

CHOICE OF LAW IN RESPECT OF
AGENCY RELATIONSHIPS IN THE
EUROPEAN UNION AND THE UNITED
ARAB EMIRATES

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ABSTRACT

Agency contracts differ from other contracts since they involve a triangular relationship among three parties: a principal, an agent and a contractor. This relationship is further divided into an internal relationship between the principal and the agent and two external relationships, one between the principal and the contractor, and the other between the agent and the contractor. Differences between various laws exist both in the substantive rules and the choice of law rules applicable to these relationships. This thesis addresses these choice of law problems, with reference to English law, the Rome I Regulation, the Hague Convention 1978, and the UAE Civil Code.

With respect to agency contracts in internal law, there are important differences in the substantive rules adopted by different legal systems, particularly between those of civilian law and common law. These differences, in turn, have consequences in private international law. Moreover differences between various laws exist also in the choice of law rules applicable to these relationships. Thus this thesis addresses these choice of law problems in respect of the three agency relationships, with reference to English law, the Rome I Regulation, the Hague Convention 1978, and the UAE Civil Code.

Since the UAE legislation does not contain any provision specifically addressing the question of which law governs the agency relationships, and the Rome I Regulation has excluded from its scope the question of whether an agent is able to bind a principal, this thesis endeavours to identify the best solution to the various choice of law problems which may arise in connection with the three agency relationships. In the final chapter the solutions identified are embodied in a draft bill, designed to amend the UAE Civil Code, as well as a draft proposal to add provisions to the Rome I Regulation.

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CHAPTER ONE

GENERAL INTRODUCTION

Introduction

The current thesis examines an important area in the field of private international law: choice of law with regard to agency relationships. Firstly, the significance of this topic comes from the importance of international agency relationships, which have spread widely in terms of international trade, and in which area the agency relationship is important for all parties. For instance, it helps a principal to find numerous markets for the promotion of commodities and provision of services. In addition, such agency will help the principal to avoid the substantial costs of building or opening a new branch in other countries; accordingly, the principal empowers agents and brokers to act on his behalf in regard to selling, buying, distributing, or providing services by concluding an agency contract with a local agent. Moreover, it is important to an agent since it is a large source of his income. It is helpful to a principal to have an agent who will find the required services and commodities in the designated area. In addition, agency contracts are extremely important to economic prosperity; therefore, most legislators in a variety of countries provide protective provisions for local agents.

Secondly, the importance comes from the fact that the United Arab Emirates (UAE) legislator has not regulated the conflict of laws in respect of agency relationships by special rules, but subjects them to the general conflict rules in regard to international contracts, although these may be inappropriate to cover agency relationships in some cases. In addition, there are various approaches to determining the applicable law, particularly in respect of the relationship

between the principal and contractor, especially in view of the fact that the Rome I Regulation excludes from its scope the question of whether the agent is able to bind his principal to a contractor.

These issues are examined with reference to the UAE Civil Code, the Hague Agency Convention 1978, and the Rome I Regulation. Various methodologies, such as critical, analytical and comparative approaches, are used to identify the problems and solve them, and the conclusions reached are embodied in a draft bill to amend the UAE Civil Code and some draft amendments to the Rome I Regulation.

Consequently, in this chapter, we will identify the subject matter, after which we shall provide a brief summary of the UAE legal system. Then, consideration will be given to the purpose of the study. Next, the research methodology used in this study will be explained, after which we shall determine the scope of the study. Finally, we will address the structure of the study.

The subject matter

Agency relationships

This thesis considers the legal issues that arises when one party (the principal) appoints another person (the agent) to conclude a contract on behalf of the principal with a third person (the contractor). In other words, it is concerned with the relationship between the agent and the principal and with the agent's acts towards the contractor. Hence, it relates to a tripartite relationship. In some cases the principal will authorise the agent to act for him, granting actual authority and thereby empowering the agent to enter into legal relations with a contractor. In other cases the principal will not authorise the agent to bind him contractually, but may only

entrust the agent with introducing him to certain business opportunities. In such a situation, the agent only acts as an intermediary. Moreover the principal may place the agent in a position where he may be seen by a third party as acting on the principal's behalf. This leads to other types of authority, such as ostensible authority (apparent authority), which may enable the agent's acts to bind the principal. Thus, it is clear that agency contracts differ from other contracts, as they involve a triangular relationship among three parties: a principal, an agent and a contractor. This relationship may be further divided into the internal relationship between the principal and the agent and two external relationships, one between the principal and the contractor, and the other between the agent and the contractor. Each of these three relationships will be examined in the following chapters. Various issues will be addressed, such the position of an undisclosed principal or indirect agency, the various types of authority (actual and apparent authority), and the liability of an agent who lacks or exceeds his authority.

Most legal systems regulate agency relationships and all the issues related to them. However, there is an important difference in the substantive rules adopted by the various legal systems, particularly between those of civilian law and those of common law. These differences in substantive law, and their effects in private international law, will in due course be examined in this thesis.

Private international law

Like other rules of private international law, choice of law rules deal with cases which have factual connections with more than one country. Such cases may usefully referred to as involving transnational situations. As regards contracts, the most typical situation is where the contracting parties reside in different countries. As regards agency relationships, perhaps the

most common scenario is where the principal and the agent reside in different countries, while the agent and the contractor reside in the same country; in other words, where a principal in one country appoints an agent in another country, and the agent deals with a contractor who is resident in the same country as the agent. This scenario may arise because the principal needs an agent to assist with international trade, as the principal is not himself in a position to deal effectively or economically with parties abroad, and he wants the agent to deal with such contractors. Another scenario is where the principal and the agent are resident in the same country but the agent concludes a contract with a contractor who is resident in another country. This may arise because the agent is more experienced than the principal in engaging in international trade. A third scenario is where each of the parties (the principal, the agent and the contractor) are residents of different countries. In such cases the agent's activities in dealing with the contractor may be carried out in the agent's country or in the contractor's country. A fourth scenario is where each party is resident in a different country, and the agent carries out his activities in a country in which none of the parties is resident.

In general every country is free to adopt its own rules of private international law, but constraints may arise from treaties governed by public international law, or from membership of and instruments adopted by Regional Economic Integration Organisations such as the European Union. Various international legislative attempts have been made to establish harmonised choice of law rules in respect of transnational agency relationships. Particularly notable is the Hague Convention of 14 March 1978 on the Law Applicable to Agency (the Hague Convention 1978, or the Hague Agency Convention), which lays down choice of law rules with regard to all three of the agency relationships. Yet, although the Convention has entered into force, it has only been ratified by a small number of countries. Within the European Community or Union, the Rome

Convention 1980 on the Law Applicable to Contractual Obligations was established to harmonise the choice of law rules for contracts in the Member States. This has now been replaced¹ by EC Regulation 593/2008 the Law Applicable to Contractual Obligations, which is known as the Rome I Regulation. The Rome I Regulation, like the Rome Convention 1980, deals with some, but not all, of the choice of law problems which may arise in respect of agency relationships.

Within dualist states, a distinction is drawn between domestic and international law, so that the latter is not directly binding, but must be implemented internally; monist states, conversely, absorb international law directly into domestic law, and where a conflict arises, the international rules prevail. EU Regulations have direct effect in all EU Member States, regardless of whether they otherwise follow a dualist or a monist approach, so that the Rome I Regulation is operative within all the Member States (except Denmark).² This has created a particularly thorny situation for monist countries within the European Union who are also signatories to the Hague Agency Convention,³ as they have to respect the Convention whilst also giving effect to the Rome I Regulation.

One of the most problematic areas relates to the exclusion specified by Article 1(2)(g) of the Rome I Regulation, by which the Regulation does not apply to "the question of whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party". This provision therefore excludes from the scope of the Regulation a question arising between a principal and a contractor (or between an agent and a

¹ See Article 24(1) of the Rome I Regulation.

² In Denmark the Rome Convention 1980 remains in force.

³ Among the EU Member States, France, Portugal and the Netherlands are party to the Hague Agency Convention.

contractor) as to whether the principal is bound by the acts of the agent. Its effect is to leave a gap, so that there is no effective single international approach within European law in respect of such conflicts. This is fundamentally problematic when considered in light of the need for harmonisation within EU private international law.

The UAE legal system

After the British withdrawal from the seven emirates (Abu Dhabi, Dubai, Sharjah, Umm Al Quwain, Ajman, Al Fujairah and Ras Al Khaimah), a federal country was formed under the name of the United Arab Emirates (UAE) on 2 December 1971. The legal system in this new country consisted of local acts of each emirate, which only applied in the territory of that emirate, along with Islamic Shari'a law and customs. But Articles 110, 120 and 121 of the Constitution of the United Arab Emirates granted the federal authorities the right to enact the federal legislation. As the UAE was a newly established country, it relied on jurists and scholars from other Arab countries, particularly from Egypt, to draft its legislation. These jurists and scholars were influenced by their own law (Egyptian law), which in turn had been influenced by French law, and directly by French law itself because they had studied in France. As a result most UAE enactments are very similar to Egyptian enactments, and this is true in particular of the choice of law rules contained in Articles 10-28 of the UAE Civil Code,⁴ which correspond to the Egyptian Civil Code.

The judiciary in the UAE is divided into a federal judiciary and a local judiciary in some emirates, such as Abu Dhabi, Dubai and Ras Al Khaimah. The structure of the federal courts includes a first instance court, an appeal court, and the federal supreme court. There are also

⁴ The Civil Code (or Civil Transactions Act) is contained in federal Act 5/1985, as amended by Act 1/1987.

separate first instance courts, appeal courts, and cassation courts in Abu Dhabi, Dubai and Ras Al Khaimah. The laws applied by all these courts include federal enactments, such as the Civil Code, the Commercial Code,⁵ and the Commercial Agencies Act.^{6,7}

The Civil Code regulates civil issues and transactions in the UAE. Various important issues are regulated in this Act, such as representation in the conclusion of a contract (Articles 149–156) and civil agency contracts (Articles 924–961). These provisions, which include substantive rules, extend to commercial agency contracts, where there is no substantive rule in the UAE Commercial Code regarding commercial agency contracts.

The Civil Code also contains choice of laws rules (Article 10–28). Despite the importance of choice of law with respect to agency relationships, the UAE legislator has not enacted particular choice of law rules regarding agency, but has merely specified general rules governing choice of law in respect of international contracts, as enshrined in Article 19 of the Civil Code. In addition, in cases that cannot be solved according to the provisions of Article 19, the UAE courts apply Article 23, which provides that “the principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict

⁵ The Commercial Code (or Commercial Transactions Act) is contained in federal Act 18/1993.

⁶ The Commercial Agencies Act is contained in federal Act 18/1981, as amended.

⁷ There is also within the UAE an enclave, known as the Dubai International Financial Centre (DIFC), which has its own courts and its own civil and commercial laws, to the exclusion of the normal UAE legislation on civil and commercial matters (including private international law). The DIFC “is designed to be a financial free zone offering a unique, independent legal and regulatory framework in order to create an environment for growth, progress and economic development in the UAE and the wider region”. The DIFC regulates choice of law by special enactments. See [www. http://difccourts.ae/](http://difccourts.ae/) (last visited on 10/5/2015). In general this thesis will not deal with the law of the DIFC.

of laws”. This thesis will discuss the important conflict principles established by the Civil Code, as well as examining Articles 19 and 23 with respect to agency relationships.

In addition, the UAE legislator has laid down substantive rules concerning commercial agency contracts in the Commercial Code. Another relevant enactment is the Commercial Agencies Act. This includes provisions designed to protect agents which are considered mandatory rules. Some of the substantive rules in the Commercial Code will be examined in this thesis and compared with the substantive rules in the common-law systems. The provisions of the Commercial Agencies Act, as mandatory rules, will also be addressed in this study.

The purpose of the study

The aim of this study is to investigate choice of law issues with regard to agency and to critically review the position in the European Union (with particular reference to the Hague Convention 1978 and the Rome 1 Regulation) and the United Arab Emirates, and to compare these and other rules and theories in respect in agency relationships, in order to establish the differences between them with a view to identifying an improved approach in conflict cases, whether between principal and agent, between principal and contractor, or between agent and contractor.

Research methodology

The current thesis uses a methodology based on examining published materials, such as legislative texts (internal enactments and international instruments), case law and commentaries. Thus, it uses an analytical method to assess the effectiveness of legislation with regard to agency relationships, such as the UAE Civil Code, the Hague Agency Convention and the Rome I

Regulation. In addition, it uses a critical method to evaluate these enactments and relevant case-law, in the light of differences between civilian legal systems (such as UAE law) and common-law systems (such as English law), and of the opinions of reputable commentators. Hence, the study uses a critical analysis to examine legal texts, particularly legislation, case law and commentators' opinions, with a view to identifying legal problems and proposing solutions.

This study also uses a comparative method with a view to identifying the best solutions to the problems of identifying the appropriate conflict rules regarding agency relationships. Therefore, after using the critical analysis method to evaluate each piece of legislation, case-law and commentary, the study uses a comparative method to compare these legal texts. For instance, the comparative study addresses the differences between the substantive rules of internal UAE law (as a civilian legal system) regarding agency relationships and the English internal substantive rules (as a common-law system), which affect private international law. Moreover, as regards the conflict rules, the study compares the different approaches adopted by the UAE Civil Code, the Hague Agency Convention, the Rome I Regulation, and in some contexts the traditional English law, with a view to achieving the aim of this study, which is to identify an improved approach in respect of conflict rules for all three relationships involved (between a principal and an agent; a principal and a contractor; and an agent and a contractor). Such a comparative study is important with a view to reforming the conflict of laws rules applied in the UAE, whether by means of possible amending legislation or by means of judicial acceptance of the best approach identified to the conflict rules in respect of agency relationships as general principles of private international law, applicable by UAE courts under Article 23 of the UAE Civil Code.

The reason for choosing UAE law as a part of this study is that the legislator has failed adequately to provide conflict rules for triangular agency relationships. It has provided general conflict rules for international contracts, but these are not adequate to deal with some agency relationships, such as the external relationship between the principal and the contractor. Another reason is that the current writer is from the UAE and is hoping to provide a draft bill concerning conflict rules regarding agency relationships, which could be used to amend the UAE Civil Code.

The reason for choosing the Hague Agency Convention is that it is the only international convention which deals fully with the conflict issues in respect of all three of the agency relationships (the internal agency relationship between the principal and the agent; and two external relationships: between the principal and contractor and between the agent and contractor).

The Rome I Regulation contains a modern and widely accepted set of conflict rules in the field of contracts which apply in the 27 EU Member States (the exception being Denmark),⁸ and which have become influential in many Asia and Africa countries. The Regulation is valuable to any comparison study since it may be regarded as the latest major development regarding conflict rules in respect of contracts. Moreover, the European approach (embodied in the Rome I Regulation) has been chosen rather than the US methods since the conflict rules in the US are not unified or even harmonised, in that some US states follow the Restatement (Second) of Conflict of Laws, while others follow the earlier First Restatement. Furthermore, because both restatements are merely advisory guidelines offered by academic experts and lack mandatory legislative force, sometimes a US court will apply other conflict rules.

⁸ There is an exception in respect of Denmark, where the Rome Convention 1980 remains applicable.

Nonetheless, it excludes from its scope the question of whether an agent can bind his principal towards a contractor. The initial proposal of the EC Commission, which led eventually to the adoption of the Rome I Regulation, included provisions in Article 7 that closely resembled provisions of the Hague Convention, but the proposed Article 7 was omitted from the Rome I Regulation as finally adopted.⁹ Thus the Regulation instead retained the exclusion relating to the agent's power to bind his principal to a third party which had hitherto been present in the Rome Convention 1980. This unexciting solution appears to reflect the existence of considerable disagreement about the appropriate rules for determining the applicable law with regard to questions of external authority (which will be examined in Chapter 6), as can be seen from the

⁹ Article 7 of the Rome I Proposal provided:

"1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the law of that country shall apply.

2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country in which the agent had his habitual residence when he acted. However, the applicable law shall be the law of the country in which the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.

3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.

4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power."

fact that the Hague Agency Convention has only been adopted by four countries. No doubt the EU institutions chose merely to retain the existing exclusionary solution rather than to delay the adoption of the Regulation so as to allow a deep analysis and lengthy discussion of matters on which there might be difficulty in reaching agreement. Consequently the Rome I Regulation excludes the question whether the agent able to bind his principal to the contractor. Consequently, this study will examine the various possible solutions to this question to investigate the best solution.

Furthermore, a historical method has been used in this study with a view to understanding how the relevant conflict rules have developed. Thus, for example, some attention is given to the negotiations at the Hague Conference on Private International Law which led to the adoption of the 1978 Convention, and to the legislative process which led to the adoption of the Rome I Regulation.

The scope of the study

The scope of the present thesis will be confined to the choice of law rules with respect to agency relationships. The main comparison will be between the UAE law (Articles 19 and 23 of the Civil Code) on one hand and the provisions of the Hague Convention on the Law Applicable to Agency 1978 and Rome I Regulation on the other hand. In addition the conflict rules of traditional English law will considered in some cases when the Rome I Regulation may not apply. Moreover, the internal substantive rules regarding agency relationships in the UAE (as a civilian legal system) and those of English law (as a common-law system) will be addressed to identify differences in substantive rules that may affect conflict rules.

Moreover, the mandatory rules contained in the UAE Agency Commercial Act and in the EU Directive on commercial agents¹⁰ will be examined. Attention will be limited to the scope of application of these two enactments in conflict cases, with regard to provisions that may be considered mandatory rules.

The structure of the study

Analysis of the conflict rules with respect to agency relationships requires separate examination of the main choice of law rules regarding three relationships: between a principal and an agent, between a principal and a contractor, and between an agent and a contractor. This requires some discussion of the more general conflict provisions of the relevant systems, as well as detailed examination of their rules relating to agency in particular. Determining the law applicable to these relationships also requires examination of the cases where the normally applicable law is set aside on grounds of public policy and where a mandatory rule is applied regardless of the normally applicable law.

Consequently, this study is divided into eight chapters as follows. The present chapter provides an essential introduction to the subject matter of this study. Chapter two addresses the fundamental provisions of the Rome I Regulation and the Hague Agency Convention. Then chapter three considers the general provision in the field of choice of law in UAE law. Thereafter, chapter four focuses on the law applicable to the relationship between the principal and the agent. Next, chapter five examines the exceptions relating to public policy and overriding mandatory provisions. Then, chapter six focuses on the law applicable to the relationship

¹⁰ EEC Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L382/17.

between the principal and the contractor, while chapter seven considers the law applicable to the relationship between the agent and the contractor. Finally, chapter eight offers conclusions to the questions studied in this thesis, and provides a draft bill to amend the UAE Civil Code, as well as a proposal to add provisions to the Rome I Regulation.

CHAPTER TWO

THE ROME I REGULATION AND THE HAGUE AGENCY CONVENTION 1978

Introduction

As noted in chapter one of this thesis, agency contracts provide an extremely important facility for businesses, enabling them to sell their products or supply their services. Such contracts are also important to countries in respect of business development, as well as in facilitating the acquisition of goods and services by contractors. Thus, legal systems regulate the various aspects of agency contracts via substantive rules. However differences exist in the substantive rules adopted in various countries. Consequently, countries have adopted choice of law rules to address this problem. But differences also exist in the choice of law rules. Some efforts have therefore been made to unify the conflict rules in regard to agency contracts. The most two important treaties in this field are the Hague Agency Convention 1978, which regulates choice of law in regard to agency contracts, and the Rome I Regulation, which addresses conflicts in the field of contracts in general. We will examine the conflict rules in respect of the various agency relationships according to these instruments in later chapters (4, 6, and 7). The present chapter will provide a background by addressing the general provisions in these international instruments which affect the determination and application of the law applicable to agency relationships.

The two international measures on choice of law adopt different approaches, although they contain some similar provisions, such as those dealing with public policy and mandatory rules. Thus, for the purpose of this thesis, the conflict rules adopted by each will be examined in detail in chapters 4–7. In this chapter we will focus on the history, scope, and various general provisions of these measures; dealing first with the Hague Convention, and then with the Rome I Regulation.

The Hague Convention 1978

The Hague Conference

The Hague Conference on Private International Law dates from 1893, when it held its first session, sponsored by the Dutch government. The Conference is an intergovernmental organisation whose aim is “to work for the progressive unification of the rules of private international law”, as is indicated by Article 1 of its Statute, which was adopted on 31 October 1951 during its seventh session, and entered into force on 15 July 1955.¹

With regard to participation in the Hague Conference and its Conventions, we must distinguish between Conference members and parties to the various Conventions adopted by the Conference, since there are 67 countries which are not members of the Conference but have signed, ratified, or acceded to one or more of the Conventions. The normal procedure is for a convention to contain a clause enabling non-member States to accede to that convention. Such a clause is included as Article 24 of the 1978 Agency Convention. Under the amendments which came into effect in 2007, a Regional Economic Integration Organisation may become a member of the Hague Conference, and the European Union has done so, alongside the 77 state members. The United Kingdom has been a member of the Conference since 1955, and has adopted many of the Conventions, such as the 1985 Convention on the Law Applicable to Trusts and on their Recognition, and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.² In contrast, the UAE is not a member of the Hague Conference,

¹ The Statute was amended on 30 June 2005, with effect from 1 January 2007. See the Hague Conference website: www.hcch.net/index_en.php?act=text.display&tid=4, last accessed on 17 February 2015.

² See the Hague Conference website: www.hcch.net/index_en.php?act=text.display&tid=4, last accessed on 17 February 2015.

and has not become party to any of the Hague Conventions.

Ordinarily, a plenary session of the Hague Conference is held every four years. Since 1983, the Conference has adopted 39 international Conventions in respect to rules on choice of law, jurisdiction, and the recognition and enforcement of judgments, in various areas, such as commercial law, family law, and international civil procedure. One area unified by the Hague Conference is that of agency contracts, which are the subject of the Hague Convention 1978.³

Structure

The Hague Agency Convention contains five chapters. The first chapter determines the scope of the Convention. The second chapter addresses the law applicable to the internal relationship between a principal and an agent. The third deals with the external relationships between a principal or an agent and a contractor (or third party). The fourth contains general provisions on private international law, and the fifth contains final provisions. At this point we shall proceed to examine the scope of the Convention, and to address the general provisions. The provisions on the internal and external relationships will be examined in chapters 4, 6, and 7. We will begin with the history of the Convention in order to understand the stages of its preparation and adoption.

Historical Stages

The 1950 and 1952 drafts from the International Law Association may be regarded as the first attempts to unify the choice of law rules in regard to agency contracts. The first draft was submitted in Copenhagen in 1950. It aimed to govern all kinds of agency contract in respect of

³ See the Hague Conference website: www.hcch.net/index_en.php?act=text.display&tid=4, last accessed on 17 February 2015.

private law except in the representation of incompetents and family relationships. The second draft was submitted in 1952 in Lucerne. This draft addressed the conflict rules in respect of agency in the field of the international sale of goods. These drafts were submitted to the Hague Conference.⁴

The question of unification of choice of law rules in regard to agency contracts, particularly agency in the field of the international sale of goods, was considered at the eighth session of the Hague Conference in 1956, but little interest was shown by member states, and in the ninth session the question was postponed for an indefinite period. In 1972, during the twelfth session, it was suggested that the agency conflict rules should be considered at a future session, and thereafter the Permanent Bureau of the Conference prepared a preliminary study of the law applicable to agency contracts and submitted a useful draft of a convention to unify the choice of law rules thereon. All member states agreed with it except Germany. At the thirteenth session, the draft convention was entrusted to a Special Commission to complete the work. In 1977, the Special Commission completed its work on a draft convention.⁵

The Convention on the Law Applicable to Agency was ultimately adopted by the Hague Conference in plenary session, and signed by France, on 14 March 1978. Eventually, after signature and ratification by France, Portugal and Argentina, the Convention entered into force

⁴ See Gamal Moursi Badr, *Agency: Unification of Material Law and of Conflict Rules*, (1985) 184 *Académie de Droit International, Recueil des Cours* 46, at p. 132. See also Alexey V. Kostromov, *International Unification of the Law of Agency* (Institute of Comparative Law, McGill University, Montreal, 1999), at p. 108.

⁵ See Karsten, I.G.F., *Karsten Report: Explanatory Report, Actes et documents of the 13th Session of the Hague Conference* (hereafter "the Karsten Report"), par. 1, p. 8 et seq. See also H.L.E. Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff Publishers, Netherland, 1995), p. 126; and Peter Hay and Wolfram Muller-Freienfels, *Agency in the Conflict of Laws and the 1978 Hague Convention*, (1979) 27 *American Journal of Comparative Law* 35.

between these three States on 1 May 1992. The Netherlands ratified later in 1992, so as to become bound on 1 October 1992,⁶ These four States are the current parties to the Convention.

The Scope of the Convention

The Convention defines its scope in Chapter I (Articles 1 to 4). Moreover, as its title indicates, the Convention confines itself to the establishment of conflict rules, and does not lay down substantive rules. It is further limited to specifying choice of law rules, and does not lay down rules with regard to judicial jurisdiction or the recognition and enforcement of judgments.⁷

THE CONCEPT OF AGENCY

Article 1 limits the scope of the Convention to relationships which have an international character.⁸ But the Convention does not define the term *international character*, and the question thus arises as to the criteria for deciding whether an agency relationship should be characterised as international. Israel's delegation to the special commission suggested that the criterion should be based on geographical circumstances, and depend on whether the places of business or habitual residences of at least two parties are located in different countries. A contrary view would recognise that it is possible for all parties involved to have their places of business in one country, but for them to be involved in an international transaction⁹ when selling and/or transferring a good from country A to country B. Thus, others argued in favour of the presence of a foreign element as

⁶ H.L.E. Verhagen, n. 5 above, p. 127.

⁷ Ibid.

⁸ Article 1(1) of the Convention provides: "The present Convention determines the law applicable to relationships of an international character arising where a person, the agent, has the authority to act, acts or purports to act on behalf of another person, the principal, in dealing with a third party."

⁹ H.L.E. Verhagen, n. 5 above, p. 130.

determining whether an agency contract has an international character,¹⁰ and the view referring to effective foreign elements was more widely accepted.¹¹

Furthermore, pursuant to Article 4, the Convention will apply whether this leads to the application of law of a country which is party to the Convention or to the law of a country which is not a contracting state.¹² Moreover the parties do not have to reside in a contracting state for the Convention to apply. In other words, the Convention will apply even if the parties have their places of business or habitual residences in non-contracting states.¹³

Moreover, Article 1(1) provides for the application of the Convention where an agent “has the authority to act, acts or purports to act” on behalf of a principal, in dealing with a contractor. Thus, a wide interpretation should be given to the term authority, as including any concept of authority accepted in either civilian or and common-law systems. The notion of authority in civilian legal systems is interpreted as a power granted to the agent to act in the name of his principal, while in common-law systems the concept is not confined to acting in the name of someone else. Moreover, Article 1(3) of the Convention provides that the Convention will apply whether the agent acts in the name of the principal or in his own name.¹⁴ Consequently, as well as

¹⁰ H.L.E. Verhagen, n. 5 above, p. 130.

¹¹ See Okasha Mohamed Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 706. See also H.L.E. Verhagen, n. 5 above, p. 131.

¹² Article 4 of the Convention provides: "The law specified in this Convention shall apply whether or not it is the law of a Contracting State."

¹³ H.L.E. Verhagen, n. 5 above, p. 129.

¹⁴ Article 1(3) of the Convention provides: "The Convention shall apply whether the agent acts in his own name or in that of the principal and whether he acts regularly or occasionally."

cases of disclosed and undisclosed agents,¹⁵ indirect agency (as in the case of a commission agent under civilian laws) is also within the scope of the Convention.¹⁶

Moreover, the Convention applies whether the agent is a professional or a non-professional.¹⁷ This follows from the provision specifying that an agency is within the scope of the Convention whether the agent acts occasionally or regularly.¹⁸

According to Article 1(2),¹⁹ the Convention is not limited to agents whose function is to conclude a contract with the contractor on behalf of a principal, but extends to agents whose function is to negotiate contracts or to receive and communicate proposals.²⁰

EXCLUDED ISSUES AND CATEGORIES

Exclusion in respect of issues or of categories of agency, are specified by Article 2 of the Convention.²¹ As regards issues, Article 2(a) and (b) excludes for the scope of the Convention questions as to the capacity of parties and to formal requirements.

¹⁵ Katarzyan Reszczyk Krol, *Law Applicable to Voluntary Representation in Some European Legal Systems*, (2014) 10 (2) Journal of Private International Law 280. See also H.L.E. Verhagen, n. 5 above, p. 144; and Alexey V, Kostromov, n. 4 above, p. 112.

¹⁶ Peter Hay and Wolfram Muller-Freienfels, n. 5 above, p. 37.

¹⁷ Peter Hay and Wolfram Muller-Freienfels, n. 5 above, p. 37. See also Katarzyan Reszczyk Krol, n. 15 above, p. 280.

¹⁸ Article 1 (3) of the Convention.

¹⁹ Article 1 (2) of the Convention provides: "It shall extend to cases where the function of the agent is to receive and communicate proposals or to conduct negotiations on behalf of other persons".

²⁰ H.L.E. Verhagen, n. 5 above, p. 151; see also Peter Hay and Wolfram Muller-Freienfels, n. 5 above, p. 37.

²¹ Article 2 of the Convention provides:

"This Convention shall not apply to –

a) the capacity of the parties;

Some categories of agency are also excluded from the Convention by Article 2. For instance, agency by operation of law is excluded by Article 2(c), since the Special Commission adopted the prevailing view that agency by operation of law has a special character and has no importance for commercial intercourse. This exclusion applies to agency under family law, agency in matrimonial property regimes, and agency in succession law. Such agencies are excluded from the Convention since the persons involved as principal in these types of agency need protection because they cannot deal with their own affairs. Other excluded categories (under Article 2(d) and (e)) are agency created by a judicial or quasi-judicial decision, and agency related to judicial proceedings. Presumably the *lex fori* will govern these categories. In some cases, a shipmaster, when performing his function, may be considered an agent; but this kind of agency is excluded from the scope of the Convention by Article 2(f). The law of ship's flag may govern such agency.²²

The Hague Convention deals with the interface between company matters and agency matters by Article 3(a), which excludes an agency from the Convention when the agent is considered an organ, partner, or officer of a company, association, or other entity, but only when he is performing actions in that capacity by virtue of an authority conferred by law or by the constitutive documents of that entity. Consequently, the agency in this case will be governed by conflict rules in respect of companies.²³

b) requirements as to form;

c) agency by operation of law in family law, in matrimonial property regimes, or in the law of succession;

d) agency by virtue of decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority;

e) representation in connection with proceedings of a judicial character;

f) the agency of a shipmaster acting in the exercise of his functions as such."

²² H.L.E. Verhagen, n. 5 above, p. 154.

²³ H.L.E. Verhagen, n. 5 above, p. 171.

Article 3(2) prevents a trustee from being regarded as an agent of the trust, the beneficiaries or the settlor of the trust, and thus excludes such cases from the scope of the Convention.²⁴ The exclusion is designed to make clear that a trust is a different kind of institution from agency. It is a clarification aimed mainly at avoiding confusion in civilian countries. Trusts are instead regulated by the Hague Convention 1986 on the Law Applicable to Trusts.

EXCLUSIONS BY RESERVATION

ARTICLE 18 OF the Convention grants each contracting state the right to make a reservation excluding three types of agency from the application of the Convention. One type is when the agent is a bank and acts in regard to a banking transaction. Another type is when the agent acts in the course of insurance matters, and the third is where the agent is a public servant acting on behalf of a private person. France and Argentina have not used this right. A reservation has been made for all three types of agency by Portugal, but the Netherlands has made a reservation only for insurance matters.²⁵

General Provisions

Like many other Hague conventions, the Agency Convention contains a number of general provisions and final clauses²⁶ in Articles 16–28. For instance, Article 16 enables the mandatory rules of any country which has a significant connection with the agency relationship in question to be applied, irrespective of the normally applicable law. Furthermore, pursuant to Article 17, the

²⁴ Article 3(b) provides: "a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries."

²⁵ H.L.E. Verhagen, n. 5 above, p. 162. See also Katarzyan Reszczyk Krol, n. 15 above, p. 280.

²⁶ Alexey V. Kostromov, n. 4 above, p. 126.

applicable law may be set aside if its provisions are manifestly incompatible with the forum's public policy.²⁷ In this section, some of these provisions, concerning territories and conflicting international instruments, will be examined.

TERRITORIES

In the case of a federal state in which each territory has its own law, each territory must be considered as a country for the purpose of determining the applicable law under the Convention.²⁸ Nevertheless, if the situation is connected solely with several territories of a federal state, that State will not be bound to apply the rules specified by the Convention to determine the applicable law.²⁹ In other words, the Convention will not have to be applied to purely internal conflicts of law between the state's territories.³⁰ For instance, supposing that the UK were a contracting state and each of its territories (England and Wales; Scotland; and Northern Ireland) had its own agency law, and a principal in England appointed an agent in Scotland to act on his behalf with a contractor in Northern Ireland, the United Kingdom would not have to apply the Agency Convention to determine the applicable law in this case. In fact the UK never utilizes such permissions. They appear to be designed to encourage the USA to adopt the Hague conventions, but in fact the USA rarely ratifies such conventions, even where its negotiators have succeeded in

²⁷ Mandatory rules and public policy will be discussed in detail in Chapter 5 of this thesis

²⁸ Article 19 of the Convention provides: "Where a state comprises several territorial units each of which has its own rules of law in respect of agency, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Convention."

²⁹ Article 20 of the Convention provides: "A state within which different territorial units have their own rules of law in respect of agency shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of this Convention."

³⁰ H.L.E. Verhagen, n. 5 above, p.133. See also Karsten Report, n. 5 above, parg. 235, p. 61.

incorporating the solutions which were seeking (as, for example, in the case of the Convention on Products Liability 1973).

Furthermore, a state which is responsible for the international relations of one or more territories other than its own territory may, when entering into the Convention or subsequently, declare that the application of the Convention will extend to some or all of these additional territories.³¹ Thus, a declaration by the Netherlands has extended the application of the Convention to Aruba.³²

RELATION WITH OTHER INTERNATIONAL INSTRUMENTS

The Hague Convention aims to avoid any conflict between its own provisions and those of other existing or future international instruments which deal with the same questions, where a state is party both to the Convention and the other instrument (as is the case for France, the Netherlands, and Portugal, which are parties to the Rome I Regulation).³³ Therefore Article 22 of the Convention provides that the Convention is not to affect the application of any international

³¹ Article 25(1) provides: "Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State." See also Article 21(1), which provides: "If the Contracting State has two or more territorial units which have their own rules of law in respect of agency, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or to one or more of them, and may modify its declaration by submitting another declaration at any time."

³² H.L.E. Verhagen, n. 5 above, p. 133.

³³ Karsten Report, n. 5 above, parg. 238, p.62.

instrument, signed or to be signed in the future by a contracting state, which deals with questions governed by the Convention.³⁴

Consequently, the question arises whether there is a conflict between the Rome I Regulation and the Hague Convention in countries that are party to both instruments. It is clear that conflict may arise in respect to the internal relationship between a principal and an agent. However, in regards to the external relationship between the principal and the contractor, no conflict can arise since Article 1(2)(g) of the Rome I Regulation excludes the question whether the agent has authority to bind his principal to a contractor.³⁵ On the other hand, it seems that conflict may arise in respect to the relationship between the agent and contractor, since the exclusion by Article 1(2)(g) confined the agent's authority to bind the principal to the contractor. Thus, both instruments could apply to such issues as the existence and extent of the agent's warranty of authority, or his own liability arising from terms which might be construed as rendering him liable on the main contract along with the principal.

Regarding the question of conflict between the Convention and the Regulation, the principle of *lex specialis derogat legi generali* supports the argument that preference should be given to the application of the Hague Convention rather than the application of the Rome I Regulation.³⁶ Furthermore, Article 25(1) of the Rome I Regulation³⁷ provides that the application of any international treaty to which a Member State is party at the time of the adoption of the

³⁴ Article 23 of the Convention provides: "The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which to which a Contracting State is, or becomes, a Party."

³⁵ H.L.E. Verhagen, n. 5 above, p. 135.

³⁶ Ibid.

³⁷ Article 25(1) of the Regulation 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 contractual obligations."

Regulation will not be prejudiced by the Regulation. Hence, preference will be given to the Hague Convention.³⁸ Thus at present, in France, the Netherlands and Portugal, the Convention prevails over the Regulation. But each of these States could, if it wished, denounce the Convention in accordance with its Article 27. The denouncing State would then have to apply the Regulation to the internal relationship between the principal and the agent, and to some aspects of the external relationship between the agent and the contractor, but could deal with external authority in respect of the relationship between the principal and the contractor as it liked.

The Rome I Regulation

Introduction

In the European Union, the Rome I Regulation regulates and unifies choice of the applicable law in respect of contracts by adopting several principles. First, the Regulation grants the parties the freedom to choose explicitly or impliedly the applicable law. In the absence of any choice, the Regulation adopts the doctrine of characteristic performance by Article 4(2), and adds in Article 4(1) rules to determine the party whose performance is considered characteristic of certain types of contracts, it proceeds to apply a rebuttal presumption in favour of the law of the country in which that party habitually resides. The Regulation also adopts the principle of closest connection, pursuant to Article 4(3) and (4), so as to enable rebuttal of the applicable presumption, and to fill the gap where no presumption is applicable. Furthermore, the Regulation sets out specific conflict rules to regulate certain types of contracts, such as contracts of carriage (Article 5), consumer contracts (Article 6), insurance contracts (Article 7), and individual employment

³⁸ See Peter Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), p. 287.

contracts (Article 8). Moreover, the Regulation, like other international enactments, defines its scope of application and contains some general provisions.

Thus, in this chapter, we will proceed to consider the scope of the Regulation, and then to examine some general provisions adopted by the Regulation. But first we will recall the Regulation's history.

The Historical Development

From soon after their creation the European institutions have worked to harmonise the European private international rules, such as choice of law rules and jurisdiction rules.³⁹ An example of this is the Rome Convention 1980, which aimed to harmonise the choice of law rules in respect of contractual obligations within the Member States of the European Community. When the Brussels Convention on civil jurisdiction and judgments was completed in 1968, the group of experts in the Commission and Council began to work towards the Rome Convention. The Convention was opened for signature in 1980, but it did not enter into force until 1 April 1991.⁴⁰ It eventually came into force in the first 27 member states of the European Union.⁴¹

On 15 December 2005, the European Commission presented a proposal that led to the adoption of the Rome I Regulation, which has now replaced the Rome Convention. Eventually the Regulation was adopted on 17 June 2008, and became applicable in the first 27 member states

³⁹ See Alexander J. Belohlavek, *Rome Convention: Rome I Regulation* (Juris, USA, 2010), p. 1.

⁴⁰ See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 217. See also John O'Brien, *Conflict of Laws* (Cavendish Publishing Ltd, UK, 2nd edition, 1999), p. 314. The United Kingdom was among the group of Member States for which the Convention entered into force on 1 April 1991; see Dicey, Morris and Collins, p. 1779.

⁴¹ Peter Stone, n. 38 above, p. 279.

(with the exception of Denmark) on 17 December 2009.⁴² It also became applicable in Croatia on 1 July 2013.⁴³ Since the Regulation does not apply to existing contracts, the Convention remains applicable to contracts concluded before 17 December 2009.⁴⁴ Furthermore, the Convention still applies in the French overseas territories and in Denmark,⁴⁵ since Denmark did not participate in the Regulation.⁴⁶

The Rome I Regulation has in general followed the approach adopted by the Rome Convention, but it has made numerous amendments, including three which may be regarded as of major significance.⁴⁷ The first is the inclusion, for cases when parties have not chosen the applicable law, of specific provisions designed to determine the applicable law for certain types of contract. Thus, Article 4(1)⁴⁸ lays down specific default rules for (among others) sales of goods,

⁴² Peter Stone, n. 38 above, p. 280. See also Dicey, Morris and Collins, n. 40 above, p. 1781.

⁴³ See Article 2 of the Croatian Accession Act, [2012] OJ L112.

⁴⁴ Article 28 of the Regulation provides: "This Regulation shall apply to contracts concluded after 17 December 2009."

⁴⁵ Article 24 of the Regulation provides: "This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty."

⁴⁶ Peter Stone, n. 38 above, p. 279.

⁴⁷ Dicey, Morris and Collins, n. 40 above, p. 1781.

⁴⁸ Article 4(1) of the Regulation provides: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

contracts for the provision of services, contracts of franchise, and contracts of distribution. Additionally, Article 5(2) deals specifically with the law governing contracts for the carriage of passengers.⁴⁹

The second major change is that Article 7 of the Regulation provides specific provisions for contracts of insurance. In this respect the Regulation has incorporated, with some simplification, choice of law rules for insurance which were previously contained in EU directives. Another important difference between the Regulation and the Convention is that under the Regulation effect may be given to certain mandatory rules of the law of the country in which the contract is performed by virtue of Article 9(3). This replaces a wider provision made by

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law".

⁴⁹ Article 5(2) of the Regulation provides: "To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply".

Article 7(1) of the Convention, which was not confined to prohibitions by the law of the place of performance, but extended to overriding mandatory rules of a country with which the contract had a close connection. But many Member States had made reservations excluding the use by their courts of Article 7(1).

The Scope of the Regulation

Article 1 provides that the application of the Rome I Regulation is confined to cases that involve a conflict of laws.⁵⁰ The Giuliano and Lagarde Report states that this requirement will be satisfied where the relationship involves one or more foreign elements; for example, in cases where the parties have different nationalities or where one or all of them habitually reside abroad or where one or more parties perform their obligations in a foreign country. In these cases, the issue of the applicable law in several countries will arise.⁵¹ It is clear that if the parties choose a foreign law to govern their relationship pursuant to Article 3(3) of the Regulation, the choosing of foreign law is sufficient to establish that the relationship involves a conflict of laws.⁵²

It is clear that the a conflict situation also arises when several territories of a federal state, each of which has its own rules for contractual obligations, are involved in the relationship.⁵³ This is confirmed by Article 22(1) of the Regulation, by which each territory within a federal state which has own law in the field of contracts is treated as a country in regard to the application of

⁵⁰ Article 1(1) provides: "This Regulation shall apply, in situations involving a conflict of laws ..."

⁵¹ See Mario Giuliano and Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, [1980] OJ C282/17, Article 1, Comment 1.

⁵² Peter Stone, n. 38 above, p. 281. See also Gralf Peter Calliess, *Rome Regulation: Commentary on the European Rules of Conflict of Laws* (Wolters Kluwer and Business, New York, 2011), p 41.

