

CHAPTER 11

FOREIGN ELEMENTS

2. THE JURISDICTION OF THE ENGLISH COURT

Jurisdiction at common law*General rule—person of defendant***11–06** NOTE 18. DELETE AND REPLACE BY: CPR, Pt 6, r.6.6(1).

NOTE 20. DELETE AND REPLACE BY: CPR, Pt 6, rr.6.3(2), 6.5(3)(b). 6.7, 6.8, 6.9 and the table following.

General rule—subject matter

AFTER §11–07 INSERT THE FOLLOWING NEW PARAGRAPH

11–07A Similarly, a trustee may invoke the assistance of the English court to determine a question arising in the administration of the trust, even though the proper law of the trust is not English and the trustee himself is based abroad.^{27a}**Jurisdiction clauses under the common law rules***Construction of jurisdiction clauses***11–10(2)** NOTE 40. AT THE END OF THE FIRST SENTENCE ADD: approved *Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd* (2010–11) 13 I.T.E.L.R. 177 at [10], Cayman GC; cited with apparent approval *Representation of AA* [2010] JRC 164; (2010–11) 13 I.T.E.L.R. 690 at [26].AT THE END OF THE TEXT ADD: But more recently the courts have favoured a narrower interpretation of the phrase so that it does not cover an action for breach of trust^{42a} or other hostile proceedings^{42b} against a former trustee.

^{27a} *Berman v SPF CDO I Ltd* [2011] HKCFI 190; (2010–11) 13 I.T.E.L.R. 831, on Hong Kong rules equivalent to the English predecessor (R.S.C. O.85, r.2) of CPR Pt 64. For applications within CPR Pt 64, see §§ 27–05 *et seq.*

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11–10(3) NOTE 44. DELETE AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.45.

Effect of jurisdiction clauses

11–11(1) NOTE 49. DELETE THE SECOND SENTENCE AND REPLACE WITH: Contrast claims about contracts, where a clause conferring jurisdiction on the English court is a ground for service out of the jurisdiction: see Practice Direction 6B—Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6), para. 3.1(6)(d).

11–11(3) NOTE 56. ADD: *Representation of AA* [2010] JRC 164 at [34].

NOTE 57. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.19, SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.19.

11–11(5) NOTE 64. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.19, SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.19.

11–11(6) DELETE THE FIRST EIGHT WORDS AND REPLACE BY: In a case where there are multiple defendants,

Variation of judicial forum

11–12 AT THE END OF THE FOURTH SENTENCE, INSERT A NEW NOTE 69A: Cf. *Oakley v Osiris Trustees Ltd* [2008] UKPC 2; (2008) 10 I.T.E.L.R. 789, where the majority assumed and the minority expressly held (see at [44]) that a power to change the proper law of a trust would be validly exercised only if exercised in the interests of the beneficiaries.

AT THE END OF THE TEXT ADD: There is no objection to trustees exercising a power to change the judicial forum so as to facilitate proceedings against former trustees in what the trustees consider to be a more convenient forum.^{70a}

^{42a} *Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd*, above.

^{42b} *Representation of AA*, above.

^{70a} *Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd* (2010–11) 13 I.T.E.L.R. 177 at [14], Cayman GC.

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Appropriate forum under the common law rules

11–14 DELETE THE HEADING TO THIS PARAGRAPH AND REPLACE BY:

Forum conveniens—*service of proceedings out of the jurisdiction with court’s permission*

NOTE 72. DELETE THE REFERENCE TO THE CPR AND REPLACE BY: CPR, Pt 6, r.6.37(3).

NOTE 73. DELETE AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.80.

NOTE 74. FOR THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments*, SEE NOW (5th edn), §§ 4.80 to 4.84. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.15(4), SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.15(4).

NOTE 77. DELETE THE SECOND SENTENCE AND REPLACE BY: The question whether there is an English governing law will, however, be decisive if the only potentially available ground for service out of the jurisdiction is that contained in Practice Direction 6B—Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6), para.3.1(12) (trusts), as to which see § 11–31.

NOTE 79. FOR THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments*, SEE NOW (5th edn), § 4.84.

Forum non conveniens—*stay of proceedings served within jurisdiction*

11–15 AT THE END OF THE THIRD SENTENCE OF THE TEXT INSERT A NEW NOTE 80A: See, e.g., *Re A and MC Trust* 2007–08 G.L.R. N8, Guernsey RC (stay refused where proper law of trust was *lex fori*, few factual issues arose and decision of forum would be given much sooner than that of foreign court).

NOTE 81. DELETE AND REPLACE BY: *Spiliada Maritime Corp. v Cansulex* [1987] A.C. 460 at 464–465, 474–478, HL; Dicey, Morris and Collins, *The Conflict of Laws* (14th ed.), Vol.1, §§ 12R–001, 12–007 to 12–010 and 12–028 to 12–034; Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), §§ 4.13 to 4.32; *Civil Procedure* (2011), Vol.1, 6.37.18.

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NOTE 82. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.15 to 4.17.

Lis alibi pendens and anti-suit injunctions

11–16 NOTE 86. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.33.

NOTE 89. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), §§ 5.38 to 5.50.

European legislation

Three regimes

11–18 NOTE 98. AFTER Cyprus DELETE (Greek part). AT THE END ADD: The whole of Cyprus is part of the EU, the government of the southern, Greek, part being recognised by the other member states as the *de jure* government of Cyprus.

Domicile of defendant

11–20 NOTE 11. DELETE THE LAST SENTENCE AND REPLACE BY: That definition is adopted for CPR Pt 6 by r.6.31(1)(i).

DELETE HEADING TO § 11–21 AND REPLACE BY:

Claims involving trusts “domiciled” in England

11–21 DELETE THE LAST TWO SENTENCES AND NN. 18 AND 19 AND REPLACE BY: To determine whether a trust is domiciled in a contracting state whose courts are seised of the matter, both the Conventions and the Judgments Regulation require those courts to apply their own rules of private international law.¹⁸ In England, the relevant rules are provided by legislation: a trust is domiciled in the United Kingdom if it is domiciled in a part of the United Kingdom; and it is domiciled in a part of the United Kingdom if, and only if, the law of that part is the

¹⁸ Brussels Convention, art.53(2); Lugano Convention, art.53(2); Judgments Regulation, art.60(3).

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system of law with which the trust has its closest and most real connection.^{18a} A trust governed by English law will be domiciled in England in all but extraordinary circumstances, even if the trust assets are abroad, the trustees and the beneficiaries reside abroad, and the trust is administered abroad.^{18b} If the proper law of a trust has been changed by the exercise of a power in that behalf, it will be the later proper law, not the original one, which determines the domicile of the trust;^{18c} and the relevant proper law is that governing when the proceedings are issued, not when the cause of action arose.^{18d}

AFTER § 11–21 INSERT THE FOLLOWING NEW PARAGRAPHS:

11–21A To fall within the provision quoted in § 11–21, the trust must be created by the operation of a statute, or by written instrument, or be created orally and evidenced in writing. Express trusts created by declaration of trust or settlement to which trustees are a party plainly qualify. So do such statutory trusts as those created by the Administration of Estates Act 1925 on an intestacy.^{18e} It is said, by contrast, that constructive trusts do not qualify;^{18f} but that must mean only that the trust must be expressly created,^{18g} since a trustee of a trust created by a written instrument who is sued to make him account for an unauthorised profit is sued as trustee of a trust within the provision even though he is a constructive trustee of the profit.^{18h} (Moreover, certain claims asserting a constructive trust will fall within another special provision of the Conventions and the Judgments Regulation.¹⁸ⁱ)

^{18a} Civil Jurisdiction and Judgments Act 1982, s.45 (as amended by Civil Jurisdiction and Judgments Act 1991, s.3 and Sch.2, para.20); Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), Sch.1, para.12).

^{18b} *Gomez v Gomez-Monche Vives*, [2008] EWCA Civ 1065; [2009] 1 Ch. 245 at [58]–[64]. See too *Chellaram v Chellaram (No.2)* [2002] EWHC 632 (Ch); [2002] 3 All E.R. 17 at [141].

