

2 of 2 DOCUMENTS

**Land Rover Exports** Ltd v Samcrete Egypt Engineers and Contractors SAE

COURT OF APPEAL (CIVIL DIVISION)

(Transcript: Smith Bernal)

**HEARING-DATES:** 21 DECEMBER 2001

21 DECEMBER 2001

**CATCHWORDS:**

Practice - Stay of proceedings - Jurisdiction - Appropriate forum - Proceedings arising out of guarantee agreement - Application for stay of proceedings - Agreement containing no choice of law or governing jurisdiction clause - Underlying contract containing English choice of law and governing jurisdiction clause - Judge dismissing application on basis that choice of law clause in underlying contract largely determinative - Whether judge in error - Rome Convention on the Law Applicable to Contractual Obligations, arts 3, 4.

**COUNSEL:**

A Thompson for the Claimant; A Tolley for the Defendant

**PANEL:** THORPE, POTTER LJJ

**JUDGMENTBY-1:** JUDGMENT OF THE COURT

**JUDGMENT-1:**

JUDGMENT OF THE COURT:

INTRODUCTION

[1] This is an appeal by the Defendant ("Samcrete"), a company incorporated and carrying on business in Egypt, from the order of Her Honour Judge Alton made in the Birmingham Mercantile Court and dated 4 January 2001 dismissing Samcrete's application for a stay of proceedings on the ground of forum non conveniens in respect of the claim of the Claimant ("Land Rover") pursuant to a guarantee dated 11 March 1996 which became binding through its acceptance by Land Rover on 18 July 1996.

[2] The guarantee contained no "choice of law" clause. The principal question which arises on this appeal is that of the weight to be attached to the presumption contained in art 4.2 of the Rome Convention on the Law Applicable to Contractual Obligations ("the Rome Convention") in the case of such a contract of guarantee, where the underlying contract to which the guarantee relates contains a choice of law and/or governing jurisdiction clause.

THE CONVENTION PROVISIONS

[3] The Rome Convention has the force of law in the United Kingdom pursuant to s 1 and Sch 1 of the Contracts (Applicable Law) Act 1990. Its relevant provisions are as follows.

[4] Article 3 (Freedom of Choice) provides:

(Transcript: Smith Bernal)

"1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable for the whole or a part only of the contract."

[5] Article 4 (Applicable Law in the absence of choice) provides:

"1. To the extent that law applicable to the contract has not been chosen in accordance with art 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 para 5 of this Article, 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 un-incorporate, its central administration. However, if the contract is entered into the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3 . . .

4 . . .

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined and the presumptions of paras 2., 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

#### FACTUAL BACKGROUND

[6] At the time of the provision of the guarantee, Samcrete was a 20% shareholder in another Egyptian company called Technotrade SAE ("Technotrade") which was until June 1997 Land Rover's appointed distributor in Egypt pursuant to a distributorship agreement dated 11 May 1993. That agreement related to Range Rover and Land Rover vehicles and parts and their distribution within the territory of Egypt. Clause 1(I) of the distribution agreement provided as follows:

"Law and Disputes

(i) This Agreement shall be governed by and construed in all respects in accordance with the laws of England

(ii) The English courts (to whose jurisdiction . . . [the parties] . . . hereby submit) shall be competent to entertain and adjudicate upon any matter arising out of or in connection with this Agreement"

[7] In 1996, Land Rover and Technotrade corresponded about an arrangement for ninety days' credit and Land Rover indicated that it required a parent company guarantee in order to grant such credit. It proffered a format for the guarantee which included a term that the guarantee should be construed in accordance with English Law and should be subject to the exclusive jurisdiction of the English Courts. It seems clear that Samcrete was not willing to include such a clause in that, on 11 March 1996, without requesting deletion of the clause, it simply signed a version of the guarantee from which the clause had been deleted, without substitution of any alternative choice of law clause and sent it to Land Rover. On 18 July 1996, Land Rover sent Technotrade a fax, agreeing to provide it with credit and indicating that it accepted the guarantee as signed subject to receipt of the original (which was thereafter provided). It seems (though it is not entirely clear from the evidence) that Land Rover's acceptance of the form of guarantee signed came about through its oversight that the choice of law clause had been deleted.

