(2). Moreover, a consideration of provisions such as section 570 of the Companies Act 1985 and, in particular, section 72(2) of the Financial Services Act 1986 compels one to conclude that Parliament would not have intended that Northern Irish companies fall within section 220 of the Insolvency Act 1986. The general rule[69] that found expression prior to the decision of Morritt J should still be applied: a company incorporated in one part of the United Kingdom can be wound up only in the place of incorporation.[70]

Finally, from an insolvency practitioner's point of view it would be most unwise to advise a creditor to rely upon the decision of Morritt J and seek to have a Northern Irish company which has a place of business in England wound up by the English court. For, even if a judge were persuaded to follow the decision in *Re A Company*,[71] it must always be remembered that the court has a discretion and may, in particular, decline to make a winding-up order where the courts in the country of incorporation are a more appropriate forum.[72]

P. ST.J. SMART*

THE IMPACT OF THE APPLICABLE LAW OF CONTRACT ON THE LAW OF JURISDICTION UNDER THE EUROPEAN CONVENTIONS

A. Introduction

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, agreed in Brussels on 27 September 1968 (and generally referred to as the Brussels Convention), has been part of English law since the coming into force of the Civil Jurisdiction and Judgments Act 1982.[1] The Convention now dominates the law of jurisdiction in civil and commercial matters as well as the law governing the recognition and enforcement of foreign judgments.

Similarly, the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (and generally referred to as the Rome Convention), which was given the force of law in the United Kingdom through the Contracts (Applicable Law) Act 1990, now constitutes the law governing choice of law in contract. The basic principle of the Rome Convention is that a contract is to be governed by the law chosen by the parties (Article 3), but if they fail to choose, the rules of law of the country with which the contract is "most closely connected" will apply; and that country will generally be the country of

69. Subject *only* to s.225 of the Insolvency Act 1986, *supra*.

70. See *per* Millett J in *DSQ Properties Ltd*, *supra* n.4, and *per* Jessel MR in *International Pulp and Paper*, *supra* n.31.

71. Obviously a very relevant costs question is involved.

72. As Evershed MR put it in *Banque des Marchands*, *supra* n.50, at p.126, *prima facie* if the local law of a corporation provides for "the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts".

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1. The Act was most recently amended by the Civil Jurisdiction and Judgments Act 1991, inserting the Lugano Convention as Sched.3C. Lugano extended the conditions of Brussels (with some variations) to the then EFTA States, viz., Austria, Finland, Iceland, Norway, Sweden and Switzerland (in force in the UK since 1 May 1992: S.I. 1992/745).

habitual residence of the party who effects the "performance which is characteristic of the contract".[2]

The purpose of this article is to investigate the interrelation between these two Conventions; and, in particular, to show that the concept of "characteristic performance", drawn from the Rome Convention, often plays a vital role in determining whether or not the English courts have jurisdiction under the Brussels Convention.[3]

B. How the Rome Convention Determines Questions of Jurisdiction

If a "civil and commercial matter" concerning parties established in different EU States comes before the courts of England and Wales, the relevant rules on jurisdiction will generally be found in the Brussels Convention.[4]

Under the Brussels Convention jurisdiction normally rests with the courts of the defendant's domicile (Article 2), or the seat of the company in the case of corporate defendants.[5] Article 5(1) of the Brussels Convention, however, creates one of several exceptions to the domiciliary principle by providing: "A person domiciled in a Contracting State may, in another Contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question ..."