^{18c} *Chellaram v Chellaram*, above, at [162].

^{18d} *ibid.*, at [148]–[153].

^{18e} Administration of Estates Act 1925, ss.46, 47.

^{18f} *Chellaram v Chellaram (No.2)*, above, at [138], [162]. See too the report by Professor Schlosser on the accession of the United Kingdom to the Brussels Convention (OJ 1979 C 59, p. 71), para. 117. The Schlosser report is made authoritative for the construction of the Brussels Convention by Civil Jurisdiction and Judgments Act 1982, s.3(3).

^{18g} The Schlosser report, at para. 117, gives as an instance of a trust outside the provision the trust which arises in favour of a purchaser on the making of a contract for the sale of land, for which see §§ 10–03 *et seq.* (though the contract of sale will ordinarily be a written instrument).

^{18h} *Gomez v Gomez-Monche Vives* [2008] EWHC 259 (Ch); [2009] 1 Ch. 245 at [59]; point not taken on appeal, [2008] EWCA Civ 1065; [2009] 1 Ch. 274. For the trustee's liability as constructive trustee, see § 20–28.

¹⁸ⁱ See § 11–21C (online supplement).

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11–21B It is not easy to say precisely what claims are within the provision quoted in § 11–21. Although the terms settlor, trustee and beneficiary are of course familiar in English law, nothing in domestic law turns on characterising a claim as being (or not being) one in which a defendant is sued “as” settlor, trustee or beneficiary. The general intention is to distinguish between the internal relationships of a trust and its external relationships.^{18j} The special jurisdiction over trusts is meant to apply to the former alone; but it does so imperfectly:

- (1) As to suing a defendant as settlor, it seems obvious that where trustees sue the settlor on a covenant to settle further property he is sued “as” settlor; and the same is true where trustees or beneficiaries sue the settlor about the scope of reserved powers, including a power of revocation of the trust. We consider that the same is also true where trustees or beneficiaries sue the settlor to confirm the existence of a trust despite allegations of sham or undue influence or duress, even though the existence of the trust (and hence the existence of the settlor’s role as such) is the very matter in issue.
- (2) As to suing a defendant as trustee, a claim against a trustee for breach of trust plainly qualifies. Beneficiaries or other trustees who sue a trustee for making an unauthorised profit similarly sue the trustee as trustee.^{18k} The same must be true of a claim, whether made by beneficiaries or other trustees, against a person whose appointment as trustee is of uncertain validity or whose removal as trustee under an express power is of uncertain validity,^{18l} whether the claim is to resolve his status or to enforce a liability arising from his having acted in the trusts. It cannot in our view make a difference whether the claim asserts that the defendant is a trustee; or asks neutrally whether the defendant is a trustee; or asserts that the defendant, though claiming to be a trustee, is not in fact one. A settlor suing trustees who asserts that the trust is void because it is a will in disguise or is a sham or was executed under duress no doubt sues them as trustees, even if the

^{18j} See the Schlosser report at paras.109–113.

^{18k} See § 11–21A (online supplement).

^{18l} The Schlosser report at para.111 states that art.5(6) of the Brussels Convention was intended solve problems “between the trustees themselves, *between persons claiming the status of trustees* and, above all, between trustees on the one hand and the beneficiaries of a trust on the other. Disputes may occur among a number of persons as to who has been properly appointed as a trustee ...”. (Emphasis added.)

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claim is that the trust is void. Where the limitations of the trust instrument do not exhaust the beneficial interests, beneficiaries under the resulting trust who sue the trustees presumably also sue them as trustees.

- (3) Trustees or beneficiaries suing a beneficiary to establish a point of construction of the trust instrument, *e.g.* the scope of a power of investment or the age of vesting, undoubtedly sue the defendant as beneficiary.^{18m} Where they sue someone whose status as a beneficiary is uncertain, *e.g.* whether someone born outside wedlock is within the category of “children”, it is less obvious that the defendant is sued as beneficiary, since his status as such is the very matter in issue; but as with doubtful trustees, it seems likely that the claim qualifies.¹⁸ⁿ A claim, whether made by trustees or beneficiaries, against a beneficiary who has been overpaid by the trustees, and whose only possible title to the payment was as a beneficiary of the trust, is a claim against the defendant as beneficiary.^{18o}
- (4) Claims concerning a power conferred by the trust instrument on a third party, such as a protector, where the donee is sued are not within the special jurisdiction as to trusts conferred by the Conventions and the Judgments Regulation: such claims arise out of the internal relationships of a the trust but the donee is not sued as settlor, trustee or beneficiary. Even when the power is, or is alleged to be, a fiduciary power and complaint is made of a breach of duty in its exercise, the donee will not be treated as a trustee for the purpose of the special jurisdiction.^{18p}

Constructive trusts

11–21C The Conventions and the Judgments Regulation all provide in substance that a person domiciled in a member state may, in another member state, be sued.¹⁹

^{18m} The Schlosser report at para.111 states that art.5(6) of the Brussels Convention extends to “disputes between the trustees and the beneficiaries as to the rights of the latter to or in connection with the trust property, as to whether, for example, the trustee is obliged to hand over assets to a child beneficiary of the trust after the child has attained a certain age”.

¹⁸ⁿ For claims against trustees whose status is uncertain, see § 11–21B(2) (online supplement).

^{18o} *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065; [2009] 1 Ch. 274.

^{18p} *ibid.*, at [91], [97]–[99].

¹⁹ Brussels Convention, art.5(3); Lugano Convention, art.5(3); Judgments Regulation, art.5.3.

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“in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”.

The expression “matters relating to tort, delict or quasi-delict” embodies an autonomous concept independent of any particular domestic law.^{19a} A claim based on dishonest assistance in a breach of trust and asserting that the defendant is liable as constructive trustee is within that provision, since the assistance is a harmful event in addition to the breach of trust.^{19b} Whether a claim based on knowing receipt of assets transferred in breach of trust is similarly within that provision is undecided.^{19c} Restitutionary claims not presupposing a harmful event or a threatened wrong fall outside it.^{19d}

Exclusive jurisdiction clauses under the European regimes

11–23 IN THE FIRST SENTENCE DELETE contracting state AND SUBSTITUTE member and contracting state.

AFTER § 11–23 INSERT THE FOLLOWING NEW PARAGRAPH:

11–23A Where a jurisdiction clause confers jurisdiction on the courts of a state other than a member or contracting state, it seems that the English court retains a discretion to give effect to the clause even though the defendant is domiciled in England, itself a member and a contracting state.^{26a}

Defendants domiciled in more than one jurisdiction – effect of European rules

11–24 NOTE 30. DELETE AND REPLACE BY: Practice Direction 6B – Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6), para.3.1(15).

NOTE 31. DELETE AND REPLACE BY: *ibid.*, para.3.1(3).

^{19a} *Kalfelis v Bankhaus Schröder, Munchmeyer, Hengst & Co.* [1988] E.C.R. 5565 at [16]–[17], E.C.J.

^{19b} *Casio Computer Co. Ltd v Sayo* [2001] EWCA Civ 661; [2001] All E.R. (D) 147 (Apr).

^{19c} *ibid.*, at [22].

^{19d} *Kleinwort Benson v Glasgow City Council* [1999] 1 A.C. 153, HL.

^{26a} *Konkola Copper Mines plc v Coromin* [2005] EWHC 898 (Comm) (jurisdiction clause in contract); point not taken on appeal, see [2006] EWCA Civ 5; [2006] 1 Lloyd’s Rep. 410 at [47], but cited with approval in *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328; [2010] F.S.R. 270 at [133].

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Stay of proceedings under European regimes

11–25 NOTE 33. DELETE *Osuwu* AND REPLACE BY: *Owusu*.

