Private International Law, Harmonisation of Laws* (Edward Elgar Publishing, 2006), 347.
[60] T. Dornis "'When in Rome, do as the Romans do?" – A Defence of the *Lex Domicilii Communis* in the Rome II Regulation' European Legal Forum 4(2007) 152.
[61] Ibid at 157.

the case, the parties could be said, on an objective basis, to have within their contemplation. When this is coupled with the weight of the factors identified by Dornis it is arguable that a closer connection is created in favour of the law of the shared habitual residence.[62]

#### 4.3.3. Concluding Remarks on Habitual Residence

For the most part, the rule under Article 4(2) will work well to further the aims of Rome II of certainty and predictability. It will produce sensible results which will ultimately benefit the parties involved. It is only at the peripheral edges of the subject that any issues are encountered. These relate mainly to the definition to be afforded to the term habitual residence for the adjudication of difficult cases. Even here, however, problems will only arise in the unusual and rare circumstance that either a private person acting for private reasons, or a private person acting in the course of business, can be considered to have two places of habitual residence, under either the test of the centre of gravity of interests or the principal place of business. Here, as stated above, it would be better if the person were to be considered as having no habitual residence.

### 4.4. The Escape Clause - Article 4 (3)

Article 4(3) states:

*"Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."*

[62] The concept of a field of expectation is developed further below in relation to Article 4(3).

Article 4(3) clearly reflects an attempt to reconcile the competing aims of certainty and predictability with fairness and justice. It is at this point (as well as under Article 4(2)) that the legitimate expectations of the parties are factored into the choice-of-law equation. As de Boer puts it:

*"A uniform choice-of-law rule referring to the law of the country coming first in the alphabet will surely enhance certainty and predictability but it will fail to meet the parties' justified expectations. To that end, the rule should not only be capable of cutting the Gordian knot of a conflict of laws but it should do so in a way that is acceptable to potential and actual litigants."* [63]

The wording of Article 4(3) suggests that the exception will only be operational upon the meeting of a particularly high threshold. A manifestly closer connection than both the country of damage (Article 4(1)), and of the parties' common habitual residence (Article 4(2)), will not be common place and will be difficult to establish. Recital 18 confirms this position, stating:

*"... Article 4(3) should be understood as an escape clause ... where it is clear from all the circumstances of the case that the tort / delict is manifestly more closely connected with another country."*

The second sentence of Article 4(3) is obviously not meant to constitute an exhaustive statement of the factors which may be determinative of a closer connection, as evidenced by the words '*might be based*'. This results in rather vague territory where knowing when the threshold will be met and by which factors can only be estimated.

[63] Th. De Boer 'The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation' (2009) Netherlands International Law Review 295, at 306.

### 4.4.1. Comparison to Article 4(3) of Rome I[64]

Essentially, Rome I provides, in Article 4(1), a number of choice-of-law rules each dealing with a specific type of contract in the absence of party choice. Where a contract does not fit within one of the categories mentioned, the applicable law will be the law of the country of habitual residence of the party effecting the characteristic performance of the contract.[65] Article 4(3) of Rome I provides an escape clause which provides that where it is clear from the all the circumstances of the case that the contract is manifestly more closely connected to a country other than that indicated in Article 4(1) or 4(2), the law of that country shall apply.

Rome I constitutes a significant change from the scheme contained in the Rome Convention.[66] Under the Convention the general rule[67] provided that the applicable law was the law of closest connection. Article 4(2) set out a rebuttable presumption that this would be the law of the habitual residence of the person effecting the characteristic performance of the contract. Article 4(5) made provision that, where it is clear from the circumstances as a whole that the contract is more closely connected with another country, the presumption could be discarded and the law of that other country applied. In this situation Article 4(1) still provides the choice-of-law rule and Article 4(5), unlike Article 4(3) of Rome I, does not constitute an escape clause. Moreover, the difference in wording between Article 4(3) of Rome I and Article 4(5) of the Rome Convention to include the stronger phrase '**manifestly**[68] more closely connected' means that the jurisprudence in relation to Article 4(5) of the Rome Convention must be treated with some caution.

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[64] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations [2008] OJ L177/6, in force from 17 December 2009. Hereinafter referred to as 'Rome I'.

[65] Article 4(2). Characteristic performance was described by the Giuliano-Lagarde report which accompanies the Rome Convention as the performance which links the contract to the social and economic environment of which it forms a part. Where counter-performance takes the form of money this is said to be the performance for which payment is due, such as the provision of goods or services. M. Guliano and P. Lagrde 'Report on the Convention on the law applicable to contractual obligations' (1980) OJ C282/1, 20. Characteristic performance will likely have the same meaning under the Rome I Regulation.

[66] Convention on the Law Applicable to Contractual Obligations [1980] Rome OJ L266/1.

[67] Article 4(1).

[68] Emphasis added.

Nonetheless, whilst over the years there have been questions as to how easily the presumptions in the Rome Convention could be displaced,[69] a recent ruling of the CJEU[70] held that the presumption would be displaced not only where there was no genuine connection to the law of the habitual residence of the person effecting characteristic performance of the contract, but where the circumstances as a whole point to a closer connection with another country.[71] It was held that Article 4(5) was to be used to counter balance the rigid nature of the presumptions where they do not identify the law of closest connection. The ruling makes clear that the correct interpretation of Article 4(5) is not as restrictive as had previously been held by the Dutch Supreme Court.[72]

It is possible that the interpretation of Article 4(3) of Rome II will follow a similar vein so that it will operate in cases where, on a comparison of the connections of a non-contractual obligation to two or more countries, there is a 'preponderance of contrary connections',[73] taken from all the circumstances of the case, in favour of one of those laws. It does, however, need to be borne in mind that Article 4(3) of Rome II mirrors the stronger wording of Article 4(3) of Rome I, suggesting that the threshold for meeting the test will be particularly high. The closer connection should be obvious in most scenarios. This was made clear in the Commission's original proposal where it was stated that:

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[69] The courts of various countries appear to have displayed an increasing deference to the presumptions indicating an increasing awareness of the importance of ensuring uniformity of decisions. Compare for example the decisions of the English court in *Bank of Baroda v. Vysya Bank* [1994] 2 Lloyds Rep 87; *Definately Maybe (Touring) Ltd v. Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283 and *Crédit Lyonnais v. New Hampshire Insurance Company* [1997] 2 C.M.L.R. 610, CA with *Ennstone Building Products v.Stanger* [2002] EWCA Civ 916; [2002] 1 W.L.R 3059. Also see *Societe Nouvelle des Papeteries de l'Aa v. BV Machinenfabriek BOA* (1992) Nederlandse Jurisprudentie 750 for a restrictive approach to Article 4(5). For further comment see O. Lando '*The Eternal Crisis'* Festschrift fur Ulrich Drobnig, 368; S. Atrill 'Choice of law in contract: the missing pieces of the Article 4 jigsaw?' (2004) ICLQ 549; W. O'Brien 'Choice of law under the Rome Convention: the dancer or the dance' (2004) LMCLQ 375; T Struycken *'Some Dutch Judicial Reflections on the Rome Convention, Art 4(5)'* (1996) LMCLQ 18; J. Hill *'Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts'* (2004) ICLQ 325;

[70] Following the referral of a number of questions on Article 4 of the Rome Convention, by the Hoge Raad der Nederlanden in Case C-133/08 *Intercontainer Interfrigo SC (ICF) V Balkenende Oosthuizen BV*, [2009] ECR I-9687.

[71] Ibid [53] –[64]. See A. Dickinson 'Rebutttable Assumptions' (2010) L.M.C.L.Q 27.

[72] See *Societe Nouvelle des Papeteries de l'Aa v. BV Machinenfabriek BOA* (1992) Nederlandse Jurisprudentie 750.

[73] This was the phrase used to describe the operation of Article 4(5) of the Rome Convention in the English case of *Samcrete Egypt Engineers and Contractors SAE v. Land Rover Exports* [2002] CLC 533, [41]. The judgment in *Intercontainer* (n.70) appears to support this view. See Dickinson (n.21), 34.

*"Since this clause generates a degree of unforeseeability as to the law that will be applicable,* ***it must remain exceptional.***" [74]

### 4.4.2. The Rattachement Accessoire

On the question of how the factors indicating closer connection are to be measured, Fentiman states:

*"Principle certainly suggests that the close connection test cannot involve a mere accumulation of territorial connecting factors, an arithmetical preponderance of elements. ... The language of close connection is no doubt consistent with such a 'balance sheet' approach. But it is hard to see how a reasoned choice-of-law test could depend merely upon adding up how many factors connect a tort with one law or another. An abacus is not a choice-of-law tool."* [75]

Fentiman proposes that measuring closer connection ought to be done by reference to the objectives of Rome II and that the matter cannot be left solely to the discretion of judges. He considers that the dominance afforded to the law of the parties' common habitual residence, as well as to the law governing any existing legal relationship between them, indicates that party expectation is such an objective. Why else, he reasons, should these factors designate the applicable law?[76] There are a number of points to be made in response to Fentiman's submissions. As stated above[77] there are alternative justifications for the primacy of the law of shared habitual residency over the place where the damage arises (where this is different), which focus on issues of economic efficiency and fairness to the victim. Furthermore, the presumption appears to be that the express mention in Article 4(3) of the law which governs the parties pre-existing relationship gives rise to the situation that, where there is a contract between the parties

[74] Commission Proposal (n. 1), 12 (Emphasis added).
[75] R. Fentiman 'The Significance of Closer Connection' in J. Ahern and W. Binchy (eds) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations A New International Litigation Regime* (Nijhoff, 2009) 85.
[76] Ibid,103.
[77] See 4.3.

and a tort is committed in the carrying out of that contract, the dispute in tort will inevitably be governed by the same law that governs the contract.

The point relates to what is known as the *rattachement accessoire* mechanism, which has the effect that where a tort is closely connected to a contract between the same parties, the law which governs the contract is to be applied to the tortious liability also. The rationale for this accessory connection is that it avoids claims arising out of the same relationship, but which are framed separately in contract and in tort, being subject to different sets of rules under different applicable laws.[78] Fentiman reasons that significant issues which could give rise to a closer connection will either be connections between the parties or a connection to the place where the tort was committed or the damage occurred.[79] Many of these things are already dealt with by the rules which give priority to the law of common habitual residency or to the law which governs existing relations between the parties (the law governing a contract between the parties). As such he concludes that attempts to decipher the law which is more closely connected are, in the main, unnecessary.[80] Fentiman is not alone in making this presumption. Czepelak, in specifically dealing with the issue of concurrent claims in tort and contract, uses this supposition to state that in many cases different laws will not apply to concurrent actions in tort and contract because Article 4(3) renders the law applicable to the tort the same as that applying to the contract.[81] The assumption is that Article 4(3) creates an accessory connection. The assumption is troubling.

In respect of Article 4(3) the Commission stated:

*"Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly*

[78] T. Graziano 'Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation' in J. Ahern and W. Binchy *The Rome II Regulation and the Law Applicable to Non-Contractual Obligations A New Litigation Regime* (Nijhoff, 2009) 114 at 124.
[79] Fentiman (n.75), 111.
[80] Ibid.
[81] M. Czepelak 'Concurrent Causes of Action in the Rome I and II Regulations' JPIL 7 (2011) 393, 407-408.

*closer connection with a country other than the one designated by the strict rules.* ***But the law applicable to the pre-existing relationship does not apply automatically,***[82] *and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship."* [83]

This statement is clear and if followed in the interpretation of Article 4(3) of Rome II will not operate as an automatic accessory connection. Rather the full facts of the case will have to be taken into account in the applicable law decision. Furthermore, the argument that such an accessory connection is an indication of the objective of party expectation finds itself on unstable ground.

However, there is mention of party expectation by the Commission. It was stated of Article 4:

*"The rule ...reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim's legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation."* [84]

Although not an aim stated within the Regulation itself, party expectation was clearly a guiding factor in the construction of Rome II and can be seen as the tool by which balance of the interests of the parties is achieved. Caution is advisable here. Party expectation, if utilised in its full, subjective glory risks subverting what has been argued throughout this work to be the overarching objective of Rome II. In light of the need to service the legal foundation on which it is built, Rome II needs to ensure certainty and predictability. It does so whilst maintaining a

[82] Emphasis added.
[83] Com proposal (n. 1), 12.
[84] Ibid.

balance with the need for justice (albeit in a value neutral and jurisdiction selecting way), but cannot do so, it is submitted, if this would mean too great a loss of certainty.

### 4.4.3. The Suggested operation of Article 4(3)

It is submitted that party expectation could be utilised as a guiding principle in measuring the significance of connecting factors, but only if it is used to limit expectation to that which is legitimate in pursuance of attaining a fair balance between the interests of the parties, as required by Recital 16 of Rome II. An objective standard is required, which can aide, rather than undermine the need for certainty. A principle of 'field of expectation' could provide a means of identifying which systems of law the parties should reasonably be subjected to.

This would seek on a purely objective basis to identify those systems of law that the parties can reasonably expect to regulate their conduct.[85] Normally the rules of Rome II can prioritise which of these should govern any dispute between two parties, but in difficult cases the principle of 'field of expectation' can ask further, whether there are some systems which only one party could reasonably be expected to contemplate and to look for a system which both could have anticipated. In the example of the mother watching an accident on television, given above in the discussion of Article 4(1) and indirect victims, the tortfeasor arguably has no way of reasonably being able to predict the application of the law of the place where she is located, to any accident which occurs when he is driving in a different country. This law would therefore be outside his 'field of expectation'. The damage she suffers is too far removed from the physical occurrence to constitute a connecting factor for choice-of-law purposes and the law of the place of the accident, which both parties could be said to expect to apply, should be designated instead.

[85] For example, when a party voluntarily enters a state they should generally expect to be subject to its laws, the existence of a contract which both parties are privy to could give rise to a further system of law which they might expect to regulate their relationship. Being resident in the same state which is different from that of the accident would, objectively, create a further expectation about which system of law might regulate conduct.

The operation of such a principle can be further illustrated by two types of traffic accident scenario, where the effect of Article 4(3) may fall to be decided.

The first example concerns situations involving hired vehicles. If a German national hires a car in Italy, which is covered by insurance provided by an Italian insurer, with the insurance contract being governed by Italian law, and that car collides with an English motorist in France, should Article 4(3) be engaged so that Italian law would apply? There are a greater number of factors which point to Italian law. However, it is submitted that Italian law in this situation is completely outside of the field of expectation of the victim. French law is not only within the field of expectation of the victim but also of the tortfeasor since he chose to drive there and of the hirer and the insurer since they permitted/covered use of the vehicle in France. The effect of Article 4(1) should not therefore be overridden in this circumstance.

However if consideration is given to the case of *Edmunds v. Simmons,* discussed above, a different conclusion could be reached. Here the hire vehicle was involved in an accident in the country of hire. This is within the field of expectation of all of the parties, including the hirer and the insurer. Where the victim brings a claim against the tortfeasor the fact of their shared residency would engage Article 4(2) so that English law would apply. However, a Spanish insurance contract provided by a Spanish insurer under Spanish law could arguably engage Article 4(3) to override the effects of Article 4(2). Here the convenience embodied in the shared habitual residence rule is overridden because additional factors attract the case back to the place of the accident, which has a strong gravitational pull. It was within the field of expectation of all of the parties involved. The place of the accident is arguably manifestly more closely connected.

This reasoning has some attractions. The greater number of connecting factors point to Spanish law. However, using a principle of 'field of expectation' in this way might be criticised for being too mechanical. Counting up objective links does not take account of the particular weight of

certain connections over others. For example, with regard to the expectations of any relevant insurer, as was pointed out earlier, the rules on motor insurance in the EU mean that when the accident is of an intra-community nature, insurers already have to have within their contemplation the laws of all the other Member States.[86] This reduces the effectiveness of the arguments about the insurers' interests. Although, where the claim is made against the tortfeasor, who then has to claim against his insurer, the problems of differences in awards made and coverage under the policy may still remain.

It is submitted that the 'field of expectation' would be an aide to the rules in Rome II and would only need to be employed in difficult cases, where presumably the weighting of connections has proved fruitless. For instance, in accidents occurring outside of the EU, but which find their way into the court system of one of the Member States, the interests of the insurer surely retain importance, but so does the fact that insurance cover was freely provided to a 'foreign' national. However, the balance of expectation will surely lie in the place which all the parties anticipated would regulate their conduct.

A second example concerns situations where there is a contract for transportation e.g. coach travel across national borders which does not begin in the claimant's country of residence, the contract being governed by the law of the place of registration of the company. Here the question will be whether the law of the place of contracting, or the law governing the contract, creates a manifestly closer connection to any tort committed, rather than the law of the place of the accident. In a scenario where an English national travels to Germany, where they purchase tickets for coach travel from Austria to Italy, the contract to be governed by German law, and the person is subsequently injured as a result of a collision in Italy, should Article 4(3) be

[86] As stated before, the rules of the MIDs are discussed fully in Chapter 5. On this point see 5.2.1.4.

employed so that German law applies instead of the law applicable under Article 4(1), Italian law?

By its exceptional nature the effect of Article 4(3) will turn on the context and detail of the case it is applied to. Here, the parties' field of expectation cannot provide anymore answer than that both the laws of Italy and Germany were within the contemplation of the parties. The parties have Italian law in contemplation, that being the place that the victim voluntarily travelled to. The parties also contemplate German law, that being the law which governs the contract of carriage and the law that the parties expect to regulate their contractual relationship and obligations to one another. This is an example where the weighing of factors according to the objectives of Rome II has to provide the ultimate outcome. The question is not how to choose between these differing results but whether there is a preponderance of factors which mean that German law under Article 4(3) is manifestly more appropriate than Italian law under Article 4(1) i.e. German law is 'manifestly' more closely connected to the tort. It is submitted that in this situation the expectation of the parties that their relationship will be governed by German law is stronger than the expectation of the law of the place of the accident since German law was freely agreed upon to regulate contractual relations, it coincides with the residence of one of the parties as well as being the place of contracting.[87] This is surely just the type of situation envisaged by Article 4(3) when it speaks of a manifestly closer connection being created by a pre-existing relationship, such as a contract which is closely related to the non-contractual obligation. It should however be noted that the author does not, as stated above, subscribe to the view that Article 4(3) creates an automatic accessory connection, where the law of the contract will routinely apply to the tort. This will only be the case if all the facts of the case point to such a result.

[87] It would also be useful here to consider by way of analogy Article 5(2) Rome I which concerns contacts of carriage. Here the place of departure and place of destination are considered important factors along with the habitual residence of the parties.

It can be noted that the discretion afforded to judges under the rules of displacement in Article 4(2) and 4(3) of Rome II is more restrictive than under the rules of displacement under the English '95 Act. Under s12 of the Act the court is free to consider whether, on an assessment of all the facts, that it is substantially more appropriate to apply a law other than that of the *lex loci delicti* (s11(1)) or the *lex loci damni* (s11(2)). Under Rome II the court can only displace the *lex loci damni* if the parties share common habitual residence or if there is a law which is manifestly more closely connected to the tort. This, as discussed above, is likely to involve factors which overwhelmingly point to the application of another law, a much higher threshold than is required by s12. The tendency of Rome II towards certainty and predictability, noted throughout this Chapter and Chapter 3, is likely to have a significant impact on the discretion available to the English court.

### 4.5. Concurrent Actions

Consideration of the effect of a pre-existing relationship on the law applicable to a tortious dispute under Article 4(3) brings to mind a further important issue, that of concurrent actions. Under some legal systems, England included, the claimant in the above scenario, concerning coach travel, would be within their rights at the national level to frame their claim in either contract or tort as they wish.[88] Other legal systems do not permit this (France for example[89]). The question is whether Rome II, and its contractual counterparts Rome I and the Rome Convention, allow claims to be framed as either contractual or tortious, at the choice-of-law level. This would entail pleading that the law applicable to a cross border dispute in tort would be determined by Rome II whilst, the law applicable to an action in contract, arising out of the same factual circumstances and between the same parties, would be determined by Rome I. In effect the claimant would be able to stack up different potential causes of action under different

[88] See for example *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145.
[89] See Czepelak (n81), 402.

potentially applicable laws and to choose the most beneficial way forward for them. That such a situation is possible is documented, in relation to the English common law choice-of-law rules, by Professor Briggs. In an article devoted to the matter, he provides the illuminating example of a claimant who is able to find five separate, but alternative, causes of action,[90] from one factual circumstance, and to then use choice-of-law rules (where each action is determined under a different applicable law) to benefit from the most favourable outcome. He clearly finds this possibility objectionable stating:

*"The defendant has to defend his goal against an opponent who may be playing with as many as five footballs at once but who stands to win damages, interest and costs if he misses with four but scores with the fifth. The present submission is that, within the domain of the common law conflict of laws, such a right to accumulate causes of action, leading to a menu of choice of choice of law rules, is objectionable and needs to be reconsidered."* [91]

Briggs is quite clear in his opinion that as between the English common law system and the Rome Convention, the autonomous definition to be given to the term 'contractual obligation' would also afford actions framed in those terms exclusivity with regards to characterisation for choice-of-law purposes. In essence, once a claim is characterised as contractual for the purposes of the Rome Convention or as falling within the scope of the Convention it cannot be otherwise and concurrently characterised as non-contractual, it is removed entirely from the reach of common law rules on choice-of-law in tort. This conclusion is reached on the basis that Article 18 of the Rome Convention requires that courts pay regard to the desirability of achieving uniform interpretation and application of its rules. Because at the domestic level concurrency of actions is allowed by some states but not by others, if this is allowed to filter through to the choice-of-law level, it will result in uneven outcomes in the application of the Rome Convention.

[90] A. Briggs 'Choice of Choice of Law' (2003) LMCLQ 12. Briggs gives the example, at p13, of a solicitor who deploys his clients money in a forbidden manner. Briggs lists as the claims which might arise in such circumstances: a claim for breach of contract, a claim in tort, a claim for breach of fiduciary duty and a claim in unjust enrichment. If the solicitor is also a corporate office holder in the client company the claim of breach of director's duties can also be added.
[91] Ibid,15.

Accordingly Briggs argues that in the interests of securing predictability and uniformity, once an obligation is characterised as falling within the scope of the Rome Convention it cannot be alternatively and concurrently characterised as sounding in tort as well.[92]

In support of this argument Briggs also relies on an analogy with the definition afforded to the term *"matters relating to contract"* in Article 5(1) of the Brussels Convention, where any claim not characterised as contractual is excluded from the remit of the provision. This being relevant because the interpretation given to terms in either one of the Brussels Convention or the Rome Convention, were accepted as guiding the meaning of the same term in the other.

Briggs' reasoning is confined to the matter of choice-of-law, so that once the applicable law is arrived upon, the internal rules of that law might then permit the concurrence of actions, but this is a purely domestic matter, outside the remit of choice-of-law rules. [93] This reasoning was not, however, supported by the English Court of Appeal, who in *Base Metal Trading Ltd. V. Shamurin*[94] found that a claim which fell within the scope of the Rome Convention could also be alternatively characterised as sounding in Equity where, under the common law, a different law would apply. In a note on the case Briggs defended his original position relying on the argument that any alternative obligation owed, other than the contractual one, only arises because a contractual agreement was entered into in the first place and as such the obligations should all fall within the scope of the Convention. [95] In the case Tuckey LJ had been clear that in his opinion:

*"..there is nothing consensual about the imposition of a tortious or equitable duty of care."* [96]

Briggs responds by recourse to the underlying principle of his argument:

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[92] Ibid at 27-29.
[93] Ibid at 31.
[94] [2004] EWCA Civ 1316, [2005] 1 WLR 1157. Noted by A. Dickinson 'Applicable law arbitrage - an opportunity missed?' LQR (2005) 374.
[95] A. Briggs (2004) BYIL 572.
[96] *Base Metal* (n94), [28].

*"...how could it be right that a claim such as that which arose in the present case would have been governed by the lex contractus if brought before a French court, but not necessarily governed by the lex contractus when brought in England. Much depends on how relentlessly one seeks to apply the principle that the Rome Convention is to be given a uniform interpretation."* [97]

He further acknowledges that it is ultimately for the European court to give the definitive answer on the matter and postulates that once the matter is governed by a Regulation (what was to become Rome I) and that once there were a set of uniform choice-of-law rules governing non-contractual obligations (which became Rome II), there would be no doubt that the English common law could not step in to provide the claimant with concurrent causes of action. Now that we have Rome I and Rome II, can the Claimant still choose to frame his claim in either contract or tort?

Recital 7 of Rome II provides that the substantive scope of the Regulation shall be consistent with the provisions of Brussels I, the Rome Convention and Rome I Regulation. Scott considers that the consequence of this must be, in furtherance of the objectives of predictability and certainty, that a claim will either be contractual or non-contractual, but it cannot be both. [98] Despite this conclusion, Scott further considers that if it is possible for the claimant to frame his claim in both contract and tort then recourse to the different choice-of-law regimes is also possible and that where the obligations are independent and arise for different reasons there is no objection to this. He notes that often the same law will in any event apply to both obligations because Article 4(3) of Rome II gives priority to the law governing the contractual obligation. Czepelak reaches a similar conclusion.[99] He describes the Rome II approach as providing filters which aim to deal with the issue of concurrent liability. Firstly, party autonomy will allow the

[97] Briggs (n.90) above, 575.
[98] A. Scott 'The Scope of Non-Contractual Obligations' in J. Ahern and W. Binchy *The Rome II Regulation and the Law Applicable to Non-Contractual Obligations A New Litigation Regime* (Nijhoff, 2009) p59
[99] Czepelak (n81).

parties to choose the laws which apply to their obligations, disposing of the need to consider the matter further. If the parties have not chosen the applicable law then autonomous characterisation of the terms 'contractual obligation' and 'non-contractual obligation' will further filter out a number of difficult cases which might, under domestic systems, have been characterised differently, depending on the system concerned. If these filters fail then Article 4(3) of Rome II will, in most other situations, designate the law which applies to the contractual obligation.

Both Scott and Czepelak rely on a practical solution to the problems raised by the issue of concurrent liability. Both assume that Article 4(3) of Rome II will automatically create an accessory connection to the law which governs the contractual obligation and, despite stating the importance of uniform and predictable outcomes, neither provides strong argument as to why a claim should not be exclusively characterised as either one type of claim or the other. As has been stated above,[100] the assumption that the law applicable to the contractual obligation will automatically apply to the non-contractual one is falsely premised. Furthermore, in the interests of certainty, predictability and the development of autonomous concepts, for use across the various complementary European conflict of laws instruments, Professor Briggs' contention that if an obligation arises as a result of an agreement freely entered into it should be characterised as contractual for choice-of-law purposes, is preferable.

However, Dickinson provides argument in favour of the continued application of concurrent actions under Rome II. He states:

*"...the Regulation ... contemplates in several places the possibility that a non-contractual obligation that has a close connection with a contractual or other pre-existing relationship may fall within the scope of the Regulation and may be governed by the law applicable to that relationship. Furthermore, Article 14(1)(b) allows parties pursuing*

[100] See above at 4.4.2.

*a commercial activity to choose the law applicable to a non-contractual obligation arising between them .... such rules would appear useless, or at the very least, of little significance if claims arising in connection with a contract must be characterised as contractual and as falling beyond their reach."* [101]

Although persuasive, this argument cannot be accepted. A claim being closely connected to a contract does not prevent the particular claim from being characterised as non-contractual, as is demonstrated in the case of direct actions against insurers. The issue to be decided will be whether a claim should be characterised as contractual or non-contractual, not whether sufficient use will be made of the provisions of Rome II. The Recitals appear to give clear guidance that the realms of contractual and non-contractual should be kept separate for choice-of-law purposes under the Rome I and Rome II Regulations. Autonomous definitions will take time to develop, but once in place will prevent the undesirable consequences of choice of choice of law, outlined by Briggs. It is submitted that the better view would be that, between them, Rome I and Rome II should not permit concurrent actions, at the choice of law level for actions arising from the same circumstances, between the same parties.

### 4.6. Article 14 – Freedom of Choice

While this chapter deals with the Articles of Rome II, which apply to traffic accidents, in numerical order, if the parties make a valid choice of applicable law, in accordance with Article 14, it is this which will prevail. This fact has led some authors to consider that it is Article 14 which is the primary and most important rule contained in Rome II.[102] This marks a significant change from the position under English law where no party choice was permitted. The use of

[101] Dickinson (n.21), 3.128.
[102] T. Graziano 'Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation' in J. Ahern and W. Binchy *The Rome II Regulation and the Law Applicable to Non-Contractual Obligations A New Litigation Regime* (Nijhoff, 2009) 114.

free choice (even limited free choice) is fairly novel in the area of non-contractual obligations.[103] However, it remains to be seen how much use will be made of it. Graziano postulates that the procedural and practical benefits of choosing a particular law will make it: *'... an attractive option in almost all cases in which the rules on applicable law set out in the Rome II Regulation would lead to the application of a foreign applicable law.'* [104] In cross border traffic accident cases a common point of disagreement with regard to applicable law is the extent of recovery provided for under one system of law or another. Here claimants are unlikely to let go of a law which would otherwise apply under Rome II and which provides for a higher level of damages in favour of a law which has some other procedural benefit. Likewise defendants are unlikely to agree to a law which would provide for a higher level of damages than the law otherwise applicable under Rome II. It remains to be seen how much use is made of Article 14.

Article 14 provides as follows:

*"1. The parties may agree to submit non-contractual obligations to the law of their choice:*

*(a) by an agreement entered into after the event giving rise to the damage occurred;*

*or*

*(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.*

*The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.*

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[103] M. Zhang 'Party Autonomy in Non-Contractual Obligations: Rome II and its Impacts on Choice of Law' Seton Hall Law Review 39 (2009) 1 at 1-6. Also see P. North 'Choice on Choice of Law'(1992) 3 KCLJ 29, 41-44. Rome II has followed Swiss and German legislation on Private International Law in this regard, see Article 42 of the German EGBGB; Article 132 of the Swiss Act on PIL.

[104] Graziano (n102),116.

*2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.*

*3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."*

### 4.6.1. Article 14(1)

Where a traffic accident occurs between parties, at least one of whom is travelling in a private capacity, Article 14(1) restricts those parties to making an agreement as to applicable law, only after the accident has taken place (commonly referred to as an *ex post* agreement). In the area of cross border road traffic accidents there is very narrow scope for agreements before the incident occurs (*ex ante* agreements) to be concluded, as the parties will usually be strangers to one another.[105] The rationale behind the prohibition on such agreements appears to be the desire to protect weaker parties.[106] The ordinary citizen has neither the ability to obtain information about the likely consequences of the application of one law over another, in the eventuality of an accident occurring, nor does he possess the parity of bargaining power, which would place him on an equal footing with a commercial operator.[107] In the main, there appears to be little

[105] It is possible that in some rare circumstances the parties may be a position to make such an agreement but it is difficult in the area of traffic accidents to find a plausible example of when this might occur. In the case of travel under contract (by coach for instance), the contract may contain a choice of law clause which aims to cover all obligations arising between the parties. Such a clause of the contract could not be a valid choice under Article 14 of Rome II because the passenger would not be considered to be contracting in pursuit of a commercial activity. Even if the travel is for the purpose of conducting business activities, the travel itself is not commercial. The same would be true of contracts for the repair of vehicles which was performed negligently, leading to an accident which causes damage to the driver of the vehicle.

[106] Commission amended proposal for Rome II COM (2006) 83 final, 3.

[107] See Th. De Boer 'Party Autonomy and Its Limitations in the Rome II Regulation' (2007) YBPIL 19.

objection to allowing *ex post* agreements since the parties, after the incident has occurred, are in a position to understand their rights and obligations and can make a free choice on this basis.[108]

There is an interesting question in respect of those tortious obligations which arise where there are pre-existing contractual relations. In such circumstances Article 4(3), as discussed above, might lead to the application of the law which governs those pre-existing relations. This however, leads Grazione to argue that the consumer protection basis of the restriction on *ex ante* agreements in Article 14 is undermined where there are pre-existing contractual relations, because an applicable law that the parties are not permitted to choose prior to the incident is then applied after the incident by way of Article 4(3). This is much easier to understand when applied to a scenario.

In the example given above of coach travel, any clause of the contract purporting to choose the applicable law for non-contractual obligations would not be a valid choice under Article 14, as one of the parties is not pursuing commercial activities. This, as stated, protects the weaker party. However, should an accident occur for which the coach company can be held liable, Article 4(3) might operate to hold that the applicable law specified in the contract for travel will also govern any liability arising out of the accident, because the existence of a contract between the parties could give rise to a manifestly closer connection to that law. This is the same law that Article 14 would not permit the parties to choose prior to the accident.

Grazione argues that where the rules in Rome I operate to designate the law applicable to the contract, in the absence of choice of the parties, as being the law of the state of origin of the seller or service provider, Article 4(3) of Rome II should be read in light of Article 14 of Rome II to exclude that law which the parties are prevented from choosing *ex ante* from applying, in order

[108] S. Symeonides 'Party Autonomy in Rome I and II : A Comparative Perspective' in K. Boele-Woelki, T. Einhorn, D. Girsberger & S. Symeonides (eds.), *Convergence And Divergence In Private International Law* (Liber Amicorum Kurt Siehr, 2010) 513, 546.

to ensure the weaker party the protection afforded by the restrictions in Article 14.[109] If adopted, this approach would be a much more sophisticated approach to the interpretation of Article 4(3) than has thus far been accorded it.[110] It certainly has appeal on a consumer protection level but it needs to be remembered that Rome II is not exclusively consumer focused, by any stretch of the imagination, and that Article 4(3) has a bigger role to play than merely to provide an accessory connection.

The existence of the contract in the above example will not make automatic the application of the law applicable to the contract and in this way Grazione overstates the problem. It is only if, when all the circumstances of the case are considered, there is an overwhelming connection to a state whose law also applies to the contract that Article 4(3) will operate to apply that law to the non-contractual obligation also. If there is an overwhelming connection to a particular country then there can be little objection to the application of that law. It has to be remembered that Rome II has elements of consumer protection contained within it, such as the restriction on agreements as to applicable law, but that in competition with this objective is the stated aim of achieving a balance between the interests of all the parties.[111] Some accuse Rome II of methodological incongruence.[112] Certainly the Regulation is trying to strike a difficult balance between certainty and predictability on the one hand and flexibility to achieve justice on the other. The weaker party protection mechanism contained in Article 14 should be confined to Article 14 and, it is submitted, should not be permitted to spill over to affect the interpretation of other provisions of the Regulation which are clearly not designed for the same purpose.

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[109] Graziano (n102), 126-128.
[110] See above at 4.4.
[111] Apparent from Recital 16
[112] See R. Weintraub 'The Choice of Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligation: Simple and Predictable, Consequence Based, or Neither?' 43(2007-2008) Tex. Int'l L. J. 401.

With regard to *ex ante* agreements made by parties who are pursuing commercial activities, it is difficult to imagine when this might occur, in terms of liability arising out of a road traffic accident.[113] If a contract was concluded between a repair garage and a haulage company for the ongoing repair of heavy goods vehicles, then a clause in the contract which selected the law which would apply in respect of any contractual or tortious obligations arising out of the performance of the contract, could be a valid choice of law under Article 14. However it has to be noted here that the choice would only be valid for claims by the company for vehicle damage since any claim by the driver victim would be brought on the victim's own behalf, and as such, would fall outside of the agreement made between the companies. It is submitted that *ex ante* agreements will be of little significance in the field of road traffic accidents.