In two judgments delivered on the same day, the European Court held that "the obligation in question" corresponds to the contractual right upon which the plaintiff's action is based (Case 14/76 *de Bloos* v. *Bouyer*),[6] and that a court in a contracting State must determine "in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question" and then use that law to determine the "place of performance" (Case 12/76 *Tessili* v. *Dunlop AG*).[7]

2. Art.4(2) Rome, discussed in more detail *infra*.

3. In non-Convention cases the law of the contract has sometimes been a decisive factor in determining jurisdiction under English conflict of law rules, but the fact that a contract is governed by English law alone will give English courts jurisdiction only where it can be shown that justice could not be obtained in the foreign court, or could be obtained only at excessive cost, delay or inconvenience (see *Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Co.* [1984] A.C. 50, 68 (*per* Lord Diplock); see generally Dicey and Morris, *The Conflict of Laws* (12th edn), pp.331–332). Even under the transitional provisions of the Brussels Convention, there may be English jurisdiction over a foreign domiciliary in a contract case, if the parties had expressly agreed in writing before 1 Jan. 1987 that English law should apply (Art.54(3) Brussels; Dicey and Morris, *idem*, pp.332–333).

4. In *In re Harrods (Buenos Aires) Ltd* [1992] Ch. 72, the Court of Appeal held that English common law rules applied in cases involving non-Brussels Convention countries; a reference was made by the House of Lords to the ECJ to test this ruling, but the case was settled by the parties and the point remains unresolved. The Rome Convention applies regardless of the countries concerned (Art.1(1)).

5. Civil Jurisdiction and Judgments Act 1982, ss.41–46, and Arts.52–53 of the Brussels Convention.

6. Case 14/76 *de Bloos* v. *Bouyer* [1976] E.C.R. 1497, particularly at para.13 of the judgment.

7. In Case 12/76 *Tessili* v. *Dunlop AG* [1976] E.C.R. 1473 the ECJ said: "It is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction. For this purpose it must determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question." This approach has been followed consistently since,

Uniformity of operation of the Brussels Convention throughout the European Union is obviously important and thus, almost invariably, the European Court has laid down that the Convention is to be interpreted independently of the national law of the court that made the reference to it.[8] *Tessili* v. *Dunlop*[9] is the exception to this rule; and because of the reliance placed upon the national laws of the States involved this decision has been criticised. Under *Tessili* the national court applies its own conflict rules to establish the law governing the contract, and then uses that law to determine where "the obligation in question" is to be performed. Since the EU States' conflict rules governing choice of law in contract are now to be found in the Rome Convention, and applying the combined *de Bloos/Tessili* test, the rules of both the Rome and Brussels Conventions may need to be applied by a national court in order to determine whether that court has jurisdiction.[10]

One common case which combines both Conventions in this way concerns contracts made between parties established in England and Germany respectively. Suppose a contract is made between a German company, X GmbH, and an English company, Y Ltd, for the sale and delivery of goods manufactured by Y Ltd, in return for payment by X GmbH. There is no choice of law clause. The contract is breached and proceedings for payment are brought in England by Y Ltd. Since the defendant company has its seat in Germany, there is no jurisdiction in England under Article 2 of the Brussels Convention. But has the English court jurisdiction to hear the case under Article 5(1)? In other words, is England the "place of performance" of "the obligation in question"?[11]

most recently in Case C-288/92 *Custom Made Commercial Ltd* v. *Stawa Metallbau GmbH* [1994] E.C.R. I-2913, discussed more fully *infra*. The first step for the national court will sometimes be to determine whether an action amounts to a "matter relating to a contract" at all—for a recent example see *Atlas Shipping Agency (UK) Ltd* v. *Suisse Atlantique Société d'Armement Maritime SA*, [1995] 2 Lloyd's Rep.188 (broker's right to sue buyer as trustee of the commission money a "matter relating to a contract", so that brokers could sue in place of performance, being the place of payment of money).

8. See e.g. Case 29/76 *LTU GmbH* v. *Eurocontrol* [1976] E.C.R. 1541; on the difference between public and civil/commercial matters see Case 814/79 *Netherlands State* v. *Ruffer* [1980] E.C.R. 3807 (claim relating to clearance of a wreck not a Convention matter).

9. *Supra* n.7

10. The combination of these Conventions is consistent with the harmonisation of EU law, indeed the Tizzano Report on the Protocols on the Interpretation of the Law Applicable to Contractual Obligations, para.22, calls the Rome Convention "the logical complement to the Brussels Convention".

