‘Characteristic’ ain’t always ‘proper’! How has the concept of ‘characteristic performance’ influenced ‘the proper law of the contract’ doctrine?

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Abstract

The present discussion purports to examine whether and to what extent the concept of “characteristic performance” as enunciated in the 1980 Rome Convention¹ has influenced and/or changed the long-held common law “proper law of the contract” doctrine in respect of the absence of a choice of law provision by the parties to a contractual relationship.

Proper Law of the Contract - the common law doctrine

When no express or implied provisions have been or can be made in a contract, matters become all the more complicated, hence in respect of the choice of law issue. Courts are called upon to decide what the ‘proper law of the contract’ is.

The leading judicial definition² of this notion derived from the judgement of Lord Simonds in Bonython³, as per which it regards “the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion.”⁴ It is, arguably, the latter limb of that test which relates to the rather unclear hint of closest connection, the former merely referring to the implication of the choice of law.⁵

Attempts to describe and/ or define the proper law of the contract had been made even prior to that well-established definition. Most profoundly, in Mount Albert⁶ it was held that it referred to the law which the court is to apply in determining the obligations arising under the contract; what just and reasonable parties ought to or would have intended had they thought about the question at the time of making the contract is the law that should govern it.⁷ Of course, such proposition blends in the intention of the parties and thus relates more to the implied choice of law scenario; the proper law of the contract is, since Bonython, understood, at common law, as being irrelevant of the parties’ intentions; or -put better- triggered when no such intention may be inferred.

On top of that, confirming that the ascertainment of the parties’ intention cannot be indicative of the proper law of the contract, Stephenson L.J. in his judgement in Coast

⁴ Ibid, 219.
⁵ Jaffey, supra, 531-533.
⁷ Ibid, 240.

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Lines, highlighted that in order for it to be established there are several localising elements that need to be taken into consideration; which country or which legal system is closer to the contract at stake is a question to be answered by a simple weighing of all elements and circumstances as well as the contemplated performance of the contract, figuring out ‘on which side the scale tips’.9

It is not infrequent that some of these elements or factors seem to be accorded more weigh than others, though this is neither always justified nor even justifiable. One of the most significant seems to be the place of performance of the contract; where the contract is to be performed is indicative of the law that ought to govern it. Lord Simonds refers to it in Bonython, as being “sometimes a decisive [factor]”.10 Whether this is sometimes or -almost- always so remains dubious.

Moreover, but a few other factors may turn out to be significant albeit not accorded the same weight as the place of performance and yet not always so. Characteristic is the case of Sayers, whereby Lord Denning M.R., indicating a series of factors that point towards one law as the proper law of the contract; namely, inter alia, the place of making it, the nationality of the claimant, the language used in the contract, the currency agreed, the country of the insurance scheme governing it, as well as the place of its administration, nevertheless decided against it, due to the opposing arguments propounded for the contemporaneous tortious claim in that case.12 Not only is one confronted with a “puzzle [in order] to grasp what it is that makes one factor a weighty indication of the proper law and another of little significance”,13 but also, one wonders why bother extensively supporting a line of argument, when at the same time the same person concludes the very opposite. Matters can only get worse if one is told that that person is the judge! How about lawyers? And businessmen?

Furthermore, it may be argued that the greater the number of factors pointing to a certain law, the closer their connections with that law and -in turn- the greater the chances of that law being the proper one.14 “The country in which they are most densely grouped [ ] constitutes the centre of the contract and furnishes the governing law.”15 There are various ways of presenting this and even more ways of trying to justify it. However, the essence of all that lies in a simple balancing exercise; a balancing exercise beyond questioning which factor is prima facie stronger in order to establish the closest connection with the contract so as to indicate its proper law. A balance of interests is at the core of any such decision; the promotion of the autonomy of the parties and the advancement of the policies of a country.16 But let us not take this any further.

On top of that, the interests of the parties may be vaguely subsumed into the following; convenience, business efficacy, certainty, predictability and justice.17 It

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9 Ibid.
10 Supra, 219-220 (own emphasis added).
12 Ibid, 1183-1184.
13 Jaffey, supra, 535.
14 Personal view.
15 Jaffey, supra, citing Cheshire, 534.
16 Jaffey, supra, 537.
17 Jaffey, supra, 541.

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goes without saying, that some of these overlap with the interests of the country, as is the case with business efficacy. The effectiveness of the business industry is -at worst- desirable and -at best- essential for the smooth running of a country’s economy. It is, by and large, the same kind of interests which the Convention purports to safeguard, attempting to offer some clarity on what –at common law– is referred to as ‘the proper law of the contract.’ Whether it has managed to achieve that remains debatable, at least in its interpretation by and application in the English courts.

**Characteristic Performance - in theory**

“The purpose behind the Convention was to ’establish common rules for [ ] ascertaining the system of law applicable to certain contractual obligations, thereby raising the level of predictability in international commercial transactions.’” These common rules have to a large extent been ‘inspired’ from the common law approach and despite persistent directions to avoid interpreting ‘the Convention by the twilight of authorities on the common law’ this is sharply what has been done.

