THE CONCEPT OF CHARACTERISTIC PERFORMANCE AND THE PROPER LAW DOCTRINE

by

Dr. Nicky Richardson

Lecturer in Commercial Law

Murdoch University

Traditionally English and Commonwealth conflict of laws for contract have been regarded as the same,[1] hence it is possible to state the Australian conflict of laws for international contracts by reference to English law. This situation may not continue. Australia could be left with the common law concept of the proper law doctrine (and its attendant difficulties) whilst England moves towards unification with Europe once the European Convention on the Law applicable to Contractual Obligations 1980[2] is ratified.[3]

The object of this article is to examine but one concept which will be introduced into English law by the Convention. This is the concept of characteristic performance. It will be considered with a view to its adoption in Australia to resolve the choice of law dilemma for international contracts.

The basic rules[4] of the Convention follow the pattern of English law. Normally party autonomy is allowed[5] and in the absence of choice the proper or applicable law will be the law of the country[6] with which the contract is most closely connected.[7]

This is but the third rule of the Proper Law doctrine. In England three rules have been developed to assist the court in determining the proper law of a contract. Thus the traditional English approach is for the judge to enquire first whether there is an express selection of the proper law by the parties (Rule 1), secondly, if not, whether there is an implied selection (Rule 2), and thirdly, if not, with which system of law did the transaction have its closest and most real connection (Rule 3). The Convention attempts to make this third general principle more precise

1 'It is therefore more acceptable to cite commonwealth authority in English conflict of laws cases, and vice versa, than in other fields of law'. *Broken Hill Proprietary Co v Latham* [1935] 1 Ch 373 at p 399 per Maugham J.

2 Hereinafter called the Convention.

3 The Convention will come into effect when seven states of the EEC have ratified it. The Convention is however starting to influence decisions. See *Compagnie Europeenne des Petroles SA v Sensor Nederland BV* (1983), 22 ILM 66 at p 69.

4 Articles 3 and 4.

5 Article 3(1).

6 As a preliminary matter it should be noted that the term 'country' rather than 'the system of law' is used. This is unfortunate. Contacts with a country emphasise geographic contacts which are often fortuitous. All contacts have to be considered. See P R Williams, 'The EEC Convention on the Law Applicable to Contractual Obligations.' (1986) 36 ICLQ 1 at p 14 et seq. See *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at p 604.

7 Article 4(1).

by use of presumptions,[8] the most important of which is that of characteristic performance.

Article 4(2) states that "... it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate ... its central administration ...."

The Convention does not define the concept, and the Report[9] which accompanies the Convention merely cites examples of what amounts to the presumption. Before considering these illustrations it should be noted that the presumption of characteristic performance does not apply if it cannot be determined[10] or if it appears from the circumstances as a whole that the contract is more closely connected with another country.[11] As no assistance is given as to what type of circumstance would need to exist to rebut the presumption Article 4 already has a defeatist air about it.

The Report suggests that the payment of money is not the characteristic performance of a contract for the supply of goods or services, rather it is the performance of the obligation for which payment is due, ie the provision of the goods or services. This means that there is a rebuttable presumption in favour of the sellers' law.

At the end of the day, however, as this is only a presumption which may be displaced if the contract is more closely connected with another country[12] 'the end result is much the same as that achieved at present by English law, but by a more complex route".[13]

It has been suggested that calling the supply of goods or services more 'characteristic' than the payment of money provides a preference for the law of the supplier's home state or business establishment over that of the payer.[14] The concept has also been criticised by a number of writers as arbitrary and bound to disappoint the hopes of certainty it raises.[15]

The Report tends to gloss over the problem of characteristic performance by emphasising that in bilateral or reciprocal contracts one of the parties usually merely has to pay money, and the characteristic performance of the contract is not the payment of money, but the performance for which payment is due (eg provision of a service or delivery of goods) which usually constitutes the centre of gravity and the socio-economic function

8 Article 4(2), 4(3) and 4(4).
9 The Explanatory Report by Guiliano and Lagarde O J 1980 C 282/4.
10 Article 4(3).
11 Ibid.
12 By Article 4(5).
13 Morris and North, *Cases and Materials on Private International Law,* (1984) p 466.
14 F K Juenger. (The EEC Convention on the Law Applicable to Contractual Obligations: An American Assessment) in *Contract Conflicts: The EEC Convention on the Law Applicable to Contractual Obligations: A comparative study* (ed P M North) (1980) at p 301.
15 Eg Juenger. Ibid. A L Diamond, 'Conflicts of Laws in the EEC' (1979) 32 Current Legal Probs 155. J d'Oliveira, 'Characteristic Obligation' in the Draft EEC Obligation Convention, 24 Am J Comp Law 303 at pp 309-13 (1977).

of the contractual transaction.[16] However, with certain contracts such as distribution contracts it can hardly be said that it is necessarily the case that the obligation of the producer and not the distributor comprises the essential characteristic of the contract.[17] Consider cases such as *Evans Marshall & Co v Bertole,*[18] which involved a contract for the distribution of sherry in England. The sherry was produced in Spain and was to be marketed in England. Under Article 4(2), the contract would be governed by Spanish law (the law of both the central administration and the place of business of the Spanish company) if the production and delivery of the sherry reflected the performance which was characteristic of the contract, and by English law (the law on the distributor's central administration and relevant place of business) if the acceptance and promotion of the sherry was regarded as the performance characteristic of the contract. A dead heat?