⁵³ See Geert Van Calster, *European Private International Law* (Hart Publishing, Oxford, 2013), p. 128. See also Gralf Peter Calliess, n. 52 above, p. 42.

the Regulation. Article 22(2), which enables the exclusion of purely internal cases by a federal State, is merely permissive, and the UK has wisely declined to make use of the permission in order to avoid pointless complication.⁵⁴

According to Article 1(1),⁵⁵ the Regulation is limited to contractual obligations. Thus, non-contractual obligations fall outside its scope. Nonetheless, contractual obligations are not defined by the Regulation except for the indication by Recital 7 that the provisions and the substantive scope of the Regulation should be consistent with the Rome II Regulation and the Brussels I Regulation.⁵⁶ Consequently, the concept of contractual obligation should be interpreted widely with an independent meaning, defined (ultimately by the European Court) as an autonomous concept of European Union law, in the light of the purpose of the Regulation and of the general trend in the laws of the Member States as a whole, rather than referring its definition to the *lex fori*.⁵⁷

Furthermore, the court should interpret the concept of a contractual obligation as having the same meaning as under Article 7(1) of the revised version of the Brussels I Regulation, so that a contractual obligation arises when a party freely assumes an obligation towards another party.⁵⁸

The independent meaning of a contract prevents the application of technical rules of forum law;⁵⁹ for instance, the English rule that consideration is a requirement for a valid contract, while

⁵⁴ Peter Stone, n. 38 above, p. 281.

⁵⁵ Article 1(1) provides: "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations ..."

⁵⁶ Peter Stone, n. 38 above, p. 281.

⁵⁷ Dicey, Morris and Collins, n. 40 above, p. 1784 See also Peter Stone, n. 38 above, p. 281; and C. M. V. Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford: Oxford University Press, 4th edition, 2011), p. 206.

⁵⁸ Peter Stone, n. 38 above, p. 281. See also Geert Van Calster, n. 53 above, p. 128; and Galf Peter Calliess, n. 52 above, p. 38.

⁵⁹ Peter Stone, n. 38 above, p. 282.

there is no such requirement in civilian legal systems. Consequently, under the Rome I Regulation an agreement unsupported by consideration is considered to be a contract.⁶⁰ Furthermore, according to Article 12(1) of the Regulation,⁶¹ the consequences of nullity of a contract are within the scope of the Regulation.⁶² However, the transfer of ownership by virtue of a contract of sale falls outside the scope of the Regulation, since proprietary issues are not been regulated by the Regulation, except in the case of Article 14 (on assignments of the benefit of contractual obligations).⁶³

Moreover, Article 1(1) of the Regulation⁶⁴ confines the application of the Regulation to civil and commercial matters, and thus to contracts governed by private law.⁶⁵ Thus, a contract that concerns public matters (a non-civil contract) falls outside the scope of the Regulation. In accordance with the rulings of the European Court on the Brussels I Regulation, it is the exercise of special public powers by a State or a public body, which are not available between private persons, which serves as the criterion for distinguishing between a civil or commercial contract and a public contract. Consequently, if a public body acts in accordance with its special public powers and concludes a contract with another party, this contract is considered a public contract, which is outside the scope of the Regulation.⁶⁶ The second sentence of Article 1(1) outlines

⁶⁰ Dicey, Morris and Collins, n. 40 above, p. 1786. See also Peter Stone, n. 38 above, p. 282.

⁶¹ Article 12(1)(e) provides: "The law applicable to a contract by virtue of this Regulation shall govern in particular: ... (e) the consequences of nullity of the contract."

⁶² Dicey, Morris and Collins, n. 40 above, p. 1786. See also Graf Peter Calliess, n. 52 above, p. 38.

⁶³ Peter Stone, n. 38 above, p. 282.

⁶⁴ Article 1 (1) provides: "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters."

⁶⁵ Peter Stone, n. 38 above, p. 281. See also; David McClean and Veronica Ruiz Abou-Nigm, *The Conflict of Laws* (Sweet and Maxwell, UK, 8th edition, 2012), p. 347.

⁶⁶ Graf Peter Calliess, n. 52 above, p. 37.

specific matters that are excluded from the application of the Regulation.⁶⁷ These matters relate to customs, revenue, or administrative issues, as they are considered public matters.⁶⁸ Despite the fact that a civil court may hear some cases concerning public matters, this does not mean that a public matter will become a civil matter.⁶⁹ Since the same distinction between civil and public matters must apply in all EU countries, the test is whether the public body acts as an ordinary trader, or whether it make use of special powers not available to ordinary traders. The dividing line is ultimately a matter for the European Court. The case-law under Brussels I will normally also apply to Rome I on this question.

The Regulation adopts the principle of universal application by Article 2, which provides that the Regulation will apply whether that leads to the application of law of a Member State or the law of a non-member country.⁷⁰ Thus, the Regulation will apply where the parties choose the law of a non-member state, and where such a law is applicable under the default rules as the law of the country that is presumed or found to be most closely connected to the contract.⁷¹

Article 1(2) outlines a list of matters that fall outside the scope of the Regulation, since there are other treaties or EU measures which lay down conflict rules in regard to these matters, or because the Regulation has chosen to leave these matters to the conflict rules contained in the law

⁶⁷ Article 1(1) provides: "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters."

⁶⁸ Galf Peter Calliess, n. 52 above, p. 37.

⁶⁹ Ibid.

⁷⁰ Article 2 provides that: "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State."

⁷¹ Dicey, Morris and Collins, n. 40 above, p. 1788. See also Geert Van Calster, n. 53 above, p. 131; and C. M. V. Clarkson and Jonathan Hill, n. 57 above, p. 207.

of the Member States.⁷² These excluded matters can be divided into three types: excluded transactions, excluded terms, and excluded issues.⁷³

EXCLUDED TRANSACTIONS

The effect of Article 1(2)(b) and (c) of the Regulation is to exclude from its scope all contracts which relate to family matters (familial status, maintenance and property) and succession on death. Some of these matters are subject to other treaties. For instance, obligations that arise out of succession and wills fall within the scope of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,⁷⁴ and fall within the EU Succession Regulation⁷⁵ now that it has entered into force on 17 August 2015. Thus, the Rome I Regulation aims to avoid conflict with these treaties and measures.⁷⁶

Article 1(2)(d) and Recital 9 exclude from the scope of Regulation obligations that arise under cheques, bills of exchange, or promissory notes, or under other negotiable instruments (such as bills of lading) to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. The exclusion was made because the conflict rules laid down in the Regulation are unsuitable for negotiable instruments in view of their special character. Usually they are documents which are designed to embody a definite obligation, specified in precise terms,

⁷² Gralf Peter Calliess, n. 52 above, p. 42.

⁷³ Peter Stone, n. 38 above, p. 282.

⁷⁴ See Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; see www.hcch.net/index_en.php?act=conventions.text&cid=62 (last accessed on 26 February 2015).

⁷⁵ See EU Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments, in Matters of Succession, and on the Creation of a European Certificate of Succession; [2012] OJ L201/107.

⁷⁶ Gralf Peter Calliess, n. 52 above, p. 43. See also Adrian Briggs, *The Conflict of Law* (Oxford: Oxford University Press, 3rd edition, 2013), p. 229.

in order to ease its transfer.⁷⁷ Furthermore, the Giuliano and Lagarde Report provides another reason for this exclusion: that such instruments are subjected in many Member States to the Geneva Conventions,⁷⁸ and elsewhere may be subject to special conflict rules of *lex fori*,⁷⁹ as in the United Kingdom.

According to Article 1(2) (h), the constitution of trusts, and the relationship between trustees, settlors and beneficiaries, fall outside the scope of the Regulation. The exclusion is designed to make clear that a trust is a different kind of institution, distinct from contract law, and having affinities with property or association law.⁸⁰ It is a clarification aimed mainly at avoiding confusion in civilian countries which in their internal law do not recognise the trust institution as understood in the UK and Ireland.⁸¹

Although Article 7 of the Regulation provides that a contract of insurance is within the scope of the Regulation, Article 1(2)(j)⁸² excludes a small range of insurance contracts from the scope of the Regulation under certain conditions: the contract should be concluded by an insurer who is established outside the European Union; the contract should provide benefits either to self-employed or employed persons "belonging to an undertaking or group of undertakings" or to a

⁷⁷ Peter Stone, n. 38 above, p. 282.

⁷⁸ See the Geneva Convention 1930 and 1931 for the Settlement of Certain Conflict of Laws in connection with Bills of Exchange or Cheques respectively.

⁷⁹ Giuliano and Lagarde Report, n. 51 above, Article 1(2), Comment 4, p. 11.

⁸⁰ Peter Stone, n. 38 above, p. 282.

⁸¹ Galf Peter Calliess, n. 52 above, p. 51.

⁸² Article 1(2)(j) provides: "insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[,], the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

trade or group of trades; and the insurance contract should cover the event of survival or death, or of discontinuance or curtailment of activity, or sickness in regard to work or accidents at work.⁸³ In contrast the Rome Convention, by Article 1(3), excluded from its scope an insurance contract that covered risks located within the European Community.⁸⁴ In fact the gap in the Rome Convention was filled by provisions contained in Directives on insurance.⁸⁵ The Regulation has incorporated slightly simplified provisions derived from the Directives, and the remaining minor exclusion is itself derived from the Directives.

EXCLUDED TERMS

Choice of court and choice of arbitration agreements are excluded from the scope of the Regulation pursuant to Article 1(2)(e). In other words, the interpretation and validity of jurisdiction or arbitration clauses fall outside the Regulation's scope.⁸⁶ This is because these matters are governed by other international instruments, such as the Brussels I Regulation or the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.⁸⁷ Some argue that the exclusion of jurisdiction clauses relates to procedural rather than contractual matters.⁸⁸ Nonetheless, this exclusion does not extend to a substantive contract that contains a jurisdiction or arbitration clause. The substantive contract remain within the scope of the Rome I

⁸³ Peter Stone, n. 38 above, p. 283. See also Gralf Peter Calliess, n. 52 above, p. 52.

⁸⁴ John O'Brien, n. 40 above, p. 324.

⁸⁵ EC Directive 88/357, as amended by EC Directive 92/49, in the case on non-life insurance, [1988] OJ L172 and [1992] OJ L228; and EC Directive 2002/83, in the case on life insurance, [2002] OJ L345.

⁸⁶ Peter Stone, n. 38 above, p. 283.

⁸⁷ Peter Stone, n. 38 above, p. 284. See also John O'Brien, n. 40 above, p. 321.

⁸⁸ Gralf Peter Calliess, n. 52 above, p. 48.

Regulation.⁸⁹ Moreover the forum clause is often an indication of an implied choice of the law governing the substantive contract.

EXCLUDED ISSUES

Questions that relate to an individual's status or his legal capacity are excluded from the Regulation by Article 1(2)(a). However, the Regulation will apply in certain cases where an individual who entered into a contract with another party who was present in the same country was incapable under the law of another country, although he had capacity pursuant of the law of the place of contracting. He may not rely on that other law to invoke his incapacity except in a situation when the other party was aware or was negligently unaware of the incapacity.⁹⁰ This provision is set out in Article 13 of the Regulation.⁹¹

Article 1(2)(f) excludes from the application of the Regulation questions governed by the law of companies and other bodies (unincorporated or corporate), such as legal capacity, creation by registration or otherwise, internal organisation, winding up, and officers' and members' personal liability for the obligations of the body. Furthermore, the question of a director's liability arising from his office is within the exclusion.⁹² This exclusion leaves unaffected the difference in conflict rules in respect of companies between common-law countries, which usually refer to the

⁸⁹ Giuliano and Lagarde Report, n. 51 above, Article 1(2), Comment 4, p. 12.

⁹⁰ Galf Peter Calliess, n. 52 above, p. 42. See also Pippa Rogerson, *Collier's Conflict of Laws* (Cambridge: Cambridge University Press, 4th edition, 2014), p. 320.

⁹¹ Article 13 provides: "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

⁹² Peter Stone, n. 38 above, p. 284.

law of the country of incorporation, and civilian countries, which usually refer to the country of the central administration (or head office).

Furthermore, Article 1(2)(g) excludes from the scope of the Regulation the question of whether an agent is able to bind his principal by his act toward a contractor. The effect of this provision will be closely examined in this thesis.⁹³

According to Article 1(2)(i), pre-contractual obligations are excluded from the scope of the Regulation. Recital 10 explains that the exclusion of obligations arising out of dealings prior to the conclusion of a contract is due to the fact that they are covered by the Rome II Regulation. Nevertheless, according to Article 12(1) of the Rome II Regulation, a pre-contractual obligation will normally be governed by the law that governs the contract or the law that would have governed the contract if it had been concluded.⁹⁴ Therefore, the law applicable to a pre-contractual obligation will be determined by reference to the Rome I Regulation; but if this proves impossible, Article 12(2) of the Rome II Regulation will apply.⁹⁵

Article 1(3) of the Rome I Regulation excludes the question of evidence and procedure from the scope of the Regulation. However, this exclusion gives way to Article 18, which deals with the burden of proof, modes of proof, and presumptions. One important result of this provision is that the burden of pleading and proving the identity and content of applicable foreign law fall

⁹³ See especially chapter 6 of this thesis.

⁹⁴ Article 12(1) of the Rome II Regulation provides: "The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into".

⁹⁵ Article 12(2) of the Rome II Regulation provides: "Where the law applicable cannot be determined on the basis of paragraph 1, it shall be: ...".

outside the scope of the Regulation. Consequently, these matters are subject to the conflict rules of *lex fori*.⁹⁶

General Provisions

The Regulation, like many treaties, contains a number of general provisions. For instance, Article 9 regulates the operation of overriding mandatory rules. Furthermore, pursuant to Article 21, the applicable law will be set aside if its provisions are manifestly incompatible with the forum's public policy.⁹⁷ Article 20 excludes *renvoi* and confines application to the internal provisions of the applicable law.⁹⁸ This section examines some of the general provisions.

FEDERAL STATE

In the case of a federal state that comprises several territories, and in which each territory has its own contract law, each territory must be treated as a country for the purpose of determining the applicable law under the Regulation.⁹⁹ Nevertheless, a Member State is not required to apply the Regulation to internal conflicts of law solely between its own territories.¹⁰⁰ However the United Kingdom has chosen not to utilise this permission.

⁹⁶ Peter Stone, n. 38 above, p. 284.

⁹⁷ Mandatory rules and public policy will be discussed in detail in Chapter 5 of this thesis.

⁹⁸ *Renvoi* will be discussed in detail in Chapter 3 of this thesis.

⁹⁹ Article 22(1) provides: "Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."

¹⁰⁰ Article 22(2) provides: "A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units."

RELATION WITH OTHER TREATIES AND MEASURES

The Regulation aims to avoid any conflict between the Regulation and other legislation adopted by the European Union that deals with questions governed by the Regulation. Therefore, Article 23 of the Regulation provides that the application of any European Union law that deals with particular matters will not be prejudiced by the Regulation.¹⁰¹ This is applicable whether the other European Union measure provides ordinary conflict rules or mandatory rules.¹⁰² Nevertheless Article 23 provides an exception in favour of Article 7 (on insurance), since the Regulation is intended to replace the choice-of-law provisions in the earlier Directives on insurance.

Furthermore, the Regulation aims to avoid any conflict with any existing international instrument to which a Member State is already a party that deals with questions that are within the scope of the Regulation.¹⁰³ Thus, Article 25(1) of the Regulation provides that the application of any existing international treaty to which a Member State is a party at the time of the adoption of the Regulation will not be prejudiced by the Regulation.¹⁰⁴ Consequently, with regards to the conflict between the Regulation and the Hague Agency Convention, preference will give to the Convention in France, the Netherlands and Portugal.¹⁰⁵ But if the UK wished now to become party to the Agency Convention, it would have to follow the procedure laid down by EC Regulation

¹⁰¹ Article 23 of the Regulation provides: "With the exception of Article 7, this 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 contractual obligations."

¹⁰² Peter Stone, n. 38 above, p. 285.

¹⁰³ Peter Stone, n. 38 above, p. 287.

¹⁰⁴ Article 25(1) 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 contractual obligations."

¹⁰⁵ See above, at p. 25.

662/2009,¹⁰⁶ which subjects such an accession to supervision by the EU Commission. Moreover, Article 25(2) of the Rome I Regulation provides that the Regulation will have precedence over any conventions concluded exclusively by two or more of the member states concerning matters within the scope of the Regulation.¹⁰⁷ However this does not apply to the Hague Agency Convention, since Argentina is also a party thereto.

Habitual Residence

Under the Rome I Regulation, in the absence of a choice of law by the parties, the law of the country in which an agent has his habitual residence will usually govern the relationship between the principal and the agent. Consequently, the definition of habitual residence is important.

Recital 39 of the Rome I Regulation explains that a clear definition of habitual residence will lead to certainty, especially in case of companies and other bodies, unincorporated or incorporated. In addition, it explains that for the purpose of choice of law habitual residence should be defined by a single criterion, unlike Article 60(1) of Brussels I, which adopted three criteria, because using a single criterion for choice of law purposes will enable parties to predict

¹⁰⁶ EC Regulation 662/2009, establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations; [2009] OJ L200/25.

¹⁰⁷ Article 25(2) of the Regulation provides: "However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation."

the law applicable to their relationship.¹⁰⁸ Consequently, Article 19 of the Rome I Regulation defines habitual residence as follows.

“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. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.”

This Article distinguishes between the habitual residence of a company and that of an individual.

THE HABITUAL RESIDENCE OF A COMPANY

For companies and other bodies, the habitual residence will be in the country in which the company or body has its central administration. The concept of central administration, under the Brussels I Regulation, was fully considered by the English Court of Appeal in *Young v Anglo American South Africa Ltd*, where Aikens LJ concluded that it refers to the place where the

¹⁰⁸ Recital 39 of the Rome I Regulation explains that "For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation."

company in question, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for its operations; or (put another way) to the place where the company, through its relevant organs, conducts its entrepreneurial management, for that management must involve making decisions that are essential for that company's operations. Such essential decisions must be distinguished from mere secondary management tasks, such as accounting and settling of tax matters. Thus, the concept usually refers to the place where the board of directors (or equivalent corporate organ) usually meets and takes important decisions.¹⁰⁹

Where the agent acts through a branch, two cases must be distinguished, in each of which the branch will count as the relevant residence of the agent. The first case is where the branch is involved in the conclusion of the contract. The second instance is where the branch is to be involved in the performance of the contract. Nonetheless, if several branches are involved in the conclusion or performance of the contract, it seems likely that one must revert to the main rules referring to the agent's central administration or (where he is an individual) his principal place of business. For instance, where a company has its central administration in the UAE, and has a branch in Paris, through which the contract was concluded, and another branch in London, from which the contractual performance is required. In this case, it seems likely that the law of the country where the central administration is located will apply.¹¹⁰

¹⁰⁹ Peter Stone, n. 38 above, pp. 71 and 310.

¹¹⁰ Dicey, Morris and Collins, n. 40 above, p. 1792.

As regards an individual agent acting in the course of his business, his principal place of business will usually counts as his habitual residence, though if the business has a branch which is involved, the exception for branches may apply.¹¹¹

In contrast, the Regulation does not define the habitual residence of an individual who is not acting in the course of his own business activities. Therefore, the question of determining his habitual residence in this case arises. It seems clear that in such a case an autonomous definition of habitual residence under EU law should be applied, rather than a reference to the *lex fori*.¹¹² Moreover, except where a special definition is included in a particular regulation, such as is provided for an individual carrying on his own business activity by the Rome I and Rome II Regulations, the concept of the habitual residence of an individual adult should usually have the same meaning in all the EU regulations in the sphere of private international law; that is, the Rome I and II Regulations, the Brussels IIA Regulation, the Maintenance Regulation, the Succession Regulation, and the Insolvency Regulation. A starting point may be the European Court's ruling in *Swaddling v Adjudication Officer*,¹¹³ given in a context other than private international law, that the habitual residence is the place in which the person has established on a "fixed basis, his permanent or habitual centre of interest", and that all relevant facts should be taken into account to determine such residence. The English court also adopted this principle in *Marinos v Marinos*¹¹⁴ and *Munro v Munro*.¹¹⁵

¹¹¹ See Indira Carr, *International Sales of Goods and the Rome I Regulation*, in *Research Handbook on EU Private International Law*, edited by Stone and Farah (Edward Elgar, UK, 2015), p. 216.

¹¹² Peter Stone, n. 38 above, p. 71.

¹¹³ Case C-90/97, [1999] ECR I-1075.

¹¹⁴ [2007] 2 FLR 1018 (Munby J).

¹¹⁵ [2008] 1 FLR 1613 (Bennett J).

More precisely, the definition of the concept of the habitual residence of an individual adult for the purpose of the EU regulations in the sphere of private international law should now be derived primarily from the ruling of the European Court in *Mercredi v Chaffe*.¹¹⁶ The case involved a woman of French origin, who had lived in England for about nine years, during which she gave birth to a child, and who had returned to France with her baby shortly after the birth. As regards the definition emerging from *Mercredi*, the following propositions appear to be justified.

In general an adult is habitually resident in the country in which he has intentionally established the centre of his interests on a lasting basis. However, a person cannot be habitually resident in more than one country at the same time. But he may have no habitual residence anywhere at a given time. Where he has several lasting centers of interests, he may be habitually resident at the principal of them, determined by reference to the length of time spent at and the strength of his social and familial connections with each of them; or, in case of equality, at the centre established earlier. Moreover, to become habitually resident in a country, an adult must be present in the country, for a moment at least, and while so present must have the intention of establishing in that country the centre of his interests, with the intention that this centre should be of a lasting character. Thus, one cannot be habitually resident in a country in which one has never set foot. But one may retain one's existing habitual residence despite temporary absences from the country, for example by way of holidays or business trips. Moreover, if the requisite intention exists, one may become habitually resident in a country from the moment when one arrives or returns there.¹¹⁷ Further, in determining whether the requisite intention exists, the actual duration of the person's stay in the country is a relevant factor, but account must also be taken of the extent of his integration in a social and family environment there, and this involves consideration of the reasons for his move to the country, the languages known to him, and his geographic and family

¹¹⁶ Case C-497/10-PPU, [2010] ECR I-14309.

¹¹⁷ Peter Stone, n. 38 above, p. 425.

origins. The requisite intention is probably that to have one's centre of interests in the country either for an indefinite period, or for a definite period of not less than three years. Thus, a soldier and the members of his family may become habitually resident in a country in which he is stationed and lives with the family members.¹¹⁸

Finally, a person may abandon his habitual residence in a country, even if he does not at the same time become habitually resident in another country; and in this situation he will for the time being have no habitual residence anywhere. Such abandonment will occur where he leaves or remains absent from the country of his existing habitual residence, and has the intention that the centre of his interests shall no longer be in that country.¹¹⁹

Assistance may also be drawn from the decision of Slade J in *Winrow v Hemphill*,¹²⁰ which involved a tort claim arising from a traffic accident in Germany in November 2009 between a car whose driver and passenger were of British nationality, and another car driven by a person of German nationality. The claim was between the passenger and her driver. Both women in the first car were living in Germany with husbands posted there in the British military. The passenger unsuccessfully claimed that she had been habitual resident in the UK, rather than Germany, because she and her husband had intended to return to the UK to live, and her presence in Germany was involuntary. Slade J followed the European Court's rulings and determined habitual residence by reference to residence in a particular place for the period of time necessary to acquire a degree of stability. The mere intention to reside somewhere did not determine habitual residence. Therefore, the court decided that:

¹¹⁸ Peter Stone, n. 38 above, p. 425. See also James Fawcett, Janeen M. Carruthers and Peter North, *Private International Law* (Oxford: Oxford University Press, 14th edition, 2008), p. 189.

¹¹⁹ James Fawcett, Janeen M. Carruthers and Peter North, n. 118 above, p. 191.

¹²⁰ [2014] EWHC 3164 (QB).

in my judgment the habitual residence of the Claimant at the time of her accident was Germany. When the Claimant came to live in England in 2011 her status changed and she became habitually resident here. However, the family's intention to return to live in England after the Claimant's husband's posting in Germany came to an end did not affect her status in November 2009.

Conclusion

As we have seen, there are similarities and differences between the provisions of the Hague Agency Convention 1978 and the provisions of the Rome I Regulation. Both have similar objectives, to achieve the unification of conflict rules. However, the Convention regulates the choice of law in regards to specific contracts and issues (agency contracts and the external relations between principals or agents and contractors), while the Regulation provides conflict rules for contracts in general.

Both have adopted a principle of universal application, so that the Regulation or Convention will apply whether that leads to the application of the law of a Member State or a Contracting State or to the law of a country that is not a party to the Regulation or Convention. However, participation in the Regulation is confined to countries within the European Union, whereas participation in the Convention is open to any country. Nevertheless, any country could choose to model its conflict rules on the Rome I Regulation, and Russia has in fact done so.

The Regulation limits its scope to cases that involve a conflict of laws, while the Convention requires agency contracts to have an international character. These criteria are very similar, since both are based on the presence of a foreign element (or perhaps an effective or significant foreign element).

The Regulation, like the Convention, has excluded some issues from its scope; for instance, family matters and succession on death are excluded. Matters related to judicial

procedure (such as the mode of trial) are also excluded from the scope of the Regulation and the Convention. Other excluded issues are conflict rules in respect of capacity, company matters, and trusts. Most importantly for the purpose of this thesis, the Regulation excludes the external authority of the agent from its scope. On the other hand, the Convention, unlike the Regulation, has granted each contracting state the right of reservation to exclude certain types of agency from the application of the Convention. Therefore, in terms of completeness, the Convention approach is better adapted than the Regulation approach to the needs of international trade in respect of agency relationships. This lacuna in the Regulation could be cured if the Regulation were amended by the addition of conflict rules in respect of agency external relationships. That will be examined in the later chapters (6 and 7).

The Convention and the Regulation both consider any territory which has its own law relating to the matter in question as capable of providing the applicable law. They also agree in permitting the exclusion from their scope by a participating State of internal conflicts solely between the laws of its territories in cases connected exclusively with those territories.

The Regulation, like the Convention, aims to avoid any conflict between its own provisions and other treaties that deal with questions within its scope. Nevertheless, the Convention's approach is that the application of the Convention will not affect the application of international instruments, already signed or to be signed in the future by a contracting state, dealing with questions governed by the Convention, without providing a definitive criterion to determine the preferable treaty in case of conflict between the Convention and another treaty.

The Regulation approach distinguishes between a conflict with a European Union measure and a conflict with another international instrument. With regard to a European Union measure, the Regulation provides that its application will not prejudice the application of any European Union legislation on particular matters concerning questions covered by the Regulation.

With regard to the conflict with other international instruments, the Regulation has adopted the criterion of precedence in time. Hence, if the international treaty was in force for the relevant Member State at the time of the adoption of the Regulation, preference will be given to the treaty rather than to the Regulation. Consequently, in the case of conflicts that may arise between the Regulation and the Convention in particular matters, such as the internal relationship between a principal and an agent, preference will be given to the Convention, since it existed before the adoption of the Regulation. Such preference for the Convention also accords with the principle of *lex specialis derogat legi generali*.

In this chapter, we have examined the Rome I Regulation and the Hague Agency Convention by addressing their historical context, their scope of application, and some of their general provisions. The next chapter will examine the UAE approach to conflict rules by examining the general provisions set out in the UAE Civil Code, since the overall aim of this thesis is to compare the UAE conflict rules with respect to agency with those of the Rome I Regulation and the Agency Convention.

CHAPTER THREE

CHOICE OF LAW IN THE UAE

Introduction

As was explained in Chapter One, UAE legislation is strongly influenced by Egyptian legislation; and this is especially true of the UAE legislation on questions related to conflict of laws, contained in Articles 10 to 28 of the UAE Civil Code. Some of these provisions (Articles 11–21) determine the law applicable to various particular issues, such as marriage, divorce, contract and tort. Others (Articles 10 and 22–28) deal with more general aspects of the operation of the choice of law rules.

Regarding choice of law questions, some provisions apply in all types of cases. Thus, Article 10 specifies the law applicable to the classification of the nature of relationships for the purpose of applying the choice of law rules. Article 23 authorises the court to apply the general principles of private international law to fill gaps in the specific choice of law rules. Article 25 provides the solution where a country has several legal systems. Article 26 regulates the question of renvoi, and Article 27 provides for the exclusion of the normally applicable law if its content offends the forum's public policy. All these provisions may impact on the determination and application of the law applicable to agency relationships. Therefore, this chapter addresses these provisions by way of background, since we will examine the conflict rules in respect of agency relationships according to the UAE legal system as one part of the comparative study in this thesis.

Consequently, the current chapter attempts to examine these issues, and in view of the purpose of the thesis, we also address the provisions of Article 19, which regulates the law applicable to contracts. Thus, we shall first examine the classification of matters and issues. Thereafter, we shall consider the law which governs contractual obligations. Next, we will examine the role of general principles of private international law. Then we will proceed to address renvoi. After this, we shall consider the possible impact of public policy on the applicable law. Then we will examine the question of proof of foreign law. Finally we shall consider determination of the applicable law in the case of a country with several legal systems.

Classification

The choice of law rules specified by the UAE legislation neither deal with all legal issues by means of a single general provision (for example, in favour of the law of the country which has the closest connection with the matter in question);¹ nor do they create a highly specific rule for each detailed legal issue. Rather, the approach adopted is to divide these legal issues into different categories, so that each category includes legal issues with similar features.² Thus, a court called on to determine the law applicable to any relationship or legal issue must determine the category to which the relationship or issue belongs. This procedure is known as classification. Accordingly the question arises as to the law by reference to which the court should classify a relationship or legal issue, as one law may classify the relationship or issue as

¹ See Ali Essa Aljasmi, (القانون الواجب التطبيق على الفعل الضار) *The Law Applicable to Torts* (UAE Researcher, 1st edition, 2011), p. 23.

² See Abdulla Saif Alsuboosi, *Choice of Law in Tort- A Comparative Study involving the Laws of the United Arab Emirates and of Other Countries*, (PhD Thesis, University of Essex, 2009), p. 80.

belonging to a different category from the category to which the matter is assigned by another law.³ For instance, the unjustifiable breaking-off of negotiations towards the conclusion of a contract may give rise to liability in tort in some civilian legal systems, such as the UAE, Egypt and France; however, in other countries, such as Germany and Switzerland, this is considered a contractual liability.⁴

As determining the law applicable to classification of relationships or issues for the purposes of private international law is of fundamental importance, many theories have been proposed to resolve this issue. For instance, some argue in favour of the *lex causae*, while others prefer classification by reference to comparative law. Nevertheless, the currently prevailing view is that classification is governed by the law of the forum; this approach is known as *Bartin's theory*.⁵

The UAE legislature has adapted *Bartin's theory* in Article 10 of the Civil Code, which provides:

“The law of the State of the United Arab Emirates shall be the authoritative source in determining relationships when the nature of such relationships requires to be determined in a suit in which there is a conflict of laws as to the law to be applied between the parties.”

This Article establishes that it is UAE law (the *lex fori*) which determines the nature of a relationship for the purpose of including it in a particular category in order to identify the law governing the relationship. However, after the court has determined the applicable law in this

³ Abdulla Saif Alsuboosi, n. 2 above, p. 88.

⁴ Ahmed Abdulkarim Salama, (النظام القانوني لمفاوضات عقود التجارة الدولية) *The Legal System of The Negotiation in International Trade Contract*, (2003) V11 Security and Law Journal (Dubai Police Academy), p. 253.

⁵ *Bartin, Etienne A., Principes de Droit International privé, selon la loi et la jurisprudence francaises.* (éditions Domat- Montchrestien, 3, place de la Sorbonne, 1930). p. 228.. See also Okasha Mohamed Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 716.

way, other classifications may become relevant under the *lex causae*. For instance, if the claim is treated as contractual in accordance with Article 10, the proper law of the contract, determined in accordance with Article 19, will apply, and this law may have different rules for contracts of agency from its rules for contracts of distribution. It will then be necessary to determine whether the contract in question is a contract of agency or a contract of distribution, and for this purpose the proper law will provide the relevant definitions. In any event, when interpreting the forum's conflict rules in accordance with Article 10, the court should use a broader concept of issues or relationships than that contained in its internal law, so that its conflict rules are able to absorb issues and relationships which exist under various foreign legal systems. Such broad-mindedness is authorised by Article 23 of the Civil Code.⁶

Furthermore, the UAE legislator has adopted an exception to Bartin's theory by virtue of Article 18(2), which provides that "The *lex situs* of the place in which real property is situated shall apply to contract made over such property." Consequently, the law of the country where the property is located governs the classification of a property's nature as immovable or movable.

Evaluation of the UAE approach (Bartin's theory)

It seems Bartin's theory is the best approach to classification in relation to choice of law rules for many reasons. The first reason is that classification involves the interpretation of the forum's choice of law rules; thus, logically, it is appropriate to interpret these rules according to *lex fori* rather than another law. Another reason is that the identification of the applicable law

⁶ Okasha Mohamad Abd Al-aal, n. 5 above, p. 113.

logically follows, rather than precedes, the characterisation of the relationship or issue; consequently, it is impossible to classify the relationship according to the *lex causae*, whose identity is not yet known, and the best approach is to apply the *lex fori*.⁷ Moreover, the legal environment in the forum country and the prevailing principles of its law will influence the court when classifying a relationship or issue; hence, adopting this theory makes the court's task much easier.⁸

Regarding the exception of Bartin's theory - the classification of the nature of property by reference to the *lex situs*- some argue in favour of the proprietary exception by providing that the desirable approach is to adopt Bartin's theory as a whole, which include the exception in favour of *lex situs* of property as the UAE law did.⁹ Others argue the exception is not important, as the UAE law does not distinguish between immovable and movable property with respect to choice of law rules.¹⁰ The latter view is not wholly justified, since the UAE law in some cases does make the application of the choice of law rules dependent on the classification of property as immovable or movable; for instance, Article 19(2) of the UAE Civil Code makes the law governing a contract in respect of an immovable property different from the law governing a contract dealing with a movable property under Article 19(1).¹¹

⁷ Abdulla Saif Alsuboosi, n. 2 above, p. 90.

⁸ See Awad Allah Al-Saiid, (أحكام تنازع القوانين وتنازع الاختصاص القضائي الدولي في القانون الإماراتي) *The Provisions on Conflicts of Law and Conflicts of International Jurisdiction in Emirate Law* (Dubai Police Academy, 1st edition, 1993), p. 64.

⁹ Ibid, p. 77.

¹⁰ Essam El-Din Al- Qasabi, (القانون الدولي الخاص لدولة الإمارات العربية المتحدة، تنازع الاختصاص القانوني الدولي) *The UAE Private International Law, Conflict of Laws* (UAE University, 2nd edition, 1991), p. 70.

¹¹ Article 19 provides:

In general, it seems that the best approach to the characterisation of relationships or issues (leaving aside movable and immovable property) is that one should apply the *lex fori*, but use its private international law, not its internal law. A broad, internationally-minded, approach is appropriate, taking account of the purposes of the forum's choice of law rules as well as the need for international harmony. It is the primordial legal error to suppose that the same concept must have exactly the same meaning for the purpose of different legal rules.

Contractual Obligations

The UAE legislation, like that of most other countries, grants to contracting parties the freedom to choose expressly or impliedly the applicable law; however, if no such choice is made, the court will apply the default rules. Thus, Article 19(1) of the Civil Code provides:

The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.

It should be noted that the official English translation of Article 19 might be interpreted as restricting the parties' freedom available under Article 19 to cases where the parties are not

"(1) The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.

(2) The *lex situs* of the place in which real property is situated shall apply to contract made over such property."

resident in the same country. However, this interpretation is incorrect, as the text of the authoritative Arabic version makes it clear that the Article enables the parties to choose explicitly or impliedly the applicable law even where they reside in the same country. If the parties do not choose the applicable law, the court will use the default rules to apply the law of the parties' common residence, if a common residence exists; or, if not, that of the place of contracting. The text in Arabic is clear and all Arab commentators tend to agree.¹²

Moreover, the UAE courts have admitted this interpretation in many decisions. For instance, the federal Supreme Court has decided in numerous cases that the law of the parties' common residence will govern their contract if the parties do not select the applicable law.¹³ This interpretation is consistent with the international trend in respect of conflict rules in the field of contract law, and it is based on granting the parties the freedom to determine the applicable law as the primary rule. If they do not, the court will apply the default rules.

It should be noted Article 19(1) does not distinguish between the contractual formalities and the substance of the contract. Consequently, the formal validity of contractual obligations will be subject to the law that is selected expressly or impliedly by the parties, to the law of the parties' common residence, or to the law of country of conclusion of the contract, as the case may be.

A normal choice of law clause (for example, one specifying "This contract shall be governed by Egyptian law.") will apply to both form and substance. But Article 19 appears to

¹² See Ahmad Alhawary, (الموجز في القانون الدولي الخاص الإماراتي) *The Emirate Private International Law* (Ithraa Publishing and Distribution, Jordan, 3rd edition, 2012), p. 458. See also Okasha Mohamad Abd Al-aal, n. 5 above, p. 697; and Awad Allah Al-Saiid, n. 8 above, p. 284.

¹³ See the federal Supreme Court decisions in Case 212, 255/1990, 19 June 1990; Case. 201, 270/1998, 15 February 1998; and Case 364/2005, 17 May 2005.

enable the parties expressly to select one law to govern form and another law to govern substance, or to choose expressly a law to govern the substance of the contract without mentioning the law governing its form.¹⁴ Some argue that in the last-mentioned case, the law expressly chosen to govern the substance of the contract will be impliedly chosen to govern form if the form used is valid according to that law; but that if the form used is invalid under that law, the court should apply the law of the common residence or the law of the place of contracting under which the form is valid.¹⁵

It should be noted that under Article 19(2) the parties do not have the freedom to choose the law that will govern a contract which deals with immovable property. Such a contract will always be subject to the *lex situs*.¹⁶

Evaluating the UAE approach

Granting the parties the freedom to select an applicable law is recognised as a desirable approach in various legal systems and various international conventions, regulations and treaties. Nevertheless, the default rules adopted by Article 19(1) are open to criticism. The parties often do not reside in the same country. Moreover in recent years numerous contracts have come to be concluded electronically; hence, the default rule in favour of the law of the place of contracting gives rise to increasing difficulty in determining that place. In addition, the default rules utilise rigid criteria which may not be appropriate to particular types of contract, such as banking

¹⁴ Okasha Mohamad Abd Al-aal, n. 5 above, p. 751.

¹⁵ Ibid.

¹⁶ Article 19 (2) provide : "The *lex situs* of the place in which real property is situated shall apply to contract made over such property."

transactions¹⁷ or agency contracts. Moreover the UAE legislation does not provide for an escape clause in favour of the law which has a closer connection to the contract.

Further, the UAE legislation does not contain any explicit provisions in the field of choice of law designed to secure protection of weaker parties in relation to certain contracts, such as consumer, insurance and employment contracts. However, it is recognised elsewhere that these kinds of contract require special provisions with respect to conflict rules.¹⁸

Due to the criticisms of the default rules in Article 19(1), commentators¹⁹ suggest the application of the general principles of private international law pursuant to Article 23 of the Civil Code to replenish deficiencies regarding conflict rules in the field of contracts.

The Principles of Private International Law

Article 23 of the UAE Civil Code provides that “The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws.”²⁰ This Article grants the court the ability to apply general principles of private

¹⁷ Okasha Mohamad Abd Al-aal, n. 5 above, p. 744.

¹⁸ See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 1948. See also Peter Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), p. 343.

¹⁹ Okasha Mohamad Abd Al-aal, n. 5 above, p. 743.

²⁰ This corresponds to Article 24 of the Egyptian Civil Code. It should be noted that the Arab commentators and scholars have not studied this provision sufficiently, but have confined their efforts to considering its application in certain areas, such as contracts or torts. Nonetheless, Samia Rashid, (نور المدة 24 مدني في حل مشكلات تنازع القوانين) “*The role of Article 24 to solve the problems of conflict of laws*” (Cairo University), while not elaborating on the concept, has endeavoured to identify some relevant principles of private international law; for instance, that state

international law to determine the appropriate conflict rule for the matter in question, where it is not governed by any provision of the conflict rules specified in the UAE Civil Code. The legislator of this provision wishes to keep abreast of recent developments in the field of conflicts of law. Nevertheless, questions arise regarding the establishment of such principles with a view to applying them; or, in other words, as to when a choice of law rule can be considered as falling within the scope of the concept of general principles of private international law.

The first problem which arises from Article 23 is to determine the characteristics which must be possessed by a choice of law rule to enable it to qualify as embodying a general principle. Some argue that a conflict rule may be regarded as a general principle of private international law when it has been adopted by the numerous legal systems, national courts in various countries, international courts or international arbitrations.²¹ Furthermore, provisions adopted by treaties, conventions, or supranational regulations may be recognised as embodying general principles. Some argue that a UAE court may rely on Article 23 of the Civil Code to utilise a rule which applies in the USA;²² however, this view cannot be acceptable unless other countries or other legal systems have adopted the same rule. In other words, a general principle should be one which is accepted in many countries. It need not be universally accepted, but acceptance in one country (even the USA, which contains about 50 law districts, and has given rise to an enormous volume of litigation dealing with conflicts between their laws) is not enough. Treaties and EU regulations may be sufficiently widely accepted. If international practice is divided between two conflicting approaches, Article 23 should be interpreted as authorizing the

contracts are not subjected to the default rules in Article 20 of the Egyptian Civil Code (Article 19 of the UAE Civil Code). Rashid's work has also identified some important questions that will be discussed in the present thesis.

²¹ Samia Rashid, n. 20 above, p. 8.

²² Abdulla Saif Alsuboosi, n. 2 above, p. 181.

UAE courts to make a choice between them, to be exercised in the light of UAE values, needs and policies.

Another important question which may arise concerns the role of the general principles of private international law. The first role of these principles is to establish conflict rules from other sources to supplement the UAE Civil Code where it does not contain any conflict rule on the matter in question. Such a role is consistent with the explicit text of Article 23. A second, and similar, role is to assist where the UAE Code is ambiguous, and needs interpretation to resolve the ambiguity. For example, as to the time at which the parties to a contract may conclude their agreement as to the law governing the contract. Much more controversial is the argument, which some have advanced, that Article 23 may be treated as an escape device granting the court a basis for disregarding the conflict rules explicitly provided in the Civil Code and instead applying a conflict rule drawn from other legislation.²³ A further possible role, for which some have argued, is that the court may rely on Article 23 to restrict the operation of an existing rule. For example, although Article 19(1) permits the court to infer an implied choice from the circumstances, without any explicit requirement of reasonable certainty or clear demonstration, some argue in favour of relying on Article 23 to insist that an implied choice should be clearly or certainly demonstrated by reference to the terms of the contract or the circumstances of the case.²⁴

In addition, some practical questions arise about the feasibility and effectiveness of these roles for Article 23. First, some facts should be considered. There is rare judicial precedent in the UAE courts relating to Article 23 of the Civil Code. Moreover, in the UAE the burden of

²³ Abdulla Saif Alsuboosi, n. 2 above, p. 181.