[8] The guarantee signed by Samcrete was headed 'Re Distributor Agreement between Land Rover . . . 'the supplier'

(Transcript: Smith Bernal)

and Technotrade SAE 'The Distributor' dated 11 March 1993'. It provided:

"In consideration of your continuing to supply our subsidiary, the Distributor, with Land Rover Group products, we, Samcrete . . .do hereby guarantee without set off or counterclaim the payment on demand of all sums not paid on due date by [Samcrete] in respect of invoices raised on [Samcrete] with regard to the purchase of Rover Group products under any agreement from time to time in force between Rover Group Limited, or any of its associated companies including [Land Rover] and [Samcrete] for the supply of the products.

...

This guarantee is and shall be unconditional and irrevocable to [Land Rover] for all debts whatsoever and wheresoever contracted by [Samcrete] with [Land Rover] in respect of Rover Group products from time to time delivered to the Distributor."

[9] Following the take-over of Rover Group by BMW in 1996, on 29 November 1996 Land Rover gave Technotrade six months' notice of termination of the distributorship agreement, making clear that the termination was not a reflection of any dissatisfaction with the performance of Technotrade, but was rather the result of a decision to select BMW's Egyptian distributor as the single importer for both BMW and Rover.

[10] A dispute developed between Land Rover and Technotrade as to the state of the account between them and the consequences of the termination of the distributorship.

[11] Land Rover claims that it is owed the sum of £ 646,162.89 by Technotrade in respect of unpaid invoices which it seeks to recover against Samcrete under the terms of the guarantee. Technotrade however asserts that on the overall account between the parties in respect of their mutual dealings under the distributorship, monies are due to Technotrade. Technotrade claims damages for wrongful termination of the distributorship. A written demand under the guarantee was made by Land Rover upon Samcrete on 20 July 1999, followed by a further written demand from Land Rover's solicitors. The claim form in these proceedings was issued on 11 April 2000 and, on 28 April 2000, an order was made giving permission to serve on Samcrete out of the jurisdiction. On 26 June 2000, the claim was amended prior to service, such service being acknowledged by Samcrete on 20 July 2000.

[12] Meanwhile, Technotrade had commenced proceedings in the Giza Court in Egypt against Land Rover seeking, in effect, an order for an account in relation to all sums due as between the parties under the distributorship agreement. Those proceedings have yet to be served upon Land Rover.

#### THE PROCEEDINGS BELOW

[13] Before the judge, Samcrete relied upon (1) the witness statement of Doctor Youssef, the chairman of Technotrade, in which he deposed to the nature of Technotrade's claims against Land Rover and asserted that their failure properly to consider such claims had led to the application made by Technotrade to the Giza Court for the appointment of an accountant expert to review the accounts between Land Rover and Technotrade; (2) the expert witness statement of Doctor Abdelwahed, an Egyptian lawyer, in which he stated that, according to Egyptian law, the content and effect of the guarantee was governed by Egyptian law; also that, under s 788 of the Egyptian Civil Code, a creditor is not able to take proceedings against a guarantor alone unless it has first taken proceedings against the debtor. He also stated that once the Egyptian Court has made a ruling in the action for an account, if it determines that Land Rover is owed sums by Technotrade, Land Rover will then be able to take steps to recover the sums due from Technotrade, and to proceed against Samcrete in default of recovery from Technotrade.

[14] In respect of Technotrade's Egyptian action, Doctor Youssef did not dispute the evidence for Land Rover that not only the language of the contract but also invoices, accounts and other correspondence passing between the parties were in English. However, he stated that it was logical for Technotrade to bring its claim before the Egyptian Court because all such invoices and related correspondence concerning vehicles, spare parts and other goods supplied by Land

Rover were at Technotrade's premises in Cairo, and that many of the staff involved in reconciling and resolving disputes on invoices were only capable of expressing themselves clearly in Arabic and not in English. He also asserted that all evidence and other documents necessary to prove Technotrade's further claims arising from termination of the distributorship agreement were at their premises in Cairo. These included correspondence and documents relating to the various heads of loss claimed, a large proportion of which were in the Arabic language.