It would seem a valid criticism of the concept to say that the more complex a transaction the less helpful the criterion becomes.[19] Furthermore, the concept confers a choice of law privilege on those who supply goods and services. Surely it is the seller rather than the buyer who is, in general, better able to evaluate the risk of doing business internationally and to hedge against it by the use of a choice of law clause or a forum selection or arbitration clause.[20] To this extent it may be said that the concept clashes with Articles 5 and 6 of the Convention which favour economically disadvantaged parties. These two articles protect consumers and employees. For example, in certain situations a consumer or employee cannot be deprived of protective legislation that applies in his or her country of habitual residence.

A further criticism concerns a limitation imposed by Article 4(4) which exempts a contract for the carriage of goods from the presumption. Difficulties are bound to arise if the concept is not to apply to all types of contracts. Any attempt to divide contracts into groups is doomed to failure, grey areas will always emerge. Furthermore, the law becomes too difficult. If a concept of characteristic performance is to apply it should have universal application.

It has been suggested[21] that the main purpose of the presumption is to provide a compromise—a compromise between those who seek certainty and predictability in the determination of the applicable law and those who, like English lawyers, see merit in the flexibility of the general rule. Some see little virtue in presumptions and believe that, if there are to be presumptions, they must be rebuttable, (which, however, can defeat their very object).

Whilst some writers consider that the adoption of the concept is 'a praiseworthy exercise of the draughtsmen to try to formulate a rule which

16 See L Collins, 'Practical Implications in England of the EEC Convention on the Law Applicable to Contractual Obligations' in *Contract Conflicts: The EEC Convention on the Law Applicable to Contractual Obligations. A Comparative Study* (ed P M North) (1980) at p 209.

17 Ibid at p 210.

18 [1973] 1 WLR 349.

19 Juenger above n 14 at p 301.

20 Ibid.

21 By North in *Contract Conflicts: The EEC Convention on the Law Applicable to Contractual Obligations. A comparative study (ed P M North) (1980) at p 15.*

should give more certainty than the closest connection test',[22] others, and one must agree, more convincingly suggest that all in all, the Convention's attempt to localise contracts by means of a 'mysterious, almost a mystical, concept'[23] is but another 'unconvincing production of divination rather than inquiry'.[24] Since it focuses on the home state law of one of the parties, rather than on their common concerns, the test cannot easily be reconciled with the proper law approach it is meant to clarify.

It has been suggested that to enter upon the search based only on a presumption is only too often tantamount to setting out upon a false trail.[25] Against this is the argument that at least a presumption enables the search to start. At present the third rule of the proper law doctrine merely informs the court and all interested parties that absent a choice of law decision by the parties the contract is governed by the legal system with which the transaction has its closest and most real connection.

This rule is clearly unsatisfactory. It is difficult to apply, the judge has no guides, the contacts between the transaction and the chosen law are potentially too numerous and the weight to be afforded each contact difficult to establish. The rule means that each case must be considered anew which is a time-consuming exercise. There is no logical or legal necessity to frame the rule in its present terms. The very fact of introducing such a concept as 'characteristic performance' in itself suggests dissatisfaction with the present rule, indeed the Report accepts that the third rule of the proper law is 'too vague'.

CONCLUSION

Rule 3 of the proper law doctrine is unsatisfactory in both the English and Australian context. England will inevitably adopt the concept of characteristic performance. Australia will be left with the unsatisfactory third rule of the proper law doctrine. However, the presumption that the law of characteristic performance will remedy matters is misconceived. The concept will be as unsatisfactory as the third rule of the proper law is itself.

If presumptions are to be used then they must be capable of precise application. For example the presence of a choice of forum clause could be seen as a clear presumption that can easily be applied to assist in the determination of the proper or applicable law. The concept of characteristic performance is simply too inherently vague to provide the court with any clear assistance.

The conclusion must be that nothing would be gained by adding a grey concept to a grey rule.

22 J C Schultsz, 'The Concept of Characteristic Performance and the Effect of the EEC Convention on Carriage of Goods in Contract Conflicts'. Ibid p 185 et seq.
23 Diamond—above n 15 at p 169.
24 Juenger—above n 14 at p 302.
25 Cheshire and North's, *Private International Law* (1988) (11th edit) p 464.