Starting just like the common law, by stating the generic principle in the absence of choice by the parties to a contract as regards its applicable law, as per which the latter shall be governed by the law of the country with which it is most closely connected, the Convention moves on to incorporate a few presumptions in respect of what that closest connection entails, which are, notably, neither comprehensive, nor conclusive. Indeed, the most important and hence most controversial presumption is that of Art. 4(2), which indicates that the contract is most closely connected with the country where the party who is to effect its **characteristic performance** has his habitual residence, central administration, principal place of business or other place of business, in case its performance is to be effected in a different place. Its controversy can only be enhanced by the possibility of its rebuttal propounded by Art. 4(5), in case the characteristic performance cannot be determined or if the circumstances point to another country as being the one with which the contact is most closely connected.

A couple of issues arise at this juncture. Firstly, it strikes one’s attention that even though the presumptions are purporting to clarify the closest connection principle, they -themselves- lack definition and are open to misuse. Secondly, the fruitfulness of the modifications attempted through these presumptions to the overall flexibility of

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18 In a different context (*jus cogens*), Jaffey, *supra*, highlights the importance of rules designed to protect the economy of a country, 538.
24 The other relating to specific kinds of contract (rights in immovable property, §3 and carriage of goods, §4), explicitly exempted from the §2 presumption, analysis of which is beyond the ambit of the present discussion.
26 Rome Convention, *supra*, Art. 4(5).
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the closest connection principle\textsuperscript{27} is encroached by the insertion of the rebuttal option and hence in the same provision.

As the explanatory report to the Convention suggests,\textsuperscript{28} submitting a contract to the law appropriate to the characteristic performance defines its connecting factor from the inside, obviating the influence of external elements, such as parties’ nationality or place of making the contract, unrelated to the essence of the obligation.\textsuperscript{29} Similarly, the difficulties inherent in seeking to ascertain the place/s of performance of the contract, which may indeed become superfluous, are to be eliminated, as that, too, is rendered unimportant.\textsuperscript{30} It is worth bearing that in mind when looking at the case-law after the incorporation of the Convention into domestic law. What, then, is the characteristic performance of the contract?

\textit{Characteristic} “is the performance for which payment is due”, “which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.”\textsuperscript{31} According to the type of contract at stake, this may be, \textit{inter alia}, the delivery of goods, the granting of a right to use property, the provision of services, transport, insurance, banking operations, security, etc.\textsuperscript{32} So the report says. Such proposition is arguably welcomed, as it is quite logical to assume that the party rendering the characteristic performance is the one who is ‘more likely, or is likely more often’ to seek resort to the laws of the country by which the contract is governed and to assume the more active and substantial role under it and whose convenience ought –thus– to be upheld.\textsuperscript{33}

However, admittedly, there are but a few instances whereby the characteristic performance is -at best- difficult and -at worst- impossible to identify. When the contract in issue does not take the form of the provision of goods or services in return for money, such as in cases involving licences, distribution, publishing and joint ventures, it is far from clear what the characteristic performance is or ought to be.\textsuperscript{34} Nevertheless, it goes without saying, that half bread is better than no bread\textsuperscript{35} and therefore some gaps in the provisions of the Convention adversely affecting the paradigms of certainty and predictability may hardly justify recourse to a system, like that of the common law, whereby these notions are non-existent in the first place.\textsuperscript{36}

In spite of the bare ‘defects’ which may be ascribed to the provisions of the Convention, it is worth noting that it has a lot of ‘potential’.

\begin{footnotes}
\item[27] Giuliano-Lagarde Report, \textit{infra}, n. 31, stating that the Art. 4(2) flexibility if modified by the presumptions of Art. 4(2)-(4), at point 2 of the discussion on Art. 4 of the Convention.
\item[29] \textit{Ibid.}, point 3 of discussion on Art. 4.
\item[30] \textit{Ibid.}
\item[31] The Report, \textit{supra}, point 3 of discussion on Art. 4.
\item[32] \textit{Ibid.}
\item[33] Jaffey, \textit{supra}, 547.
\item[34] Jaffey, \textit{supra}, 551.
\item[35] Personal view.
\item[36] Paraphrase of Jaffey, \textit{supra}, 551.
\end{footnotes}
of the brush’ one should look at the ‘proper structure’, not to mention the ‘cornerstone’. More than workable seem both the general presumption of Art. 4(2) and its complementary “antidote”37 of Art. 4(5). The latter’s role is to supplement the former in case of ‘impasse’ of any sort38 and not to be constantly invoked in order to override it. Unfortunately, that is sharply what seems to be happening throughout the period since the transposition of the Convention into national law. The presumption is resorted to only in “tie break” situations,39 raising questions regarding the constructive effect of the former on the latter.40

The raison d’être41 of Art.4 is to provide certainty, without –however– undermining the need for flexibility, given the vast and divergent types of contractual relationships it governs.42 Arguably, “it should be possible to tell solely from a consideration of the terms of the contract what its governing law is or ought to be.”43 English courts, persistently using a more “open –textured” approach, disregarding the presumption “on a little more than a balance of factors,” contribute to the generation of “unnecessary and undesirable uncertainty.”44 A closer look into the case-law will neatly demonstrate that.