11. As occurred (in the context of an agency contract) in a Court of Appeal case, decided before the coming into force of the Rome Convention: *Mercury Publicity Ltd* v. *Wolfgang Loerke GmbH* [1993] I.L.Pr. 142. The Court allowed an appeal from an order, made under R.S.C. Ord.12, r.8, that the English courts did not have jurisdiction to hear the case between the English company (Mercury) and the German company (Loerke) under the Civil Jurisdiction and Judgments Act 1982. Purchas LJ also held (*idem*, p.152) that "to establish jurisdiction all the Plaintiffs have to do is to show that they have a 'good arguable case' that the English courts have jurisdiction". It is suggested that this standard of proof falls short of that set by the ECJ in Case 38/81 *Effer* v. *Kantner* [1982] E.C.R. 825 (at para.7 of the judgment), in the context of whether a court can examine the existence of an alleged contract for the purposes of jurisdiction: "the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the *essential preconditions* for its jurisdiction, having regard to *conclusive and relevant evidence* adduced by the party concerned" (emphasis added). (Although the court need not first satisfy itself that the contract exists if that is the subject matter of the dispute: *Tesam Distribution* v. *Schuh Mode Team* [1990] I.L.Pr. 149.) Although

The answer to this question depends upon whether English or German law governs the contract: in English law the general rule is that the debtor must seek out the creditor and pay him at his residence or place of business, if it is in England; [12] whereas under German law the creditor must normally seek out the debtor and make demand upon him at his domicile or seat.[13]

The significance of this difference in relation to the place of performance provision of Article 5(1) is obvious: since it forms the basis of the plaintiff's claim, *payment* is clearly "the obligation in question", and the place of that payment depends upon which law governs the contract. Accordingly, jurisdiction will depend on whichever law governs the contract. If German law governs, performance of the obligation in question will take place in Germany (and the English courts will not have jurisdiction); but if English law governs, performance will take place in England (and the English courts will have jurisdiction).[14]

C. *The Characteristic Performance of a Contract for the Sale of Goods*

It is thus necessary to look more closely at how it is determined which law governs a contract for the sale of goods between an English seller and a German buyer where there is no choice of law clause. As adumbrated the English choice of law rules are now to be found in the Contracts (Applicable Law) Act 1990, i.e. the Rome Convention. The relevant provision is Article 4 of that Convention, which states, *inter alia*:

> 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected ...
>
> 2. Subject to the provisions of paragraph 5 of this Article,[15] 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 or unincorporate its central administration.

Thus, it is crucial to the operation of the Rome Convention in these circumstances to determine the "performance which is characteristic of the contract".

Mercury is still good law, it is doubtful whether the "good arguable case" test should be followed, as it requires something less than conclusive proof (at least to the civil standard) that the English court is indeed the correct forum for the case under the Brussels Convention, thus contradicting the Convention's aim of legal certainty (see e.g. *Effer, idem*, para.6).

12. *Robey & Co.* v. *Snaefell Mining Co. Ltd* (1887) 20 Q.B.D. 152; see generally *Chitty on Contracts* (26th edn), Vol.1, para.1530; cf. *Royal Bank of Scotland* v. *Cassa di Risparmio delle Provincie Lombardi* [1991] I.L.Pr. 411 (held: the rule does not apply to the relationship between banker and customer); the place of performance can also be specified by the contract. It is interesting to note that if a sale of goods contract governed by English law is silent on place of payment and delivery, and delivery is then effected at the seller's place of business, payment will also have to be effected at that place, since payment and delivery are concurrent conditions unless otherwise agreed: Sale of Goods Act 1979, s.28.