INSERT AFTER THE FIRST SENTENCE: That is so whether the ground on which the English court has jurisdiction is that the defendant is domiciled in England or is one of the special heads of jurisdiction provided for in the Conventions and the Judgments Regulation.^{33a} But the English court is not precluded from staying proceedings to give effect to a jurisdiction clause where the clause confers jurisdiction on the courts of a state other than a contracting state.^{33b}

Bringing the parties before the court*Defendant present in the jurisdiction and submission to the jurisdiction*

11–26 NOTE 41. DELETE AND REPLACE BY: CPR, Pt 6, r.6.30 *et seq.* and Practice Direction 6B – Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6).

Service out of the jurisdiction where the European rules apply

11–27 IN THE FIRST SENTENCE, DELETE Civil Procedure Rules, Part 6, rule 6.19 AND REPLACE BY: Civil Procedure Rules, Part 6, rule 6.33.

NOTE 45. DELETE UP TO THE LAST SEMI-COLON AND REPLACE BY: See further the notes on CPR, Pt 6, rr.6.33 *et seq.* in *Civil Procedure* (2011), Vol.1.

NOTE 46. DELETE AND REPLACE BY: CPR, Pt 6, rr.6.33(1)(a), (2)(b).

^{33a} *Gomez v Gomez-Monche Vives* [2008] EWHC 259 (Ch); [2009] 1 Ch. 245 at [105]–[116] (jurisdiction over trusts under Judgments Regulation, art. 5(6)); point not taken on appeal, [2008] EWCA Civ 1065; [2009] 1 Ch. 274 at [22]. See too *Aiglon Ltd v Gau Shan Co. Ltd* [1993] B.C.L.C. 1321 (jurisdiction under equivalent of Judgments Regulation, art. 6(1) (domicile of co-defendant)); *Lafi Office and International Business SL v Meriden Animal Heal Ltd* [2001] 1 All E.R. (Comm.) 54 at 71–73 (jurisdiction under equivalent of Judgments Regulation, art. 23 (prorogation)).

^{33b} See § 11–23A (online supplement).

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Service out of the jurisdiction in non-European cases—grounds for service out

11–28 DELETE AND REPLACE BY: In all other cases the Civil Procedure Rules, Part 6, rule 6.36 applies, requiring the permission of the court. Permission to serve out cannot be given except on one of the grounds specified in the associated Practice Direction.^{46a} References to paragraphs in §§ 11–29 to 11–33 are to provisions of the Practice Direction.

Specific grounds concerning trusts

11–29 DELETE AND REPLACE BY: Paragraphs 3.1(12) to (16) apply to claims about trusts. They provide that the court may grant permission to serve abroad in the following claims.

“Claims about trusts etc.

- (12) A claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where –
- (a) the trusts ought to be executed according to English law; and
 - (b) the person on whom the claim form is to be served is a trustee of the trusts.
- (13) A claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction.
- (14) A probate claim or a claim for the rectification of a will.
- (15) A claim is made for a remedy against the defendant as constructive trustee where the defendant’s alleged liability arises out of acts committed within the jurisdiction.
- (16) A claim is made for restitution where the defendant’s alleged liability arises out of acts committed within the jurisdiction.”

General grounds

11–30 AFTER three rules INSERT: (now contained in Practice Direction 6B)^{47a}.

11–30(1) IN THE FIRST SENTENCE, DELETE Rule 6.20(3) AND REPLACE BY: Paragraph 3.1(3).

^{46a} Practice Direction 6B – Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6), para. 3.1.

^{47a} Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6), see CPR Pt 6, r.6.36.

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NOTE 48. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.57.

11–30(2) IN THE FIRST SENTENCE, DELETE Rule 6.20(1) AND REPLACE BY: Paragraph 3.1(1).

NOTE 50. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.55.

11–30(3) IN THE FIRST, FOURTH AND FIFTH SENTENCES, DELETE Rule 6.20(10) AND REPLACE BY: Paragraph 3.1(11).

NOTE 51. DELETE THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments* AND REPLACE BY: Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), § 4.67.

NOTE 53. AT THE END ADD: See too *Pakistan v Zardari* [2006] EWHC 2411 (Comm); [2006] All E.R. (D) 79 (Oct) at [157].

IN THE FOURTH SENTENCE OF THE TEXT DELETE rule 6.20(11) AND REPLACE BY: paragraph 3.1(12).

AT THE END OF THE TEXT ADD: Assets are often held through companies incorporated abroad, so that the immediate trust property is shares located overseas, even though the assets of the companies may be located within the jurisdiction. A claim may nonetheless be said to “relate” to assets within the jurisdiction if, *e.g.*, the complaint is that the trustees failed to supervise the conduct of the companies’ affairs,^{53a} and where a constructive trust is asserted over such assets it makes no difference that the wrongdoer holds them through overseas companies.^{53b}

11–31 DELETE THE HEADING AND REPLACE BY:

Claims about express trusts—paragraph 3.1(12)

IN THE FIRST AND SECOND SENTENCES DELETE rule 6.20(11) AND REPLACE BY: paragraph 3.1(12).

^{53a} See §§ 34–49 *et seq.*

^{53b} See *Pakistan v Zardari* [2006] EWHC 2411 (Comm) (assets alleged to be bought with proceeds of bribery).

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11–31(1) IN THE SECOND SENTENCE DELETE rule 6.20(11) AND REPLACE BY: paragraph (12).

DELETE THE THIRD SENTENCE AND REPLACE BY: The limiting words “to execute” are enlarged by the previous words “any remedy which might be obtained in proceedings”.

NOTE 57. DELETE AND REPLACE BY: In *Gomez v Gomez-Monche Vives*, [2008] EWCA Civ 1065; [2009] 1 Ch. 245 at [23] claims for breach of trust were held to be within what is now para. 3.1(12) (of Practice Direction 6B – Service out of the Jurisdiction (supplementing Sec. IV of CPR, Pt 6). See too *Chellaram v Chellaram (No.2)* [2002] EWHC 632 (Ch); [2002] 3 All E.R. 17 which was a claim for breach of trust but there was no suggestion that it fell outside the predecessor of para. 3.1(12) as not being a claim to execute the trusts.

11–31(2) IN THE SECOND AND THIRD SENTENCES DELETE rule 6.20(11) AND REPLACE BY: paragraph (12).

11–31(4) AT THE END OF THE THIRD SENTENCE ADD A NEW FOOTNOTE 60a: In the Cayman Islands a foreign beneficiary may be served out of the jurisdiction without the permission of the court in a trustee’s application for directions (though not hostile litigation), but that favourable result turns on statutory provisions which have no English counterpart: *Merrill Lynch Bank and Trust Co. (Cayman) Ltd v Demirel* [2010] 2 C.I.L.R. 75, Cayman GC.

IN THE FIFTH, SEVENTH, NINTH AND THIRTEENTH SENTENCES DELETE rule 6.20(11) AND REPLACE BY: paragraph (12).

IN THE SIXTH SENTENCE DELETE rule 6.20(14) and (15) AND REPLACE BY: paragraph 3.1(15) and (16).

IN THE TWELFTH SENTENCE DELETE rule 6.20(14) AND REPLACE BY: paragraph 3.1(15).

11–32 DELETE THE HEADING AND REPLACE BY:

Claims about constructive trustee liabilities—paragraphs 3.1(15) and (16)

IN THE FIRST SENTENCE DELETE rule 6.20(14), and rule 6.20(15) may also be relevant AND REPLACE BY: paragraph 3.1(15). Paragraph 3.1(16) will also be relevant, as it permits service

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out where a claim is made “for restitution” and the defendant’s alleged liability arises out of acts committed within the jurisdiction.

IN THE SECOND SENTENCE DELETE rule 6.20(14) AND REPLACE BY: paragraph 3.1(15).

11–32(1) IN THE FIRST SENTENCE DELETE “as a constructive trustee” AND REPLACE BY: “as constructive trustee”

IN THE THIRD AND SEVENTH SENTENCES DELETE rule 6.20(14) AND REPLACE BY: paragraph 3.1(15).

NOTE 73. AT THE END ADD: *Pakistan v Zardari* [2006] EWHC 2411 (Comm) at [161]–[165].

IN THE FOURTH SENTENCE DELETE rule AND REPLACE BY: paragraph.