[15] It was common ground between the parties below, as it has been before us, that the relevant governing principles in relation to an application to stay proceedings on the ground of forum non conveniens remain those formerly applicable under RSC Order 11 and set out in the well established authorities of *Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460, [1986] 3 All ER 843 and *Seaconsar Far East Limited v Bank Markazi Iran* [1994] 1 AC 458, [1993] 4 All ER 968, ie whether the court can be satisfied that there is another available forum, with competent jurisdiction, which is clearly a more appropriate forum for the trial of the dispute in the interests of the parties and the ends of justice.

[16] Before the judge it was effectively accepted by both parties that the appropriate forum for Land Rover's claim under the guarantee would be the country whose law governed the contract. It appears that it was initially argued on the part of Land Rover that the English choice of law clause in the distributorship agreement had the effect of an implied choice of the same law under the guarantee: Art 3 of the Rome Convention. However, it appears from the judgment that it was acknowledged by Mr Thompson for Land Rover that the deletion by Samcrete of the original express choice contained in the guarantee forwarded to it might preclude the inference of a choice of English law under Art 3 and the judge dealt with the matter on the basis that her task was to determine the applicable law in the absence of a choice of law by application of the principles set out in Art 4. The judge acknowledged that upon a simple application of the presumption contained in Art 4(2), Egyptian law would be the governing law as it was the country where the party (Samcrete) who was to effect the performance characteristic of the contract of guarantee (ie payment) had its central administration. She noted the argument of Mr Tolley for Samcrete that, in the light of the presumption, the Claimant had the burden of proving that the contract was more closely connected with another country (England) but stated that she found it possible to reach a conclusion without resorting to the burden of proof. She expressed herself satisfied that it was clear that the contract was more closely connected with England on the basis:

"... firstly that the contract is written in English. Secondly, that whilst the guarantor may effect its performance by action taken in Egypt, given its central basis there, the place of performance of the contractual obligation is England, as the guarantor is obliged to make payment to the creditor in that country, in Sterling or Sterling equivalent. Equally, on default the breach is a breach arising in England. Thus, it guarantees obligations owed in England to an English company with its central administration in England, those guaranteed obligations arising pursuant to an agreement which is itself declared to be governed by English law and to be subject to the jurisdiction of the English Courts."

[17] Later the judge referred to:

"...the fact that the underlying contract guaranteed itself has an express choice law clause and submission to jurisdiction is plainly a highly material consideration when determining with which country the contract is most closely connected."

She went on:

"I would not suggest for one moment that the guarantee contract must, so far as proper law is concerned, invariably follow the principal contract. But in this particular case the existence of that choice of law in the principal contract is of considerable relevance. In essence, the contract under consideration guarantees the performance of obligations by Technotrade which are themselves to be governed and interpreted by English law, and to be subject to the competent jurisdiction of the English Courts. The obligation as to payment, which is guaranteed, is to be performed by Technotrade in England, and if there is a breach that breach occurs within this jurisdiction also. The central administrative base of the surety has little relevance to the contract which is, I find, most closely connected to England .

It is plain that Technotrade would not have been able to operate an open account unless or until a guarantee of their obligations and liability to make payment under the distributorship agreement was provided. Accordingly, the execution of the guarantee was intimately bound up with the distribution agreement and payments due thereunder. I conclude therefore, that the contract was governed by English law."

#### THE GROUNDS OF APPEAL

[18] Mr Tolley for Samcrete has argued before us that, whereas the judge was correct to hold that art 3 had no application to this case, she erred in her approach to art 4 and the lack of weight which she attached to the presumption in para 2 of that Article. He complains that she treated that presumption as no more than a 'default' or 'fallback' provision in cases where it is difficult otherwise to decide the question with which country is the contract most closely connected. Whilst accepting that the presumption under art 4(2) is rebuttable, Mr Tolley has submitted that it should not be regarded as readily or easily rebuttable, but as requiring the demonstration of connecting factors of significant force, if not overwhelming weight, before the wording of art 4(5) comes into play. At the very least he invites us to adopt the view expressed by Dicey and Morris: *Conflict of Laws* (13th ed) at para 32-123(p 1240) that:

"It would be inconsistent with the scheme and purpose of Art 4 for the presumptions to have no role except where other factors are evenly balanced, and that, for the presumptions to be displaced, it must be shown (which probably means clearly) that the contract has a closer connection with some other country."