The final sentence of Article 14(1) stipulates that any choice made shall not prejudice the rights of third parties. The most likely third parties in a road traffic accident will be the insurers of the respective parties involved. Any agreement made as to applicable law, by the parties to the accident, should take account of this fact. In an example where the victim of an accident claims against the tortfeasor, who in turn claims indemnity against his insurer, if the law chosen by the parties provides for more generous levels of damages than the law of the insurance contract, the tortfeasor is unlikely to be able to recover the full amount paid to the victim, since the insurer cannot be prejudiced by the choice between the parties. This fact is likely to act as a significant limiting factor on the ability of the parties to choose the applicable law because of the importance of insurance in the settlement of claims arising out of cross border road traffic accidents.

[113] As stated above those contracts which are for travel and which purport to chose the applicable law for any obligations arising between the parties will not be valid under Article 14, since the party who is travelling is unlikely to be considered as pursuing a commercial activity in undertaking the travel, and, in any event, any standard term of a contract is unlikely to fulfil the requirement of Article 14(1)(b) that the agreement be freely negotiated. The same arguments would also apply to a contract for repair of a private vehicle where the repair was performed negligently with the result that the vehicle crashed causing loss. This example was created by Graziano (n102).

#### 4.6.2. Article 14(2) and 14(3)

In addition to not prejudicing the rights of third parties, Article 14(2) and 14(3) also provide a further restriction on the ability of the parties to freely choose the applicable law to a non-contractual obligation. Article 14(2) prevents the choice of the parties from prejudicing the mandatory rules of the state where all the elements relating to the situation are located in that state, at the time that the event giving rise to damage occurs. Article 14(3) provides that where all the elements relating to an incident are located in one or more Member States at the time that the damage arises, the mandatory rules of Community law along with any relevant national implementing provisions shall also not be prejudiced. In respect of road traffic accidents, the most important mandatory rules relate to the provision of insurance coverage and compensation to victims by insurance companies. In a choice-of-law agreement between the victim and the tortfeasor, these mandatory rules have little bearing. However, if the parties to an action arising out of an intra-community cross border road traffic accident and to a purported choice-of-law agreement were the victim and the liable person's insurer, any choice could not prejudice the application of the rules contained in the MID and those national provisions which implement it into the national law of Member States.[114]

### 4.7. Scope of the Applicable law

#### 4.7.1. Article 15

Article 15 provides:

*"The law applicable to non-contractual obligations under this Regulation shall govern in particular:*

[114] The rules of the Motor Insurance Directives form much of the focus of Chapter 5 and as such are not discussed further here.

*(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;*

*(b) the grounds for exemption from liability, any limitation of liability and any division of liability;*

*(c) the existence, the nature and the assessment of damage or the remedy claimed;*

*(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;*

*(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;*

*(f) persons entitled to compensation for damage sustained personally;*

*(g) liability for the acts of another person;*

*(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."*

Whilst various Articles deal with the extent to which the law applicable under the Regulation will apply to specific issues,[115] the most important Article in this regard is Article 15. Here the Regulation drafters have provided a lengthy list of issues which are to be determined by the law designated under the Regulation. However, whilst this list is comprehensive and will certainly mean that the vast majority of issues arising from a dispute will be dealt with under the law designated by the Regulation, it is clear that it is a non-exhaustive provision. The wording of the provision makes it apparent that the list of issues could expand, stating as it does, that the designated law will '*govern* ***in particular'*** the things mentioned.[116]

Article 15(a) directs that the basis and extent of liability will be determined by the applicable law.

[115] Such as Article 22 regarding burden of proof and Article 24 on the exclusion of renvoi.
[116] Emphasis added.

Article 15(b) provides that the applicable law will resolve issues relating to exemption from and limitation of liability as well as any questions pertaining to the division of liability. When a traffic accident occurs there could be more than one party who is responsible for the ensuing damage. This can happen in the case of a multi vehicle collision. Here Article 15(b) works well to ensure that the applicable law is applied to most if not all of the issues that might arise from the dispute, so long as all of the claims which arise are governed by the same law under Rome II. In a situation where an English driver is injured in a collision which is jointly caused by another English driver and a German driver, in Germany, any claim against the English driver would be decided under English law in accordance with Article 4(2), whilst a claim against the German driver would be decided under German law in accordance with Article 4(1). Here the application of Article 15(b) means that the apportionment of liability is performed under two separate laws. If under each law the method of apportioning liability differs, the result could be the over or under compensation of the victim. In a domestic situation these claims would likely be joined and the court would apportion the blame to cover the whole liability, i.e. 60:40. If different laws apply to the claims they cannot, for practical reasons be joined together, and the result of the apportionment might be, for example, that one defendant is found to have been 30% liable whilst the other defendant, who is subject to separate proceedings, is found to have been 60% liable. Thus the claimant is left with a 10% shortfall. However, the alternative would have been to subject all claims arising out of one factual circumstance to one applicable law, the *lex loci damni* for example, but for the reasons stated above in relation to Article 4(2) this would be more undesirable than the possibility of problems with the division of liability under Article 15(b). It is submitted that in this regard the approach of Rome II is correct.

Article 15(c) is dealt with in detail below.

Article 15(d) requires the applicable law to address which measures may be taken by the court to prevent or terminate the damage or to ensure the provision of compensation. This is to be done within the confines of the limits imposed on the court by its procedural rules. In a traffic accident the damage occurs at once and cannot be a continuing action. As such the first part of the provision is not relevant to this work. The final section of the provision might be used to prevent the disposal of assets by a defendant who wishes to avoid payment of compensation. In accordance with the Article, this would be done by reference to the applicable law, but within the confines of the procedural rules of the *lex fori*. This creates another slightly opaque situation where outcomes are difficult to predict and may differ depending on the court hearing the case.

Article 15(e) requires the applicable law to deal with the question of whether a right to damages or other remedy can be transferred, including by inheritance.

Article 15(f) directs the applicable law to determine who is entitled to compensation for personal injury and Article 15(g) ensures that the applicable law deals with issues of whether one party can be liable for the acts of another. This will include the liability of a vehicle owner under a scheme if strict liability, the liability of an employer for acts of his employee as well as whether the acts of a child can become the liability of the parent or guardian of that child.

Finally, Article 15(h) provides that issues concerned with when an obligation is extinguished and all rules concerning limitation will also be governed by the applicable law.

The provision of Article 15 which is most relevant to traffic accidents is Article 15(c).

#### *4.7.1.1. Article 15(c)*

Article 15(c) provides that the applicable law will govern:

*"The existence, the nature and the assessment of damage or the remedy claimed;"*

This provision can be viewed as an express reversal of the rule applicable under English law pre-Rome II, where any provision which goes to the measurement of remedy as opposed to the scope of liability would be deemed procedural, and therefore a matter for the *lex fori.* [117]

The notion of dépeçage, that is the application of different laws to separate substantive issues of a case, is not supported in Rome II. Most of the substantive provisions of Rome II refer to the law which will govern *'the non-contractual obligation'* rather than individual issues. Moreover, the Parliament's proposed amendment, which would have seen the issues in traffic accident cases split between the law of the place of the accident, which would govern liability, and the law of the victim's habitual residence, which would govern the types and quantification of damages, was rejected. The rejection was not however expressly based on an objection to dépeçage and a number of Rome II's provisions appear to require it.[118] However, it appears that the intention behind Article 15 is to ensure that the applicable law will govern the vast majority of the substantive issues of a case.

Certainly it could be argued, therefore, that the wording of Article 15(c) has altered the position in English law with regard to the quantification of damages. This has the advantage of subjecting all issues of the claim to the same law, thereby securing consistency of approach to issues of both liability and remedy. However, Peter Hay considers that the terminology in Article 15 (c) requires the quantification of damages to be performed under the lex fori. He reasons that Article 15(c) does not contain wording which qualifies its effect, as the analogous provision of the Rome Convention does, where the lex fori applies unless the assessment is governed by a

[117] See Chapter 2 at 2.3.3.3.

[118] Article 27 for example requires in some circumstances a law to be applied in the fulfilment of another Community instrument to the extent that is required to ensure the proper functioning of the internal market. For more on this view see P. Kozyris 'Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity" (2008) 56 Am J Comp L 471 at 477-8. Article 27 is discussed at length in Chapter 5.

rule of law; when the applicable law would apply.[119] He considers that this, along with the appearance that the institutions were in favour of the lex fori during the legislative process[120] and the wording of Recital 33, which states:

*"According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention."*

results in the term '***assessment'*** being procedural in nature, such that the lex fori applies to the assessment of damages. [121]

In fact the lack of qualifying language simplifies matters considerably. The Article is plain: assessment of damages will be governed by the applicable law. It would be bizarre if implicit intentions and the wording of a non-binding Recital, which appears to require information to be taken account of as factual datum and which is aimed at a specific type of tortious incident, could counteract the express wording of a Regulation provision. It is submitted that under Rome II traffic accident victims will generally have compensation for damage assessed by the standards of the applicable law.

Recital 33 does, however, raise some interesting questions with regard to quantification of damages for traffic accident victims. It is obviously inspired by a desire to ensure that the perceived problem of under compensation of traffic accident victims[122] is in some way

[119] Article 10 (1)(c) of the Rome Convention states that the applicable law will apply to the assessment of damages in so far as it is governed by rules of law. Accordingly this provides a default position that the lex fori will apply unless the assessment is governed by a rule of law when it will be governed by the applicable law.
[120] P. Hay 'Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation' (2007) 4 European Legal Forum I-137, 148.
[121] Ibid.
[122] As highlighted in the Commission report on cross border road traffic accident victims, prepared by law firm Demolin Brulard Barthélémy for the Commission *Compensation of victims of cross-border road traffic accidents in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims*

ameliorated, but its effect is far from certain and, further, its usefulness is dubious. Being a Recital the statement is not binding on any court, and even where courts are minded to attempt to achieve full compensation for a victim, the domestic compensation scheme may legitimately prevent a higher award of damages. This would be so, for example, in a claim brought by an English claimant in the Spanish courts, where the court would be bound to apply the baremes: tables which cap damages in traffic accidents cases.[123] Once the modest cap is reached the actual circumstances of the victim will have no bearing on the decision by the court. This not only highlights the possible ineffectiveness of the Recital, but also demonstrates how elements of one legal system will not necessarily be congruous with those of another. The amount of compensation may be lower in Spain than in England but liability is strict, whereas it is based on fault in England. As has been argued above, systems of law ought to be applied in a holistic way to avoid the bias that would flow from the application of strict liability with a high award of damages, or fault based liability with a low award of damages. Recital 33 is unlikely to be sufficient to remedy the potential for inappropriate compensation.

The predictability created by the application of Article 15(c) is significant for claims brought in the English courts, in respect of traffic accidents having occurred in a different Member State. Article 15(c) provides the driver with a degree of certainty as to which law will be applicable which is missing if, in terms of damages, the applicable law is dependent upon the court that accepts jurisdiction over the matter. So too the insurer can be more sure of the applicable law in this regard. However, Recital 33 creates a degree of uncertainty with regard to the assessment of damages. It is unclear how, when and to what extent it will be utilised, nor will it be possible for a driver to predict the country of residence of a potential victim as opposed to being able to predict the applicable law on the basis of it being the country whose territory has voluntarily

<http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf> accessed on 5 October 2011. Hereinafter referred to as the Commission Report.

123 See B. Koch and H. Koziol (eds) *Compensation for Personal Injury in a Comparative Prespective* Tort and Insurance Law Vol. 4 (Springer, 2003) p277 – 279.

been entered. It is submitted that a more comprehensive approach to the questions raised by Recital 33 ought to be considered. However, if the proposed legislative change advocated in Chapter 5 of this work were to be accepted the need for Recital 33 would be obviated.

## 4.8. Other Matters Affecting the Choice-of-Law

There are a number of Articles of Rome II, which are not choice-of-law rules as such, but which will impact, at certain times, on the choice made by other rules in the Regulation. The most significant of these for cross border traffic accidents are Article 16 on overriding mandatory provisions of the forum, Article 17 on rules of safety and conduct of the place of the accident and Article 27 on choice-of-law rules contained in other Community Instruments. In respect of the provisions of Article 16 and Article 27 the most pressing issues, in respect of road accidents, relate to the provisions of the Motor Insurance Directives. As such these Articles are dealt with in Chapter 5.

### 4.8.1. Article 17

Article 17 states:

*"In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."*

It is supplemented by Recital 34 which states:

*"In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should*

*be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident."*

Article 17 is only relevant where the law applicable to the non-contractual obligation is other than the place where the incident occurred. Most States will have a large bulk of rules of safety and conduct in force, in respect to traffic regulation, within their jurisdiction. One could suppose, for example, that a seised court would take into account the speed limit in force at the time and place of the incident, as a point of fact as to whether the speed limit was actually broken.

There are two issues which require consideration in respect of Article 17. Firstly, what will be its effect and, secondly, when will it be utilised. In respect of the first issue, the Commission's proposal was keen to point out that taking account of rules of safety and conduct is not the same as applying them and that they should be taken account of as a point of fact.[124] This notion is mirrored in the wording of the Article. The Commission Proposal states that Article 17 is based on Article 7 of the Hague Convention on Traffic Accidents and that account should be taken of rules of safety and conduct because a tortfeasor would have been subject to them at the time of the incident.[125] The Hague Convention Explanatory Report states that:

*"[Local] law is only of relevance in providing certain factual elements to the judge and so to enable him to apply the law governing liability"* [126]

It is further stated that the wording of Article 7 is purposely flexible to allow for wide judicial discretion. Examples are given where there is a lack of local rules, where speed is unlimited, or there is no time limit for driving without breaks, for professional drivers. Here it is stated that the lack of rules under local law will not override the existence of rules under the applicable law.

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[124] Commission Proposal (n1), 25.
[125] Ibid.
[126] E. Essen *Convention on the Law Applicable to Traffic Accidents' Explanatory Report* (HCCH, 1970), 26-27.

The report is, however, silent as to the situation where the local law is more exacting than the applicable law. If it is assumed that more exacting local standards will be adhered to then the applicable law becomes subject to the local law in a complex mix, where the role of the local law will not be purely factual. The result is effectively dépeçage. Since dépeçage is not fully embraced in Rome II[127] this should only be done, as argued above, to the extent necessary to achieve sensible and justifiable results

In relation to the issue of usage, the wording of the Article requires such rules to be taken account of, but concurrently grants discretion in respect of when the provision will be engaged. It has been observed that the phrase *'in so far as is appropriate'* will, for example, restrict the Article's effect where liability under the applicable law is strict, since here the existence of liability is not dependent upon the observation (or lack of) of rules of safety and conduct at the place of the accident.[128] This creates, however, a system where, when, as argued above, rules are not afforded a purely factual status, sometimes the applicable law will apply in full and others times where it will be modified by the law of the place of the accident. This creates a lack of uniformity in choice-of-law terms. Although it can also be viewed as merely a reflection of the non-uniform schemes of tortious liability in operation across the EU. Solutions based on conflict of laws approaches reach their limit here, where the issue is more appropriately dealt with by substantive harmonisation.

Article 17 is important in that it formalises what should have already been obvious, that conduct should be measured against the standards which the actor felt himself to be regulated by, i.e. the laws of the place of conduct, unless there is a sound reason for not so doing. However, Article 17 represents a weak point in terms of uniformity for Rome II. It is open to national courts to

[127] As stated above see para 3.4.4.
[128] R. Plender and M. Wilderspin *The European Private International Law of Obligations* (Sweet and Maxwell, 3rd ed, 2009), 8-110.

decide when and how to engage the provision and as such it may prove difficult to achieve consistency of application, or to build a body of principles of general application, in respect of it.

### 4.9. The Commission Report on Cross Border Traffic Accidents

It will be remembered from Chapter 3 that the compromise achieved for the passage of Rome II included an undertaking from the Commission to produce a report on the effects of cross border traffic accidents on victims.[129] Quite unusually the report was commissioned and published prior to the entry into force of the Regulation. The report constitutes the findings of a study carried out by law firm Demolin Brulard Barthélémy[130] into the effects of cross-border traffic accidents on victims and, in particular, focused on two key issues: quantification of damages and limitation periods; these issues having been identified as factors which can impede access to justice and full compensation.[131] The report raises a number of interesting points.

As an initial point the scope of the study is worthy of note. The target of the study is:

*"victims who are EU citizens that are;*

*injured in traffic accidents which occur in a Member State other than that of their habitual residence;*

*for whom third party liability insurance is relevant and;*

*who are not at fault."* [132]

Since Article 3 of Rome II provides for the universal application of the rules contained within it, the effect of the Regulation extends far beyond the boundaries of the EU.[133] By restricting the scope of the study to EU citizens only, there are a proportion of cross border victims not

[129] See Chapter 3 at 3.3.4.
[130] Commission Report (n122). The study was conducted mainly by way of a comparison of national practices through the completion of national reports on the basis of a survey sent out to experts in each Member State.
[131] Ibid, 20-25 and 27 – 33.
[132] Ibid, 42.
[133] See chapter 3 at 3.5.1.3.

contemplated at all by it. Since the rules apply to non EU citizen victims with equal force, surely any proposed changes ought to have factored in all potential victims. This would have been the only way to gain a clear view of the potential impact of any proposed changes.[134]

The restrictions on the scope of the study also mean that those victims who fall foul of uninsured or untraceable drivers and those who are partly at fault themselves were also not considered.

The lack of reliable information available about the numbers of cross border traffic accidents is noted in the report.[135] Nonetheless, a figure of 7.5 % is arrived at as representing, on average, the numbers of traffic accidents involving visiting parties and causing serious injury.[136] This figure obviously does not take account of the very many accidents involving minor or slight injury or property damage without personal injury. Once the effects of the restrictions of the report (factors 1-4 above) are taken into account however, the figure of 7.5% is reduced to one of *'far less than one percent'*, for the purposes of the report.[137]

Despite finding that there are large differences in the levels of compensation between Member States, which gives rise to the very real possibility of over or under compensation of victims, one of the main recommendations to come out of the report is that action of any kind might be disproportionate to the significance of the issues for the internal market.[138] Issues of subsidiarity and proportionality are raised.[139] This is a bold assertion to make when not all cross border accidents are taken into consideration and it is accepted that both the full numbers are difficult

134 Part of the reason for restricting the study in this way may have been that the report is not concerned with only proposing changes to Rome II, its mandate is much wider looking at all potential options for improving the position of cross-border victims. Many of the non-conflicts based solutions would require the consensus and co-operation of the EU Member States in order to achieve them and would only be applicable to citizens of Member States and so, to that end, could be seen as mainly concerning European citizens. However, the fact remains that where a case comes to be decided before the court of a Member State the plight of the non-EU national should be no less of a concern and at the very least the study might have considered the appropriateness of the Rome II regime for such victims.
135 The Commission Report (n122), 47-51.
136 Ibid, 52.
137 Ibid.
138 Ibid, 44-46.
139 Ibid, 53.

to ascertain and that in any event, it is generally agreed that the numbers of cross border accidents are increasing.[140]

Crucially, the report highlights the importance of insurance in the settlement of claims for traffic accidents. Three quarters of responses to the survey revealed that accidents were usually settled by insurance companies in more than 90% of cases and the vast majority of the remaining responses reveal the same position for more than 75% of cases. [141] Furthermore, the report attributes the potential for over/under compensation of victims to a number of complex factors, which are all inter-related and include: the fact that different compensation systems are in existence in different Member States, some being based on fault, some on no-fault, some on strict liability and others a combination of any or all of these;[142] the discretion granted to the judiciary, which is a factor in the differing quantification of damage;[143] the existence in law of different types or heads of damage, which can also affect the quantification of damages.[144]

With regard to limitation periods, distortion is attributed to the differing lengths of limitation periods, when periods begin and the factors which will result in the suspension or interruption of the period.[145] If these distortions are viewed as negative, because they make it more difficult for victims to bring claims which match social and economic context, choice-of-law rules could play a role in reducing the impact on victims, in a similar way to the role played by such rules for consumer contract cases.[146] By viewing accident victims as the weaker party and designating the victim's home law, the victim is not guaranteed more compensation but an outcome which fits their social and financial circumstance.

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140 Ibid, 51.
141 Ibid, 43-44.
142 Ibid, 63.
143 Ibid, 68-76.
144 Ibid, 77-84.
145 Ibid, 22-23.
146 Article 6 of Rome I for example allows, in certain circumstances, a consumer (as defined in the Article) to bring a contractual claim under the law of the State of his habitual residence.

Despite the recognition of distortions, the main recommendation of the report is in essence to do nothing. This is the result of the report concluding that the numbers of traffic accidents involving a foreign party and which occur outside of the victims State of habitual residence is very small (far less than 1%). However, the report does formulate a number of other options for improving the situation of the victim. The options range from pragmatic suggestions, such as providing more and better information regarding levels of compensation and limitation periods, to proposals for Europe wide harmonisation of rules on type and quantification of damages and limitation periods.[147] From a conflict of laws perspective there are only two proposals which would change the current legal position. Both entail applying the law of the victim's state of habitual residence to quantification of damages and limitation periods. [148]

Following on from the report the European Commission held a public consultation which opened on 30 March 2009 for three months.[149] The Commission sought the views of all interested parties on the options for addressing the situation of the cross-border traffic accident victim. In the main the responses were split three ways. Responses from lawyers who predominantly represent claimants overwhelmingly supported the application of the law of the victim's habitual residence. This was on the basis that the only means of achieving full compensation for victims is to apply the law that accords with their standard and cost of living, social security arrangements and their expectations, which can only be the law of the state of their habitual residence.[150] Another justification for this position was that insurance companies have the resources and international network of information about local laws to enable them to deal with the consequences of this approach relatively easily.[151]

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147 Commission report (n122), 43.
148 Ibid, 44-46.
149Information on the consultation along with all the contributions received is available at <http://ec.europa.eu/internal_market/consultations/2009/cross-border-accidents_en.htm> accessed on 24 August 2013.
150 Ibid. See in particular the contributions from Irwin Mitchell Solicitors and PEOPIL.
151 Ibid. See the contribution from Thomsons Solicitors.

The second group of responses came mostly from insurers or associations representing insurers and/or their legal representatives. Here the preference was, predictably, for better provision of information to potential victims along with increased availability of voluntary first party insurance products.[152] The third category of responses came from more neutral parties such as the Law Society of England and Wales.[153] These contributions advocated the wait and see option on the basis that the Regulation, having only been in force for a short time, should not be altered before its impact can be properly measured. This is especially in light of Recital 33, which if applied in a literal manner could avoid some of the circumstances when under compensation may occur.

### 4.9.1. Is the Application of the Victim's Home Law Desirable?

As has been noted throughout this work, the approach taken by Rome II favours certainty and predictability of outcome, but also seeks a fair balance between the parties. Always applying the law of the victim's habitual residence, in claims between the victim and the tortfeasor, cannot meet these objectives. The defendant in such circumstances would never be able to predict in advance which law would apply were he to have a traffic accident. The principle of lex loci damni provides a driver with the certainty that if he drives in France he may become subject to the law of France. Applying the law of the victim's habitual residence thwarts that predictability because the applicable law becomes, bearing in mind the universal application of Rome II, potentially any country in the world. This is unworkable and manifestly unjust to the defendant, even where it applies to quantification of damages and limitation periods and not to rules regarding liability. This is because the defendant can know where he will drive but has no way of foreseeing the habitual residence of the person who he collides with. The victim has also made a

[152] Ibid. See for example the FOIL contribution.
[153] Ibid. See contribution from the Law Society of England and Wales

choice about being in the state of the accident and so a balance is struck between the parties, it being the place where both have chosen to be present and which, as has been argued throughout, is within their field of expectation and is, on that basis, highly foreseeable.

It has been noted that in reality insured defendants *'cede control over their case to their insurer and thereafter play little or no part in the litigation process."*[154] This sheds new light on proposition that the parties are on an equal footing. Although this statement was made at a time when direct actions were not possible under English law, the same may be true today in respect of claims brought against tortfeasors.[155] However, it cannot be said with complete confidence that this will be the situation all of the time, particularly because insurers in different jurisdictions may have different ways of operating.[156] In the absence of complete knowledge of this situation and without being completely confident that insurers are always in control of cases on behalf of tortfeasors it is submitted that such cases should be approach on face value as if the parties are on an equal footing.[157]

As noted in Chapter 3, Rome II is firmly rooted in the European tradition of Private International Law which is value neutral and jurisdiction selecting.[158] Where there is no inequality of relationship between the parties, there can be no justification for the special treatment of one of them for the purposes of determining the applicable law.

Moreover, a major criticism of the European Parliament's proposals in respect of traffic accidents, and of the options given in the Commission report, is that adoption of the proposal would have required different laws to be applied to the quantification of damages and to liability. The difficulty and criticism associated with the application of different laws to different

154 R. Lewis 'Insurance and the Tort System' (1985) 25 Legal Studies 85, 86.
155 As demonstrated in the recent case of *Bristol Alliance Partnership Ltd v. Williams* [2012] EWCA Civ 1267, [2013] R.T.R. 9.
156Lewis was only commenting on the English system.
157 This would be a more acceptable way of proceeding if the victim were to have the option of claiming directly against the insurer under a protectionist choice of law rule. See Chapter 5 at 5.4 for a proposal for such a rule.
158 See Chapter 3 at 3.2.

substantive issues, in relation to Rome II, is documented in Chapter 3.[159] It is argued that the mixing of different schemes of liability and compensation should be avoided.[160] This conclusion does not mean that the author considers, in relation to Rome II, that the choice-of-law rules in Rome II are entirely satisfactory, merely that when account is taken of the underlying objectives of the Regulation of providing certainty and uniformity of choice-of-law it is difficult to see how a victim centred approach to certain elements of a claim between a victim and a wrongdoer can be accommodated without affecting a change to the philosophy at the heart of the provision.

## 4.10. Conclusion

In English courts Rome II will now govern the choice-of-law issues which arise from the vast majority of cross border road traffic accidents, even if, as discussed in the next chapters, this means that by its own rules, Rome II ends up giving way to other instruments. As between the victim and the tortfeasor there is little about the general scheme of the Regulation which is severely objectionable. It is more that the details of the rules themselves and their relationship to one another need to be elucidated and given meaningful life.

The discussion in this chapter has highlighted a number of issues in respect of the interpretation of the choice-of-law provisions of Rome II. The opinions proffered on the likely resolution of these issues have been guided to a large extent by what the author considers to be the overriding objective of the Regulation: certainty and predictability. It is the author's view that where there is doubt, interpretation of the provisions will be done in a way that supports the Regulation's need to further the internal market. This will most likely be achieved through uniformity of application, which in turn is derived from certainty and predictability of outcome.

[159] Ibid.
[160] Ibid.

Consequently, whether the place of damage to an indirect victim is relevant, for the purposes of Article 4(1), has been answered in the negative because certainty would dictate that the defendant be able to predict the laws which will apply in any given circumstance. Likewise, where discretion is reserved for the court under Articles 4(2) and (3), in an attempt to facilitate a fair result as between the parties, it has been argued that the exercise of discretion should be based on an objective notion of party expectation, again to maximise certainty and predictability, and should not be impacted upon by Article 14, which serves a different purpose to that of Article 4(3).

This chapter has noted the other provisions of Rome II which have the potential to impact upon the applicable law for a cross border traffic accident. A number of these give rise to unnecessary uncertainty. In particular the inclusion of Recital 33 has meant that the inclusion of the assessment of damages within the scope of the applicable law has been muddied in respect of traffic accidents. It is unclear what impact this provision is likely to have in practice. Also the discretion afforded to the judge by Article 17 means that a matter of common sense is now likely to be a source of inconsistency in the Regulation.

A major obstacle to achieving clarity, and in turn to achieving the overall objectives of Rome II, is the fact that the vast majority of claims arising out of road traffic accidents do not ever reach the stage of court proceedings. Here the Regulation will be applied by practitioners in the settlement of claims despite the remaining ambiguities. One has to wonder how things pan out for the parties involved, in practice. This type of information, valuable as it would be in informing the progression of rules in this area, is simply not available. One thing, however, is clear. There is no place in Rome II, as it stands, for a rule which favours the victim over the tortfeasor in an action between the two.

# 5. Provisions on Third Party Motor Insurance

## 5.1. Introduction

In England, rules on compulsory third party insurance are, in large part, derived from the Motor Insurance Directives[1] (MIDs) of the European Union. A harmonised scheme of compulsory third party insurance, covering all of the Member States, was created through the MIDs which, collectively, represent a social policy seeking to minimise the impact, on victims, of the large volumes of loss and injury that occur in the EU, as a result of traffic accidents. The underlying objective was to ensure comparable treatment of victims, regardless of where in the Union an accident occurred; thereby supporting free movement of persons and vehicles, in furtherance of the single market.[2]

This chapter will examine the scheme laid down by the MIDs, along with the provisions of Rome II which relate to direct actions against the insurer, and will consider what the relationship between them is.[3] The scheme of the Directives is laid out below before being contrasted with

[1] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability[1972] OJ L103; Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L8/17; Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC Of The European Parliament And Of The Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [2000] OJ L181/65; Directive 2005/14/EC of The European Parliament And Of The Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14. The Directives have now been consolidated into a new Directive 2009/103/EC of The European Parliament And Of The Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability[2009] OJ L263/11.

[2] This objective is apparent form the Recitals to the MIDs as discussed below.

[3] It should be noted that the effect of the jurisdictional rules in force in England means that the cross border cases which will be heard most often in English courts are those arising from two situations. Firstly, where a traffic accident has occurred in an EU Member State. It will be recalled from Chapter 3, that Direct actions against insurers arising out of traffic accidents occurring in EU Member States may be brought in the State of residence of the victim under Article 9 and Article 11 Regulation 44/2001 of

that created by Rome II.[4] It appears that the schemes created in the respective provisions have not been designed to fit together as a congruous whole. Reconciliation of the two schemes is considered in the third section of this chapter. However, the rules of the MIDs in respect of the claims for compensation by a victim can be split into two categories: those which deal with claims against a third party liability insurer and those which govern claims against those compensation bodies set up in accordance with the Directives. Treatment of the issues, which arise from each of these types of claim, are dealt with separately in this chapter, save for a descriptive mention of the rules relating to compensation bodies early on.

## 5.2. Intra-Community Cross Border Traffic Accidents

### 5.2.1. The Motor Insurance Directives

During the first half of the 20th Century the rise in the use of motorised vehicles was matched by a rise in the levels of loss and damage suffered by third parties, as a result of vehicle accidents. This has led, in some continental European countries, to a move away from fault based liability for such loss, to schemes of strict liability, backed by compulsory third party motor insurance.[5]

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Dec 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) as confirmed in the case of *FBTO Schadeverzekeringen NV v. Odenbreit* Case C- 463/06 [2007] ECR I-11321. Also the application of a law other than that of an EU Member State law is unlikely to occur very often due to the operation of the defendant domicile principle under Brussels I (subject to the limited possibility under Article 13 that the parties may agree to a forum outside of the EU). The Regulation only applies to defendants domiciled in an EU Member state and the English common law rules on jurisdiction usually require a defendant to be present in the jurisdiction for service of proceedings before accepting jurisdiction. As such it is unlikely that an EU court will often hear a case which concerns the application of a non-EU law. Secondly, English courts will hear claims arising from accidents involving a vehicle normally based in the territory of a Member State (The MIDs are implemented by Member States through national provisions and apply to vehicles normally based in the territory of a Member State. See in particular Article 2 Dir 2009/103/EC, OJ L263/11, 7.10.2009). Disputes arising from traffic accidents which occur in a third country, which involve vehicles not usually stationed in a Member State are not completely unknown in English courts, as is demonstrated by the case of *Harding v. Wealands*[2007]2 AC 1, HL, but will be more of a rarity. As such the main focus of this chapter is on those accidents which engage the MIDs since it is these which will arise most often in the English courts. There are a separate set of significant issues relating to the relationship between the MIDs and the Hague Convention on the law Applicable to Traffic Accidents which will be of relevance to those EU member States who are signatories to that Convention. These issues are examined along with the Convention itself in chapter 6.

[4] Although Article 19 of Rome II on subrogated claims will have relevance in motor claims because insurers will often be subrogated to the rights of their insured in bringing or defending claims, it is not immediately apparent that any issues of particular relevance to this Thesis will arise from the operation of Article 19. The decision was made, therefore, to devote the available space to those provisions where there are difficulties, which are in greater need of attention such as those surrounding Article 18 on direct actions.

[5] See generally W. Ernst *The Development Of Traffic Liability* Vol 5 *Comparative Studies in the Development of the Law of Torts in Europe* (Cambridge University Press, 2010).

In some states, such as France, liability was purposely channelled onto those who own or operate vehicles because it is those parties who are *'best placed and able to master the potentially damage-creating activity, and consequently the better able to obtain insurance to cover the risks to which their activity gives rise.'* [6]

It seems that a common feature of each scheme of strict liability, in respect of the use of motor vehicles, is the idea that whilst motoring is a socially useful, if not vital, activity, the risks it gives rise to should not be borne by the victims of accidents.[7] However, insurance coverage was not and is not uniform throughout the EU and this was felt in the late 1960's to be a potential barrier to cross border movement and, therefore, to the internal market. As such the Motor Insurance Directives, over time, put in place a scheme of harmonised rules designed to provide comparable treatment for victims, regardless of where in the EU an accident occurs. The MIDs are arguably a reflection of the policies behind the schemes of strict liability in force in many EU states. They aim to ensure that victims are compensated.

The Directives are progressive. They built, each on the next, over a period of forty years or so, to form the scheme which is in existence today. By examining each of the Directives in turn it is possible to portray more clearly the development of the rules and the policies behind those rules.

#### *5.2.1.1. The First MID*

The first MID,[8] initiated the scheme of compulsory third party insurance that remains in existence today. Article 2 prohibits frontier checks on insurance in relation to vehicles normally based in another Member State. Article 7(2) ensures that vehicles, normally based in a third country, shall also be regarded as being normally based in the Community if:

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[6] Ibid at p71.
[7] Ibid at p61 (re: France), p93(re: Germany), pp136-137(re: The Netherlands), p177 (re: Spain) and p203 (re: Sweden).
[8] Dir 72/166/EEC.

*"...the national bureaux of all the Member States severally guarantee, each in accordance with the provisions of its own national law on compulsory insurance, settlement of claims in respect of accidents occurring in their territory caused by such vehicles."*

Thus the territorial scope of the scheme of the MIDs is extended beyond the boundaries of the EU Member States to include certain other countries such as Switzerland and Norway. Although the third countries which have in place such agreements are all currently European Free Trade Area countries, it would not appear that there is anything in the Directives to limit the countries who may make agreements in this regard.

The current system under the MIDs has grown out of the green card scheme which was begun in 1949 by the UN. The scheme was originally open for adoption by European nations and allowed a person insured in their home state, and in possession of a 'Green Card' issued by their insurer, to drive in any other state with which reciprocal arrangements had been made. [9] The States which are party to the Green Card scheme have now grown to include States which are not members of the EFTA such as Russia, Israel and Morocco. For this reason it is not inconceivable that agreements could be made under the MIDs with non-EFTA counties in the future.[10]

The abolition of frontier checks on insurance in Article 2 of the first MID was necessarily coupled with Article 3, which provided that:

*"Each Member State shall take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.*

[9] See R. Merkin and A. Rodger *EC Insurance Law* (Addison Wesley Longman, 1997), 52.
[10] For a full list of countries who are members of the Green Card scheme see: <http://www.cobx.org/en/index-module-orki-page-view-id-62.html> accessed on 24 August 2013.