13. See para.269 of the *Allgemeines Bürgerliches Gesetzbuch*.

14. See e.g. Dicey and Morris, *op. cit. supra* n.3, at pp.358–359.

15. Para.5 states that para.2 shall not apply where the characteristic performance cannot be determined, in which case the contract is governed, according to para.1, by the law of the country with which it is most closely connected.

The key word must be "characteristic", and in our case the right upon which the action is based, payment, is *not* itself a characteristic performance of such a contract. If this were otherwise, Article 4(2) would be robbed of its meaning, since payment is a necessary part of virtually every commercial agreement and hardly a particular characteristic, distinguishing one contract from another.

The intention of Article 4 must be for courts to decide on a case-by-case basis what the real "meat" (i.e. characteristic) of a particular contract is. Thus, if a contract is for the sale of goods, sale and delivery of goods must be the characteristic performance; if it is one of agency, the act of the agent is the characteristic performance, and there have been rulings to that effect by national courts.[16] If the residence of the party making payment, rather than performance, were decisive of the issue of the proper law, the grossest distortions could occur.[17]

It follows that the particular characteristic of our hypothetical contract must be the production, packaging and shipping of the goods in question, distinguishing this contract from other types of commercial agreement. In the present case, the company effecting the characteristic performance has its seat in England and accordingly the contract must be governed by English law.[18]

This, however, is not enough. Now it must be determined what the "place of performance" of the "obligation in question" is under an English applicable law. As set out above, the obligation in question is that which corresponds to the contractual right upon which the plaintiff's action is based[19] (unless the parties have

16. See Dutch courts in *Machinale Glasfabriek de Maas BV* v. *Embaillerie Alsacienne* [1984] E.C.C. 123 (sale of goods); *Bata* v. *Beugro* N.J. 1984 No.745, 2663 (agency), and Tribunal de Grande Instance, Paris, in *S* v. *K and ors*, 3 Feb. 1982, D. 1983 J. 146 (legal services). See generally Plender, *The European Contracts Convention* (1991) pp.111–112.

17. E.g. a contract for the purchase of Dorset cider, to be delivered to a yacht off the Dorset coast, paid for by the Liberian company chartering the yacht: should the law of the contract be Liberian?

18. According to the Giuliano–Lagarde Report on the Rome Convention, the country concerned is that in which the company's principal place of business is situated or, if the contract is to be performed through a place of business other than the principal place of business, the country in which that other place of business is situated (Report on Art.4, at para.3).

19. *De Bloos*, *supra* n.6. There is an exception in the case of contracts between employer and employee. Thus in Case 133/81 *Ivenel* v. *Schwab* [1982] E.C.R. 1891 the ECJ held that the "obligation in question" is that which characterises the contract as a whole (see para.20 of the judgment) and in the case of contracts of employment that is work. (The ECJ was influenced by the draft provision of what was to become Art.4(2) of the Rome Convention.) *Ivenel* was, however, firmly restricted to contracts of employment in Case 266/85 *Shenavai* v. *Kreischer* [1987] E.C.R. 239. The Court of Appeal in *Mercury* v. *Loerke*, *supra* n.11, determined the type of relationship required to give rise to the *Ivenel* exception as: "those cases of a personal nature in the relationship of master and servant where inequality of bargaining power may well become critical, and in which to allow a jurisdiction in a court other than the place in which the main execution of the work is to take place, might well deprive the employee or agent from the protection of restrictive agreements and from other statutory and union protections which have been negotiated for his benefit". The *Ivenel* exception is now contained in the second clause of Art.5(1) of the Brussels Convention, as amended by the San Sebastian Convention (given effect in the UK by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, S.I. 1990/2591).

validly exercised a right to specify the place of performance),[20] in our case: payment.

As we have seen, under English law, in the absence of agreement otherwise, the debtor must seek out the creditor at his place of residence. Since English law applies, payment is to be effected in England, so that the "place of performance" of the "obligation in question" is England. Consequently, the English courts have jurisdiction under Article 5(1) of the Brussels Convention.