[19] In addition to that passage from Dicey and Morris, Mr Tolley relies (i) upon certain passages from the Giuliano and Lagarde Report on the Rome Convention OJ 1980 C282, to which the court is directed by s 3(3)(a) of the 1990 Act and which he submits assist him in this case; (ii) observations by Hobhouse LJ in *Credit Lyonnais v New Hampshire Insurance Company* [1997] 2 Lloyd's Rep 1 at 5-7 emphasising the need, if the presumption in art 4(2) is to be disregarded, to look for a geographical connection in relation to the performance of the contract pointing elsewhere than the country in which the party who is to effect the performance which is characteristic of the contract is located; (iii) a decision of the Dutch Supreme Court in *Société Nouvelle des Papèteries de l'Aa v Machinefabriek BOA* (1992) *Nederlandse Jurisprudentie* No 750, as noted in the commentary by THD Struycken at 1996 LMCLQ 18. In that case the court propounded a rule of thumb that the 'main rule' set out in art 4 (2) should be disregarded only if, in the special circumstances of a particular case, the place of business of the party who is to effect the characteristic performance contract has no real significance as a connecting factor. Mr Tolley submits that, if the judge had given proper recognition to the weight of the presumption or 'main rule', in art 4(2), she would have disregarded, or, at any rate discounted, the significance of the various other factors mentioned by her and would have found in favour of Egyptian law.

[20] Mr Thompson for Land Rover, on the other hand, submits as follows. The first point which he takes appears in the first ground of Land Rover's Respondent's Notice, namely that, on ordinary principles of construction under English law (the *lex fori*), by reason of the circumstances in which the contract of guarantee was concluded, the parties impliedly chose English law for the purposes of art 3 and that the judge should so have decided, thus rendering an investigation under art 4 unnecessary. In this respect, he relies upon the so-called doctrine of 'infection', submitting that it is a general principle recognised by the English courts that, when a contract such as a contract of guarantee is dependent or parasitic upon another principal contract, in the absence of an express choice of law the parasitic contract will be governed by the same law as the principal contract: see for instance *Wahda Bank v Arab Bank PLC* [1996] 1 Lloyd's Rep 470 and *Broken Hill PTY Co Limited v Xenakis* [1982] 2 Lloyd's Rep 304.

[21] In relation to the implied choice said thereby to arise, Mr Thompson submits that, again under English principles of construction, evidence that Samcrete had deleted the choice of law clause in the guarantee as originally proffered by Land Rover is irrelevant and should be ignored as one of 'the circumstances of the case' referred to in art 3.

[22] Alternatively, Mr Thompson supports the decision of the judge for the reasons given by her in the passages from her judgment which I have quoted at paras 16 and 17 above. In this connection he has submitted that the presumption in art 4(2) is not to be regarded as a 'fortified' presumption in the sense which appears to have been applied by the Dutch Supreme Court in *Société Nouvelle des Papétries de l'Aa*, but simply a presumption which calls for clear and convincing rebuttal by a party who asserts that the circumstances as a whole demonstrate a closer connection with another country. In that respect he, too, is content to adopt the statement in *Dicey and Morris* which I have already quoted (see para 18 above). Finally, Mr Thompson relies upon two recent decisions of English judges at first instance which, he submits, (whether expressly or by implication) rejected the 'weighted' approach of the Dutch Supreme Court and have rather taken the words of art 4 at face value: see *Definitely Maybe (Touring) Limited v Marek Lieberberg Konzertagentur Gmb* [2001] 1 WLR 1745, [2001] 2 Lloyd's Rep 455 (Morison J) and *Kenburn Waste Management Limited v Heinz Bergmann* 11 May 2001, unreported, (Pumfrey J).