*The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.*

*Each Member State shall take all appropriate measures to ensure that the contract of insurance also* ***covers: (a) according to the law in force in other Member States,***[11] *any loss or injury which is caused in the territory of those States;"*

The Recitals to the Directive make it clear that its purpose is to create a common market through the creation of conditions which enable free movement of persons.[12] They go on to state that frontier controls in relation to insurance of motor vehicles arise out of the need to ensure protection for those who may become victims of accidents caused by those vehicles and that controls are necessary as a result of disparities in national laws.[13] It is the disparities which therefore have a direct impact on the free movement of persons and vehicles.

It should be noted that the Directive as a whole is light on substantive harmonisation, leaving it to the Member States to determine the '*extent of liability'*. This could not have made a large impact on the disparities between national systems, other than to ensure that compulsory insurance cover was in existence. As such, Article 3(2)(a) attempts to alleviate disparities through its effect, which is to make certain that insurance policies cover losses and injury in accordance with the law of the state in which they occur. This measure is a choice-of-law provision since it requires losses caused in the territory of a Member State to be covered in accordance with the law of that Member State. The rule potentially selects, in relation to the types and scope of the loss at least, the law of the place of the accident.[14] However, the rule simultaneously leaves it open for national systems to determine the scope of liability.

[11] Emphasis added. The significance of this provision is discussed below in relation to Article 2 of the third MID.
[12] Recital 1.
[13] Recital 2.
[14] The precise meaning of the term 'cover' is discussed below at 5.2.1.3.

This measure would alleviate the position of victims who suffer damage or loss in their home state, as a result of an accident with a vehicle from another Member State (a 'visiting vehicle'). It allows the victim to recover damages in accordance with the social and economic conditions in existence in their state of residence[15] and as if the accident had been a purely domestic one. The measure does not, however, aid those victims who suffer accidents outside their country of residence (a visiting victim), where disparities between national systems would still result in the victim receiving damages based on differing schemes of both liability and damages.

This position was mitigated somewhat, however, by the ruling of the CJEU in the case of *Bernaldez*[16] where it was held that Art3 of the first MID as modified by the second and thir MIDs[17] must be interpreted so as to ensure that compulsory third party insurance enables third party victims of traffic accidents to be compensated for **all** damage to property and personal injury. The court stated:

*"Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness."* [18]

The exact meaning and extent of this ruling has recently been questioned in a case heard by the English Court of Appeal.[19] This is discussed below following the setting out of the relevant provisions of the second MID.

The wording of Article 3 of the first MID has been transposed wholesale into the sixth MID,[20] so that it remains an important provision in the consideration of choice-of-law issues.

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[15] As discussed in Chapter 4. See 4.9.1.
[16] C-129/94 [1996] E.C.R. I-01829.
[17] Discussed below.
[18] *Bernaldez* (n16), [19].
[19] *Bristol Alliance Partnership Ltd v. Williams* [2012] EWCA Civ 1267, [2013] R.T.R. 9

#### *5.2.1.2. The Second MID*

The second MID[21] began the process of harmonisation of substantive measures. Article 1(1) made it compulsory for policies of insurance to cover both personal injury and property damage. It also set down minimum amounts of coverage, which, under the fifth MID, are periodically reviewed[22] to ensure that they do not become outdated. The current amounts that must be covered, as a minimum, are 1million Euros per victim or 5 million Euros per claim[23] for personal injury claims and 1million Euros per claim for property damage.[24]

Article 1(4) requires Member States to establish a compensation body to provide payment for losses, up to those minimum amounts, to victims of untraced or uninsured drivers. Article 1(7) provides that the payment of compensation by the body is to be governed by the law of the State of the body, essentially a choice-of-law rule. Again this has been transposed into the consolidated Directive and is now contained in Article 10(4).[25]

Article 2(1) provides for a number of insurance contractual clauses and/or statutory provisions to be void as against a third party claimant. Accordingly, a third party claim against the policy can still be made even though: the driver does not hold a licence, is in breach of technical requirements as regards the condition and safety of the vehicle, or does not have authorisation (express or implied) to drive the vehicle.[26] The only exclusion that is allowed is where a passenger enters the vehicle knowing it to be stolen. In *Churchill* the CJEU ruled quite clearly that this permitted exclusion is a single and specific case of permitted derogation from the duty

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[20] Dir 2009/103/EC.
[21] Dir 84/5/EEC.
[22] Article 1(3) of the fifth MID provides for the review of minimum compensation levels every five years. This is now contained in Article 9 of the sixth MID.
[23] Regardless of the number of victims.
[24] Also regardless of the number of victims.
[25] See below at 5.5 for a full discussion of these provisions.
[26] When the directives were consolidated Article 2 became Article13. Article 13 contains a further exclusion not listed in the original Article2 which does not permit the insurer to rely on the victim's knowledge that the driver of the vehicle was intoxicated at the time of the accident. This reflects the judgement of the CJEU in the case of *Bernaldez* (n16).

to provide insurance coverage for all losses, under Article 3(1) of the first MID, as elucidated by *Bernaldez*.[27]

However in the recent case of *Bristol Alliance Partnership Ltd v. Williams,*[28] this position was questioned. The driver of a car purposely drove the vehicle into a wall in a failed suicide attempt. The car was launched into the air before hitting the plate glass windows of a shop, causing damage. A clause in the insurance policy excluded cover for deliberate acts of the driver. The court found that this rendered the use made of the vehicle an uninsured use such that no claim could be put to the insurer by a third party. The court found that the rulings of *Berndaldez* and *Churchill* were specific to their own facts and that the exclusion clauses which could not be enforced against a third party were those listed in Article 2(1) of the second MID, or those held by the CJEU not to be enforceable. Exclusion clauses were not unenforceable more generally than this.

It is submitted, with all due respect, that this judgment is wrong. It is not in keeping with the spirit of the decisions in *Bernaldez* and *Churchill* where the aim of victim protection was stressed and the avenues of escape from liability for an insurer appear to have been reduced to those situations in which the victim knew that the vehicle was stolen. Had the case come before the CJEU it would almost certainly have ruled that since a policy of insurance was in existence, that the insurer could not escape liability by relying on a contractual clause. Such is the strength of the policy of the MIDs of victim protection that in no case before it has the CJEU ever found, on a matter of payment of compensation by an insurer, that the victim should not be compensated. The duty is a complete one which transcends national systems. It is a reflection of the strict liability schemes coupled with compulsory insurance that exist in some continental countries whereby the risk of motoring is effectively channelled onto those with control over the vehicle

[27] C-442/10 *Churchill Insurance Company Limited, Tracy Evans v Benjamin Wilkinson, by his father and litigation friend Steven Wilkinson, Equity Claims Limited* [2012] R.T.R. 10, [35]. This case is hereinafter referred to as *Churchill*.
[28] [2012] EWCA Civ 1267, [2013] R.T.R. 9.

and then spread through compulsory motor insurance.[29] Such a system is unknown in England but the effects of these policies on the law of motor insurance will nevertheless be felt here.

#### *5.2.1.3. The Third MID*

The third MID addressed issues relating to the remaining disparities between Member States, in relation to cover for passengers.[30] Article 1 ensured that cover was provided for all passengers, other than the driver. This has been interpreted widely by the CJEU so that in the case of *Farrell,*[31] it was held that the provision covered passengers being carried in parts of a vehicle not equipped with seating accommodation. It was held that to rule otherwise would run counter to the objectives of the third MID, which were to fill in the gaps in compulsory third party insurance cover in certain Member States and to guarantee comparable treatment of victims regardless of where in the Community the accident occurred.

In *Candolin,*[32] it was held that national rules could not deprive the MIDs of their effectiveness so as to deny or disproportionately limit the payment of compensation to a victim. The victim, although a passenger at the time, was the owner and usual driver of the car. She had been drunk and knowing her companion also to be drunk had nevertheless allowed him to drive the vehicle. Under the relevant provisions of Finnish law she was found to have contributed to her loss and as such would have been unable to recover compensation from her insurer, but following the ruling of the CJEU would have to be allowed to recover, at least in part.

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[29] In France, for example, it would seem that the need to ensure that victims received compensation was the driving force behind the adoption of a regime of strict liability for traffic accidents.[29] In Spain the growth of injuries caused by traffic accidents was such that it was considered that compensation should be provided '*at all costs'*.[29] In these countries the payment of compensation is much more automatic than in England, so that there is far less room for debate about whether compensation has to be paid. These concerns can be seen to be reflected in the MID. See W. Ernst *The Development Of Traffic Liability'* Vol 5 *Comparative Studies in the Development of the Law of Torts in Europe* (Cambridge University Press, 2010) particularly pp70 -72 and pp177-188.

[30]Dir 90/232/EC. In its proposal for a third MID the Commission was open in stating that its purpose was to '*resolve certain problems left over from the first two motor insurance directives.'* Com (88) 644 Final, OJ C16 20.1.1989 p2.

[31]Case C-356/05 *Farrell v. Minister for the Environment, Ireland, Attorney-General and Motor Insurance Bureau Ireland* [2007] E.C.R. I-03067.

[32] Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta* [2005] ECR I-05745.

This judgement has received recent support in the AG's Opinion in the case of *Churchill.* [33] The English court referred to the CJEU questions regarding the compatibility with EU law of certain provisions of English law, relating to the payment of compensation by third party motor insurers. In particular s151(8) of the Road Traffic Act 1988 gives insurers the right to claim back sums paid to a victim, who is also the insured, when the insured suffers loss as a result of allowing a person to drive the vehicle who they know to be unauthorised by the policy of insurance. The A-G was clear in his opinion that Article 2(1) of the second MID does not permit reliance on any statutory provision which interferes with the right of a victim to receive compensation and Article 1 of the third MID ensures that any party other than the driver is to be covered as a third party under the policy of insurance. Whether the provision of national law is viewed as providing an offset mechanism so that the amount to be paid is set off against the amount to be claimed back so that the victim receives nothing (the insurers opinion), or whether the national provision is interpreted as meaning that the insurers simply pays no compensation (the English court's view) has, in the A-G's opinion, no effect on this outcome. [34]

The CJEU upheld the overall conclusions of the A-G. It held that the English provision amounted to an automatic exclusion of the benefit of the insurance cover, which could not be permitted under Article 2(1) of the second MID. The only exclusion permitted under that provision is where a victim knows that the vehicle they are entering is stolen. Furthermore, an

[33] OJ C 346, 18.12.2010, p. 29.

[34] It should be remembered here that the rules of the MID do not purport to affect Member States' ability to formulate rules relating to civil liability. This has been reiterated recently by the CJEU in Case C-409/09 *José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade — Mundial SA* . [2011] ECR 0. Reference for a preliminary ruling from the Supremo Tribunal de Justiça (Portugal) lodged on 27 October 2009 —OJ C 11, 16.1.2010, p. 17–18, where rules relating to the reduction of compensation on account of the contribution to liability by the victim themselves, which are concerned purely with the question of the existence of liability of the driver concerned, where confirmed as being outside the scope of the MIDs. This case was distinguished from *Candolin* since in here compensation was not denied on the basis of general or abstract criteria that limited cover against liability but was rather concerned with limitation of the driver's liability.

insured who was a passenger was in the same position as any other passenger for the purposes of the Directives.[35]

The above cases give a much clearer picture than the provisions of the Directives alone as to the strength of the particular policy being employed and the overriding nature of the harmonisation measures on national law. Ensuring the free movement of persons and vehicles throughout the Community, through diminishing the disparities between national measures relating to compulsory insurance cover, and thereby establishing comparable treatment of victims of traffic accidents, has become a very powerful purpose which affects a State's ability to formulate and pursue national strategies in relation to tort in the field of road traffic accidents. But the CJEU's determination of this as the dominant objective can be questioned.

The Recitals to the first MID state that one of the essential conditions for establishing the common market is to bring about the free movement of goods and persons. Disparities in national laws, relating to motor insurance, lead to frontier controls because each nation wishes to guarantee the protection of its citizens by ensuring that vehicles driving in its territories are covered by insurance. By harmonising the rules relating to this it was possible to remove the need for frontier controls and also to ensure that people were not dissuaded from travelling across Member State borders by the possibility of becoming the victim of a traffic accident, where compensation would not be available. However, with regards to insurance more generally, there have been three generations of Directives covering both the life and non-life sectors. Directive 88/357EEC[36] is the second generation non-life Directive and it clearly sets out the reasons for regulatory harmonisation in this area. Recital 1 states:

[35] C-442/10 *Churchill Insurance Company Limited, Tracy Evans v Benjamin Wilkinson, by his father and litigation friend Steven Wilkinson, Equity Claims Limited* [2012] R.T.R. 10.
[36] Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), *Official Journal L 228 , 11/08/1992, 1.*

*"Whereas it is necessary to develop the internal insurance market and, to achieve this objective, it is desirable to make it easier for insurance undertakings having their head office in the Community to provide services in the Member States, thus making it possible for policy-holders to have recourse not only to insurers established in their own country, but also to insurers which have their head office in the Community and are established in other Member States;"*

It becomes apparent by the time of the fourth MID[37] that removing obstacles to the free provision of insurance services within the EU is also a factor that should be considered in relation to the harmonisation of rules relating to motor insurance. Recital 1 of the fourth MID states:

*"At present, differences exist between provisions laid down by law, regulation or administrative action in the Member States relating to insurance against civil liability in respect of the use of motor vehicles and those differences constitute an obstacle to the free movement of persons and of insurance services."*

This is further underlined by Recital 1 of the fifth MID[38] which states:

*"Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident. It is also a major concern for insurance undertakings as it constitutes an important part of non-life insurance business in the Community. Motor insurance also has an impact on the free movement of persons and vehicles. It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the single insurance market in motor insurance."*

The jurisprudence of the CJEU, however, displays substantial disregard for the objective of promoting the internal market in the provision of insurance services. Arguably this should be balanced against the pursuit of ensuring comparable treatment for the victims of traffic

[37] Dir 2000/26/EC.
[38] Dir 2005/14/EC.

accidents. In the cases referred to above the court does not even consider freedom to provide services as an objective. It might be said that it was not clear from the early MIDs that this should have been considered, since the goal of removing obstacles to the free movement of persons and vehicles, through the removal of disparities in insurance coverage, would arguably have been enough to provide a legal basis for the Directives, but it should have been clear by the time of *Commission v. Italy*[39] in 2009.

In this case the Commission challenged Italian national rules relating to the provision of compulsory third party motor insurance, on the basis that they hindered access to the Italian market for those companies whose head offices were outside of Italy. The Italian rules compelled any insurer, wishing to provide motor insurance services in Italy, to accept any request for cover made by a potential customer and placed restrictions on the calculation of premiums, which aimed to avoid exorbitant prices being charged. The Commission contended that this prevented undertakings from freely determining the insurance services they offered and that this meant that they were required to bear costs which were excessive in relation to their commercial strategy. This was even more significant for those operators who intended to operate in Italy only occasionally.[40] Italy argued that the purpose of the national rules was to ensure that all drivers were able to secure reasonably priced insurance, particularly in the south of Italy where high instances of traffic accidents made it difficult for motorists to obtain insurance. This was in light of the obligation to ensure that all vehicles were covered by insurance under Article 3 of the first MID. Italy stated:

[39] Case C-518/06 *Commission v Italy* [2009] ECR I-3491.
[40] Ibid, [44].

*" It* [the Italian Republic] *considers that, if the Court were to accept the Commission's reasoning, third-party liability motor insurance would become insurance based solely on market logic and would lose, to a large extent, its social character.*" [41]

The CJEU found that the national rules did act as a restriction to the Italian market for those undertakings based in other Member States,[42] but that the restriction was:

*"...apt to contribute to implementing the Community legislation relating to the obligation, for every vehicle owner, to take out third-party liability motor insurance and, therefore, to the attainment of the objective of that legislation, which is to guarantee adequate compensation for victims of road traffic accidents." "[43]*

This ruling is significant. The court was express in stating that the very purpose of third party motor insurance is to guarantee compensation for victims, without really entering into any form of balancing process where the twin aims of compensation and freedom to provide services was undertaken. [44] This is detrimental to insurers who, as demonstrated in the cases discussed above, find that they are exposed to risks which are difficult to predict or manage. The insistence that compulsory third party motor insurance should not be open to market logic on account of its social character[45] does not seem to fit well with the provision of such a service by private business.

Article 2 of the third MID clarifies Article 3 of the first MID stating:

*"Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles:*

[41] Ibid, [52].
[42] Ibid, [66]-[71].
[43] Ibid, [82].
[44] Ibid, [75].
[45] Ibid, [52].

*(2) guarantee, on the basis of that single premium, in each Member State, the* ***cover***[46] *required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher."*

The purpose of the modification is to make clear that policies of compulsory third party insurance must guarantee at least the minimum cover required, in each of the Member States, on the basis of a single premium. Prior to the adoption of the third MID, it became apparent that in some Member States provision of the cover required for travel abroad was only made upon the payment of an additional premium, which was not compatible with the creation of a single market.[47]

In practice this provision means that every insurance policy must cover third party liability in accordance with the law operational in the country where the accident takes place, or the State where the vehicle is normally based, if that requirement is greater. In an accident caused by an English driver in France, where the victim is French, this would be either French law, as the law of the place of the accident, or English law, as the law of the place where the vehicle is normally based, whichever provides for the highest cover. However, rules on liability would be those of the law of France, since the MID does not affect rules of liability. This provision gives rise to some uncertainty for the parties involved. What is meant by the term 'cover'? If this can be determined, what then is meant by 'highest cover'?

It is clear from both Article 3 of the first MID and Article 2 of the third MID that any choice-of-law effects of the rules relate only to questions pertaining to ***'cover'***. The term 'cover' is not defined within the Directives. On a first party basis the cover provided by a contract of insurance is determined by the contract itself and is therefore incapable of general definition. For policies of compulsory third party insurance under the MIDs 'cover' could relate to the minimum standards required by the Directives in respect of who is to be covered by the policy

[46] Emphasis added.
[47] Commission Proposal, Com (88) 644 Final, 5-7.

and with regard to which types of loss. However, since Member States are at liberty to enact more rigorous standards than those set out in the MIDs, should they so wish,[48] 'cover' is unlikely to be able to achieve an autonomous meaning derived from the Directives. Instead, national rules on compulsory third party insurance will need to be consulted in order to determine whether a particular issue is a question of 'cover,' as referred to in Article 2.

In respect of highest cover there are at least three possible ways to understand this measure. Under the first option we might understand that the Article is an instruction to insurers to provide cover in accordance with the highest cap from the two possibilities given. Under the MID all EU Member States must ensure that policies of motor insurance cover third party victims up to minimum specified amounts. However, Member States are free provide for more favourable cover if they so wish. For example, in England under s145 of the RTA 1988, cover for personal injury or death is not capped at 1 million Euros per victim as the MID requires but is unlimited. Cover for damage to property is capped at 1 million pounds per accident as required by Article 9 of the MID.

If Member States can offer different amounts of cover then there is the possibility of disparities in the amount of cover which is available under policies from different countries. Here the rule might mean no more than that the insurer must provide coverage up to the highest amount in this regard.

Under the second option the provision could be understood to be an instruction to insurers to provide not only the highest amount in terms of monetary cover but also the most extensive cover. It could be that disparities between policies from different countries go further than the financial limits of policies. There could be a difference in the scope of the coverage that a policy

[48] Article 28(1) of the MID states: *Member States may, in accordance with the Treaty, maintain or bring into force provisions which are more favourable to injured parties than the provisions needed to comply with this Directive.*

provides. This possibility has been recognised by the House of Lords in *Clarke v Kato*[49] where the court stated:

*"The scope or extent of the cover required in different member states may be greater or smaller than in others, but the policy must secure that the greater cover is available in respect of those states where the greater cover is required by its domestic law."*

Again English law can provide an example. Despite the ruling of the CJEU in *Bernaldez* that all third party loss should be recoverable under a compulsory motor insurance policy, as explained above, it has been held by the English Court of Appeal that damage caused deliberately will not be recoverable under a policy of insurance where the policy itself excluded cover for such acts.[50] In these circumstances, under English law, the driver will be considered to be uninsured. Other states may not impose such a restriction on the payment of compensation under a policy of compulsory third party motor insurance, with the effect that the cover required by one law would be greater than that provided by another.

Here it could be said that it is the cover required by the state which provides for the highest amount of cover not only in monetary terms but also in terms of the scope of the cover which must be met. Firstly, this is somewhat ambiguous because some types of loss may greater in scope in one law, whilst another type of loss may be greater in scope in the other law, so that it might be difficult to say accurately which law provides the 'highest cover' as a whole. Secondly, there is the potential for the rule in the MID to begin to impact upon the law applicable. It is clear, however, that since rules of civil liability are not touched upon at all by the Directives, the rule in Article 2 will not affect the law applicable to issues in respect of liability.[51] If the law with the 'highest cover' is not that which is applicable under either Rome II or the Hague Convention

[49] [1999] R.T.R. 153.
[50] *Bristol Alliance Partnership Ltd v. Williams* [2012] EWCA Civ 1267, [2013] R.T.R. 9
[51] This matter is discussed more fully below.

it might be necessary to apply parts of two different laws, the law applicable to liability, as well as the law providing the highest cover.

The third option is that the insurer is required to pay compensation in accordance with the law providing for the 'highest cover'. Under this option the award of damages payable under the law of the place of the accident is compared to the award that would be payable under the law of the place of registration for the vehicle and the highest amount is the one payable to the victim. Undoubtedly this is the most radical and therefore, unlikely interpretation of the provision, yet some support for this proposition can be found.

Although almost certain not to have been the intended meaning of the provision at the time it was enacted, when set against the victim protection measures of the fourth and fifth Directives (as discussed below), a basis can be found for arguing that provision of the highest cover should be extended to the types and amount of damages that should be paid under the policy. The provisions of those Directives are in recognition of the fact that visiting victims face many more hurdles when bringing a cross border claim and the provisions, including the right to sue the insurer directly before the courts of the victim's home state, try to make it as easy as possible for a victim to seek redress and obtain compensation regardless of where in the community the accident occurred. An interpretation of Article 2 which affords the victim the highest award of damages as between the law of the place of the accident and the law of the place of registration of the vehicle seems to fit with this rationale.

This would have the most profound impact on the law applicable under either Rome II or the Hague Convention, of the options given. It would mean that issues relating to liability would be governed by the applicable law, whilst the type and amount of damages would be calculated under the law providing the 'highest cover' out of the law of the place of the accident or the law of the place of registration of the vehicle. This is also true of option two, but to a much lesser

extent. It can be noted that fragmentation of the applicable law in this way is what Article 15 of Rome II sought to avoid.

There is much to be resolved on this point. Not only is there no clear answer here, but for insurers the difficulties for the conduct of business noted above are added to by Article 2 because, even if it was clear what 'highest' meant, the determination of the applicable law will require an in-depth comparative exercise on a case-by-case basis, necessitated by the fact that different elements of a claim are given varying degrees of importance under different systems of law. Although there is no evidence that this is an issue in practise at present, if the point were raised in a suitable case insurers might find that they have to devote time and resources to the matter which would increase claims ratios[52] and eventually feed back in to premium prices.

The ambiguities contained in the choice-of-law rules highlight a more systematic problem. The MIDs sought furtherance of certain policies by choice-of-law means without undertaking an analysis of the impact on the provision of insurance services. Moreover, it appears that a full choice-of-law analysis was not undertaken in the composition of those rules and the system is not underpinned by a full choice-of-law scheme which would determine, for example, what elements of a claim are to be dealt with by the applicable law, in the way that an instrument such as Rome II does. The issues referred to above could make it difficult for insurers accurately to calculate risks and therefore premiums. This is likely to increase pressures on insurers leading to an increase in premium prices.

[52] '*A helpful way to understand the profitability of insurance is to investigate the level and dynamism of the following ratios: (a) The claims ratio: calculated as claims incurred (including changes in relevant provisions) divided by premiums earned in a year. The higher this ratio is, the greater the proportion of revenue paid out to policyholders (i.e. a lower ratio is good for the profitability of insurers). It can be seen as a measure of pricing efficiency. (b) The expense ratio: calculated as the sales and administration costs divided by premiums earned. This ratio can be seen as a measure of administrative efficiency. (c) The combined ratio: is the simple addition of the two. When this ratio exceeds 100 per cent, the result is that the insurer is losing money at the underwriting level. (Insurers invest premiums received and can use the resulting gains to fund such losses, at least to a degree.)*' extract from 'Retail Insurance Market Study' Report prepared at the request of the European Commission by European Economics available at <http://ec.europa.eu/internal_market/insurance/docs/motor/20100302rim_en.pdf> accessed on 24 August 2013.

Article 3 of the third MID modifies Article 1(4) of the second MID so that the payment of damages by the compensation body cannot be dependent on the victim establishing that the person who was liable for the loss either will not or cannot pay. Article 4 provides that Member States are to designate either the compensation body, or the liability insurer, as responsible for the payment of compensation in the first instance, where there is a dispute between these bodies as to which of them is liable to pay. Article 5 obliges Member States to ensure that information about the identity of the insurer of any given vehicle is readily available to the parties to a traffic accident.

#### *5.2.1.4. The Fourth MID*

The fourth MID[53] continued the harmonisation effort, this time focusing on the position of a so called 'visiting victim', a victim temporarily present in a state other than that where they are normally resident. In its proposal for the Directive the Commission states:

*"None of* [the previous] *directives, however, took particular account of victims who, while temporarily in another Member State, suffer loss or injury there through a vehicle registered in a Member State other than that where the victim resides."* [54]

The Commission continued:

*"'The purpose of the European Parliament's resolution is to improve the present remedies available to persons who are temporarily in a Member State other than their State of residence and suffer loss or injury ... caused by a vehicle registered and insured in a Member State other than their State of residence."* [55]

[53] Dir 2000/26/EC.
[54] Commission 'Proposal For A European Parliament And Council Directive On The Approximation Of The Laws Of The Member States Relating To Insurance Against Civil Liability In Respect Of The Use Of Motor Vehicles And Amending Directives 73/239/EEC and 92/49/EEC' (1997) COM 510 FINAL, OJ C 343,1.
[55] Ibid,2.

The Commission recognised that there was a need to improve the remedies available to such persons on the basis that: settlement of the claim is more complicated abroad than domestically, particularly since the means of identifying the insurer differs from country to country and there may in fact be no means available; the collection of evidence is made difficult by the fact that the incident may happen a long distance from the victim's state of residence; the applicable law will typically be other than that of the victim's residence and accordingly procedural rules may be different and unfamiliar and. All of the above may be aggravated if the insurer proves dilatory.[56] The European Parliament stated that the proposed solution to these problems:

*"...is pragmatic and does not interfere in either national liability law or the rules governing Member State's jurisdiction (international private law). To do so would have been neither easy nor absolutely necessary, as the actual problem is not so much the differing levels of protection of traffic accident victims but the assertion of their claims in other Member States."* [57]

The fourth MID importantly ensures that a direct right of action, by a third party victim of a traffic accident, against the insurer covering the person liable for the loss, is available in all Member States.[58] This right applies equally to all traffic accident victims regardless of whether there is a cross border element to the accident or not. Article 4 provides that all insurance undertakings are to appoint, in all Member States other than that where they received their official authorisation, a claims representative who will be responsible for handling and settling claims arising from an accident caused by a vehicle insured or normally based in a state other than that of the victim's state of residence. The representative must be capable of examining cases in the official language of the State of residence of the victim. This provision enables

[56] Ibid, 2-3.
[57] European Parliament 'Report on the proposal for a European Parliament and Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Directives 73/239/EEC and 92/49/EEC (Fourth Motor Insurance Directive)' (1998) A4-0267/98, OJ C292, 21.9.1998, 24. Emphasis here is the Parliament's own.
[58] Article 3.

victims to deal with a representative of the insurance company in their own country and in their own language. To complete the package of measures which would overcome the perceived obstacles to a third party victim bringing a claim, the fourth MID (as amended by the fifth MID) relied upon a particular interpretation of Arts 9(1)(b) and 11(2) of Brussels I.[59] Recital 16a (inserted by the fifth MID) states:

*"Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled."*

It was not clear that the terms contained in Article 9(1)(b) (policyholder, insured or beneficiary) were capable of extending to a third party direct claimant however, until this position was confirmed by the CJEU in the case of *Odenbreit.*[60] In this case the effect of Article 11(2) was felt to be to widen the category of claimants that Article 9(1)(b) applied to, so as to include third party victims, on the basis that one purpose of the provisions was to guarantee more favourable protection to weaker parties.

These measures effectively ensure that all aspects of a claim can be dealt with from the state of residence of the victim. This, of course, does not have any bearing on which law will apply to a dispute, but will affect any policy argument put forward in support of the view that victims need the security of having their home law applied, since the victim is already at a significant advantage in such proceedings. The victim will have the benefit of conducting the case under the system of law which is familiar to them including, obviously, but importantly, the procedural

[59] Council Regulation (EC) No 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2001] OJ L12/1, hereinafter referred to as Brussels I.
[60] Case C- 463/06 *FBTO Schadeverzekeringen NV v. Odenbreit* [2007] ECR I-11321.

rules of the forum, and in their native language; all of which, from the defendant's point of view makes the case more onerous to contend with.

It can be noted again here that the CJEU can be seen to be supporting the social policy of ensuring adequate access to compensation for the victims of traffic accidents, rather than focusing on the objective of furthering the internal market in insurance services. It must also be stated, however, that there is no evidence to suggest that favouring the victim in this way has directly led to an increase in insurers' costs and consequently consumer's premium prices. A report published on behalf of the Commission into the retail insurance market shows that the primary driver of motor insurance premiums is a rise in average claims costs mainly due to inflationary pressures such as the rise in cost of medical treatment or repair of vehicles.[61] The report makes mention of both the MIDs and Rome II[62] but at no points suggests that the cost of settling cross border claims is a distinctive feature of rising premium prices. However, as stated above, if cross border claims require more resources this will feed into the average claims cost and affect claims ratios, which will impact premium prices. So an indirect correlation cannot be ruled out.

Article 6 of the fourth MID requires each Member State to establish a compensation body with the task of providing compensation to injured parties resident there, where either an insurance undertaking or its representative does not provide a reasoned reply to a claim within the permitted three month period. Upon providing compensation the body is entitled to claim back those sums from the compensation body of the State where the responsible insurer is established. This body is then subrogated to the injured party in his rights against the tortfeasor or his insurer. In respect of this provision the Directive is silent as to which law will apply to the payment of compensation by the body. However, in England at least, national implementing

[61] Commission report into the retail insurance market, (n.52), 108-110.
[62] Ibid, 70-77.

provisions have been held (*obiter*) to have the effect that it is the law of the compensation body that is determinative.[63]

Article 7 provides that the same compensation body will provide compensation where the vehicle causing the accident cannot be identified or, after a period of two months from the date of the accident, the insurer cannot be identified. Here the compensation body can recover sums paid from the Guarantee fund of the state where the accident took place, or the fund of the state where the vehicle is normally based, respectively. Importantly Article 7 states that the provision of compensation should be in accordance with the requirements of Article 1 of the second MID. This includes what has been identified above as a choice-of-law rule in Article 1(7), so that Member States should ensure the application of their own law to the payment of compensation by the body. The importance of this provision is that it guarantees that the victim will be able to make a claim to the body of his or her country of residence. This was not clear from the second MID which sought only to ensure the creation of such bodies without stating that there should be a right to bring a claim in the home state. In respect of the choice-of-law provision, however, its implementation by national legislatures has thrown into question, in recent case law, its function in allocating a particular legal regime. [64]

#### *5.2.1.5. The Fifth and Sixth MIDs*

Dir 2005/14/EC, the fifth MID, consists of a list of amendments to the previous four Directives with the aim of updating the provisions of those measures and extending the efficient settlement mechanism provided in the fourth MID for 'visiting victims' to all victims regardless of where the accident took place. There is a notable extension of the cover required under

[63] This was in the case of *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609. Analysis of this issue is undertaken below in the section dealing with claims against compensation bodies.
[64] Ibid.

Article 3 of the first MID so that personal injuries and property damage suffered by pedestrians, cyclists and other non-motorised users of the road must also now be included under policies of compulsory insurance.[65] As already stated Dir 2009/103/EC, the sixth MID, is a consolidation measure, which draws together, in one instrument, all of the provisions from the previous Directives in their amended state. It repeals all fiver earlier Directives.

## 5.3. Direct Actions against Insurers

It is unclear whether, now that Rome II is in force, the choice-of-law rules contained in the Directives will continue to apply in those cases covered by the MIDs, or whether they will be superseded by those in the Regulation. It is important therefore, to set out the relevant provision of Rome II in respect of an action brought directly against the insurer of the party who bears the liability for a traffic accident, before considering the overlap between the two schemes and how that overlap might be resolved.

### 5.3.1. Rome II – Article 18

Article 18 of Rome II states:

*"The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides."*

Given the importance of direct actions against insurers in traffic accident cases, this is an ambiguous and somewhat unhelpful provision. A plain reading of the provision suggests that the injured party's choice of either the law applicable to the non-contractual liability, or the law of the insurance contract, will govern only the question of whether a direct action can be permitted.

[65] Although this effectively amends Article 3 of the first MID it is achieved under Article 4(1) fifth MID as an amendment to Article 1 of the third MID.

However commentators have read the provision as providing a genuine choice for the victim of the law otherwise applicable under the Regulation or the law applicable to the insurance contract.[66] Since Article 3 of the fourth MID requires all EU Member States to establish a direct right of action against an insurer, the first possibility adds nothing to the existing rules, at least as far as intra-community cross border traffic accidents are concerned. The latter possibility, where the victim is able to choose the law which is more favourable to him, could be considered to be the creation of an alternative connection, which potentially prefers the victim. It is unclear which interpretation is correct.

Certainly the Commission, in its original proposal, made clear that the provision would provide a choice for the victim stating:

*"The proposed rule... protects the person sustaining the damage by giving him the option..."* [67]

The wording of the then Article 14 was also clear in offering the victim a choice of applicable law. It stated that the right to take direct action shall be governed by the applicable law unless the victim *'prefers to base his claims on the law applicable to the insurance contract.'*[68] The change in wording to the current Article 18 first appeared in the Council Common Position[69] and was then replicated in the Commission amended proposal;[70] but in neither document are any reasons provided for this change. An earlier amendment to the Article by the Parliament had apparently been at the request of the insurance industry, which had sought clarification that the provision would only apply where either of the two specified laws allowed for such an action.[71] It is possible that the

[66] See A. Dickinson *The Rome II Regulation The Law Applicable to Non-Contractual Obligations* (OUP, 2008), 14.87-14.88 and Jan von Hein 'Article 4 and Traffic Accidents' in A. Malatesta 'The Law Applicable to Traffic Accidents' in A. Malatesta (ed) *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM, 2006), 172-173.

[67] European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final, 25.

[68] Ibid.

[69] OJ C289E/68.

[70] Commission 'Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (Rome II)' COM (2006) 83 Final, 18.