²⁴ Okasha Mohamad Abd Al-aal, n. 5 above, p. 710.

invoking foreign law and proving its content rests on the litigants (plaintiff and defendant). Thus, foreign law is ignored unless one or both of the parties requests the court to apply a conflict rule, and that party must then prove the content of the applicable law. This practice has been established in the UAE courts by many decisions. For instance, the federal Supreme Court²⁵ and the Dubai Court of Cassation²⁶ have decided in numerous cases that a litigant who asks for the application of a foreign law must prove and provide an official translation of it.

Moreover, it seems arguable that the establishment of a general principle of private international law, with a view to its adoption in the UAE under Article 23, will also be held to be subject to a requirement that a plaintiff or defendant must prove that the relevant conflict rule has been adopted by various legal systems, national courts in numerous countries or international courts or arbitrations, or has been recognised by an international treaty or similar measure. If so, this burden will severely limit the practical effect of Article 23.

To return to the discussion of the legitimate scope and effect of Article 23, it seems that where there are no existing conflict rules in the Civil Code which are applicable to the issue or matter, the UAE court may utilize Article 23 to recognise and apply a general principle of private international law. On the other hand, if there is an existing conflict rule in the Civil Code, it is not easy to consider Article 23 a legitimate escape device from the rule enacted, as the fundamental rule on interpretation of legal texts is that where the text is clear, the court should apply it without departing from its clear and explicit meaning. Consequently, the application of Article 23 in the case of existing conflict rules should be severely limited by reference to the

²⁵ See the federal Supreme Court decisions in Case 257/2001, 28 March 2001.

²⁶ See the Dubai Court of Cassation decisions in Case 258/1999, 2 October 1999; and Case. 17/2001, 10 March 2001.

purpose of the legislation; the economic, social, political or moral interests that the legislature intends to achieve from the legal text of an Article.

The best example of the application of Article 23 is in the area of the law applicable to contracts. Although the text of Article 19 is clear and explicit, Article 23 may also be applied for several reasons. Firstly, the Explanatory Memorandum of the Civil Code points out the legislator chose an elastic formulation to allow the court some scope for creativity, as well as to enable the use of recent developments in jurisprudence.²⁷ Secondly, the legislator has not directly regulated by specific rules the choice of law for certain contracts which have a special nature. Consequently, the default rules in Article 19(1) may be inflexible and unsuitable for contracts such as bills of exchange and promissory notes, where the document is intended to embody a precise obligation in a special way.²⁸ In this case, the text of Article 19, as regards the default rules, may be regarded as a defective text that must be interpreted in a manner that eliminates this defect by using conflict rules drawn from other legal systems as indicating general principles of private international law.

Another situation in which recourse may usefully be had to Article 23 in relation to contracts is where the parties do not reside in the same country²⁹ and there is difficulty in determining the place of contracting; particularly where the parties conclude a contract by communications across borders, especially as there are various rules to resolve this question

²⁷ UAE Ministry of Justice, Explanatory Memorandum of the Federal Act No 5 of 1985 (Civil Transactions Act), p. 29.

²⁸ Okasha Mohamad Abd Al-aal, n. 5 above, p 742.

²⁹ Foad Mohammed Alodaini (تحديد القواعد القانونية الواجبة التطبيق على عقود الوسطاء التجاريين ذات الطابع الدولي) *Determination of the Legal Rules Applicable to International Commercial Agency* (PhD thesis, Cairo University, 2012), p. 71.

according to different legal systems.³⁰ Moreover, one might argue that the reference in Article 19 to the place of contracting is impliedly limited to cases where the entire negotiations took place unambiguously in a single country, and that otherwise there is no single place of contracting to which the reference by Article 19 applies. In other words, in some situations the court cannot apply the default rules in Article 19 of the Civil Code because the parties do not have a common residence and the place of contracting cannot be determined. This means that there is a gap or lacuna in the enacted conflict rules. Consequently, Article 23 will apply because there are no other relevant provisions of the conflict of laws in the UAE Code. But it is only where, by means of a legitimate process of interpretation, that such a gap or lacuna can be established, that it is legitimate to apply Article 23 so as to override an otherwise apparently clear and complete enactment in this way.

A remaining question in relation to Article 23 arises where examination of the conflict rules applied in other countries reveals a dichotomy in international practice. For example, for the same issue, some countries may refer to the law of the nationality of the relevant person, while other countries refer to the law of his habitual residence. In this case, the UAE court should decide which rule should apply to the issue in question in the light of the interests of the state, the parties and (where relevant) the weaker party. The general objectives and purposes of the UAE legislation should also be considered. In other words, the UAE court should choose the general principle which it considers more useful, in the light of UAE values, needs and policies.

³⁰ Walter Breslauer, *Agency in Private International Law*, (1938) 50 Juridical Review, p. 284. See also Hisham Sadek, (القانون الواجب التطبيق على عقود التجارة الدولية) *The Applicable Law on the International Trade Contract* (Dar Alfekr Aljamae, Alexandria, 2001), p. 555.

But once a UAE court has made its choice, its decision should serve as a precedent in other cases dealing with the same issue.

Renvoi

In any legal system, there are two kinds of rule: substantive rules and choice of law rules. When the forum's choice of law rules point to the application of a foreign law, the question arises as to whether the court should simply apply the internal substantive rules of that foreign law, or whether it should also take into account the conflict rules of the said foreign law. In the latter case it will be utilizing some version of a doctrine of renvoi. In other words, the question of renvoi will arise when the forum's conflict rule refers to a foreign law; but the conflict rules of that law refer the question to the forum law or to the law of a third country.³¹

With regard to the problem of renvoi, any legal system may resolve this question in one of three possible ways. In the first approach, the court may simply apply the domestic substantive rules of the foreign law and ignore its conflict rules. This is called the internal law theory. In other words, whenever the forum choice of law refers to the law of a particular country, the court simply considers the internal law of that country, regardless of the private international law of that country.³²

Single (or partial) renvoi is another approach that may be followed by the forum. This approach occurs when the *lex fori* refers to the law of a particular country, and the court takes account of the conflict rule of that country, which either refers back to the *lex fori*, or onwards to

³¹ Dicey, Morris and Collins, n. 18 above, p. 79.

³² Abdulla Saif Alsuboosi, n. 2 above, p. 232; see also James Fawcett, Janeen M. Carruthers and Peter North, *Private International Law* (Oxford: Oxford University Press, 14th edition, 2008), p. 59.

the law of a third country. On this approach the forum accepts the remission to the *lex fori*, and applies its own internal law; or it follows the transmission to the law of third country, and applies the internal law of the third country.³³

Double (or total) *renvoi* is also an approach that may be adopted. In this method, the forum will resolve the question of *renvoi* by endeavouring to decide the issue in the same manner as would be followed by the courts of the foreign country whose law is referred to by the forum's conflict rule. For instance, if we suppose that the UAE adopted this approach, and the UAE conflict rule referred the issue to Indian law, the UAE court would try to resolve the *renvoi* so as to apply whatever internal law would be applied to the issue by the Indian courts if they had been seised of the dispute. Thus, if the Indian conflict rule referred to UAE law and was construed as referring to UAE domestic law, the UAE Court would also apply UAE internal law. However, if the Indian conflict rule referred to the UAE conflict rule and accepted the reference by the UAE conflict rule to Indian law, the UAE court would apply Indian domestic law.³⁴

The situation in the UAE

In the UAE, the legislator has regulated the problem of *renvoi* by Article 26 of the Civil Code, which provides that:

³³ Dicey, Morris and Collins, n. 18 above, p. 80. See also Abdulla Saif Alsuboosi, n. 2 above, p. 232; and Joseph Lookofsky and Ketilbjorn, *European Union Private International Law in Contracts and Tort* (DJOF Publishing, Copenhagen, 1st edition, 2009), p. 22.

³⁴ Dicey, Morris and Collins, n. 18 above, p. 80.

“(1) If it is established that a foreign law is to be applied, only the domestic provisions thereof shall be applied, to the exclusion of those provisions relating to private international law.

(2) Provided that the law of the United Arab Emirates shall apply if international law relating to applicable law provides that United Arab Emirates law shall apply.”

According to this Article, it is clear the UAE legislation regarding renvoi has adopted a general principle and an exception. The general principle is the rejection of renvoi and the application of the domestic provisions of the applicable law. Hence, a party who invokes the application of foreign law should prove the substantive rule of the applicable foreign law. The exception is that if the applicable law refers back to the *lex fori*, the UAE court will accept the renvoi and apply the domestic provisions of UAE law. Nonetheless, a party relying on Article 26(2) to override Article 26(1) must prove the foreign conflict rule referring to UAE law.

Evaluating the UAE approach

Scholars are divided with respect to the UAE approach to renvoi into two groups. The first group is opposed to the admission of renvoi. Consequently, they support the approach adopted by Article 26(1) of the Civil Code, which rejects renvoi and applies the domestic provisions of the applicable law. However, they argue against the exception in Article 26(2), which admits partial renvoi to the *lex fori*, on the grounds that this is contrary to the principle of legal consistency and the standardisation of solutions between countries in respect of the relationship in question. Standardization would only be achieved if some countries adopted the doctrine of renvoi and others rejected it. Moreover in some cases the renvoi may be contrary to

the parties' expectations, and in other cases it is worthless, particularly when the UAE conflict rules are similar to the conflict rules in other countries.³⁵

The second group, who support the use of renvoi, argue that the application or rejection of the renvoi (partial and total) should be based on the purpose and object of the relevant conflict rule; thus, the decision should consider each case individually. They would prefer the UAE legal system to adopt the whole renvoi doctrine not by enactment, but by leaving to the court the decision to accept or reject the renvoi in each case. Therefore, they justify the UAE law approach in Article 26(2) by arguing that this approach will achieve the national interests of the country, and that the application of the *lex fori* makes the court's task much easier.³⁶

Through reading and analysing the last-mentioned approach, which supports the use of renvoi, several conclusions can be drawn. First, this approach would grant the court great discretion. Secondly, this approach would apply renvoi in all cases except those wherein a difficulty arises, such as when the *lex fori* refers to the law of country (A) and this law refers to the law of country (B), which refers to the law of country (C), and this law refers to the law of (A) or (B); one would then reject the use of renvoi and apply the internal law of country (A). It also rejects the use of renvoi if *lex fori* refers to the law of country (A), which refers to the law of country (B), which accepts the application of its domestic provisions, but these are contrary to the public policy of the forum; then the internal law of country (A) will be applied.

Thirdly, that group of commentators would also use renvoi as an escape device for any conflict rules which they consider inappropriate to the matter in question. For example, suppose that students from the UAE travel to New York, and all the students have UAE nationality and

³⁵ Ahmad Alhawary, n. 12 above, p. 360.

³⁶ Okasha Mohamad Abd Al-aal, n. 5 above, p. 136.

normally reside there. During the visit to New York, one student injures another student. In this case, according to Article 20(1)³⁷ of the UAE Civil Code, the court will apply New York law, which is not appropriate in this case. However, a more acceptable result could be reached if we suppose New York law refers to UAE law as that of the common domicile or residence (as is indeed likely in most constituent states of the USA).³⁸

Nonetheless, it seems to the current writer that using renvoi as an escape device is inconsistent with the legislative purpose and objectives of the conflict rules established by the UAE legislator. Furthermore, these commentators also advocate the principle that the court should itself, of its own motion, apply the relevant conflict rules and ascertain the content of the relevant foreign law. But at present, in the UAE, it is for the parties to request the application of conflict rules and to provide proof of the foreign law, including as regards the invoking and proof of the domestic provisions alone of the applicable law or also of its conflict rules. Thus, the current situation of the UAE regarding proving the applicable law makes it difficult to accept this approach.

Contractual obligations and renvoi

The majority of scholars argue renvoi should not be applied in the area of contractual obligations. Consequently, whether the parties select the law governing their contract or this law is determined by the default rules, it is the substantive rules of this law which will be applied,

³⁷ Article 20(1) of the Civil Code provides: "Non-contractual obligations shall be governed by the law of the state in which the event giving rise to the obligation took place."

³⁸ Okasha Mohamad Abd Al-aal, n. 5 above, p. 146. See also *Neilson v Overseas Projects Corp of Victoria Ltd* [2006] 3 LRC 494 (High Court of Australia).

and not its conflict rules.³⁹ Accordingly, at EU level, the Rome I Regulation excludes the application of renvoi within its scope by virtue of Article 20;⁴⁰ and similar provision is made by the Rome II Regulation in respect of torts and restitutionary obligations. Renvoi is also excluded in relation to contracts by the traditional laws of many European countries; including England and France. It is also excluded for many matters by various Hague Conventions.

Others argue that whenever the parties choose expressly or impliedly the applicable law, the substantive rules of this law should be applied. But if the applicable law is determined by default rules, consideration should be given to the nature of these default rules. Thus, if the legislation adopts a rigid approach (as in the UAE legal system), the court should admit renvoi, as this rigid approach is not appropriate to certain contracts. Consequently, renvoi is accepted as an escape device or correction method that achieves the parties' interests. In contrast, if the default rules utilise a flexible approach, as by referring to characteristic performance and closest connection, renvoi should not be applied.⁴¹

It can be concluded that whatever the merits, article 26 does not explicitly exclude contractual claims. The most conventional view must be that article 26 applies to such claims,

³⁹ See John O'Brien, *Conflict of Laws* (Cavendish Publishing Ltd, UK, 2nd edition, 1999), p. 140. See also Talia Einhorn, *Private International Law in Israel* (Wolters Kluwer Law and Business, New York, 2nd Edition), p. 56 ; see also Geert Van Calster, *European Private International Law* (Hart Publishing, Oxford, 2013), p. 8; and Joseph Lookofsky and Ketilbjorn, n. 33 above, p. 22.

⁴⁰ Article 20 of the Regulation provide: "The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation."

⁴¹ Okasha Mohamad Abd Al-aal, n. 5 above, p. 156.

and accordingly that an internal law approach is operative, with an exception for remissive partial renvoi to UAE law. This appears to be the case whether the proper law is determined by reference to party choice or to the default rules.

Public policy

The UAE legislation, like many others, recognises the principle of public policy in the context of choice of law rules. This is by virtue of Article 27 of the UAE Civil Code, which provides:

“It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a, public order, or morals in the State of the United Arab Emirates.”

Consequently, the court should refuse to apply the normally applicable law if such an application would infringe on the basic concepts and fundamental values underpinning the UAE community. In other words, the applicable law will be set aside if its provisions are manifestly incompatible with the UAE public policy or Islamic Shari'a.

The concept of public policy in the UAE

The UAE legal system does not have a definition of public policy and does not list the issues involved in public policy. Consequently, some argue that public policy is related to the basic concepts and fundamental values underpinning the UAE community; however, regarding private international law, the issues that fall within the scope of public policy cannot be listed, as

the concept of public policy is not constant and changes from time to other. The court determines whether the question is within the scope of public policy.⁴²

The explanatory memorandum of the UAE Civil Code provides that the concept of public policy in internal law differs from the notion relevant when the relation contains a foreign element under private international law.⁴³

The UAE legislation, differing from the corresponding Egyptian legislation, has added the terms “Islamic Shari’a” to Article 27; thus, the question arises regarding the notion of Islamic Shari’a in relation to public policy.

Some argue the concept of Islamic Shari’a law falls naturally under the concept of public policy as part of it; consequently, specific reference to Islamic Shari’a is not needed. It has also been argued that not all Islamic Shari’a rules should be considered to fall within public policy, but only the Islamic Shari’a rules which have been included in the statutory codification should be considered to do so.⁴⁴ On the other hand, although the protection of the fundamental rules of Islamic Shari’a law might have been accomplished under the general reference to public policy, the specific reference to Islamic Shari’a confirms that the provisions of the Civil Code are compatible with Islamic Shari’a.

Furthermore, it seems to the present writer that the interpretation of Islamic Shari’a in Article 27, as limited to the Shari’a rules that have been codified, is unacceptable. Article 1 of the Civil Code states in the absence of any provision of the Civil Code, the court should apply the

⁴² Okasha Mohamad Abd Al-aal, n. 5 above, p. 378.

⁴³ The UAE Ministry of Justice, Explanatory Memorandum of the Federal Act No 5 of 1985 (Civil Transactions Act), p. 34.

⁴⁴ Abdulla Saif Alsuboosi, n. 2 above, p. 261.

provisions of Shari'a.⁴⁵ Article 2(3) of the UAE Personal Status Code also states in the absence of any provision in this Act, the court should apply the provisions of one of the Sunni schools of Shari'a law, selected in a specified order.⁴⁶ Consequently, according to these two Articles, the provisions of Shari'a may be applied despite not being codified; and in such cases there is no reason why they should not be capable of being considered public policy within Article 27 of the Civil Code.

Moreover, the codification of some Shari'a provisions is not within the scope of public policy. The best example of that is Article 1(2) of the UAE Personal Status Code, which states this measure has codified some Shari'a provisions. However, not all of its provisions are considered as universally applicable public policy, as this Act will not apply to non-Muslim citizens who belong to a group for which special provisions have been adopted. It also does not apply to non-citizens if they ask for the application of their own law.⁴⁷

⁴⁵ Article 1 of Civil Code provides: "Legislative provisions shall be applicable to all matters dealt therein, in letter and context. In presence of an absolutely unambiguous text, there is no room for personal interpretation. In the absence of a text in this Law, the judge shall adjudicate according to the Islamic Shari'a taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad Ben Hanbal and, if not found there, then in the schools of Imam El Shafe'i and Imam Abou Hanifa, as the interest so requires. Where no such solution is found, the judge shall decide according to custom, provided it is not incompatible with public policy and morals. In case the custom is restricted to a specific Emirate, it shall be effective therein."

⁴⁶ Article 2(3) of Federal Act 28/2005 on Personal Status (Family Act) provides: "In the absence of a text in this Law, judgment shall be given in accordance with what is widely known of Malik's doctrine, then Ahmed's, then El Shaffei's, then Abi Hanifa's doctrine."

⁴⁷ Article 1 (2) provides: "The provisions of this Law shall apply on citizens of the United Arab Emirates State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non citizens unless one of them asks for the application of his law."

In other words Shari'a law cannot be confined to rules which have been specifically codified, but must extend to rules which apply in the UAE under general enactments, such as Article 1 of the Civil Code. But the reference to Shari'a law must be confined to rules which, in one way or another, form part of UAE internal law.

Some argue that not all of Shari'a law constitutes public policy. Some its provisions establish a public policy applicable only to Muslims, while other provisions establish a public policy extending both to Muslims and non-Muslims.⁴⁸ It can also be argued that the reference to Shari'a law in Article 27 can be limited in various other ways. Some rules may leave to the legislator a choice of ways of achieving a result compatible with Islamic requirements, and in such cases any rule which could be reasonably considered compatible with those aims could then be regarded as acceptable.

Furthermore, it should be noted that if the foreign law is based on Shari'a law, but it adopts a different approach to Shari'a,⁴⁹ it will not necessarily be incompatible with UAE public policy; for instance, if Qatar adopts Abi Hanifa's doctrine, which is different from Malik's doctrine adopted by UAE law, then the Qatar law is not incompatible with UAE law since Hanifa's doctrine is not fundamentally different from Malik's doctrine. Nevertheless if the foreign law is based on the doctrine of a group of Islam other than the Sunni group adopted by UAE law, the court will have to decide whether the foreign rules in question are fundamentally incompatible with the UAE version of Shari'a law; and if so, they will be set aside. However, rules adopted by a Shia version of Islamic law are not necessarily fundamentally incompatible

⁴⁸ Okasha Mohamad Abd Al-aal, n. 5 above, p. 385.

⁴⁹ Shari'a law is divided into many groups, such as the Sunni groups and the Shia groups, and the Sunni group is divided into four schools, those of Malik's doctrine, Ahmed's doctrine, El Shaffei's doctrine, and Abi Hanifa's doctrine.

with the UAE version of Shari'a law; for instance, the UAE Supreme Court has decided that the Kuwaiti law based on Shia doctrine should apply to govern a claim between Kuwaiti parents in accordance with Article 16 of the UAE Civil Code (on the protection of children).⁵⁰

The results of the application of public policy

The application of the public policy provision has two main results: a negative result, which is the exclusion of the relevant substantive rules of the normally applicable law. This exclusion is limited to the provision that is contrary to public policy. Thus, the court will apply other provisions of the applicable law that are consistent with public policy. In other words, the court will not exclude the entire applicable law, but only the part which is inconsistent with the public policy of the *lex fori*. Nonetheless, if the unacceptable element the applicable law cannot be severed from other parts of that law, a merely partial elimination will not be possible.⁵¹

The exclusion of the whole or part of the applicable law will lead initially to a legislative vacuum, which needs to be filled. The best method of filling this gap is to apply the *lex fori*, since the elimination of the foreign law is a result of opposition to the forum's public policy; consequently, the protection of that public policy will be accomplished through the application of the *lex fori*, instead of the excluded foreign law.⁵²

⁵⁰ See the federal Supreme Court decision in Case 254/25, 29 January 2005.

⁵¹ Okasha Mohamad Abd Al-aal, n. 5 above, p.402. See also Abdulla Saif Alsuboosi, n. 2 above, p. 259.

⁵² Abdulla Saif Alsuboosi, n. 2 above, p. 259.

Proof of Foreign Law

Where a relationship involves a foreign element and the conflict rules in the lex fori call for the application of foreign law, two questions about pleading and proving the foreign law must be addressed. The first question is whether the court will apply the forum's conflict rules of its own motion, or the parties must ask the court to apply those rules. The second question is whether the court will seek to determine the provisions of the foreign law and apply them, or the parties must prove the content of the foreign law.

The UAE Civil Code does not contain any provisions to answer these questions. But Article 1(2) of the federal Act No. 28/2005 on Personal Status (Family Law) provides that:

"The provisions of this Law shall apply to citizens of the United Arab Emirates State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non-citizens unless one of them asks for the application of his law".

The Practice of the UAE Courts

The UAE Supreme Court judgments have established that foreign law must be treated as a question of fact; consequently, the parties must ask the court to apply it and they should also prove its content. The court has further insisted that the foreign law should be translated into Arabic. Otherwise, the court will apply its own law.⁵³

⁵³ See the UAE Supreme Court decisions in Case 171/14, 29 November 1992; Case 257/21, 28 March 2001; Case. 278/24, 26 April 2003; Case 364/ 25, 14 February 2005; Case 84/27, 25 April 2007; and Case 253/ 2009, 27 October 2009.

Although the Dubai Court of Cassation adopted this approach in numerous earlier cases, at one stage it changed its approach and adopted another principle, that the conflict rules in respect to personal status are related to public policy. Consequently, the court should apply the forum's conflict rules, whether or not the parties ask for the application of those rules. In addition, in the application of the foreign law, the court must investigate that law's provisions.⁵⁴ Thus, the Dubai Court of Cassation considered foreign law to be a question of law not fact.

In response, the UAE legislator enacted Federal Act No. 28/2005 on Personal Status Act (Family Act), which in Article 1(2) provides that the parties should ask the court to apply the foreign law; otherwise the court will apply the *lex fori*. Furthermore, the Explanatory Memorandum of the UAE Personal Status Act explains that, in the case of non-citizen personal status, UAE law will be applied unless the parties ask the court to apply their foreign law and prove it, since foreign law is a question of fact and whoever asks to apply it should also prove it. Consequently, the Dubai Court of Cassation has reverted to applying the old principle, that the parties should ask for the application of the foreign law and prove its content.⁵⁵

Commentators

Most of the explanations for the UAE situation were offered before the Personal Status Act was enacted, and all of the commentators criticised the UAE Supreme Court's approach by

⁵⁴ See the Dubai Court of Cassation decisions in Case 26/ 2000, 26 June 2000; Case 31/200, 30 September 2000; Case 49 /2000, 26 November 2000; Case 23/2004, 20/6/2004; Case 55/2004, 26 June 2005; and Case 24/ 2005, 26 June 2005.

⁵⁵ See the Dubai Court of Cassation decisions in Case 52/ 2006, 3 June 2006; Case 127/ 2007, 1 April 2008; and Case 52/2010, 25 May 2010.

arguing that foreign law is a question of law. Thus, the court should apply the forum's conflict rule whether or not the parties ask for its application. Moreover, the court must seek to ascertain the provisions of the foreign law, with the possibility of requesting assistance from the parties.⁵⁶ The commentators support their view by arguing that the objective of the conflict rules in the law of forum is to achieve harmony between different legal systems and to choose the most appropriate law. In addition, the conflict rules are compulsory; consequently, the court should apply them automatically. Moreover, the application of the forum's conflict rules and the application of the law to which they refer should adhere to the aims that the legislators sought to accomplish, which accord with the legislative policy.⁵⁷

Although the legislator enacted the Personal Status Act, some have criticised it since Article 1(2) adopted the optional approach to the application of conflict rules.⁵⁸

Evaluation of the UAE situation

In order to evaluate the UAE situation it is important to consider the following points. In principle, it is inaccurate to consider foreign law to be a question of fact, since the foreign law has the character of law, even where it is applied by a court of another country. However, the procedural treatment of the foreign law differs from that of the *lex fori*. Since the Supreme Court monitors the correct interpretation and application of law, if foreign law is regarded as a question

⁵⁶ Okasha Mohamad Abd Al-aal, n. 5 above, p 266. See also Ahmed Abdulkarim Salama, (القانون الدولي الخاص) *The UAE Private International Law* (The UAE University, 1st edition, 2002), p 180; and Ahmad Alhawary, n. 12 above, p. 369.

⁵⁷ Okasha Mohamad Abd Al-aal, n. 5 above, p 226; See also Ahmad Alhawary, n. 12 above, p. 321.

⁵⁸ However, the Personal Status Act does not state whether the court should investigate the provisions of the foreign law or the parties should do so (Ahmad Alhawary, n. 12 above, p. 321).

of fact it will not be subjected to the supervision of the Supreme Court. On the other hand, proof of the foreign law by the parties does not make it a question of fact, since in internal law the parties must sometimes prove a custom, and the custom is a question of law.

In regards to pleading and proving foreign law, it is obvious that when the UAE Supreme Court was established it was influenced by the Egyptian Supreme Court and other Arabian courts, which consider foreign law as a question of fact. Moreover, most of the judges were from Egypt and other Arab countries. Nevertheless, at one point the Dubai Court of Cassation adopted a different approach since it was influenced by input from some scholars. However, it reverted to its previous approach after the enactment the Personal Status Act.

The committee that prepared a draft of the Personal Status Act included judges from the UAE Supreme Court and some Shari'a law scholars, but it did not include any private international law jurists or scholars; hence, this Act was influenced by the Supreme Court's approach. Nevertheless, it should be noted that the Personal Status Act only provided that the parties should ask for the application of their foreign law, without any mention of the question of proof of its content., It is only the Explanatory Memorandum which insists that the parties should prove the foreign law since foreign law is a question of fact; and the Explanatory Memorandum is not binding on the courts.

All the commentators who have criticised the UAE federal Court's approach are from Egypt and are influenced by the French scholars.

The courts in the UAE could face some difficulty in respect of the burden of proof of foreign law, since there are people of more than 200 nationalities who are resident in the UAE. Thus, it would be impracticable to expect the court to know or investigate all relevant foreign laws. On the other hand, a requirement that the parties must bear the burden of proof of the

foreign law and of translating that law into Arabic may be impossible to fulfil in some cases. For example, if an impecunious wife has a maintenance claim against her husband and the court asks her to prove the applicable foreign law (such as German law) and translate it into Arabic, she cannot do so since that task would be extremely expensive for her. Thus, asking her to do so represents an injustice, since justice requires taking an individual's personal condition into account, particularly the condition of the weaker party.

The wording in the Articles of the Civil Code, laying down conflict rules, indicates that the rules are compulsory and not optional; consequently, the court should apply the conflict rules of its own motion.⁵⁹

Moreover, it can be argued that the court should distinguish between the question of applying the conflict rules and the question of who bears the burden of proof of the foreign law. In regard to the application of the conflict rules, the court should inform the parties that there is a conflict rule which it is willing to apply a foreign law, since the forum's conflict rules are compulsory. In many cases the parties then have a right to choose between the application of the conflict rules and the substantive rules of the *lex fori*, since, the parties' right to choose which law governs their relationship is generally recognised in private international law, at least regarding ordinary obligations, such as in contracts or torts. Nevertheless, this right is restricted by certain conditions. Firstly, the choice is limited to the application of the *lex fori* instead of the law which is indicated by the conflict rules.⁶⁰ Moreover, with regard to immovables, the court

⁵⁹ Okasha Mohamad Abd Al-aal, n. 5 above, p 232.

⁶⁰ Some argue that the parties can choose any law to govern their relationships instead of the law which is indicated by the conflict rules . See Ashraf Wafa, (استبعاد تطبيق قاعدة التنازع بواسطة الأطراف) *Exclusion of Conflicts Rules by the Parties Agreement* (Dar Alnahda Alarbia, Cairo, 1st edition, 2005), p. 146.

should apply the law of the country in which the immovable is located. Furthermore, the court should not apply the substantive rule in the *lex fori* if that leads to invalidating the form.

With regard to the proof of foreign law, it can be argued that the court should investigate and determine the content of foreign law and apply it, when the court is easily able to access the content of the foreign law. For instance, in the UAE judges can easily know about or research the laws of any of the Arab countries, particularly if the decisions of a country's Supreme Court or a country's laws are available online. Nevertheless, where it is difficult for the court to ascertain the foreign law, it may ask the parties to provide proof of the foreign law; and if they fail to do so, the court can apply the *lex fori*. However, the court should indicate the reason for its decision, and the decision should be subjected to the supervision of the Supreme Court.

With regard to agency relationships, in view of their contractual nature, the parties should ask the court to apply the law that they have chosen to govern their relationship; and the parties should also prove that law.

Countries with multiple legal systems

Some countries have more than one law governing some or all matters, and this may add a further level of complication to the operation of private international law. There are two types of situation of this kind. The first situation occurs where a federal state, such as the UK or the USA, is composed of several territories, and each territory has its own law in respect of the matter in question. We may then speak of an inter-territorial conflict. The second situation is where a country has different laws on personal status for different groups of people according to their religion. For example, the Egyptian legislation provides different rules on personal status for Muslims, Christians and Jews. This may be referred to as an inter-personal conflict. Although

the conflict of internal laws in respect of personal status issues is largely irrelevant to the current thesis, there is an exception in respect of capacity, since the existence of capacity to contract is essential to the valid formation of an agency relationship.

Both inter-territorial and inter-personal conflicts have been addressed in the UAE by Article 25 of the Civil Code which provides:

"Where, in the provisions of the preceding Articles the governing law is that of a specific country that has a multi-legislative system, the domestic law in this country shall indicate which law in this system should be applied. In the absence of such indication, the prevailing law or the domicile, as the case may be, shall apply."

Thus, the UAE legislature distinguishes between two situations. The first situation occurs when the law applicable to the matter in question has a provision to solve an internal conflict of law. In this case, the court will apply this law in determining which law to apply. The second situation happens when the applicable law does not contain any provisions to solve this issue. In this situation, a distinction can be drawn between inter-territorial and inter-personal conflicts.⁶¹ In particular, the reference to the law of domicile can be applied in inter-territorial conflicts, but is meaningless in the case of inter-personal conflicts.

Although the wording of Article 25 may lack perfect clarity, it seems to present writer that Article 25 will rarely apply when the choice of law rule laid down by the UAE Civil Code is based on a territorial connection (such as the residence of a person, the place where a contract was concluded, or the place where the events constituting a tort occurred), since each territory having its own legal system should be treated as a country in determining the applicable law. For

⁶¹ Okasha Mohamed Abdel-aal, n. 5 above, p. 198. See also Awad Allah Al-Saiid, n. 8 above, p. 104.

instance, in the case of tort liability, Article 20(1) of the Civil Code⁶² refers to the law of the country where the event giving rise to the obligation took place. Thus, if the road accident involved in the case happened in California, Article 20(1) points directly to Californian law, and there is no need to consider Article 25 or the law of any other territory within the United States. In contrast, Article 25 will have significant operation where the UAE choice of law rule refers to the law of the nationality of a person involved.

Inter-territorial conflicts

Article 25 may apply to an inter-territorial conflict in cases where the UAE conflict rule refers an issue (such as an individual's capacity to contract, under Article 11(1) of the Civil Code) to the law of a person's nationality, and the person in question is a national of a federal state (such as the United Kingdom, the United States, Canada or Australia).

Some argue that when the applicable law under the UAE conflict rules is that of a federal state, and it does not contain any provision to determine the inter-territorial conflict, the UAE court will apply the law of residence. Nevertheless, commentators⁶³ have raised an issue about the situation where the party has his residence in a country other than the federal state. Some writers argue that the law of the country in which the party has his residence should apply not to determine which law in the federal state should apply, but that the law of the residence should itself apply in governing the matter in question.⁶⁴ However, this view is open to criticism. First, Article 25 is designed to resolve conflicts between laws of different territories within the same

⁶² Article 20(1) provides: "Non-contractual obligations shall be governed by the law of the state in which the event giving rise to the obligation took place."

⁶³ Ahmad Abdul Karim Salama, n. 56 above, p. 124. See also Okasha Mohamed Abdel-aal, n. 5 above, p. 197; and Awad Allah Al-Saiid, n. 8 above, p. 103.

⁶⁴ Okasha Mohamed Abdel-aal, n. 5 above, p. 198. See also Awad Allah Al-Saiid, n. 8 above, p. 104.

state, where the UAE conflict rule refers to the law of that state, not to enable application of the law of third country, which has no relevance under the conflict rule of *lex fori*. Moreover, the explanatory memorandum of the UAE Civil Code explains that under Article 25 the applicable law does not give up its jurisdiction to other laws, in contrast to what may happen under *renvoi*.⁶⁵

Others argue that in such cases the court should apply the law of the territory that has the closest connection with the matter in question.⁶⁶ This argument relies on the reference to general principles of private international made by Article 23 of the UAE Civil Code, and on the relevant provisions of numerous international instruments, including the Hague Agency Convention (1978) and the Rome I Regulation.⁶⁷ Furthermore, this provision is consistent with the purpose of the UAE legislature in regulating the conflict rule.

Nevertheless, if the matter in question is an individual's capacity to contract, when the party is a national of a federal state and has his residence in a country other than that of his nationality, and the applicable law does not contain any provision to determine its territory whose law should apply, Article 25 directs the UAE court to the "prevailing law". This appears to mean the law which is dominant in the relevant state. Thus, in the UK the prevailing law is English, since about 90% of the population reside in England. It may be more difficult to identify the "prevailing law" in the United States. If the court cannot determine the prevailing law, it should apply an internal law of the forum pursuant to Article 28 of the Civil Code, which provides that "The law of the United Arab Emirates shall be applied if it is impossible to prove the existence of an applicable law or to determine its effect."

⁶⁵ The explanatory memorandum, n. 27 above, p. 33.

⁶⁶ Ahmad Abdul Karim Salama, n. 56 above, p. 124.

⁶⁷ See Chapter 2 of this thesis.

Inter-personal conflicts

In regard to personal status, where the forum conflict rule points to the law of a country that has several laws for personal status, Article 25 of the Civil Code directs the court to apply the applicable law in determining which of its personal status laws should apply. For instance, if the country in question has enacted different legislation on personal status for persons of different religions, so as to apply to Muslims a law based on shari'a law and to Christians a law based on Christianity, the applicable law provides the criterion (religion) to determine which of its laws should apply.

Other question may arise when there are two parties involved, and each of them has a different religion (personal status). Since the reference in Article 25 of the Civil Code to domicile is meaningless in this situation, the court will apply the “prevailing law”.⁶⁸ This seems to mean the dominant law in the relevant country. For instance, in India Hinduism is the dominant religion, because it has the greatest number of adherents.

It seems to present writer that this solution may cause some difficulties, since this law may lead to strange results or may not be accepted by the parties. For example, the prevailing law may be a personal status law based on Christianity, and one party may be Muslim and other party Jewish. In the UAE, if one party is a Muslim, the UAE court will not accept this solution and will apply the law based on shari'a law, since this solution is inconsistent with UAE public policy. It may be difficult for the court when no party involved is Muslim. In this case, it seems that the court should select the personal status law by reference to the party to whom the UAE conflict rule in the Civil Code gives priority in relation to the particular status issue. For instance,

⁶⁸ Okasha Mohamed Abdel-aal, n. 5 above, p. 193.

as regards the effects of marriage, Article 13 of the Civil Code gives preference to the husband;⁶⁹ As regards maintenance obligation, Article 15 prefers the person that has the obligation;⁷⁰ as regards the protection of incompetent persons, Article 16 prefers the person requiring protection;⁷¹ as regards inheritance, Article 17(1) prefers the deceased;⁷² and as regards wills, Article 17(3) prefers the person who makes the testamentary disposition.⁷³

Contractual obligations (including agency relationships)

Article 19(1) of the Civil Code will rarely give rise to any particular problems in connection with inter-territorial conflicts. If the parties expressly or impliedly choose the law of a territory within a federal state, such as a choice of New York law, the court will apply the law of this territory.⁷⁴ Similarly, where there is no express or implied choice by the parties, the default rules referring to the residence of the parties or the place of contracting can be applied on the basis that each territory within a federal state is a separate country.

⁶⁹ Article 13 (1) of the Civil Code provides: "The law of the state of which the husband is a national at the time the marriage is contracted shall apply to the effects on personal status, and the effects with regard to property, resulting from the contracting of the marriage."

⁷⁰ Article 15 provides: "Obligations to support relatives shall be governed by the law of the person having such obligation."

⁷¹ Article 16 provides: "Substantive matters relating to guardianship, trusteeship and maintenance and other systems laid down for the protection of persons having no competence or of defective competence or of absent persons shall be governed by the law of the person requiring to be protected."

⁷² Article 17(1) provides: "Inheritance shall be governed by the law of the deceased at the time of his death."

⁷³ Article 17(3) provides: "The substantive provisions governing testamentary dispositions and other dispositions taking effect after death shall be governed by the law of the state of which the person making such dispositions is a national at the time of his death."

⁷⁴ Okasha Mohamed Abdel-aal, n. 5 above, p. 191.

However it seems possible that ill-advised parties may on occasion expressly choose a federal law without choosing the law of a particular territory, and it seems that in this situation the court should apply Article 25 of the Civil Code to identify the law of the territory that should apply. In such cases it is possible that the chosen law does not contain any provisions to solve this problem; for instance, where the parties choose US law, since the choice of law rules are not harmonised in the United States. It seems that under Articles 19 and 25 the UAE court will then apply the law of the territory within the federal state in which both parties have their residence. If one party is resident within the federal state and other in a different country, a sensible solution would be to interpret the choice of the federal law as a choice of the law of the territory within the federal state in which one party is resident. However, if the parties have their residences in different territories of the federal state or neither is resident therein, it seems that the court should treat the choice of law clause as void for meaninglessness, and proceed to apply the default rules specified by Article 19 (referring to the common residence or the place of contracting), or determine the applicable law under general principles in accordance with Article 23 (and thus perhaps refer in the case of agency contracts to the agent's habitual residence). Under the default rules each territory will be treated as a separate country.

Conclusion

The aim of this chapter was to shed light on some important provisions of UAE private international law, which are regulated in the Civil Transactions Act (the Civil Code).

The UAE legislator regulates questions related to choice of law in the Civil Code, particularly in Articles 10 to 28. Nevertheless, it would be better if the UAE legislator regulated

all questions related to private international law, such as rules on conflict of laws or jurisdictions, in a separate enactment (a Code on Private International Law).

Classification of issues is important in the operation of the conflict rules to determine the applicable law. The UAE legislation has adopted Bartin's theory by virtue of Article 10 of the Civil Code; therefore, the *lex fori* will be applied to classify the relationship or legal issue in question. Furthermore, Article 18(2) recognises the exception to Bartin's theory; consequently, the court will apply the *lex situs* to classify the nature of the property as immovable or movable.

Regarding contractual obligations, Article 19(1) has granted the contracting parties the freedom to select expressly or impliedly the applicable law to the form and the substance of their contractual obligations; however, if there is no such choice, the court will apply the default rules, which make applicable the law of the parties' common residence or (failing any such common residence) the law of the place of contracting. Nonetheless, a contract dealing with immovable property will be governed by the *lex situs* by virtue of Article 19(2), and the parties cannot select the law applicable to such a contract.

Regarding default rules, it seems that the legislation has adopted rigid criteria to determine the applicable law, and these will frequently give rise to difficulty or inconvenience. Furthermore, there is no escape clause in favour of the law which has the closest connection with the contract. The legislator has also not specified conflict rules to protect weaker parties to contracts in which disparity of bargaining power may lead to abuses. Consequently, it seems to the present writer it would be better if the legislator amended Article 19(1) by providing for the application of modern theories in place of the default rules, as well as by adopting an escape clause in favour of the law which has the closest connection with the contract. Furthermore, it

would be desirable to provide special rules for certain kinds of contract, such as agency contracts, consumer contracts, insurance contracts and employment contracts.

The general principles of private international law pursuant to Article 23 of the Civil Code have a supplementary role in determining the applicable law where there are no relevant conflict rules in the Civil Code, or that rules are unclear or incomplete. Nevertheless there has not yet been any application of this provision in the UAE case law.

The UAE legislator rejects the renvoi doctrine as a general principle; however, exceptionally, it utilizes partial renvoi to the lex fori. Nevertheless, it would be better if the legislator added a paragraph to Article 26 to provide that partial renvoi will not apply to contractual obligations.

The applicable law will be set aside when its provisions are manifestly incompatible with the UAE public policy or with Islamic Shari'a as applied in the UAE. It should be mentioned not all Islamic Shari'a rules are considered to relate to public policy, so as to fall within Article 27.

In view of the absence of any provision in the UAE legislation to regulate the questions of pleading and proving foreign law except Article 1(2) of the Federal Act No.28/2005 on Personal Status (Family Law), which provides that the parties should ask the court to apply their law", the UAE Courts have decided that foreign law is a question of fact; hence, the parties must ask the court to apply it and they should also prove its content. In addition, the court has gone beyond that by requiring that the foreign law should be translated into Arabic. Nevertheless, the application of this principle may lead to an injustice in some cases as we discussed above. It is also inaccurate to consider the foreign law to be a question of fact. Thus, it is more appropriate to avoid adopting a general rule for all cases in respect of the question of proof of foreign law. The court should consider in each individual case whether the court is able to ascertain the content of

the relevant foreign law, or whether this would involve excessive difficulty task, so that it must call on the parties to prove it. Nevertheless, the court before that should draw the attention of parties to the relevant conflict rule and indicate its willingness to apply the appropriate foreign law, since the conflict rules in the forum country are compulsory. The parties then have a right to choose between the application of the conflict rules and the substantive rules of the *lex fori*, but this right is restricted by certain conditions.

With regard to agency relationships (contracts), when the parties have chosen the applicable law they should ask the court to apply the law that they chose and they should prove it.

Article 25 of the Civil Code addresses the question of determining the applicable law in the case of a country with multiple legal systems. However, it would be useful if the legislature indicated more clearly that, where possible in view of the connecting favours used in the UAE conflict rules, each territory of a federal state should be treated as a country in determining the applicable law.