NOTE 76. DELETE As to whom see § 42–29 AND REPLACE BY: As to whom see §§ 41–40 *et seq.*

IN THE FIFTH AND SEVENTH SENTENCES DELETE rule 6.20(15) AND REPLACE BY: paragraph 3.1(16).

11–32(2) NOTE 81. DELETE CPR, Pt 6, r.6.20(15) AND REPLACE BY: paragraph 3.1(16).

IN THE SECOND SENTENCE DELETE The previous rule AND REPLACE BY: A previous rule.^{81a}

IN THE THIRD SENTENCE DELETE rule 6.20(14) AND REPLACE BY: paragraph 3.1(15).

NOTE 82. AT THE END ADD: See too *Pakistan v Zardari* [2006] EWHC 2411 (Comm) at [166]–[170].

^{81a} R.S.C. O. 11 r. 1(1)(t) (revoked).

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AFTER PARAGRAPH 11–32 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Trusts created by contract

- 11–32A** Paragraph 3.1(6)^{82a} extends to claims “in respect of” a contract where the contract (i) was made within the jurisdiction or (ii) was made by or through an agent trading or residing within the jurisdiction or (iii) is governed by English law or (iv) contains a clause conferring jurisdiction on the English court. Hence a claim to enforce a covenant in a declaration of trust is covered.^{82b} But in addition, because the claim need not be a claim to enforce the contract itself, the paragraph extends to a trust arising out of a contract. Hence a claim to enforce a trust founded on a common intention,^{82c} a trust arising on a contract to sell land or unquoted shares,^{82d} and other trusts arising from a contract^{82e} will all be within the paragraph if the contract itself is within one of the four classes specified.^{82f}

Injunctions

- 11–33** IN THE FIRST SENTENCE DELETE Civil Procedure Rules, Part 6, rule 6.20(2) AND REPLACE BY: paragraph 3.1(2).

NOTE 83. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.26, SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.27.

Service out of the jurisdiction in non-European cases—general requirements

- 11–34** IN THE FIRST SENTENCE DELETE paragraphs.

AT THE END OF THE SECOND SENTENCE INSERT A NEW NOTE 84A: See *AK Investment CJSJG v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2011] All E.R. (D) 144 (Mar) at [71] for the first three of these requirements.

^{82a} See generally Dicey, Morris and Collins, *The Conflict of Laws* (14th edn), Vol.1, §§ 11R–181 to 11–198; Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn), §§ 4.60 to 4.61.

^{82b} *Official Solicitor v Stype Investments (Jersey) Ltd* [1983] 1 W.L.R. 214.

^{82c} For such trusts, see §§ 9–66 *et seq.*

^{82d} For such trusts, see §§ 10–03 *et seq.*

^{82e} For other such trusts, see Chap. 10 *passim*.

^{82f} *Cherney v Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All E.R. (Comm.) 333 at [137] (agreement to hold shares on trust for claimant); point not taken on appeal, [2009] EWCA Civ 849; [2009] N.J.L.R. 1138.

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NOTE 84. DELETE AND REPLACE BY: CPR, Pt 6, r.6.37(1), (2).

NOTE 85. FOR THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments*, SEE NOW (5th edn), § 4.54. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.15(1), SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.15.1.

11–34(1) DELETE rule 6.20 AND REPLACE BY: paragraph 3.1.

11–34(2) NOTE 86. DELETE AND REPLACE BY: CPR, Pt 6, r.6.37(3).

11–34(3) NOTE 88. FOR THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments*, SEE NOW (5th edn), § 4.85. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.15(2), SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.15.2.

NOTE 89. DELETE AND REPLACE BY: CPR, Pt 6, r.6.37(1)(b).

NOTE 90. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 6.21.15(2), SUBSTITUTE *Civil Procedure* (2011), Vol.1, 6.37.15.2.

11–34(4) NOTE 93. DELETE AND REPLACE BY: *Civil Procedure* (2011), Vol.1, 6.37.6 and cases there cited.

Challenging service

11–35 NOTE 96. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 11.1.1, SUBSTITUTE *Civil Procedure* (2011), Vol.1, 11.1.1.

Consequences of trustees submitting to a foreign jurisdiction

11–37 NOTE 3. FOR THE REFERENCE TO Briggs and Rees, *Civil Jurisdiction and Judgments*, SEE NOW (5th edn), § 7.49.

NOTE 4. AT THE END ADD: *Re IMK Family Trust* [2008] JRC 136; (2008–09) 11 I.T.E.L.R. 580 (affirmed [2008] JCA 196; 2008 J.L.R. 430).

AFTER THE THIRD SENTENCE INSERT A NEW SENTENCE: It is now clear that in general Jersey trustees will be expected not to submit to the jurisdiction of the English court (or any other

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overseas court)^{4a} unless, for example, the trust assets are within the jurisdiction of the English court, so that an English order will be enforceable without the trustees' co-operation,^{4b} or it is in the interests of the trust for the trustees to give evidence to the English court about the trust;^{4c} and in the converse situation the English court will be likely to take the same view.^{4d}

Supplementary—the situs rules*Choses in action*

11–43 Note 34. DELETE CPR, Pt 6, r.19 AND REPLACE BY: CPR, Pt 6, r.33.

3. THE VALIDITY OF TRUSTS AND CHOICE OF LAW**Preliminary issues on lifetime trusts***Contractual rights*

11–52 NOTE 74. DELETE AND REPLACE BY: Regulation (EC) No.593/2008 of June 17, 2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), art.14(1), (2).

Shares in companies

11–54 NOTE 76. AT THE END ADD: *Macmillan Inc. v Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387.

^{4a} See e.g. *Re M and L Trusts* [2003] JRC 002A; [2003] W.T.L.R. 491 (proceedings challenging trust in Illinois); *Re H Trust* [2006] JRC 057; [2007] W.T.L.R. 677 (divorce proceedings in England).

^{4b} *Re H Trust*, above, at [15]; *Re A and B Trusts* [2007] JRC 138; 2007 J.L.R. 444 at [31].

^{4c} *C Trust Co. Ltd v Temple* [2009] JRC 048; [2010] W.T.L.R. 417. Note that it is possible for overseas trustees to participate in English proceedings by giving evidence without becoming parties (*B v B* [2009] EWHC 3422 (Fam); [2010] W.T.L.R. 1689 at [22]) but it is uncertain whether the Jersey court would treat such participation as warranting enforcement of an award in Jersey.

^{4d} The same view has been taken in the Cayman Islands: *Re B Trust, RBS Coutts (Cayman) Ltd v W*, Cayman GC, December 10, 2010, unreported.

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AFTER § 11–54 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

Preliminary issues on constructive trusts and similar liabilities

General

- 11–54A** The Hague Convention applies by its terms only to trusts created by a settlor,^{78a} and created voluntarily and evidenced in writing,^{78b} but it permits contracting states to extend its provisions to “trusts declared by judicial decisions”.^{78c} Section 1(2) of the Recognition of Trusts Act 1987 extends it to trusts “arising ... by virtue of a judicial decision”. Although the latter wording is not wholly apt to cover constructive trusts existing before the judicial decision, the evident intention is to apply the provisions of the Convention to such trusts; and the same applies to implied and resulting trusts. But nothing in the Convention or the 1987 Act governs the preliminary issue whether such a trust has arisen at all.^{78d} As with express testamentary and lifetime trusts, therefore, the English court has to apply its own rules of the conflict of laws to identify the law governing that issue. The Convention will apply only if that law (whether English or foreign) holds that such a trust has come into being.
- 11–54B** There is little authority on the applicable rules.^{78e} It has been pointed out that the terms “constructive trust” and “constructive trustee” are often imprecisely used and cover a range of dissimilar liabilities,^{78f} so there is no reason why all claims which in a wholly domestic context would give rise to a constructive trust should be governed by the same rules. The question is now complicated by recent legislation, in the form of the European Union Regulation of 2007 on non-contractual obligations (the so-called Rome II Regulation).^{78g} The rules introduced by the Regulation now apply in England generally, not merely to cases involving the law of another member state.^{78h} The muddled provisions as to its

^{78a} Art.2.