[71] See the European Parliament 'Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")' 27.6.2005, A6-0211/2005 FINAL, 46.

revised Article 18 was intended better to embody this notion and simplify the wording so that the obvious was not thought necessary. It is, however, not obvious that a choice was intended by the Article until one considers the potential problem thrown up by a literal interpretation. Where the law designated under the Regulation does not recognise a direct action, a literal interpretation would mean that such an action would have to be accommodated if the law of the insurance contract recognised the possibility. This is not a desirable situation and it makes more sense that the claim would be based on one or other of the laws provided for.

Whether the victim can choose the law applicable to the non-contractual obligation,[72] or Article 18 simply identifies situations where a direct action is permissible, there is a common problem in respect of the relationship between the insurer's liability in contract and in tort.

Firstly, with regard to characterisation, Harris has convincingly argued that where an obvious characterisation is elusive, the forum should step in to classify the claim since to do otherwise might result in a perpetual cycle of saying that the matter must be characterised by the applicable law but that the applicable law cannot be arrived at until the matter is characterised.[73] In the context of Rome II the situation is a little different. The forum is no longer 'king'[74] in the context of harmonised measures of EU law and deference must be paid to the designs of EU legislators, as interpreted by the CJEU. Although different Member States might characterise a direct action in different ways under domestic law, it is submitted that a harmonised characterisation for the purposes of EU law would be better viewed as non-contractual.

It can be noted that the treatment of all direct actions against insurers under one rule is somewhat unhelpful. Direct actions against motor insurers take on a unique character because of the obligations imposed by the MID, which, obviously, do not apply to other types of direct

[72] It is possible that under some systems of law the victim's claim may be considered as subrogated to the victim's contractual rights against the insurer and that the claim as a whole would therefore be considered to be contractual.
[73] J. Harris 'Does Choice of Law Make Any Sense' (2004) Current Legal Problems 305, 309.
[74] Ibid at 327.

action. The MID restricts the insurer's ability to rely on contractual policy limitations against third party claimants, in order that the social policy being pursued by the Directive may be realised, as discussed above.[75] It is submitted that the inability of the insurer to protect itself from particular risks through the contract, elevates the obligation owed beyond the contractual, making a non-contractual characterisation logical.

This however, leads to a further issue: if direct actions are characterised as non-contractual and therefore as falling within the scope of Rome II, will the insurer be able to rely on permissible contractual limits of the policy?[76] The Commission's comments on the original version of Article 18 suggested that the scope of the insurer's obligations would always be determined in accordance with the law of the insurance contract.[77] It would seem that the editors of Dicey and Morris agree with this position stating as they do that:

*"...any right of direct action under the law applicable to the non-contractual obligation may well be limited, expressly or otherwise, to the amount for which the insurer would have been liable to the insured under the contract of insurance. If so, it seems appropriate to take account of the law applicable to the contract of insurance in order to determine that limit, to the extent that this would be consistent with the law for which the claimant has elected."*[78]

Plender considers that Article 18 should operate to determine whether a direct action is permissible, with the ultimate characterisation of the claim being dealt with by the designated law. This characterises the claim as non-contractual for choice-of-law purposes thereby retaining

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[75] See above at 5.2.1.2.

[76] For example, a contract governed by one law may set a legitimate limit as to the amount of cover, which the law of another state exceeds. In this situation if the law of the second country is the applicable law, can the insurer rely on the policy of insurance which accords with the law of the state where is presumably operates and where the cover was taken out?

[77] Commission Proposal (n67), 25-26. Although the English case of *Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Insurance Co. Ltd (The Hari Bhum)*[2004] EWCA Civ 1598; [2005] Lloyd's Rep 67 illustrates that the law governing contractual limitations may be disregarded, this case can no longer be relied upon with regard to interpretation of Rome II.

[78] L. Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, 2012), 34-072.

the distinction between Rome I and Rome II, whilst treating the question of the effect of the terms of the insurance contract as a matter for that designated law.[79] Whilst this would dispose of the characterisation problem on one level, the solution perpetuates it on another. If, when a case is dealt with by the designated law, it is felt that the terms of the contract should limit the liability of the insurer so that the claim takes on a contractual nature, does this not mean that the court really ought to have applied Rome I and not Rome II? Alternatively, if the designated law simply deals with the matter, the contract may still not be judged in accordance with its governing law and the insurer may still not be able to rely on the terms of the contract.

Characterisation will ultimately be an issue that the CJEU will rule on. If, as suggested, direct actions against motor insurers are regarded as non-contractual, yet the issue of policy limits is considered to be contractual and falling within the scope of Rome I, any court faced with a direct action against a motor insurer would have to subject the claim to the law as designated by Rome II, but then also consider the limitations of the policy in accordance with the law which governs the contract of insurance under Rome I. This causes a problem since Recitals 7 of both Rome I and Rome II require that the applicable law rules in the spheres of contractual and non-contractual obligation should be consistent, in effect separate.

On the other hand it is very difficult to conceive of a court subjecting a contract of insurance to limits which are appropriate under a law which does not govern that contract. Furthermore, unequivocal categorisation of a claim as contractual or non-contractual could be viewed as harmonisation of national rules relating to civil liability in this area, which is clearly beyond the remit of Rome II.[80]

[79] R. Plender and M. Wilderspin *The European Private International Law of Obligations* 3rd ed (2009) Sweet and Maxwell at para 28-011 – 28-015.
[80] On the scope of Rome II see Chapter 3 at 3.5.

In theory this is a very difficult matter, with no clear solution. However, on balance, the arguments in favour of subjecting the contract to its governing law are probably stronger. Pedantically pursuing the aims as stated in Recital 7 to a logical extreme, despite the difficulties it would create in terms of certainty for insurers is difficult to justify.

In any event, in the context of traffic accidents the cases which might arise are highly unlikely to give rise to problems in this regard. Outside of the European context the author cannot envisage in practice a situation in which the English court feels able to take jurisdiction over a case concerning a direct action against a foreign, non-European, insurer whereby the accident occurred in a third country so that the insurer is potentially subject to a law which is not the law of the contract of insurance. Unless the defendant could be served in England the case would not be heard here.

In the context of an intra-community accident, if an accident occurs in one country but is caused by a vehicle insured in another country, an English victim could bring a claim directly against the insurer in the English courts. The applicable law under Rome II would either be the law of the place of the accident under Article 4(1)or the law manifestly more closely connected to the tort under Article 4(3). This could conceivably be the law which also governs the contract of insurance. However, under the MID the insurer would be required to provide the cover required by the law of the place of the accident or the law of the place of registration of the vehicle, whichever provided for the highest cover. Coupled with the inability of the insurer to rely on contractual exclusions of the policy, the contractual limits of the policy therefore become irrelevant. The insurer must already pay out in accordance with the law of the place of the accident (the law applicable under Art 4(1)) or the law of the place of registration of the vehicle (potentially applicable under Art 4(3)). Again, motor accidents can be singled out as being different from other direct actions. Here the characterisation should be non-contractual and the

applicable law should apply to the entire claim. The need for a different characterisation of issues relating to policy limitations simply doesn't arise.

### 5.3.2. Rome II and the MIDs – The Conflict

Because the choice-of-law rules identified in the MID are restricted to issues of "cover", in the same action, between the same parties, there may be a number of issues where the applicable law is disputed. Unless Rome II prevails over the choice-of-law rules in the Directives (and it is in no way clear that it does), questions relating only to cover may be dealt with under the Directives, leaving questions relating to other matters to be dealt with by Rome II. The resulting situation is very complex whereby both schemes could apply simultaneously, with the court left to decide which questions relate to "cover" and which do not.

Furthermore the choice-of-law outcome is then open to a good deal of variation depending on which scheme is being applied. While the general rule in Rome II points to the place of the damage (which, it is argued, will be the place of the accident),[81] there is no way of knowing in advance if the parties will share the same residence so as to engage Article 4(2) of Rome II, or whether there will be another factor creating a manifestly closer connection with another country so as to engage Article 4(3). Neither of these options is available under the Directive. Importantly, as discussed above, Article 18 of Rome II may also give the victim a choice of the law of the insurance contract, which will usually relate to the place where the vehicle is normally based, but this is optional for the victim. Under the Directives the application of this law is compulsory if the State provides a higher level of cover than the State of the place of the accident. Further, the effect of Article 17 of Rome II, which directs the court to take into account *'as a matter of fact and in so far as is appropriate'* any rules of safety and conduct in force at

[81] For discussion on this point see Chapter 4 at 4.2.

the place of the accident, could lead to an altered interpretation of the facts where local rules of safety are thought to be significant to the finding of liability.[82] Similarly, Recital 33 may give rise to a particular approach to the calculation of damages under Rome II,[83] which the courts will not pay attention to under the rules in the Directives. Therefore, the choice-of-law outcome is very much dependent upon the scheme which is being applied.

Take, for example, the situation where an Englishman, driving a French hire car decides to drive from France into Italy. Whilst there he causes an accident in which the Italian driver of an Italian car and the English driver of an Italian hire car are injured. Both victims bring actions for their losses against the liable driver's insurer, as permitted by Article 3 of the fourth MID. Both claims are brought in the state of residence of the victim, i.e. Italy and England respectively, as is permitted under Articles 9 and 11 of the Brussels I Regulation. Under Article 18 of Rome II the Italian claim would be governed by Italian law, as the law of the place of the accident or French law, as the law of the insurance contract. Under the MID the applicable law would be Italian law, as the law of the place of the accident or French law, as the law of the place where the vehicle is normally based. The English claim would be governed, under Rome II, by English law, as the law of shared habitual residency or French law, as the law of the insurance contract. Under the MID the applicable law would be Italian law, as the law of the place of the accident or French law, as the law of the place where the vehicle is normally based. Under Rome II the ultimate law is arrived at by the victim's choice and under the MID it is based on which law provides the "higher" cover. Hence, in both claims the two instruments could potentially lead to different choice-of-law outcomes.

Prodding beneath the rules themselves to look at the rationale for the schemes also reveals a great deal of variance. While Rome II is based on certainty and predictability of choice-of-law

[82] Ibid at 4.3.
[83] Ibid at 4.4.

outcome, with importance attached to objectively ascertainable results and achieving a reasonable balance between the parties,[84] the Directive's single focus is the removal of obstacles to the free movement of persons and vehicles and the comparable treatment of victims no matter where in the Community an accident may occur.[85] The CJEU has been seen to refer to these objectives (time and again in the case of the Directives) when deciding difficult issues[86] and so it seems implausible that national courts should have to refer one type of question to one set of objectives and another type to a wholly different underlying principle.

This situation is entirely unsatisfactory, although it appears to have arisen through oversight rather than by design. At no point does the potential overlap of choice-of-law rules relating to direct actions against insurers between the Regulation and the MIDs appear to have been recognised during the legislative process of Rome II. At no point do any of the institutions appear to have even acknowledged the existence of choice-of-law rules in the MIDs. This is very surprising given the interest the Parliament took in the plight of the victims of cross border traffic accidents[87] and the very lengthy report which was prepared and published on the matter on behalf of the Commission.[88]

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84 These objectives were expressed by the Commission in its Proposal (n67), 11-12. They are repeated in Recital 6 of Rome II.

85 As discussed above.

86 See for example *Candolin,* (n32) [17]; *Bernaldez* (n16), [13]; *Ferreira* (n34), [24]; *Commission v. Italy* (n39), [75]; Case C-166/02 *Daniel Fernando Messejana Viegas v. Companhia de Seguros Zurich SA, Mitsubishi Motors de Portugal SA*, [2003] ECR I-07871, [22]; Case C-447/04*Autohaus Ostermann GmbH v VAV Versicherungs AG* [2005] *ECR* I-10407, [25].

87 The only reference to the MIDs made during the process was by the Parliament who, when making an argument for the inclusion of rules specific to traffic accidents, which would favour the victim, justified its position by stating that: '*Under the provisions of the fourth and fifth motor insurance directives, a party sustaining damage in a traffic accident is at liberty, in cross-border cases, either to bring about an out-of-court settlement directly with the loss adjuster of the other party's insurer, in the home country of the party sustaining damage, or, failing agreement, to bring an action directly against the other party's insurer (also in the home country of the party sustaining damage). In traffic accident cases, then, applying the law of the state of the victim's place of habitual residence is more equitable (for the victim, e.g. where he or she needs lifelong care) and more practicable for insurers and the courts.'* See European Parliament 1st reading of Rome II (n.71) above at p20. Not only do the Parliament appear to have overlooked the potential for overlap between the Directives and the Regulation, this statement represents a sea change in opinion regarding the significance of a foreign applicable law, without any justification whatever. During the legislative process for the fourth MID, where a choice of law solution to the problems faced by visiting victims was rejected, it was stated: *'The proposed Community directive is pragmatic and does not interfere in either national liability law or the rules governing Member States' jurisdiction (international private law). To do so would have been neither easy nor absolutely necessary**, as the actual problem is not so much the differing levels of protection of traffic accident victims** but the assertion of their claims in other Member States.'* Emphasis added (Despite the wording of this statement, where it refers to *'Member States' jurisdiction (international private law)',* reference later in the sentence to the differing levels of protection suggests that what the Parliament had in mind here was the law which the courts in the Member States would apply rather than jurisdiction questions, as understood by conflict of laws scholars.

88 Report, prepared by law firm Demolin Brulard Barthélémy for the Commission *Compensation of victims of cross-border road traffic accidents in the EU: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims*

It could be argued that once harmonisation of choice-of-law rules became a serious possibility under Rome II, it would also have been a good time to build on the victim protection measures for visiting victims in the fourth and fifth MIDs to provide the victim with their home law, in addition to being able to bring an action in their home courts. But the Parliament's Rome II proposal is not stated in these terms. Firstly, it does not differentiate between claims brought against tortfeasors and those brought directly against insurers. Obviously, the provisions of the MID have no bearing on claims against tortfeasors and should not be used to justify the creation of an alternative choice-of-law rule for such actions. Secondly, it shows no appreciation of the fact that such a solution, for direct actions against insurers, was previously rejected during the legislative process for the fourth MID, nor does it provide any evidence as to why circumstances have altered so as to justify it now. It is argued below that there may indeed be very good reason for applying the victim's home law to a direct action against an insurer in an intra-community cross border traffic accident, but the point here is that during the legislative process for Rome II the Parliament was unable to provide any such justification and appeared to be completely unaware of the choice-of-law overlap between the Directives and Rome II in relation to 'cover'.

### 5.3.3. Reconciliation

Once the overlap between the Directives and the Regulation is understood it is important to attempt to decipher which of the schemes will take precedence.[89] The obvious answer to this would be to say that Rome II, being a directly applicable piece of Community legislation and being later in time than the MID, will take precedence over any conflicting rules of the Directive.

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<http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf> accessed on 5 October 2011. Hereinafter referred to as the Commission Report.

[89] The MIDs require national implementing measures. If these conflict with subsequent EU legislation the subsequent measures must take precedence. This much is a basic principle of EU law and was made clear in the case of Case C-106/77 *Simmenthal*. [1978] ECR 629 [17]-[22].

However, with regard to the relationship between Rome II and the MIDs, there are two provisions of Rome II which require consideration: Article 16 and Article 27.

#### *5.3.3.1. Rome II - Article 16*

Article 16 states:

*"Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.*"

What is meant by 'overriding mandatory rules' is explained to a degree in the Explanatory Memorandum accompanying the original proposal for Rome II. The Commission referred to the definition given to the term in the case of *Arblade,* where it was felt that it was necessary for a rule to be:

*"... so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".*[90]

When read together with Recital 32 which states:

*"Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions;"*

it becomes plain that in order for a provision to be considered of an overriding mandatory nature, it must be clear that it is a rule which cannot be derogated from and that the rule serves the public interest.[91] This reasoning has been held to apply not only to national rules of the

[90] Cases C-369/96 and C-376/96 [1999] ECR I-8453.

[91] Since Rome I and Rome II are to be interpreted congruously, the wording of Article 9(1) of Rome I could also be persuasive. It defines an overriding mandatory provision as: "[P]rovisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to

forum, which are of a purely domestic nature, but also to those rules which implement EU legislation into national law.[92] In the case of *Ingmar,*[93] the CJEU held that Articles 17 and 18 of Directive 86/653, on self-employed commercial agents, were mandatory in nature. The English Court of Appeal, who had referred the case to the CJEU, accordingly upheld the ruling of the Court of Justice and referred the question of compensation to the Queen's Bench Division to be decided on the basis of the rules of Directive 86/653, as implemented by the relevant regulations in the UK.

With this in mind can the rules of the MIDs and the national provisions implementing them fit the definition of an 'overriding mandatory rule', so that they will take effect regardless of the law applicable under Rome II? On their face, the rules contained in the Directives are mandatory in nature; that they are intended to apply regardless of national rules would be the natural conclusion to draw following the examination of the CJEU jurisprudence undertaken above. They are almost certainly to be considered as serving the public interest. The ultimate aim of the Directives is greatly to reduce the obstacles to free movement of persons and vehicles within the Community by ensuring that accident victims receive comparable treatment regardless of where in the Community the accident occurs. This serves Community interests, in furthering the internal market, it also serves national public interests, by ensuring that all those who are resident in a State are guaranteed insurance coverage against losses incurred as a result of a traffic accident. There is, however, a significant issue which becomes apparent once this subject is reflected upon.

There are three ways in which the MIDs may have been received in a Member State. Firstly, the Member State may have achieved the minimum standard required by the MIDs. All Member

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any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation." For more on the meaning of "overriding mandatory rules", see R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell,3rd edn, 2009), 27-009–27-013.

92 Case C-381/98 *Ingmar Gb Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305.

93 Ibid.

States should have in place provisions which implement at least this standard. Where the minimum standard has been met the question is why should one Member State's law take precedence over the law of another? In the example of the English driver causing injury to the Italian driver, given above, if the applicable law under Rome II is French law, but under the MID it would be Italian law, why should the Italian court be permitted to apply Italian rules on the basis that they are overriding because they implement the MID, when French law also implements the MID?

The MID is open to the possibility of national variance in the rules on civil liability, which is why a choice-of-law rule was included. That rule itself cannot fulfil the Article 16 test to be overriding and mandatory in nature. There is no compelling reason as to why that choice-of-law rule is in the public interest any more than the rule contained in Rome II. It can on this basis be argued that the rules contained in the MID, and the national implementing provisions which transpose that measure into domestic systems, will not be of an overriding mandatory nature, such that they will apply regardless of the otherwise applicable law under Rome II, unless the applicable law has failed to transpose the minimum standards required by the MID. It should be remembered that for accidents occurring outside of EU Member State territories and involving vehicles not normally based in the territory of a Member State the MID does not apply and Rome II will be determinative of the applicable law.

The second way that the MID may have been received is that the minimum standards required by the Directive may not have been met. Here there is a basis for arguing that the law of the forum could treat its own rules, which do meet the minimum standards, as overriding the rules of the applicable law which do not, under Article 16.

It can be noted here that in some respects the UK has not met the minimum standards required by the MID. In particular it appears that the direct action against the insurer, which was

implemented in the UK by the European Communities (Rights Against Insurers) Regulations 2002,[94] grants a narrower right than that anticipated by the Directive.[95] The difficulties arise owing to the definitions given by the Regulations to certain terms. Regulation 2 defines 'Accident' to mean an accident occurring on a road or other public place in the UK caused by, or arising out of, the use of any insured vehicle. 'Vehicle' is defined as a motor vehicle, which is normally based in the UK. The result of these definitions is to deny the right of direct action to a UK citizen where the applicable law is that of part of the UK, but the accident either occurs outside of the UK, involves a non-UK based vehicle, or takes place in an area that is not considered to be a 'road or other public place'.

The most likely scenarios where this would occur are either when an accident occurs outside of the UK between two parties habitually resident in the UK (whereby Article 4(2) of Rome II would designate the law of a part of the UK), or when the accident occurs in the UK but the liable vehicle is registered in another Member State (here Article 4(1) of Rome II would designate the law of a part of the UK). Where the second of these two scenarios occurs, a direct action may still be allowed where the law of the insurance contract permits it, since Article 18 gives the option of both laws in this regard. It should be noted, however, that if such a law applied to the whole claim this could be much less favourable to the victim. [96]

Under the first of the scenarios set out above there is no option for the victim to avail himself of a right of direct action, which clearly goes against the scheme of the MIDs. The question is

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94 SI 2002/3061.

95 See Dickinson (n66), 14.105-06 and Plender (n79), 28-016-17.

96 In the example of a collision between a Spanish registered vehicle and an English victim in England, English law gives no right of direct action to the victim. Under Article 18 the victim could chose to rely on Spanish law (assuming that this is the law of the insurance contract) in order to avail himself of the direct action permitted under that law. If Spanish law then applies to the whole claim the claimant not only has to bring a claim for an accident that occurred in his home state in the courts of that state but under a foreign law, that law is highly likely to result in a much lower award of damages than if the claim had been brought under English law. It is generally understood that awards of damages is lower in southern European countries than in the north. That UK damages are generally higher than those awarded in Spain is born out in the Commission Report (n84), see 56-60. This is clearly an undesirable situation.

whether it could be found that the rule in the Directive is of such a character to be overriding and mandatory in nature? It is submitted that a foreign court applying English law could substitute its own laws, which grant the right of direct action, for the defective English Regulations, relying on the fact that those national rules which meet the minimum standards are indeed overriding mandatory rules. Likewise, English courts, which find defects in the implementation of the MID by other Member States, could substitute its own compliant rules.

There is a further scenario which must be considered, however. It is less clear what will happen in situations where the law of the forum has enacted provisions which surpass the requirements of the MID, to offer a more favourable outcome to the victim. As already stated, states are free to enact such measures under Article 28 of the sixth MID and Article 16 of Rome II leaves it open to the forum concerned to decide for itself which rules cannot be derogated from and are in its public interest. There is, therefore, the possibility that national courts may invoke Article 16 to override the otherwise applicable law and apply its mandatory rules, which are more favourable to the victim. The occurrence of this situation cannot easily be predicted and for this reason puts a dent in the idea of rules of applicable law being clear and objectively ascertainable by the parties. All that can be said is that in reconciling the conflict between the MIDs and Rome II Article 16 may apply, sometimes. As such attention must turn to whether Article 27 can provide any further answers.

#### *5.3.3.2. Article 27*

Article 27 of Rome II provides that the Regulation:

*".. shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations."*

Article 27 is to be read in conjunction with Recital 35 which provides that the Regulation should not prejudice the application of instruments laying down provisions designed to contribute to the proper functioning of the internal market *'in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation'*. The MID was designed to ensure harmonisation of Member State rules on third party liability insurance, with a view to providing a level playing field for insurance providers and minimum standards of protection for victims of traffic accidents. Recital 2 of the MID indeed states that motor insurance is an important part of the non-life insurance business in the Community and that it has an impact on the free movement of people and vehicles, making consolidation of the internal market in motor insurance a key objective of Community action.

It is arguable therefore that, to the extent that the law specified by the Regulation, as applying to a direct action against the insurer of a vehicle usually based in the territory of an EU Member State, provides for a lower level of cover than the law applicable under the MID (either the law of the place of the accident or the law of place where the vehicle is normally based), the law specified by the MID will prevail in accordance with Article 27. The fact that the Directive requires implementation in Member States through national measures which would normally be subordinate to Community law in the form of a Regulation should not be a bar to the operation of Article 27. It has been noted that, where national measures are required to ensure the deliverance of Community wide policies, the protection afforded to the Community measure will almost certainly be extended to cover the implementing measure.[97] Were it not so, the effect of Article 27 would be greatly reduced.

For intra-Community road traffic accidents the conclusion is that Article 18 of Rome II operates in a residual manner, providing that the applicable law may be chosen by the claimant from

[97] Plender (n79) 1-033.

either the law otherwise applicable under the Regulation or the law applicable to the insurance contract, unless, the law of the place where the vehicle is normally based provides a higher standard of insurance cover. Here the claimant could, through Article 27, invoke Article 2 of the third MID to take advantage of that higher provision. The combined operation of these instruments effectively prevents insurers in intra-Community cases from imposing any policy limits on the claimant which cannot be justified under the law providing the highest cover of the three options available.

## 5.4. The Need for Reform

Although through Article 27 of Rome II it is possible to make sense of the relationship between the choice-of-law rules relating to direct actions against insurers contained in the MID and those contained in the Regulation, the situation remains unsatisfactory. It continues to be the case that the two schemes could apply to different questions, arising from the same claim[98] and that those schemes give rise to different choice-of-law outcomes on the basis of different aims and objectives. For this reason it is necessary to consider how reform could ameliorate these difficulties. Furthermore, there are deeper policy reasons for considering reform, which are apparent from a number of different sources, each of which is discussed in turn.

In the explanatory memorandum accompanying the initial proposal for the third MID the Commission stated the purpose of the Directive was to

*".... safeguard the interests of motor accident victims throughout the Community and irrespective of where in the Community the accident occurs."*[99]

This was built upon in the fourth MID when attention turned to the problems faced by visiting victims. The best solution at that time was felt to be a practical one, which would make access to

[98] The criticisms of fragmentation of the applicable law have been set out in Chapter 3. See 3.2.
[99] Commission Proposal (n.67), 1.

compensation easier. Victims were provided with a method of claiming compensation which was administered in their home state and in their home language. These measures are strongly victim focused. They accept that the victim is usually the weaker party and that the insurer is better placed to deal with different national systems of law and to absorb the cost of settling actions outside their country of establishment. As stated above, at the time of the fourth MID the Parliament did not feel that the application of a foreign law to a victim's claim was problematic, stating that it was the practical issues which created the biggest obstacles to achieving compensation, rather than the differences in national laws. However, there is now evidence of the desirability of the application of the victim's home law to a claim for compensation, as a result of the recent report published on behalf of the European Commission into the effects of visiting victims of cross border traffic accidents.[100]

Despite the recognition of distortions, the main recommendation of the report is in essence to do nothing. This is as a result of the report concluding that the numbers of traffic accidents involving a foreign party and which occur outside of the victim's state of habitual residence is very small.[101] However, in respect of actions brought by victims directly against third party liability insurers, there would appear to be a case for arguing that the law of the victim's habitual residence should apply. The justification for such an assertion consists of four parts.

Firstly, the distortion that the Commission report recognised in relation to quantification of damages and limitation periods gives rise to a risk of over or under compensation for victims of cross border road traffic accidents, through the application of foreign law. The Commission report recognised that where under compensation occurs, it is the claimant themselves who often ends up bearing the cost.[102] Under many national systems, schemes of strict liability, backed by compulsory third party insurance, reflect conscious national decisions not to allow the

[100] Discussed fully above in Chapter 4 at 4.9.
[101] Commission report (n88), 52.
[102] Ibid, 17.

risk of motoring to fall on the victims of accidents.[103] Although most EU Member States subscribe to the principle of *restitutio in integrum* with regard to compensation, this translates into differing types and amounts of compensation depending on the national system in question where there may be a unique interplay between the cost of living, compensation and social security.[104] In systems where it is felt that the victim should not bear the loss of an accident and should be compensated fully it is surely unjustifiable to allow that person to bear the shortfall in compensation because a foreign law has been applied to their claim. It is likewise not justified that such a person should secure a windfall in terms of over-compensation.

Secondly, there is a clear policy of protection towards such victims under the scheme created by the MID. The ultimate justification for this is that if victims do not face any disparity in treatment on the basis of where an accident occurred, the obstacles to free movement are reduced or removed and the internal market is supported. Rome II is also premised on the need to facilitate the internal market. A victim centred approach to choice-of-law rules forwards the aims of both instruments if it were to eliminate the disparity between the way the victim would be treated at home and the way they are treated under a foreign law.

Thirdly, a very small percentage of claims arising out of traffic accidents are not dealt with through insurance. Within the EU, third party liability insurers have to have within their contemplation the cover required in respect of both damages and liability, in all the other EU Member States courtesy of Article 14 of the MID. They also must have in place a network of claims representatives in each Member State other than that where they received their authorisation to provide insurance services. The relationship between a onetime claimant and a motor insurer is therefore very unbalanced. The insurer has at his disposal a network of advisers

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103 See generally W. Ernst *The Development Of Traffic Liability'* Vol 5 *Comparative Studies in the Development of the Law of Torts in Europe* (Cambridge University Press, 2010).

104 B. Koch and H Koziol (eds) *Compensation for Personal Injury in a Comparative Perspective* (Tort and Insurance law, Vol 4, Springer, 2003); M. Bona, P. Mead (eds) *Personal Injury Compensation in Europe* (Kulwer, 2003).

in every Member State, in the form of the claims representatives. He will also be able to secure legal advice relatively easily, where necessary. The claimant must seek costly legal advice to obtain information, which may be difficult to fund. The insurer will have dealt with similar claims many times before, he will be familiar with (and may set part of) the procedure to be followed in making a claim and will know how best to work the system to his advantage. The claimant will likely have no experience of making a cross border claim and will be daunted by the prospect. The loss suffered by the claimant may mean that he has no choice other than to accept the settlement offered by the insurer, because he cannot afford to spend more time and money arguing about the quantification of the claim.

Fourthly, in other areas of law choice-of-law rules reflect the substantive law position, where there is a need to protect one party who is perceived as a weaker party. The function of protection is facilitated by the choice-of-law rules. Such is the case for consumer contracts concluded by distance means. Here, the consumer is thought of as being in a weaker position to that of the supplier because of an information deficit. [105] Substantive rules aim to correct the balance and this correction mechanism is then carried forward into jurisdictional and choice-of-law rules.[106] This still constitutes a fair balance between the parties, because one of the parties was in a stronger position to begin with. The same could be said for direct actions against insurers. The protection afforded to victims at the substantive level, really needs to be reflected in a corresponding choice-of-law rule, in order to ensure the effectiveness of the protection.

With this in mind, although justification cannot be found to take a victim centred approach in cases between the parties directly involved in the accident,[107] it makes sense that when the claim is brought directly against the insurer of a vehicle normally based within the EU and insured in

[105] See J. Hill *Cross Border Consumer Contracts* ( OUP, 2008), 7-8
[106] For example Article 6 of Rome I provides some applicable law advantage to consumers by designating the law of the consumers habitual residence, as long as the professional conducts or directs his business activity in or to that country. See J. Hill, ibid, Chapter 12.
[107] See Chapter 4 at 4.9.1.

accordance with the requirements of the MID, by a victim who is also an EU Member State resident, the victim's home law, which provides the most satisfactory form of compensation, should apply to the whole claim.[108] Such a rule would be best achieved as an amendment to Rome II, most sensibly as a subparagraph of Article 18. The new Article 18 might read as follows:

*Article 18*

*The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.*

***In the case of a direct action against a motor insurer to which Dir 2009/103/EC is applicable and where the person who suffers damage elects to bring the action before the courts of the EU Member State of his or her habitual residence, the law applicable to the claim shall be the law of that Member State.***

***This provision shall prevail over any other conflicting choice-of-law rule contained in any other instrument and in spite of Article 28 of this Regulation.***

This amendment would need to be coupled with an amendment to Article 14 of the MID[109] which should read:

*Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles:*

[108] It should be noted that a similar proposal was made in the PEOPIL response to the European Commission consultation on the compensation of victims of cross border traffic accidents in 2009. However, PEOPIL recommend the application of the victim's home law to the issues of damages and limitation periods only. Also the proposal unclear about whether the home law should only apply to direct actions against insurers or whether it should apply to all claims brought in the victim's state of residence. See the PEOPIL response at http://ec.europa.eu/internal_market/consultations/2009/cross-border-accidents_en.htm.

[109] Previously Article 2 of the third MID.

*(2) guarantee, on the basis of that single premium, in each Member State, the cover required by ~~its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher~~* ***the law applicable to any obligation owed to a third party claimant in accordance with Article 18 of Regulation (EC) No 864/2007 Of The European Parliament And Of The Council Of 11 July 2007 On The Law Applicable To Non-Contractual Obligations (Rome II)***

Recital 33 of Rome II should also be disposed of as part of any reform process.

Effecting amendments in this way would ensure that the rule could take effect immediately and uniformly across all the Member States, without the possibility of questions being raised as to its compatibility with, or relationship to, Rome II, which would invariably happen if it were included in the MID to take effect under Article 27 of Rome II. [110]

From the insurers' point of view, the main point of contention is likely to be the difference in the numbers of claims that will have to be dealt with under foreign laws. Some countries (e.g. Greece[111]) experience a net flow inwards of visitors, as opposed to nationals visiting other Member States. Where, under the current system, Greek insurers have to meet some claims on the basis of foreign laws because accidents are caused by Greek drivers in other Member States, the numbers would significantly increase if the rule were altered so that visiting victims had to be compensated under their home law, the occurrence of such instances being statistically more likely to occur. It is not so much that Greek insurers do not already have to contemplate foreign laws, than that the cost of doing so more often could become burdensome. This could lead, in some countries, to an increase in premiums being directly related to the cross-border nature of

[110] Amending Article 18 in this way could cut across the universal application of the Regulation pursuant to Article 3 as discussed in Chapter 3, See Chapter 3 at 3.5.1.3.Objections may be raised to the proposal on the basis that it creates complexity in this regard. However, it is submitted that the resolution of complexity in the relationship between the MIDs and Rome II should far outweigh any additional complexity caused.

[111] Greece has a population of around 11 million, yet according to the Hellenic Statistic Authority received in excess of 17 million foreign visitors during 2007. Statistics can be found at: http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A2001/Other/A2001_STO03_TB_MM_12_2007_02_F_EN.pdf> accessed on 24 August 2013.

claims.[112] It is also acknowledged that this solution would mean that an economic burden would be disproportionately borne by low-compensation countries, whose insurers would potentially have to meet the claims of victims from high-compensation countries. It might be noted here that the reasoning employed in the Commission report[113] can be turned on its head. Since the numbers of relevant cases are low the burden should not be overly onerous – although, as stated above, the change is likely to lead to an increase in numbers of cases being dealt with under a law foreign to the insurer, for some countries at least.

Moreover, the uncertainty to which the proposal gives rise because it cannot be predicted in advance which law will apply to any given claim, is less significant in light of the fact that the current position enables drivers within the EU to drive across national borders without notifying their insurer beforehand. Furthermore, the laws which could apply are restricted to the EU Member States, the laws of which, as already stated, should be within the contemplation of insurers under the MID and in whose territory insurers should already have an appointed claims representative to deal with claims on their behalf. Finally, the proposal might be viewed as overly generous to the victim in offering a choice between bringing an action against the tortfeasor under the law designated by the Regulation, or against the insurer under the victim's home law, which could be seen as providing two bites of the cherry. It should be noted however, that the situation would not be substantially different from the current scheme whereby the victim is still offered a choice of bringing a claim against the tortfeasor under the designated law, or against the insurer under the designated law or the law of the insurance contract.

### 5.5 Claims against a Compensation Body

[112] See Retail Insurance report (n52) which shows that the primary driver of motor insurance premiums is a rise in average claims costs mainly due to inflationary pressures such as the rise in cost of medical treatment or repair of vehicles. The report makes mention of both the MIDs and Rome II but at no point suggests that the cost of settling cross-border claims is a distinctive feature of rising premium prices. However, as stated above if cross-border claims require more resources this will feed into the average claims cost and affect claims ratios, which will impact on premium prices. So an indirect correlation cannot be ruled out. See in particular pp 70–77 and 108–10.
[113] See the Commission report (n88), 52.