In this chapter and previous chapter we examined the general provisions of the Rome I Regulation, the Agency Convention and the UAE legal system in respect of conflict rules. We shall proceed to compare them more specifically in regard to choice of law in respect of agency relationships. Thus, in the next chapter we will examine conflicts of law in relation to the internal relationship between a principal and an agent.

CHAPTER FOUR

THE RELATIONSHIP BETWEEN THE PRINCIPAL AND THE AGENT

Introduction

Agency contracts differ from other contracts because they involve a triangular relationship between three parties: a principal, an agent and a contractor. This relationship is further divided into an internal relationship between the principal and the agent and two external relationships, one being an *inter praesentes* relationship between the agent and the contractor, and the other an *inter absentes* relationship between the principal and the contractor. Nonetheless, some argue that the internal relationship between the principal and the agent is not an agency contract, and that agency contracts are limited to the external relationships.¹ There are also many countries, such as Germany, Italy and Sweden, which have limited the concept of agency contracts to the external relationships.² Nevertheless, this is a minority approach, and it seems proper to regard the relationship between the principal and the agent as an agency contract. The Hague Agency Convention treats the relationship between the principal and the agent as an agency contract, and regulates the law which governs this relationship in its Chapter

¹ See Gamal Moursi Badr, *Agency: Unification of Material Law and of Conflict Rules* (1985) 184 *Académie de Droit International, Recueil des Cours*, 46.

² See Peter Hay and Wolfram Muller-Freienfels, *Agency in the Conflict of Laws and the 1978 Hague Convention* (1979) 27 *American Journal of Comparative Law* 37.

2. According to the (UK) Commercial Agents (Council Directive) Regulation 1993, Council Directive, the relationship between the principal and the agent is an agency contract.

In the UAE, the legislator regulates commercial agency in Part 6 (Articles 197 to 253) of the Commercial Code, and deals therein with the relationship between the principal and the agent. This means that the relationship is considered an agency contract. Additionally, the legislator, when defining the different types of agency in Article 17 (contracts proxy),³ Article 229 (proxy by commission),⁴ and Article 245 (commercial representation),⁵ focuses in these definitions on the relationship between the principal and the agent.

With respect to the internal relationship, there is an important difference in the substantive rules adopted by different legal systems, particularly between those of civilian law and those of common law. This difference in substantive law has consequences in private international law.

With regard to the internal relationship between the principal and the agent, we shall first determine the law governing this relationship. Thereafter, we shall examine the scope of this law.

³ Article 217 of the Commercial Code provides: "A contracts proxy is a contract pursuant to which a person undertakes to carry on continuously against remuneration, in a specific area of activity, instigation and negotiation in order to enter into transactions for the benefit of the principal and in return of a fee. The agent's task may include the execution and implementation of transactions in the name of the principal and for his account."

⁴ Article 229 (1) of the Commercial Code provides: "A proxy by commission is a contract pursuant to which the agent undertakes to carry out in his own name a legal act for the account of the principal against a commission to be received from the principal."

⁵ Article 245 of the Commercial Code provides: "The commercial representation is a contract pursuant to which the commercial representative undertakes to enter into transactions in the name and for the account of his principal, on a permanent basis and within a specific area."

Finally, we will consider the possible impact of mandatory rules and public policy on the applicable law.

Since the relationship between the principal and the agent should be considered a contract, it should be subjected to the same conflict principles as apply to other international contracts. The primary principle is that the contracting parties have freedom or autonomy in choosing a law to govern their contract. The principle has been accepted in most enactments and international conventions and regulations, including (in respect to an agency contract between the principal and the agent) the Hague Convention 1978 on the Law Applicable to Agency and the Rome I Regulation. The choice of law by parties may be express or implied.

The relationship between a principal and an agent plays an important role in the marketing of goods and services. Therefore sound rules of conflict of laws are needed to facilitate such transactions, so as to enable parties to achieve the cooperation aimed at, and in some cases to protect the agent as a weaker party. The conflict rules need to be suitable to facilitate the employment of agents abroad, and to enable such agencies to operate effectively in the market. The conflict rules also need to ensure that agents are not exploited by foreign principals. Consequently, some rules are needed to protect the agent as a weaker party in some cases. All these considerations should be borne in mind in the framing of appropriate choice of law rules.

Choice of law

With respect to private international law, the law governing the internal relationship may be determined by the parties by means of an express or implied agreement. However, if the

parties do not choose the governing law, the court will apply the default rules to solve the conflict question. We will examine these three ways to determine the applicable law.

Express Choice

The parties have a right to choose expressly the law applicable to the internal relationship between the principal and the agent. This right was recognised by the International Law Association in Article 3 of both its 1950 Copenhagen draft and its 1952 Lucerne draft. In 1948, the International Law Institute had formed a committee to consider the conflict of laws with respect to the commission agency contract. In 1950, the committee established a draft that was limited to determining the law applicable to the relationship between a principal and a commission agent, and Article 2 of this draft granted the parties a right to choose the law that governs their relationship.⁶ Moreover, in the Hague Convention 1978, Article 5 grants the parties (the principal and the agent) the right to choose the law that governs their relationship.⁷

Although, by Article 1(2)(g),⁸ the Rome I Regulation excludes from its scope the question of whether the agent can bind a principal towards a contractor, it is generally accepted that the exclusion does not extend to the relationship between the principal and the agent. Thus,

⁶ Gamal Moursi Badr, n. 1 above, p. 132.

⁷ Article 5 of the Convention stipulates: "The internal law chosen by the principal and the agent shall govern the agency relationship between them. This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case."

⁸ Article 1(2)(g) provides: "The following shall be excluded from the scope of this Regulation: ... (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated in relation to a third party".

the Regulation covers any disputes between them.⁹ Moreover, the EC Commission has explained that the relationships between the principal and the agent and between the agent and the contractor are covered by the Convention (now replaced by the Rome 1 Regulation).¹⁰ Therefore, under Article 3(1) of the Regulation, the parties (principal and agent) may choose expressly a law to govern their relationship.¹¹

In the UAE, Article 19(1) of the Civil Code grants the parties to international contracts the right to choose the law that governs their contract. An internal relationship between principal and agent is a contract; hence, the principal and the agent may determine the law that is applicable to this relationship.¹²

⁹ See Gralf Peter Calliess, *Rome Regulation: Commentary on the European Rules of Conflict of Laws* (Wolters Kluwer and Business, New York, 2011), p. 50. See also Alexander J. Belohlavek, *Rome Convention: Rome I Regulation*, (Juris, USA, 2010), p. 561.

¹⁰ EC Commission, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*, COM(2005) 650 final, at p. 7; [2008] OJ. L177/6.

¹¹ Article 3(1) of Rome I Regulation provides: "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or ...".

¹² Article 19(1) of the Civil Code provides: "The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply."

IS A CONNECTION REQUIRED BETWEEN THE CHOSEN LAW AND THE INTERNAL RELATIONSHIP?

As regards the parties' freedom to choose the applicable law, the question may arise as to whether the law chosen by the parties must have an objective connection to the internal relationship. Some argue that the autonomy of the principal and the agent in determining the applicable law should be constrained by a requirement that a connection should exist between the applicable law and the internal relationship, or that there should be some other valid reason for the choice.¹³ The Spanish delegation in the committee of the Hague Conference argued that the agent and the principal should choose a law that is "necessarily related to the surrounding circumstances of the transaction".¹⁴

Others argue that the parties have a right to choose a law, irrespective of whether it has a connection with the transaction.¹⁵ From Article 5 of the Hague Agency Convention, it is obvious that no kind of connection is required between the chosen law and the internal relationship.¹⁶

¹³ Peter Hay and Wolfram Muller-Freienfels, n. 2 above, p. 9. See also Alexey V. Kostromov, *International Unification of the Law of Agency* (Institute of Comparative Law, McGill University, Montreal, 1999), p. 53.

¹⁴ See H.L.E. Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff Publishers, Netherland, 1995), p. 199.

¹⁵ See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 217. See also Michael Bogdan, *Concise Introduction to EU Private International Law* (European Law Publishing, Netherland, 2006), p. 122.

¹⁶ The Karsten Report explains that "The Commission considered that the parties should be completely free to choose whichever law they wished, regardless of the degree of the connection between that law and their relationship and irrespective of the parties' motives in making the choice" See Karsten, I.G.F., *Karsten Report: Explanatory Report, Actes et documents of the 13th Session of the Hague Conference* (hereafter "the Karsten Report"), parg. 45, p. 19 et seq.

Moreover, it is generally accepted that under Article 3(1) of the Rome I Regulation no connection is required between the law chosen and the parties or the contract.¹⁷

It seems acceptable for many reasons that the principal and the agent should have the right to determine expressly the law applicable to an international contract, even if the chosen law does not have any other connection with their relationship. A requirement of a connection between the law and the contract would be contrary to the parties' freedom, and could lead to uncertainty, since the principal and the agent might choose a particular law to regulate their relationship, but other applicable laws might compel one party to take on an obligation greater than his expectation. Some add that the parties are granted wide freedom with respect to applicable laws, permitting them to achieve a mutually acceptable solution regarding the appropriate law to regulate their relationship. In addition, in reality, the law most often chosen by parties for practical reasons is the law of the country which controls a particular market.¹⁸

It is also arguable that the effect of a choice of law by the principal and the agent should be restricted by mandatory rules and public policy. Thus, the judge should apply the mandatory rules of the forum.¹⁹ Additionally, the judge can refuse to apply the otherwise applicable law if it is incompatible with the forum's public policy.²⁰

Under Article 19 of the UAE Civil Code, parties have the freedom to determine expressly the law that governs their contract, regardless of any connection between the chosen law and the transaction. Some support the freedom of parties to choose the law that governs their contract,

¹⁷ See Geert Van Calster, *European Private International Law* (Hart Publishing, Oxford, 2013), p. 126.

¹⁸ See Alan Reed, *The Rome I Regulation and Rapprochement of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism over Theory* (2011) 23/3 Florida Journal of International Law 360.

¹⁹ The question of mandatory rules and public policy will be examined in detail in Chapter 5.

²⁰ H.L.E. Verhagen, n. 14 above, p. 199. See also Karsten Report, n. 16 above, para. 45. p. 19.

but insist that there should be a legitimate and serious interest of the parties in choosing the law in question.²¹ This argument is based on an alleged general principal of private international law, applicable under Article 23 of the Civil Code.²² But the argument seems unacceptable, since Article 23 is expressed in general terms, while Article 19 is specific in granting the parties freedom of choice, without any restriction by reference to a connection between the chosen law and the transaction or a legitimate and serious interest. Moreover the alleged general principle imposing such restrictions would contradict the solutions adopted by the Rome I Regulation (Article 3(1)) and in the Hague Agency Convention (Article 5).

TIME OF CHOICE

As regards express choice, the question arises as to the time when the principal and the agent may determine the applicable law. It is widely accepted that the parties may choose the law governing their contract at any time. For instance, when the contract is concluded, or later by separate agreement, or when the court is hearing the case.²³ Furthermore, the parties may choose another law to replace the law which they had previously chosen. However, the subsequent

²¹ See Okasha Mohamed Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 716.

²² Article 23 provides: "The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws."

²³ H.L.E. Verhagen, n. 14 above, p. 208. See also Alexander J. Belohlavek, n. 9 above, p. 565; and Okasha Mohamed Abdel-aal, n. 21 above, p. 719.

choice should not prejudice the contract's formal validity, and it should not affect negatively the rights of third parties.²⁴ The Rome I Regulation so provides in Article 3(2).²⁵

Although the Hague Convention contains no similar provision, some argue that it permits the principal and the agent to choose the law governing the internal relationship at any time, and also to subject the internal relationship to a law other than the law previously agreed upon.²⁶ In the UAE Article 3(2) of the Rome I Regulation may be followed as embodying a general principle, pursuant to Article 23 of Civil Code.

PARTIAL CHOICE OF LAW

Another question is whether the principal and the agent may subject the internal relationship to more than one law, or whether they can only choose a single law to govern their relationship. Some argue in favor of maintaining the unity of a contract and are against splitting the applicable law. They argue that a partial choice of law negatively affects the harmony of the contract.²⁷ But others argue in favour of permitting a partial choice of law; thus, the parties may expressly subject their contract to more than one law. In other words, the parties may choose

²⁴ See Peter Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), pp. 291-92. See also Dicey, Morris and Collins, n. 15 above, p. 1805.

²⁵ Article 3(2) provides: "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of the Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties."

²⁶ H.L.E. Verhagen, n. 14 above, p. 208.

²⁷ See the presentation of this opinion in Okasha Mohamed Abdel-aal, n. 21 above, p. 721.

different laws to govern different parts of the contract.²⁸ The Rome I Regulation endorses this approach in the last sentence of Article 3(1): "By their choice the parties can select the law applicable to the whole or to part only of the contract". However, in the case of the partial choice of law, some argue that subjecting various parts of a contract to different laws must not prejudice the logical consistency of the contract or lead to contradiction.²⁹ It should also not prejudice the balance between the different parts of the contract.³⁰ The Giuliano and Lagarde Report limited the splitting of the applicable law to contract elements that can be subjected to different laws without leading to contradiction.³¹

The Agency Convention does not expressly regulate the question of partial choice of law. Karsten relies on the words, "in so far as", at the beginning of Article 6 of the Convention to argue that the principal and the agent may select more than one law to govern different parts of the internal relationship.³² Other jurists³³ argue that the words, "in so far as", are not sufficient on their own to provide a strong basis for permitting the possibility of the partial choice. However this concept is broadly recognised in many enactments and it has been adopted in numerous

²⁸ Dicey, Morris and Collins, n. 15 above, p. 1805. See also Peter Kaye, *The New Private International Law of Contract of the European Community* (Dartmouth, UK, 1993), p. 145.

²⁹ Peter Kaye, n. 28 above, p. 145.

³⁰ Okasha Mohamed Abdel-aal, n. 21 above, p. 721.

³¹ Mario Giuliano and Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, [1980] OJ C282/17, Article 3, Comment 4.

³² The Karsten Report, n. 15 above, para 159, p. 47, explains: "The words 'in so far as' are designed to cover a variety of possible situations in which the law specified by Article 5 is not applicable. They include cases where the parties have made no choice of law at all, where they have made only a partial choice, for instance, by choosing a law to govern only certain aspects of their agency relationship, and where their choice is ineffective."

³³ H.L.E. Verhagen, n. 14 above, p. 207.

international conventions, such as the Hague Convention 1986 on the Law Applicable to Trusts and on their Recognition, and the Hague Convention 1986 on the International Sale of Goods. However, according to this jurist, the use of partial choice must not disrupt the internal relationship.³⁴

In the UAE, the Explanatory Memorandum of the Civil Code, in its commentary on Article 19, explains that this Article guarantees the unity of the law applicable to the contract. Such unity would not be guaranteed by the idea of analysing the elements of the contract and the choice of a law appropriate to the nature of each of them.³⁵ This means that the Explanatory Memorandum has adopted the principle of unitary choice of law with respect to international contracts.

Nevertheless, some argue³⁶ that UAE law permits the parties to international contracts to choose several laws to govern different parts of their contract. In other words, the court may apply the principle permitting partial choice of law. It is argued that the justification for Article 19, which is to achieve predictability and certainty in choice of law, is consistent with and requires adaptation to the principle of partial choice of law. The UAE legislator also admits the principle of partial choice of law with respect to contracts where it subjects the parties' capacity to another law; and the court may also split the applicable law when applying a mandatory rule of forum country to some aspects of a contract. It is further argued that it is unacceptable to rely on the position adopted in the Explanatory Memorandum, since its drafters were influenced by the Egyptian Explanatory Memorandum and they did not follow recent developments and new

³⁴ H.L.E. Verhagen, n. 14 above, p. 207.

³⁵ UAE Ministry of Justice, Explanatory Memorandum of the Federal Act No 5 of 1985 (Civil Transactions Act).

³⁶ Okasha Mohamed Abdel-aal, n. 21 above, p. 721.

approaches in the field of the conflict of laws in relation to contracts. In addition, the Explanatory Memorandum admits that the legislator chose an elastic formulation, so as not to prevent the court from exercising its good sense and not to preclude the court from following and utilizing recent developments in jurisprudence.³⁷ Consequently, it seems that the better view is that UAE law permits the principal and the agent to choose different laws to govern different parts of their internal relationship.

Implied choice

In cases when the principal and the agent have not expressly chosen the applicable law, the court must consider whether the parties have made an implied choice. This approach is accepted by the Hague Agency Convention, the Rome I Regulation and the UAE Civil Code.

Article 5 of the preliminary draft of the Agency Convention proposed that a court should infer the implied choice of the parties by considering the terms of the contract and the circumstances of the case, and seeking a choice made "by necessary implication". However, after discussion the special commission decided that the words, "by necessary implication", were too inflexible. Thus, the special commission preferred the words "with reasonable certainty" instead of "by necessary implication". This would give the court a certain degree of freedom to discover the parties' implied choice. Thus, Article 5 of the Convention as adopted requires that an implied choice of the law governing the agency relationship between the principal and the agent must be "such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case." A similar formula was used by the Rome

³⁷ Okasha Mohamed Abdel-aal, n. 21 above, p. 721.

Convention. Pursuant to Article 5 of the Convention, the court may deduce an implied choice from the terms of the contract and circumstances of the case, either together or separately.³⁸

Under the Rome Convention 1980, Article 3(1) allowed the court to discover an implied choice where it was demonstrated with reasonable certainty by the terms of the agreement between the parties or the circumstances of the case. Different wording is used in Article 3(1) of the Rome I Regulation,³⁹ which requires that the choice must be "clearly demonstrated" instead of "demonstrated with reasonable certainty".⁴⁰ However, it seems this change in the wording was not intended to change the meaning. This was confirmed in *Lawlor v Sandvik Mining*,⁴¹ where the English Court of Appeal (per Lord Toulson) explained that the change of language was not intended to involve a change of meaning, but was simply intended to bring the English and German texts into line with the French text of the Convention. Although this ruling is not binding on the European Court, it seems likely that the European Court adopt this approach.

In the UAE, Article 19(1) of the Civil Code provides for implied choice where "it is apparent from the circumstances that the intention was, that another law should apply". On a literal reading, this would permit the court to infer an implied choice from the circumstances, without any requirement of reasonable certainty or clear demonstration. Nonetheless, some argue that an implied choice should be clearly or certainly demonstrated by reference to the terms of the contract or the circumstances of the case. This would ensure that the court does not apply a

³⁸ H.L.E. Verhagen, n. 14 above, p. 203.

³⁹ Article 3(1) of Rome I Regulation provides that "a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case...".

⁴⁰ Dicey, Morris and Collins, n. 15 above, p.1805. See also Peter Stone, n. 24 above, p. 305.

⁴¹ [2013] EWCA Civ 365.

law which might prejudice the parties' expectations.⁴² A contrary argument, that Article 19 merely requires the implicit choice to be inferred from the circumstances, without a restriction that the intention must be certain, is certainly possible. Nonetheless, it seems to the present writer that the better view is that the UAE court should only infer the parties' intention from clear circumstances, in view of Articles 19 and 23 of the Civil Code.

EXAMPLE OF FACTORS RELEVANT IN THE DETERMINATION OF IMPLIED CHOICE

The jurists mention many factors that may amount to a clear indication of an implied choice. For instance, where there were several previous contracts between the principal and the agent, under which the agent acted on behalf of the principal, and they were governed by a particular law, this law may govern their internal relationship in a case where there is no express choice.⁴³ Another factor is a jurisdiction clause, as where the agent and principal in their contract choose the courts of a particular country; thus, the substantive law of this country may be applied on the basis of an implied choice.⁴⁴ However, some argue that in this case there should be another factor in support of the jurisdiction clause to justify the discovery of the implied choice, as in the field of conflict law it is necessary to distinguish between choice of law and jurisdiction.⁴⁵

⁴² Okasha Mohamed Abdel-aal, n. 21 above, p. 710.

⁴³ Karsten Report, n. 16 above, prag, 46, p. 20.

⁴⁴ Peter Stone, n. 24 above, p. 306.

⁴⁵ Okasha Mohamed Abdel-aal, n. 21 above, p. 712.

Moreover, if the parties include in their contract a term that the contract shall be interpreted or construed according to a particular law, it should be understood from this term that the parties intend to choose this law as the law applicable to their agreement.⁴⁶ The Giuliano-Lagarde Report provides as an example of implied choice the inclusion by the parties in their contract of a reference to specific provisions in a particular system of law. Although there is no express choice of this law, such referencing may amount to a clear indication of implied choice. However, an express choice of the law to govern a part of contract cannot demonstrate an implied choice for whole contract, because if the parties had wanted this law to govern their whole contract, they could have said so in the agreement.⁴⁷ Some argue that the internal relationship may be subjected to the law which governs a contract that an agent is to conclude with a contractor, on the basis that this is a clear indication of implied choice.⁴⁸

In English case law, an indication of implied choice may arise when the contract and all its terms are valid according to one connected law, whereas the effect of another connected law would be to invalidate the whole or a part of the contract. Consequently, the factor of validation will be considered the clearest indication of an implied choice.⁴⁹ Another instance may arise where the type of contract is familiar to one connected law, which has detailed rules on the interpretation and supplementation of the contract terms, while the application of another connected law to such a contract would lead only to the broadest speculation.⁵⁰ Hence, it is

⁴⁶ H.L.E. Verhagen, n. 14 above, p. 205.

⁴⁷ Giuliano and Lagarde Report, [1980] OJ C282/17, Article 3, Comment 3.

⁴⁸ Okasha Mohamed Abdel-aal, n. 21 above, p. 713.

⁴⁹ See *Coast Lines v Huding & Veder* [1972] 2 QB 34. Cf. *Hathurani v Jassat* [2010] EWHC 2077 (Ch) (Mann J).

⁵⁰ See *Amin Rasheed v Kuwait Insurance Co* [1984] 1 AC 50.

necessary, in order to enable the contract to achieve sufficient certainty, that an implied choice of the law which has useful supplementary rules should be recognised. Where the parties have used a standard form which originated in a particular country, the law of this country may apply, by way of an implied choice. The same applies where they have used a form generally used in a particular market.⁵¹ Furthermore, when the contract is one of a group of similar contracts concluded by the principal with numerous agents, the law of the country of the principal's residence (as the party common to all the contracts) may govern all of the contracts.⁵²

Nonetheless, it is preferable to discover an implied choice on the basis of more than one factor, and not merely from a single factor. For instance, the French Court of Cassation discovered an implied choice in the case of a commercial agency between a French principal and a German agent, who acted in Germany, by considering many factors, including that the contract had been concluded in France, the contract was drafted in French, and there was a jurisdiction clause in favour of the French court. Consequently, the court applied French law.⁵³

Furthermore, according to the Rome I Regulation, ordinary factors - such as the places of negotiation, contracting, performance of various applications under the contract, and the parties' residences- cannot on their own be considered a clear indication of an implied choice, since these factors must of necessity exist for every contract. They may however be considered as indications of a closest connection under Article 4.

⁵¹ See *Wasa International Insurance v Lexington Insurance* [2008] 1 All ER (Comm) 286 (Simon J), affirmed sub nom. *Lexington Insurance v AGF Insurance* [2009] UKHL 40.

⁵² Peter Stone, n. 24 above, p. 299.

⁵³ Cour de cassation, 24 January 1978; cited in H.L.E. Verhagen, n. 14 above, p. 203.

In contrast, in UAE law the legislator has not explicitly authorised the use of a test of closest connection. Thus, two possibilities are open to a UAE court which wishes to avoid following the default rules in favour of the common residence or (more frequently) the place of contracting. It may take a wide view of implied choice; or it may refer to the closest connection by way of a general principle of private international law in accordance with Article 23. While both approaches will usually lead to the same result, it seems preferable for practical reasons to adopt a wide view of implied choice under Article 19. This may be more acceptable to the UAE court, since it avoids disregarding any explicit provisions of the Civil Code.

The default rules

In the absence of an express or implied choice of law by the principal and the agent, the court will apply the default rules. With respect to the internal relationship between the principal and the agent, potentially relevant connections include the residence of the principal, the residence of the agent, the place where the agent was authorised to act, and the place where the agency agreement was negotiated and concluded. The currently prevailing view is that the law of the country where the agent has his business establishment or habitual residence should in most cases be applied, subject to certain exceptions.

EARLY DRAFTS

The 1950 and 1952 drafts from the International Law Association proposed to give much greater weight to the residence of the principal than do the measures ultimately adopted by the Hague Conference and the European Union.

According to Article 3 of the 1950 Copenhagen draft of the International Law Association, where the principal and agent had not chosen an applicable law, and the agent was a professional agent, the court would apply the law of the country where the professional agent had his place of business, provided that the principal had granted authority to the agent there. In other words, to apply the law of country where the professional agent had his place of business, it would have been necessary that the authority should have been given to the agent in that country. In all other cases, the court would apply the law of the country where the principal had his habitual residence or his relevant place of business.⁵⁴

However, pursuant to Article 3 of the 1952 Lucerne draft of the International Law Association, in the absence of an agreed choice of law, the court would apply the law of the country where the principal had his habitual residence or relevant place of business. But the law of the country where the agent had his habitual residence or relevant place of business would apply in the case of an independent professional agent.⁵⁵

Obviously, the general principle adopted in the Copenhagen and Lucerne drafts required application of the law of the principal's habitual residence or relevant place of business, and the application of the law of the agent's habitual residence or relevant place of business occurred by way of an exception. Nevertheless, the Copenhagen draft required that authority had been granted to the agent in his place of business in order to make applicable the law of the country where his place of business was located, while the Lucerne draft stipulated the application of that law without requiring the granting of authority in that place, it being made sufficient that the agent should be independent and professional.

⁵⁴ Gamal Moursi Badr, n. 1 above, p. 133.

⁵⁵ Ibid.

In the case of a commission agent, Article 2 of the 1950 draft of the committee of the International Law Institute would have referred to the commission agent's habitual residence or place of business to determine the law governing the internal relationship. By way of exception, the law of the country where the principal had his habitual residence or place of business would apply if the commission agent received his order from his principal in that country.

However, the Eighteenth Committee of the International Law Institute's final draft (1961) would have excluded the application of the law of the principal's habitual residence or place of business, and provided for the application of the law of the place of the agent's habitual residence or place of business.⁵⁶

These early texts are not in themselves important, but they formed part of the background to the negotiations which led to the adoption of the Hague Agency Convention.

THE HAGUE CONVENTION 1978

Under Article 6(1) of the Agency Convention, the internal relationship is regarded as having its centre of gravity at the place where the agent has his business establishment, or his habitual residence if he does not have a business establishment. Consequently, in the absence of express or implied choice, the internal relationship is usually governed by the law of the country in which the agent has his business establishment, or his habitual residence when he does not have a business establishment.⁵⁷

⁵⁶ Gamal Moursi Badr, n. 1 above, p. 137.

⁵⁷ Article 6(1) provides: "In so far as it has not been chosen in accordance with Article 5, the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence."

In the preliminary draft which led to the Convention, this provision was applicable to all internal relationships, without exception. However, some argued that reference solely to the agent's establishment or residence to determine the applicable law was too rigid and could lead to unacceptable results in cases where it was apparent from the circumstances that another law had a closer connection to the contract. Thus, an amendment to the preliminary draft was suggested, so as to displace the law of the agent's residence where another law had a closer connection to the internal relationship.⁵⁸

Ultimately, in the Convention as adopted, Article 6(2) makes an exception to the application of the law of the agent's business establishment or habitual residence. This applies the law of the country of the principal's business establishment or, if he has none, his habitual residence, where the agent is primarily to act in that country.⁵⁹ But there is no general exception in favour of the law of the country of closest connection. An additional rule, specified by Article 6(3), deals with the case where either party (the principal or the agent) has more than one business establishment. Preference is then given to the law of the business establishment that is most closely connected with the internal relationship.⁶⁰

Article 6(1) makes it clear that it is the business establishment or habitual residence at the time of the formation of the contract which should be considered in determining the applicable law.

⁵⁸ Peter Hay and Wolfram Muller-Freienfels, n. 2 above, p. 40.

⁵⁹ Article 6(2) provides: "However, the internal law of the State where the agent is primarily to act shall apply if the principal has his business establishment or, if he has none, his habitual residence in that State."

⁶⁰ Article 6(3) provides: "Where the principal or the agent has more than one business establishment, this Article refers to the establishment with which the agency relationship is most closely connected."

THE ROME I REGULATION

Under the Rome I Regulation, the contract between the principal and the agent is regarded as a contract for the provision of services, and it is the agent's obligation to provide the service. Thus, under Article 4(1)(b),⁶¹ in the absence of an express or implied choice by the parties, the internal relationship will be governed by the law of the country where the agent, who is the service provider, has his habitual residence.⁶² In the case of a corporate agent, this will usually be the country where the agent's central administration was located at the conclusion of the contract. In the case of an individual agent acting in the course of his business, it will usually be that of his principal place of business. But where the agent acts through a branch, two cases must be distinguished, in each of which the branch will count as the relevant residence of the agent. The first case is where the branch is involved in the conclusion of the contract. The second instance is where the branch is to be involved in the performance of the contract.⁶³ Nonetheless,

⁶¹ Dicey, Morris and Collins, n. 15 above, p. 2113. See also Alexander J. Belohlavek, n. 9 above, p. 565.

⁶² Article 4(1)(b) provides: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: ... a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence." See *HIB v Guardian Insurance* [1997] 1 Lloyd's Rep 412 (Longmore J); *Sharab v Prince Al-Waleed Bin Takak Bin Abdul-Aziz Al-Saud* [2008] All ER (D) 16 (Aug) (Powell QC); and *Lawlor v Sandvik Mining* [2012] EWHC 1188 (QB) (Mackie QC) affirmed [2013] EWCA Civ 365.

⁶³ Article 19 provides:

"1. For the purpose of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

if several branches are involved in the conclusion or performance of the contract, it seems likely that one must revert to the main rules referring to the agent's central administration or principal place of business. For instance, where a company has its central administration in the UAE, and has a branch in Paris, through which the contract was concluded, and another branch in London, from which the contractual performance is required, it seems likely that the law of the country where the central administration is located will apply.⁶⁴

The general rule in the Rome I Regulation in favour of the law of the country where the agent has his habitual residence is subject to an exception specified by Article 4(3). This provides an escape clause where it appears to the court from all the circumstances of the case that the contract between the principal and the agent is obviously more closely connected to a country other than the country of the agent's habitual residence. The law of that other country then governs the internal relationship.⁶⁵ This exceptional character of this provision must be emphasised. It is not expected to be frequently applied.⁶⁶

2. Where the contract is concluded in the course of operation of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. When determining the habitual residence the relevant point of time shall be the time of the conclusion of the contract."

⁶⁴ Peter Stone, n. 24 above, p. 310.

⁶⁵ Article 4(3) provides: "Where it is clear from all the circumstances of the case that the contract 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."

⁶⁶ See Gülin Güneysu-Güngör, *Article 4 of the Rome I Regulation on the applicable law in the absence of Choice- methodological analysis, considerations, Research Handbook on EU Private International Law*, edited by Stone and Farah (Edward Elgar, UK, 2015), p. 189. See Also Indira Carr, *International Sales of Goods and the*

Some⁶⁷ argue that in most cases the agent's habitual residence coincides with the place where the agent acts, so that applying the general rule accords with the closest connection. Nonetheless, in the case when the agent acts in a country where he has no place of business, the application of the law of the agent's habitual residence is less persuasive. In such cases, the court may apply the law of the country where the principal has his habitual residence instead of the agent's habitual residence, on the ground that it is more closely connected to the agency contract, especially if the agent sought out the principal in that place and the negotiation and conclusion of the agency contract took place in that country.⁶⁸ Preference may also be given to the place of performance when both parties are to perform in a country other than that of the agent's habitual residence.⁶⁹

THE POSITION IN THE UAE

In the UAE, the default rule specified by Article 19(1) of the Civil Code subjects an international contract to the law of the country that is the common residence of the parties (the principal and the agent). Article 19(1) also provides for application of the law of the country where the parties concluded the contract, where each of the parties had a different country of residence.⁷⁰ As the relationship between the principal and the agent is considered a contract,

Rome I Regulation, in Research Handbook on EU Private International Law, edited by Stone and Farah (Edward Elgar, UK, 2015), p. 216.

⁶⁷ Dicey, Morris and Collins, n. 15 above, p. 2114.

⁶⁸ Ibid.

⁶⁹ Peter Stone, n. 24 above, p. 313.

⁷⁰ Article 19(1) of the Civil Code provides: "The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same

logically this Article must apply. Thus, the internal relationship is governed by the law of the country where the principal and the agent resided; or if they did not have a common residence, by the law of the country where the agency contract was concluded.

Nevertheless, there are arguments against the application of this provision to the internal relationship. These are considered below, after the various provisions presented above have been examined and evaluated to determine the best solution with respect to choice of law in the field of agency internal relationships.

WHICH OF THE VARIOUS SOLUTIONS IS PREFERABLE?

As regards the default rules in the field of the internal relationship between the principal and the agent, many approaches have been suggested; but preference for the agent's residence (business establishment or habitual residence) is the currently prevailing approach. This solution does indeed appear to have more advantages than other approaches, and other approaches are open to various objections.

It may be argued that the principal and the agent do not always reside in the same country; thus, it is difficult to apply the law of common residence to the internal relationship.⁷¹ The location of the place of contracting may be determined by an accidental event, and it may

state, but if they are resident in different states the law of the state in which the contract was concluded shall apply ...".

⁷¹ Foad Mohammed Alodaini (تحديد القواعد القانونية الواجبة التطبيق على عقود الوسطاء التجاريين ذات الطابع الدولي) (*Determination of the Legal Rules Applicable to International Commercial Agency* (PhD thesis, Cairo University, 2012), p. 71.

have no substantial connection with the contract.⁷² Moreover, there may be difficulty in determining the place of contracting, particularly when the principal and the agent conclude a contract by communications across borders, as the rules for determining the place of contracting in such cases are not uniform in all legal systems.⁷³

The application of the law of the country where the agent acts may face some difficulty, particularly when the agent acts in numerous countries, and it may be unclear which place should be considered to determine the applicable law.⁷⁴ Some argue also that the dispute may arise before the agent has acted; therefore, it is difficult to rely on the place of acting.⁷⁵ However, this could be resolved by considering the place in which the agent is intended to act. Furthermore, it is difficult to accept the application of the law of the country where the agency is to be performed, because the agent may perform his obligations in a country other than the country in which the principal performs his obligations.⁷⁶ Moreover the principal's habitual residence is not a centre of gravity in the internal relationship, and the principal's performance is not considered a characteristic performance of the internal relationship. The principal's main performance is to pay remuneration, and a payment is not usually regarded as a characteristic performance because it is common to numerous types of contract.⁷⁷

⁷² Hisham Sadek, (القانون الواجب التطبيق على عقود التجارة الدولية) *The Law Applicable to International Trade Contracts* (Dar Alfekr Aljamae, Alexandria, 2001), p. 554.

⁷³ Walter Breslauer, *Agency in Private International Law*, (1938) 50 *Juridical Review*, p. 284. See also Hisham Sadek, n. 72 above, p. 555.

⁷⁴ Hisham Sadek, n. 72 above, p. 561. See also Foad Mohammed Alodaini, n. 71 above, p. 76.

⁷⁵ Hisham Sadek, n. 72 above, p. 561.

⁷⁶ Walter Breslauer, n. 73 above, p. 284.

⁷⁷ Alexander J. Belohlavek, n. 9 above, p. 565.

It seems inappropriate to adopt any of the various approaches criticised above as a general rule with respect to the default choice of law in the field of agency contracts. Nevertheless, exceptionally a law can be considered for application when it is most closely connected with the internal relationship.

However, for many sound reasons, it seems appropriate to adopt the prevailing approach, based on the agent's habitual residence. According to the Special Commission which negotiated the Hague Agency Convention, this place was considered to be a permanent and easily ascertainable connecting factor that the principal and the agent could reasonably predict. Moreover the agent's performance is regarded as the characteristic performance of the agency contract,⁷⁸ as the principal's obligation to provide remuneration is common to numerous contracts, while the agent's obligation is to provide a service. Consequently, the law of the country of the agent's habitual residence is the law of the party whose performance is the characteristic performance.⁷⁹

Moreover, the agent's place of habitual residence is likely to coincide with the country in which the agent acts.⁸⁰ In addition, the reference to the law of the agent's habitual residence may ensure the application of mandatory rules, such as protective provisions for the agent. Finally, in the internal relationship, the agent is at the centre of the relation; hence the application of the law of the agent's habitual residence reflects the agent's pivotal role.⁸¹

However, some argue that exclusive reference to the agent's residence to determine the applicable law is too rigid and may lead to unacceptable results in some cases, such as when it is

⁷⁸ Karsten Report, n. 16 above, par. 50, p. 21.

⁷⁹ Alexander J. Belohlavek, n. 9 above, p. 565.

⁸⁰ Karsten Report, n. 16 above, par. 50, p. 21. See also Alexey V. Kostromov, n. 13 above, p. 50.

⁸¹ Karsten Report, n. 16 above, par. 50, p. 21. See also H.L.E. Verhagen, n. 14 above, p. 211.

apparent from the circumstances that there is another law that has a closer connection to the contract. In addition, when the agent acts in a country other than that of his habitual residence, the application of the law of his habitual residence may lead to the application of a law which lacks a substantial connection with the contract.⁸²

To avoid this weakness, two approaches are possible. One, adopted by the Hague Agency Convention, is the application of the law of the country in which the principal has his habitual residence when the agent acts primarily in that country (Article 6(2)). The second, adopted by the Rome I Regulation, is the application of the law of the country that has a closer connection to the internal relationship (Article 4(3)).

In respect of preference between the Rome I Regulation approach and that of the Hague Convention, it is noteworthy that the Regulation solution is more flexible, and that leads to application of the most appropriate law. In contrast, the Convention approach is much more rigid; and thus may lead to the application of a law other than the law with the closest connection to the internal relationship, apparent from all the circumstances of the case.

In the UAE, the question arises regarding whether the court should apply Article 19(1) of the Civil Code, which specifies the default rules, or whether it is possible to substitute a solution derived from the provisions of the Rome I Regulation by virtue of Article 23 of the Civil Code. It can be argued that in a case when the principal and the agent did not choose expressly or impliedly the applicable law, the court may ignore the default rules specified in Article 19(1) and instead apply the law of the country in which the agent has his habitual residence or that of the country which has the closest connection to the contract.

⁸² Peter Hay and Wolfram Muller-Freienfels, n. 2 above, p. 40.

This is for many reasons. In the UAE, the legislator has not directly regulated by specific rules the question of choice of law with respect to the agency internal relationship. Some argue that the default rules in Article 19(1) are inflexible and unsuitable to be applied to certain contracts which have a special nature.⁸³ The Explanatory Memorandum of the Civil Code points out that the legislator chose an elastic formulation to allow the court some scope for creativity, and to enable the use of recent developments in jurisprudence.⁸⁴ Consequently, pursuant to Article 23 of the Civil Code, the court may consider the provisions adopted by the Rome I Regulation. If this approach, applied in an unlimited way, is considered to accord insufficient respect to the clear wording of Article 19, it may be given a more limited role, by means of a broad interpretation of implied choice so as to equate to closest connection, or by a narrow interpretation of the concept of the place of contracting, so as to create a gap in the rules specified by Article 19 where there is no common residence and the contract is negotiated by means of cross-border communications.

The Scope of the Normal Choice of Law Rules

The law that governs the internal relationship, whether determined by parties (expressly or impliedly) or by default rules will apply to most issues related to this relationship. Nonetheless, there are certain contracts of agency that are considered employment, consumer or carriage contracts, and these kinds of agency are excluded from the scope of the normal choice of law rules. In addition, some issues are excluded from this scope. Consequently, we shall first consider agency contracts which are also employment contracts. After which we shall examine

⁸³ Okasha Mohamed Abdel-aal, n. 21 above, p. 742.

⁸⁴ The Explanatory Memorandum of the Civil Law Code, n. 36 above, p 29.

agency contracts which are also consumer contracts or carriage contracts. Thereafter, we shall proceed to address various issues that are excluded from the scope of the applicable law. Finally, we will consider the matters within the scope of the applicable law.

Contracts of Employment

In some cases an agent may be an employee of his principal.⁸⁵ Thus, the question arises of whether this type of agency is within the scope of the normal choice of law rules, discussed above, which usually apply to the internal relationship. Some argue that the notion of an employment contract should be interpreted widely.⁸⁶ As the Karsten Report explained, the concept of a contract of employment should not be construed too restrictively,⁸⁷ because the contract of employment in one legal system may have characteristics that are unfamiliar to other legal systems.⁸⁸ According to Article 10 of the Hague Agency Convention, when the agent deals with the principal as his employee and their agency relationship is created by a contract of employment, this contract will be excluded from the scope of the Chapter II of the Convention. In other words, the law that normally governs the internal relationship will not govern the relationship between the principal and the agent when it arises from an employment contract.⁸⁹ The reason behind this provision is that the Special Commission which negotiated the

⁸⁵ Dicey, Morris and Collins, n. 15 above, p. 2113.

⁸⁶ H.L.E. Verhagen, n. 14 above, p. 251.

⁸⁷ Karsten Report, n. 16 above, parg. 201, p. 55.

⁸⁸ H.L.E. Verhagen, n. 14 above, p. 251.

⁸⁹ Article 10 of the Convention provides that "This Chapter shall not apply where the agreement creating the agency relationship is a contract of employment."

Convention aimed to prevent conflict between the choice of law rules in the Convention and mandatory rules in employment law.⁹⁰

The Rome I Regulation provides a special rule for individual employment contracts in Article 8, which excludes or overrides Articles 3 and 4. Consequently, the law governing the agency internal relationship, as determined by the default rules specified by Article 4(1)(b) or 4(3), does not apply where the agency contract is regarded as an employment contract. The Giuliano-Lagarde Report explains that Article 8 is designed to grant adequate protection for the employee (agent) who is considered a weaker party in the contract, according to the socio-economic point of view.⁹¹

According to Article 8(1) of the Rome I Regulation, the parties, the principal (employer) and the agent (employee), have a right to determine the law governing their relationship pursuant to Article 3.⁹² Nonetheless, the protection mandatorily provided to the employee under the law that would be applied in the absence of choice cannot be excluded by the choice of another law by the parties.⁹³ In the absence of party choice, the law of the country where the agent habitually carries out his work will be applied. This country will not be changed where the employee works temporarily in another country (Article 8(2)). If the applicable law cannot be determined

⁹⁰ H.L.E. Verhagen, n. 14 above, p. 249.

⁹¹ Giuliano and Lagarde Report, n. 31 above, p. 25.

⁹² Article 8(1) of the Rome I Regulation provides: "An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article."