^{78b} Art.3. See §§ 11–60, 11–61.

^{78c} Art.20 (not enacted as part of Recognition of Trusts Act 1987, Sch.).

^{78d} The point, however, was left open in *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71, CA. The same seems to have happened in *Martin v Secretary of State for Work and Pensions* [2009] EWCA Civ 1289; [2010] W.T.L.R. 671 at [25], [35].

^{78e} *Grupo Torras SA v Al-Sabah* [2000] EWCA Civ 273; [2001] C.L.C. 21 at [121].

^{78f} *ibid.*, at [122].

^{78g} Regulation (EC) No.864/2007 of July 11, 2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).

^{78h} The previous English legislation, the Private International Law (Miscellaneous Provisions) Act 1995, has been modified (and largely superseded) to make it fit the Rome II Regulation by Law

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commencement⁷⁸ⁱ appear to mean that events giving rise to damage after August 19, 2007 (the date on which it came into force) will be subject to the Regulation in proceedings commenced after January 11, 2009 (the date from which it is expressed to “apply”).^{78j} It governs non-contractual obligations in civil and commercial matters^{78k} but not “non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily”^{78l} and certain other excluded cases.^{78m} Two sets of rules created by the Regulation are material in this context:

- (1) The general rules for “a non-contractual obligation arising out of a tort/delict” are that (i) the law applicable is the law of the country where the damage occurred (irrespective of the country where the event causing the damage occurred and irrespective of any country where the indirect consequences of the event occurred),⁷⁸ⁿ although (ii) if both claimant and defendant were habitually resident in the same country when the damage occurred the law of that country applies^{78o} and (iii) despite those rules if the tort/delict is “manifestly more closely connected” with another country then the law of that country applies. Such a close connection may be based on a pre-existing relationship between the parties that is closely connected with the tort/delict in question, such as a contract, says the Regulation,^{78p} or, no doubt, an express trust.
- (2) There are separate but similar rules for “a non-contractual obligation arising out of unjust enrichment” (including payment of amounts wrongly received) namely that (i) where the obligation concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict (or again, no doubt, an express trust), that is closely connected with that unjust enrichment, it is governed by the

Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI 2008/2986), which also apply the Regulation so as to govern conflicts between the laws of different parts of the United Kingdom and between any of those parts and Gibraltar.

⁷⁸ⁱ Rome II Regulation, arts.31, 32.

^{78j} That is the view expressed in the Ministry of Justice’s *Guidance on the law applicable to non-contractual obligations (Rome II)*, para. 28.

^{78k} *ibid.*, art.1(1).

^{78l} *ibid.*, art.1(2)(e).

^{78m} *ibid.*, art.1(2)(a)–(d), (f)–(g).

⁷⁸ⁿ *ibid.*, art.4(1).

^{78o} *ibid.*, art.4(2).

^{78p} *ibid.*, art.4(3).

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law that governs that relationship,^{78q} (ii) where that is not so but the parties are habitually resident in the same country when the event giving rise to unjust enrichment occurs, the law of that country applies,^{78r} (iii) absent both such a relationship and common habitual residence, the law of the country in which the unjust enrichment took place applies,^{78s} but (iv) all of those rules may be displaced in favour of the law of another country where the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with that country.^{78t}

Both sets of rules are expressed as if the relevant obligation has already arisen but it seems clear that the Regulation is meant to govern the question whether the obligation has arisen at all.^{78u}

11–54C The absence of much domestic authority, and the loose terms of the Rome II Regulation, make it difficult to identify confidently the approach which the English court will take when the question is whether a constructive trust has arisen. We tentatively suggest the following answers to questions arising in connection with the commoner forms of liability under English law.

Express trust—obligations of settlor, trustee or beneficiary

11–54D Where there is an existing express trust, and the liability alleged (whether personal or proprietary) is that of a settlor, trustee or beneficiary, the Rome II Regulation will not apply: such liabilities are expressly excluded.^{78v} Instances are the liability of a trustee for an unauthorised profit^{78w} and a beneficiary's liability to refund an overpayment.^{78x} Such

^{78q} *ibid.*, art.10(1).

^{78r} *ibid.*, art.10(2).

^{78s} *ibid.*, art.10(3).

^{78t} *ibid.*, art.10(4).

^{78u} Under the Rome II Regulation, the applicable law governs such questions as the basis and extent of liability and the existence of the remedy claimed (art.15(a), (c)). Note also the recitals, requiring the concept of a non-contractual obligation to be treated as an autonomous concept (recital (11)), *i.e.* one independent of the domestic rules of any member state, a requirement difficult to reconcile with any expectation that the existence of the obligation would remain a matter for domestic law, and specifically requiring the applicable law to govern the question of capacity to incur a liability for tort/delict (recital (12)).

^{78v} Rome II Regulation, art.1(1)(e).

^{78w} See §§ 20–28 *et seq.*

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liabilities are presumably governed by the proper law of the trust under the Recognition of Trusts Act 1987, the personal liability of trustees being expressly referred to the proper law.^{78y} The same is probably true of one who is liable as a trustee *de son tort*.^{78z}

11–54E A resulting trust arises in favour of the settlor under English law when the beneficial interests are not exhausted by the disposition on trust. The question which law determines whether such a resulting trust arises is not covered by the Rome II Regulation: the Regulation is concerned with obligations, not property, and the exclusion just mentioned would in any case apply. It seems clear that the proper law of the trust will determine that question.^{78aa}

Express trust—obligations of third parties

11–54F Where there is an existing express trust and the liability alleged is that of a third party, *i.e.* not a settlor, trustee or beneficiary, the law is less clear. A distinction has to be drawn between proprietary claims and personal claims. We take proprietary claims first. Instances are those against an innocent transferee of trust property who is a volunteer or who does not take a legal estate and against one who knowingly receives trust property transferred in breach of trust.^{78ab} The Rome II Regulation is concerned with obligations, not property, and so seemingly has no application. Disputes as to title between a trustee or beneficiary and a third party recipient of trust property have been held to be governed by the *lex situs* of the asset,^{78ac} namely the law of the place of incorporation in the case of shares,^{78ad} and so on.^{78ae}

11–54G Where there is an existing express trust and a personal liability is alleged against a third party, the law is less clear. Instances are a liability for dishonest assistance in a breach of trust^{78af} and the liability of one who knowingly receives trust property transferred in breach of

^{78x} *i.e.* the liability, whether personal or proprietary, of a “*Diplock* recipient”, if a beneficiary; see §§ 41–40, 4142, 42–04 *et seq.*

^{78y} Hague Convention, art.8(g).

^{78z} See §§ 42–74 *et seq.*

^{78aa} *Cf.* § 11–62.

^{78ab} See §§ 41–41 *et seq.*

^{78ac} *Macmillan Inc. v Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, where shares held on trust for the plaintiff were pledged, in breach of trust, to the main defendants as security for loans.

^{78ad} *ibid.*; *cf.* § 11–54.

^{78ae} See §§ 11–50 *et seq.* for the relevant rules as to situs.

^{78af} See §§ 40–09 *et seq.*

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trust.^{78ag} The latter is a receipt-based liability and the former is not, and the applicable rules appear to be different:

- (1) At common law, in cases of tort a rule of double actionability applied: the alleged wrong had to be actionable both by English law and by the law of the place where the act was committed. Although a liability for dishonest assistance is not a tort in English law,^{78ah} it is plainly very like a tort; and it was held that even if the rule of double actionability did not apply, the court should take account of the presence or absence of liability by the law of the place where the act complained of occurred in deciding whether it would be equitable to hold the defendant liable.^{78ai} For that purpose, it was irrelevant that the foreign law did not recognise the concept of proprietary rights arising under trusts.^{78aj} The English legislation which abolished the rule of double actionability and replaced it with the rule applying the law of the country in which the events complained of occurred, the Private International Law (Miscellaneous Provisions) Act 1995,^{78ak} may have applied only to tort in the English sense^{78al} and if so did not affect that approach. Now, however, under the Rome II Regulation, a personal liability for dishonest assistance appears to be one of the non-contractual obligations within the Regulation, given that that category is to be treated as an autonomous concept,^{78am} and specifically a liability for a

^{78ag} See §§ 42–22 *et seq.*

^{78ah} *Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 at 474, CA.