### ARTICLE 3

[23] Because of the circumstances in which the contract of guarantee was agreed, it seems to me that the judge was right to hold that she could not be satisfied that the parties had made a choice of law for the purposes of art 3. There was plainly no express choice, and nor was any choice demonstrable from the terms of the contract. As to "the circumstances of the case", I would accept that if, in applying the rules of evidence of the *lex fori*, the Court were confined to considering the terms of the contract itself, construed against the background of the underlying distributorship contract with its express choice of English law, and eschewing all reference to the negotiations between the parties, there would be strong arguments for inferring a choice of English law in respect of the contract of guarantee: see *Wahda Bank v Arab Bank* (supra) at pp 472-3. However, in relation to choice of law, in the light of the incorporation into English law of art 3 of the Convention, I do not think the court is so confined, and I consider that it is entitled to have regard to the fact that when Land Rover requested the inclusion of an English choice of law clause Samcrete deleted it from the original draft before signing the guarantee.

[24] Article 18 (Uniform interpretation) provides:

"In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application."

[25] It is suggested at para 32-078, p 1223 of *Dicey and Morris* (supra):

". . . that the question of interpretation should be looked at from a broad Convention-based approach, not constrained by national rules of construction. This is supported by the fact that whether an actual choice of law is to be inferred from the circumstances depends on it "being demonstrated with reasonable certainty" under Art 3(1), and not on purely national rules relating to terms to be implied from the contract itself or from surrounding circumstances."

[26] I agree, as did Clarke J in *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380 at 387, where he also observed that:

"It is indeed appropriate to adopt a purposive approach and not to construe the Convention in a narrow literal way."

[27] In that case Clarke J gave a useful review of academic authority as follows:

"It is sufficient to say that the party relying upon art 3 must demonstrate with reasonable certainty that the parties have chosen a particular law as the governing or applicable law. I accept the submission that, as the Giulano-Lagarde report says, it must be a real choice which the parties had a clear intention to make. In *Redfern & Hunter on International Commercial Arbitration* (2nd ed at p 123) the authors say that in the absence of an expressed choice the tribunal must look for a tacit choice of law which they say may be known as an implied inferred or implicit choice. They add that art 3 makes it clear that a tacit choice must only be found where it is reasonably clear that it is a genuine

choice by the parties. I accept that approach. See to the same effect Jaffey in (1984) 33 ICLQ 545."

Mr Dunning further relies upon an article in [1979] Current Legal Problems, where Professor Diamond said (at p 160):

"The principle that the parties can choose the governing law is not intended to introduce the possibility of implied choice of law. Where there is no choice the Court is not expected to define what law the parties would have chosen if they had thought about it. Freedom of choice operates only if there is genuine choice.

However I agree with Dr Plender (op cit at par 5.06) that it is plain from the wording of art 3 and the Giulano-Lagarde report that the Convention contemplates an implied choice of law, provided that the choice is a real choice which appears with sufficient clarity from the terms of the contract as a whole, or the circumstances of the case."

[28] In a recent decision of the Court of Appeal in *Aeolian Shipping SA v ISS Machinery Services Limited* [2001] EWCA CIV 1162, [2001] 2 Lloyd's Rep 641, I expressed the view that:

"The circumstances which may be taken into account when deciding whether or not the parties have made an implied choice of law under Art 3 of the Rome Convention (whether by initial choice or subsequent change) range more widely in certain respects than the considerations ordinarily applicable to the implication of a term into a written agreement, in particular by reason of the reference in Art 3(1) to 'the circumstances of the case'." (paragraph 16)

and at paragraph 18, I implicitly accepted that the correspondence prior to the undertaking in relation to which a 'choice of law' issue arose in that case would have been admissible upon that issue had it been available.

[29] It seems to me that the deletion by Samcrete of the English choice of law/jurisdiction clause proffered by Land Rover is a positive indication that the parties made no choice as to the governing law, in the sense that, when the circumstances are considered, no clear common intention is apparent that English law should apply. The effect of that omission is to leave the question for determination under Art 4 on the criteria therein set out.