⁹³ Dicey, Morris and Collins, n. 15 above, p. 2113.

according to Article 8(2), the court may apply Article 8(3), which refers to the law of the country of the place of business by which the employee was engaged. Nonetheless, if the court discovers through the circumstances that another country is more closely connected to the contract than that determined under Article 8(2) and (3), the law of this other country will apply (Article 8(4)).⁹⁴

In the UAE, it should be noted that the UAE legislation does not contain any provisions specifying which law governs an agency contract when it is considered an employment contract. Thus, the question arises of whether this kind of contract will be governed by Article 19 of the Civil Code or whether it is outside the scope of this Article. It can be argued that the parties in the agency employment contract may select expressly or impliedly the applicable law. Nonetheless, in the absence of choice some argue that Article 23 of Civil Code enables the court to apply the provisions of the Rome I Regulation relating to such contracts. In other words, Article 8 of the Rome I Regulation should be applied to the internal relationship between the

⁹⁴ Article 8(2)-(4) of the Regulation provides:

"2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2. the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than indicated in paragraphs 2 or 3, the law of that other country shall apply."

principal and the agent when the agreement is regarded as an employment contract in accordance with general principles of private international law.⁹⁵

Consumer Contracts

In essence a consumer contract is a contract whereby a person who is not acting in the course of business (the consumer) acquires goods or services from another person who is acting in the course of business (the supplier). An agency contract is a contract whereby the principal obtains the services of the agent. It is not uncommon for the principal to be acting outside his trade or profession,⁹⁶ for example when a holiday-maker concludes a contract with a travel agency to act in his behalf in the booking of a hotel and flight. In this case the agency contract is considered a consumer contract. Thus, the question arises as to the law which governs this contract.

Some argue that an agency consumer contract is within the scope of Article 5 of the Hague Agency Convention. In other words, the agency consumer contract will be governed by the law that governs normal agency contracts, which in the absence of a choice by the parties is usually the law of the country in which the agent has his business establishment or if he has none, his habitual residence. In this context, the principal may be able to rely upon the protective provisions in the law of the country in which he has his residence, insofar as they are regarded as overriding mandatory rules within Article 16 of the Convention.⁹⁷ But it must be borne in mind that the operation of Article 16 is at the discretion of the forum, and that it is confined to

⁹⁵ Okasha Mohamed Abdel-aal, n. 21 above, p. 742.

⁹⁶ Dicey, Morris and Collins, n. 15 above, p. 2113. See also H.L.E. Verhagen, n. 14 above, p. 254.

⁹⁷ H.L.E. Verhagen, n. 14 above, p. 254. Article 16 will be examined in detail in Chapter 5 below.

situations in which the protective law attempts to insist on the application of its protective rules in certain transnational situations including the instant case.

In contrast, under the Rome I Regulation a consumer agency contract which fulfils certain conditions is excluded from the normal conflict rules for agency contracts, and is regulated instead by Article 6, which lays down particular provisions in respect of the choice of law for consumer contracts in order to protect the consumer, who is regarded as the weaker party to the contract. The principal must be acting outside his trade or profession, and the other party (the agent) must be acting within his trade or profession.⁹⁸

According to Article 6(1) of the Regulation, in the absence of choice, a consumer contract will be subjected to the law of the country in which the consumer habitually resides. However, the application of the law of this country requires that the other party (the professional) must have conducted commercial or professional activities in this country, or have directed such activities to this country. Alternatively, this country may be one of several countries to which the professional directed such activities. Moreover the contract in question must fall within the scope of these activities. In addition, in accordance with Article 6(2), the parties may determine the applicable law, but the chosen law will operate subject to the application of the mandatory protective provisions of the law of the consumer's habitual residence. The requirements of paragraph 1 must also be fulfilled in the case where the parties choose the applicable law. On the other hand, pursuant to Article 6(3), if the requirements in paragraph 1 are not fulfilled, the consumer contract will be governed by the law determined by the normal conflict rules specified by Articles 3 and 4 of the Regulation.

⁹⁸ Dicey, Morris and Collins, n. 15 above, p. 1950.

In the UAE, the parties may choose the law to govern a consumer contract by virtue of Article 19 of the Civil Code. However, in the absence of choice, the court should ignore the default rules specified by this Article and instead use the general principles of private international law referred to in Article 23 of the Civil Code, in order to apply rules derived from Article 6 of the Regulation.

Carriage of Goods Contracts

In some cases, a principal may conclude an agency contract with an agent for the carriage of the principal's goods. UAE legislation refers to this kind of agency contract as a commission agency for carriage, and regulates it by Articles 341 to 352 of the Commercial Code. Article 341 provides that:

"(1) Commission agency for carriage is a contract by which the agent undertakes to enter into a carriage contract in his own name and for the account of his principal, and where necessary, the commission agent should operate what is appropriate related to this transportation from commission paid by the principal. A commission agent for carriage shall be as concerns the consignor in the same status as a carrier.⁹⁹

(2) Where the commission agent undertakes carriage by his own means, he shall be governed by the provisions of the carriage contract, unless otherwise agreed upon."

According to this Article, the commission agent for carriage may conclude the contract of carriage with the carrier on behalf of the principal or use his own means to execute the carriage.

⁹⁹ This is the present writer's translation. The official translation by the Ministry of Justice on their website, elaws.gov.ae/ArLegislations.aspx, is defective, in omitting most of the clause following "and where necessary".

In respect to private international law, the question may arise about the law governing this relationship between the principal and the commission agent for carriage. To determine the applicable law of this relationship, it is necessary to determine whether this relationship is a contract of agency or a contract of carriage.

Pursuant to Article 341(2), it is clear that if the agent uses his own means to execute the carriage, the relationship is considered a contract of carriage. Moreover, when the commission agent for carriage concludes the contract with the carrier on behalf of his principal, it could be argued that the relationship between the principal and the commission agent is considered a contract of carriage in respect to the choice of law; this is so for many reasons. According to Article 345, the commission agent should guarantee the goods' safety, and this is the task of the carrier. In addition, pursuant to Article 446, the commission agent is liable for any damage to all or part of the goods. He is also liable for any delay in receiving the goods; this kind of liability is the carrier's responsibility. Furthermore, pursuant to Article 350, if the commission agent pays the freight to the carrier, he will replace him in his rights. Moreover, the principal is only aware of the commission agent, and will address him about any question relating to the carriage of goods.

Therefore, because the commission agent's task is to perform the carriage of goods in his own name, whether by concluding a contract with the carrier or by his own means, he is considered as the carrier for the principal; consequently, he is subject to the law governing the carriage of goods contract.

Under the Rome I Regulation, by Article 5(1), in the absence of a choice of law, a contract of carriage of goods will be subject to the law of the country in which the carrier has his habitual residence, but only if this law is also the law of the country of receipt, the country of

delivery, or the consignor's habitual residence. If this requirement is not met, the laws of the country of delivery will apply. If all the circumstances of the case point to another country as more closely connected to the contract, the law of that country will apply.

It should be noted that in the Rome Convention Article 4(4) provided for the application of the carrier's principal place of business, rather than his habitual residence. The Rome I Regulation also provides for the application of the law of the place of delivery in cases where the law of the carrier's residence does not apply, while in such cases the Convention merely applies the test of the closest connection directly.¹⁰⁰ Both measures specify that single-voyage charterparties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods.¹⁰¹

On 23 October 2014, in *Haeger & Schmidt GmbH v Mutuelles du Mans Assurances*¹⁰² the European Court dealt with a contract whereby a principal engaged a commission agent to arrange a carriage of goods on behalf of the principal. It indicated that the contract fell within Article 4(4) of the Rome Convention and Article 5(1) of the Rome I Regulation, since its main purpose was the carriage of goods.

UAE legislation does not contain any provisions dealing specifically with choice of law in respect of a contract of carriage of goods. Thus, such a contract will be governed by Article 19 of the Civil Code, and the parties may expressly or impliedly choose the applicable law. In the absence of choice, the law of the common residence will apply. However, if the parties have different places of residence, it could be argued that Article 23 of the Civil Code should be

¹⁰⁰ Peter Stone, n. 24 above, p. 316.

¹⁰¹ See Recital 22 to the Regulation, and Article 4(4) of the Convention.

¹⁰² Case C-305/13.

invoked, so as to enable the court to apply the provisions of the Rome I Regulation, rather than the law of the place of contracting.

Issues excluded from the scope of the applicable law

Some issues are excluded from the scope of the law governing the internal relationship between the principal and the agent. These issues will be examined as follows.

FORMAL VALIDITY

The formal validity of the agency contract between the principal and the agent is excluded from scope of the Hague Agency Convention by virtue of Article 2(b).¹⁰³ In other words, the law governing the internal relationship, as determined by Articles 5 or 6, will not apply to the formal validity of this contract.¹⁰⁴ The matter will instead be left to the conflict rules of the forum country.

Moreover, the Rome I Regulation partly removes this issue from the scope of the law governing the internal relationship, as determined by Articles 3 and 4. Instead Article 11(1) and (2) regulate formal validity.

Pursuant to Article 11(1) of the Regulation, the formal validity of an agency contract entered into between parties who are in the same country will be governed by the law governing the internal relationship, as determined by Articles 3 or 4 of the Regulation, or by the law of the country in which the contract is concluded. Whichever of these laws is more favourable to the

¹⁰³ Article 2(b) of the Convention provides: "This Convention shall not apply to: ... requirements as to form".

¹⁰⁴ H.L.E. Verhagen, n. 14 above, p. 257.

formal validity of the contract will apply. By Article 11(2), when the parties are in different countries, the formal validity will be governed by the law governing the internal relationship, or by the law of any country in which one of the parties was present at the time of conclusion, or was habitually resident at that time. Again, whichever of these laws is more favourable to the formal validity of the contract will apply.

In the UAE, formal validity is explicitly referred to in Article 19 of the Civil Code as falling within its scope. Thus, the parties may choose expressly or impliedly the law governing the formal validity of the internal relationship. However, in the absence of choice, the law of the parties' common residence is applied, but in respect to the agency contract the principal and the agent do not always live in the same country. Moreover, in cases where there is no common residence, the law of the country where the contract was concluded is applied. It is obvious that the legislator in the UAE overlooked cases where the contract was concluded by means of correspondence across borders. This has become particularly problematic in relation to cross-border electronic transactions. Hence, the court may apply Article 11(2) of the Regulation in this case, pursuant to Article 23 of the Civil Code.

Furthermore, in respect of the preference between the Rome I Regulation approach and that of the UAE Code, it is noteworthy that the Regulation solution is more flexible, in that it enables application of the most validating of the various laws referred to; while under the UAE Code, the court must apply a single specified law.

CAPACITY

Pursuant to Article 2 of the Hague Agency Convention, the principal and the agent's capacity is excluded from the scope of the law governing the internal relationship.¹⁰⁵ Thus, the matter is left to the conflict rules of the forum country.

The Rome I Regulation also excludes the capacity of both companies and individuals from the scope of the Regulation pursuant to Article 1(2)(a) and (f).¹⁰⁶ Nonetheless, Article 13 of the Regulation provides an exception where the parties (principal and agent) are in the same country when they conclude the contract and both have capacity according to the law of this country. In such a case a party who is an individual (rather than a company) cannot rely on the law of another country to invoke his own incapacity. However this barrier applies only if the other party was aware of this incapacity at the time of the conclusion of the agreement, or he was unaware because of his negligence.¹⁰⁷ Some argue that the purpose of Article 13 is to protect the party who concludes the contract in good faith.¹⁰⁸

¹⁰⁵ Article 2(a) provides: "This Convention shall not apply to: ... the capacity of the parties".

¹⁰⁶ Article 1(2) provides: "The following shall be excluded from the scope of this Regulation:

(a) question involving the status or legal capacity of natural person, without prejudice to Article 13;

(f) question governed by the law of companies and other bodies corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity ... of companies and other bodies, corporate or unincorporated ...".

¹⁰⁷ Article 13 of the Regulation provides: "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

¹⁰⁸ Dicey, Morris and Collins, n. 15 above, p. 1870.

Since capacity is for the most part excluded from the scope of the Regulation, the court should apply the traditional conflict rule of the forum country to determine the law governing the capacity of the principal and the agent. As regards an individual (as distinct from a company), English law recognises a rule of alternative reference to determine the law that is applicable to capacity. This refers to the proper law of the internal relationship, as determined by the Regulation, to govern the capacity of the principal and the agent. However, if an individual lacks capacity according to the proper law, his capacity will be subjected to his personal law. In other words, it is sufficient in the English approach that each party (the principal and the agent) has capacity either according to the proper law of the internal relationship, or according to the personal law of that party. In contrast, a company must have capacity both under the law governing the contract and under the law of country where the company is incorporated.¹⁰⁹

In the UAE, pursuant to Article 11(1) of the Civil Code, the capacity of the principal or the agent is governed by the law of his nationality. However, the legislator provides an exception to this provision in the case when the agency contract is transacted and its results materialise in the UAE, and one party lacks capacity according to the law of his nationality, and it is not easy for other party to discover the incapacity. In such a case this incapacity will be disregarded.¹¹⁰ According to Article 11(2), a company's capacity will be subjected to the law of the country

¹⁰⁹ Peter Stone, n. 24 above, p. 329.

¹¹⁰ Article 11(1) provides: "The law of the state of which a person has the nationality shall apply to the civil status and competence of such person but nevertheless in financial dealings transacted in the State of the United Arab Emirates the results of which materialise therein, if one of the parties is an alien of defective capacity and the lack of capacity is attributable to a hidden cause which the other party could not easily discover, such cause shall have no effect on his capacity."

where its main administrative centre is located. But insofar as the company conducts activities in the UAE, the UAE internal law will apply.¹¹¹

In respect to the preference between the English approach and that of the UAE law, it is noteworthy that the English solution is more flexible than the UAE approach, and it is more suitable to international agency contracts for many reasons. The English approach adopts an alternative solution between the law of the internal relationship and the party's personal law, and makes it sufficient that the party has capacity according to one of these two laws. In contrast the UAE law provides a general provision in favour of the application of the law of a party's nationality, but makes includes an exception to this provision to avoid the application of this law to the party's lack of capacity, and then subjects his capacity to the UAE internal law.

To avoid the application of the personal law, UAE law requires that the agency contract should be transacted and materialised in the UAE, while according to the English law, it is not required that the agency contract be transacted in the UK. Additionally, the UAE requires that the lack of capacity be a result of a hidden cause which is difficult for the other party to discover. The English approach does not have such a requirement. Moreover, pursuant to the UAE conflict rule regarding the lack of capacity, the UAE internal law will apply to consider the party capable, whereas, in accordance with the English approach, the law governing the internal relationship will apply.

Some argue that it is more adequate for international transactions that the parties' capacities be subjected to the law of the country in which the contract was concluded.¹¹²

¹¹¹ Article 11(2) provides: "With regard to the legal regulation of foreign juridical persons including companies, associations, establishments and otherwise, the law of the state in which such bodies have their actual main administrative centre shall apply thereto, and if such a body carries on an activity in the State of the United Arab Emirates, the national [that is, UAE] law shall apply."

Nevertheless, this opinion may lead to difficulty in determining the place of contracting, particularly when the contract was concluded by means of correspondence across borders.

The issues within the scope of the applicable law

The law that governs the internal relationship, whether determined by the parties or by reference to default rules, will apply to the whole contract between the principal and the agent from the creation of the contract to its termination.¹¹³ However, some specific issues that fall within the scope of the applicable law merit specific attention as follows.

THE EXISTENCE AND VALIDITY OF THE INTERNAL RELATIONSHIP

The formation of the contract between the principal and the agent is governed by the law which is putatively applicable to the contract.¹¹⁴ This rule is adopted both by Article 10(1) of the Regulation¹¹⁵ and by Article 8(1) of the Agency Convention¹¹⁶ Some argue that the main problem which may arise in relation to the formation of the internal relationship is where a party (principal or agent) did not expect to be bound by the law governing the internal relationship.

¹¹² Okasha Mohamed Abdel-aal, n. 21 above, p. 475.

¹¹³ H.L.E. Verhagen, n. 14 above, p. 257.

¹¹⁴ Dicey, Morris and Collins, n. 15 above, p. 1842.

¹¹⁵ Article 10(1) of the Regulation provides: "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid."

¹¹⁶ Article 8(1) of the Convention provides: "The law applicable under Articles 5 and 6 shall govern the formation and validity of the agency relationship, the obligations of the parties, the conditions of performance, the consequences of non-performance, and the extinction of those obligations."

This includes, for instance, cases when the applicable law would consider silence as an acceptance of an offer, and the party did not respond to the other party's offer; with the result that the silent party will be bound in circumstances where under the law of his residence he would not be bound.¹¹⁷ The Regulation solves this problem by means of an exception specified by Article 10(2), which enables the party to rely on the law of the country of his habitual residence to avoid his liability under the contract. To do so he must establish that in all the circumstances it would be unreasonable to determine the effect of his words and conduct, as giving rise to his consent, in reference to the law governing the internal relationship.

Moreover, the essential or substantive validity of the agreement between the principal and the agent is within the scope of the law that is applicable to the internal relationship. This rule is adopted by Article 8(1) of the Agency Convention¹¹⁸ and Article 10 (1) of the Regulation. Thus defects in consent, such as fraud, error or duress fall within the scope of the applicable law. In other words, whether any party was influenced by factors vitiating his consent when he entered into the agency contract, and whether the contract can therefore be annulled, are governed by the law governing the internal relationship.¹¹⁹ But questions of substantive validity and defects in consent may be affected by the overriding mandatory rules or the public policy of the forum.¹²⁰

¹¹⁷ H.L.E. Verhagen, n. 14 above, p. 259.

¹¹⁸ See note 116 above.

¹¹⁹ H.L.E. Verhagen, n. 14 above, p. 263.

¹²⁰ See Chapter 5 below.

THE PARTIES' OBLIGATIONS AND THE EXTINCTION OF THESE OBLIGATIONS

The law governing the internal relationship will determine the principal's obligations, such as paying the agent's remuneration, and the agent's obligations, such as his duties of care, skill and loyalty. It also governs the validity, interpretation and effects of exclusion clauses.¹²¹ Moreover, the agent's authority to appoint a sub-agent is also governed by the law governing the internal relationship.¹²²

The extinction of the principal and the agent's obligations is within the scope of the law governing the internal relationship. Thus, this law will govern a variety of ways of extinguishing obligations, such as performance, discharge, frustration of the contract, and waiving of rights.¹²³ The Agency Convention, by Article 8(1), subjects the extinction of such obligations to the law applicable to the internal relationship.¹²⁴ The Regulation also adopts this rule by Article 12(1)(d). Furthermore, both the Agency Convention and the Rome I Regulation provide for prescription and time-limitation of rights to be subjected to the law governing the agency agreement between the principal and the agent.¹²⁵

¹²¹ H.L.E. Verhagen, n. 14 above, p. 265.

¹²² H.L.E. Verhagen, n. 14 above, p. 292.

¹²³ Dicey, Morris and Collins, n. 15 above, p. 1858. See also H.L.E. Verhagen, n. 14 above, p. 267.

¹²⁴ See note 116 above.

¹²⁵ See Article 8(1) of the Agency Convention, and Article 12(1)(d) of the Rome I Regulation.

INTERPRETATION

When interpreting an agency contract to discover the principal and the agent's intentions, the court should do so in accordance with the law governing the internal relationship.¹²⁶ The Regulation adopts this rule in Article 12(1)(a), which provides that "The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation". Although the Agency Convention does not explicitly so provide, it is clear that the interpretation of the agency contract between the principal and the agent should be governed by the law that governs this contract.¹²⁷

THE MANNER OF PERFORMANCE

In relation to the manner of performance, a question arises regarding which law governs this issue. Pursuant to Article 9 of the Agency Convention, the court should take into account the law of the country of performance in regard to the manner of performance.¹²⁸ But this only means that the law of this country should be taken into account, and not that the issue of the manner of performance of the internal relationship must be subjected to the law of the place in which the contract is carried out.¹²⁹ Consequently, the manner of performance will be subjected to the law governing the internal relationship, and the provisions of the law of the place of

¹²⁶ Gralf Peter Calliess, n. 9 above, p. 251.

¹²⁷ H.L.E. Verhagen, n. 14 above, p. 273.

¹²⁸ Article 9 of the Regulation provides: "Whatever law may be applicable to the agency relationship, in regard to the manner of performance the law of the place of performance shall be taken into consideration."

¹²⁹ H.L.E. Verhagen, n. 14 above, p. 275.

performance will be considered as factual data taken into account to assess the extent of the agent's duties and rights.¹³⁰

For example, an agent instructed to buy shares on a stock exchange will be justified in following the procedures which are laid down by the law of the country in which the exchange is located.

By virtue of Article 12(2) of the Regulation, when determining the law governing the manner of performance, account should be taken of the law of the country where the performance is carried out. Furthermore, in the case of a defective performance, this law will be taken into account to determine the steps that should be taken.¹³¹ It should be noted that the substance of a party's obligation will not be affected by the law of the country of performance, but this law will be referred to in order to regulate the minor details of the performance.¹³²

In the UAE, the legislator does not specifically regulate the question of the law applicable to the manner of performance. Thus, the court may have regard to the law of the country of performance in this case under Article 23 of the Civil Code.

¹³⁰ Karsten Report, n. 16 above, para. 196, p. 54.

¹³¹ Article 12(2) of the Regulation provides: "In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place."

¹³² Peter Stone, n. 24 above, p. 329.

THE CONSEQUENCES OF NON-PERFORMANCE

Pursuant to Article 8(1) of the Agency Convention, the consequences of non-performance are governed by the law governing the internal relationship.¹³³ Thus, whenever any party (principal or agent) has not performed his obligation properly, legal consequences will arise, which are governed by the law of the internal relationship. Moreover the concept of non-performance covers many situations, such as when the party does not perform at all, when the party performs too late, or when the performance is defective.¹³⁴

The Rome I Regulation also refers non-performance to the proper law of the contract according to Article 12(1)(b).¹³⁵ And by Article 12(1)(c), the proper law also governs, within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law.

ACTUAL AUTHORITY

It is clear that under the Rome I Regulation the existence of actual authority, between the principal and the agent, should be governed by the proper law of the agreement between them, determined in accordance with the Regulation.¹³⁶ In addition, Article 8(2)(a) of the Agency

¹³³ Article 8(1) of the Agency Convention provides: "The law applicable under Articles 5 and 6 shall govern the formation and validity of the agency relationship, the obligations of the parties, the conditions of performance, the consequences of non-performance, and the extinction of those obligations."

¹³⁴ H.L.E. Verhagen, n. 14 above, p. 266.

¹³⁵ Gralf Peter Calliess, n. 9 above, p. 252.

¹³⁶ Peter Stone, n. 24 above, p. 330.

Convention provides that the existence and extent of the agent's authority are determined by the law that governs the internal relationship. The modification and termination of the agent's authority are also governed by this law.¹³⁷

THE CONSEQUENCES OF NULLITY

It was apparently on the basis that the consequences of nullity fall within the law of restitution or quasi-contract that the UK made a reservation against applying Article 10(1)(e) of the Rome Convention, which referred this issue to the proper law of the contract. Some argue that the provision of this Article is inappropriate in such cases when the parties expressly choose an applicable law, because it might not have a factual connection to the situation.¹³⁸ But no reservation is possible in relation to Article 12(1)(e) of the Rome I Regulation, which echoes Article 10(1)(e) of the Rome Convention.¹³⁹ Thus, even in the UK a claim for the recovery back of money paid under a void contract is now governed by the law governing the contract.¹⁴⁰

Although the Agency Convention does not contain a provision similar to Article 12(1)(e) of the Rome I Regulation, some argue that the law governing the internal relationship should govern the consequences of the nullity of the agency contract between the principal and the agent, because these consequences are most closely connected to the agency contract.¹⁴¹

¹³⁷ Article 8(2)(a) of the Convention provides: "This law shall apply in particular to ...the existence and extent of the authority of the agent, its modification or termination".

¹³⁸ Dicey, Morris and Collins, n. 15 above, p. 1861.

¹³⁹ Article 12(1)(e) of the Regulation provides: "The law applicable to a contract by virtue of this Regulation shall govern in particular: ... the consequences of nullity of the contract."

¹⁴⁰ Dicey, Morris and Collins, n. 15 above, p. 1862.

¹⁴¹ H.L.E. Verhagen, n. 14 above, p. 272.

Conclusion

As previously discussed in this section, it is clear that, in enabling the parties to make an express or implied choice of the law governing their contract, Article 19(1) of the UAE Civil Code has adopted a modern approach with respect to choice of law in respect of international contracts, and that this applies to the internal agency relationship between the principal and the agent. This approach is recognised by Article 5 of the Hague Convention 1978, as well as by Article 3(1) of the Rome I Regulation. Nonetheless, it would be desirable for the UAE legislator to enact a specific provision addressing the question of choice of law with respect to agency contracts.

It is also clear the UAE legislation does not contain any provision explicitly regulating some particular issues in respect of express or implied choice of the law applicable to a contract; thus, the court may use Article 23 of the Civil Code to adopt solutions for these issues. For instance, in respect of express choice, to establish that the parties may choose the law governing their contract at any time; and that the parties may choose another law to replace the law that they had previously chosen. Nevertheless, the subsequent choice should not prejudice the contract's formal validity, and it should not affect negatively the rights of third parties. Article 23 may also be used to permit the parties to choose several laws to govern different parts of their contract. Furthermore, in regard to implied choice, the court may use Article 23 to adopt a wide view of the implied choice equivalent to a test of the closest connection. Nevertheless, it would be preferable for the legislator in the UAE to amend Article 19 to address these issues.

However, Article 19(1) of the Civil Code also establishes default rules, applicable to all types of international contract, in favour of the law of the country that is the common residence

of the parties, or (where there is no common residence) the law of the country where the parties concluded the contract. This approach is in contrast to the modern approach, as recognised by the general rule specified by Article 6(1) of the Agency Convention (which refers to the agent's business establishment or his habitual residence) and the exception specified by Article 6(2) (which refers to the principal's business establishment or his habitual residence), or by Article 4(1)(b) of the Rome I Regulation (which refers to the agent's habitual residence) and Article 4(3) (which refers to the law of the country that is obviously more closely connected to the internal relationship than the agent's habitual residence). Thus, commentators argue that Article 23 of the Civil Code may be used to apply the law of the country where the agent has his habitual residence, or the principle of closest connection, in the absence of a choice by the parties. Nevertheless, it would be preferable for the UAE legislator to enact an amendment adopting default rules reflecting those of the Rome I Regulation, since (in the present writer's opinion) the Rome I Regulation approach provides better solutions than the Hague Convention approach.. Moreover an explicit amendment would be more helpful to the courts than leaving them to utilise general principles of private international law (under Article 23), as courts may be reluctant to depart from apparently clear express provisions in order to apply general principles.

Consequently, it could be argued that the UAE legislator should regulate choice of law with respect to the internal agency relationship by a specific article that adopts a modern approach, respecting the parties' freedom to choose expressly or impliedly the applicable law and establishing suitable the default rules for cases where no choice has been made by the parties.

It is also clear the UAE legislation does not contain any provisions specifying which law governs an employment or consumer contract, or an agency contract when it is considered an employment or consumer contract; consequently, some argue in favour of the application of Article 23 of the Civil Code. Nevertheless, it could be argued that it would be preferable if the Civil Code were amended by the addition of provisions regulating these questions.

As regards choice of law with respect to agency contracts, the operation of the normally applicable law may be excluded by the public policy of the forum country, and may also be displaced by overriding mandatory provisions. These questions will be examined in the next chapter.

CHAPTER FIVE

PUBLIC POLICY AND

OVERRIDING MANDATORY PROVISIONS

Introduction

In regard to conflict law, there is a generally accepted principle whereby the application of the normally applicable law may be excluded because it offends the public policy of the forum country. This principle extends to choice of law in respect of agency contracts. Additionally, many countries recognise the existence of overriding mandatory provisions that should be applied regardless of the normally applicable law. Examples of such provisions include EEC Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents,¹ which is transposed in Great Britain by the Commercial Agents (Council Directive) Regulations 1993. It seems that all the Articles of the Directive should be regarded as overriding mandatory provisions, and not only Article 17 and 18, which give the agent certain rights in relation to the termination of the contract by the principal.² Similarly, in the UAE the provisions of Federal Act 18/1981 on the Regulation of Commercial Agencies (the Agency Code) appears to be overriding mandatory provisions, as generally understood for conflict purposes.

These two concepts are important, since (in the first place) the law applicable to the relationship between a principal and an agent, as determined in accordance with the rules which

¹ [1986] OJ L382/17.

² See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 2120.

we have examined in Chapter Four, will be set aside if its content is incompatible with the forum's public policy. Secondly, the operation of the normally applicable law may be displaced so as to give effect to overriding mandatory provisions. Consequently we need to examine these two questions to understand how these issues impact on the law applicable to agency relationships.

With regard to public policy and overriding mandatory provisions, we shall first consider the possible impact of public policy on the applicable law. Thereafter, we shall proceed to address the possible impact of overriding mandatory provisions on the applicable law. Next we shall examine Directive 86/653 and the Commercial Agents (Council Directive) Regulations 1993, to determine the application of the Directive as overriding mandatory provisions in the EU Member States in respect of agency contracts. Finally, we shall examine the UAE Regulation on Commercial Agencies.

Public policy

The Hague Agency Convention, like many other conventions, recognises the principle of public policy. Thus, under Article 17 of the Agency Convention,³ the court should refuse to apply the normally applicable law if such application would infringe essential values of the legal system of the forum. In other words, the applicable law will be set aside its provisions are manifestly incompatible with the forum's public policy.⁴

³ Article 17 of the Convention provides that "The application of a law specified by this Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*)."

⁴ H.L.E. Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff Publishers, Netherland, 1995), p. 248.

A similar saving in favour of the forum's public policy is made by the Rome I Regulation in Article 21. Consequently, application of the normally applicable law will be refused in rare cases where its provisions are inconsistent with the concepts of essential justice of the forum country.⁵ In other words, when the application of the law governing the internal relationship between the principal and the agent is manifestly incompatible with the forum's public policy, it will be set aside. Under both the Hague Convention and the Rome I Regulation, the effect of the public policy proviso is to exclude the relevant substantive rule of the normally applicable law in favour of the corresponding rule of the *lex fori*.

By Article 27 of the Civil Code, the UAE legislator has adopted the doctrine of public policy in the context of choice of law rules. This article states that "It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a, public order, or morals in the State of the United Arab Emirates." Thus, public policy plays a significant role in the exclusion of offending provisions in the applicable law in the light of the basic concepts and fundamental values underpinning the UAE community. The exclusion is limited to the provision that is contrary to public policy, and consequently, the court will apply other provisions of the applicable law that are not inconsistent with public policy. The *lex fori* will apply instead of the provision which is excluded by reference to public policy.⁶

⁵ See Peter Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), p. 335.

⁶ Okasha Mohamed Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 402.

Overriding Mandatory Rules

The Rome I Regulation defines the concept of overriding mandatory provisions in Article 9(1):

"Overriding mandatory provisions are provisions 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 any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

It should be noted that the Regulation uses the expression "mandatory provision" instead of "mandatory rule" which is used in Article 7 of the Rome Convention.⁷ The Hague Agency Convention also uses the expression "mandatory rule". But this change in terminology does not appear to have any significance.

The aim of these provisions is to safeguard public interests of a country that are related to its economy or its social or political arrangements, or to protect weaker contracting parties, such as consumers or employees. As regards the Hague Agency Convention, the preliminary draft provided for mandatory rules which aimed to protect the agent; but in the final version this limitation has been removed.⁸

Under Article 16 of the Hague Agency Convention,⁹ the law governing agency, whether in regard to an internal or external relationship, is potentially subjected to an exception in favour

⁷ Dicey, Morris and Collins, n. 2 above, p. 1828.

⁸ H.L.E. Verhagen, n. 4 above, p. 226.

⁹ Article 16 provides: "In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules."

of overriding mandatory rules of a country that has a significant connection with the situation. Under the Convention, the court has an option to apply such a rule, because the Convention uses the expression: "effect may be given". In other words, the wording of Article 16 indicates that the application of this rule is at the discretion of the court. Moreover, to permit the operation of a mandatory rule under Article 16, the rule must have overriding character under the law of the country to which the rule belongs.¹⁰

Thus, according to the Hague Agency Convention, the overriding mandatory rules of the forum country or of a third country may be applicable when there is a significant connection. In addition, the mandatory rules of the law governing an agency contract will apply under the normal conflict rules as part of the normally applicable law. Further, the mandatory rules of the forum country may also be applied pursuant to public policy under Article 17.¹¹

Under Article 9(2) of the Rome I Regulation, the application of the forum's overriding mandatory provisions is not restricted by the law determined by the provisions of the Regulation. However, Recital 37 indicates that the forum's overriding mandatory provisions should be applied only in exceptional circumstances.¹²

In contrast, Article 9(3)¹³ provides that the overriding mandatory provisions of a third country may be applied where the contractual obligations have been or have to be performed in

¹⁰ H.L.E. Verhagen, n. 4 above, p. 226.

¹¹ Ibid.

¹² Peter Stone, n. 5 above, p. 338.

¹³ Article 9(3) provide: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those

that country, and the performance is unlawful according its law (country of performance). It is also required that the court, when deciding on the application of Article 9(3), should take into account the purpose, nature, and consequences of the overriding mandatory provisions in question.¹⁴ In any event, in view of the features required by Article 9(3), it seems likely that this provision will rarely have any effect on issues concerning agency.

From the foregoing discussion, it appears that the Hague Agency Convention requires a significant connection between the agency contract and the country whose overriding mandatory rule is under consideration, whether these rules are from the *lex fori* or from a third country. In contrast, the Regulation gives general respect to the *lex fori*, but otherwise it focuses on unlawful performance with a view to applying the law of the country of performance. It must be noted that, as regards overriding mandatory rules of third countries, the Rome Convention resembled the Hague Convention, and merely required a close connection between the third country and the contract.¹⁵ Moreover, under the Hague Agency Convention, the Rome Convention, and the Rome I Regulation, the overriding mandatory provisions of any country will only apply in a

provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

¹⁴ Dicey, Morris and Collins, n. 2 above, p.1836. See also Peter Stone, n. 5 above, p. 341; and Geert Van Calster, *European Private International Law* (Hart Publishing, Oxford, 2013), p. 147.

¹⁵ Article 7(1) of the Convention provides: "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

situation where the law of the country to which the provisions belong asserts an interest in their application and insists that they be given overriding effect.¹⁶

In the UAE, the legislature does not stipulate expressly for the application of overriding mandatory rules in the manner of the Hague Agency Convention and the Rome I Regulation. Nonetheless, some argue that a UAE court may apply such rules on the basis of the public policy proviso specified by Article 27 of the Civil Code.¹⁷ While this would enable a UAE court to apply overriding mandatory provision of UAE law on the basis of public policy, it would be difficult to use Article 27 of the Civil Code to apply the overriding mandatory provisions of a third country. That is because the public policy proviso differs from respect for overriding mandatory provisions in some aspects. Firstly, public policy functions by excluding the application of foreign rules which are inconsistent with the public policy of the forum country, while a saving for overriding mandatory provisions is applied directly to safeguard the interest of the country in question. In other words, in the case of public policy, the court initially applies its conflict rules to determine the applicable law, after which the applicable foreign law will be excluded because it is inconsistent with the forum's public policy. In contrast overriding mandatory provisions apply directly without the application of the normal conflict rules. Another difference is that public policy, whether it is determined by the court or the legislator, does not operate by way of a list of cases where foreign law is regarded as contrary to public policy, whereas overriding mandatory provisions are sometimes indicated by a legislature in specifying the territorial scope of the substantive rules. Despite these differences, some argue that the UAE

¹⁶ In this sense, see H.L.E. Verhagen, n. 4 above, p. 229.

¹⁷ Okasha Mohamed Abdel-aal, n. 6 above, p. 367.

courts may apply mandatory provisions of a third country if it has a close connection with the dispute on the basis of general principles of private international law under Article 23.¹⁸

EEC Directive 86/653 and the (GB) Commercial Agents (Council Directive) Regulations 1993.

EEC Directive 86/653, which is designed to harmonise the laws of the EU Member States in regard to the internal relationship between the principal and the agent, is implemented in England and Scotland by the Commercial Agents (Council Directive) Regulations 1993/3053 (as amended). It is clear that this Directive is a mandatory provision in the Member States.¹⁹ The European Court, in *Ingmar v Eaton Leonard*,²⁰ decided that the Directive must be applied in the case where an agent performed his activities in a Member State, even if the principal was established in a non-member country, and (under the normal conflict rules) the agency contract was governed by the law of that country.

The Directive's aim is to unify and harmonise domestic law in the EU Member States in relation to the internal relationship between the principal and the agent,²¹ so as to protect the weaker party (the agent)²² and to maintain the security of commercial transactions.²³

¹⁸ Okasha Mohamed Abdel-aal, n. 6 above, p. 367.

¹⁹ Dicey, Morris and Collins, n. 2 above, p. 2116. See also Peter Stone, n. 5 above, p. 339.

²⁰ Case C-381/98, [2000] ECR I-9305.

²¹ See Roy Goode, Herbert Kronke, Ewan McKendrick, and Jeffery Wool, *Transnational Commercial Law, International Instruments and Commentary* (Oxford: Oxford University Press, 2nd edition, 2012), p. 350. See also H.L.E. Verhagen, p. 230.

²² Peter Stone, n. 5 above, p. 338. See also H.L.E. Verhagen, n. 4 above, p. 230.

²³ H.L.E. Verhagen, n. 4 above, p. 230.

The Directive regulates the rights and obligations of the commercial agent and the principal, the agent's remuneration, the conclusion of the agency contract, and its termination. It also deals with the compensation or indemnity payable to an agent as a result of the termination of the agency contract.²⁴

As discussed above, the overriding mandatory provisions of any country will apply in that country in a situation which is determined according to the law of that country. In other words, the scope of application of the overriding mandatory provision will be determined according to the law of the enacting country. In the case of the Directive, the relevant country in the European Union. Thus, in all the Member States the courts will have to apply the Directive in the cases where the European Court rules that it is applicable. In terms of the Rome I Regulation, one may ascribe this result to Article 9(2), on the overriding mandatory provisions of the *lex fori*, or to Article 23, which gives primacy to other provisions of European law which deal with particular matters.

Thus, in examining the scope of the Commercial Agents (Council Directive) Regulations, the starting point should be the scope of the Directive. The GB regulations must, so far as possible, be interpreted so as to accord with the requirements of the Directive, as interpreted by the European Court. Insofar as such an interpretation of the GB regulations proved to be impossible, the UK would be in breach of its obligations under EU law. Thus, in this respect the precise wording of the GB Regulations should be treated as of secondary importance, especially as it is clear that their drafting offers an excellent example of how not to proceed.

²⁴ Dicey, Morris and Collins, n. 2 above, p. 2116. See also Fergus Randolph and Jonathan Davey, *The European Law of Commercial Agency* (Hart Publishing, Oxford, 3rd edition, 2010), p. 55; and Roy Goode, Herbert Kronke, Ewan McKendrick, and Jeffery Wool, n. 21 above, p. 351.

According to Article 1(2),²⁵ the 1993 Regulations apply to the internal relationship between the principal and the commercial agent; however, the external relationship, whether between the principal and the contractor or between the agent and the contractor, is outside the scope of the Regulation.²⁶ Additionally, pursuant to Article 2(1),²⁷ the scope of the Regulations is confined to self-employed agents who act on behalf of the principal, so that if the agent is an employee of the principal the Regulations will not apply.²⁸ The provisions are also confined to agents who negotiate the sale or purchase of goods (as distinct from services and intangible assets, such as shares, bonds and patents).

Article 1(2) of the Regulations provides that "These Regulations govern the relations between commercial agents and their principals and, subject to paragraph (3), apply in relation to the activities of commercial agents in Great Britain". Thus, the Regulations will apply when the commercial agent carries out his activities in Britain.²⁹ The Regulations do not define the term "activities"; however, some rely on the definition of commercial agents in Article 2(1)³⁰ in order

²⁵ Article 1(2) provides: "These Regulations govern the relations between commercial agents and their principals and, subject to paragraph (3), apply in relation to the activities of commercial agents in Great Britain."

²⁶ See Peter Watts and F.M.B. Reynolds, *Bowstead and Reynoldson on Agency* (Thomson Reuters, UK, 19th edition, 2010), p. 682.

²⁷ Article 2(1) provides: " In these Regulations-- "commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal".

²⁸ Dicey, Morris and Collins, n. 2 above, p. 2117.

²⁹ Peter Watts and F.M.B. Reynolds, n. 26 above, p. 682.

³⁰ Article 2(1) provides: "... "commercial agent" means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and

to define the term "activities", and conclude that activities include all acts of negotiation or conclusion of a sale or purchase of goods contract on behalf of the principal.³¹ On the other hand, the question may arise whether the agent acting on behalf of the principal is selling or buying a service, rather than goods, and thus acting outside the scope of the Regulation. It was held in *Crane v Sky In-home Services*³² that the agency contract in question (involving the sale of Sky Television digital packages) was related to a service; and therefore was outside the Regulation's scope.

The requirement for the application of the Regulations is that the activity should be carried out in Britain; however, geographically, it is not explicitly required that the agent, being an individual, should be physically present in Britain, or, in the case of a legal entity, should maintain any place of business therein. Therefore it is arguable that the Regulations will cover the case where the agent conducts his activities in Great Britain by correspondence, such as telephone, electronic mail or telex.³³

However, it can also be argued that the Directive should be interpreted as applying where the agent's establishment, at or from which he is wholly or mainly to carry out the activities envisaged by the agency contract, or his habitual residence (as defined by the Rome I Regulation), is situated within the European Union. Some support for this approach may be drawn from the decision of the European Court in *Ingmar GB Ltd. v Eaton Leonard*

conclude the sale or purchase of goods on behalf of and in the name of that principal; but shall be understood as not including in particular: ...'.

³¹ Dicey, Morris and Collins, n. 2 above, p. 2117.

³² [2007] EWHC 66 (ChD), at para 11.

³³ Dicey, Morris and Collins, n. 2 above, p. 2117. See also Peter Watts and F.M.B. Reynolds, n. 26 above, p. 683.

*Technologies Inc.*³⁴ On this basis, references in the GB Regulations to the place of the agent's activities should be interpreted accordingly.

Moreover, the Regulations do not require the agent and the principal to be established in different Member States, and do not specifically refer to the case where one or both are established in a non-member country. Nonetheless it is indicated in the Recitals to the Directive that its provisions will apply when the commercial agent and the principal are established in different Member States. Dicey argues that such a restriction cannot be accepted since it will prejudice the achievement of harmonisation of the law in the area and will not achieve protection for the agent. They further argue that the Regulations will apply when the agent carries out his activities in Great Britain regardless of the place of either the agent's or the principal's establishment.³⁵ Nonetheless, the better view appears to be that the Directive should be interpreted as applying where the agent's establishment, at or from which he is wholly or mainly to carry out the activities envisaged by the agency contract, or his habitual residence (as defined by the Rome I Regulation), is situated within the European Union. This approach seems to accord best with the reasoning of the European Court in *Ingmar GB Ltd. v Eaton Leonard Technologies Inc.*, where it ruled that Articles 17 and 18 of the Directive should be applied where the agent's activities are conducted in a Member State, although the principal is established in a non-member country (in casu, California), and the contract terms indicate

³⁴ Case C-381/98, [2000] ECR I-9305.