As stated at the beginning of this chapter, in certain circumstances the victim of a road traffic accident may be able to bring a claim against one of the compensation bodies set up in accordance with the Directives. The main provisions dealing with the creation and function of compensation bodies are Article 1 of the second MID and Articles 6 and 7 of the fourth MID.

Article 1(4) of the second MID provides for the creation of a body to compensate victims of traffic accidents, where the vehicle which is responsible for the accident is not covered by insurance. Article 1(7) provides:

*"...each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."*

In accordance with the first MID this will apply to all vehicles normally based in an EU Member State.

Article 6 of the fourth MID provides that each Member State shall establish a compensation body for the payment of compensation to victims where the insurer or his representative does not provide the victim with a reasoned reply within a three month period following the submission of a claim. Victims may submit such claims to the compensation body in their country of residence.

Article 7 of the fourth MID provides that if it is impossible to identify the vehicle which causes an accident, or it is not possible, within two months, to identify the insurer of that vehicle, then the victim may submit a claim to the compensation body of the country in which they reside. The compensation shall be provided in accordance with Article 1 of the second MID, which includes Article 1(7), so that the applicable law will be the law of the compensation body and also the law of the victim's state of residence. Both causes of action under the fourth MID are

available to injured parties who suffer injury in a Member State which is not the Member State of their residence.

Each of these three causes of action is dogged by slightly differing issues. Article 1 of the second MID is not explicit about in which state the claim may be brought. It should be recalled here that at the time of the second MID measures were not specifically aimed at resolving the issues faced by visiting victims as the measures of the fourth MID are. For this reason it becomes logical to suggest that the claim would have to be brought in the State of the accident, which would make the applicable law the law of the state of the accident also. If this is the case then the rule regarding choice-of-law is quite clear: the law of the state of the accident will apply.

Article 6 of the fourth MID is clear that the action may be brought in the state of residence of the victim, but is silent as to which law would apply in the settlement of such a claim. Article 7, on the other hand, is clear that the claim may be brought in the state of residence of the victim and in accordance with the law of that state. This leaves the situation for Article 6 very uncertain. Does the lack of specific mention of the applicable law, when Article 7 is explicit on the matter, mean that a different outcome was intended for Article 6? Alternatively, should Article 6 follow Article 7, bearing in mind the weight given to the protection of the victim under the Directive? The Commission proposal on the fourth MID is silent on the matter other than a comment in relation to Article 7 where it is stated:

*"The reasoning behind this Article is in line with that of Article 5*[now Article 6] *of the proposed Directive. A victim of an accident occurring outside his State of residence has an interest in securing compensation on the same conditions as those applicable to the functioning of the compensation body provided for in Article 5 in his State of residence."*

If compensation is to be on the same conditions as for a claim under Article 7, then it is commonsense that this should also apply to the matter of applicable law. Furthermore, if in no other type of action does the compensation body have to apply a foreign law and in both scenarios the compensation body ultimately claims sums paid by way of compensation back from the compensation body of the Member State where the insurer is established (or where the vehicle is registered or the accident takes place). As such there is nothing obvious which makes a claim for dilatory settlement apt for the application of foreign law more than the unavailability of the identity of the vehicle or the insurer. It is submitted, on this basis, that for Article 6 claims, the applicable law will be the law of the state of the compensation body, which is also the state in which the victim resides.

Since the rule in Article 1(7) of the second MID provides for the application of a specific law in the circumstances noted above, whether it was intended or not, the rule has the effect of being a choice-of-law rule. It would be natural to assume at this point that, as outlined above in respect of direct claims against the insurer, this rule could take effect subject to Article 27 of Rome II. It could also be considered to be a measure which is mandatory in nature and as a minimum standard, the rule that the law of the state of the compensation body should apply to the assessment of damages by that body, would apply regardless of the otherwise applicable law under Article 16 of Rome II, as also discussed above. However, recent English case law casts significant doubt on this reasoning.

The recent case of *Jacobs*, [114] the first case decided by the English courts where Rome II was potentially applicable, concerned a cross border traffic accident. Mr. Jacobs was the English victim of an accident in Spain, where the German tortfeasor was an uninsured driver of a car ordinarily based in Spain. Mr. Jacobs made a claim for compensation in respect of his losses to

[114] *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609.

the English compensation body, as he is entitled to do under Article 7 of the fourth MID. In the UK the compensation body is the Motor Insurers' Bureau.[115] This is achieved at the national level by way of two agreements between the MIB and the Secretary of State for Transport, currently The Uninsured Drivers Agreement 1999[116] and the Untraced Drivers Agreement 2003.[117] The main issue leading to legal proceedings was, by which law should Mr. Jacobs' claim be assessed? The Claimant had argued that English law should apply to the matter of compensation. Regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, the national provision which incorporates the provisions of the fourth MID into English law, was clear in providing that the claim should be determined in accordance with English law. Regulation 13 states:

*"(2) Where this regulation applies—*

*(a)the injured party may make a claim for compensation from the compensation body, and*

*(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain."*

The MIB argued that Rome II, being the later provision, should apply to determine the correct applicable law. In the High Court, reference was made to the self executing nature of an EU Regulation which would take precedence over any previous or future conflicting rule of national law. As such, the rules in Rome II were found to supersede the conflicting choice-of-law rule in Regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. It was accepted that this rule was derived from the

[115] Hereinafter referred to as the 'MIB'. This was in existence before the MIDs required it, but the same body now fulfils the UKs obligations under the MIDs.
[116] As supplemented by the Supplementary Agreement 2008.
[117] As supplemented by the Supplemental Agreements dated 2008 and 2011.

choice-of-law rule contained in Article 1(7) of the second MID, but the court held that Rome II took precedence.[118] Notably the court did not discuss Article 16 or Article 27 of Rome II in reaching its decision and the outcome would have been questionable on that basis. However, on appeal, the Court of Appeal cast an entirely different light on the relationship between the various legislative provisions.

Accepting Counsel for the Claimant's submission, the Court of Appeal opined that the rule in Regulation 13 was not a choice-of-law rule at all. Moore Bick L.J. stated:

*"... the parties agreed that regulation 13(2)(b) is not a choice of law clause, rightly, in my view, because it is concerned with defining the existence and extent of the MIB's obligation as the body appointed to provide compensation for injury suffered in road traffic accidents rather than with determining the liability of the wrongdoer."* [119]

The view was that Rome II was not engaged and did not, therefore, take priority over Regulation 13. Consequently the court concluded that the question of damages payable by the MIB would be governed by English law.[120] There are a number of issues which the case leaves in an unsatisfactory state.

Firstly, a cross border road traffic accident concerns a non-contractual obligation, any dispute about which between the victim and the tortfeasor, or his insurer, will be dealt with under the law designated by Rome II (even if this leads back to the choice-of-law rules under the MIDs as discussed above). The obligation of the MIB to pay compensation is also non-contractual, but the court did not consider whether the obligation fell within the scope of Rome II at all. In fact, the dictum in Moore-Bick L.J.'s judgment is somewhat confusing in places. He quite clearly expresses the opinion that the rule in Regulation 13 amounts to a free standing right to

[118] *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609, [28]-[31].
[119] Ibid,[38].
[120] Ibid.

compensation, which is governed by purely domestic provisions. It is quite clearly stated[121] that Rome II can not apply in this situation because Regulation 13 is not a choice-of-law clause which should be overridden by the provisions of the Rome II. Yet at paragraph 33 he states that:

*"The judge approached the matter on the basis that the claim against the MIB, being based on a non-contractual obligation arising out of a tort, must be governed in all respects by a single system of law. However, it is well established that different systems of law may govern different questions raised by the same claim (see, for example, Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3) [1996] 1 W.L.R. 387, 418A-B per Aldous L.J.) and under English conflicts of laws rules the assessment of damages gives rise to a separate issue."*

This is perplexing indeed. Firstly, if the obligation to pay compensation is a purely domestic one, why is it necessary to make reference to the position, within conflict of laws, that separate issues can be dealt with under separate applicable laws? This surely has no bearing on an issue which does not concern applicable law. Secondly, it is clear that the issues of liability and assessment of damages may not ordinarily be treated under separate systems of law in accordance with Article 15 of Rome II, which it was believed was the conflict of laws regime applicable at the time of this decision.[122] Under Article 15 of Rome II, the assessment of damages is to be performed in accordance with the designated law. This gives no basis whatever for the proposition that the issue of liability should be treated as a separate issue under a separate applicable law. The line of reasoning demonstrates the disjointed nature of the rules in this area, and the potential for confusion.

[121] Ibid.

[122] A ruling of the CJEU in C-412/10 *Homawoo v. GMF Assurances SA* [2011] ECR I-00000 subsequently confirmed that Rome II would not have been applicable to the facts which gave rise to Mr. Jacobs claim since the Regulation only applied to events occurring on or after 11 January 2009. However, the court in *Jacobs* proceeded on the basis that Rome II was in force and would apply. This is clear from the consideration of the judge that matters of liability would be determined by the law designated by Rome II.

The issue in this regard is likely to be whether the obligation can be considered a *'civil and commercial matter'* for the purposes of Article 1(1) of Rome II, thereby bringing the obligation of the compensation body within the scope of Rome II. Dickinson suggests that:

*"... it may be doubted whether a scheme of this kind for compensating victims of anti-social conduct from public funds was intended to fall within the ambit of the Regulation."*[123]

It will be recalled from the discussion in Chapter 3, on the interpretation of Article 1 of Rome II, that the meaning of *'civil and commercial matter'* in Article 1(1) is likely to be such that the acts of public bodies will be excluded from its scope.[124] Whether the MIB fulfils a public function or a private one has been the subject of a previous dispute put before the English courts. In the case of *McCall v. Poulton*[125] the MIB argued that it was a private operator and not an emanation of the State, such that it was not subject to the *Marleasing*[126] principle and the MID was not directly effective against it. The trial judge decided to refer a question to the CJEU regarding the status of the MIB and whether the *Maleasing* principle applied.[127] From the point of view of achieving clarity in the law it is a pity that the case settled and the reference was withdrawn.

However, the fact that the English courts felt the need to make a reference to the CJEU is evidence of the difficulty of this matter. There are a number of factors on both sides of the argument which make it difficult to predict which way the CJEU would have gone.[128]

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123 A. Dickinson 'Rome–ing Instinct' (*Conflict of Laws.net* 8 November 2010) <http://conflict oflaws.net/2010/rome-ing-instinct/> accessed on 13 January 2013.
124 See Chapter 3 at 3.5.3.
125 [2008] EWCA Civ 1313; [2009] 1 C.M.L.R. 45.
126 Case C-106/89*Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] E.C.R. I-4135; where a rule of interpretation was established, applicable to national courts when interpreting national legislation in light of the objectives of an EU Directive. Waller L.J. in *McCall v. Poulton* described it in these terms "…the national court goes much further in interpreting the enactment than it could conceivably go by the ordinary rules of interpretation…the court can use a 'cleaver' and simply strike out provisions that do not comply with the directive." Ibid at 28.
127 The MIB appealed this decision. The Court of Appeal rejected the appeal and upheld the decision to make a reference.
128 The MIB is a private company limited by guarantee. Every insurance undertaking providing third party motor insurance in the UK must be a member of the Bureau and must contribute to its funding (In accordance with the Road Traffic Act 1988 s95(2)). In *White v. White* [2001] UKHL 9; [2001] 1 W.L.R. 481Lord Nicholls was of the opinion that the MIB agreement was of a private law nature, even though one of the parties to it was an emanation of the state (i.e. the Secretary of State) (at para 21-22). On the other hand, powers, duties and responsibilities are imposed on the MIB by the Government and the Government is able to alter

A second issue which becomes apparent from the judgment in *Jacobs* is the classification of the national implementing provision as a rule which is not a choice-of-law rule. This is not so much an issue with the judgment, as an issue with the way the Directive has been implemented. Article 1(7) of the second MID is a rule which selects the law of a particular forum. Because it is the law of the state of the body concerned, at national level the rule transforms into a provision concerned only with the domestic situation and which is not expressed in choice-of-law terms. However, if the minimum standard required by that rule, that the law of the state of the compensation body should apply to the assessment of damages, can be considered an overriding mandatory provision for the purposes of Article 16 of Rome II then the result is the same as if the national rule is construed as one of choice-of-law, which would then take effect through Article 27 of Rome II. It is submitted that since the outcome would be unaffected, this issue is not of great concern.

Whatever the nature of the national implementing provisions and whether Rome II is engaged or not, the judge in *Jacobs* recognised that there are two anomalies which arise from the current arrangement, where the law of the compensation body applies to the assessment of compensation. Firstly, that the victim in a cross border traffic accident, of an uninsured driver, an untraced driver or of a driver whose insurer does not honour their obligation to compensate the victim, will receive a different amount of compensation to a victim who can claim directly against the liable driver or his insurer.[129] Secondly, the effect of the agreements between the

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the Agreements, as it has done to incorporate new obligations under the Directives. Bevan is of the opinion that this allows the Government to control the Bureau and to expand the scope of its responsibilities (Bevan 'Case Comment *McCall v. Poulton*' Journal of Personal Injury Law (2009) 107 at 110). Clearly this matter needs to be resolved. In *McCall* the MIB argued that they were a private operator but to avoid the operation of Rome II in *Jacobs* they would need to argue the opposite (although this argument has so far not been made). This is obviously an unacceptable situation. It must also be born in mind that the MIB is the compensation body for the UK but that each EU Member State will have adopted their own arrangements for ensuring the compensation of victims of uninsured and untraced drivers. The classification of the MIB as performing a private or public function and of falling within or without the scope of Rome II must be done in the furtherance of developing the autonomous meanings which Rome II is dependent upon, but also of ensuring retention of the scheme created by the MIDs.

[129] *Jacobs* (n119), [23].

national Bureaux[130] means that where that victim receives more compensation than he would otherwise have, the compensation body will be unable to recoup the total amount because the recuperation is calculated in accordance with the law of the place of the accident.[131] This adds weight to the proposal that has been set out above in respect of direct actions against insurers.

If, as has been argued, the law applicable under Rome II to a direct action against an insurer in an intra-community cross border road traffic accident is that of the victim's home state then any differences between the amounts that can be claimed from the insurer and the compensation body disappear and the undesirable situation of subjecting the issues of liability and damages to separate law regimes is resolved. If such a scheme were created it would make it a logical step for the national Bureaux to amend the agreement between them to take account of that fact and permit the recuperation of sums paid in compensation at the rate applied in the home state of the victim, which would then deal with the remaining anomaly.

### 5.6. Conclusion

Choice-of-law rules in respect of claims made directly against an insurer are somewhat problematic, it being open to debate, for example, how far the insurer may go in reliance on the terms of the insurance policy. However, the complexity becomes manifold in the intra-Community sense because of the relevance of the MID. It is unfortunate that during the Rome II process the opportunity was not taken to attempt to simplify the relevant rules, however, it seems as though the problems were not even recognised. This in itself, along with the lack of reported cases on the issue of choice-of-law for these types of claims, suggests that there may in fact be commonly used practices for settling claims which are generally accepted and utilised by lawyers and insurers. It has to be wondered whether such practices, expedient as they may be, are

[130] See in particular Article 3(4) of the 'Agreement Between Compensation Bodies and Guarantee Funds' 29th April 2002 available at <http://www.4directive.org/en/index-module-orki-page-view-id-233.html> accessed on 24 August 2013.
[131] *Jacobs* (n119), [29[-[30].

in the best interests of the victim. The suggested amendment to the law, of applying the law of the victim's home law, would provide a simple solution to choice-of-law for intra-community cross border road traffic accidents. It seems that this will already be the law applicable to claims against compensation bodies, where the choice-of-law rules are in better shape and the problems relate to the nature of the claim and the relationship between the MID and Rome II: issues which require clarification. Implementing a uniform rule in respect of both types of claim would have the additional advantage of removing the anomalies which the current disparity creates.

# 6. The Hague Convention on the law Applicable to Traffic Accidents

## 6.1. Introduction

It was stated in the very first chapter of this Thesis that the emphasis of this work would be on those choice-of-law rules pertinent to non contractual claims, arising out of cross border road traffic accidents, which were of significance in England and Wales.[1] However, with the advent of Rome II[2] and because of the importance of the Motor Insurance Directives,[3] consideration of the position at the European level is unavoidable. The impact made by the continued application of the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971[4] in a little under half of the EU Member States renders it natural to also take account of that instrument in this Thesis.

To date there are twenty-one signatories to the Convention,[5] although, it is notable that there are no signatories from North or South America, Asia or Australia and only one from Africa, namely Morocco. It should be noted that although the UK took an active part in the process leading up to the drafting and adoption of the Convention,[6] the UK did not sign or ratify it and it does not, therefore, have any direct relevance to the law of England and Wales. However, the Convention

[1] See Chapter 1 at 1.2.
[2] Regulation (EC) No 864/2007 on the law applicable to non- contractual obligations (Rome II) (2007) OJ C 343/7.
[3] Council Directives 72/166/EEC, 84/5/EEC, 90/232/EEC, 2000/26/EC and 2005/14/EC, now consolidated in Directive 2009/103/EC.
[4] Hereinafter referred to as 'the Convention'.
[5] Currently: Austria, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, Netherlands, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, Switzerland, The former Yugoslav Republic of Macedonia, Ukraine.
[6] It was in fact the British delegation who had the consideration of choice of law for torts placed on the agenda of the Conference; see X Conference (7 – 28 October 1964), Final Act B IV 1(a). Also see K Lipstein 'One Hundred Years of Hague Conferences on private international law' (1993) ICLQ 553, at 632. Furthermore, K.M.H Newman, Assistant Solicitor at the Lord Chancellor's Office was elected Vice –Chairman for the first session of the special commission (16 – 22 October 1967) which considered and drafted the Convention.

provides the most obvious comparison to the rules in Rome II, it being quite different in approach and philosophy. Not considering the Convention would provide an incomplete picture of the current landscape in this area. Moreover, there are interesting and pertinent questions about the relationship between Rome II, the MID and the Convention which have not received sufficient consideration to date.

This chapter will briefly comment on the methodology of the Convention before setting out the rules of choice-of-law contained in it. These rules will be contrasted with the rules of Rome II and the MID. The scope of the Convention itself, as well as its choice-of-law rules, will then be considered. Again a comparison will be made to the scope of Rome II. The relationship between Rome II, the MID and the Convention will then be considered and potential reform of the undesirable situation, whereby three instruments might be simultaneously applicable to a single traffic accident claim, is suggested.

## 6.1. Methodology

The methodological approach of the Convention is worthy of note. In relation to the basic choice-of-law rule, set out in Article 3 of the Convention, the Explanatory report states that the rule is in no way motivated by any theoretical considerations. The only basis for the rule is that it be *'simple, clear and easy to apply'*.[7] The report goes on to say that any notion of the proper law of the tort was rejected by the Hague Conference.[8] This makes it difficult to accept that the rules of the Convention were not in any way motivated by theoretical considerations. It is possible to say, at least, that a proper law approach was clearly considered, and rejected, and an approach based more on the need for certainty preferred.

[7] E. Essen 'Convention on the Law Applicable to Traffic Accidents – Explanatory Report' (HCCH, 1970), 13. The report is hereinafter referred to as 'the Explanatory Report'.
[8] Like other Hague conventions the Convention on the Law Applicable to Traffic Accidents is in fact a multilateral treaty. It is the creation of the Hague Conference on Private International Law, a permanent intergovernmental organisation.

It has to be acknowledged however, that the Convention trod a new and different path to what had gone before it, in respect of traffic accidents, and this remains the case to the present day. The methodology of the Convention has been described as one which tries to:

*"Achieve a compromise between the traditional lex loci delicti and the more flexible approaches that had been developed in the course of the American choice-of-law revolution."*[9]

The compromise consists of a rigid general rule, followed by a number of rigid exceptions, which determine closest connection by determining in advance the place where the most significant factors are likely to converge and designating this as the applicable law. North explains that the rules amount to:

*"...an attempt to identify the most likely factual circumstances to arise and the law that would be applicable under a flexible general proper law approach and then to cast those solutions in the form of specific rules. A structure of complex rules is inevitable."* [10]

This difference in methodology has been given in explanation for the refusal of some countries to sign or ratify the Convention.[11] It will be useful to keep the approach of the Conference in mind during the following analysis of the rules of the Convention.

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[9] J. von Hein 'Something Old and Something Borrowed, but Nothing new? Rome II and the European Choice-of-Law Evolution' (2007-08) 82 Tul. L.Rev. 1663, at 1679.

[10] P. North 'Hague Conventions and the Reform of English Conflict of Laws' (1980-81) 6 Dalhouse L.J. 417, at 445.

[11] The USA had been vocal in its objection to a convention in this area from the beginning. Responding to the initial questionnaire, sent out by the Permanent Bureau, the US government had stated: *"It seems questionable whether choice of law in torts is a field that is suitable for treatment in a convention. At least in the United States the area is in a state of flux, and there is uncertainty and disagreement even with respect to basic principles."* Specifically on traffic accidents, the US position was in a similar vein: *"Road Accidents are not thought to provide a suitable topic for treatment in a convention. At least in the United States, this segment of the torts choice of law field is in a particularly confused and uncertain state. Also this is an area where the parties are most unlikely to give advance thought to the question of what law will be applied to determine their rights and liabilities. Hence this is an area where there is little need for the certainty and predictability that a convention might bring." (* See 'Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law' 8 I.L.M. (1969) 785 at 800). The opposition of the US to the Convention mirrors quite closely the divide in approach and underlying philosophy between Europe and the US with regard to choice of law in the field of torts. US rules had undergone a paradigm shift in approach when the conflict of laws revolution occurred. Flexibility, leading to justice in each case became of more value than the predictability of the past. In Europe, rules remained faithful to the Savigny principles of predictability and certainty. The rules proposed and eventually adopted in the Convention accord much more closely with the latter approach. In a note on the Convention Reese put it like this: *"It is possible, as is done in the present Convention, to state choice-of-law rules which will reach satisfactory results in this area in a substantial majority of the cases. The question is whether the advantages of predictability, uniformity and certainty of result which such rules would bring justify the bad results to which these rules would lead on a comparatively few occasions. By and large, we in this country tend to answer this question in the negative while most jurists belonging to civil law systems would answer in the affirmative."* W.L.M.. Reese

## 6.2. Choice-of-Law Rules

The choice-of-law rules of the Convention will be explained and discussed in the order in which they appear in the Convention.

### 6.2.1. Article 3

The basic choice-of-law rule of the Convention is contained in Article 3 which states:

"*The applicable law is the internal law of the State where the accident occurred.*"

Reference to the internal law of a state indicates the exclusion of the choice-of-law rules of that state, *renvoi* is not permitted by the Convention.

In the explanatory report which accompanies the Convention, Article 3 is described as the adoption of the *'classical solution of the application of the lex loci comissi'*.[12] This, it is stated, is in conformity with the practice of the majority of Conference Member States.[13]

However, the explanatory report raises the possibility of an imprecise meaning of this provision. In the vast majority of cases, the circumstances of the claim, the operation of the rule and the choice-of-law outcome will be perfectly clear and straight forward. The accident will occur in the state in which the tort took place and this will also be the place where the damage occurred. Nevertheless, in the explanatory report an example of a difficult case is given whereby a French lorry, carrying gas, explodes in Belgium, but only one hundred meters from the Luxembourg

'Draft Convention on the Law Applicable to Traffic Accidents' as part of 'Documents – The Eleventh Session of the Hague Conference on Private international Law' (1986) 16 Am. J. Comp. L. 580 at 588. When the rules of the Convention are radically different from existing national rules and ideals, reticence in signing up is understandable. However, the US example sets out clearly the challenges should any attempt be made to redraft the Convention in a way which is appealing to more of the international community.

[12] The Explanatory Report (n7), 13.

[13] Ibid. There is however an acknowledgement that although this had been the position in the US, the then recent case of *Babcock v. Jackson* (1963) 12 N.Y. 2d 473 may have change things.

border, damage being caused in Luxembourg. Here it is stated in the report that the applicable law will be Belgium law, that being the place where the tortious act took place.[14]

Suddenly the rule is not that the law of the place of the accident should apply but that the law of the place where the tort occurred should apply. That this is equivocal becomes clear if another scenario is considered. If the same lorry, at the Luxembourg border is struck by another vehicle, on the Belgium side, which shunted the lorry across the border causing it to collide with a number of other vehicles damaging them and their occupants, the place of the accident is not so straightforward. Whilst in the first scenario it might be argued that the place of the accident coincides with the place where the tort occurred, in the second the same cannot be said. The accident occurred in both Belgium and Luxembourg, whilst the tort arguably occurred in Luxembourg. Which law is to apply here? The reference in the report to the *lex loci commisi* indicates that the law of Luxembourg might apply, but it has to be recognised that this is a different law to the law of the place of the accident, which is what is stated in the Article itself.

The Convention shows a clear tendency towards certainty and predictability through rigid rules. This only makes the possibility of the basic rule having to be flexible in some situations all the more difficult to comprehend. The explanatory report states that the Conference was:

*"... not.... receptive to the proposals to introduce the principle of the proper law of the tort, even in very restricted fields."* [15]

Yet it appears to be accepted that the very clear, basic rule contained in Article 3 is capable of having more than one meaning, dependent upon the circumstances. This, of course, will only occur in very exceptional circumstances and is therefore highlighted as more of a theoretical possibility than a likely, daily problem. Nonetheless, it is submitted that the rigidity of the rule

[14] The Explanatory Report, (n7), 13.
[15] Ibid.

displays an inability to adequately accommodate all possible scenarios. This, paradoxically, creates uncertainty.

Generally speaking, the possibility of uncertainty aside, the basic rule in Article 3 will produce the same choice-of-law outcome as Article 4(1) of Rome II. In the majority of cases Article 4 of Rome II will designate the law of the place of the damage, which will coincide with the place of the accident to produce the same outcome as Article 3 of the Convention. The most notable difference between the rules of Rome II and the rules of the Convention is that the general rule in Article 4 of Rome II can give way, in difficult cases, to a flexible exception where necessary. In difficult cases Article 4(3) of Rome II allows the court to consider which law is manifestly more closely connected to the tort and arrive at an applicable law that reflects this closer connection. However, as stated above, there are a number of rigid exceptions to the basic rule in Article 3. These need to be considered before any more comparison between the outcomes of Rome II and the Convention can be carried out.

### 6.2.2. Article 4

Article 4 is fairly complex in as much as it contains a number of different exceptions to the basic rule contained in Article 3, depending primarily on whether there are one or more vehicles involved in the accident. There is, then, a further exception relating to potentially liable persons outside of the vehicle/s. However, these exceptional rules are bound by a common principle, that of unity of the applicable law. At various points throughout the explanatory report it is stated that the Convention is marked by the re-enforcement of the principle of unity,[16] which is a

[16] The Explanatory report, (n7), 4,12,16,21,22,23 and 31.

guiding principle of the Convention.[17] The principle is really an extension of the idea (laid out in respect of Article 3) that the rules of applicable law should be clear and easy to apply.

The application of this principle means that when there is a plurality of co-authors of an accident, the same law will apply to a claim by a victim against any or all of them. In this way, what the report calls, internal relationships (those between a transported person and the party transporting them) and external relationships (relationships between the driver of one vehicle and the driver of another vehicle, the passenger of another vehicle or a pedestrian), will all be governed by the same law.[18] The principle is followed religiously in this way because it is deemed essential for practical and procedural reasons for co-authors of an accident to be subject to the same applicable law.[19]

#### *6.2.2.1. Article 4(a)*

The text of Article 4(a) reads as follows:

*"Subject to Article 5, the following exceptions are made to the provisions of Article 3 -*

*"a) where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability*

*- towards the driver, owner or any other person having control of or an interest in the vehicle irrespective of their habitual residence,*

*- towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,*

[17] Ibid, 31.
[18] Ibid, 3-4. The principle of unity is conformed to throughout the Convention. This is so under the exceptions contained in Article 4, as well as at other points in the Convention, such as under Article 8(7) which determines that the same law will apply to a principal as applied to his agent; as well as under Article 2(4) which determines that the Convention shall not apply to recourse actions between co-authors which may involve the application of different applicable laws.
[19] Ibid, 21.

*- towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.*

*Where there are two or more victims the applicable law is determined separately for each of them."*

The law of the place of registration of the vehicle will apply in the three situations identified.[20] It is stated expressly in the explanatory memorandum that the place of registration of the vehicle will usually coincide with the habitual residence of the driver and of the owner, as well as the place of establishment of the insurer.[21] The report states:

*"The criterion of the registration therefore has the advantage of representing the place on which a number of connecting factors converge."* [22]

The role of the insurer in claims for compensation following a traffic accident had not been lost on the Special Commission. The Swiss delegation, having consulted with insurers prior to the meeting of the Commission, made it known that insurers were in favour of a predictable rule, which would allow easy settlement of cases without recourse to any national courts at all. The Swiss delegate highlighted findings that showed that out of 1000 traffic accidents 995 were settled by insurers, out of court.[23] Professor Loussouarn, President of the second meeting of the Special Commission, has written that applying the law of the place of registration would in fact allow insurers to settle claims more easily.[24]

It is interesting that the position of the insurer should be considered and that a choice-of-law rule which favours the insurer should follow. An insurer will find that business costs are kept to

[20] The first draft of the Convention utilised a common habitual residency rule, however, this was eventually considered to be too complex, since there were potentially a number of different parties to an action such as the driver, owner, hirer or passenger. As such the place of registration was deemed to be clear and to limit any complexity in applying the rule.
[21] The Explanatory Report, (n7), 15.
[22] Ibid.
[23]See the Explanatory Report at p13; see also, J. Castel and P. Crepeau 'Views from Canada' (1971) 19 Am J Comp L 17, at 25. It seems that the Belgian delegate concurred with this position 'Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law' 8 I.L.M. (1969) 785 at 802.
[24] Y. Loussouam, 'La Convention de la Haye sur la loi applicable en maltire d'accidents de la circulation routibre' *(*1969) 96 Journal. du Droit International. 5, at 7.

a minimum by the application of the law under which he usually operates. Under this rule there is no need for the insurer to negotiate or defend himself under a foreign law. But within the setting of the EU such an approach can appear outdated and out of kilter with the victim protection measures employed by the MID[25]

With regard to the scope of the rule in Article 4(a), very broadly speaking, the exception will apply when a victim shares his habitual residence with the place of registration of the vehicle. This could be seen to be a fair balancing of the interests of the parties with both the victim and the insurer[26] being strongly connected to that place. For the majority of the time the rule is likely to work in this way to produce sensible results. However, it is possible to conceive of circumstances when the rule will produce choice-of-law outcomes which are not underpinned by firm connections between the parties and the state whose law is to be applied.

### *I. The First Indentation*

The first indentation refers to cases where the issue to be determined is liability towards the driver or owner or another person having control of the vehicle. Here, the driver or owner or person having control of the vehicle is the victim and will usually have his or her place of habitual residence in the state of registration of the vehicle. Indeed the explanatory report makes clear that:

*"...these persons are totally assimilated with the vehicle. In fact, the claims which the driver could bring against the owner or the owner against the driver, have no connexion with the local law. The links with the State of registration are usually much closer seeing that these persons normally have their residence in that country, but even if such were not the case, for example if the vehicle has been rented during a visit to a foreign country, the*

[25] As discussed in Chapter 5.
[26] The party who is most often ultimately responsible for the payment of compensation.

*connexion with the law of the State of registration would even then be quite normal as this law usually also governs the contract of hire, Furthermore, the insurance cover is usually taken out in the country of registration."* [27]

This makes it clear that the provision in Article 4(a) is aimed at any action which arises between the owner, driver or person having control of the vehicle. In this scenario the rule is likely to work quite well in designating to the action the law with which the parties have a closer connection than the law of the place of the accident (which may be purely fortuitous). However, there is a point worthy of note here. A possibility exists that the parties to an action of this nature, where the driver (for example) is the victim, may consist not of the driver and the owner but of the driver and his passenger who caused the accident; or of the driver and a pedestrian who might be held liable for the incident.

In such a situation there may be no sensible link between the parties, the incident and the state of registration. If the passenger is not resident in the state of registration the link between residence and registration breaks down and the rationale for the rule looks weaker. Registration now only possibly coincides with the seat of the insurer and the habitual residence of the owner. However, because the liable party has no connection to the car it is far less likely that they will have any insurance covering the incident in the way that a driver would have compulsory third party insurance. As will be explained below,[28] the Convention is not concerned with contractual claims, which might include a first party claim by the driver or owner of the vehicle against their own insurer. This diminishes the argument that the place of registration coincides with the seat of the insurer.

At this point an example may help to clarify the issues. Take the situation where an English man, habitually resident in England, travels to France on holiday and whilst there hires a car which is owned by a French company and is registered and insured in France. Whilst on holiday the man

[27] The Explanatory Report, (n7), 19.
[28] See 6.3.1 below.

decides to visit an old friend who has been living for many years in Spain. While in Spain the two are travelling in the car when they have an argument. The friend punches the man in the face causing him to crash the car into a tree and thereby sustaining vehicle damage and personal injury. When the driver brings his claim for personal injury in the Spanish court (where the Hague Convention is in force) the court, following Article 4(a) will apply French law to the claim. This is a slightly bizarre outcome. The accident occurred in Spain, neither party is French, there is no insurance covering the conduct of the passenger, in short there is nothing to connect the incident to the law of France other than the fact that the car was originally hired there and is owned by a French party. Furthermore, a claim by the owner of the car for property damage might be thought of as having some connection to France since the owner is French and resident in France, but here it can be said that the defendant may never have contemplated the application of the law of France, since he did not act in France he did not subject himself to the laws of that country and therefore the rule appears rather one sided.

The possibility of such bizarre results is limited by the Convention because Article 4(c) states:

"*c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident.*"

This acts as an exception to the Article 4(a) exception and means that where an accident has potentially been caused by a pedestrian, the exception will not apply unless that person has their habitual residency in the state of registration. So in the scenario above, if the accident was caused by someone on the street, rather than by a passenger inside the car, the outcome would be that Article 3 would be applied to designate the law of Spain as the law of the place of the accident. This is much more sensible since the applicable law does then coincide with a number of connecting factors such as the place where the accident occurred along with the habitual

residency of the defendant. Whilst this does not afford any additional protection for the victim it is at least the application of a law which the victim subjected themselves to by driving in Spain in the first place.