Characteristic Performance - in practice

Of particular interest is the explicit or implicit adoption by the courts of a ‘strong’ or a ‘weak’ presumption model. In Definitely Maybe,45 Morrison J. highlighted the existence of these two schools of thought: on the one hand the Art. 4(2) presumption, expressly subjected to 4(5), is weak and where the place of performance is different from the place of business it will more readily be displaced, whilst on the other hand, the ambit of 4(5) is narrowed and 4(2) is accorded firm dominance.46 It needed not much effort for the conclusion to be reached that the presumption on the facts at stake ought to be disregarded.

The ample debate which has evolved over the peculiarity and consequent preponderance of the place of performance over the place of business, one way or another considering appropriate to rely on Art. 4(5), despite express directions on the cautiousness of so doing, is also evident in The Bank of Baroda47 case, whereby Mance J. remarked that “the presumption(s) are to be applied unless there is valid reason, looking at the circumstances as a whole, not to do so”,48 but, not surprisingly, considered that such valid reason existed.

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37 Purposive use of these opposing terms, to accentuate the fact that is included in the same article but (1) its use should not be comparable and (2) one strikes out the other!
38 *Jaffey, supra*, argues that it should be invoked only in exceptional circumstances, 554.
40 *Jaffey, supra*, 556.
44 *Ibid*.
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Along the same lines, Potter L.J. argued in *Samcrete*\(^49\) that where the payment of money is the principal concern of the contract the presumption should be applied and that it should “only be disregarded in circumstances which clearly demonstrate the existence of connecting factors justifying [such action].”\(^50\) As one would assume, the insertion of the word “clearly” could hardly stand a barrier to the application of Art. 4(5), furthering the approach of the common law.

Moreover, in *Crédit Lyonnais*,\(^51\) Lord Justice Hobhouse noted that “if the Court concludes that it is not appropriate in the circumstances of any given case, [the presumption is [displaced], [which] formally, makes [it] very weak” and reached his conclusions accordingly.\(^52\)

On a different footing was the decision in *Continental Shelf*,\(^53\) whereby Clarke L.J. neatly analysed in separate headings Art. 4(2), Art. 4(5) and issues relating to the place of business of the parties in that case, *prima facie* adopted the “strong” presumption model, holding that Art. 4(5) could not be applied.\(^54\) However, it is worth noting that the elements which localised the contract in that case were spread between more than two countries, as is usually the case; the likelihood of Art. 4(2) being indicative of the applicable law is great in such a scenario and therefore not much could be drawn on the court’s view regarding the strength of Art. 4(2).\(^55\)

All in all, whether characterising the presumption of Art. 4(2) as “strong” or “weak”, the courts are inclined to invoke Art. 4(5) in order to rebut it. It seems that most cases brought before the English courts “on their facts” justify such process! A process which in effect implies: “choose the proper law of the contract”? How come?

**Suggestions**

No matter how appealing it may be for lawyers and judges to play with words, there should be more caution in respect of the substance which these words describe as opposed to lingering with the selection of the most suitable one in their literal context. This by no means suggests that finding the appropriate wording is not be accorded importance. On the contrary, the differences between the common law and the Convention provisions are not always accidental. Whether it is a contract or a transaction that should establish a close connection with a country is arguably of less importance than the distinction between a country and a system of law. It had been suggested that, despite the fact that these terms may be or have been used interchangeably, the latter connotes adherence to factors such as legal terminology, form of contract and jurisdiction clauses, whilst the former puts emphasis on factors such as the place of making the contract, the place of its performance or the currency


\(^{50}\) *Ibid*, 545.


\(^{52}\) *Ibid*, 5.


\(^{54}\) *Ibid*, 718.

\(^{55}\) *Hill*, supra.

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to be chosen, “factors [which] are often coincidental” and should be avoided from the “digging-for-the-applicable-law” process and in turn the text of the Convention.56

On top of that, turning the current Convention into a Regulation may prove fruitful in eliminating its misuse, especially if the provisions of the Proposal57 thereto are adopted, as per which the habitual residence of the characteristic performer becomes the key issue, whilst closest connection is to be relevant only when the requisite service of the characteristic performer cannot be identified.58 Not expressly subjecting the current Art. 4(2) to Art. 4(5) or adding the word “clearly” in the closest connection requirement of the latter59 is hardly effective.

Last but not least, “the missing piece of this jigsaw” could be provided by the inclusion of market expectations into the process, thus rendering the test one of identifying “the law of the country with which the contract has its closest commercial connection”.60 But even then, it is submitted certainty may be sacrificed for flexibility, at least in domestic cases.

Conclusion

All in all, the common law approach has hardly changed in practice, not to say – bluntly– that is has been entirely unaffected by the incorporation of the Convention into domestic law. Presumably it will all depend on whether the U.K. will stop choosing between acting as a Sovereign and as a Member State, depending on what best serves the needs at stake.

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