[30] Accordingly I agree with the judge that the question of the governing law fell to be decided under Art 4.

#### ARTICLE 4

[31] The role of Art 4 within the scheme of the Rome Convention has been helpfully described by Hobhouse LJ in the *Credit Lyonnais* case (supra) at p 5 where it is stated:

"Article 4 deals with the applicable law in the absence of choice and lays down the general rule that, to the extent that the law applicable has not been chosen according to art 3:

' . . . the contract shall be governed by the law of the country with which it is most closely connected.'

paras 2 to 4 of art 4 lay down certain presumptions . . ."

[32] Article 4(2) is then set out and the passage continues:

"The test in this paragraph is a test which I identify as the closest connection of the contract with a country by identifying the country in which the primary performing party is located. Thus, the test looks first at what is involved in the performance of the contract, then identifies the party who is to provide that performance and then connects that party to a country. Paragraphs 3 and 4 similarly refer to the location of the subject-matter of the contract or of a performing party.

It is therefore a test which consistently with the logic of the drafting does not look for some referred or imputed intention but rather implies a criterion which takes into account the performance of the contract and a geographical

location. As the commentators point out, this criterion gets away from the concept of simply having regard to where the contract is made, nor is it, as such, a criterion of place of performance. It is a criterion which seeks to identify the country in which the party providing the significant performance is located. It is also to be observed that, just as it is not a test directed to ascertaining intention, so it is not directed to identifying a legal system with respect to which the intention to enter into contractual relations must be taken to refer. The test fundamentally departs from the logic of the approach of the conflicts of laws rules or English private international law for ascertaining the proper law of a contract.

The word used in art 4 of the Rome Convention is 'presumption'. The commentators refer to it as a 'rebuttable' presumption. But para 5 of the Article goes further: it provides that where the 'characteristic performance' cannot be determined the presumption in para 2 is not to be made and, in any case the presumptions in paras 2 to 4 -

. . . shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

The presumption is therefore displaced if the court concludes that it is not appropriate in the circumstances of any given case. This, formally, makes the presumption very weak but it does not detract from the guidance that para 2 gives as to what is meant by 'the country with which it is most closely connected' and does not detract from the need to look for a geographical connection. This reading of art 4 is also supported by the commentators." (emphasis added)

[33] A little further on, when dealing with the Second Council Directive dated June 22, 1988 regarding the law applicable to insurance contracts, Hobhouse J stated in a passage which applies equally to the construction of Art 4:

"It is always important to have in mind that [the provisions] are intended to have a uniform international implication. Their provisions and the Act by which they are incorporated into English law should not be given a construction deriving from specifically English concepts which are not within the scheme of the relevant International Convention."

[34] This view is of course a reflection of art 18 (uniform interpretation) which provides that:

"In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application."

[35] Article 4 may conveniently be divided into three main parts. First, the basic rule that the contract shall be governed by the law of the country with which it is most closely connected. Second, the basic general presumption based on the concept of characteristic performance which requires identification of the country with which the contract is most closely connected (there are also two special presumptions in art 4(3) and (4) in respect of two particular types of contract). Third, the provision in art 4(5) which provides that the presumption should be disregarded where it appears that the contract is most closely connected with another country. While this might suggest a three stage exercise by the court in approaching the problem of determining the applicable law in the absence of choice, it seems to me that art 4(1) is no more than a paragraph which introduces the concept and labels the test as that of "closest connection" before indicating the process of reasoning to be applied in determining it. As stated in the Giuliano and Lagarde report, (p 21):

"Article 4 (2) gives specific form and objectivity to the, in itself, too vague concept of "closest connection."

[36] Whereas, at that point, the report goes on to suggest that the presumption in respect of characteristic performance is likely to be determinative:

". . . even in situations peculiar to certain contracts, as for example in the contract of guarantee where the characteristic performance is always that of a guarantor, whether in relation to the principal debtor or the creditor',

it elsewhere recognises that Art 4(5) provides for the possibility of disregarding the presumption in para (2)

because:

'.. given the entirely general nature of the conflict rule contained in Art 4, the only exemptions to which are certain contracts made by consumers and contracts of employment, it seemed essential to provide for the possibility of applying a law other than those referred to in the presumptions in para 2, 3 and 4 whenever all the circumstances show the contract to be more closely connected with another country.