The difficulties with the *de Bloos/Tessili* approach are demonstrated by considering the converse example: a German manufacturer of goods who sells to an English company. If the seller is not paid, may he, in reliance upon Article 5(1), sue in Germany? The answer seems to be no: the characteristic performance is the manufacture and dispatch of the goods, and this is carried out by the German party. Thus the applicable law is German law and under German law, as we have seen, the place of payment is the debtor's residence, i.e. England.[21]

Considerations of equity suggest that all unpaid sellers should have the same jurisdictional advantages or disadvantages under the Brussels Convention. In fact our examples show that they do not, which is the consequence of the use of the *de Bloos/Tessili* approach in the determination of the "place of performance" of the "obligation in question" in Article 5(1).

D. A Review of de Bloos/Tessili *and the Uniform Law on the International Sale of Goods*

The European Court recently had the opportunity to review the operation of the *de Bloos/Tessili* approach in the context of the Uniform Law on the International Sale of Goods. The Hague Convention laying down that uniform law[22] provides in the first part of Article 59(1) that: "The purchaser must pay the price to the vendor at the latter's place of business or usual place of residence."

Where Article 59(1) of the Uniform Law applies, it has appeared to some that the application of Article 5(1) of the Brussels Convention in the usual way is unsatisfactory and incompatible with the underlying purpose of the Brussels Convention.[23] The reason for this is that the plaintiff/seller appears to be unfairly favoured. In the context of the most recent case before the European Court, *Custom Made Commercial Ltd* v. *Stawa Metallbau GmbH*,[24] this is readily understandable. This case concerned the manufacture and sale of windows by a German firm (the plaintiff) to an English firm (the defendant). The plaintiff/seller sued for payment not in the court where the defendant was domiciled or established (as required by Article 2 of the Brussels Convention) but in the German courts. The plaintiff relied on Article 5(1) of the Brussels Convention read with Article 59(1) of the Uniform

20. Case 56/79 *Zelger* v. *Salinitri* [1980] E.C.R. 89, para.5 (if such a choice is permitted by the law of the contract).

21. But see *infra* Section D.

22. Done at The Hague, 1 July 1964; currently being replaced by the UN Convention on Contracts for the International Sale of Goods, done at Vienna on 11 Apr. 1980, which contains in its Art.57 a provision similar to that of Art.59 of the Uniform Law.

23. See *Custom Made Commercial Ltd* v. *Stawa Metallbau GmbH* [1993] I.L.Pr. 490, 495. This is the judgment of the German Federal Supreme Court; the judgment of the ECJ is considered *infra*.

24. Case C-288/92 [1994] E.C.R. I-2913.

Law (which apparently applies to all international sales of goods in Germany), for the jurisdiction of the German courts. Under Article 59(1) payment was to be made at the seller's place of business; thus "the place of performance" of the obligation in question was in Germany and Article 5(1) jurisdiction followed.

This combination of Article 5(1) and Article 59(1) sets aside, in effect, the venerable maxim *actor sequitur forum rei*,[25] i.e. the basic rule of the Brussels Convention that the defendant should be sued in the courts of his domicile. If this combination were to apply generally the defendant would never be sued for payment in the court of his domicile; he would always be sued in the place of the plaintiff's domicile or establishment. Consequently, such a combination of articles was controversial.[26]

That controversial question was referred to the European Court by the German Federal Supreme Court in *Custom Made Commercial*. The Advocate General Carl Otto Lenz[27] suggested that such cases were an exception to the method of determining place of performance described in *de Bloos*,[28] but that the *lex causae* test in *Tessili* would still apply, even if it was now being applied not to the obligation in question (payment) but the counter-obligation of the other party (delivery).[29] Thus, the place of delivery should be the place of performance, regardless of which party bore the risk of transporting the goods.[30] The Court of Justice refused to follow its Advocate General, and reiterated its established case law on Article 5(1) of the Brussels Convention: that the obligation in question corresponds to the contractual right on which the action is based (*de Bloos*) and that each court must decide which law applies and define, according to that law, the place of performance of the said obligation (*Tessili*).[31] The Court concluded:[32]