³⁵ Dicey, Morris and Collins, n. 2 above, p. 2119.

expressly that the law of that country should apply.³⁶ It follows that the Regulations will apply even though the parties choose the law of a non-Member State.³⁷

Nonetheless, Article 1(3)(a)³⁸ of the Regulations provides that if the commercial agent and the principal choose the law of another Member State to govern their internal relationship, the Regulations will not apply, even though the agent carries out his activities in Great Britain.³⁹ In this respect the question may arise about the application of the Regulations in the following case: a French agent, who has his habitual residence in Paris, carries out his activities in Great Britain, and the parties do not choose, expressly or impliedly, the applicable law; but the default rules indicate the application of French law (that of a Member State) in this case. Following the literal meaning of the words, "the parties have agreed", it can be argued the Regulations will be applied. Nonetheless, the Directive is satisfied if the law of any Member State is applied, and the GB Regulations indicate that that the UK is happy to give effect to a choice of the parties, or a default solution under Article 4 of the Rome I Regulation, which leads to the application of the law of any Member State in a case to which the Directive applies.

Moreover, some⁴⁰ argue that the Regulations will not apply when an English agent carries out his activities in the territory of another Member State, even though the parties choose English law to govern their contract. However, as an exception, if the parties choose English law to

³⁶ Case C-381/98, [2000] ECR I-9305.

³⁷ Peter Watts and F.M.B. Reynolds, n. 26 above, p. 687.

³⁸ Article 1(3)(a) provides: "A court or tribunal shall ... apply the law of the other member State concerned in place of regulations 3 to 22 where the parties have agreed that the agency contract is to be governed by the law of another member State."

³⁹ Peter Watts and F.M.B. Reynolds, n. 26 above, p. 687.

⁴⁰ Dicey, Morris and Collins, n. 2 above, p. 2118.

govern their contract, according to Article 1(3)(b),⁴¹ the Regulations will apply when the law of that Member State (the place of activities) includes provisions enabling the parties to choose the law of another Member State as an applicable law.⁴²

Nonetheless, some argue that if the parties choose to include the provisions of the Regulations in their contract, the Regulations will apply irrespective of where the agent conducts his activities.⁴³

If the agent is established or habitually resident, and accordingly to be treated as conducting activities, outside Europe, the Directive does not apply. However there seems to be no reason why the parties should not agree that their rights and obligations should be determined as if the Directive applied. This would amount effectively to incorporation by reference, and the validity of such incorporation would be subject to the law governing the contract. If English law is the proper law, such incorporation appears to be acceptable.

It is necessary also to consider the situation where a Member State has extended the scope of its legislation transposing the Directive beyond the scope of the Directive itself; for example, so as to apply to an agent who sells the principal's services (rather than goods). This situation was addressed by the European Court in *Unamar v Navigation Maritime Bulgare*,⁴⁴ where it ruled that such a Member State may permissibly invoke Article 9(2) of Rome I, on

⁴¹ Article 1(3)(b) provides: "A court or tribunal shall ... (whether or not it would otherwise be required to do so) apply these regulations where the law of another member State corresponding to these regulations enable the parties to agree that the agency contract is to be governed by the law of a different member State and the parties have agreed that it is to be governed by the law of England and Wales or Scotland."

⁴² Dicey, Morris and Collins, n. 2 above p. 2118.

⁴³ Ibid.

⁴⁴ Case C-184/12, [2014] 1 All ER (Comm) 625.

overriding mandatory provisions, to apply its extended provisions to a contract governed by the law of another Member State.

Regulation of Commercial Agencies in the UAE

The UAE legislator considers agency contracts to involve a public interest. In addition, it has desired to provide protection to local agencies against foreign principals.⁴⁵ Consequently, Federal Act 18/1981, on the Regulation of Commercial Agencies, was enacted. It has been amended many times: by Act 14/1988, Act 13/2006 and Act 2/2010. This enactment (which may also be referred to as the Agency Code) regulates the internal relationship between a commercial agent and his principal by providing many protective provisions for the agent. Nonetheless, there are many requirements which must be fulfilled to enable these provisions to be applied, and these are stated hereinafter.

The first requirement, provided by Article 2, is that the agent should be an individual with UAE nationality or a company that is wholly owned by individuals with UAE nationality.⁴⁶ Additionally, according to Article 3, the commercial agent must be registered in the Commercial Agents Register,⁴⁷ and the agency contract should be written and the contract should be ratified⁴⁸

⁴⁵ See Adil Sinjakli, *Commercial Agency Disputes and Related Court Judgments in the UAE* [2001] International Business Lawyer 458.

⁴⁶ Article 2 provides: "Carrying out the activities of commercial agency in the state shall be restricted to national individuals or companies wholly owned by national physical persons".

⁴⁷ Article 3 provides that "the activities of the commercial agency in the state shall only be performed by persons whose names are inscribed in the commercial agents' register provided for this purpose in the Ministry; any commercial agency not registered in this register shall not be considered, nor lawsuit therefore shall be heard."

pursuant to Article 4.⁴⁹ If these requirements are fulfilled, any dispute related to the agency will be subject to the protective provisions of the Agency Code and will be heard by a UAE court. Furthermore, according to Article 1, which defines an agency contract and an agent, it is clear that this Regulation will apply to all of an agent's activities, such as distribution, sale, and providing services, on behalf of the principal.

Protective Provisions

The Regulation of Agency imposes many protective provisions, which are considered mandatory, and which apply regardless of the law otherwise governing the internal relationship between the principal and the agent. Some of these provisions will now be examined.

Although the principal may choose to appoint a single agent for all territories of the country or a different agent for each emirate, the registered agent has an exclusive right in his agency's territory.⁵⁰ The exclusive agency grants the agent a right to claim a commission for all transactions concluded within his territory, even if the transaction was concluded by the principal

⁴⁸ The words (ratified contract) in Article 4 mean that the commercial agent must be registered in the Commercial Agents Register.

⁴⁹ Article 4 provides that "for the validity of the agency at the time of registration, the agent must be directly bound to the original principal by a written and ratified contract."

⁵⁰ Article 5 provides: "The original principal may resort to the services of one agent in the state like one area, as he is allowed to resort to one agent in each Emirate, or in several Emirates, provided that the distribution of goods and services object of the agency is restricted to him inside the agency area".

or a third party, and even if the agent did not seek to conclude the transaction.⁵¹ Furthermore, pursuant to Article 23 of the Regulation, the importation by others of any products within the ambit of a registered commercial agency is prohibited. In that regard, the agent has a right to obtain the assistance of UAE authorities to prohibit the importation of any product within the scope of the agency.⁵²

Moreover, under Article 8, an agency contract may not be terminated or left unrenewed by the principal without a substantial reason to justify the termination or non-renewal, whether it be on the agency's expiration date or during the agency's contract term.⁵³ In addition, pursuant to

⁵¹ Article 7 provides that "the agent shall be entitled to commissions for the transactions concluded by the agent himself or by other persons in the area of agency, even if the transactions were not concluded as a result of the effort of the agent".

⁵² Article 23 provides: "It is not allowed for any person to enter goods, products, manufactures, materials or other assets object of any commercial agency registered in the Ministry in the name of another person, for the purpose of trading through other than the agent. The customs departments must not release these goods not imported by the agent unless approved by the Ministry or the agent. The customs departments and the competent authorities each within his concern and upon the application of the agent through the Ministry are required to seize these imports and consign them in the ports' warehouses and the importers' warehouses until this dispute is adjudicated, except for the materials which are decided to traded freely by resolution given by the Council of Ministers, and the Ministry is required to erase the commercial agencies related to these materials from the commercial agencies register."

⁵³ Article 8 provides: "Subject to the provisions of Articles 27 and 28 hereof, the principal may not terminate the agency contract or refrain from the renewal thereof unless there is a fundamental reason for the termination or non- renewal. Furthermore, the agency may not be re-registered in the register of commercial agents under the name of another agent, even if the previous agency's contract was of definite term, unless they said agency has been rescinded upon the mutual consent of the agent and the constituent, or if there is a fundamental reason for the

Article 9, the injured party, who was damaged by termination of the agency contract, is entitled to claim compensation to remedy the damage incurred.⁵⁴

Unregistered Agency

Even though registration is required to carry out an agency's activities in the UAE, in practice there are many unregistered commercial agents conducting business in the country. Moreover, foreign principals often prefer to work through unregistered agents to avoid the protective provisions of the Regulation of Commercial Agencies.⁵⁵ Thus, a question may arise in regard to the situation of unregistered commercial agents under Article 3, particularly in view of the words: "any commercial agency not registered in this register shall not be considered, nor lawsuit therefore shall be heard."

Some argue that, in the case of an unregistered agency, the UAE courts should not hear any claim according to Article 3.⁵⁶ Older UAE court decisions adopted this viewpoint.⁵⁷ Nevertheless, it is arguable that this strict interpretation of Article 3 is not equitable. It should be interpreted more broadly to allow the court to hear a claim related to an unregistered agency. However, in this case the agent would not enjoy the benefit of the protective provisions which

termination of the agency or its non-renewal that convinces the committee, or subsequent to the issuance of a final judicial ruling to cancel the said agency."

⁵⁴ Article 9 provides: "If the termination of an agency contributed to cause damage to any of its parties, the prejudiced person is allowed to demand compensation for the damages sustained."

⁵⁵ See Howard, L. Stovall, *Recent Revisions to Commercial Agency Law in the United Arab Emirates* (2008) 22 Arab Law Quarterly 313.

⁵⁶ Ibid.

⁵⁷ See the Abu Dhabi Court of Cassation decision in Case 227/1998, 31 May 1998.

are imposed by agency law for a registered agency.⁵⁸ Therefore, the court should apply the general rules under the Commercial Code and the Civil Code to solve any dispute between the principal and agent in the case of unregistered agency.⁵⁹ The UAE courts have admitted this viewpoint in many recent decisions. For instance, the Abu Dhabi Court of Cassation has decided in numerous cases⁶⁰ that if a dispute is related to the application of the provisions of the Regulation of Commercial Agency, the court would not apply this regulation in the case of unregistered commercial agencies in view of Article 3, and it will apply general rules to the dispute. The court should take into account Article 22, which provides that a fine in the amount of 5000 AED will be imposed on any person practising a commercial agency activity in the state contrary to the provisions of agency law. However, no fine can be imposed on the principal.

As mentioned above, it appears that the Commercial Agents (Council Directive) Regulation 1993 and the UAE Regulation of Commercial Agencies 1981 (with its amendments) constitute mandatory provisions which apply regardless of the law normally governing the internal relationship between the principal and the agent. Both of the regulations are confined to the internal relationship. In respect to the preference between the English approach and the UAE approach in regard to determining the regulation's scope of application, it is noteworthy that the English solution provides more protection to the agent and to the commercial interest of the country. The UAE approach is confined to a registered agency, which means that an unregistered agent receives no protection, particularly when a foreign principal prefers to deal with an

⁵⁸ Howard L. Stovall, n. 55 above, p. 314.

⁵⁹ See Richard Briggs and Armita Araghi, *Franchising in the United Arab Emirates* (2009) 7/1 International Journal of Franchising Law 6.

⁶⁰ See the Abu Dhabi Court of Cassation decisions in Case 487/2012, 7 November 2012; and Case 875/2009, 10 September 2009.

unregistered agent. Further, UAE legislators desire to provide protection to the weaker local agents in order to protect the public interest; the public interest is the most important consideration, not the interests of the agent. Consequently, following the English approach may provide more protection to the public interest.

Conclusion

The public policy proviso plays a significant role in setting aside the normally applicable law wherever its provisions are inconsistent with the concepts of essential justice of the forum country; or, in other words, where the application of its provisions lead to an infringement of the essential values of the legal system of the forum. Thus, the proviso is adopted by various legal systems, such as by Article 27 of the UAE Civil Code. Moreover, numerous international conventions and regulations recognise the principle of public policy, such as Article 17 of the Hague Agency Convention and Article 21 of the Rome I Regulation.

Moreover, the law governing the internal agency relationship cannot displace the forum country's overriding mandatory rules. In the UAE, a court may use Article 27 of the UAE Civil Code to apply any overriding mandatory provisions of UAE law as a matter of public policy. However, some argue the court may apply the overriding mandatory provisions of other countries using Article 23. Nonetheless, it could be argued that it is desirable that the legislator enact an amendment to the Civil Code, by adding a new Article that provides explicitly for the application of overriding mandatory provisions of the *lex fori*.

Furthermore, the UAE Federal Act 18/1981 on the Regulation of Commercial Agencies (as amended) constitutes overriding mandatory provisions in the UAE, applicable when the agency has been registered in the Commercial Agents Register. This approach may be criticised

because in practice, there are not many registered agencies, as the principal prefers not to register the agency contract to avoid the application of the protective provisions. Consequently, it seems that the legislator should amend the Regulation of Commercial Agencies, by specifying that the Regulation applies when the agent carries out his activity in the UAE or is established therein, and also adding a provision enabling a financial penalty to be imposed on a principal who does not register an agency.

In this and the previous chapters, we have discussed the law normally governing the internal relationship and the exceptional role of public policy and overriding mandatory provisions. The law governing the external relationships will be addressed in the next two chapters.

CHAPTER SIX

THE RELATIONSHIP BETWEEN THE PRINCIPAL AND THE CONTRACTOR

Introduction

Agency contracts differ from other contracts because they involve a triangular relationship between three parties: a principal, an agent and a contractor. This relationship is further divided into an internal relationship between the principal and the agent, and two external relationships, one being an *inter praesentes* relationship between the agent and contractor, and the other an *inter absentes* relationship between the principal and the contractor. The external relationships arise when the agent acts on behalf of the principal and concludes the contract with the contractor.¹ In this chapter, we will examine the law applicable to the external relationship between the principal and the contractor. In Chapter 7 we will turn to the external relationship between the agent and the contractor.

The agency concept involves a person (the agent) acting on behalf of another (the principal) to conclude a contract with a third person (the contractor). Thus, the question arises as to whether the acts of the agent are effective to bind his principal toward the contractor. In other words, whether the agent has authority to create a direct contractual relationship between the principal and the contractor. This question is important to all of the parties. The principal needs to know when he will be bound towards the contractor. The agent needs to ensure he will not be

¹ See H.L.E. Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff Publishers, Netherland, 1995), p.2. See also Alexey V. Kostromov, *International Unification of the Law of Agency* (Institute of Comparative Law, McGill University, Montreal, 1999), p. 41.

liable towards the contractor. The contractor needs to ensure that he is able to claim against the principal. Consequently, we need sound rules of conflict of laws to facilitate such transactions, so as to enable parties to achieve the co-operation aimed at.

Most legal systems recognise the notions of agency and authority. However, there is an important difference in the substantive rules adopted by these systems, particularly between those of civilian law and those of common law, as to whether it is necessary for this purpose that the agent should act in the name of his principal. This difference in substantive law, and its effects in private international law, will in due course be examined under the heading, the Position of an Undisclosed Principal, below.²

As regards the external relationship between the principal and the contractor, we shall first consider the various solutions which have been adopted or suggested to the general problem in private international law of identifying the law which should govern the agent's authority for the purpose of this external relationship. Thereafter we shall proceed to address in turn the more specific problems in relation to the choice of law in respect of that relationship which relate to actual authority, apparent authority, ratification, and the position of an undisclosed principal. In Chapter 7 we will consider the relationship between the agent and the contractor.

Choice of law

In regard to private international law, when an agent acts on behalf of a principal, a question arises regarding which law is applicable to determine whether the agent has the authority to bind his principal to the contractor, so as to create a direct relationship between the

² See p. 188 et seq. below.

principal and the contractor. In other words, the question is which law governs the authority of the agent in relation to the relationship between the principal and the contractor.

Many solutions have been suggested to answer this question.³ Some believe that the principal needs more protection, and others believe the contractor needs more protection. Some argue that determination of the applicable law should involve some kind of balance between the principal's interests and the contractor's interests. Furthermore, reasonably foreseeability, workability, clarity and simplicity are necessary requirements in the determination of the law which governs the agent's authority in the context of the relationship between the principal and the contractor.⁴

It should be noted that UAE legislation does not contain any provision specifying which law governs the agent's authority in context of the relationship between the principal and contractor. Moreover, by virtue of Article 1(2)(g) of the Rome I Regulation, the question of whether an agent is able to bind a principal is excluded from the scope of the Regulation. Thus, it is necessary to examine the most important solutions which have been suggested to determine which law should govern this problem.

Choice by the parties on this specific issue

Some who do not distinguish between representation and the agency contract claim that the parties do not have a right to choose which law governs this aspect of the external

³ See Peter Hay and Wolfram Muller-Freienfels, *Agency in the Conflict of Laws and the 1978 Hague Convention* (1979) 27 American Journal of Comparative Law at p. 16.

⁴ H.L.E. Verhagen, n. 1 above, p. 277.

relationship between the principal and contractor.⁵ This view relies on the provision in the Copenhagen (1950) and Lucerne (1953) drafts of the International Law Association in favour of the *lex loci actus*, and interprets this as excluding the parties' right to choose the law.⁶ This opinion is not acceptable because the parties' right to choose which law governs their relationship is generally recognised in private international law, at least regarding ordinary obligation, such as in contracts or torts.

Others accept that the parties have a right to choose which law governs the agent's authority in the context of the relationship between the principal and the contractor. However, some argue that only the principal has this right to choose the applicable law, without any right to the contractor or the agent.⁷ This view cannot be accepted, since it excludes the contractor who in fact is part of the relationship.

The prevailing view is that the principal and the contractor have the right to choose, by agreement between them, the law which governs the agent's authority for the purposes of their relationship.⁸ In the Hague Convention 1978, Article 14 gives the parties (the principal and the contractor) the right to choose which law governs the agent's authority for the purposes of their

⁵ See Gamal Moursi Badr, (النيابة في التصرفات القانونية طبيعتها وأحكامها) *The Representation in the Legal Actions* (Dar Alnahda Alaarbia, Cairo, 2nd edition, 1968), p. 311. See also Foad Mohammed Alodaini (تحديد القواعد القانونية) *Determination of the Legal Rules Applicable to International Commercial Agency* (Cairo University, 2012), p. 103.

⁶ Gamal Moursi Badr, n. 5 above, p. 312.

⁷ Ibid, p. 311.

⁸ Foad Mohammed Alodaini, n. 5 above, p. 104.

relationship, but also requires that such a choice must be in writing.⁹ It is obvious that the Convention authorises an express choice but not an implied choice. The Karsten Report explains the requirement of writing as designed to avoid a conflict of evidence in respect of existence of a choice, and to ensure that the other party accepted the choice.¹⁰

English law almost certainly accepts the same solution on this as the Hague Convention, except that English law would not require writing and would permit an implied choice (for instance, where the agreement contained a London arbitration clause).

Usually, however, there will be no agreement between the principal and the contractor as to the law governing the agent's authority for the purposes of their relationship. Thus, we must proceed to consider the default rule for this problem, as to which many solutions have been suggested.

The principal's business establishment or domicile

Some argue that the principal should be protected against a law which is not foreseeable by him by applying the law of the country where he has his business establishment or domicile. This view appeared in the nineteenth century.¹¹ It is arguable that if the principal were actually to choose a governing law, he would usually choose that of his domicile.¹²

⁹ Article 14 of the Convention stipulates that "Notwithstanding Article 11, where a written specification by the principal or by the third party of the law applicable to questions falling within Article 11 has been expressly accepted by the other party, the law so specified shall apply to such questions."

¹⁰ See I.G.F., *Karsten Report: Explanatory Report, Actes et documents of the 13th Session of the Hague Conference* (hereafter "the Karsten Report"), parg. 69, p. 26 et seq.

¹¹ H.L.E. Verhagen, n. 1 above, p.71.

¹² Foad Mohammed Alodaini, n. 5 above, p. 110.

Others argue against the applicability of this law on the grounds that favouring the principal's interests over the contractor's interests is not based on a sound reason. Thus, it is not acceptable to ignore the contractor's interests when determining which law should be applied. In addition, the internal rules in the law of the principal's business establishment will not necessarily provide more protection to the principal than some other law.¹³ This law may also not be easily accessible to the contractor.¹⁴

The law governing the internal relationship

Traditional French and Italian jurists, who do not differentiate between the internal relationship and the external relationship, regard the agent's authority as one of the consequences of the contract of mandate. Hence, even in the context of the relationship between the principal and the contractor, the agent's authority should be governed by the law which governs the internal relationship, so as to ensure that the law governing the internal relationship will govern all the consequences of this relationship. In other words, the law which governs the relationship between the principal and the agent should apply to the agent's authority in the context of the relationship between the principal and the contractor.¹⁵

However, this solution has an intrinsic defect, which is that it ignores the present theory of representation which is based on the principle of separation between the internal and external

¹³ Foad Mohammed Alodini, n. 5 above, p. 111.

¹⁴ H.L.E. Verhagen, n. 1 above, p. 109.

¹⁵ H.L.E. Verhagen, n. 1 above, p. 68.

relationships.¹⁶ Furthermore, the contractor is not part of the internal relationship; thus, it may be difficult for him to ascertain the law which governs this relationship.¹⁷

However, reference to the law which governs the internal relationship seems justifiable in respect of actual authority. If the agent acts within his actual authority, determined under the law governing the internal relationship, it seems at the very least arguable that he should therefore necessarily have authority to establish the external relationship.¹⁸

The agent's business establishment or residence

Some writers argue that the place of the agent's business establishment or residence is a suitable connecting factor in regards to the agent's authority. Consequently, the agent's authority for the purpose of the relationship between the principal and the contractor might be governed by the law of the country where the agent has his business establishment or habitual residence. The Hague Convention 1978 adopts this approach in Article 11(1), which provides: "As between the principal and the third party, the existence and extent of the agent's authority and the effect of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the state in which the agent had his business establishment at the time of his relevant acts".¹⁹

In his report, Karsten explains the advantages of applying the law of the country in which the agent has his business establishment to the agent's authority as achieving a balance between

¹⁶ Gamal Moursi Badr, n. 5 above, p. 334.

¹⁷ H.L.E. Verhagen, n. 1 above, p.108.

¹⁸ See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p.217. See also Peter Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), p. 327.

¹⁹ H.L.E. Verhagen, n. 1 above p. 75.

the principal's interests and those of the contractor, because of its intermediate position between the principal and the contractor. Both parties would foresee and accept this law equally. The agent's business establishment is the factor most closely connected with the agent, whose authority is in question. Furthermore, in many cases this law will govern both the external and the internal relationships and thus provide a convenient coincidence.²⁰ Others add that reference to the law of the agent's business establishment would prevent manipulation with respect to choice of law. This law also accords with the characteristic performance doctrine and is most closely connected with the agent's authority.²¹

However, some argue against the application of the law of the country where the agent has his business establishment or habitual residence, on the ground that the contractor might face some difficulty in determining its content, particularly when the agent and the contractor act in another country. It may also be an unsuitable connecting factor when the agent acts in another country. Consequently, the desired certainty might not be achieved.²² It was on the ground that this law is not appropriate for all cases that the Japanese and the Scandinavian delegates to the special commission of the Hague Conference sought to modify the rule in Article 11(1).²³ Moreover it is not necessary that the law which governs the internal relationship should also govern the external relationship to achieve a reasonable balance between the principal's interests and those of the contractor.

²⁰ Karsten Report, n. 10 above, par. 77, p. 29 et seq.

²¹ H.L.E. Verhagen, n. 1 above, pp. 76 and 111.

²² H.L.E. Verhagen, n. 1 above, p. 114.

²³ Peter Hay and Wolfram Muller-Freienfels, n. 3 above, p. 45.

The lex loci actus

Some argue in favour of the law of the country where the agent acts or exercises his authority. In other words, the agent's authority, for the purpose of the relationship between the principal and the contractor, should be governed by the *lex loci actus*. This is in order to protect commercial intercourse. Some also add that the exercising of the agent's authority is at the centre of the tripartite relationship of the principal, the agent and the contractor. When the agent exercises his authority, he executes his obligation to the principal, transacts with the contractor, and at the same time creates the relationship between them. This law is easily accessible to and foreseeable by the contractor, particularly when the agent exercises his authority and concludes the contract with the contractor in the place where the contractor has his domicile. Therefore, the application of this law is fair to the contractor.²⁴

Nonetheless, reference to this law has been criticised for several reasons. For instance, the place where authority is exercised might be fortuitous,²⁵ as when this place is not in the country in which the business establishment or habitual residence of the contractor, the agent or the principal is located.²⁶ This law might be easily ascertainable by the contractor when his business establishment or habitual residence is in the country where the agent is acting. But the *lex loci actus* may be unforeseeable by the principal.²⁷

Consequently, some proponents of the *lex loci actus* claim that the place where the agent exercises his authority is not alone sufficient to determine which law should govern the agent's

²⁴ H.L.E. Verhagen, n. 1 above, p. 74.

²⁵ H.L.E. Verhagen, n. 1 above, p. 110.

²⁶ Foad Mohammed Alodaini, n. 5 above, p. 119.

²⁷ H.L.E. Verhagen, n. 1 above, p. 110.

authority for the purposes of the relationship between the principal and the contractor. It should coincide with the country of the business establishment or habitual residence of the agent, the contractor or the principal.²⁸ The Hague Convention follows this approach. By Article 11(2), the law of the place of acting (*lex loci actus*) will be applied when the agent acts in a different country from that of his business establishment in each of the following instances: where the principal has a business establishment or habitual residence in the country of acting and the agent acts in the name of the principal (Article 11(2)(a)); where the contractor has a business establishment or habitual residence in the country of acting (Article 11(2)(b)); where the agent acts at an exchange, such as a stock exchange, commodity exchange, charter exchange or auction, and therefore the law of the country where the auction or exchange is located applies (Article 11(2)(c)); and where the agent does not have a business establishment (Article 11(2)(d)).

Nonetheless, Article 11(2) itself might be criticised because it might lead to difficulties for the principal or the contractor with respect to the applicable law because of the impossibility of predicting with any certainty whether the law of a state where the agent has his business establishment, or of a state where the principal has his business establishment, or of a state where the contractor has his business establishment, will be applied.

Moreover, it can be argued that if one is going to use the agent's establishment as the primary rule, there is no reason to subject it to the exceptions contemplated by Article 11(2)(a) and (b).

²⁸ Gamal Moursi Badr, n. 5 above, p. 335.

The law which governs the main contract

English jurists believe that the law governing the main contract concluded by the agent with the contractor should apply to the agent's authority for the purposes of the mutual rights and liabilities of the principal and the contractor. In other words, the question of whether the agent can bind his principal to the contractor should be subjected to the law governing the main transaction.²⁹ The majority of Italian jurists also support application of the law of the main contract to authority for the purpose of the relationship between the principal and the contractor.³⁰ In France, Henri Batiffol, once the leading expert on private international law, claimed that all relationships which arise from agency contracts, whether internal or external, should be subjected to the law which governs the main contract.³¹

In Germany, Spellenberg gives many reasons for referring the agent's authority to the law which governs the main contract. In substantive law there is a functional coherence between the main contract and the agent's authority. An agent's authority is connected to a particular legal system, where its effects are deployed, and not to a particular place. This legal system is the law which applies to the main contract. Between the agent's authority and the main contract there is an identity of purpose; thus both should be governed by the same law. The application of this law does justice to the interests of all parties: the principal, the agent and the contractor. It is easy for the contractor to refer to this law in order to ascertain whether the agent has authority, since the contractor is himself involved in the choice of the law which governs the main contract, and (in the absence of a party choice) the default rules will assist him in ascertaining the applicable law.

²⁹ Dicey, Morris and Collins, n. 18 above, p. 2125. See also Peter Stone, n. 18 above, p. 327.

³⁰ H.L.E. Verhagen, n. 1 above, p. 78.

³¹ Foad Mohammed Alodaini, n. 1 above, p. 15.

The contractor also has the option of refraining from concluding the main contract if the agent's authority is suspect. For the principal, this law is fair because it is foreseeable for him on the basis of choice of law rules or default rules. The agent also cannot reasonably claim that the application of the law governing the main contract to the authority is a surprise for him, since he may co-select this law or he may be aware of the choice of law problem. In other words, the parties can balance their interests when they choose the applicable law. There is also a balance when the applicable law is determined by the default rules, which respect all interests.³² Some support this view by arguing that if the agent's authority is governed by the law which applies to the main contract, then all questions that arise between the principal and the contractor will be governed by the same law. Thus, the parties will come to court preparing to address one law and not two.³³

A preliminary draft of the Hague Convention had endorsed the application of the law governing the main contract to the agent's authority. Its Article 11 provided: "The relationship of the principal (and the agent) with the third party is governed by the law which is applicable to the contract (negotiated or) entered into by the agent with the third party or, if no contract is intended or no contract results, by the law governing the act of the agent." The Karsten Report explains that the special commission experts argued in the first stage that distinguishing between the question of the agent's authority and other questions related to the main contract in respect of the applicable law would be impracticable and inconvenient. Consequently, subjecting the agent's authority to the law governing the main contract would be more practical and simpler. They

³² H.L.E. Verhagen, n. 1 above, p. 79.

³³ Karsten Report, n. 10 above, para. 71, p. 27.

noted that in practice a dispute as to the agent's authority arises in the context of a dispute arising out of the contract that the agent concluded with the contractor, rather than on its own.³⁴

Nonetheless, some argue against the applicability of the law governing the main contract on the grounds that the identification of this law relies on the existence of the agent's authority. Thus, the determination of the applicable law is susceptible to manipulation. This is because the agent and the contractor choose the applicable law, thus enabling them to affect the scope of the authority.³⁵ If this does occur, the principal might protect himself by relying on the law of the state where he has his business establishment or habitual residence. This is by analogy with the provision of Article 10(2) of the Rome I Regulation.³⁶

It is arguable that an important disadvantage of the application of the law governing the main contract is that if it cannot not be decided which law will govern the main contract during the negotiation stage, this will lead to a legal vacuum in terms of the agent's authority. In addition, subjecting the agent's authority to this law might create an obstacle in choosing which law governs the main contract.³⁷ This objection might be answered by noting that if the parties do not choose the applicable law during the negotiation stage or when they conclude the contract, the applicable law governing the main contract will be determined according to the default rule.

Nonetheless the difficulty is that the law chosen, or arising from the default rule, might in some cases be unexpected by the principal. This is no doubt an exceptional case, and the best way of dealing with it is an exception, utilizing some concept of reasonableness, analogous to Article 10(2) of the Rome I Regulation.

³⁴ Karsten Report, n. 10 above, parg. 71, p. 27.

³⁵ H.L.E. Verhagen, n. 1 above, p. 119.

³⁶ Ibid.

³⁷ H.L.E. Verhagen, n. 1 above, p. 120.

Conclusion

Various solutions have been suggested regarding which law should govern the agent's authority, as regards the relationship between the principal and the contractor. However, reference to the law governing the main contract seems the most appropriate and convenient solution, because it is practicable, foreseeable, workable, clear and simple. Moreover, it provides a balance between the parties' interests.

Actual Authority

It is largely accepted in English law that, even in relation to the external relationships, the existence and scope of the actual authority of an agent (whether express or implied) is governed by the law which governs the internal relationship; in other words, the law which governs the contract between the principal and agent. The rationale is that if the agent's acts are fully justified, as between the agent and the principal, so that the agent is entitled to his promised reward from the principal, and is not liable to his principal for any breach of his duties, then it is right that they should also be effective to create a valid contract between the principal and contractor, both of whom have obtained exactly what they wanted.³⁸

However this approach is not accepted by the Hague Convention, which insists on subjecting all forms of authority, including actual authority, for the purpose of the external relationships, to a law which may differ from that applicable to the internal relationship.³⁹

³⁸ Dicey, Morris and Collins, n. 18 above, p. 2127. See also Peter Stone, n. 18 above, p. 327.

³⁹ H.L.E. Verhagen, n. 1 above, p.27.

Apparent authority (or ostensible authority)

In English internal law, apparent authority (also known as ostensible authority) arises where an agent concludes a contract with a contractor on behalf of a principal without any actual authority, or in excess of his actual authority, but the contractor relies on a representation by the principal as to the agent's authority when entering into the contract. In other words, the principal represents by his words or conduct to the contractor that the agent has authority, and in reliance on the representation the contractor concludes the contract with the agent.⁴⁰ Since the doctrine of apparent authority is based on estoppel,⁴¹ it enables the contractor to sue the principal, but the principal does not have a right to make counterclaims against the contractor on the basis of apparent authority. However, if the principal ratifies the agent's acts, then he may sue the contractor based on subsequent actual authority, rather than apparent authority.⁴² Although implied actual authority and apparent authority are both determined in the light of the surrounding circumstances, these authorities differ from each other in terms of the person towards whom the principal's conduct is directed: whereas in actual authority this conduct is

⁴⁰ See *Freeman & Lockyer v Buckhurst Park Properties(Mangal) Ltd* [1964] 2Q.B. 480 at 503; *C R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* [1973] 2 NSWLR 7; *Arctic Shipping Co Ltd v Mobilia AB (the Tatra)* [1990] 2 Lloyd's Rep 51, 59. See also Roderick Munday, *Agency, Law and Principles* (Oxford: Oxford University Press, 2nd edition, 2013), p. 61; and Cheng-Han Tan, *Unauthorised Agency in English Law, in The unauthorised Agent, perspective from Europeam and Comparative Law*, edited by Busch and Macgregor (Cambridge: Cambridge University Press, 1st edition, 2012), p. 188.

⁴¹ See *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717,777. See also Nicholas Ryder, Margaret Griffiths, and Lachmi Singh, *Commercial Law, Principles and Policy* (Cambridge: Cambridge University Press, 2012), p. 20.

⁴² H.L.E. Verhagen, n. 1 above, p.27. L.S. Sealy and R.J.A. Hooley, *Commercial Law, Text, Cases and Materials* (Oxford: Oxford University Press, 3rd edition, 2005), p. 122.

towards the agent, in apparent authority it is towards the contractor.⁴³ Additionally, there is a real consent of the principal in the case of implied actual authority; while in cases of apparent authority the principal does not intend to authorise the agent to act on his behalf.

A similar concept of apparent authority exists in many internal laws, including that of the UAE. Although the UAE legislature has not fully regulated the doctrine of apparent authority, the concept appears to underlie Article 155 of the Civil Code, which ensures that if the agent and contractor conclude a contract without knowing about the termination of the agency, the agent's act will bind the principal and his successors towards the contractor. However, Article 155 requires both the agent and contractor to conclude the contract in good faith.⁴⁴ Moreover the UAE courts have admitted apparent authority in many decisions. For instance, the Dubai Court of Cassation has decided in numerous cases⁴⁵ that a contractor is a stranger to any relation between agent and principal; and therefore the contractor should be sure of the availability of a representative characteristic in the person with whom he deals. Nevertheless, if the principal contributes by his conduct or his words to representing to the contractor that the agent has authority to act on his behalf, then the contractor may sue the principal based on apparent

⁴³ H.L.E. Verhagen, n. 1 above, p. 27.

⁴⁴ Article 155 of the Civil Code states: "If the agent and the person contracting with him are both ignorant at the time the contract is made of the agency having been terminated, the effect of the contract made by the agent will attach to the principal or his successors".

⁴⁵ See the Dubai Court of Cassation decisions in Case 136/2007, 28 October 2007; Case 260/2005, 5 February 2006; Case 359/2004, 28 January 2006; Case 258/2005, 22 January 2006; Case 128/2005, 27 November 2005; Case 89/2005, 2 July 2005; Case 549/2003, 23 May 2004; Case 173/1999, 20 June 1999; Case 379/1997, 22 February 1998; Case 107/1997, 11 May 1997; and Case 253/1995, 11 May 1996.

authority. The contractor must deal in good faith in order to have this right; he must not know at the time of contracting that the agent does not have real authority.

In private international law, a question arises about the law governing apparent authority and determining the requirements of its existence, its effect, its duration, and other related issues.

Some jurists argue that the arbitrary references and unpredictable results might arise from distinguishing between actual and ostensible authority in respect to choice of law in the context of the external relationship between the principal and the contractor; consequently, they state that both authorities (actual and apparent) should be governed by the same law.⁴⁶ This approach is adopted by the Hague Convention 1978 in its Chapter 3.

By virtue of Article 11(1) of the Hague Convention, the law of the country where the agent has his business establishment at the time of his relevant acts governs the relation between the principal and the contractor with respect to the “existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority”.⁴⁷ Karsten, in his

⁴⁶ H.L.E. Verhagen, n. 1 above, pp. 301 and 307.

⁴⁷ The initial proposal of the EC Commission which led eventually to the adoption of the Rome I Regulation included in Article 7(2)-(3) a provision closely resembling Article 11 of the Hague Convention, but this Article was omitted from the Rome I Regulation as finally adopted. Article 7 of the Rome I Proposal provided:

"1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the law of that country shall apply.

2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country in which the agent had his habitual residence when he acted. However, the applicable law shall be the law of the

Report, explains the advantages of applying the law of the country of the agent's business establishment to the agent's authority (actual and apparent): reference to this law would achieve a kind of balance between the interests of the principal and the contractor because of its intermediate position between the principal and the contractor. Both of them would foresee and accept this law equally. The agent's business establishment is a factor closely connected with the agent whose authority is in question. Furthermore, this law might in many cases govern both the external relationship and internal relationship and thus provide a convenient coincidence.⁴⁸ Others add that reference to the law of the agent's business establishment would prevent manipulation with respect to choice of law. Reference to this law also accords with the characteristic performance doctrine.⁴⁹

Nonetheless, the reference to the law of the agent's business establishment might be criticised, primarily on the grounds that distinguishing between actual and ostensible authority with respect to choice of law is extremely important. This is because the two kinds of authority differ from each other in terms of the person towards whom the principal's conduct is directed (as stated above). In addition, in actual authority (express or implied), the principal's consent to

country in which the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.

3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.

4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power."

⁴⁸ Karsten Report, n. 10 above, parg. 77, p. 29 et seq.

⁴⁹ H.L.E. Verhagen, n. 1 above, pp. 76 and 111.

granting an agent the authority to act on his behalf exists; however, this consent does not exist in the case of apparent authority. As a result, apparent authority is related to the principal and contractor; hence, the agent's business establishment is at most not a connected factor and might not be relevant to this relation, especially if the agent acts in another place. Moreover, it cannot be said that both the principal and the contractor would foresee and accept this law equally. It might be true for the principal in the context of actual authority, but in the context of apparent authority the principal might not expect to incur liability by reason of his words or conduct as evaluated under another law when pursuant to the law of his own business establishment or habitual residence no such liability would arise from such words or conduct.

Moreover, because the law of the agent's establishment was not regarded as appropriate for all cases, the Japanese and the Scandinavian delegates in the special commission of the Hague Conference sought to modify the rule in Article 11(1).⁵⁰ As a result, Article 11(2) of the Convention provides for certain exceptions to the reference to the law of the agent's business establishment in favour of the law of the country in which the agent acted.

By Article 11(2) of the Hague Convention, the law of the country where the agent's business establishment is located is set aside in favour of the law of the place of acting (*lex loci actus*) when the agent acts in a different country in each of the following cases: where the principal has a business establishment or habitual residence in the country in which the agent acts, and the agent acts in the name of the principal (Article 11(2)(a)); where the contractor has a business establishment or habitual residence in the country in which the agent acts (Article 11(2)(b)); where the agent acts at an exchange, such as a stock exchange, commodity exchange, charter exchange or auction, and therefore the law of the country where the auction or exchange

⁵⁰ Peter Hay and Wolfram Muller-Freienfels, n. 3 above, p. 45.

is located applies (Article 11(2)(c)); or where the agent does not have a business establishment (Article 11(2)(d)). Nevertheless, the law of the country of the agent's business establishment will apply when the agent acts by communicating with the contractor by message, telex, telegram, telephone, or similar means, sent from one country to another country (Article 13).

In justifying the applicability of the law of the country where the agent acts, Karsten emphasises that the place of the agent's acts is the place where the agent has exercised or purported to exercise his authority which is in question.⁵¹ Others claim that the application of this law, particularly on apparent authority, would provide adequate protection for the contractor.⁵² In addition, with respect to application of the law of the state where an exchange or auction is located, Karsten claims that this law would be expected by the parties, and a real connection between this law and the transaction justifies the application of this law.⁵³

However, some argue against the application of the *lex loci actus* on the grounds that it is difficult for a principal to foresee this law, and the identification of this law might be susceptible to fraud.⁵⁴ Moreover, the application of Chapter 3 of the Hague Convention on apparent authority might be burdensome to the principal in view of the impossibility of predicting with any certainty whether the law of the country where the agent has his business establishment, or that of the country where the principal has his business establishment, or that of the country where the contractor has his business establishment, or the *lex loci actus* would be applied. This might discourage the principal from engaging in international trade, for fear of the possibility of

⁵¹ Karsten Report, n. 10 above, parg. 79, p. 30.

⁵² H.L.E. Verhagen, n. 1 above, p. 74.

⁵³ Karsten Report, n. 10 above, parg. 81, p. 31.

⁵⁴ H.L.E. Verhagen, n. 1 above, p. 74.

being bound towards a contractor by considering his conduct or words as authorising an agent to act on his behalf and thus binding him towards the contractor contrary to his intention and desire.

Other views that differentiate between actual authority and apparent authority with respect to choice of law also disagree with the Hague Convention. Some argue that apparent authority should be governed by the law which is applicable to the contract that the agent concluded or purported to conclude with the contractor, by the law which governs the main contract.⁵⁵ Some support this view by noting that if the agent's (apparent) authority is governed by the law which applies to the main contract, then all questions that arise between the principal and the contractor will be governed by the same law; thus, the parties would come to court preparing one law and not two laws.⁵⁶ It has also been argued that the adoption of this solution does justice to the fact that apparent authority in most legal systems is subjected to the same principles to which the formation of a contract is subjected.⁵⁷

Nonetheless, some argue against applicability of the law governing the main contract on the grounds that this law is often uncertain for the contractor and the principal and difficult to predict in advance. This is because the law of the main contract would be determined by the Rome I Regulation, and in the absence of a choice of law by the parties, the applicable law under the default rules would differ from case to case.⁵⁸ Moreover the application of the law of the main contract relies on the assumed existence of the agent's authority. Thus, the determination of

⁵⁵ Dicey, Morris, and Collins, n. 18 above, p. 2124.

⁵⁶ Karsten Report, n. 10 above, parg. 71, p. 27.

⁵⁷ H.L.E. Verhagen, n. 1 above, p. 80.