^{78ai} *Arab Monetary Fund v Hashim (No.9)*, *The Times*, October 11, 1994 (not a case of an express trust). The relevant passage was cited with approval in *Grupo Torras SA v Al-Sabah* [2000] EWCA Civ 273; [2001] C.L.C. 21 at [133]. It was held in *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) that the rule of double actionability applied, see *ibid.* at [217].

^{78aj} *Arab Monetary Fund*, above. It was sufficient that the foreign law imposed a right of recovery by civil action, whether or not the act or omission complained of was characterised by that law as a tort or delict: *Grupo Torras*, above, at [141].

^{78ak} See s.10 (abolition of rule of double actionability), s.11(1) (new general rule). S.11(2) caters for cases in which elements of those events took place in different countries and s.12 provides for the application of a law which is “substantially more appropriate” than the law identified by s.11.

^{78al} The term “tort” is a term of art in English law and it is used in Private International Law (Miscellaneous Provisions) Act 1995, ss.9–12 without any indication that it is to be understood in a wider sense. But it was said obiter in *Yugraneft*, above, at [223] that dishonest assistance in a breach of trust was probably a “tort” for the purpose of the 1995 Act and that view was adopted in *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm); [2011] L.S. Gaz. R. 17 at [154].

^{78am} Rome II Regulation, recital (11). Cf. *Kalfelis v Bankhaus Schröder, Munchmeyer, Hengst & Co.* [1988] E.C.R. 5565 at [16]–[17], E.C.J., holding that the term “tort/delict” in the Brussels Convention, art.5(3) was to be given an autonomous meaning; see § 11–21C (online supplement).

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“tort/delict”. If that is correct, the primary rule is that the governing law determining the existence and incidents of the liability is that of the country where the damage occurred (not where the events complained of took place), though other rules may apply.^{78an}

- (2) In the case of knowing receipt of trust property, however, the rule at common law was that the defendant’s liability was ordinarily governed by the law of the country where the receipt took place,^{78ao} seemingly the same thing as the *lex situs* of the asset at that time.^{78ap} Under the Rome II Regulation, it seems clear that the liability will be treated as one of unjust enrichment and hence as governed by one of the rules applicable in such a case.^{78aq} The primary rule, that the law governing any pre-existing relationship between the parties should govern the obligation arising out of an unjust enrichment where the two are closely connected, will tend to divorce the law applicable to the personal claim from the law applicable to the proprietary claim, *e.g.* if the English solicitor to offshore trustees is sought to be made liable for knowing receipt in both ways. The rule that a manifestly closer connection with another country will trump the other rules may then perhaps be invoked to ensure that both claims are governed by the same law.

Directors and other fiduciaries

11–54H Directors of companies are treated as if they are express trustees of the company’s assets, since they have both fiduciary duties and a power of disposition over the assets, but they are not in fact trustees and the exclusion from the Rome II Regulation of non-contractual obligations arising between settlors, trustees and beneficiaries^{78ar} will not apply to them.

^{78an} See § 11–54B(1). If the Rome II Regulation is held not to apply, the common law will continue to do so.

^{78ao} Dicey, Morris and Collins, *The Conflict of Laws* (14th edn), Vol.2, § 34R–001 (suggesting a different rule for contracts and immovables); *El Ajou Dollar Land Holdings plc* [1993] 3 All E.R. 717 at 736–737 (not a case of an express trust; reversed on another point [1994] 2 All E.R. 685), the latter passage cited with approval in *Grupo Torras*, above, at [131]. See too *Kuwait Oil Tanker Co. SAK v Al Bader* [2000] 2 All E.R. (Comm.) 271 at [190], CA; *Christopher v Zimmerman* (2001) 192 D.L.R. (4th) 476 at [14], BC CA. In *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), however, it was held that at common law the applicable law was the law which had the closest connection with the obligation to make restitution, see at [246].

^{78ap} See § 11–54F (online supplement).

^{78aq} See § 11–54B(2) (online supplement).

^{78ar} See §§ 11–54B, 11–54D (online supplement).

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Under English domestic law directors may be made liable for dishonest assistance or knowing receipt and so may other fiduciaries, though there is no express trust. The common-law rules discussed above^{78as} applied to such fiduciaries but now the question whether such liabilities arise we think is plainly within the Rome II Regulation.^{78at}

Trusts arising under contracts

11–54I Where a trust is treated by English law as arising under a contract, such as the trust which arises in favour of a purchaser under a contract to sell land or unquoted shares^{78au} or the trust which arises under an agreement for mutual wills,^{78av} we do not consider that the Rome II Regulation can have any application. The trust is not ordinarily regarded as an express trust but it seems to have been created voluntarily within the terms of the exclusion of trusts so created from the Rome II Regulation.^{78aw}

11–54J The question whether such a trust has arisen is presumably governed by the proper law of the contract. Until recently the law determining the proper law of most contracts was to be found in the Contracts (Applicable Law) Act 1990, giving effect to the Rome Convention of 1981 on the law applicable to contractual obligations.^{78ax} From December 17, 2009, however, it is to be found in the European Union Regulation of 2008 on the law applicable to contractual obligations (the so-called Rome I Regulation),^{78ay} the 1990 Act having been modified so that

^{78as} See §§ 11–54F, 11–54G (online supplement). The authorities there cited are mainly decisions on claims against directors.

^{78at} Note that at common law, where the question arose whether a person was to be regarded as a fiduciary but the duties to which a relationship gave rise were determined by a foreign law, the question for the foreign law was what was the nature of those duties; but it was for the English court to decide whether duties of that nature were to be regarded as fiduciary: *Arab Monetary Fund v Hashim* (No.9), *The Times*, October 11, 1994 in a passage approved in *Kuwait Oil Tanker Co. SAK v Al Bader* (2000) *The Times*, May 30, 2000 at [192] and in *Grupo Torras SA v Al-Sabah* [2000] EWCA Civ 273; [2001] C.L.C. 21 at [125], CA. It is not easy to see that that approach, relevant under a rule of double actionability, can have survived the Rome II Regulation.

^{78au} See §§ 10–03 *et seq.*

^{78av} See §§ 10–35 *et seq.*

^{78aw} Art.1(1)(e). See § 11–54B (online supplement).

^{78ax} The Rome Convention is scheduled to Contracts (Applicable Law) Act 1990 (in Sch.1). It applied to contracts made after April 1, 1991: art.17 and Contracts (Applicable Law) Act 1990 (Commencement No.1) Order 1991 (SI 1991/707).

^{78ay} Regulation (EC) No.593/2008 of June 17, 2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I). Art.29 provides that it is to apply from December 17, 2009, which has been taken to mean that it applies to contracts concluded on or after that date.

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it is inapplicable wherever the Rome I Regulation applies.^{78az} Both the Rome Convention and the Rome I Regulation exclude “the constitution of trusts and the relationship between settlers, trustees and beneficiaries”.^{78ba} It seems unlikely, however, that contracts were meant to be excluded merely because under domestic law they are of a kind held to give rise to a trust; and indeed contracts governing immovables are especially mentioned in both.^{78bb} The basic rule in both the Convention and the Regulation is that the parties to a contract have complete freedom to choose the law applicable to the contract, either expressly or impliedly.^{78bc} Absent such a choice, the two instruments diverge. Under the Rome Convention the contract is governed by the law of the country with which it is most closely connected,^{78bd} though certain presumptions are imposed, one of which is that a contract affecting immovables is most closely connected with the *lex situs*;^{78be} under the Rome I Regulation, there are binding rules for certain particular contracts,^{78bf} one of which is to the same effect as to contracts affecting immovables,^{78bg} though a close connection governs where the case falls outside the rules^{78bh} and a manifestly closer connection will override the rules.^{78bi}

11–54K Hence the question whether a contract for the sale of land creates a trust, if determined by the proper law of the contract, will be governed by the law expressly or impliedly chosen by the parties or, if none is chosen, ordinarily by the *lex situs*; that is so for such contracts made both before and after December 17, 2009. The question whether a contract for mutual wills creates a trust receives a slightly different answer, since the Rome Convention expressly excludes contractual obligations relating to wills and succession^{78bj} but the Rome I Regulation does not. The latter will therefore apply only to such contracts made on or after December 17, 2009 and

^{78az} By Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 (SI 2009/3064), which (by reg.2) insert a new s.4A into Contracts (Applicable Law) Act 1990 having that effect. The 2009 Regulations also (by reg.5) apply the Rome I Regulation to conflicts between the laws of different parts of the United Kingdom.