> That interpretation must also be accepted in the case where the conflicts rules of the court seised refer to the application to contractual relations of a "uniform law" such as that in issue in the main proceedings.
>
> That interpretation is not called into question by a provision such as Article 59(1) of the Uniform Law, under which the place of performance of the obligation on the buyer to pay the price to the seller is the seller's place of business ...
>
> It follows that Article 5(1) of the Convention must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a

25. See Digesta 2.3.12; 3.3.19–20; and Codex Iustinianus 3.19.1.3, this last text showing how the *forum rei* is considered to be at the defendant's domicile.

26. In a judgment of 22 Nov. 1990 in *Jeumont-Schneider SA* v. *Gruppo Industriale Ercole Marelli SpA* (rep. at [1994] I.L.Pr. 12), the Italian Supreme Court took an extreme position in holding (at para.11): "Article 59 applies in an overriding and enveloping manner in place of the common provisions of private international law."

27. See opinion delivered 8 Mar., *supra* n.24, at p.2915.

28. *Idem*, p.2933, para.77.

29. *Idem*, para.78.

30. *Idem*, p.2934, para.82.

31. Judgment, *idem*, pp.2957 *et seq.*, paras.23 and 26. The ECJ also held that place of performance of the obligation is the only criterion to be used to confer jurisdiction under Art.5(1), even where the court which is accorded jurisdiction has no connection with the dispute, because to do otherwise would be contrary to the Convention and mean a return to the criterion of closest connection (*idem*, pp.2956 *et seq.*, paras.16–21).

32. *Idem*, p.2958, paras.27–29.

> contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague convention of 1 July 1964.

In other words, the court seised must look to the applicable law of the contract and, if that law includes the provisions of the Uniform Law, the place of payment must be determined taking into account Article 59(1) thereof.

At least in Germany therefore, the net effect of the Conventions will give the German courts jurisdiction in the *Custom Made Commercial* type of situation.

Whilst this solves the particular inequitable situation concerning the application of *de Bloos/Tessili* to a German manufacturer seeking payment from an English buyer in Germany as opposed to an English manufacturer seeking payment from a German buyer in England (these being the examples discussed above), it would be a fundamental misunderstanding of the nature of Article 59(1) to argue that this Article presented a "short cut" in determining jurisdiction: it is not itself a provision governing jurisdiction, it merely determines the place of payment, where payment may or may not be the obligation in question. In addition, the Uniform Law applies only where it is recognised by the applicable law of the contract. The Uniform Law does not generally apply if the applicable law is English law.[33]

E. Conclusion

It is apparent that the applicable law of the contract can play a pivotal role in determining jurisdiction. The applicability of a uniform law in certain jurisdictions is merely a part of the applicable national law. In our hypothetical examples it appears that (albeit contrary to the basic principle in Article 2 of the Brussels Convention) both English and German manufacturers could sue their respective German and English buyers for payment in their (the manufacturers') jurisdiction: the English one because of the common law rules on place of payment and the German one due to the effect of the Uniform Law. However, this equitable outcome has come about due to the particularities of these two national laws and because the obligation in question happens to be payment. In other cases the role that the applicable national law is given by *de Bloos/Tessili* will be equally decisive, but may not always contribute to the foreseeability of jurisdiction which the Brussels Convention was intended to produce.

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33. Although the Convention was implemented by the UK in the Uniform Laws on International Sales Act 1967 (in force by virtue of Uniform Laws on International Sales Order 1972, S.I. 1972/973), the Act provides that the Uniform Law will apply under English law only where the parties have expressly agreed that this should be so (s.1(3); see generally *Chitty, op. cit. supra* n.12, Vol.2, at para.4682). Since, in practice, parties rarely so agree, the Convention is seldom applicable in contracts governed by English law.

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