⁵⁸ H.L.E. Verhagen, n. 1 above, pp. 82 and 112.

the applicable law is susceptible to manipulation, since the agent and the contactor choose the applicable law, and are thereby enabled to affect the scope of the apparent authority.⁵⁹

Nonetheless, to avoid some of the disadvantages of applying the law governing the main contract to the agent's apparent authority, there could be an exception enabling the principal to rely on the law of the country in which he had his habitual residence in order to avoid his direct liability to the contractor, where he could establish that in all the circumstance it would be unreasonable to determine the effect of his words and conduct, as giving rise to apparent authority, by reference to the law governing the main contract. This exception would apply by analogy the provision of Article 10(2) of the Rome I Regulation, which itself dealt directly with the validity of a party's consent to a contract or term.

A good example to support the application of such an exception to apparent authority is this. Suppose that the principal has his business establishment in the UAE, and writes on his website, which discloses that he is based in the UAE, "A is my commission agent in" England (or some other common law country) where the agent and the contractor have their business establishments. In such a case, the words of the principal, construed under UAE law, would not indicate that the agent had any authority to bind the principal towards the contractor, since a commission agent cannot bind a principal to a contractor under UAE law. Nonetheless, if the agent's authority in this case is governed by the law of the agent's business establishment, or that of the contractor's business establishment, or the *lex loci actus*, or the law governing the main contract, this would lead to application of common-law rules under which the principal is bound by his commission agent's acts, even though in this case these acts are not acceptable to or predictable by the principal. Thus, the principal might rely on the law of the country in which he

⁵⁹ H.L.E. Verhagen, n. 1 above, p. 119.

has his habitual residence to avoid his direct liability to the contractor by analogous application of the rule specified by Article 10(2) of the Rome I Regulation.

Ratification

Under English internal law, an agent cannot bind a principal towards a contractor if the agent acts without any authority. However, in this case the principal has the right to ratify an act performed by the agent in the name of the principal, or alternatively to disavow the transaction.⁶⁰ Ratification is equivalent to antecedent authority. Thus, the principal is bound from the moment when the agent acted on his behalf to conclude the contract with the contractor, and not merely from the time of ratification.⁶¹ Even though the principal has initially refused to ratify the agent's unauthorised acts, he may be able to ratify them later within a reasonable time, if he finds that this would benefit him.⁶² Ratification by the principal is a unilateral act of will, and may be expressed or implied.⁶³

The ratification must be by the principal on whose behalf the agent acted. Thus, the principal does not have a right of ratification if the agent acts on his own behalf.⁶⁴ Nevertheless,

⁶⁰ L.S. Sealy and R.J.A. Hooley, n. 42 above, p. 138. See also Nicholas Ryder, Margaret Griffiths, Lachmi Singh, n. 41 above, p. 22.

⁶¹ See *Koenigsblatt v Sweet* [1923] 2 Ch 314, 325.

⁶² Roderick Munday, n. 40 above, p. 122; and Cheng-Han Tan, n. 40 above, p. 206.

⁶³ See *Harriosons & Crossefield Ltd v London & North-Western Railway Co* [1917] 2 KB 755, 758 (Rowlatt J).

⁶⁴ See *Jones v Hope* (1880) (1886) 3 TLR 247n, 251.

the principal may ratify unauthorised acts through an agent, by authorising him to ratify such unauthorised acts on his behalf.⁶⁵

Apparent authority exists when an agent concludes a contract with a contractor on behalf of a principal without actual authority, but the contractor relies on a representation by the principal when entering into the contract.⁶⁶ The contractor may sue the principal based on apparent authority, but the principal does not have a right to make counterclaims against the contractor upon this basis. However, if the principal ratifies the agent's acts, then he may sue the contractor based on the subsequent actual authority, rather than on the apparent authority.⁶⁷

By Article 930 of the Civil Code the UAE legislator has adopted the doctrine of ratification as part of the UAE internal law. This article states that "the subsequent ratification of the act shall be considered as a prior mandate". Thus, the principal has the right to ratify the unauthorised act or refuse it. The effect of ratification would be effectuated from the moment the agent acts. In other words, the effect of ratification is retrospective to the date of the agent's act.

As regards private international law, the ratification by a principal of an agent's unauthorised act falls within the scope of Article 11 of the Hague Convention 1978.⁶⁸ Thus under the Convention ratification is usually governed by the law of the country where the agent has his business establishment, but there are four exceptions in which this rule is displaced in favour of the law of the place of acting (*lex loci actus*).⁶⁹ This is confirmed by the Karsten report, which states that "in the case of acts which were originally outside the agent's powers to bind his

⁶⁵ Roderick Munday, n. 40 above, p. 122.

⁶⁶ Roderick Munday, n. 40 above, p. 61; and Cheng-Han Tan, n. 40 above, p. 188.

⁶⁷ L.S. Sealy and R.J.A. Hooley, n. 42 above, p. 122.

⁶⁸ H.L.E. Verhagen, n. 1 above, p. 369.

⁶⁹ On Article 11, see p. 172 above.

principal, it [the scope of Article 11] includes the effect, as the between principal and a third party, of ratification by the principal of his agent's unauthorised act."⁷⁰ Some commentators support this approach by emphasizing the connection between apparent authority and ratification, as necessitating that they should be governed by the same law to avoid incongruities. Thus, ratification and its legal consequences are governed by the law specified by Article 11.⁷¹ Accordingly in several cases the Dutch courts have applied the Article 11 to ratification.⁷²

However, in the UK (which has not ratified the Hague Convention), jurists tend to apply the law governing the main contract which the agent has concluded with the contractor to govern the question of ratification. Thus, ratification will be subjected to the law which applies to the main contract under the Rome I Regulation. The English courts have adopted this view.⁷³

Nonetheless, it seems arguable that the application of the law governing the main contract concerning the ratification requires the exception contemplated earlier in this chapter,⁷⁴ which would enable the principal to rely on the law of the country in which he habitually resides to avoid direct liability to the contractor where it would be unreasonable to evaluate the principal's words and conduct by reference to the law governing the main contract. The exception would be

⁷⁰ Karsten Report, n. 10 above, parg. 206, p. 56 et seq.

⁷¹ H.L.E. Verhagen, n. 1 above, p. 370.

⁷² See the following decisions (cited in H.L.E. Verhagen at p. 370): Rb. Amsterdam, 27 January 1976 and 21 February 1979, Ak No. 11.656; and Rb. Amsterdam, 27 January 1982, SS 1982, 89.

⁷³ See *Presentaciones Musicales v Secunda* [1994] Ch 271 (CA); *Merrill Lynch v Municipality of Piraeus* [1997] CLC 1214 (Cresswell J); *Marubeni v Mongolian Government (No 1)* [2002] 2 All ER (Comm) 873 (Aikens J); *Marubeni v Mongolian Government (No 2)* [2004] 2 Lloyd's Rep 198 (Cresswell J), affirmed [2005] 1 WLR 2497 (CA); and *SEB Trygg v Manches* [2005] 2 Lloyd's Rep 129 (Gloster J), affirmed [2006] 1 WLR 2276 (CA). Cited in Peter Stone, n. 18 above, at p. 327.

⁷⁴ See p. 175above.

based on an analogy with the provision of Article 10(2) of the Rome I Regulation. It might apply, for example, where an agent (being aware of his possible lack of authority to conclude the contract into which he has entered in the name of the principal) sends a message to the principal, inviting the principal to ratify the transaction, and the principal does not answer the message or take any other step; and under the law governing the main contract, but not under the law of the principal's residence, the principal's silence is treated as amounting to ratification.

In the UAE, the legislator has not directly regulated the question of choice of law in respect of the ratification of an agent's unauthorised act by the principal. Commentators in the UAE and Egypt argue that the court ought to apply the provision of Article 23 of the UAE Civil Code (which corresponds to Article 24 of the Egyptian Civil Code).⁷⁵ Article 23 provides: "The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws." Consequently, the UAE courts might derive principles from the English model, and thus apply the law which governs the main contract concluded by the agent with the contractor, to the existence of ratification and its legal consequences. There are however as yet few judicial decisions applying Article 23. Thus its operation will be dependent on a developing case-law.

The Position of an Undisclosed Principal

It is necessary first to consider the difference in the substantive rules as to the position of an undisclosed principal adopted in common law systems from those adopted in civilian legal

⁷⁵ See Okasha Mohammed Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 40. See also Samia Rashid, (دور المادة 24 مدني في حل مشكلات تنازع القوانين) *The role of Article 24 civil to solve the problems of conflict of laws* (Cairo University), p. 7.

systems. Then we will proceed to address the problems which arise in private international law from this difference in substantive law.

The substantive law in common law systems (such as English law)

Under common law systems (such as English law), the agent may create a direct relationship between the principal and the contractor not only where he acts in the name and on behalf of the principal and reveals the identity of the principal to the contractor (so that there is a disclosed principal), but also where the agent acts in his own name on behalf of the principal (so that there is an undisclosed principal). In both instances, the principal can sue and be sued by the contractor.⁷⁶ Thus, the agent has the authority to bind his principal whether the principal is disclosed or undisclosed.

Under English law, an undisclosed agency arises when an agent creates a direct relationship between an undisclosed principal and a contractor, although he acts on behalf of the principal in his own name; thus, the undisclosed principal can sue a contractor and be sued by him.⁷⁷ The agent may hide the fact that he is acting on behalf of the principal for many reasons. For instance, the agent may be afraid that if the contractor knows the identity of the principal, he may ignore the agent and deal with the principal directly. The principal also might prefer to remain unknown. This situation also arises when no one bothers to reveal the principal to the

⁷⁶ Roderick Munday, n. 40 above, p. 236.

⁷⁷ See *Siu Yin Kwan v Eastern Insurance Co. Ltd* [1994] 2A.C. 199 at 207(Illustration 12) per Lord Lloyd of Berwick.

contractor because the agent has become used to acting in his own name on behalf of the principal.⁷⁸

Historically the doctrine of the undisclosed principal originated in the eighteenth century in English cases in which a principal had entrusted an agent to sell the principal's goods to a contractor, the agent had sold these goods, and the contractor had paid the price for them. But before the agent had transferred the price to the principal, the agent became insolvent. Thus, a question arose as to whether the price belonged to the principal or to the agent (and his creditors). As a result the courts established the doctrine of the undisclosed principal to protect principals against the bankruptcy of their agents.⁷⁹

In the case of agency for an undisclosed principal, the principal is entitled to sue the contractor and is liable to be sued by him. The agent may also sue and be sued by the contractor.⁸⁰ However, if the principal decides to intervene on the contract and sue the contractor, the agent's right to sue the contractor is lost.⁸¹ Moreover, if the contractor has any defence against the agent, it is also available against the principal.⁸² But, although the contractor has a right to choose whether to sue the agent or the principal, the doctrines of election and merger insist that if he sues one of them, he will not be permitted to sue the other.⁸³

⁷⁸ Roderick Munday, n. 40 above, p. 249.

⁷⁹ Roderick Munday, n. 40 above, p. 250. See also H.L.E. Verhagen, n. 1 above, p. 38.

⁸⁰ Nicholas Ryder, Margaret Griffiths, Lachmi Singh, n. 41 above, p. 53.

⁸¹ Roderick Munday, n. 40 above, p. 268.

⁸² See *Siu Yin Kwan v Eastern Insurance Co. Ltd* [1994] 2A.C. 199 at 207(Illustration 12) per Lord Lloyd of Berwick.

⁸³ See *Kendall v Hamilton* (1879) 4 App. Cas. 504 at 544.

The requirements of the doctrine enabling an undisclosed principal to sue and be sued by the contractor are that the agent must act within scope of his actual authority, and that his intention must be to conclude the contract with the contractor on behalf of the principal.⁸⁴ Moreover, if the agent intends to act on behalf of an undisclosed principal, but does not have actual authority to act on behalf of the principal, it is not open to the principal to ratify the agent's act. For ratification is only possible where the contractor was aware that the agent was acting on behalf of the principal, and in the case of an undisclosed principal, the contractor believed that the agent was himself the counterparty. The existence of an undisclosed principal is also inconsistent with the existence of apparent authority.⁸⁵

In some exceptional situations the undisclosed principal does not have a right to intervene on the contract which the agent concludes with the contractor. For example, where the terms of the contract between the agent and the contractor expressly or impliedly exclude the undisclosed principal's right to sue and to be sued on the contract; or where the agent's personality is a matter of importance to the contractor.⁸⁶

Under English law, one must also distinguish between an undisclosed principal and an unnamed principal. In the case of an unnamed principal, in contrast to the case of an undisclosed principal, the agent conceals the identity of his principal, but not his existence. This distinction is important in relation to the liability of the agent.⁸⁷ In the case of an unnamed principal, the agent will incur personal liability on the contract alongside the principal, unless a contrary intention

⁸⁴ See *Rolls Royce Power Engineering Pl v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC).

⁸⁵ Roderick Munday, n. 40 above, p. 254.

⁸⁶ See *J.A. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418 at 516.

⁸⁷ Roderick Munday, n. 40 above, p. 251.

appears; while in the case of an undisclosed principal, the contractor is entitled to sue the principal or the agent, but if he chooses to sue one of them, he cannot sue the other.⁸⁸

The substantive law in civilian legal systems

In civilian legal systems, in order to bind his principal towards a contractor, the agent must act in the name of the principal, and reveal that he acts as a representative on his behalf. The publicity principle does not require that the agent should expressly mention that he is concluding the contract in the name of the principal. It is sufficient that the contractor is aware the agent is acting in the name of the principal from the circumstances of the case.⁸⁹

Thus, when the agent concludes a contract with a contractor in his own name on behalf of a principal, he does not create a direct relationship between his principal and the contractor. Consequently, the principal cannot sue the contractor or be sued by him. Where the agent acts in his own name, the situation is referred to as indirect representation. Such a situation arises in the case of a commission agent. Thus, although the contract between a commission agent and his principal is an agency contract, the contractor cannot sue the principal, whether or not he was aware that the agent was acting on behalf of the principal.⁹⁰

⁸⁸ Peter Watts and F.M.B. Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters, UK, 19th edition, 2010), p. 605.

⁸⁹ H.L.E. Verhagen, n. 1 above, p. 32.

⁹⁰ H.L.E. Verhagen, n. 1 above, p. 36. See also, Danny Busch, *Unauthorised Agency in Dutch Law, in The Unauthorised Agent, perspective from European and Comparative Law*, edited by Busch and Macgregor (Cambridge: Cambridge University Press, 1st edition, 2012), p. 138.

The substantive law in the UAE

The civilian approach is adopted by the UAE legislation. Thus the definitions of contracts proxy in Article 217 of the UAE Commercial Code,⁹¹ and of the commercial representation contract in Article 245,⁹² refer to the entry into transactions by the agent or representative in the name and for the account of his principal. By Article 247, the principal is bound by acts of his representative within the latter's authority.⁹³ Thus, upon the conclusion of the transaction by the agent, he will drop out of the contract, and a direct relationship will arise between the principal and the contractor, so that each will have a right to sue the other for any breach of the contractual terms. Moreover Article 249 requires that the representative should indicate he is acting as such

⁹¹ Article 217 of the UAE Commercial Code provides: "A contracts proxy is a contract pursuant to which a person undertakes to carry on continuously against remuneration, in a specific area of activity, instigation and negotiation in order to enter into transactions for the benefit of the principal and in return of a fee. The agent's task may include the execution and implementation of transactions in the name of the principal and for his account."

⁹² Article 245 provides: "The commercial representation is a contract pursuant to which the commercial representative undertakes to enter into transactions in the name and for the account of his principal, on a permanent basis and within a specific area."

⁹³ Article 247 provides:

- "1. The trader shall be liable for any transactions and contracts entered into by his representative within the limits of the authority conferred to him by the trader.
2. Where the representative is delegated by several traders, they shall be jointly responsible.
3. If the representative is delegated by a company, the company shall be responsible for his action and the partners' responsibility shall depend on the type of company."

when signing the contract with the contractor; and specifies that if he does not, he will be personally liable, without prejudice to the contractor's right to sue the principal directly.⁹⁴

In the UAE, as in other civilian legal systems, when the agent concludes a contract with a contractor in his own name but on behalf of a principal, he does not create a direct relationship between his principal and the contractor. Thus, the principal cannot sue the contractor or be sued by him. In the UAE such indirect representation arises in the case of a commission agent.⁹⁵ In such a case, under Article 237(1) of the UAE Commercial Code, the contractual obligations must be fulfilled by the agent and the contractor. Thus, any breach of contractual terms by either party (the agent or the contractor) creates the right to sue by the other party. Article 237(2) prevents any direct claim between the contractor and the principal based on a commission contract, which is regarded as concluded between the commission agent and the contractor.⁹⁶ This provision has

⁹⁴ Article 249 provides: "The commercial representative shall carry on in the name of the trader who delegated him the commercial activities which he has been authorized to undertake; when signing he shall place next to his name in full, the full name of the trader and shall indicate his capacity as commercial representative; otherwise he shall be personally liable for his own action. Nevertheless, third parties may have direct recourse against the trader in regard to the transactions concluded by the representative in connection with the trade which he has been authorized to carry on."

⁹⁵ H.L.E. Verhagen, n. 1 above, p. 36.

⁹⁶ Article 237 of the UAE Commercial Code provides:

"1. A commission agent shall be directly bound to the third party with whom he entered into contract; such third party shall also be directly bound to the commission agent.

2. A third party with whom the commission agent has entered into contract may not have direct recourse against the principal, neither may this latter have direct recourse against such third party unless there is a legal provision to the contrary." On commission agents more generally, see Articles 229-44.

been applied by UAE courts in numerous decisions, especially those of the Dubai Court of Cassation.⁹⁷

An exceptional provision, specified by Article 242 of the UAE Commercial Code, applies in the case of a commission agent's insolvency where the main contract is for the sale of goods. It enables the principal to make a direct claim for the price against the buyer, or for delivery of the items bought against the seller.⁹⁸ A question may arise as to whether Article 242 can be extended by analogy to a contract for services. Such an expansive interpretation appears to be excluded by Article 30 of the Civil Code, which provides that exceptions may neither be applied by analogy, nor receive extended interpretations.

Article 242 resembles Articles 7:420 and 7:421 of the Dutch Civil Code. Other civilian countries, such as France and Germany, recognise that in the case of a commission agent's bankruptcy, the principal and the contractor may sue each other. Such provisions in civil law systems are designed to protect the principal and the contractor against the agent's bankruptcy, or more precisely, to protect them against the agent's creditors.⁹⁹

By Article 2 of the UAE Commercial Code, in the commercial sphere the court should apply "the provisions pertaining to civil matters as long as they do not contradict the general

⁹⁷ See the Dubai Court of Cassation decisions in Case 173/2007, 17 September 2007; and Case 37/2003, 3 May 2003.

⁹⁸ Article 242 provides:

"1. Where the commission agent who is assigned to sell is declared bankrupt before cashing in the price, the principal may claim payment of the price directly from the buyer.

2. Where the commission agent who is assigned to buy is declared bankrupt before he received the item bought, the principal may claim delivery of the item bought directly from the seller."

⁹⁹ H.L.E. Verhagen, n. 1 above, pp. 34-53. See also, Danny Busch, n. 90 above, p. 140.

principles of the commercial activity.” Thus, it seems possible for a court to apply Article 392 of the Civil Code to a commission agency.¹⁰⁰ Accordingly, under Article 392(1), the principal could exercise an indirect claim to sue the contractor in the agent's name, but the proceeds of this claim would be paid to the agent's estate. The contractor could also exercise a corresponding claim against the principal.¹⁰¹ The reason for granting this right to make an indirect claim is that the failure by the debtor (the agent) to make a direct claim could lead to or aggravate his insolvency, and thus be detrimental to the creditor (the principal or the contractor). In France a similar provision is made by Article 1166 of the Civil Code, which grants the principal and the contractor the right to sue each other by means of an indirect claim, which is known as an *action oblique*.¹⁰²

¹⁰⁰ See Abdul Razak Alsanhoori, (الوسيط في شرح القانون المدني) *The Explanation of Civil Law* (Al-Halabi, Beirut, 3rd edition, 1998), p. 622; and Adel Ibrahim Mostafa, (قانون المعاملات التجارية، العقود التجارية والعمليات المصرفية) *The Law of Commercial Transaction, Commercial Contracts and Banking Operations* (UAE, Dubai Police Academy, 2008), p. 159.

¹⁰¹ Article 392 of Civil Code provides:

"(1) Every obligee, notwithstanding that his right may not be due for discharge, may exercise, in the name of his obligor, all of the rights of that obligor, save those that relate particularly to his person or which are not capable of being attached.

(2) The exercise by the obligee of the rights of his obligor shall not be permitted unless it is established that the obligor has not exercised those rights and that his failure so to do is such as may lead to or aggravate his bankruptcy, and the obligor must be brought into the claim."

¹⁰² H.L.E. Verhagen, n. 1 above, p. 51.

Outside the commercial sphere, UAE law is more willing to recognise the rights and liabilities of an undisclosed principal. Article 154 of the UAE Civil Code¹⁰³ does not apply to a commercial agent, but in the case of a non-commercial agent, it recognises a kind of agent known as an *agent as nomine*. In this kind of agency, the principal asks the agent to conceal from the contractor that he is acting on behalf of the principal, and to conclude the contract in the agent's name. In such cases in general the principal and the contractor cannot exercise direct claims against each other, and such claims exist between the contractor and the agent.

But Article 154 provides two exceptions in which a direct relationship between the principal and the contractor may arise. The first exception applies when the contractor knows at the time of contracting that the agent is acting on behalf of the principal. Although some have argued that this exception should be confined to cases where the contractor intends to deal with the principal and not the agent,¹⁰⁴ on its face Article 154 only requires that the contractor should know that the agent is acting on behalf of the principal, without any further requirement of the contractor's intention to deal with the principal. Moreover the wider interpretation has been confirmed by a decision of the Dubai Court of Cassation,¹⁰⁵ holding that the contractor may sue the principal if he knows at the time of contracting that the agent is acting on behalf of the principal, without reference to the contractor's intention.

¹⁰³ Article 154 of the Civil Code: "If the party making a contract does not state at the time the contract is made that he is contracting in his capacity as agent, the effect of the contract will not attach to the principal either as obligee or obligor unless it is conclusively presumed that the person with whom the agent contracted knew that he was an agent or if it was a matter of indifference for him whether he was contracting with the principal or the agent." This corresponds to Article 106 of the Egyptian Civil Code.

¹⁰⁴ Abdul Razak Alsanhoori, n. 100 above, p. 622.

¹⁰⁵ Case 420/1997, 28 March 1998.

The second exception specified by Article 154 applies where the contractor is indifferent as to the person with whom he concludes the contract. In this case a direct relationship between the principal and the contractor arises and they can sue each other by direct claims. This exception is analogous to the German doctrine of “whom the matter concerns”. According to this doctrine, although the agent acts in his own name, he creates a direct relationship between the principal and the contractor, and he himself drops out of the contract, in cases where it is immaterial to the contractor who is the counterparty.¹⁰⁶

In the UAE, a further exception to the principle of indirect representation is made by Article 349 of the Commercial Code, which grants the principal and the contractor the right to sue each other by direct claim in the case of a commission agency for carriage.¹⁰⁷

From the foregoing discussion, it is obvious that the feature common to cases involving an undisclosed principal, a commission agent, and an *agent as nomine*, is that the agent acts in his own name on behalf of the principal. The main difference between these is that, under the English doctrine of the undisclosed principal, the principal can sue the contractor and be sued by him, since a direct relationship between the principal and the contractor arises at the time of contracting. But under the UAE law relating to a commission agent, the principal and the

¹⁰⁶ H.L.E. Verhagen, n. 1 above, p. 52.

¹⁰⁷ Article 349 provides:

"1. The principal and passenger shall each have direct recourse against the carrier to claim the rights arising from the carriage contract. The carrier shall also have direct recourse against each of the principal and passenger to claim such rights. In all cases, the commission agent must be intromitted in the case.

2. The passenger in the carriage contracts of persons and the consignee in the carriage contract of things shall have direct recourse against each of the principal, carrier and commission agent for carriage for the rights arising from the carriage contract."

contractor cannot sue each other by way of a direct claim unless the agent is faced with bankruptcy. However under the UAE law relating to an *agent as nominee*, the principal and the contractor have the right to make direct claims against each other if the contractor is aware at the time of contracting that the agent is acting on behalf of the principal, or if the contractor is indifferent as to the person with whom he concludes the contract; but not otherwise.

Private international law

Where the agent acts in his own name on behalf of an undisclosed principal, a question of private international law arises as to which law is applicable to determine whether the agent's act creates a direct contractual relationship between the principal and the contractor, so as to enable the principal to sue and be sued by the contractor on the main contract.

This issue falls within the scope of the Hague Convention 1978, since Article 1(3) specifies that the Convention applies "whether the agent acts in his own name or in that of the principal". Moreover, when the agent exercises his authority and creates or fails to create a direct relationship between the undisclosed principal and the contractor, this creation or its absence is an effect of the exercise of the agent's authority, and thus falls within Chapter III of the Convention. The agent's liability to the contractor in the case of undisclosed agency is also governed by Chapter III, since (under Article 15) the agent's liability arises from the fact that he has acted in the exercise of his authority.¹⁰⁸ Thus, under Chapter III the consequences of the fact that the agent acted in his own name on behalf of an undisclosed principal, as regards the relationship between the principal and the contractor, and as regards the relationship between the

¹⁰⁸ H.L.E. Verhagen, n. 1 above, p. 375. See also Chapter 7 below.

agent and the contractor, are governed by the law of the country in which the agent has his business establishment, or in some exceptional cases by the law of the country in which the agent acted, in accordance with Article 11.

The solution adopted by the Hague Convention differs from that envisaged by the Benelux Treaty 1969 concerning a Uniform Law on Private International Law. Article 18 of that Treaty would subject the agent's authority to the *lex loci actus*, and this would include the question of whether a principal can sue and be sued on the main contract when the agent acts in his own name.¹⁰⁹ The treaty, however, has not entered into force and it is unlikely to do so, since the harmonisation of private international law in Benelux level has bonded in favour of the harmonisation of European private international law.

Some English commentators who consider that apparent authority should be governed by the law which is applicable to the main contract which the agent concluded or purported to conclude with the contractor, also consider that this law should govern the question of whether a principal can sue and be sued on the main contract when the agent acts in his own name.¹¹⁰ Then all questions which arise between the principal and the contractor will be governed by the same law.¹¹¹

¹⁰⁹ Article 18 of Benelux Treaty provides: " The right to represent a person by virtue of a power of attorney shall with respect to third parties be governed by the law of the country where the representative acts.

This law shall determine to what extent one who acts in his own name on behalf of another may create legal relations between the one for whom he acts and the third party with whom he deals". Cited in Kurt H. Nadelmann, *The Benelux Uniform Law on Private International Law Comment*, (1970) 18 (2) [The American Journal of Comparative Law](#), at p. 425.

¹¹⁰ Dicey, Morris and Collins, n. 18 above, p. 2126.

¹¹¹ Karsten Report, n. 10 above, parg. 71, p. 27.

In the UAE, the courts could use Article 23 of the Civil Code to decide which law should govern indirect representation and the position of an undisclosed principal. On this basis the court might follow the English model and subject the question of whether a principal can sue and be sued on the main contract when the agent acts in his own name to the law which governs the main contract. It might also admit an exception derived by analogy from Article 10(2) of the Rome I Regulation. The following example will illustrate this exception. A principal, who has his business establishment in the UAE, appoints a commission agent, who has his business establishment in France, to act on his behalf in European countries in the agent's own name. The agent concludes a contract in his own name with a contractor in England, and the law governing this contract is English law. Thus if English law applies in determining whether the principal can sue and be sued, the contractor may sue the principal directly. Nonetheless, using the analogy of Article 10 of the Rome Regulation, the principal might rely on the law of the country in which he has his habitual residence (UAE law) to avoid his direct liability to the contractor.

As we have seen, laws such as English law which in general recognise the direct relationship between the undisclosed principal and the contractor often give the contractor, where he discovers that he has dealt with an agent for an undisclosed principal, an option of suing either the agent or the principal on the main contract. It seems clear that this right must be governed by the law which applies to the position of the undisclosed principal. In other words, the doctrine of election should be governed by the law which is applicable to the position of the undisclosed principal. Nonetheless, under laws such as English law, when the contractor sues one of them (the principal or the agent), he cannot sue the other; this is called the doctrine of merger. Some have argued that this issue should be regarded as a matter of procedure, and therefore governed by the *lex fori*. But others have pointed out that in such cases the doctrine of

merger is most closely linked to and affects the application of the doctrine of the undisclosed principal, and to the doctrine of election. Thus, merger should also be governed by the law which governs the position of the undisclosed principal.¹¹²

The exceptions under civilian laws

In a civilian legal system, when the agent acts in his own name on behalf of the principal, there are many legal consequences which may arise. Thus one must consider how far these legal consequences should be considered as effects of the agent's exercise of his authority, and thus subjected to the law applicable to the external authority, or whether they should be otherwise characterised and thus subjected to another law.

The most important of these questions relates to the agent's bankruptcy. This is because in the case of agent's insolvency civilian laws (including UAE law) often recognise the existence of a direct relationship between the principal and the contractor. It seems arguable that this creation of a direct relationship should be considered as an effect of the agent's exercise of his authority, as well as an exception to the general rule on indirect representation. Thus, the legal consequences should be governed by the law applicable to the agent's authority in connection with the external relationship between the contractor and the undisclosed principal,¹¹³ whether this law is determined under Chapter III of the Hague Convention or is the law which governs the main contract.

On the other hand, a different approach seems appropriate in relation to provisions such as Article 392(1) of the UAE Civil Code and Article 1166 of the French Civil Code, which

¹¹² H.L.E. Verhagen, n. 1 above, p. 394.

¹¹³ H.L.E. Verhagen, n. 1 above, p. 382.

enable the principal and the contractor to sue each other by way of an indirect claim.. This is because they enable the principal or the contractor to bring an indirect claim against the contractor or the principal in the agent's name, and the proceeds of this claim will be payable to the agent's estate.¹¹⁴ Consequently, if the principal sues the contractor on this basis, the law which governs the relationship between the contractor and agent would be applied. However, if the contractor sues the principal, the law which governs the relationship between the principal and agent would be applied.

Exclusion by agreement

As we have noted above,¹¹⁵ it is in principle possible for the undisclosed principal's right to sue and liability to be sued by the contractor to be excluded by agreement between the agent and the contractor. Thus, the question of which law governs the existence, validity and interpretation of such an agreement arises. It seems clear that such agreements should be governed either by the law which applies to the position of the undisclosed principal under Chapter III of the Hague Convention, or by the law which applies to the main contract. Which of these should applied must depend on the general approach adopted by the forum's conflict rules to the position of the undisclosed principal. Nonetheless, some argue that difficulty may arise when the internal law referred to does not have a specific rule for this situation. They suggest that in this case the court should apply the corresponding provision of the law in question which deals with the assignability of contractual rights.¹¹⁶

¹¹⁴ H.L.E. Verhagen, n. 1 above, p. 382.

¹¹⁵ See p. 191 above.

¹¹⁶ H.L.E. Verhagen, n. 1 above, p. 391.

As regards actions brought in the UAE courts, it seems necessary to distinguish between two scenarios. In the first situation, the position of the undisclosed principal is governed by a law such as English law which in general provides for a direct relationship between the undisclosed principal and the contract, but which also enables the agent and the contractor to eliminate this relationship by agreement. In such a case the UAE court should give effect to the exclusionary agreement. In the second situation, UAE law is the law governing the position of the undisclosed principal, and the agent and contractor agree to exclude the principal and the contractor's rights to sue each other directly in the case of the agent's insolvency under Article 242 of the UAE Commercial Code. In this case the UAE court should disregard the exclusionary agreement because it is contrary to the internal public policy of the UAE. This is because Article 242 is an exceptional provision designed to protect the principal and the contractor against the agent's insolvency, and is regarded as an imperative commercial text which may not be prejudiced by the parties' agreement according to Article 2(1) of the Commercial Code.¹¹⁷

Set-off

The question of set-off between the undisclosed principal and the contractor may arise in cases where the undisclosed principal intervenes and sues the contractor on the main contract, or the contractor discovers that the agent was acting on behalf of an undisclosed principal and chooses to sue the principal rather than the agent on the main contract.¹¹⁸ There are differences in

¹¹⁷ Article 2(1) of UAE Commercial Code provides: "Traders and commercial activities shall be governed by the agreement entered into by the two contracting parties unless such agreement contradicts an imperative commercial text."

¹¹⁸ H.L.E. Verhagen, n. 1 above, p. 393.

the concept of set-off in different countries, especially between the English concept of set-off and the concept in continental European legal systems.¹¹⁹ Thus a question of private international law arises as to the identification of the law which governs the existence and extent of the rights of the undisclosed principal and the contractor to invoke a set-off against each other.

Some have argued that such set-off should not be governed by the law applicable to the position of the undisclosed principal, determined under Chapter III of the Hague Convention or by reference to the law governing the main contract. Instead the law applicable to such set-off would be determined in the same way as in the case of assignment or subrogation.¹²⁰ Article 17 of the Rome I Regulation enables the parties to make a substantive agreement about set-off. Such an agreement would be governed by the law applicable under the Regulation. Where they make no such agreement, set-off is governed by "the law applicable to the claim against which the right to set-off is asserted".

Conclusion

In the tripartite situation which exists where an agent contracts or purports to contract on behalf of a principal with a contractor, there are two external relationships: one between the principal and the contractor, and the other between the agent and the contractor.

The question of the law applicable to the agent's authority for the purpose of the relationship between the principal and the contractor has been the subject of much debate and has led to the proposal or introduction of several ways to determine the applicable law. These solutions include reference to the law of the principal's business establishment or domicile, to

¹¹⁹ Alexander J. Belohlavek, *Rome Convention: Rome I Regulation* (Juris, USA, 2010), p. 1811.

¹²⁰ H.L.E. Verhagen, n. 1 above, p. 394.

the law governing the internal relationship, to the law of the agent's business establishment or residence, to the *lex loci actus*, and to the law governing the main contract. In the present writer's opinion, the most appropriate solution is to subject the agent's authority for the purpose of the relationship between the principal and the contractor to the law which govern the main contract, since this solution is practicable, foreseeable, workable, clear and simple, and because it provides a balance between the parties' interests.

It is possible to distinguish various issues which may arise in connection with such authority, which may give rise to conflict problems as a result of the differences in the internal substantive rules of different countries. These include the position of the undisclosed principal, which arises when the agent acts in his own name, and is concerned with whether in this situation the principal can sue and be sued by the contractor on the main contract. Another issue is that of apparent authority or ostensible authority, which arises where an agent concludes a contract with a contractor on behalf of a principal without actual authority, and the contractor relies on a representation by the principal as to the agent's authority when entering into the contract, thus raising a question regarding which law is applicable to this authority and its effect. Yet another issue concerns ratification by the principal when the agent has acted without authority or in excess of his authority.

Although many solutions and opinions have been presented in this chapter, the present writer takes the view that all of these issues should be governed by the same law because they are connected with each other, and that it is best to unify the applicable law on all questions arising between the principal and the contractor. However, there should be an exception enabling the principal to rely on the law of the country in which he has habitual residence to avoid his

direct liability to the contractor, in circumstances analogous to those contemplated by Article 10(2) of the Rome I Regulation.

These matters are not adequately addressed in most of the legislative texts examined. The Rome I Regulation, by virtue of Article 1(2)(g), excludes the question of whether the agent is able to bind the principal from the scope of the Regulation. The UAE legislation also does not contain any provision dealing specifically with the law applicable to the agent's authority in the context of the relationship between the principal and the contractor.

Consequently, it seems desirable, in the interests of international trade, that Article 1(2)(g) of the Rome I Regulation should be repealed, and that the question whether an agent is able to bind a principal to a contractor should be brought within the scope of the Regulation. Provisions could be included specifying that the matter is included in the issues to which the law governing the main contract applies, but an exception should also be specified, enabling the principal to rely on the law of the country in which he habitually resides to avoid direct liability to the contractor, where it would be unreasonable to subject the interpretation and effect of his words and conduct to the law governing the main contract, by analogy with the provision of Article 10(2) in respect of a person's consent to a contract in non-agency situations.

In the UAE the courts should adopt a general principle, in accordance with Article 23 of the Civil Code, so as to make the law which governs the main contract concluded by the agent with the contractor applicable in determining the agent's authority for the purpose of the relationship between the principal and the contractor. This should apply to the question of whether the agent is able to bind the principal), and to related issues, such as indirect representation (the position of an undisclosed principal), ratification of the agent's unauthorised acts, and apparent authority. The court could also apply Article 23 to admit an exception

enabling the principal to rely on the law of the country of his habitual residence to avoid his direct liability to the contractor in certain cases. Nevertheless, it would be preferable for the legislator in the UAE to amend Article 19 so as to add specific provisions addressing these issues.

CHAPTER SEVEN

THE RELATIONSHIP BETWEEN THE AGENT AND THE CONTRACTOR

Introduction

As discussed in Chapter 6 above, it is obvious that the external relationships which arise when an agent acts on behalf of a principal and concludes a contract with a contractor consists of two relationships, one being an *inter praesentes* relationship between the agent and the contractor, and the other an *inter absentes* relationship between the principal and the contractor.¹ Moreover, in most legal systems, it is generally accepted that when the agent acts in the name of the principal in concluding the contract with the contractor, the agent drops out of the contract, and the contractor can neither sue nor be sued by the agent.² Nonetheless, there are various exceptions to this: where the terms of the contract concluded between the agent and the contractor provide that the agent is to be liable to the contractor; where the agent has acted without authority or in excess of his authority; or where the agent has committed a tortious act causing damage or loss to the contractor. It is submitted that in general the law which governs the external relationship between the principal and the contractor should also govern the external relationship between the agent and the contractor. However, the question may arise as to whether

¹ See H.L.E. Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff Publishers, Netherland, 1995), p. 2. See also Alexey V. Kostromov, *International Unification of the Law of Agency* (Institute of Comparative Law, McGill University, Montreal, 1999), p. 41.

² See Roderick Munday, *Agency, Law and Principles* (Oxford, Oxford University Press, 2nd edition, 2013), p. 309.

it is convenient to subject the agent's liability in these exceptional instances to the law governing external authority.

As regards the external relationship between the agent and the contractor, we will first address the differences which may exist in the substantive rules adopted in various countries. We will note an important substantive difference between civilian legal systems and those based on common law in respect of the agent's liability to the contractor based on the terms of the contract. We shall then proceed to look at the various substantive rules that apply in civilian legal systems and common-law systems when the agent exceeds his authority or acts without authority. Thereafter, we will examine the substantive rules as to the agent's liability when he acts in his own name. Finally, we will consider the substantive rules on the agent's liability in tort. Then, in the light of these discussions of substantive rules, we will consider the various solutions which have been adopted or suggested to identify the law that should govern the external relationship between the agent and the contractor.

The agent's liability under the main contract

Under English law, the general rule is that when an agent concludes a contract with a contractor on behalf of a principal, he drops out of the contract and the principal acquires rights and incurs obligations towards the contractor. Nonetheless, in exceptional circumstances, the agent may incur liabilities and acquire rights by virtue of the terms of the contract which he concluded with the contractor on behalf of the principal or under a collateral contract. In such cases, the agent may be solely, jointly, or jointly and severally liable. For instance, when creating a contract between the principal and the contractor, the agent may agree to become a party to the contract. In such a case the contractor will be entitled to sue the principal or the agent on the

contract. Another possible situation is for the agent to create a contract between himself and the contractor, but not between the principal and the contractor. In other words, in his relationship with the contractor, the agent will be a principal, but in his relationship with the principal, he will be an agent. In such a case the agent will be the only person who can sue or be sued by the contractor.³

In determining whether the agent is to be liable and acquire rights, the parties' intentions are crucial. The relevant guiding principles were set out in by Brandon J in *The Swan*,⁴ as follows:

Where A contracts with B on behalf of a disclosed principal C, the question whether both A and C are liable on the contract or only C depends on the intention of the parties. That intention is to be gathered from (1) the nature of the contract, (2) its terms and (3) the surrounding circumstances... The intention for which the Court looks is an objective intention of both parties, based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended.

Similarly, in civilian legal systems, the agent is not liable to the contractor when he concludes the contract in the name of and on behalf of his principal. His act simply creates a direct relationship between the principal and the contractor, and he (the agent) drops out of the contract. Nonetheless, it is arguable that the agent and the principal may agree that, in addition to

³ See Peter Watts and F.M. B. Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters, UK, 19th Edition, 2010), p. 541. See also Roderick Munday, n. 2 above, p. 309.

⁴ [1968] 1 Lloyd's Rep 5.

concluding the contract, the agent's task is the implementation of the contract.⁵ For instance, Article 802 of the Lebanese Civil Code provides that the contractor has a right to sue the agent in order to force him to accept the implementation of the contract when the contract is within the agency of the agent.⁶

The agent's liability where he acts without authority or in excess of his authority

Under common-law systems

Under English principles, the agent acts on behalf of the principal when the principal grants him the authority to bind him towards the contractor; thus, when the agent acts without any authority, actual or apparent, he cannot bind his principal. Nonetheless, the agent may incur personal liability to the contractor if the principal does not ratify the agent's unauthorised act.⁷ The agent may also be liable when he exceeds his authority.⁸ In other words, when a person represents by his words or conduct, that he is acting with authority on behalf of another, and the contractor relies on this in concluding the contract, so that, without that representation, the contract would not be concluded,⁹ the agent may be liable to the contractor by virtue of a breach

⁵ See Gamal Moursi Badr, (النيابة في التصرفات القانونية طبيعتها وأحكامها) *The Representation in the Legal Actions* (Dar Alnahda Alaarbia, Cairo, 2nd edition, 1968), p. 266. See also Abdul Razak Alsanhoori, (الوسيط في شرح القانون) *The Explanation of Civil Law* (Al-Halabi, Beirut, 3rd edition, 1998), p. 584.

⁶ Gamal Moursi Badr, n. 5 above, p. 266.

⁷ Roderick Munday, n. 2 above, p. 135.

⁸ See Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 2136.

⁹ Peter Watts and F.M.B. Reynolds, n. 3 above, p. 581.

of warranty of authority for any damage that has been caused to the contractor.¹⁰ As Lord Esher MR explained in *Firbank's Executors v Humphreys*:¹¹

Where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

The agent can incur liability for breach of warranty of his authority, irrespective of whether he was acting in good faith or was guilty of a fault in representing that he had the authority to act on behalf of the principal.¹² The application of the doctrine of warranty of authority is not restricted to the contract itself but extends to all transactions which the contractor enters into while relying on the agent's assertion that he has authority.¹³

Furthermore, the agent's liability arising under the warranty of authority has been determined by the English courts to be contractual, rather than tortious, in nature. The warranty amounts to a collateral contract. But the liability under the warranty is less extensive than full liability under the main contract would be. The agent warrants only that he has authority, not that

¹⁰ See *Mocatta J in Rasnoimport V/O v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1 at 10.

¹¹ (1887) 18 QBD 54, at 60.

¹² See *Collen v Wright* (1857) 7 E. & B. 301; *Yonge v Toynbee* [1910] 1 K.B. 215. See also Basil S Markesinis and Roderick Munday, *An Outline of The Law of Agency* (Butterworths, London, 4th edition, 1998), p. 84.