Whilst Article 4(c) significantly restricts the scope for undesirable choice-of-law outcomes it is stressed that in respect of those rare actions, taken out against passengers, the possibility for an unfair result remains. This issue was not deemed to be important enough to be dealt with expressly in the Convention. The explanatory report states:

*"The fairly rare case of the passenger being co--author of the accident was not considered sufficiently important to be dealt with explicitly in the Convention. Silence of the Convention on this point implies that the habitual residence of the passenger-co-.author of the accident is not to be taken into consideration in the determination of the applicable law. Thus the negligent passenger is totally assimilated with the vehicle, in the same fashion as the driver, He has indeed intermeddled with the driving of the vehicle."*

Although it would have added an additional phrase to an already wordy provision, it is submitted that it would have been possible for Article 4(c) to refer to both persons outside of the vehicle and passengers for the avoidance of an undesirable outcome. It seems, from the wording of the report at least, as though the claimed wrongdoing of a passenger is a basis on which to punish that person in choice-of-law terms. This cannot be right. It is for the trier of fact to decide who is at fault, or who has committed a civil wrong in any given circumstance. The exception in Article 4(a) appears to be driven by a desire to find the law which is of most relevance to the dispute, the law that is most closely connected.[29] However, to prejudge liability at the choice-of-law stage is not to seek the proper law of the tort, whether that is fixed before cases arise or

[29] See for example p19 of the Explanatory Report (n7) which, in connection with Article 4(a) states:
"*..the claims which the driver could bring against the owner or the owner against the driver, have no connexion with the local law. The links with the State of registration are usually much closer seeing that these persons normally have their residence in that country, But even if such were not the case, for example if the vehicle has been rented during a visit to a foreign country, the connexion with the law of the State of registration would even then be quite normal as this law usually also governs the contract of hire, Furthermore, the insurance cover is usually taken out in the country of registration."*

whether it is decided on a case-by-case basis. Nor does it work towards the ends of any other theory of conflict of laws, already expounded or imagined. On this point the Convention is criticised.

### *II. The Second Indentation*

The second indentation of Article 4(a) refers to cases where the victim is a passenger who has a habitual residence in a state other than that where the accident occurred. Here the law of the state of registration of the vehicle will apply. Again this rule seeks to connect the applicable law to a number of connecting factors through the medium of the place of registration. The explanatory report explains that:

*"In respect of the passenger, the place of the accident is no longer in itself a connecting factor. This factor must correspond with the habitual residence of the passenger for the local law to be applicable. In other cases, when the passenger is resident in a country other than that where the accident occurred, the law of the State of registration is more relevant, as the passenger and the person responsible for the vehicle usually have their habitual residence in that country, the place where the insurance contract has also normally been taken out. Furthermore the passenger can foresee and accept the fact that the law of the State of registration will be applied."* [30]

It is likely that the driver and the passenger will be resident in the place of registration. Most vehicles are driven by their owners, who live in the place where they register their vehicles. It might be said that most passengers will be known to the driver of a private vehicle and will therefore, also be resident in the same country. Also for those travelling under contracts of carriage (e.g. for bus or coach travel), it is conceivable that frequently the carrier and the passenger will be resident in the country in which the journey began. Having said this, there are

[30] The Explanatory Report, (n7), p20.

again a number of scenarios in relation to which this rule could give rise to unjustifiable or undesirable results.

The US delegation report on the eleventh session of the Conference, gives an account of concerns of the Danish delegation in this regard. The report states:

*"The Danish delegate found it difficult to understand why Dutch law should be applied in a Danish court if a party of Danes who rented a car in Amsterdam drove it to Paris and were involved in an accident there."* [31]

In an action for compensation by one of the passengers against the driver brought in Denmark,[32] the Convention would designate Dutch law as the applicable law, on the basis that it is the law of registration of the vehicle and the claim concerns liability towards a victim who was a passenger and whose habitual residence is not in the state where the accident occurred. Again, in such a scenario there appears to be a lack of connection between the applicable law and the factors connecting the claim to it. However, it seems that at the meeting of the Special Commission concerns of this nature were not thought to be serious enough to warrant a different choice-of-law approach. The report of the US delegation recounts that the principle of unity required unity with regard to the application of law, so that the same, clear choice-of-law rule should apply in as many scenarios as possible. The report states:

*"Basic to this position, however, was the view expressed by a number of delegates in connection with different issues that insurance companies would be able to settle claims more expeditiously if there was no need to argue about what law was applicable."* [33]

There are two points to note. Firstly, this provides an example of the choice-of-law rules of the Convention falling in favour of insurers, in contrast to Rome II which tries to balance the

[31] Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law' 8 I.L.M. (1969) 785 at 802.
[32] Presumably with the assumption that Denmark was a signatory of the Convention.
[33] US delegation report (n31), 802.

interests of the parties and of the MID which aims at victim protection.[34] Secondly, in respect of passengers travelling under a contract, the explanatory report acknowledges that the result of the rule under the second indentation can appear arbitrary.[35] A passenger on a cross border coach trip, for example, who suffers loss, will be able to bring a claim only in accordance with the law of the place of registration of the coach. This favours both the owner of the coach as well as the insurer, where the victim begins their journey outside their country of residence. Certainly the contract will form a connecting factor linking the parties to the state in which the contract was made, which is likely to coincide with the country of registration and insurance of the vehicle concerned. To this end there is some justification for the application of this law to any non-contractual claim. Nevertheless, there may be little else to connect the victim to the applicable law and it may be to this that Mr. Essen refers in the explanatory report when he talks of the result being arbitrary.

To counter the arbitrariness the explanatory report makes clear that the parties are always free to agree on the applicable law by making provisions in the contract of carriage.[36] This position is outdated. At the conflict of laws level recent developments have recognised the weaker position of certain parties within some contractual relationships.[37] To state that the parties are free to contract to include a different choice-of-law outcome is to divorce what is possible in theory from the practical realities of the relative bargaining strength of the parties to a contract for transport by coach. The truth is that a passenger will not be in a position to negotiate the terms of the contract of travel and must simply accept or decline the clauses decided upon by the transport operator.

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[34] See Chapter 3 at 3.2 and Chapter 5 generally.
[35] The Explanatory Report, (n7), 20.
[36] Ibid.
[37] See for example Section 4 of Council Regulation (EC) No 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2001] OJ L12/1 (hereinafter referred to as Brussels I) where Article 15-17 provide jurisdictional advantages to the consumer in order to balance the relative bargaining strength of the parties. This is also true of Article 18-21 on disputes between employees and employers. The same may also be said of the choice of law rules contained in Article 6 (consumer contracts) and Article 7 (Contracts of insurance) of the Rome I Regulation.

Having said this, chances are the applicable law outcome under Rome II, in a claim concerning a passenger who travelled under a contract, will be the same as under the Convention. The flexible exception contained in Article 4(3) of Rome II dictates that where it is clear that there is a law which is manifestly more closely connected to the tort, that law should apply. A particular example of when this might occur is given as where there is a pre-existing relationship between the parties such as a contract. As such the law governing a contract of carriage, which is likely to be the law of the country where the operator is based and which will be the place where the contact is concluded, could also be extended to cover any tortious claim that arises as a result of that contractual relationship. However, since Article 4(3) does not lay down any hard and fast rules, a coincidence of outcome in this regard cannot be guaranteed, as has been discussed previously in chapter 4.[38]

In both of the scenarios identified above, the lack of a flexible exception, such as that contained in Article 4(3) of Rome II, could be viewed as a source of potential injustice. The policy of the Convention is to achieve a clear, uniform, predictable but fair outcome in the majority of cases. This presumably includes ensuring victims can get compensation quickly and easily by making the payment of compensation by insurers uncontroversial. At the time the Convention was drawn up there were no Motor Insurance Directives, no comprehensive EC wide scheme of compulsory insurance and certainly no victim protection policy, in the way that there is today.[39] In some ways then the Convention can be seen as innovative in providing solutions which aim to assist in the provision of compensation to as many victims as possible. The problem now is that the Convention rules look outmoded. Under Rome II it is generally accepted that, as between a victim and a tortfeasor, the proper balancing of the parties' interests requires a degree

[38] See Chapter 4 at 4.4.2.
[39] The victim protection policy referred to here is that embodied in the MID as discussed in Chapter 5.

of flexibility to allow justice to be done in unusual cases.[40] As between a victim and an insurer there are very clear indications from the MID that victim protection is to be preferred at a procedural level,[41] as well as at the level of private international law.[42] A change in choice-of-law rules to also reflect this policy, at least with regard to intra-community traffic accidents, has been argued for in the previous chapter, in respect of Rome II.[43] However, such arguments render the difference in approach of the Hague Convention stark. Favouring the insurer in terms of applicable law means that an accident victim is much more likely to be exposed to a law which is foreign to them. It can also lead to associated issues concerning unfamiliar limitation periods and different levels in awards of damages.[44]

### *III. The Third Indentation*

The third indentation of Article 4(a) refers to victims who are outside the vehicle at the place of the accident and who are habitually resident in the state of registration of the vehicle. Here, again the law of the state of registration will apply.

There appears to be far less in the way of controversy with regard to this rule. If a pedestrian victim is usually resident in the same state as the car is registered, which will likely be the place where the owner and the driver are also habitually resident, the place where the vehicle is registered and insured and the place where the after effects of the accident are likely to be felt, then a number of important connecting factors will indeed converge in one place and the application of that law will provide the best balance of all the parties interests.

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[40] As evidenced by the inclusion of Article 4(3) in Rome II. See Chapter 4 at 4.4.
[41] That the victim needed procedural protection was made clear during the legislative process for the fourth MID. This resulted in the system of claims representatives set up by that Directive. See Chapter 5 at 5.2.1.4. and in the right of the victim to bring an action against an insurer before the courts of their home state.
[42] Victims are to be given jurisdictional preference under Article 9(1)(b) and 11(2) of Brussels I as was made clear in the CJEU judgement in the case of Case C- 463/06 *Odenbreit* [2007] ECR I-11321. See Chapter 5 at 5.2.1.4.
[43] See Chapter 5 at 5.4.
[44] Ibid.

Interestingly it seems that reference to victims *'at the place of the accident'* is meant to have the effect that the rule will only apply to direct victims and not to victims who suffer damage indirectly. Indirect victims, according to the explanatory report are completely assimilated with the direct victim.[45] So, if a mother witnesses a car accident in which her son is injured and she suffers post traumatic stress disorder as a result, her claim will be governed by the same law as applies to the claim by the son against the driver. It can be noted here that this result is the one which has been argued ought to apply under Article 4 of Rome II.[46] If Rome II is interpreted in this way then in this regard the two instruments will achieve the same effect.

### *IV. Article 4(a) - The Last Clause*

The last clause of Article 4(a) provides that where there is more than one victim, the applicable law is determined separately for each of them. In the explanatory report a distinction is drawn between cases where there are multiple victims and cases where there is just one victim but multiple defendants or co-authors of the accident. In the former it is stated that the claims by different victims are severable and can easily be dealt with under different applicable laws. With regard to multiple defendants preservation of the principle of unity[47] was thought to be *'essential for practical and procedural reasons.'*[48] It is stated that this is because the liability of each of the co-authors of the accident need to be evaluated in light of the liability of the others.[49]

It is submitted that this is a useful distinction to have made. It is in recognition of the fact that each victim will form the lynch pin in terms of any set of claims against multiple defendants. The claimant is the common denominator as it is the damage to that person which will be the focus of all the claims. Conversely, the defendant may be liable to multiple victims but in respect of

[45] The Explanatory Report, (n7), 21.
[46] See Chapter 4 at 4.2.
[47] That is the application of the same law to each action by the same victim against different defendants.
[48] The Explanatory Report, (n7), 21.
[49] Ibid.

different damages in each case. The differentiation is a sensible and balanced approach to the application of the principle of unity.

#### *6.2.2.2. Article 4(b)*

Article 4(b) of the Convention provides:

*"Where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State."*

This provision is fairly self explanatory. Where at least two vehicles are involved in an accident the applicable law will be the law of the place where the accident occurs, unless all the vehicles are registered in the same state when the law of that state will apply. If the vehicles are all registered in the same state then the exceptions that apply under Article 4(a) will apply under Article 4(b) in exactly the same way as for single accident actions. On this point Castel and Crépeau state:

*"It is clear that when two vehicles are registered in two different States, it is impossible to apply the law of the place of registration. The lex loci applies. However, accidents involving cars registered in different States are quite frequent, particularly in resort States, and the rigid application of the lex loci may at times seem fortuitous."* [50]

This would be so, for example, where two English drivers of Spanish hire cars collide in Spain. The rejection of shared habitual residency as a connecting factor in the Convention leads to the application of Spanish law, as the law of the registration of the vehicles. On one view, this may seem to be a law which, as between the parties, is not as closely connected as the law of their shared habitual residency. However, the party who is likely to bear responsibility, in the end, will be the liable driver's insurer who, in this scenario, will probably be Spanish. On this view, by

[50] J. Castel and P. Crepau ' Views from Canada' (1971) 19 Am. J. Comp. Law 17, at 22.

including the insurer, the place of registration is not so fortuitous. This was a fact which was appreciated by Newman, who had acted as vice chairman for the first meeting of the Special Commission. He stated in a report on the eleventh session of the Conference that:

*"...the determining factor for the applicable law is in some cases the place of registration of a vehicle. This factor has advantages over others more familiar to most lawyers, like the habitual residence of the owner or driver, because it is more likely to indicate the legal system of the person who will ultimately have to meet the liability; ..."* [51]

So, in the example given above of the English drivers of Spanish hire cars, whilst Rome II would utilise the connection of shared habitual residency to determine the applicable law, it cannot be said that the law of Spain, which would be that corresponding to the place of hire, the location of the insurer and the place of the accident, has no bearing on the case at all, far from it.

If the accident is caused by a passenger inside the vehicle, as illustrated above in the example of an English driver of a French hire car travelling in Spain,[52] but this time the passenger having punched the driver causes the driver to collide with another motorist, the claim by the driver against the passenger will only be governed by French law if the other vehicle is also French, if not the applicable law will be Spanish law. Equally any action by the driver of the other vehicle will be governed by Spanish law as the law of the place of the accident, unless his vehicle is French registered in which case French law will apply. For the driver of the second car the result is straight forward and sensible. For the driver of the first vehicle the result is affected by the involvement of another vehicle, but arguably this has little or no bearing on any liability as between the driver and the passenger. The issues related to a scenario such as this are set out above.[53] They are not particularly altered by the involvement of a second vehicle, other than the fact that the potential for a bizarre result is limited by the need for the second vehicle to be

[51] K.M.H. Newman 'Commission II – The Law Applicable to traffic Accidents' (1969) 18 ICLQ 643, at 644.
[52] See 6.2.2.1 above.
[53] Ibid.

registered in the same state as the first. The situation, being a very rare one in any event, is neither better nor worse than under Article 4(a).

### 6.2.3. Article 5

Article 5 deals exclusively with the law applicable to claims in respect of damage to property or goods, either being carried inside the vehicle, or which is outside the vehicle, but at the scene of the accident and is thus damaged when the accident occurs. The Article states:

*"The law applicable under Articles 3 and 4 to liability towards a passenger who is a victim governs liability for damage to goods carried in the vehicle and which either belong to the passenger or have been entrusted to his care.*

*The law applicable under Articles 3 and 4 to liability towards the owner of the vehicle governs liability for damage to goods carried in the vehicle other than goods covered in the preceding paragraph.*

*Liability for damage to goods outside the vehicle or vehicles is governed by the internal law of the State where the accident occurred. However the liability for damage to the personal belongings of the victim outside the vehicle or vehicles is governed by the internal law of the State of registration when that law would be applicable to the liability towards the victim according to Article 4."*

In choice-of-law terms, property, other than the vehicle itself, is therefore assimilated to either a passenger to whom it belongs, or to whom it has been entrusted, or to the owner of the vehicle in which the property is being transported. There is little to discuss specifically in respect of property, other than what has already been stated above in respect of claims for personal injury and vehicle damage. The applicable law outcome is determined in accordance with Article 3 or 4, as the circumstances dictate.

### 6.2.4. Article 6

Because the Convention is so heavily reliant on the notion of vehicle registration for the majority of its exceptional choice-of-law rules, necessity demanded that the situation in which there is no registration, or multiple registration, be dealt with. In this regard Article 6 provides as follows:

*"In the case of vehicles which have no registration or which are registered in several States the internal law of the State in which they are habitually stationed shall replace the law of the State of registration."*

Furthermore, as noted above, Article 6 also provides for the situation whereby neither the owner, person in control of the vehicle, or the driver is habitually resident in the state of registration. Here Article 6 continues:

*"The same shall be true if neither the owner nor the person in possession or control nor the driver of the vehicle has his habitual residence in the State of registration at the time of the accident."*

Accordingly, the law of the place of habitual stationing of the vehicle shall be applied in an attempt to ensure an appropriate level of connection between the parties and the applicable law. The explanatory report puts it in terms of the counteraction of a meaningless registration.[54] Applying the law of the place of the vehicle's habitual stationing seeks to ensure that questionable choice-of-law results are kept to a minimum by avoiding the designation of a law which is completely unconnected, in any real sense, to the incident and the parties.[55]

A scenario, which provides a useful example in this regard, is given by Istvan Nagy, who contemplates the potential applicable law outcome where a vehicle is registered in the Netherlands, but owned by a party resident in Germany. If another German resident hires the vehicle and drives it in Belgium, where he crashes it, Istvan Nagy concludes that under the first

[54] The Explanatory Report, (n7), 25-26.
[55] Ibid.

indentation of Article 4(a) the claim by the owner against the driver will be governed by Dutch law, as the law of the vehicle's registration. He comments that this law applies irrespective of the parties' habitual residence and even though the vehicle may have only been registered in The Netherlands for tax evasion purposes.[56] Of course it is conceivable that commercial vehicles may be taxed and stationed in a state which is different from the owner's state of habitual residence so that the law of registration will apply. It is submitted, however, that on these facts, where the vehicle is usually stationed will be an important consideration. Article 6 could operate here. Dutch law should only apply if the vehicle is habitually stationed in The Netherlands. If it is stationed in Germany for much of the time, where the owner is resident, then German law would apply, notwithstanding that it is registered in The Netherlands. The application of Dutch law is not automatic in the scenario given, more information is required.

In dealing with Article 6 Istvan Nagy suggests that its use will be restricted for a number of reasons including:

"*...the concept of "habitual station" invoked in order to act as a substitute for the place of registration does not solve the problem completely. Even though individual countries may have diverging regimes, it is usually the very circumstance that the vehicle is normally located (or to put it another way, "habitually stationed") in the country concerned that triggers the duty of registration; and since the vehicle registry is an official register, it is definitely capable of entailing the presumption, though rebuttable, that the vehicle is usually situated in the country of registration. Proving the contrary would point out that the owner or the operator (user) failed to meet his duty to register, and eventually to pay the corresponding fees and taxes."* [57]

This is surely correct in the long term. Maintenance of a situation whereby an owner habitually stations his vehicle in one State, whilst keeping it registered in another is unlikely to be tenable

[56] C. István Nagy 'The Rome II Regulation And Traffic Accidents: Uniform Conflict Rules With Some Room For Forum Shopping – How So?' (2010) 6 JPIL 93, at 104.
[57] Ibid at 101.

without violating national rules. However, this may not completely restrict the practical usefulness of Article 6, depending on the definition to be afforded to the term 'habitually stationed'.

Neither the Convention nor the explanatory report contains any definition of the phrase '*habitually stationed*'. The explanatory report contains a comment in respect of habitual residence where it is used in the second indentation of Article 4(a). It states:

*""Habitual residence" is a fundamentally factual concept. It involves a certain stability with respect to both duration and intention."* [58]

The same considerations will presumably apply in determining the habitual stationing of a vehicle. Will a vehicle, which is being kept for six months in a State where it is not registered, be considered as habitually stationed there? At what point does the stationing become habitual. A person on holiday for example will habitually station their vehicle at the place of the holiday accommodation. Will this satisfy the Article 6 test?

It is submitted that taking a vehicle on holiday does not give rise to the necessary stability of either duration or intention. It is by its nature a temporary arrangement, the intention being that after a relatively short time the vehicle will be returned to the state where the owner/driver normally resides. Other than this it is very difficult to state with any certainty at what point a vehicle will be considered to be habitually stationed at a place. A student who travels by car from France to England, with the intention of remaining there for the duration of the academic terms, but who will travel home for each holiday, would demonstrate a level of stability of both duration and intention with regard to their residence in England. Although it would be clear that the situation cannot be deemed a permanent one, could the vehicle be deemed to be habitually stationed in England during term time? In an accident whereby the French student crashes into a

[58] The Explanatory Report, (n7), 20.

wall in England, injuring a friend who was visiting from France and who was a passenger in the car at the time, which law would apply?

Under the second indentation of Article 4(a) the law of the place of registration of the vehicle should apply, presumably French law. However, is the student to be considered as habitually resident in France or England, and if it is England, where will the vehicle be considered to be habitually stationed?

In the explanatory report for the Convention an example of a further difficulty is given. A car is purchased in Germany by a Swedish resident. Whilst driving the car back to Sweden an accident occurs in Denmark. Here the law of the place of registration (Germany) cannot be applied under Article 4 because the owner-driver does not have his habitual residence in that state, yet the vehicle also lacks a place of habitual stationing since it has now left Germany and has yet to arrive in Sweden. In this circumstance the report suggests that the points of contact of the case converge on Sweden, *'the State in which the vehicle could be said to be habitually stationed in anticipation, taking into account the habitual residence of the owner; ...'* [59] This hints that habitual stationing should, in difficult circumstances, be equated with the habitual residence of the owner or driver or person having control over the vehicle and one might then wonder why this connecting factor was not simply used in the first place.

The explanatory report identifies the place of habitual stationing as an objective criterion, much closer to that of the place of registration.[60] Habitual residence is classified as a personal factor.[61] Why habitual stationing should be preferred on this ground is not made clear by the report. However, the uncertainty is not automatically resolved even if this approach is adopted since the

[59] Ibid, 26.
[60] Ibid, 25.
[61] Ibid.

report goes on to state that *'one could also return to the basic principle of the application of the lex loci.'*[62] This indicates that a degree of discretion is reserved for the court in difficult situations, where it is unclear where a vehicle is habitually stationed, so that it could abandon the exceptional rules and return to the application of Article 3. Bearing in mind the desire of the Conference to produce clear and simple rules, it is far from clear that this is the correct approach to take. It is submitted that the best approach would be for the courts to decide on the place of habitual stationing, even when this is difficult, and apply Article 6 in order to restrict the amount of discretion and associated uncertainty and to prevent the uneven application of the Convention by national courts.

While the majority of cases falling to be decided under Article 6 are likely to be uncontroversial in terms of where the vehicle is habitually stationed, the uncertainty which remains in respect of difficult cases does not aid the resolution of the earlier example given regarding the French student. Here the problem is made even more difficult because it is the residence of the student as well as the stationing of the vehicle which would be under question.

One way to approach such a situation would be to reflect on whether the registration of the vehicle was meaningless. If the student is in fact resident in France for part of the year and the vehicle remains insured there, then there may not be any cause for the invocation of Article 6. Another possibility would be to determine residence and link stationing of the vehicle to it. A third possibility would be for the court to exercise discretion and revert back to the Article 3 to apply the *lex loci*. There is no clear answer here, but it is submitted that the first option would be most appropriate considering the rationale of the provision.

[62] Ibid, 26.

### 6.2.5. Article 9

Article 9 is the last rule of the Convention which provides a choice-of-law rule. The rule concerns direct actions against insurers. Article 9 provides:

*"Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable according to Articles 3, 4 or 5.*

*If the law of the State of registration is applicable under Articles 4 or 5 and that law provides no right of direct action, such a right shall nevertheless exist if it is provided by the internal law of the State where the accident occurred.*

*If neither of these laws provides any such right it shall exist if it is provided by the law governing the contract of insurance."*

This Article is designed to favour victims in allowing a direct action, if one is permitted under any of the three laws specified, these being the law designated under Article 3, 4 or 5, the law of the place of the accident, or the law of the insurance contract. The explanatory report is explicit:

*"The Conference wished to allow those suffering damage to bring an action directly against an insurer to the greatest extent possible and to avoid such rights being abolished due to the effect of the Convention."* [63]

However, what becomes immediately apparent is that the Article suffers from the same issues of interpretation as Article 18 of Rome II. On a plain reading the Article appears to designate the law which will determine whether a direct action is permitted, rather than providing for a law to govern the action itself. The explanatory report, on the other hand, seems to suggest that the law designated by Article 9 will in fact govern the claim as a whole. The report states:

[63] Ibid, 33.

*"The way in which Article 9 is drafted makes it clear that if all three laws permit a direct action against the insurer, the victim will not be able to choose the law which is most favourable to him,* ***The laws apply in the order in which they are set out in the text.*** *"* [64]

If the laws are to apply in the order set out in the text, this would indicate that the relevant law will apply to the whole claim, since otherwise it would not matter whether they were applied in order or not. If the designated law were not to apply to the substance of the claim then, as is discussed in Chapter 5 in respect of Article 18 of Rome II,[65] the situation could arise where a court is being asked to apply a law to a direct action against an insurer when that law does not itself recognise such an action. On this basis the approach taken in the explanatory report seems quite sensible. Because the explanatory report is not binding on national courts however, it is a pity that the wording of the Article should not reflect it so that a certain amount of ambiguity is avoided.

Whatever advantage Article 9 may provide to a victim is limited. The victim may not choose which law to pursue their claim under. The only choice available to the victim is whether to claim against the insurer in accordance with the law as designated by Article 9 or to pursue the wrongdoer under the law as determined by the other rules of the Convention. Article 18 of Rome II is more generous to the claimant who may make a choice of governing law from either the law applicable under the other rules of the Regulation or the law of the insurance contract.

The position under the Convention is unsurprising given the general trend of the instrument to favour the party who is to pay any compensation owed. If the victim could choose which law is to apply, from the options provided, this would result in uncertainty for the defendant who could not know in advance which law would govern the claim. Furthermore, the options themselves either provide for a neutral law (the law of the place of the accident) or a law which

[64] Ibid.
[65] See Chapter 5 at 5.3.1.

favours the insurer (the law of the place of registration of the vehicle or the law of the insurance contract). However, whilst the approach of Article 9 fits with the scheme of the Convention, it, like Article 18 of Rome II, is in discord with the aim being pursued within Europe by the MID, which, as discussed in Chapter 5, promote the position of the victim relative to that of the insurer. The relationship between the Convention and the MID is discussed further below.[66]

### 6.2.6. Conclusion on The Choice-of-Law Outcome

By way of conclusion, it can be said that there are two main choice-of-law outcomes produced by the Convention. The governing law will either be the law of the place of the accident, or it will be the law of the place of registration of the vehicle. The only caveats to this are that the law of the place of registration may at times be replaced with the law of habitual stationing of the vehicle, where registration is meaningless for some reason. Also, the governing law in a direct action may sometimes be the law of the insurance contract.

Because the Convention is specific to traffic accidents the Conference was able to produce an instrument which took account of the peculiarities of traffic accident litigation, acknowledging the role of insurance and the fact that many cases are settled out side of the court process. It is notable however, that the choice-of-law rules of the Convention appear to favour the insurer, as has been highlighted above. The international character of the Convention can provide a rational basis for this. There is no comprehensive network of compulsory third party insurance whereby policies are recognised in all signatory states and which are backed up by a system of guarantee funds, which are obliged to pay compensation in the absence of insurance coverage, no matter where the accident occurred. Such a system exists in the EU but does not extend to all the signatory states of the Hague Convention. Moreover, if countries from other continents were

[66] See below at 6.7.

ever to become signatories to the Convention the lack of uniformity and reciprocity in this regard would become even more pronounced. In these circumstances it is arguable that favouring the insurer provides the best way of securing compensation in the largest number of cases since the insurer, acting under familiar rules and regulations, is more likely to process the claim in a timely fashion rather than spend time disputing the applicable law. Whether these rules are suitable in intra-Community situations, in light of the MIDs, which have since been enacted is, however, a more difficult issue which is discussed below. [67]

It is clear that Rome II and the Hague Convention will produce different choice-of-law outcomes. This becomes obvious if an example is considered: where two German citizens hire a car in Spain and the driver crashes into a tree, a German court applying Rome II would apply German law as the law of shared habitual residence, whilst a Spanish court, applying the Hague Convention, would apply Spanish law as the law of the place of registration of the vehicle. While the basic rule of the Convention produces the same effect as Article 4(1) of Rome II, there are differences in the outcomes produced by the exceptional rules. The rules of Rome II point to the application of the law of shared habitual residence, or to the law which is manifestly more closely connected to the tort. A certain amount of discretion is inherent in this last rule because it aims to provide a limited amount of flexibility to ensure that fair and balanced outcome can be reached. Such an approach was rejected by the Conference.

Furthermore, as just discussed in the preceding section, in a direct action it is possible that the victim might be able to choose the applicable law from the law of the insurance contract or the law otherwise applicable under the Regulation for Rome II; whereas, under the Convention, the law will be determined by the provisions of Article 9, in the order that they are set out. This gives rise to further, potential, divergent outcomes in terms of applicable law. It should be noted that

[67] See 6.8 below.

the differences here are not skin deep, they are driven by different methodological approaches. Both instruments achieve a rigid basic rule, but Rome II accommodates an element of the flexible proper law approach, whilst the Convention tries to second guess the result of a proper law enquiry and to formulate the outcome as a rigid exception.

Finally, it is notable that the Convention does not contain any rules on choice-of-law agreements, as Rome II does. It will be recalled from Chapter 4 that Article 14 of Rome II permits the parties, in some circumstances, to choose the law that should determine the issues between them. The Convention appears to leave this matter to be decided by the national rules of the forum.[68]

## 6.3. Scope of the Convention

Having determined the choice-of-law outcomes that are likely to be produced by the Convention, attention now turns to when the Convention will apply: what is its scope? The provisions which determine this are primarily Articles 1 and 2. Articles 11 and 15 also have a bearing on the question of scope. Each of these provisions will be discussed in turn.

### 6.3.1. Article 1

Article 1 of the Convention provides:

*"The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability.*

[68] This matter is discussed more fully below under the discussion on the relationship between Rome II and the Hague Convention. See 6.6 below.

*For the purpose of this Convention, a traffic accident shall mean an accident which involves one or more vehicles, whether motorised or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access."*

Unlike Article 1 of Rome II, the Convention does not expressly require that the situation concern a conflict of laws. This may lead to a different treatment of claims brought, in accordance with the MID, against national compensation bodies. It will be recalled from Chapter 5 that in the English case of *Jacobs*[69] the court did not evaluate whether this claim would meet the requirements set out in Article 1 of Rome II, which are necessary for the application of the Regulation, but by inference it could be argued that if the relevant rules of the MID, and of domestic implementing measures, concern only domestic issues, then the situation would not involve a conflict of laws and might not, therefore, satisfy Article 1 of Rome II. Consequently it is arguable that Rome II might not apply to actions against compensation bodies.

On the face of it, it seems that the Convention, in not requiring the situation to concern a conflict of laws, could in theory extend to claims by victims against compensation bodies. However, Article 2(6) of the Convention excludes from its scope, amongst other things, actions against public automobile guarantee funds. When considering the Convention therefore, the question is not whether the circumstance involves a conflict of laws but whether claims against compensation bodies will be considered to be against public automobile guarantee funds for the purposes of Article 2(6).

With regard to the type of bodies which will fall within the Article 2(6) exclusion, the explanatory report on the Convention makes mention[70] of the funds set up in accordance with the European Convention on Compulsory Insurance Against Civil Liability in respect of Motor Vehicles.[71]

[69] *Jacobs v. Motor Insurance Bureau* [2010] EWCA Civ 1208, [2011] 1 WLR 2609.
[70] The Explanatory Report, (n7), 13.
[71] Of 20thApril 1959, ETS No. 29, 720 UNTS 119.

These related to the provision of compensation where the responsible driver was uninsured, unidentified or where ordinary insurance is excluded (such as where the driver had stolen the vehicle). Although termed guarantee funds, this is clearly the role taken on by the compensation bodies under the MIDs. Claims against the compensation bodies are, therefore, potentially excluded from the scope of the Convention.

However, the key word here is *'public'*. The explanatory report provides that actions against public guarantee funds fall outside of the scope of the Convention, but that claims against private funds are covered.[72] It appears that this is on the basis that actions against public funds *'belong to the realm of public law'*; they could not as a result be considered to concern civil liability.[73] Whether the compensation bodies created under the MID are public or private in nature is uncertain, as has been discussed in Chapter 5.[74] Moreover, when applying the Convention national courts may take differing views on this matter, thereby compounding the uncertainty further. The answer will nevertheless be determinative of whether the Convention will apply to this category of claim.

To further complicate matters, it is possible that for the sake of consistency the interpretation of compensation bodies as public or private may need to be consistent as between Rome II states and Hague EU Member States. As discussed below,[75] Rome II is likely to be afforded primacy over the Convention. Rome II requires an autonomous definition of the matters falling within the scope of the Regulation, due to the need for mutual exclusivity regarding scope as between Rome I and Rome II. In order that this requirement is not undermined by the provision of a different scope for the Convention, how the matter is determined under Rome II could impact

[72] The Explanatory Report, (n7), 13.
[73] Ibid.
[74] See Chapter 5 at 5.5.
[75] See 6.6 below.

on the inclusion or exclusion of such claims under the Convention, for the courts of EU Member States.

The other elements required by Article 1 are that actions must be civil in nature and that they should concern non-contractual liability. Although Rome II refers to civil and commercial matters, rather than merely civil matters,[76] for the purposes of traffic accidents it is submitted that these requirements are virtually the same. There is however one important difference. The Hague Convention is interpreted by the courts of each signatory state in accordance with the framework of that state's national law.[77] Accordingly, whether a dispute falls within the term *'non-contractual'* will depend on the way in which each court characterises a particular issue. It has been noted that this could mean, for example, that when a passenger in a taxi is injured during an accident, where the driver is at fault, any subsequent claim might be characterised as non-contractual in some states, but as contractual in others.[78]

By contrast, Rome II requires that the term *'non-contractual obligation'* in its Article 1 will be given an autonomous definition throughout the EU[79] and that the definition will be mutually exclusive with the definition of *'contractual obligation'* for the Rome I Regulation on the law applicable to contractual obligations.[80] There should be no overlap between the two instruments. Uniform characterisation is important in achieving uniformity of outcome in general which is in turn important for securing the proper functioning of the internal market.

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[76] Article 1 of Rome II.
[77] See J.H.A. van Loon 'The Hague Conventions on Private International law', 338-343.
[78] See C. Armstrong 'The Hague Convention On The Law Applicable To Traffic Accidents: Search For Uniformity Amidst Doctrinal Diversity' (1972) 11 Colum. J. Transnat'l L. 74, at 76-77.
[79] As set out in Recital 11 of Rome II.
[80] See Recital 7 of Rome II and Rectial 7 Of Regulation (EC) No 593/2008 Of The European Parliament And Of The Council Of 17 June 2008 On The Law Applicable To Contractual Obligations (Rome I) [2008] OJ L177/6. Hereinafter Referred To As Rome I.

The second paragraph of Article 1 defines what a traffic accident is for the purposes of the Convention. It can be noted that the definition is very broad, covering any incident between two vehicles whether or not they are motorised and in more or less any location.[81]

### 6.3.2. Article 2

Article 2 contains a number of important exclusions which affect the scope of the Convention. It is here that a number of important differences in the scope of the Convention and of Rome II become apparent. Article 2(6) has already been discussed above, but the other provisions of Article 2 are considered here. Article 2 provides:

*"The present Convention shall not apply -*

*(1) to the liability of manufacturers, sellers or repairers of vehicles;*

*(2) to the responsibility of the owner, or of any other person, for the maintenance of a way open to traffic or for the safety of its users;*

*(3) to vicarious liability, with the exception of the liability of an owner of a vehicle, or of a principal, or of a master;*

*(4) to recourse actions among persons liable;*

*(5) to recourse actions and to subrogation in so far as insurance companies are concerned;*

[81] The Explanatory Report, (n7), 9-10. The question of the relationship between the Convention and the Motor Insurance Directive will be addressed below but suffice it to say here that under the MID the word vehicle refers to a motor vehicle propelled by mechanical power. It is argued below that in any potential conflict between the Convention and the Directive, the Directive is likely to prevail. However, where a case relates to an incident between non-motorised vehicles (horse drawn carriages or cycles for example) falling outside of the MID, the Convention would remain applicable on account of its much broader scope.