^{78ba} Rome Convention, art.1(2)(g); Rome I Regulation, art.1(2)(h).

^{78bb} Rome Convention, art.4(3); Rome I Regulation, art.4(1)(c).

^{78bc} Rome Convention, art.3(1); Rome I Regulation, art.3(1). In both cases, where all the connecting factors point to a different country from that whose law has been chosen, the parties cannot opt out of rules of that law which have overriding force, see art.3(3) of both instruments.

^{78bd} Rome Convention, art.4(1); Rome I Regulation, art.3(1).

^{78be} Rome Convention, art.4(3). But not if there is a closer connection with another country: art.4(5).

^{78bf} Rome I Regulation, art.4(1), (2).

^{78bg} *ibid.*, art.4(1)(c).

^{78bh} *ibid.*, art.4(3).

^{78bi} *ibid.*, art.4(4).

^{78bj} Rome Convention, art.1(2)(b).

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earlier contracts will be governed by the common law, which allowed the parties to choose the proper law of the contract, expressly or impliedly, and in the absence of such a choice looked to the law with which the contract was most closely connected.^{78bk}

Trusts arising in relation to the acquisition of property

11–54L In the case of a resulting trust which, under English domestic law, would arise on the payment of the purchase price of property followed by a purchase in the name of another,^{78bl} and the similar trust arising where contributions have been made to the purchase price,^{78bm} it has been held that the law determining whether such a trust arises depends on the law governing the relationship or arrangement between the parties. If the property happens to be abroad but everything else to do with the arrangement is English, then the trust will arise.^{78bn} But if the arrangement was made by reference to some other system of law, as where a purchase funded by A was taken in B’s name so as to avoid the impact of a provision of French succession law which would have applied if A had been the purchaser, then French law governed the arrangement, with the result that no trust arose.^{78bo} Those decisions did not depend on the proper law of the contract between the parties, if there was one, and the suggestion that the Contracts (Applicable Law) Act 1990 governed the question was rejected.^{78bp} Hence it seems that the Rome I Regulation will also be inapplicable.

11–54M In the light of those authorities, it is not wholly clear what law will apply to the question whether a “common intention” trust arises on the acquisition of property^{78br} but a similar approach would seem to be warranted.

The Recognition of Trusts Act 1987, the Hague Convention and the von Overbeck Report

11–56 NOTE 81. INSERT IN THE LIST IN THE FIRST SENTENCE: Manitoba, Malta, Monaco, and the Turks and Caicos Islands.

^{78bk} Dicey and Morris, *The Conflict of Laws* (14th edn), §§ 32–005 to 32–006.

^{78bl} See §§ 9–16 *et seq.*

^{78bm} See §§ 9–57 *et seq.*

^{78bn} *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71, CA (property in Scotland). See too *Webb v Webb* [1991] 1 W.L.R. 1410.

^{78bo} *Martin v Secretary of State for Work and Pensions* [2009] EWCA Civ 1289; [2010] W.T.L.R. 671.

^{78bp} See *Lightning*, above, where the contract would probably have been governed by Scots law.

^{78br} See §§ 9–66 *et seq.*

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NOTE 83. THE CORRECT NEUTRAL CITATION FOR *Tod v Barton* IS [2002] EWHC 264 (Ch).

Timing

11–59 NOTE 91. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 100.49.

Involuntary trusts

11–60 NOTE 91. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 100.83.

Writing

11–61 AT THE END OF THE SECOND SENTENCE, INSERT A NEW NOTE 98A: *Berezovsky v Abramovitch* [2010] EWHC 647 (Comm); [2010] All E.R. (D) 2 (Apr) at [176] (where “Article 2” is a slip for “section 1(2)”).

Constructive and resulting trusts

11–62 NOTE 5. DELETE THE SECOND SENTENCE.

DELETE THE LAST SENTENCE OF THE TEXT AND N.6 AND REPLACE BY: The preliminary question whether a constructive or resulting trust arises at all falls outside the Convention. That is governed by rules already discussed.⁶ It is only if the law identified by those rules holds that a constructive or resulting trust arises that the Convention can apply, and then only if the liability is proprietary and not merely personal.

Trusts declared without transfers

11–63 NOTE 91. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 100.122.

⁶ See §§ 11–54A to 11–54M (online supplement).

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The settlor's choice of governing law

11–65 INSERT AT THE END OF THE FIRST SENTENCE AFTER THE QUOTATION: Where the trust is wholly oral, the reference to the terms of the instrument or writing has to be understood as meaning the words spoken in the course of creating the trust.^{9a}

NOTE 13. THE CORRECT NEUTRAL CITATION FOR *Tod v Barton* IS [2002] EWHC 264 (Ch).

NOTE 16. DELETE AND REPLACE BY: Compare Regulation (EC) No.593/2008 of June 17, 2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), art.3(3), applicable where there is only one connected law and preserving its mandatory rules.

INSERT AT THE END OF THE TENTH SENTENCE AFTER THE QUOTATION: before its repeal.^{18a}

INSERT AFTER of the very strong kind IN THE THIRTEENTH SENTENCE AFTER THE QUOTATION: (especially given the repeal of the former).

Governing law in default of choice

11–67 NOTE 23. AT THE END ADD: *Tod v Barton* [2002] EWHC 264 (Ch); (2001–02) 4 I.T.E.L.R. 715.

NOTE 26. DELETE AND REPLACE BY: Von Overbeck, para. 61; Parker & Mellows, *The Modern Law of Trusts* (9th edn), § 23–053; Underhill and Hayton, *Law of Trusts and Trustees* (18th edn), § 100.156. But the contrary view has also been expressed, that the invalidity of the trust under the law with which it is most closely connected is irrelevant: Harris, *The Hague Trusts Convention*, at pp.226–227, supported *obiter* by *Berezovsky v Abramovitch* [2010] EWHC 647 (Comm) at [121], [183].

Governing effects of the applicable law

11–70 NOTE 33. THE CORRECT NEUTRAL CITATION FOR *Tod v Barton* IS [2002] EWHC 264 (Ch).

^{9a} *Berezovsky v Abramovitch* [2010] EWHC 647 (Comm) at [177]–[178].

^{18a} For which see § 5–100A (online supplement).

FOREIGN ELEMENTS

AFTER PARAGRAPH 11–70 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Validity of trusts

- 11–70A** Article 8 provides that the proper law governs, amongst other things, the validity of the trust. That rule, however, is subject to the qualification that the Convention does not apply to the validity of wills or other acts by which assets are transferred to the trustee. Hence it does not extend to, *e.g.*, questions of the settlor’s capacity. But it seems that the proper law does govern questions as to whether a trust, or a transfer into trust, may be set aside for mistake.^{36a}

Variation of trusts

- 11–71** NOTE 37. THE CORRECT NEUTRAL CITATION FOR *Tod v Barton* IS [2002] EWHC 264 (Ch).