¹³ Roderick Munday, n. 2 above, p. 137.

the main contract will be performed by the principal. The distinction is important where, for example, the principal's insolvency reduces the value of its promises.¹⁴

Under civilian legal systems

In civilian law systems, when the agent acts without authority or exceeds his authority, and the principal does not ratify, the principal is not liable beyond the limits of the authority conferred on the agent;¹⁵ and in such a case, the agent is liable to the contractor. Nevertheless, if the contractor is aware that the agent is acting without authority or in excess of his authority, the agent may not be liable.¹⁶ However, there are questions surrounding the nature of agent's liability when he acts without authority or in excess of his authority and the principal has not ratified his unauthorised acts.

Some argue that when the agent exceeds his authority or acts without authority, he still concludes the contract in the name of the principal and not in his own name; and thus that his liability cannot be classified as contractual since he was not a party in the contract. On this basis it is argued that the agent's liability should be regarded as tortious. However tortious liability

¹⁴ Peter Watts and F.M.B. Reynolds, n. 3 above, p. 583. See also Basil S Markesinis and Roderick Munday, n. 12 above, p. 84; and Dicey, Morris and Collins, n. 8 above, p. 2136.

¹⁵ Article 247(1) of the UAE Commercial Code states: "The trader shall be liable for any transactions and contracts entered into by his representative within the limits of the authority conferred to him by the trader..."

¹⁶ Abdul Razak Alsanhoori, n. 5 above, p. 587. See also Martin Severine Saintier, *Unauthorised Agency in French Law*, in *The Unauthorised Agent, perspective from European and Comparative Law*, edited by Busch and Macgregor (Cambridge: Cambridge University Press, 1st edition, 2012), p. 52.

may not provide complete protection to the contractor in a case where he cannot prove fault on the part of the agent.¹⁷

Others argue that agent's liability in this case should be classified as arising from a collateral contract, by way of an implied agreement requiring a party to a contract who causes the invalidity of a contract to compensate the other party for the mistake in the formation of the contract.¹⁸ However, it seems that the application of this theory in the UAE would require its adoption by the legislator, in the form of a measure resembling Article 39 of the Swiss Civil Code and Article 1398 of the Italian Civil Code of 1943.¹⁹

Nevertheless, the German legislator has adopted unique rules in respect of cases where the agent acts without authority or in excess of his authority, as per Article 179 of the Civil Code.²⁰ This Article distinguishes between two instances. In the first, the agent is aware that he is acting in excess of his authority or without authority. In this case, the contractor has the right to sue the agent in order to implement the contract or to sue him in compensation for damages. In

¹⁷ Gamal Moursi Badr, n. 5 above, p. 194.

¹⁸ Ibid.

¹⁹ Gamal Moursi Badr, n. 5 above, p. 195.

²⁰ Article 179 of German Civil Law provides:

"(1) A person who has entered into a contract as an agent is, if he does not furnish proof of his power of agency, obliged to the other party at the other party's choice either to perform the contract or to pay damages to him, if the principal refuses to ratify the contract.

(2) If the agent was not aware of his lack of power of agency, he is obliged to make compensation only for the damage which the other party suffers as a result of relying on the power of agency; but not in excess of the total amount of the interest which the other or the third party has in the effectiveness of the contract.

(3) The agent is not liable, if the other party knew or ought to have known of the lack of power of agency. The agent is also not liable if he had limited capacity to contract, unless he acted with the consent of his legal representative."

other words, the contractor has an option to sue the agent based on contractual or tortious liability.²¹ Some argue that the agent's liability in this case is considered semi-contractual.²² In the second instance, when the agent is unaware that he is acting without authority or in excess of his authority, the agent's liability may be considered tortious. Therefore, the contractor may sue for compensation in respect of the benefit he lost from entering into the main contract.²³

Nonetheless, through extrapolation of judicial decisions in the UAE, it could be said that when the agent acts without authority or in excess of his authority, and the principal fails to ratify the unauthorised act, the agent's liability would be considered tortious liability rather than contractual liability, although in some cases the court may ask the agent to fulfill the contractual obligations. For instance, the Dubai Court of Cassation has held that when the agent, in concluding a second loan contract, exceeded his authority, the principal did not have obligations in respect of this contract and that the agent should fulfill the contractual obligations.²⁴

The agent's liability when he acts in his own name

Under common law systems (such as in English law), in the case of agency for an undisclosed principal, when the agent acts in his own name, he may sue and be sued by the contractor.²⁵ However, if the principal decides to intervene in the contract and sue the contractor,

²¹ Gamal Moursi Badr, n. 5 above, p. 199. See also Martin Schmidt- Kessel, n. 16 above, p. 106.

²² H.L.E. Verhagen, n. 1 above, p. 402.

²³ Gamal Moursi Badr, n. 5 above, p. 199. See also Martin Schmidt- Kessel, n. 16 above, p. 106.

²⁴ See the Dubai Court of Cassation decisions in Case 230/2004, 19 December 2004.

²⁵ See Nicholas Ryder, Margaret Griffiths, Lachmi Singh, *Commercial Law, Principles and Policy* (Cambridge: Cambridge University Press, 2012), p. 53.

the agent loses his right to sue the contractor.²⁶ But if the contractor exercises his right to sue the agent, according to the doctrines of election and merger, the agent will be liable under the main contract.²⁷ Furthermore, there are some exceptional situations in which the undisclosed principal does not have a right to intervene in the contract that the agent has concluded with the contractor,²⁸ and in which, accordingly, the agent may incur contractual liability to the contractor.

In the UAE, as in other civilian legal systems, when the agent concludes a contract with a contractor in his own name but on behalf of a principal, he does not create a direct relationship between his principal and the contractor. Thus, the principal cannot sue the contractor or be sued by him. In the UAE, such indirect representation arises in the case of a commission agent.²⁹ In such a case, under Article 237(1) of the UAE Commercial Code, the contractual obligations must be fulfilled by the agent and the contractor. Thus any breach of the contractual terms by either party (the agent or the contractor) gives the other party the right to sue. Article 237(2) prevents any direct claim between the contractor and the principal based on a commission contract, which is regarded as concluded between the commission agent and the contractor.³⁰ This provision has

²⁶ Roderick Munday, n. 2 above, p. 268.

²⁷ See L.S. Sealy and R.J.A. Hooley, *Commercial Law, Text, Cases and Materials* (Oxford: Oxford University Press, 3rd edition, 2005), p. 153.

²⁸ See Chapter 6 above, p. 192.

²⁹ H.L.E. Verhagen, n. 1 above, p. 36.

³⁰ Article 237 of the UAE Commercial Code provides:

"1. A commission agent shall be directly bound to the third party with whom he entered into contract; such third party shall also be directly bound to the commission agent.

been applied by UAE courts in numerous decisions, especially those of the Dubai Court of Cassation.³¹ Thus, it may be concluded that the commission agent, when he concludes the contract in his name on behalf of the principal, is the main party liable to the contractor, and the agent and the contractor can each sue the other on the basis of contractual obligations.

The agent's liability in tort

Under English law, the agent may be liable to the contractor in tort in respect of his wrongful acts or omissions, where he acts with or without authority on behalf of the principal and causes loss, damage or injury to the contractor. More specifically, the agent may be liable on the grounds of negligent representation or negligent conduct.³²

Furthermore, since the main role of the agent is to create a direct relationship between the principal and contractor, torts committed by the agent may involve the making of false representations to the contractor. The agent may incur liability for economic loss on the basis of the common-law torts of deceit or negligent misrepresentation.³³ Such liability may arise from statements made by the agent in the negotiations leading to the conclusion of the main contract.

2. A third party with whom the commission agent has entered into contract may not have direct recourse against the principal, neither may this latter have direct recourse against such third party unless there is a legal provision to the contrary.” On commission agents more generally, see Articles 229-44.

³¹ See the Dubai Court of Cassation decisions in Case 173/2007, 17 September 2007; and Case 37/2003, 3 May 2003.

³² See *Polhill v Walter* (1832) 3 B. & Ad. 114; *Randell v Trimen* (1856) 18 C.B. 786; *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360.

³³ Roderick Munday, n. 2 above, p. 268. See also Basil S. Markesinis and Roderick Munday, n. 12 above, p. 181.

In this case, since the agent is not a party in the contract he has negotiated, the agent incurs liabilities in tort, rather than contract, to the contractor.³⁴

Under civilian legal systems, the contractor may sue the agent in tort (rather than contract) if the agent causes damage or loss to the contractor through wrongful acts.³⁵ Some argue that, in respect of tort liability, the agent may be solely or jointly liable with the principal to the contractor.³⁶ However, civilian countries differ as to the requirements for liability in tort, with some countries, such as Egypt, considering fault to be the basis of tort liability. Thus the contractor has to prove fault on the part of the agent.

Other countries, such as the UAE, consider damage to be the basis of tort; hence, the contractor can establish liability by proving damage without proving that the agent is at fault.³⁷

Furthermore, the unjustifiable breaking off of negotiations towards the conclusion of a contract may give rise to liability in tort in some civilian legal systems, such as the UAE, Egypt and France.³⁸

³⁴ Roderick Munday, n. 2 above, p. 268

³⁵ Gamal Moursi Badr, n. 5 above, p. 265. See also Samiha Alqalyoobi, (شرح العقود التجارية) *Explanation of Commercial Contracts* (Dar Alnahda Alarabia, Cairo, 2nd edition, 1992), p. 132.

³⁶ Gamal Moursi Badr, n. 5 above, p. 265.

³⁷ See Ali Aljasmi, (القانون الواجب التطبيق على الفعل الضار) *The Law Applicable to Torts* (the UAE Researcher, 1st edition, 2011), p. 186.

³⁸ Ahmed Abdulkarim Salama, (النظام القانوني لمفاوضات عقود التجارة الدولية) *The Legal System of The Negotiation in International Trade Contract*, (2003) V11 Security and Law Journal, Dubai Police Academy, p. 253.

Choice of law

In respect of private international law, a question arises regarding which law governs the relationship between the agent and the contractor. It should be noted that UAE legislation does not contain any provision specifying the law which governs the relationship between the agent and the contractor.

Nonetheless, on the basis of the Rome I Regulation, the question arises whether the relationship between the agent and the contractor is excluded from the scope of the Regulation by virtue of Article 1(2) (g), or whether this exclusion is confined to the question of whether an agent is able to bind a principal to a contractor. Some argue that the exclusion does not extend to the relationship between the agent and the contractor; thus the Regulation covers any disputes between them.³⁹ Moreover, the Commission of the European Communities explained that the relationships between the principal and the agent and between the agent and the contractor were covered by the Rome Convention 1980.⁴⁰

With regard to the agent's liability, as noted above, the agent may incur liability to the contractor by virtue of the terms of the contract they have concluded. When the agent has exceeded his authority, has acted without authority, or may be liable in tort, the question may arise as to whether it is convenient in such exceptional circumstances to subject the agent's liability to the law governing external authority.

³⁹ See Gralf Peter Calliess, *Rome Regulation: Commentary on the European Rules of Conflict of Laws* (Wolters Kluwer and Business, New York, 2011), p 50. See also Alexander J. Belohlavek, *Rome Convention: Rome I Regulation*, (Juris, USA, 2010), p. 561.

⁴⁰ Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*, COM(2005) 650 final, at p. 7.

Contractual liability

Generally, it is desirable that the law governing the existence of authority for the purpose of the relationship between the principal and the contractor should also govern the existence of authority for the purpose of the relationship between the agent and the contractor, since the substantive law in many systems provides a unified set of rules that apply to both external relationships. This may especially be the case in situations where the agent has joint liability with his principal to the contractor.⁴¹

Consequently, the Hague Agency Convention specifies in Article 15 that the law applicable under Chapter III to the agent's authority for the purpose of the relationship between the principal and the contractor also governs the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his authority, has exceeded his authority, or has acted without authority. Thus, this relationship is subjected to the law of the country where the agent has his business establishment or to the *lex loci actus* in accordance with Article 11.⁴²

⁴¹ See, I.G.F., *Karsten Report: Explanatory Report, Actes et documents of the 13th Session of the Hague Conference* (hereafter "the Karsten Report"), par. 19, p. 13 et seq.

⁴² The initial proposal of the EC Commission which led eventually to the adoption of the Rome I Regulation included in Article 7(4) a provision closely resembling Article 11 of the Hague Convention, but the proposed Article 7 was omitted from the Rome I Regulation as finally adopted. Article 7 of the Rome I Proposal provided:

"1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the law of that country shall apply.

Nonetheless, some argue that the relationship between the agent and the contractor subject to the law governing the main contract as determined by the Rome I Regulation.⁴³ Consequently, it seems that apart from the question of the existence of authority to bind the principal, the agent's rights against and liabilities towards the contractor should usually be governed by the law which governs the main contract under the Rome I Regulation. That law applies directly to his contractual rights and liabilities arising from terms of that contract. As regards the agent's warranty of authority, his liability arises under a collateral contract, which is usually governed by the same law as governs the main contract under the Rome I Regulation.⁴⁴

Another approach is adopted by German commentators who regard the agent's unauthorised act as semi-contractual, and argue in favour of the law governing the main contract to cover the agent's liability.⁴⁵ On the other hand, Portuguese law provides that when the agent exceeds his authority, the law of the principal's domicile should extend to the relationship

2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country in which the agent had his habitual residence when he acted. However, the applicable law shall be the law of the country in which the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.

3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.

4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power."

⁴³ Dicey, Morris, and Collins, n. 8 above, p. 2135.

⁴⁴ See *Golden Ocean Group v Salgaocar Mining Industries* [2012] EWCA Civ 265.

⁴⁵ H.L.E. Verhagen, n. 1 above, p. 402.

between the agent and the contractor. However, Austrian law provides that the *lex loci actus* will apply in this case.⁴⁶

In the UAE, it can be argued that Article 19 of the Civil Code applies to the agent's contractual liability to the contractor, since there is no saving such as is found in Article 1 of the Rome I Regulation for the agent's power to bind his principal to the contractor. In any case, such a saving would only apply to the issue of the existence of authority; and not, for example, to whether a contractual term was designed to make the agent jointly liable with the principal to the contractor.⁴⁷

Tort liability

Tort liability on the part of the agent arises under English and civilian laws when the agent causes loss, damage or injury to the contractor by his wrongful actions, such as by making false statements in the contractual negotiations. Moreover, under civilian legal systems, the agent may also be liable in tort to the contractor when he acts without authority or when he exceeds his

⁴⁶ See Foad Mohammed Alodaini, (تحديد القواعد القانونية الواجبة التطبيق على عقود الوسطاء التجاريين ذات الطابع الدولي) *Determination of the Legal Rules Applicable to International Commercial Agency* (PhD thesis, Cairo University, 2012), p. 127.

⁴⁷ Article 19 of the UAE Civil Code provides:

"(1) The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.

(2) The *lex situs* of the place in which real property is situated shall apply to contract made over such property".

authority. In this case, questions will arise concerning the law that governs the agent's tort liability.

Some argue that under the Hague Convention the agent's tort liability should be governed by the law determined in Chapter III, since Article 15 determines the applicable law in the case of an agent acting without authority or in excess of his authority, without any restrictions formulated as to the nature of that liability.⁴⁸ In his report, Karsten explains that the law governing the relationship between the agent and the contractor should be the same law, regardless of whether the nature of the parties' liability is contractual or tortious; hence, Article 15 should apply in the case of the agent's tort liability.⁴⁹

On the other hand, some argue that in respect of the conflict rules governing the agent's liability, there should be differentiation between tortious liability and contractual liability. Thus the agent's tort liability should be subjected to the law determined under the Rome II Regulation.⁵⁰ Consequently, by virtue of Article 14 of the Rome II Regulation,⁵¹ as regards the agent's tort liability, the agent and the contractor may agree to choose the law applicable to this liability.⁵² In the absence of any choice by the parties, by the virtue of Article 4, the agent's tort

⁴⁸ H.L.E. Verhagen, n. 1 above, p. 402.

⁴⁹ Karsten Report, n. 41 above, parg. 226, p 59.

⁵⁰ Dicey, Morris, and Collins, n. 8 above, p. 2137.

⁵¹ EC Regulation 864/2007, on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

⁵² Article 14 of the Rome II Regulation provides:

"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

liability may be governed by the law of the country where the contractor incurred its initial loss, but if the agent and the contractor, at the moment when the damage occurred, had their habitual residences in the same country, the law of that country will apply. However, if the tort is more closely connected with another country, the law of that country will apply.⁵³

(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.

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."

⁵³ Article 4 provides:

"1. 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.

2. 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.

3. 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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

It seems that the agent's liabilities in tort arising from the contractual negotiations should normally be subjected to the law governing the main contract by way of closest connection under Article 4(3) of the Rome II Regulation. Article 4(3) could also be used to apply the law governing the existence of authority – either the law governing the main contract or (in Hague Convention countries) the law of the agent's establishment or in certain cases his acts.

In the UAE, by virtue of Article 20 of the UAE Civil Code, the agent's non-contractual obligation would be governed by the *lex loci delicti*.⁵⁴ However, some argue that in respect of non-contractual obligations, the court may use Article 23 (on general principles of private international law) to apply the provisions of the Rome II Regulation. Nonetheless, it is difficult to justify the application of Article 23 in the face of the explicit text contained in Article 20.⁵⁵

Which of the various solutions is preferable?

With regard to the agent's contractual liability to the contractor, it is generally accepted that questions concerning the existence and extent of the agent's authority to bind the principal should be governed by the same law as is applicable to those questions in the context of the relationship between the principal and the contractor, in order to unify the law governing both external relationships that arise from the agency contract. This may conveniently be referred to

⁵⁴ Article 20 of the UAE Civil Code provides:

"(1) Non-contractual obligations shall be governed by the law of the state in which the event giving rise to the obligation took place.

(2) The provisions of the foregoing paragraph shall not apply to obligations arising out of an unlawful act in connection with events taking place abroad which are lawful in the State of the United Arab Emirates notwithstanding that they are considered to be unlawful in the country in which they took place."

⁵⁵ Ali Aljasmi, n. 37 above, p. 106.

as the law governing external authority. This law should also in general apply to the consequences of the existence or absence of sufficient authority in the context of the relationship between the agent and the contractor. In general, according to the English approach, this is the law governing the main contract, and according to the Hague Convention, the law of the agent's establishment.

On the English model, a question of external authority may exceptionally be governed by the law of the principal's residence under a rule analogous to Article 10(2) of the Rome I Regulation. Under the Hague Convention, it is important to avoid applying Articles 11 and 19 beyond question of authority. Under any system, the law governing the main contract should govern its validity, interpretation and effects, for all persons and in all respects not involving the existence of authority.

In respect of preference between the English approach and that of the Hague Convention, it is noteworthy that the English solution has the advantage of avoiding the splitting of issues involving external authority from other issues relating to the main contract. There is also no reason to depart from the law governing external authority in relation to the issues discussed in this chapter in cases where the agent has sufficient authority to act on behalf of his principal, and in cases where the agent acts in his own name on behalf of the principal. This relates to the basic principle that the agent normally drops out, and to situations involving an undisclosed principal.

Furthermore, as regards the rights and liability of the agent in the case where he may be liable under the terms of the contract which he concluded with the contractor, even though he had sufficient authority to bind the principal to the contractor, the English solution seems preferable to that of the Convention, since such rights and liabilities will arise from the wording or interpretation of the main contract.

Moreover, in respect of the agent's obligations to the contractor which arise from lack of sufficient authority (acting without authority or in excess of authority) to bind the principal to the contractor, it must be noted that the agent's warranty of authority under English internal law is regarded as a collateral contract, and this is normally subjected under English private international law to the law governing the main contract by reference to the provisions of Article 3 and 4 of the Rome I Regulation based on implied choice or closest connection.

In respect of choice of law with regard to the agent's liability to the contractor, the Hague Convention approach is preferable, when subject the agent's contractual and tortious liability to the same law.

Conclusions

In most legal systems, it is generally accepted that the agent normally drops out of the contract that he concludes with the contractor when he acts on behalf of his principal. Thus, the contractor can neither sue nor be sued by the agent. Nonetheless, the agent may in exceptional circumstances be liable to the contractor, and this liability may be regarded as either contractual or tortious in character.

There are three instances under English law where the agent is contractually liable to the contractor. Firstly, such liability may arise from the terms of the contract which the agent concluded with the contractor. Secondly, the agent is liable for breach of a collateral warranty when he acts without authority or in excess of his authority and the principal does not ratify the unauthorised act. Thirdly, the agent's liability may arise where he acts for an undisclosed principal. In addition, the agent may incur liability in tort to the contractor for his wrongful acts or omissions, whether performed with or without authority from the principal, which cause loss

to the contractor. In particular, liability in tort for misrepresentation may arise from acts performed by the agent in the negotiations with respect to the main contract.

In civilian legal systems, the agent's contractual liability to the contractor may arise when the agent acts in his own name on behalf of the principal; for example, as a commission agent. However, when the agent acts without authority or in excess of his authority and the principal fails to ratify the unauthorised act, civilian legal system countries differ with regard to the nature of the agent's liability; namely, whether it is based on tort, or a collateral contract, or on the main contract. The agent may incur liabilities in tort if he causes damage or loss to the contractor through his wrongful acts. Furthermore, the unjustifiable breaking off of contractual negotiations is considered tortious in some civilian legal systems, such as the UAE, Egypt and France.

The Hague Convention approach with respect to the agent's liability to the contractor is to subject contractual and tortious liability to the same law; usually that of the country of the agent's business establishment. In contrast, the English approach distinguishes between contractual and tortious liability. Contractual liability is subjected to the law governing the main contract, which is determined in accordance with the Rome I Regulation, while tort liability is subjected to the conflict rules specified by the Rome II Regulation.

In the UAE, the legislator has not specifically regulated the question of choice of law in respect of the relationship between the agent and the contractor. However it can be argued that Article 19 of the Civil Code extends to the agent's contractual liability to the contractor, since there is no saving such as is found in art 1 of the Rome I Regulation for the agent's power to bind his principal to the contractor. Nonetheless, in the case of the agent's tort liability, the court will have to apply Article 20 of the Civil Code, which provides that the *lex loci delicti* should

apply to non-contractual obligations, and the court cannot invoke general principle under Article 23 to apply the Rome II regime.

Notwithstanding the above, some argue that the agent's contractual liability to the contractor is closely linked to the matters governed by the Rome I Regulation, and that it would be more convenient if the Regulation included this issue in its scope. It would also be beneficial if the UAE legislator addressed this matter and explicitly extended the law governing the main contract so as to govern the contractual liability of the agent to the contractor. Moreover, as regards tort liability, it seems that Article 20 of the Civil Code needs amendment in order to keep pace with modern theories and approaches in this field.

Overall, it would clearly be more convenient for international trade if the agent's contractual liability and tortious liability to the contractor were both subjected to the law governing the main contract between the principal and the contractor, for many reasons discussed above. Consequently, such a provision should be added by the UAE legislator to Article 19 of the Civil Code, and by the EU legislator to the Rome I and II Regulations.

CHAPTER EIGHT

CONCLUSION

Introduction

This thesis has aimed to determine the applicable law in relation to agency contracts. Undoubtedly, the law governing the internal relationship between a principal and an agent may differ from the law governing the external relationships. Moreover, the external relationship between the principal and a contractor may be subject to a different law from the law governing the external relationship between the agent and the contractor. This thesis has studied these questions in the light of the provisions of the Rome I Regulation, the Hague Convention 1978, and the UAE Civil Code. Although this chapter will not summarize all of the points that were presented in the previous chapters, it will focus on the main points that answer the fundamental questions of the current thesis regarding conflict rules in the field of agency contracts. It will also provide a proposed draft of a bill, designed to be enacted by the UAE legislator, embodying what are regarded by the present writer as the best solutions to these questions. In addition, a draft proposal, designed to be adopted by the EU institutions, so as to amend the Rome I Regulation in a manner embodying the same principles, will also be provided. This will address, *inter alia*, the question whether the agent can bind his principal towards the contractor; this question being currently excluded from the scope of the Regulation. Therefore, this chapter will be divided into two parts: the first will summarise the main points emerging from the present study; and the second part will set out drafts of enactments concerning conflict rules regarding agency contracts, designed to amend the UAE Civil Code and the Rome I Regulation.

Part One

As seen in this thesis, in respect to agency contracts, there is an important difference in the substantive rules adopted by different legal systems, particularly between those of civilian law and those of common law. For instance, the doctrine of the undisclosed principal, accepted in common-law systems, is not recognised by civilian legal systems. These differences in substantive law have consequences in private international law. Many countries in the international community have attempted to unify the conflict rules regarding agency contracts. The Hague Convention 1978 was the first attempt to unify the choice of law rules in respect of agency contracts by the Hague Conference on Private International Law. The Rome I Regulation contains some rules that may apply to agency contracts. In any case, if the application of the Convention is incompatible with the Regulation, in countries which are party to both the Convention and the Regulation, the Convention will prevail, in accordance with the principle of *lex special derogat legi generali*, and pursuant to Article 25(1) of the Regulation, which provides that if the relevant international treaty existed at the time of the adoption of the Regulation, preference will be given to this treaty rather than to the Regulation.

The internal relationship

In the UAE the legislator has regulated the question of choice of law in the field of contracts by Article 19 of the Civil Code. Since the relationship between the principal and the agent should be considered a contract, it should be subject to the same conflict principles as apply to other international contracts. The first principle is that the parties have freedom or autonomy in choosing a law to govern the contract. This choice may be express or implied. Secondly, however, if the parties do not choose the governing law, the court will apply the

default rules to resolve the conflict question. These apply the law of the parties' common residence, or (in its absence) the law of the place of contracting.

Nevertheless, as seen in this thesis, the principal and the agent do not always reside in the same country. Furthermore, the location of the place of contracting may be determined by an accidental event. Moreover, there may be additional difficulties in determining the place of contracting as well. In these cases, the court may apply Article 23 of the Civil Code (which invokes general principle of private international law) to determine the applicable law.

Therefore, for many sound reasons, which were presented in Chapter 4 of this thesis, it seems appropriate to adopt the approach to the internal relationship adopted by the Agency Convention and the Rome I Regulation, under both of which the default rule refers primarily to the agent's residence (his business establishment or habitual residence). Nonetheless, using the agent's residence to determine the applicable law is too rigid and may lead to unacceptable results in some cases, such as when it is apparent from the circumstances that there is another law that has a closer connection to the contract. In this case, reference to the law of the country that has a closer connection to the internal relationship (the Rome I Regulation approach) offers more flexibility, and leads to the application of the most appropriate law. Although at present the UAE courts may be able in some cases to use Article 23 to reach these results, it would be better if the UAE legislator were to add such provisions to the Civil Code.

The external relationship between the principal and the contractor

With regard to the external relationship between the principal and the contractor, the authority of the agent in relation to this relationship is excluded by Article 1(2)(g) of the Rome I Regulation from the scope of the Regulation. Moreover, the UAE law does not contain any

provision dealing with external authority in regard to the applicable law in respect of the relationship between the principal and the contractor. Consequently, the UAE court may use Article 23 of the Civil Code to find the solution.

In contrast, the Hague Convention has regulated this question. Article 14 gives the parties (the principal and the contractor) the right to choose which law governs the agent's authority for the purposes of their relationship, but it also requires that such a choice must be in writing, which means that the Convention authorises an express choice but not an implied choice. Moreover English law probably accepts the same solution on this as the Hague Convention, except that English law does not require writing and permits an implied choice. More generally, however, the English conflict rules subject the agent's external authority to create a binding contract between the principal and the contractor to the proper law, or the putative proper law, of the contract between the principal and the contractor; that is, the law which governs that contract, or would do so if the necessary authority existed. Under this approach there seems little need to deal specifically with the possibility (which in any event is likely only rarely to occur) of a direct agreement between the principal and the contractor as to the law which governs external authority as between them.

As regards external authority as between the principal and the contractor, the English approach, applying the law governing the main contract that the agent concluded on behalf of his principal with the contractor seems worthy of adoption in the UAE under Article 23 of the Civil Code. This solution seems practicable, foreseeable, workable, clear and simple. Moreover, it also provides a balance between the parties' interests; in addition to the numerous reasons presented in Chapter 6 of the current thesis. Nonetheless, the law governing the main contract might, in some cases, be one whose application and effects the principal could not reasonably

have foreseen. Thus, some exception is needed to enable the principal to rely in certain circumstances on the law of his business establishment or habitual residence. The exception could be defined by analogy with the provision of Article 10(2) of the Rome I Regulation on a party's consent.

The law governing the main contract should apply to issues such as indirect representation and the position of an undisclosed principal, apparent or ostensible authority, and ratification of the agent's unauthorised act. Since all of these issues are connected with each other, the same law should govern them; moreover, it is best to unify the applicable law on all questions arising between the principal and the contractor. Furthermore, these legal consequences should also be considered as effects of the agent's exercise of his authority, and thus subjected to the laws applicable to the external authority. Thus, the law governing the main contract should apply, subject to an exception derived by analogy from Article 10(2) of the Rome I Regulation.

Such an approach could also usefully be applied at European Union level. This would entail the amendment of the Rome I Regulation, by repealing Article 1(2)(g) and adding the appropriate provisions in favour of the law governing the main contract and the exception thereto.

Nevertheless, the existence and scope of the actual authority of an agent (whether express or implied) should always, and between all persons, be governed by the law which governs the internal relationship.

The external relationship between the agent and the contractor

As regards the external relationship between the agent and contractor, in most legal systems the agent normally drops out of the contract that he concludes with the contractor when he acts on behalf of his principal. Nonetheless, in exceptional circumstances, the agent may be liable to the contractor. The agent's liability might arise from wording or circumstances indicating that he promises that the principal will perform the contract; or from failure to disclose the existence or identity of the principal; or from the agent's purporting to exercise an authority which he lacks. The agent's liability may be regarded as either contractual or tortious in character. Consequently, it may be necessary to distinguish between contractual and tortious liability. Contractual liability might then be subjected to the law governing the main contract, which might be determined in accordance with the Rome I Regulation, while tort liability might be subjected to the conflict rules specified by the Rome II Regulation. This appears to be the English approach.

In the UAE Article 19 of the Civil Code applies to the agent's contractual liability to the contractor. In the case of the agent's tort liability, the court will apply Article 20 of the Civil Code, which provides that the *lex loci delicti* should apply to non-contractual obligations, and it seems impossible for the court to employ Article 23 so as to invoke the Rome II regime. In contrast, the Hague Convention approach with respect to the agent's liability to the contractor is to subject contractual and tortious liability to the same law; usually that of the country of the agent's business establishment.

Reform in the UAE

In the foregoing discussion, it is obvious that in the UAE the legislator has not specifically regulated the question of choice of law in respect to agency contracts, whether in respect of the internal relationship or the external relationships. Consequently, the court applies Article 19 or Article 23 of the Civil Code when the relationship is considered as contractual; however, when a party's liability is considered as a tort liability, Article 20 of the Civil Code is applied to the case.

It seems that it would be more convenient for trade, and would otherwise be beneficial, if the UAE legislator were to add some new provisions in the Civil Code dealing with the law governing the three agency relationships. Such provisions should, firstly, introduce a default rule applying the law of the place where the agent has his habitual residence to the internal relationship between the principal and the agent, Secondly, they should apply the law of the main contract that the agent concluded with the contractor to the external authority of the agent in relation to the relationship between the principal and the contractor -- in other words, to the question whether the agent has bound his principal to the contractor; including questions of indirect representation and the position of an undisclosed principal, apparent or ostensible authority, and ratification of the agent's unauthorised act. Moreover, the UAE legislator should adopt an exception analogous with Article 10(2) of the Rome I Regulation.

Moreover the reforming provisions should extend the law of the main contract to the relationship between the agent and contractor, as regards both contractual liability and tort liability. This will avoid the splitting of issues involving external authority from other issues relating to the main contract; and the extension to tort liability will unify the law applied to claims between the contractor and the agent. This extension resembles the solution adopted by

the Hague Convention, which has unified the law governing the agent's liability towards the contractor, whether it is contractual liability or tortious liability. Furthermore, Article 4 (3) of the Rome II Regulation provides that:

"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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question".

This means that the law governing the contract may govern the tort liability, since the connection between the contract and the tort causes the tort to have a manifestly closer connection with the country whose law governs the contract.

Until these amendments occur, the parties should ask the court to apply the general principles of private international law pursuant to Article 23 of the Civil Code to determine the applicable law where no specific conflict rules contained in the Civil Code are applicable, and they should prove the provisions of the substantive law in the applicable law.

Public policy and overriding mandatory rules

The Hague Agency Convention and the Rome I Regulation recognise the principle requiring respect for the forum's public policy. The UAE legislator also has adopted the public policy exception in the context of choice of law rules. Nevertheless, the UAE legislator has added a reference to the Islamic Shari'a; consequently, the applicable law will be set aside if its provisions are manifestly incompatible with UAE public policy or Islamic Shari'a. Nonetheless, it should be noted that not all the rules of Shari'a law establish a public policy designed to have

universal scope. Some of its provisions establish a public policy which is applicable only to Muslims, while others provisions give rise to a public policy applicable both to Muslims and non-Muslims.

The Hague Agency Convention and the Rome I Regulation also provide for the application of overriding mandatory rules regardless of the law otherwise governing the matter. In contrast, the UAE legislature has not stipulated expressly for the application of overriding mandatory rules in the manner of the Hague Agency Convention and the Rome I Regulation. Nonetheless, some argue that a UAE court may apply such rules of the *lex fori* in application of the public policy proviso specified by Article 27 of the Civil Code. However, it seems preferable for the legislator to enact a new Article that explicitly provides for the application of overriding mandatory provisions of *lex fori*.

Substantive rules on agency contracts have been laid down by EEC Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents, which is transposed in Great Britain by the Commercial Agents (Council Directive) Regulation 1993 (as amended). The provisions of the Directive are regarded as overriding mandatory provisions. Somewhat similar provisions are made in the UAE by Federal Act 18/1981 on the Regulation of Commercial Agencies (the Agency Code).

There seems no doubt that the provisions of UAE Federal Act 18/1981 (as amended) constitute overriding mandatory provisions in the UAE in cases where the agency has been registered in the Commercial Agents Register. In practice, however, there are many unregistered agencies, as the principal prefers not to register the agency contract to avoid the application of the protective provisions. Consequently, it seems that the legislator should amend the existing enactment, so as to ensure that, regardless of registration, the Regulation of Commercial

Agencies will be applied when the agent carries out his activity in the UAE or is established in it, as well as imposing a financial penalty on a principal who does not register an agency.

Part Two

In this part we will offer a draft of a bill concerning conflict rules in respect of agency contracts, designed for adoption by the UAE legislator and serving to amend the UAE Civil Code. We will also offer a draft of provisions designed to be adopted by the EU institutions by way of amendment of the Rome I Regulation.

Draft Amendments to the UAE Civil Code

We Khalifa Bin Zayed Bin Sultan Al Nahyan President of the United Arab Emirates State, Pursuant to the perusal of the provisional 2 Constitution, and

Federal Act no. 1 of 1972, concerning the Jurisdictions of the Ministers and the Powers of the Ministers and the amending Acts thereof, and

Federal Act no. 5 of 1985 concerning the Civil Transaction Act and the amending Acts thereof, and

Acting upon the proposal of the Minister of Justice and the approval of the Council of Ministers and the ratification of the Federal Supreme Council,

Have promulgated the following Act

Article 1

The Civil Transactions Act shall be amended by inserting, after Article 19, new Articles 19A, 19B and 19C, which make provision as to the law applicable to agency relationships, as follows:

“Article 19A

(1) Article 19(1) shall not apply to agency relationships.

(2) The agency contract between a principal and an agent shall be governed by the law chosen by the parties. The choice shall either be made expressly or be clearly demonstrated by the terms of the contract or the circumstances of the case. Nevertheless, in the absence of such a choice this contract shall be governed by the law of the country in which the agent had his habitual residence at the time when the agency contract was concluded.

(3) Where in concluding the agency contract the agent was acting in the course of his business, he shall be treated for the purpose of paragraph (2) above as having been habitually resident at his business establishment which was involved in the negotiation or conclusion of the agency contract; or, where that establishment cannot be identified, at his principal place of business. This applies regardless of whether or not the agent is a corporate entity.

Article 19B

(1) Subject to paragraphs (2) and (3) below, the law governing the main contract between a principal and a contractor (ascertained in accordance with Article 19 above) shall govern the relationship between the principal and the contractor arising out of the fact that the agent acted in the exercise of his powers, in excess of his powers or without power. This applies, in particular, to questions concerning indirect representation (or the position of an undisclosed principal), apparent authority, and ratification of the agent's unauthorised acts.

(2) Paragraph (1) above shall not apply to questions concerning the agent's actual authority. Such questions shall in all circumstances, and as regards all persons, be determined in accordance with the law which governs the contract between the principal and the agent, determined in accordance with Article 19A above.

(3) By way of exception to paragraph (1), in order to establish that he is not bound by the agent's acts, a principal may rely upon the law of the country in which he has his own habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of the principal's conduct (for example, as establishing apparent authority, or amounting to ratification) in accordance with the law specified in paragraph (1). For this purpose where the principal is engaged in business activities, he shall be regarded as being habitually resident at his principal place of business; and this applies regardless of whether or not the principal is a corporate entity.

Article 19C

(1) The law designated by Article 19B(1) above shall also govern the relationship between the agent and the contractor arising from the fact that the agent acted in the exercise of his powers, in excess of his powers or without power, unless this relationship is the subject of an explicit or clearly demonstrated choice of another law by the agent and the contractor, in which case the law so chosen shall apply.

(2) Where, under the rules contained in the law which is applicable under paragraph (1) to the mutual rights and obligations of the agent and the contractor, their mutual rights and obligations may be affected by the existence or extent of an effective contractual relationship between the principal and the contractor, account shall be taken, in determining the existence and extent of a contractual relationship between the principal and the contractor:

(a) of the law which is applicable to external authority as between the principal and the contractor under Article 19B(1);

(b) of the law which is applicable to actual authority under Article 19B(2), and

(c) of the fact (if it be the case) that the principal has successfully relied, or could successfully rely, against the contractor on the law of the principal's habitual residence under Article 19B(3)."

Article 2

The following paragraph shall be inserted into Article 26 as paragraph (3):

"(3) Paragraph (2) above (which provides for partial renvoi) shall not apply to contractual obligations."

Article 3

The following paragraph shall be inserted into Article 27 as paragraph (2):

"(2) The application of any law specified by the preceding Articles shall not prejudice the application of overriding mandatory rules of the UAE. For this purpose a rule is mandatory if its operation cannot be excluded by a contractual term designed to do so, and a rule is overriding if its wording or purpose indicates that it is designed to regulate certain situations connected with the UAE, and in such situations to displace any foreign law which may otherwise be applicable under ordinary conflict rules."

Draft Amendment to the Rome I Regulation

Regarding the Rome I Regulation, the modification proposed is similar to the provisions of Articles 19B and 19C that are proposed above by way of amendment to the UAE Civil Code. However a provision corresponding to Article 19A (on the internal relationship) is not needed in Rome I Regulation. The provision corresponding to Article 19B (on the external relationship between the principal and the contractor) should refer to the law applicable under the Regulation

(usually by virtue of Articles 3 and 4; though other provisions, such as Articles 5-8, may on occasion apply). Consequently, we propose the following amendments to the Rome I Regulation.

REGULATION (EU) No *** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of *** on the law applicable to contractual obligations, amending Regulation No 593/2008
(Rome I)

Article 1

Article 1(2)(g) of the Rome I Regulation shall be deleted.

Article 2

The Rome I Regulation shall be amended by inserting, after Article 8, new Articles 8A and 8B, which make provision as to the law applicable to external agency relationships, as follows:

“Article 8A

(1) Subject to paragraphs (2) and (3) below, the law governing the main contract between a principal and a contractor (ascertained in accordance with this Regulation) shall govern the relationship between the principal and the contractor arising out of the fact that the agent acted in the exercise of his powers, in excess of his powers or without power. This applies, in particular, to questions concerning indirect representation (or the position of an undisclosed principal), apparent authority, and ratification of the agent's unauthorised acts.

(2) Paragraph (1) above shall not apply to questions concerning the agent's actual authority. Such questions shall in all circumstances, and as regards all persons, be determined in accordance with the law which governs the contract between the principal and the agent, determined in accordance with the provisions of this Regulation.

(3) By way of exception to paragraph (1), in order to establish that he is not bound by the agent's acts, a principal may rely upon the law of the country in which he has his own habitual residence, if it appears from the circumstances that it would not be reasonable to determine the effect of the principal's conduct (for example, as establishing apparent authority, or amounting to ratification) in accordance with the law specified in paragraph (1).

Article 8B

(1) The law designated by Article 8A(1) above shall also govern the relationship between the agent and the contractor arising from the fact that the agent acted in the exercise of his powers, in excess of his powers or without power, unless this relationship is the subject of an explicit or clearly demonstrated choice of another law by the agent and the contractor, in which case the law so chosen shall apply.

(2) Where, under the rules contained in the law which is applicable under paragraph (1) to the mutual rights and obligations of the agent and the contractor, their mutual rights and obligations may be affected by the existence or extent of an effective contractual relationship between the principal and the contractor, account shall be taken, in determining the existence and extent of a contractual relationship between the principal and the contractor:

(a) of the law which is applicable to external authority as between the principal and the contractor under Article 8A(1);

(b) of the law which is applicable to actual authority under Article 8A(2);

(c) of the fact (if it be the case) that the principal has successfully relied, or could successfully rely, against the contractor on the law of the principal's habitual residence under Article 8A(3)."

Conclusion

The present writer hopes that the UAE legislative body will amend the UAE Civil Code by adopting a draft bill as proposed in this thesis. Until that happens, the existing situation in the UAE, with respect to the conflict of laws in the field of agency relationships, involves application of the provisions of Article 19 of the UAE Civil Code. This provides for the application of a law chosen by the parties either explicitly or implicitly; and in the absence of any such choice, for the application either of the law of the common residence or the law of the place of contracting. If there is no common residence and it is also difficult to determine the place of contracting, the court may use Article 23 of the Civil Code to apply the law of the place of the agent's habitual residence to the internal relationship between a principal and his agent. It may also utilise Article 23 so as to apply the law governing the main contract to the external relationships between the principal and contractor and between the agent and contractor.

In the European Union, the Rome I Regulation applies to the internal relationship between a principal and his agent, and to many aspects of the external relationship between an agent and contractor. The Hague Agency Convention applies in countries that have ratified the Convention (France, Portugal, and the Netherlands), so as to override the Rome I Regulation and also to deal with matters excluded from the Regulation, such as external authority as between the principal and the contractor. However, in other European countries, the conflict rules of the forum country apply to external authority as between the principal and the contractor. For instance, in England the law governing the main contract that the agent concluded with the contractor on behalf of the principal will govern external authority as between the principal and the contractor.

In addition to the conflict of laws regarding agency relationships examined in this thesis, more research concerning choice of law with respect to electronic agency is also recommended.

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