*(6) to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile guarantee funds, and to any exemption from liability laid down by the law which governs these institutions."*

#### *6.3.2.1. Article 2(1)*

The essence of Article 2(1) is that claims which arise out of an incident caused by the faulty nature of the vehicle or one of its component parts should be excluded from the scope of the Convention.[82] This makes some sense when one considers that there is another Hague Convention dealing specifically with the law applicable to cases concerning products liability.[83] It does however leave questions open with regard to claims against negligent vehicle repairers.

A lot hinges here on what exactly is meant in Article 2(1) by *'repairers'*. The Hague Convention on the law applicable to products liability also uses the term in its Article 3, where it states:

*"This Convention shall apply to the liability of the following persons –*

*(4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product."*

In the explanatory report accompanying that Convention[84] WLM Reese is quite clear that:

*"Repairers and warehousemen are covered by the Convention in situations, and only in situations, where they are involved 'in the commercial chain of preparation or distribution of a product'. So, for example, the Convention covers the liability of an automobile dealer to the person to whom he sells an automobile, for repairs negligently made to the automobile either prior, or subsequent, to its sale.* ***On the other hand, the Convention does***

[82] The Explanatory Report, (n7), 10.
[83] The Hague Convention on the Law Applicable to Products Liability of 2 October 1973.
[84] W.L.M. Reece 'Explanatory Report on the 1973 Hague Products Liability Convention' (1974) HCCH.

*not cover the liability of a garageman for negligent repairs to an automobile to a person to whom he neither sold nor leased it."* [85]

The reference in the report accompanying the Traffic Accident Convention to products liability might suggest that the meaning of *'repairer'* is to be the same in both Conventions. This would be the most coherent approach to take.

If a pedestrian is run down by a vehicle because the brakes failed as a result of a negligent repair carried out by a mechanic, any claim brought by the victim against the mechanic would not fall within the Products Liability Convention. It would, however, fall within the Traffic Accident Convention if the term *'repairer* means the same under that Convention since then the exclusion in Article 2(1) would not apply. However, there is no further guidance on the meaning of the provision and a literal interpretation would dictate that, in the case just described, the case would not fall within the Products Liability Convention but would also fall under the exclusion in scope of Article 2(1) of the Traffic Accident Convention. It is submitted that the more likely outcome is the former situation whereby the terms of both Conventions are interpreted in a consistent manner. Some uncertainty remains however, because the meaning of the provisions may be treated differently in different signatory states.

It should also be noted that only five of the EU member states who are signatory to the Traffic Accident Convention are also signatory to the Products Liability Convention.[86] The remaining signatory states of the Traffic accident Convention may be less inclined to pay attention to the need for consistent interpretation of terms between the two instruments. If this were the case then there could be a greater likelihood that claims against a repairer of a vehicle would be held to be excluded from the scope of the Traffic Accident Convention.

[85] Ibid, at p16.
[86] Namely, Finland, France, Luxembourg, Netherlands, Slovenia and Spain.

From the point of view of the parties to an action, who may be trying to settle their differences out of court, this situation is unhelpful. It leaves some doubt as to which instrument will apply to determine the applicable law and adds a layer of complexity to the settlement process.

#### *6.3.2.2. Article 2(2)*

Article 2(2) excludes from the Convention any action against a person responsible for the maintenance of a road or other way open to traffic. This was on the basis that in most cases this person would be a public authority. In such a situation the explanatory report could not conceive of any law applying to such a claim other than the law of the place where the accident occurred and as such the decision was taken to exclude the matter from the Convention.[87] This is a slightly different type of scenario than has been thus considered in this work. The cause of the accident is the party responsible for the land on which it occurred, rather than a motorist, or other person present at the scene of the accident. This type of situation is unlikely to amount to an act of state authority and so probably would fall within the scope of Rome II. However, the explanatory report is probably correct that the only conceivable applicable law, in relation to the condition of a piece of immovable property is likely to be the law of the place of the accident and there is little to comment on in this regard.

#### *6.3.2.3. Article 2(3)*

It would seem that the principal aim of Article 2(3) is to exclude from the Convention actions arising against one member of a family in respect of damage caused by another member of the same family; most notably, but not exclusively, the liability of parents for the acts of their children. It would appear from the explanatory report that this was on the basis that such actions

[87] The Explanatory Report (n7), 11.

would be closely related to family law and therefore could concern issues the Convention was not apt to address.[88]

It appears that actions against employers for the acts of their employees will be covered, as will actions against parents, if they own a vehicle which their child was operating when the accident occurred.[89] So although the rule is initially expressed in very comprehensive terms whereby it appears that all vicarious liability is excluded from the scope of the Convention, the exclusion is in fact significantly narrowed by the subsequent wording of the provision.

However, it can be noted that Rome II does not contain any such exclusions in respect of vicarious liability.[90]

#### *6.3.2.4. Article 2(4) and (5)*

Together Article 2(4) and 2(5) mean that the Convention will not apply to determine the applicable law in an action brought by one defendant against another defendant and co-author of the accident. Neither will it apply to an action by an insurer against an author or co-author of the accident whether that action takes the form of an action where the insurer is subrogated to the rights of the victim who was the insurer's insured, or of a re-course action.

With regard to re-course actions, it is explained in the explanatory report that excluding such actions was thought to be wise, on account of the amount of complexity that such situations can give rise to.[91] Additionally, recourse actions were considered to be quasi-contractual in some

[88] Ibid.
[89] Ibid, 12.
[90] Here again a case falling outside of the scope of the Convention would be dealt with by Rome II. Again this is a source of complexity and confusion in the quest to discover which should be the applicable law in any given circumstance. Although Rome II excludes from its scope non-contractual obligations arising out of family relationships under Art 2(a), this is not thought to cover the vicarious liability of a parent for the actions of a child as was made clear in the European Commission's original proposal for Rome II. See European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final, 24.
[91] Ibid.

countries and so not suitable for treatment under the Convention.[92] Such issues are considered to be wholly contractual in cases where the insurer is subrogated to the rights of the victim, his own insured, and the author of the accident has a recourse action against his own insurer.[93]

Again, Rome II contains no such exclusions. There is no suggestion anywhere in the Regulation that recourse actions are to be excluded. Presumably the controlling mechanism will be Article 1 of Rome II and the consideration of whether the claim is in fact contractual or non-contractual. Furthermore, subrogation is expressly dealt with by Article 19 of Rome II. Inclusion of this provision could be viewed as a demonstration that an action by an insurer who is subrogated to the rights of his own insured, the victim of an accident, is thought to be non-contractual in nature for the purposes of Rome II.[94]

#### *6.3.2.5. Remarks on Article 2 Exclusions*

Many of the circumstances or types of claim that are excluded from the scope of the Hague Convention are likely to be covered by Rome II. This is both good and bad at the same time. Bearing in mind the ground covered by the Hague Convention, Rome I and Rome II there is a greatly reduced risk of any issue falling between the cracks of all the instruments providing for harmonised choice-of-law regimes, which apply in the EU. If none of these harmonised instruments applied, the parties would be left to grapple with the pre-existing national choice-of-law rules in whichever was the forum state. From the perspective of legal certainty this would be less than desirable. However, the question of whether something falls within or without of the Convention could provide grounds for litigation. One only has to put one's self in the position

[92] Ibid.
[93] Ibid.
[94] It has been argued above that the meaning of non-contractual, for the purposes of the Convention, might well be affected by the autonomous definition of the concept under Rome II. Of course Article 2(5) represents an express exclusion of subrogation from the scope of the Convention, but this will not affect the determination of the inclusion of such actions in Rome II. It is submitted that the applicable law for subrogation and recourse actions will be determined by Rome II as long as the circumstances dictate that the definition of non-contractual for the purposes of Article 1 of Rome II is met.

of a party to the type of litigation that has been considered in this section to realise that it would not be easy to say with certainty at all times which instrument will apply in the designation of the applicable law. Because there is room for doubt it is more difficult to conceive of parties, in certain circumstances, agreeing amicably on which law should govern the settlement of a dispute in order to arrive at an agreement in respect of compensation.[95]

### 6.3.3. Other Provisions on Scope

By and large it is Articles 1 and 2 which determine the scope of the Convention. There are, however, two other provisions which have some impact on this issue. Firstly, Article 11 provides:

*"The application of Articles 1 to 10 of this Convention shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State."*

This gives the Convention the same universal application as Rome II enjoys under its Article 3. The explanatory report highlights that the Convention is to replace, in full, national rules on choice-of-law in respect of traffic accidents for signatory states. This requires the application of the law which is designated by the Convention, regardless of whether it is the law of a contracting state or not. The report does however acknowledge that consequentially, there is an important role for the public policy exception contained in Article 10. If the designated law is not to be restricted in any way, the report suggests that it is important that signatory states should have the means by which to avoid laws which are repugnant.

[95] Of course prior to Rome II this situation would have been very much worse. Each signatory state of the Hague Convention would have had their own method for dealing with issues not covered by the Convention leading to a multitude of potential outcomes. The situation is vastly improved in this respect, following the entry into force of Rome II, but arguably, there is more to be done.

The second provision which could potentially affect the scope of the Convention is Article 15 which states:

*"This Convention shall not prevail over other Conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning civil non-contractual liability arising out of a traffic accident."*

This is a similar provision to that contained in Article 28 of Rome II which provides:

*"This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations."*

This may raise a question as to whether a circular situation is created. Rome II, through Article 28, permits the application of the Hague Convention as an international convention which lays down rules in respect of non-contractual obligations.[96] Does Article 15 of the Convention mean that it will not prevail over Rome II, an international instrument containing provisions relating to civil non-contractual liability arising out of a traffic accident? If so, how is the circle broken? Which instrument is to apply?

It is submitted that this problem is unlikely to arise. Whilst it is clear that Article 28 of Rome II will mean that in EU states, which are signatories to the Convention, it will apply in place of the Regulation, mention in Article 15 of the Convention of *'Conventions in special fields'* will prevent the courts from being referred back to Rome II. Rome II is not an international Convention, it is secondary legislation of a supranational entity. Furthermore, it is not in a field which is more specialist that the Convention. It is very much more general than the Convention, dealing with a wide range of non-contractual obligations. The explanatory report is clear:

[96] See 6.6 below for a full discussion on the effect of Article 28 of Rome II in respect of the Convention.

*"However, it should be noted that Article 15 does not refer to other conventions in general but only to conventions which, in special fields, contain provisions concerning the questions of liability dealt with in this Convention."* [97]

As such the conclusion must be that where Rome II points to the application of the Convention, it is the Convention which will apply.

### 6.4. Scope of Applicable Law

Once the governing law has been determined by the Convention, as in Rome II, there are then further provisions which delineate the scope of that applicable law. Article 8 plays a key role in this respect and is remarkably similar to Article 15 of Rome II. It states:

*"The applicable law shall determine, in particular -*

*(1) the basis and extent of liability;*

*(2) the grounds for exemption from liability, any limitation of liability, and any division of liability;*

*(3) the existence and kinds of injury or damage which may have to be compensated;*

*(4) the kinds and extent of damages;*

*(5) the question whether a right to damages may be assigned or inherited;*

*(6) the persons who have suffered damage and who may claim damages in their own right;*

*(7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;*

*(8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period."*

[97] The Explanatory report, (n7), 38.

As with Rome II, the words *'in particular'* at the beginning of the provision indicates that the list of things to which it refers should be regarded as non-exhaustive. This is supported by the explanatory report:

*"The Conference did not deem it useful to make an exhaustive list of all matters to be covered by the law applicable to liability. In its view, it sufficed to make an enunciative enumeration (demonstrated by the use of -the adverbial phrase "in particular"), so as not to exclude involuntarily any important matter, Article 8 therefore mentions only as examples certain matters which are governed by the applicable law."* [98]

Nevertheless, the list itself is quite comprehensive. The explanatory report makes clear that the scope was purposely drawn very broadly so that all matters, other than those excluded by Article 2, would be decided in accordance with the designated law. The report indicates that the Conference rejected any notion of a carving up of the applicable laws (dépeçage) in order that any link between the rules on liability and those on reparation could be maintained.

As already stated, the matters listed in Article 8 reflect very closely the matters listed in Article 15 of Rome II. In fact the similarity is so great that it is to be wondered whether Rome II did not, in fact, borrow from Article 8 in this regard. If Rome II did 'borrow' in this way from the Hague Convention this could in fact have been somewhat misguided. In the Convention the application of the applicable law to, effectively, all issues arising under the dispute in question is supported by the principle of unity of the applicable law which pervades the Convention. There is no such guiding principle under Rome II.

Both measures provide for the same effect in law, i.e. that the applicable law will govern exemption from liability, limitation to liability and division of liability. As discussed in Chapter 4 for Rome II this could lead to over or under compensation of a victim, where a mismatch on apportionment of liability under different laws is produced. This is because under Rome II it is

[98] Ibid, 28.

possible that a victim could bring actions against different defendants in respect of damage sustained in a single accident and that these claims might be subject to different applicable laws. Under the Convention however, because the principle of unity means that the rules of applicable law are designed to ensure that the same law applies in all the claims brought by the victim, Article 8 simply means that questions of division of liability will also be governed by this law.

Certainly, it has been a theme of this work that an applicable law ought to be kept, as far as it is possible to do so, as a whole, un-fragmented system, which avoids the application of parts of one system in combination with parts from another. The pursuit of a principle of unity in the Hague Convention provides a significant advantage over Rome II in as much as it secures, together with the application of Article 8(2)of the Convention, the application of one coherent system of law in the resolution of these difficult issues.

The other provision worthy of discussion in relation to Rome II is Article 15(c), since it affected a substantial change in approach to the quantification of damages. The same cannot be said of the Hague Convention since it does not apply in England. Whether the measure altered the national law of each of the signatory states in this regard does not have any particular bearing on this work.

There are two further provisions of the Convention which have some bearing on the scope of the applicable law. Firstly, Article 10 provides that the application of the designated law may be refused if it is manifestly contrary to public policy. It is for the forum to decide when this is the case and to what extent the applicable law will be disregarded. Secondly, Article 7 provides:

*"Whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident."*

Article 17 of Rome II looks very much like this provision. This is unsurprising since Article 17 is, according to the Commission Proposal for the Regulation, based on Article 7 of the Convention.[99] The existence of the explanatory report which accompanies the Convention provides some advantage over the position under Rome II. It explains the purpose and intended operation of the Article. However, in fact, the report does little more than to confirm the discretionary nature of the measure:

At its source the rule aims to produce a common sense outcome. The report states:

*"...it would be inconceivable to refer to a law other than that of the place of the accident in respect of rules governing one-way streets or priority or those laying down whether one should drive on the left or on the right."* [100]

However, as has been explained in Chapter 4 during discussion of Article 17 of Rome II, a wide discretion is intended for judges when deciding on the role to be afforded to the local law. For example, if the local law does not set a speed limit this may be immaterial to a judge who may decide that, taking account of all the circumstances, the speed at which the driver was travelling amounted to negligence.[101] The report also countenances the situation whereby the applicable law demands higher standards in one way or another than the local law. The report uses an example whereby the applicable law requires the driver of a coach to be changed every six hours whereas the local law does not. Here the report states that the local rules could be disregarded by the judge who could simply apply the applicable law on this point instead. The report concludes:

*"The evaluation of the tortious nature of the act committed by the author of the accident therefore depends on the combined effect of the local law and the law applicable to liability. The rules of the local highway code are data which play a part in the evaluation of the whole situation. This evaluation is carried out according to the applicable*

[99] See the European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final,.25.
[100] The Explanatory Report, (n7), 27.
[101] Ibid.

*law, but on the basis of factual elements drawn inter alia from the local law, This law is therefore only of relevance in providing certain factual elements to the judge and so to enable him to apply the law governing liability."* [102]

Although reference is made to the use of local laws as factual datum which enables the application of the governing law, the above statement is perhaps a little contradictory. If the local law and the applicable law work together in a combined way it will surely be very difficult for the local law to maintain a strictly factual role. The arguments given in respect of Article 17 of Rome II are also relevant here.[103]

Unlike Article 17 of Rome II, Article 7 does not appear to afford national judges any discretion about when to employ the provision. On a plain reading it would seem that the local law should always be thought relevant. This is less problematic than the position under Rome II where the words *'in so far as appropriate'* appear to allow the court to exercise their own judgement as to when it will be appropriate to consult the local law and when it need not do so.

At a very basic level the rule in Article 7 is essential. With regard to fundamental rules of the highway, a driver's actions cannot be judged by a law under which he was not acting. This includes, for example, which side of the road to drive on and how and when to obey traffic signals and road signs. The difficulty comes when it is necessary to consider conduct which could be negligent in spite of conformity with local rules. Not exceeding the official speed limit will not mean that the speed being travelled at, in the particular circumstances (taking into account road or weather conditions, for example), was not negligent. Here, the discretion afforded to judges by the Article 7, allowing an uncertain pick and mix of rules concerning traffic

[102] Ibid.

[103] The report does not consider the situation where the local law is the law providing more exacting standards. If the example of the need to change a coach driver is reversed so that the local law requires the change of driver whilst the applicable law does not, liability could be judged in accordance with the standards set out by the local rule. This would not be on a purely factual basis since the rule is certain to embody a particular policy of the state which enacted it, applying the rule gives force to this policy, which is unknown to the applicable law. The rule will also alter the outcome that would have been produced by the applicable law alone so that it is difficult to conceive of a purely factual role for the local rule in this circumstance. See Chapter 4 at 4.8.1.

safety and conduct, and liability, does a great deal to diminish the provision of clear and simple rules which are easy to apply. This said, the fundamental aim of Article 7 makes it indispensible and it is difficult to see how it could be drawn more narrowly. There is no way of entirely separating out rules of safety and conduct from the issue of liability, the two are so intertwined that unless the governing law is the law of the place of the accident, consideration of local rules is always going to involve an exercise in patchworking.

#### 6.4.1. Concluding Remarks on Scope

The scope of both the Convention itself and of the applicable law is quite comprehensive. Claims arising out of traffic accidents will, for the most part, fall squarely within the sphere of application of the Convention and the vast majority of issues arising from any dispute will be dealt with by the law designated by its rules. At the outer edges however, the Convention does not sit precisely on the imprint made by Rome II, which is broader in application in some respects. With this in mind it becomes imperative to understand the relationship between the Regulation and the Convention.

### 6.6 The Relationship Between the Convention and Rome II

Bearing in mind the differences between Rome II and the Convention in respect of choice-of-law outcome and scope, it is essential to understand the relationship between the two instruments. In cases of conflict which instrument should prevail? Which has primacy?

Article 28 of Rome II provides:

*"This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations."*

There is no doubt that this provision allows those Member States who are signatories to the Convention to continue to apply it. The European Commission, in its original proposal for Rome II, made specific mention of the Hague Convention for choice-of-law in traffic accidents in relation to this provision[104] and Article 30 of Rome II calls for a study into the effect of Article 28 in respect of this Convention specifically. However, where the two instruments provide conflicting answers to particular problems, it is far less clear what the exact nature of the relationship between Rome II and the Hague Convention is or should be.

There is no exact authority which can answer this question, but a number of decisions of the CJEU, together with a provision of the Treaty on the Functioning of the EU, can be pieced together to form some propositions.

In cases concerned with issues as varied as the pricing of dairy products[105] and the import of apples[106] to the existence of emissions trading schemes[107] and the details of merchant shipping agreements,[108] the CJEU has been called upon, on a number of occasions, to shed light on the relationship between acts and measures taken in accordance with the Treaties of the EU on the one hand, and rules of International law in the form of treaties, agreements, protocols and customary rules on the other. The factual substance of these cases has no particular bearing on this work, what is of importance are the decisions of the court which can be summed up as follows:

[104] See the Commission Proposal for Rome II, (n.99), 29.
[105] Case C61/94 *Commission v. Germany* [1996] ECR I-03989.
[106] Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219,
[107] Case C-366/10 *American Airlines Inc. And others ,v Secretary of State for Energy and Climate Change,* ECR [2011] page 00000
[108] Case C-84/98 *Commission v Portugal* [2000] ECR I-5215.

The CJEU has held that the EU must respect international law in the exercise of its powers.[109] Under Article 216(2) TFEU international agreements concluded by the EU are binding on its institutions and on the Member States. It has been accepted that such agreements, which are binding, will have primacy over secondary legislation of the EU.[110]

The validity of a secondary measure can, therefore, be affected by the fact that it is incompatible with a rule of international law.[111] However, in order to be reviewable by the CJEU the rule of international law must be binding on the EU, the broad nature and logic of the rule must not preclude the review and the rule must be one which is unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings to contest the validity of the EU measure.[112]

The EU may conclude international agreements with one or more third countries, or international organisations and the rules of such an agreement will become binding upon the EU.[113] However, the EU may also become bound by the terms of an agreement where all the Member States of the Union are party to the agreement and the EU has assumed, in their entirety, the rights and duties previously held by all the EU Member States.[114]

Where a finding of invalidity of a secondary measure of Union law would result in the contravention of rules of International Law, the CJEU has ruled that the Community is an autonomous legal order over which the Court enjoys jurisdiction to review the validity of Community measures in the light of the basic constitutional character of the EC Treaty. In a

[109] Joined cases C- 402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* ECR 2008 page I-06351, at 291-294. This case is hereinafter referred to as 'the *Kadi* case'
[110] Case C-308/06 *The Queen (On the Application of International Association of Independent Tanker Owners v Secretary of State for Transport (Intertanko)* [2008] 3 C.M.L.R. 9, at 42; Also see American Airlines, (n107) [50] and Commission v Germnay, (n105), [52].
[111] Ibid, *Intertanko,* [43].
[112] Ibid; also American Airlines, (n107), [52]-[54].
[113] Art216(1) TFEU
[114] International Fruit Company, (n106), [16]-[18].

Community based on the rule of law, this is a constitutional guarantee which cannot be prejudiced by international agreements.[115]

Article 351(2) TFEU provides:

*"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*

*To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. ..."*

The first paragraph of this provision has been held to mean that:

*"...the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement concluded with a Member State prior to the entry into force of the Treaty or, as the case may be, the accession of a Member State, or the observance by that Member State of its obligations under the agreement and that, consequently, the institutions of the Community are bound not to impede the performance of those obligations by the Member State concerned;"* [116]

In *Commission v Portugal,*[117] the Commission applied for a declaration that Portugal had failed to fulfil its obligations in respect of certain provisions of a Council Regulation, because it had failed to denounce or adjust an agreement between itself and the Republic of Yugoslavia in respect of merchant shipping. The CJEU found that although Article 351 required Portugal to respect the rights of Yugoslavia under the agreement, denouncement of the agreement was possible and that therefore, denouncement would not be an encroachment on the rights of Yugoslavia. The court

115 The *Kadi* case, (n109), 316; also see American Airlines, (n107), [61] –[71].
116 Case C-812/79 *Attorney General v Juan C. Burgoa* [1980] ECR 2782.
117 (n108).

found that in accordance with paragraph two of Article 351, Portugal was under an obligation to eliminate all incompatibilities existing between the international agreement and the EC Treaty (taken here to include provisions of secondary Community legislation in the form of a Regulation).[118]

Since a little under half of EU Member States were signatories to the Hague Convention at the time of the adoption of Rome II, one can imagine that it was politically expedient to include Article 28 in the Regulation and that it would have been difficult for it to have passed through the legislative process without it. But, Article 28 has the ancillary effect that, when considering the application of the Hague Convention, no question arises as to the validity of Rome II in light of the Hague Convention, for the most part. As already stated above, there are times when a question may arise as to whether the interpretation of the Convention is affected by the autonomous definitions to be used for Rome II (such as the meaning of non-contractual under Article 1), although even then it is unlikely to be the validity of Rome II which will be called into question. With this in mind, the above propositions, derived from the jurisprudence of the CJEU, do not prove to be an exact fit in terms of resolving unanswered questions of the relationship between the Regulation and the Convention. Despite this, the rulings of the CJEU have some use.

Let us imagine for a moment a situation where the Rome II Regulation exists without the inclusion of Article 28 and a Hague signatory state calls into question the validity of Rome II as it applies in that state. The state might argue that it is bound to apply the Convention and should not therefore be required to apply Rome II. Essentially, the Convention has primacy. Here the pronouncements of the CJEU are useful. We can say that if the EU is bound by the Convention then the validity of Rome II can be affected, if it is found to be incompatible. The question then

[118] Ibid at [54]-[61].

transforms into one of whether the EU is bound by the Convention. It seems fairly clear that the EU is not bound. Although the EU is now a member of the Hague Conference, it is not a signatory to the Convention on the Law Applicable to Traffic Accidents. Also, since there has not been a transfer of the rights and duties under the Convention from the Member States to the Union institutions, which could not in any event take place because not all EU member States are signatories to that Convention, it cannot be said that the EU is bound in this way either. If the EU is not bound by the Convention then the validity of Rome II cannot be called into question. Furthermore, the Member State in question would be required to take all appropriate steps possible under the Hague Convention to render that instrument compatible with Rome II in accordance with Article 351(2) TFEU and the ruling in the case of *Commission v Portugal*. Since in Article 20 the Convention provides a procedure for denunciation, it could be argued that the Member States would have a means of eliminating the incompatibilities between it and Rome II. There would certainly be political fallout if such a requirement were enforced in the way that it was in *Commission v. Portugal*. The agreement in that case concerned third countries, but these were limited in number and the decision only affected one EU Member State. What we are discussing here would require twelve Member States to denounce a Convention that they and other third party states have agreed to abide by. Some argument might be put forward in this regard that denunciation would not be an *'appropriate'* step to take. On the other hand, the strict legal view might be thought to require a denunciation and this offers support to the view that it is Rome II which ultimately would prevail in any direct contest.

Of course all of this is, to a degree, academic, because Article 28 manages to bypass most of these issues. But, arguably, absent Article 28 of Rome II, the Hague Convention would not be applicable in the EU Member States which are signatories to it, from the date on which the Regulation entered into force. This position is fully supported by the decisions of the CJEU,

which deal with very similar provisions to Article 28 of Rome II contained in the Brussels Convention[119] and the Brussels I Regulation.

In *The Tatry*[120] a cargo of soya bean oil, belonging to a number of different parties, was transported from Brazil to Rotterdam, where some of the cargo was unloaded before the remainder was carried on to Hamburg. The owners of the cargo contested that the cargo had become contaminated by diesel, or something similar, during the voyage and was now not fit for purpose. Various actions were lodged in the courts of both England and the Netherlands. Jurisdiction to bring claims in the Netherlands was founded on provisions of the Brussels Arrest Convention 1952. However, a question arose as to whether, under the provisions of the Brussels Convention on jurisdiction and the enforcement of judgments, the first action to be lodged could exclude the courts in other states form hearing the same or related actions in observance with the rules of *lis pendens* and/or the rules on related actions contained in that Convention.

The English court of Appeal decided that the answer to this question depended on a number of factors, including the interpretation of Article 57 of the Brussels Convention. The English court made a reference for preliminary ruling to the CJEU.

Article 57 of The Brussels Convention provides:

*"This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.*

*This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."*

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[119] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, hereinafter referred to as 'The Brussels Convention'.
[120] Case C-406/92 *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj* [1994] ECR I-05439.

This is a provision with obvious similarities to Article 28 of Rome II. The CJEU ruled that Article 57 introduced an exception to the general rule that the Convention should take precedence over other Conventions signed by Contracting States, which had the aim of ensuring compliance with the rules of specialist conventions which could take account of the specialist features of the matter to which they relate. Accordingly, Article 57 precluded the application of the Brussels Convention, but only in respect of questions governed explicitly by those specialist conventions. If a specialist convention does not contain rules on a particular point covered by the Brussels Convention the Brussels Convention applies to those matters. In this circumstance the Brussels Convention could be viewed as retaining a background role. Essentially, the specialist Convention will apply, but where that instrument does not contain rules on matters which are covered by the Brussels Convention. The Brussels Convention lies beneath and will cover any ground not covered by the specialist convention.

In a subsequent case the CJEU made further statements which pertain to the relationship between specialist conventions and EU Regulations. In the *TNT* case[121] the CJEU was asked to interpret the relationship between the Brussels I Regulation and the Convention on the Contract for the International Carriage of Goods by Road (CMR). Article 71 of Brussels I is the equivalent provision of Article 57 of the Brussels Convention, it provides that:

*"1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments."*

A question arose as to the interpretation of Article 71 and in particular whether the rules of the Regulation should always yield to those of the specialist Convention or whether this should only be the case in circumstances where that Convention claims exclusivity of application. A further question which fell to be decided was whether, in the event of concurrence of certain rules of

[121] Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ECR I-00000.

that Convention with rules of the Regulation, the rules of the specialist Convention should, under Article 71 of Brussels I, take precedence.

In the case, goods being transported under agreement by road from the Netherlands to Germany were lost. A dispute arose which fell within the scope of both the CMR and the Brussels I Regulation. The carrier instituted proceedings in the Netherlands for a declaration that it was not liable to the insurer of the goods, relying on the rules of the CMR to found the jurisdiction of the court in the Netherlands. The insurer, however, began proceedings in Germany in accordance with Brussels I. The insurer secured a judgment in its favour which it then attempted to enforce in the Netherlands. The carrier argued that the German proceedings had been brought in contravention of the lis pendens rules of the CMR and that on this basis the German court had lacked jurisdiction to hear the case.

Ultimately the Hage Raad de Netherlanden referred a question to the CJEU, asking for clarification on the meaning and effect of Article 71 of Brussels I.[122] The court considered that the Regulation provided for the application of specialist conventions where they existed in order that rules which took account of the specific features of a particular matter might be complied with. Citing *Tatry* with approval the court stated:

*"In the light of that objective, the Court has held that the rules laid down in specialised conventions have the effect of precluding the application of the provisions of the Brussels Convention relating to the same question."* [123]

However, the court further ruled that the application of a specialist convention could not compromise the principles underlying judicial co-operation in civil and commercial matters in the EU such as free movement of judgements, predictability and legal certainty for litigants, the

[122] The court ruled that although Article 71 was different from Article 57 of the Brussels Convention in that it did not permit Member States to conclude future agreements which contained rules incompatible with the rules of Brussels I; for agreements already concluded at the time when the regulation entered into force Article 71 reflected the same system as Article 57 of The Convention. Accordingly, the interpretation of Article 57 of the Convention by the court could be taken into account in interpreting Article 71 of the Regulation.
[123] *TNT* (n121), [48].

sound administration of justice and the minimisation of the risk of concurrent and irreconcilable judgments. Since these principles are necessary for the sound operation of the internal market, rules in specialist conventions could only be applied to the extent that they are supportive of those principles. [124]

The court considered that it had no power to interpret the CMR, unless it was bound by it, which it was not. Importantly though, the court held that it was apparent from the interpretation to be given to Article 71 of Brussels I that those rules laid down in the specialist convention could only be applied in the EU if the principles underlying the Regulation are observed.

By analogy these decisions have the potential to add meaning to the relationship between Rome II and the Hague Convention. The decisions suggest that specialist Conventions apply because the Regulation concerned directs that they should, not because they are owed a higher status in law. Accordingly, the Hague Convention on the law applicable to Cross Border Traffic Accidents will be applied in the courts of those states which are signatories of that Convention because Article 28 permits this.

Furthermore, the decisions indicate that the aims and objectives of Rome II will be important in the decision about whether the Convention will be applied. If the rules of the Convention contradict or undermine the objectives of certainty, uniformity and predictability of outcome and of balancing the interests of the parties, which are important in securing the free movement of persons throughout the Union,[125] then their application may be curtailed. Whilst in the main the choice-of-law rules of the Convention are unlikely to challenge the aims of Rome II, the scope of the Convention as expressed in Article 1 could be problematic.

[124] Ibid.
[125] See in particular Recitals 6 and 16 of Rome II.

The Hague Convention is interpreted by the courts of each signatory state in accordance with the framework of that state's national law.[126] Accordingly whether a dispute falls within the term *'non-contractual'* will depend on the way in which each court characterises a particular issue. It has been noted that this could mean, for example, that when a passenger in a taxi is injured during an accident, where the driver is at fault, any subsequent claim might be characterised as non-contractual in some states, but as contractual in others.[127] By contrast Rome II requires that the term *'non-contractual obligation'* in its Article 1 will be given an autonomous definition throughout the EU and that the definition will be mutually exclusive with the definition of *'contractual obligation'* for the Rome I Regulation on the law applicable to contractual obligations.[128] There should be no overlap between the two instruments. Uniform characterisation is important in achieving uniformity of outcome in general which is in turn important for securing the proper functioning of the internal market. If countries maintain a separate and different characterisation of a non-contractual obligation under the Hague Convention, than under Rome II, this aim would be put in jeopardy. The CJEU decisions on the Brussels regime as discussed above could suggest that since the underlying aims and objectives of both the Regulation, and of EU law in general, should be taken into account in the application of any specialist Conventions, that the interpretation of *'non-contractual*' for the purposes of the Hague Convention should, in EU Member States, accord with the definition of that term for the purposes of the Rome II Regulation.

There is a live debate as to whether the Hague Convention excludes choice-of-law agreements between the parties altogether.[129] One reading of the Brussels I jurisprudence would suggest that since the Convention contains no express rules on the matter the Regulation can step in to fill

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[126] J.H.A. van Loon 'The Hague Conventions on Private International law' at 338-343.
[127] See C. Armstrong 'The Hague Convention on the Law Applicable to Traffic Accidents; Search for Uniformity Amidst Doctrinal Diversity' (1972) 11 Colum. J. Transnational Law 74, at 76. Also see Reese (n11) above at 589.
[128] See Recital 7 of Rome II and Rectial 7 of Rome I.
[129] See T. Kadner Graziano *'The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability – Interaction Conflicts and Future Perspectives'* (2008) NiPR 425 at 426.

that gap, it providing that certain agreements are valid. There is, in fact, a direction, contained in the explanatory report for the Convention, stating that the domestic law of the signatory states should determine this point. The report states:

*"The question as to whether parties may choose the applicable law is not settled by the Convention. ... The law of the forum must ... stipulate whether litigating parties in a non-contractual claim may, after the accident, agree on the law to be applied, and whether such an agreement must be made expressly or whether it may be made impliedly."* [130]

Since the rules of Rome II now form part of the systems of law of each of the EU Member States (apart from Denmark) this is a fairly strong indication that the choice which is allowed under Rome II will also be applicable in those courts applying the Hague Convention.

For other issues, this gap- filling approach could also be useful. For example, any disputes falling outside the scope of the Convention but within the scope of the Regulation (cases relating to the vicarious liability of a parent for example) could be dealt with by the Regulation even if brought in the courts of a state which is a signatory to the Convention. Article 16 of Rome II, which provides for the application of overriding mandatory rules of the forum, such as those rules contained in the MID as discussed above, might also apply on the basis that there is no corresponding provision in the Convention. This could also be said of Article 27 of Rome II on the application of choice-of-law rules in other EU instruments. However, it could conversely be argued that the exclusion from the Convention of rules on these matters was deliberate and that as such these exclusions form a part of the choice-of-law scheme as much as the rules in the Articles do. For example it may be the intention of the Convention not to allow forum rules to override the applicable law. To view the situation as one where any provision of the Regulation

[130] The Explanatory Report (n7), 8-9.

which does not have a corresponding provision in the Convention must automatically apply it too simplistic.