Variation under matrimonial legislation

NOTE 40. DELETE AND REPLACE BY: See Matrimonial Causes Act 1973, s.24 (prospectively replaced by Family Law Act 1996, s.15, Sch.2, para.6) and (after a foreign decree) Matrimonial and Family Proceedings Act 1984, s.17 (as amended by Welfare Reform and Pensions Act 1999, s.84(1), Sch.12, Pt I, paras.2, 3 and prospectively by Family Law Act 1996, s.66(1), Sch.8, Pt I, para.32(2) and Welfare Reform and Pensions Act 1999, s.84(1), Sch.12, Pt I, paras.64, 66(1), (14)).

Changing the proper law

- 11–74** AT THE END OF THE THIRD SENTENCE INSERT A NEW NOTE 50a: In *Oakley v Osiris Trustees Ltd* [2008] UKPC 2; (2008) 10 I.T.E.L.R. 789, the PC took it for granted that such a provision was valid. Powers to change the proper law are almost universal in offshore trusts. In *Oakley*, the majority assumed and the minority expressly held (see at [44]) that a power to change the proper law of a trust would be validly exercised only if exercised in the interests of the beneficiaries.

^{36a} *Re DSL Remuneration Trust* [2007] JRC 251; [2009] W.T.L.R. 373: the Jersey court applied English law to the question whether a trust should be set aside for mistake, as the trust was governed by English law; but no reference was made to the Hague Convention.

FOREIGN ELEMENTS

Recognition*Third parties*

- 11–76 NOTE 58. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 100.215 to 100.218.

Registration

- 11–79 IN THE LAST SENTENCE DELETE by s.360 of the Companies Act 1985 AND N.62 AND REPLACE BY: by section 126 of the Companies Act 2006.⁶²

Mandatory rules

- 11–80 NOTE 63. THE CORRECT NEUTRAL CITATION FOR *Tod v Barton* IS [2002] EWHC 264 (Ch).

Overriding rules

- 11–82 NOTE 71. DELETE AND REPLACE BY: Also (and somewhat confusingly) described as “overriding mandatory provisions” in Regulation (EC) No.593/2008 of June 17, 2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), art.9. *Cf.* § 11–80.

Public policy*Trusts invalid under English law*

- 11–84 NOTE 82. FOR THE REFERENCE TO Cayman Islands Trust Law, SEE NOW (2011 Revision), Pt VIII (STAR Trusts).

Apart from the Convention*Lifetime settlements of foreign movables*

- 11–88 DELETE THE THIRD SENTENCE AND REPLACE BY: For instance, it may well be that an English settlor of English movables with English trustees, and beneficiaries residing in England and

⁶² Replacing Companies Act 1985, s.360. Companies Act 2006, s.126 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

FOREIGN ELEMENTS

Wales, would not have been allowed to avoid the former rule against excessive accumulations in section 164 of the Law of Property Act 1925 (now repealed)^{91a} simply by choosing a law, such as the law of the Bahamas, which has no such rule at all.

5. FOREIGN INCAPACITIES

DELETE THE HEADING TO PARAGRAPH 11–99 AND THE ENTIRE PARAGRAPH AND N.32 AND REPLACE BY:

Foreign rules as to minority

- 11–99** References in a trust instrument to the age of majority and the like are construed, by virtue of the Recognition of Trusts Act 1987, in accordance with the proper law of the trust.³²

AFTER § 11–99 INSERT THE FOLLOWING THREE NEW PARAGRAPHS:

- 11–99A** Trustees are concerned from time to time with the ability of a beneficiary who is domiciled abroad to give them a good receipt when the beneficiary is of age by the law of his domicile but a minor by the proper law of the trust or (if different) by English law; or when the beneficiary is a minor by the law of his domicile but of age by the proper law or by English law. It has been held that a legatee under a will may give a good receipt if of age either by the law of his own domicile or by the law of the testator's domicile.^{32a} Apart from the Recognition of Trusts Act 1987, it should follow that a beneficiary who is of age by the law of his domicile, though not by the proper law of the trust or by English law, can give a good receipt to the trustees; and presumably also that a beneficiary who is a minor by the law of his domicile or by English law can nonetheless give a good receipt to the trustees if of age by the proper law of the trust. The 1987 Act, however, refers to the proper law the relationship between the trustees and the beneficiaries, and the distribution of the trust assets,^{32b} and if those provisions are apt to deal with questions of minority it will follow that a beneficiary cannot give a good receipt if under age by the proper law, even if of age by the law of his

^{91a} See § 5–100A (online supplement).

³² *Re Jagos* [2007] ABQB 56, Alberta Ct of QB, referring to Art. 8(i) of the Hague Convention, enacted in England by Recognition of Trusts Act 1987, Sch. and printed at § 11–70.

^{32a} *Re Hellmann's Will* (1866) L.R. 2 Eq. 363; *Re Schnapper* [1928] Ch. 420; *Re Fargus* 1997 J.L.R. 89, Jersey RC. All those cases concerned beneficiaries who were of age by the law of their domicile but not by the law of the testator's domicile.

^{32b} Recognition of Trusts Act 1987, Sch., Art. 8(g), (i), printed at § 11–70.

FOREIGN ELEMENTS

domicile, though conversely that a beneficiary of age by the proper law can give a good receipt even if under age by the law of his domicile. The 1987 Act permits the *lex fori* to apply the law designated by its conflicts rules “in so far as [it] cannot be derogated from by voluntary act” where it relates to the protection of minors;^{32c} but since English law has not insisted on applying restrictive rules of the beneficiary’s domicile where the alternative was more relaxed^{32d} it seems that in an English court that permission will have no operation.

11–99B It is common nowadays to provide that should moneys be payable to a beneficiary under age, or assets transferable to such a beneficiary, the trustees are discharged if they pay the money or transfer the assets to the parent or guardian of the beneficiary.^{32e} Trustees may also be authorised to pay money or transfer assets to a beneficiary at a given age even though he is then under the age of majority.^{32f} There is no reason to doubt the efficacy of such provisions even when the beneficiary is domiciled abroad. Absent such provisions, and apart from the Recognition of Trusts Act 1987, a parent or guardian of a minor domiciled abroad may give a good receipt for trust income or capital if so authorised by the law of that domicile.^{32g} Where, however, the fund is in court, the court may decline to pay it out to the father or guardian entitled to call for it under the law of the domicile and may instead consider in its discretion whether the payment is properly required for the benefit of the minor, acting for the protection of the minor accordingly.^{32h} We think it unlikely that the 1987 Act has altered those rules.

11–99C When the court is considering an application under the Variation of Trusts Act 1958,³²ⁱ it has jurisdiction to give consent to an arrangement on behalf of any beneficiary who “by reason of infancy” cannot consent for himself.^{32j} It seems likely that in that context infancy refers solely to a person under the age of eighteen years in accordance with English law^{32k} and that accordingly the court can consent (and its consent is required) even if the beneficiary is of full

^{32c} *ibid.*, Art. 15(a).

^{32d} See text to n.32a and following.

^{32e} The Standard Provisions of the Society of Trust and Estate Practitioners (1st edn), para. 6, confer such a power.

^{32f} *ibid.*

^{32g} *Re Chatard’s Settlement* [1899] 1 Ch. 712 at 716 (“the trustee would have had a legal discharge if he had paid the money of the infants to their guardian”).

^{32h} *Re Chatard’s Settlement*, above. See too Children Act 1989, s.1 (child’s welfare to be the paramount consideration when court makes order as to child’s property).

³²ⁱ See §§ 45–31 *et seq.*

^{32j} Variation of Trusts Act 1958, ss.1(1)(a), printed at § 45–34.

^{32k} Family Law Reform Act 1969, s.1(1), (2).

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age by the law of his domicile.^{32l} If the beneficiary is of full age by English law, then on that construction the English court has no power to consent for him, even though he is a minor by the law of his domicile or the proper law of the trust; but if we are right as to the ability of such a beneficiary to give a good receipt to the trustees,^{32m} his consent will be binding under the 1958 Act unless the 1987 Act requires the application of the proper law of the trust.³²ⁿ

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^{32l} *Cf. Re Representation of N and N* 1999 J.L.R. 86, Jersey RC, seemingly reaching the same conclusion on comparable Jersey legislation.

^{32m} § 11–99A (online supplement).

³²ⁿ *ibid.*