Nevertheless, the task of determining what the Convention intended to exclude will not be easy and a certain amount of uncertainty persists here.

### 6.7. The Relationship Between the Convention and the MID

It will be remembered here that, as argued in Chapter 5, Article 14 of the MID is likely to amount in some way or other to a choice-of-law rule which will extend at least to the type amount and extent of cover to be provided by a policy of compulsory third party motor insurance. This could impinge upon the application of the law designated by the Hague Convention, where this is different from that under Article 14 of the MID. Again, the question arises, if these two instruments should conflict which should take precedence? In an action brought directly against an insurer it could become necessary to refer to the law of highest cover to assess damages in respect, for example, of some head of damage which is covered by that law, but unknown to the otherwise applicable law. For example, in Italy non-pecuniary damage can be awarded for pain and suffering following the death of a loved one.[131] However, in England a much lower, fixed statutory award is made in this regard.[132] This might mean that Italian insurance law provides the most extensive cover when this head of damage is taken into account. The matter is not simple though, because under English law a claim can be made for loss of dependency, which cannot be made under Italian law.[133] The difficulty in assessing the 'highest

[131] A head of damage referred to as *danno morale* which can cover pain, mental and emotional distress generated by the death of a relative. See M. Bona and P. Mead (eds) *Personal Injury Compensation in Europe* (Kulwer, 2003) 311.
[132] Under the Fatal Accidents Act 1976 s1 certain relatives are entitled to a statutory award for no-pecuniary loss following the death of a loved one. The amount is currently set at £12,980.
[133] See B. Koch and H. Koziol (eds) *Compensation for Personal Injury in a Comparative Perspective* Tort and Insurance Law Vol. 4 (Springer, 2003), p92 and 202 to compare the English and Italian systems in this regard.

cover', as discussed in Chapter 5,[134] in respect of Rome II, is exactly the same in relation to the Convention.

It is notable that the choice-of-law outcomes of the MID and the Hague Convention, as regards the payment of damages by an insurer, are very similar. Both point to either the law of the place of the accident or the law of the place of registration of the vehicle. The difference being that under the MID the choice is made on the basis of which law provides for the highest cover, whereas the Convention determines this on the basis of the country where most of the connecting factors converge, in accordance with its exceptional rules. Additionally, the MID seeks to make it as easy as possible for the victim to seek compensation in a practical sense, whereas the main purpose of the Convention is to provide clear, easy to apply rules which result in predictable outcomes.

It is submitted that, since the EU itself is not a party to the Hague Convention and since uniform application of EU rules in all Member States is important in ensuring the underlying objectives of the Union, it can be argued that it would be untenable to allow nearly half of the Member States to consider the rules of the MID to be subordinate to the rules of the Convention, which is only applicable because an EU Regulation directs that it is, whilst the remaining Member States, under Article 27 of Rome II, may have to apply the rules of the MID to the issue of quantification of damages or amount of insurance coverage. The resulting uneven application of an EU Directive, designed to have equal effect throughout the Union, would be opposed to the fundamental principle that EU law should be applied uniformly by all the Member States.[135]

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[134] See Chapter 5 at 5.2.1.3.

[135] That this is a fundamental requirement is clear from Article 17 TEU which gives the Commission powers to ensure the uniform application of EU law, furthermore, Article 267 TFEU is viewed by the CJEU as conferring jurisdiction on the CJEU for the purpose of ensuring the uniform application of Union law. See *American Airlines* (n107), [47].

As such it is in fact irrelevant whether Article 27 of Rome II can take effect alongside the Hague Convention because, as a matter of EU law the Directive should be applied equally throughout the entire territory of the EU. It is submitted that the rules of the Hague Convention will apply to issues of liability and the rule contained in the MID will apply to determine the law governing the type and extent of cover to be provided under a policy of insurance and potentially to the assessment of damage and calculation of damages to be paid where there is no or lesser provision for that type of damage under the law designated by the Hague Convention.

### 6.8. Reform

Within the EU there exist three regimes, each pulling in a different direction. The MID has at its heart the aim of victim protection; the Hague Convention shows an overt tendency to favour the defendant; whilst Rome II sits somewhere in the middle trying to balance the interests of all the parties to a dispute. Consequently, the regimes are very difficult to reconcile at times, and this in itself is the cause of much confusion and intricacy. Reform of this situation is, on this basis, highly desirable, but what to do about it? Three possibilities for reform of the current situation are considered here.

One way to reduce the complexity here would be for the EU itself to become a signatory of the Convention. The EC became a member of the Hague Conference on private international law on 3 April 2007 and thus has the ability to become a signatory to the Traffic Accident Convention, thus binding all the EU Member States to that instrument. This would mean that in all cross border traffic accident cases all Member States would apply the Hague Convention, thus eliminating the possibility of different courts applying different laws. However, problems would still arise in respect of the residual application of Rome II to those areas that the Convention does not cover, as discussed above. The clash of approach with the MIDs would also remain. Arguably the difference between the MID and the Convention is greater than as between the

MID and Rome II. The MID favours the victim while the Convention favours the defendant. Conceptually it is therefore difficult to visualise the application of the Convention in all Member States as a step forward. It would in any event be a politically difficult move. The UK, for example, made a clear choice not to sign up to the Convention, which is very much against flexibility of the choice-of-law outcome. Flexibility in order to ensure justice in the particular case is something the English system promoted, as discussed in Chapter two. It is submitted that this would not be the most appropriate solution to the current problems.

A second potential solution would be to amend Article 28 of Rome II so as to make it clear that the Hague Convention is no longer capable of application. In theory this would be a simple solution. The signatory states now have an EU wide harmonised set of rules to apply, in the form of Rome II. Arguably the Regulation reflects a more modern view of the relative bargaining power of the parties in relation to a traffic accident, especially in light of the provisions of the MID. It is no longer necessary, in intra-community cases at least, to favour the insurer in order to ensure that more victims receive more compensation in a more timely fashion. The MIDs provide a right of direct action in all cases involving vehicles registered in the territory of an EU state, and Rome II provides rules, which in the main, will provide for a clear choice-of-law rule. The rationale of the Hague Conference, that favouring the insurer would prevent disputes about applicable law and, therefore, produce outcomes where more victims receive more compensation, looks a little outdated in the light of the Regulation and the Directive, neither of which existed at the time the Convention was drawn up. Removal of the Convention from the equation would reduce the current complexity to any conflict which arises between Rome II and the MID. This could then be dealt with by way of an amendment to Article 18 of Rome II and to Article 14 of the MID, as described in Chapter 5.

However, in practice this solution looks very much more difficult. During the legislative process for Rome II the European Parliament, at its first reading of the Commission's original proposal for Rome II accepted the need for the continued application of certain international conventions. The Parliament stated:

*"The regulation should not prejudice the application of both existing and future international conventions. There are often conflict-of-laws rules in international conventions that are not entirely dedicated to that field."*[136]

The Parliament did, though, single out the Hague Convention on the Law Applicable to Traffic Accidents. It proposed a new subparagraph to the then Article 25 (now Article 28) which provided:

*"If all the other elements of the situation at the time when the loss is sustained are located in one or more Member States, the rules of this Regulation shall take precedence over the rules of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents."* [137]

the only explanation for this being:

*"To date, only a few Member States have ratified the Hague Convention referred to. In this connection, the regulation should make it clear that the Hague Convention should be secondary to Rome II in terms of applicability."* [138]

It may be that the Parliament was able to foresee the potential difficulty of the concurrent operation of two choice-of-law regimes to traffic accident cases, a subject on which the Parliament had strong views, as discussed in Chapter 3. If this was the case then it would have been better for the Parliament to expressly say as much in the report of the first reading. To give as a justification the fact that only a few Member States had ratified the Convention, when in fact

136 European Parliament 'Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")' 27.6.2005, A6-0211/2005 FINAL, 35-36.
137 Ibid.
138 Ibid.

twelve Member States had done so, was rather weak support for the proposal. Moreover, the proposed subparagraph would not have reduced complexity that much since there would have been a new split between intra-community and extra-community cases. Such a split has been argued for in this work,[139] but, it is submitted that this was done so on a principled and fully reasoned basis, drawing on the EU scheme for compulsory motor insurance already in place throughout the EU. The Parliament provided no such reasoning for its position.

The Commission accepted the Parliament's proposal and an amended Article 25 duly appeared in the amended proposal for Rome II.[140] The response of the Council on this point was clear. The proposal for the new subparagraph was rejected on the basis that the Hague Convention provided for a specific regime for traffic accidents and many of the EU Member States who are contracting parties to the Convention had expressed a wish to preserve it.[141] The Council proposed that the matter be the subject of review.[142] At the Parliament's second reading for Rome II the new subparagraph had disappeared without comment.

What occurred during the legislative process is a likely reflection of what would happen if EU Member States were informed that they were no longer to be at liberty to apply the Hague Convention but had, instead, to apply Rome II. There would be political resistance. Since an amendment to this end would need to pass both the Parliament and the Council, before being adopted, one can predict the difficulties. Such difficulties would only be added to should insurers feel that they would be worse off under Rome II than under the Hague Convention, since the insurance industry would lobby against such a move, both at the national and European level.

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139 See Chapter 5 at 5.4.
140 Commission 'Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations (Rome II)' COM (2006) 83 Final, 22.
141 OJ C289E/68 Common Position (EC) No. 22/2006, 28.11.2006, at 79.
142 Ibid.

The third and final option for reform explored here is the ousting of the application of the Convention in direct actions brought against insurers only, leaving it to apply in any action brought against any other party. Such a change would be dependent upon acceptance of the changes proposed in Chapter 5. If a specific choice-of-law rule for direct actions could be added to Rome II and an amendment made to the MID to remove any possible conflict between the new rule and Article 14 of the MID, then it would make sense to remove the application of the Convention for direct actions and permit one victim-centred rule to prevail. Reforming in this way would not add any further layers of complexity. Direct actions would have one, clear choice-of-law rule, while actions against other parties would still be subject to either the rules of the Convention or of Rome II. It is currently the position that in a direct action a separate rule of either the Regulation or the Convention must be consulted to determine the applicable law and so this solution would not add anything in this regard. Furthermore, although there would be a possibility for a victim to bring an action against a tortfeasor, whereby the difficulties of the concurrent application of Rome II and the Hague Convention would persist, it is submitted that if victims are able to bring direct actions in their home courts and in accordance with their home law, then in practice this is surely going to become the preferred and main way of resolving claims arising out of cross border traffic accidents. The consequence is that for intra-community cases the situation would be coherent and straight forward and that states would be left with their preferred instrument for dealing with cases which have elements that are external to the EU.

This said, the third solution is still in no way perfect, there can be no perfect solution. All possible ways of proceeding involve compromise by some or all of the states concerned. This third option might be more palatable to those states who are signatories to the Convention because it would not require them to reject the application of the Convention entirely, rather only in certain circumstances. On the other hand, this is not to suggest that it would be easy to

persuade those states about the merits of such a move. States are likely to object to the removal of their ability to apply the Convention, even in the restricted way being suggested. As noted in Chapter 5, there is likely to be opposition from insurers to a rule which favours the victim in terms of applicable law. Accordingly, since this option is contingent on the reform of Rome II in respect of direct actions, it has the potential to attract more in the way of opposition from insurers than the second option.

In theory then, the author's preferred solution would be the second, the removal of Hague Convention from the equation altogether. This would be in addition to the proposed changes to Rome II and the MID in respect of direct actions. Doing so would provide for one, coherent (as far as Rome II is internally coherent), choice-of-law regime, to apply in all cases coming before the courts of the EU Member States. Since this is so unlikely to occur in practice, the next best solution would be option three with regard to direct actions, which in intra-community cases would likely become the preferred way of proceeding for victims.

## 6.9. Conclusion

There is a great deal to be commended in the rules of the Convention and the regime of choice-of-law which it created. As a standalone instrument it applies in a clear and straightforward way to the majority of road traffic cases which will fall squarely within its scope. The fact that it is necessary to engage in quite intricate mental gymnastics in order to come up with situations in which the Convention will produce absurd results, and that these scenarios take us some distance from the paths of most peoples' lives, is suggestive that the rules of the convention are in fact quite sound.[143] In isolation the Convention is relatively unproblematic. This is because it is subject specific, able to take account of the unique features of a cross border traffic accident in

[143] Certainly it is to be hoped that passengers punching drivers in the face, or lorries exploding at national borders are rare events, of the type many people never experience.

choice-of-law terms. In particular the role of insurers was accounted for and a policy adopted with this in mind.

Most of the problems with the Convention stem from the existence, now, of an EU wide harmonised scheme of compulsory motor insurance and the supporting provisions for this contained in the MID, and of an EU wide (excluding Denmark) harmonised scheme for choice-of-law for non-contractual obligations, in the form of Rome II. There exists a tripartite relationship between these instruments which is uneasy on account of the different policy objectives of each of them. Furthermore, the potential for three separate instruments to impact on the applicable law gives rise to complexity, confusion and uncertainty at an unacceptable level.

Nevertheless, the Hague Convention provides an interesting comparison to Rome II. Although the approach taken by the Hague Conference of trying to secure compensation by the easiest means possible (through favouring the insurer and thus reducing the potential for dispute about the applicable law), reflects the lack of harmonisation in choice-of-law rules and compulsory insurance at the time the Convention was drawn up, it also creates a fascinating question. The drafters of Rome II chose to attempt to balance the interests of the parties, but in traffic accidents, would encouraging insurers to pay compensation quickly and easily be more efficient and provide a better deal for victims overall, despite the potential for individual cases of hardship? The answer to this question is elusive. Much more data is required to answer it, including on the way that insurers deal with cross border claims on a day to day basis and what effect choice-of-law rules, particularly those in Rome II, have had on those practices. Such research is obviously beyond the scope of this work, however, consideration of the question allows us to reflect on whether there is an alternative approach, more subtle in its differences to a traditional European conflicts methodology than is demonstrated in the methods employed in

the US, which might be better suited to achieving justice for the parties to a cross border traffic accident.

# 7. Conclusion

The preceding chapters of this Thesis form layers. In analysing the law applicable to cross border traffic accidents they begin with the examination of one choice-of-law regime, and then add understanding of another, and another and another. In this final chapter the main problems and issues uncovered by the research and the recommended ways of dealing with them, will be briefly presented.

## 7.1. Claimant v. Tortfeasor Claims

It is a central tenet of this work that the role of insurers is key in settling claims arising out of traffic accidents. However, the availability of a direct action against the insurer in all EU Member States does not mean that a claimant cannot and will not bring an action against the tortfeasor. There may be some procedural advantage in doing so and the claimant risks very little since if the claim is accepted, or a judge rules in favour of the claimant, the insurer will still be the party who will pay the compensation in most cases. But, it makes a difference at the choice-of-law level whether the defendant is the tortfeasor or his/her insurer. Firstly differentiation is possible because in the claimant - tortfeasor relationship the MID is of no relevance at all[1] and the additional complexity which arises in actions against insurers because of the potential conflict between the rules of Rome II and those of the MID[2] do not apply here. Secondly, the policy considerations are, arguably, different. If the defendant is the tortfeasor the parties are much

[1] This is because the applicable law will be decided purely as between the claimant and the tortfeasor and provisions of insurance will have no bearing on this.
[2] On the potential for conflict see Chapter 5 at 5.3.2. and Chapter 6 at 6.6 Also see 7.2.1. below.

more likely to be on an equal footing.[3] There is no basis on which to favour one party over the other as there is where the relationship is grossly uneven. It is therefore the policy of the instrument itself, in a more general sense, which will dictate the choice-of-law outcome. Each of the choice-of-law regimes considered in this work produces a justifiable outcome in line with the stated aims of the instrument in question.

In the majority of cases brought before the English courts the situation is one which is likely to fall squarely within the scope of Rome II.[4] Some cases will demonstrate the continued (although ever decreasing) importance of English pre Rome II choice-of-law rules, where the dispute falls outside of either the temporal or the substantive scope of Rome II. Nevertheless, apart from the issue of military vehicles, which could give rise to a difficult question about the scope of Rome II, there is nothing overly complicated about this. It depends only on the date when the accident occurred.[5] Likewise the rules themselves are, for the majority of cases, plain and straightforward. The law of the place of the accident will apply under both regimes[6] unless there is cause to invoke one of the exceptional rules.

However, as choice-of-law responses *lex loci delicti* or *lex loci damni*, alone, are deficient, potentially leading to absurd, unjustifiable results.[7] Both the '95 Act and Rome II have in place exceptional rules, displacing this basic rule in circumstances deemed appropriate by the policy and aims of

[3] As discussed in chapter 4 at 4.9.1. the fact that the insurer may be in the background orchestrating the claim should not affect the formulation of choice of law rules in claims brought directly against the defendant because it is not a certainty that this will be the case.
[4] See Chapter 3 at 3.5.
[5] Rome II will apply to accidents occurring on or after 11 January 2009. Accidents occurring before this date will be subject to the '95 Act as decided in C-412/10 *Homawoo v. GMF Assurances SA* [2011] ECR 00000. See Chapter 3 at 3.5.2.
[6] This is the effect of the general rule in Article 4(1) of Rome II as discussed in Chapter 4 at 4.2. The rule in s11 of the Private International Law (Miscellaneous Provisions) Act 1995 also provides for the application of the law of the place of the accident. See Chapter 2 at 2.3.2.1.
[7] This would be so for example in a case where a husband driving the family car on holiday in a country other than that of the family's habitual residence negligently caused injury to other family members by crashing the car. Here the claimants and defendant parties are normally resident in country A, the insurer of the car is established in country A and the vehicle is registered and normally kept in country A. It would make very little sense to apply the law of country B in these circumstances.

the instrument concerned.[8] The weighing up process performed under s12 of the '95 Act is inherently uncertain but the court is afforded flexibility and discretion in order to designate the law which is most appropriate in the circumstances. Understanding which law is manifestly more closely connected, under the rule in Article 4(3) of Rome II, by its nature requires judicial discretion in its application. It is a manifestation of a desire (more limited than under the English system) to apply the most appropriate law in the circumstances.[9] Article 4(3) is the way in which Rome II seeks to balance the primary aim of certainty and predictability with the concurrent and competing aim of achieving a fair balance of the interests of the parties.

By contrast the Hague Convention leads to the application of rigid exceptional rules, the outcome of which will be, in the main, the law of the place of registration of the vehicle. There is far less in the way of uncertainty of outcome under these rules. This, it is submitted, is partly because the instrument is subject specific. Because it is focussed on traffic accidents the Convention is able to take account of the likely scenarios and fact patterns that arise from traffic accidents and formulate rigid rules to deal with them. The Hague Convention aims for simplicity, clarity and ease of application,[10] unity of application[11] and the minimisation of dispute about applicable law so as to promote the payment of compensation to claimants more easily, in more cases.[12] At a practical level this means that the defendant is favoured in choice-of-law terms. However, the Convention is not free of complexity. Like Rome II the applicable law will be subject to a public policy exception as well as the rules of safety and conduct of the place where the accident occurred.

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[8] In Rome II the rules of displacement are contained in Article 4(2) and 4(3). Under the Hague Convention the exceptional rules are to be found in Articles 4 and 5. How these rules reflect the policies of the respective instruments is discussed in Chapter 4 at 4.3 and 4.4 and Chapter 6 at 6.2.2 and 6.2.3.

[9] See European Commission 'Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations (Rome II)' COM (2003) 427 Final, 12.

[10] E. Essen 'Convention on the Law Applicable to Traffic Accidents – Explanatory Report' (HCCH, 1970), p13.

[11] Ibid at pp 4,12,16,21,22,23 and 31.

[12] See Chapter 6 at 6.1.

Situations involving a claim by a victim against a tortfeasor are provided for in a mainly reasonable way. Whether the correct balance has been struck between certainty and flexibility is a difficult question to answer. Because the parties are on an equal footing the choice-of-law rules have to be driven by the policy of the instrument to achieve the aims and objects thought important. The differences between the instruments reflect the different aims and polices being pursued by those instruments. Since there is nothing overtly unjust or significantly objectionable in any of the rules of the instruments considered, or in the policies of those instruments, this work does not suggest the policy which should be adhered to. This is a matter for policymakers.

Nevertheless, because of the primary relevance of Rome II in English courts, some suggestions have been made for the improved correlation between the rules of that Regulation and its underlying objective of achieving certain and predictable outcomes.[13] In particular in Chapter 4 of this work an objective use of the notion of party expectation in the form of a field of expectation principle has been advocated for the resolution of difficult cases under Article 4(2) and 4(3).

Other than the resolution of uncertainty in the interpretation of the rules of Rome II, there is a further issue which has the potential to cause complexity. In states which continue to apply the Hague Convention the relationship between Rome II and the Convention could give rise to difficulty. There is the potential for fragmentation of the applicable law. This would be so where a case falling within the scope of the Convention also contained issues falling outside of it, so that Rome II also applied to certain elements of the case. The continued application of the Convention damages the uniformity of outcome in all EU Member States that Rome II set out to achieve. For this reason the removal of the application of the Convention has been suggested

[13] Indeed certainty should be valued in traffic accident cases, where the majority of cases are settled outside of the courtroom. Straightforward rules would facilitate earlier settlement which is beneficial for all parties.

in Chapter 6 of this work, although the political and practical difficulties of achieving such an end have also been recognised.

## 7.2. Direct Actions Against Insurers

The importance of insurance in the settlement of claims arising out of traffic accidents cannot be stressed enough.

*"Nowadays, road accidents seem to be handled almost everywhere in a sort of 'systemic' quai-bureaucratic way. This is largely because the issue of liability has become intertwined with insurance. Insurance companies ...are at the core of today's system. The actual participants of an accident rarely confront each other on the question of compensation; their insurers take these issues in hand and apply very efficient standard procedures...."* [14]

The majority of traffic accident claims are settled between the claimant and the insurer without recourse to the courts[15] and often without any dispute as to liability.[16] With this in mind the need for clear and simple choice-of-law rules, which can be easily understood and applied by the parties to the dispute, is paramount. In the Author's view the current situation does not sufficiently reflect this need. Choice-of-law rules relating to actions against insurers are beset with problems. The issues identified above, in relation to a claim made against a tortfeasor or an owner of a vehicle, apply here, but three concerns can be added to them. These are discussed in turn.

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[14] W. Ernst (ed)*The Development Of Traffic Liability'* Vol 5 *Comparative Studies in the Development of the Law of Torts in Europe* (Cambridge University Press, 2010), at p5.

[15] See in relation to the English system, R. Lewis 'Insurance and the Tort System' 25 LS (2005) 85 at 88. Also see the General Report of Mr. E.W. Essen, in Conference de La Haye de Droit International Prive, *"Actes et Documents de la XIN Session,"* 1970, t.III, 200 at 206 in respect of evidence presented by the Swiss delegation to the eleventh session of the Hague Conference which showed that out of 1000 traffic accident cases insurers settled 995 out of court.

[16] Ibid, Lewis.

### 7.2.1. Choice-of-law Uncertainty

Under English law, following a period of uncertainty about whether to characterise such claims as contractual or non-contractual, the English courts have decided that it is the issue, rather than the claim which should be characterised.[17] This gives rise to some uncertainty about which choice-of-law rules might be applied since it will always be dependent upon how a particular issue might be characterised by the court. This is not conducive to out of court settlement.

Under Rome II it is unclear whether the provision dealing with direct actions against insurers (Article 18) provides a rule for the direct action itself or for merely the question of whether a direct action is permitted.[18] This is also true of Article 9 of the Hague Convention, although here the accompanying explanatory report would seem to suggest that the rule governs the direct action as a whole.[19]

Each of the above choice-of-law regimes is further complicated by the MID. Analysis of the Directive in this research reveals that it contains rules which amount to choice-of-law rules, in effect, if not in name.[20] In respect of the cover to be provided to a victim of a cross border accident, an insurer must provide the cover required by the law of the place of the accident or the law of the place where the vehicle is registered, whichever provides for the highest cover. Although this has never (to the author's knowledge) been the subject of a case brought before a court, it has been argued that it would be open to a claimant to argue that insurance cover ought to be provided in accordance with the law which provided for the highest level of that cover.[21]

However, this method of determining the law applicable to a claim against an insurer could conflict with the outcome produced by Rome II. The Regulation, the Directive and the

[17] *Maher and another v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] 1 W.L.R. 1564. See Chapter 2 at 2.3.1.2.
[18] This matter is discussed in Chapter 5 at 5.3.1.
[19] See Chapter 6 at 6.2.5.
[20] The is the conclusion reached by this research following extensive discussion of the matter. See Chapter 5 at generally.
[21] The meaning of 'cover' is discussed in chapter 5. See 5.2.1.3.

Convention each point initially to the law of the place of the accident but then offer different outcomes for exceptional cases, based on different methods and backed by different policies, aims and objectives.

Rome II would only depart from the law of the place of the accident where the parties have a common habitual residence or where there is a law which is manifestly more closely connected to the tort. However, under Article 18 the claimant may also choose to avoid these basic rules in a direct action against an insurer and opt instead for the law of the insurance contract.[22] The MID automatically designates the law of the place of registration of the vehicle where that law provides for higher insurance coverage than the law of the place of the accident. Under the Convention, the applicable law will be either the law of the place of the accident or the law of the place of registration of the vehicle. However, in a direct action it might also be the law of the insurance contract. The appropriate law is determined in accordance with the hierarchical structure set out in Article 9.[23]

It has been argued that the resolution of uncertainty is likely to be guided by the underlying aims and objectives of the instrument in question. For the MID this is the protection of claimants.[24] For Rome II, certainty is crucial but balancing the interests of the parties is also important.[25] For the Hague Convention reducing the amount of dispute about choice-of-law is paramount, and this is achieved through the creation of rigid and certain rules which favour the Defendant.[26] Between them they cover a full spectrum of policy objectives. Where the instruments overlap

[22] This is on the basis that the choice-of-law rule in Article 18 applies to the whole claim and not only to the question of whether the direct action is permitted. It is concluded in Chapter 5 that this is the appropriate interpretation of the provision. See Chapter 5 at 5.3.1.
[23] See Chapter 6 at 6.2.5.
[24] The aim of the Directives of ensuring comparable treatment for victims regardless of where in the Community the accident occurs is stated in Recital 2 of the sixth MID. This has been added to by the jurisprudence of the CJEU in cases such as Case C129/94 *Bernaldez* [1996] ECR I-01829, where the court have upheld the right of a victim to receive compensation in all cases, subject to relevant national rules in liability. See Chapter 5.
[25] See Recital 16 of Rome II.
[26] See Y. Loussouam, 'La C6nvention de la Haye sur la loi applicable en maltire d'accidents de la circulation routibre' *(1*969) 96 Journal. du Droit International. 5, at 7. Also see Chapter 6 at 6.1.

this is likely to cause difficulty. The interpretations given to provisions of each instrument will not be congruous with the other.

This is a complex and, therefore, unfortunate situation. It produces a level of uncertainty which is inappropriate for the subject matter, bearing in mind the practicalities of traffic accident litigation already repeatedly mentioned. It is unfortunate that the most important type of claim brought in connection with a traffic accident – a direct action against liability insurer – should be the subject of the worst of the uncertainty in respect of choice-of-law in cross border disputes.

### 7.2.2. Fragmentation of the Applicable Law

It is possible to resolve the uncertainty through a process of determining which instrument is to be afforded primacy. This Thesis has suggested how this might play out.[27] It has been submitted that in the event of a conflict the MID should prevail because of the mandatory and overriding nature of the rules that it creates. Accordingly, Rome II by its Article 16 or 27 will succumb to the rule in the MID.

Despite giving an answer to which instrument to apply, this in fact causes additional complexity because the rule in the MID only relates to one aspect of a claim i.e. the cover to be provided by an insurer,[28] leaving (in English courts) the law designated by Rome II or the English rules to deal with the remaining issues in the case. This results in complication and a fragmentation of the applicable law which is undesirable, because of the potential detrimental effects on the parties of trying to fit together pieces of different legal systems which simply do not match up.

The reform proposals put forward in this Thesis relate to choice-of-law for direct actions against insurers, which are the most frequent and important category of claim for traffic accidents. In

[27] See Chapter 5 at 5.3.3.1 and 5.3.3.2 and Chapter 6 at 6.6. and 6.7.

[28] The CJEU has reinforced the wording of Article 3 of the MID on a number of occasions recently, stressing that the rules of the Directive relate only to the provision of insurance and not to rules on liability. The most recent ruling on this point is to be found in Case C-300/10 *Almeida v Companhia de Seguros Fidelidade-Mundial SA* [2013] 1 C.M.L.R. 39.

this regard it is painfully clear that having two or three potentially applicable instruments is too many and that this is the cause of a great amount of complexity and uncertainty. The potential for the concurrent application of different instruments, driven by different aims and objectives and underpinned by uncertain relationships is an undesirable situation. It is proposed that the MID should no longer contain any choice-of-law rules and Rome II ought to contain the only choice-of-law rule applicable in cases of direct action against third party liability insurers. [29]

### 7.2.3. Protection of the Claimant

In England and Wales third party motor insurance has been compulsory since 1930.[30] Insurance has served as a way of spreading the risks associated with a socially valuable activity (road transportation) so as to compensate those who suffer loss as a result of that activity.[31] However, as motoring has grown, so too have the risks and insurance has become a vital feature in the protection of claimants.[32] The provision of motor insurance within the EU is accordingly regulated by the Motor Insurance Directives to prevent insurers being able to avoid third party liability and the payment of compensation to claimants.[33] In fact, in the last twenty years the protection of those suffering losses as a result of traffic accidents has become the primary concern of EU legislators and of the CJEU.[34]

However, the harmonised regulation of insurance provision does not eliminate differences in national laws between Member States. Firstly, the Directive does not purport to affect national rules on liability. Secondly, the Directive is an instrument of minimum harmonisation, meaning

[29] See Chapter 5 at 5.4.
[30] Under the Road Traffic Act 1930.
[31] See generally W. Ernst (ed) *The Development Of Traffic Liability* Vol 5 of Comparative Studies in the Development of the Law of Torts in Europe (Cambridge University Press, 2010).
[32] Ibid.
[33] See in particular the decisions of the CJEU in Case C129/94 *Bernaldez* [1996] ECR I-01829 and Case C-442/10 *Churchill Insurance Co Ltd v Wilkinson* [2012] R.T.R. 10.
[34] See Chapter 5.

that Member States are free to enact provisions more favourable to claimants if they so wish.[35] Argument has been put forward in this work that a claimant will always be better compensated in accordance with the law of the place where they are habitually resident.[36] This is the law which matches the standard of living of the claimant and the law which will provide compensation which matches other aspects of the legal system under which the claimant lives, such as rules on the payment of social security benefits, pensions and health care.[37] The claimant is not guaranteed more compensation but compensation that meets the social setting in which they conduct their day to day life.[38]

This Thesis has argued that traffic accident victims, in claims against insurers, are in a similar position to consumers in consumer contract cases. Whereas consumers have had their weaker position acknowledged and factored into the choice-of-law equation for contractual obligations, the same has not happened for traffic accident victims. The MIDs display an overt victim protection bias and it has been argued that this should be reflected in the choice-of-law rules for actions between victims and insurers in one clearly applicable instrument. This could be achieved, as indicated above, by the removal of any hint of a choice-of-law rule from the MID and inclusion in Rome II of an amended Article 18. The amended Article should state clearly that the applicable law for direct actions against insurers, which are brought in the courts of the victim's state of habitual residence, should be the law of that habitual residence. This should be to the exclusion of the Hague Convention.

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35 Article 28 of the sixth MID.
36 See Chapter 4 at 4.9.1 and Chapter 5 at 5.4.
37 Ibid.
38 The policy of the MID would support this. Although at the time of adoption of the fourth MID it was felt the application of a foreign law was unproblematic (See the Chapter 5 at [...]), there is increasing evidence that the application of a foreign law is detrimental to the compensation of claimants. The detriment faced may be procedural, as highlighted in the response of PEOPIL to the European Commission's public consultation on the application of foreign limitation periods; available at: <http://www.peopil.com/peopil/userfiles/file/PEOPIL%20Response%20EU%20Commission %20consultation%20Limitation%202012%20(2).pdf.> The prejudice may also be material, the possibility of which was recognised in "Compensation of Victims of Cross-border Road Traffic Accidents in the EU: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross-border Victims"(2009), a report prepared by law firm Demolin Brulard Barthélémy for the Commission and available at: <http://ec.europa.eu /internal_market/insurance/ docs/motor/20090129report_en.pdf.> See discussion of this in Chapter 4 at 4.9.

The proposals made in this Thesis have been partly led by the policies displayed at national and EU level of protecting victims, spreading the losses fairly and ensuring that those who suffer loss are adequately compensated. Society leans heavily on insurance for growth and innovation. There are many activities that would simply not be undertaken without the guarantees that insurance provides. However, this does not take away from the fact that in terms of motor insurance, the compulsory requirement to have third party insurance creates an instant market for insurers. Insurers enter that market to make money. They provide insurance products at a profit. They are risk neutral on account of the Law of Large Numbers.[39]

This is in contrast to victims who have little or no choice about the risks they face from accidents caused by motor vehicles. The regulation of motor insurance for the benefit of the victim builds upon the schemes of strict liability established in many continental European countries.[40] Following the enormous rise in the use of motor vehicles, legislators took a societal view of the unsustainably high levels of loss that were occurring.[41] They took action which allowed the continued use of vehicles whilst channelling the losses onto those who caused the risk whilst simultaneously providing, through compulsory third party liability insurance, a way of spreading the cost of that risk.[42] This has been matched to an extent at the cross border level, under the fourth MID, but presently, thinking in respect of applicable law does not reflect those wider and underpinning principles of risk channelling and spreading, which are to be found in the substantive national laws of liability and in the harmonised rules on motor insurance. Following the adoption of an EU wide harmonised choice-of-law regime under Rome II there is now a practical way in which to affect such a policy for rules of applicable law across the EU for

[39]The law of large numbers means that in a large group the risk of something occurring can be measured. Insurers use this to set appropriate policy premiums and thus make themselves risk neutral. See L. Cohen and M. Boardman 'Methodology: applying economics to insurance law – an introduction' in J Burling and K Lazarus (eds) *Research Handbook on International Insurance law and Regulation* (Elgar, 2011) at pp19-21.
[40] For example in France and Spain, see Ernst (n31), pp67-69 and 176-184.
[41] Ibid at 177 (Spain) and 61(France).
[42] Ibid at 71.

intra-community cross border accidents. Furthermore, the uncertainty insurers may face in terms of being able to predict which law might apply to a claim is heavily mitigated because insurers are already subject to all the laws of the EU Member States by the fact that drivers are free to travel anywhere in the Union, without first notifying their insurer, who must provide insurance cover in accordance with the terms of the policy throughout that territory.[43] Bearing all of this in mind, a choice-of-law rule which favours the victim in an intra-community direct action against an insurer makes good sense.

[43] In accordance with Article 3 and 14 of the MID.

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