Article 4(5) obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumptions in paras 2, 3 and 4. But this is the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract."

[37] The approach of the English courts to the application of art 4 has been essentially a two stage process ie first to identify the characteristic performance of the contract and the country of the party who is to effect it and then to ascertain what factors, if any, might, should lead the court to disregard the presumption under 4(5), the burden of proof in that respect lying upon the party who asserts that the presumption in art 4(2) should be disregarded: see the *Credit Lyonnais* case (supra) and *Bank of Baroda v Vysya Bank Limited* [1994] 2 Lloyds Law Rep 87, in which (at p 93) Mance J quoted and applied the comment in *Dicey & Morris* (12 Ed) at pp 1137-1138:

"Inevitably the solution of individual cases will depend on the facts, but in principle it is submitted that the presumption may be most easily rebutted in those cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract."

See also the approach of Morison J in the *Definitely Maybe v Marek Lieberberg* (supra) at para 15 p 1750.

[38] Under a contract of guarantee, there is no room for doubt that the obligation characteristic of the performance is the payment of money by the guarantor and thus that a simple application of the presumption in art 4(2) would render the law of Egypt the governing law in this case.

[39] By way of contrast, under the rules of English private international law applicable prior to importation of the presumption by the 1990 Act, little importance would have been attached to the residence of the debtor in a case of this kind. The notional task of the court in deciding the 'proper law' was that of inferring a choice by the parties, albeit none had been expressed. That task compendiously involved the considerations now required to be looked at separately under arts 3 and 4 of the Convention, the former of which looks to the common (subjective) intention of the parties as to the system of law governing the contract, whereas the latter in the absence of an express or tacit choice of law, looks to localise the contract on the basis of objective considerations connecting the contract to a particular country and giving precedence to the residence of the party performing the characteristic obligation, unless the circumstances as a whole demonstrate a closer connection to another country.

[40] The practical difficulty which the court faces in performing the exercise required under art 4 is the weight to be attached to the presumption in 4(2) in any given case or, put another way, determining the strength of the connecting factors properly to be taken into account before it is appropriate to disregard the presumption laid down by art 4(2) in the interests of achieving a uniformity of approach. As Morison J observed in the *Definitely Maybe* case at para 7 on p 1747-8:

"Paragraph (2) must have been inserted to provide a "normal" rule which it is simple to apply. Giving wide effect to para (5) will render the presumption of no value and represent a return to the English common law test to ascertain the proper law, which places much less weight on the location of the former and much more on the place of performance, and the presumed intention of the parties."

[41] While a straight reading of the words of art 4 renders the presumption "formally very weak" (per Hobhouse LJ in the *Credit Lyonnais* case at p 5), unless art 4(2) is regarded as a rule of thumb which requires a preponderance of contrary connecting factors to be established before that presumption can be disregarded, the intention of the

Convention is likely to be subverted. At the same time, as the Guiliano and Lagarde Report appears to acknowledge at p 22, because the overall rule is intended to apply across a wide range of types of contract, it is essential to leave a measure of discretion to the court to be exercised on a basis which takes into account the nature and circumstances of the particular contract in question. To date, the high point of the jurisprudence justifying the decisive application of the presumption in all but the most exceptional of cases is *Société Nouvelle des Papétieries de l'Aa* in which the court stated:

"... it follows both from the wording and the structure of art 4, as well as from the uniformity in the application of the law which has been intended with the Convention, that this exception to the main rule has to be applied restrictively, to the effect that the main rule should be disregarded only if, in the special circumstances of the case, the place of business of the party who is to effect the characteristic performance has no real significance as a connecting factor."

[42] That quotation is taken from a translation by T H D Strucyken in an illuminating commentary contained in [1996] LMCLQ18, in which the author points out the difference in approach of the Dutch court from that of the English courts, in particular in *Bank of Baroda v Vysya* (supra). He points out that, in each case, the court concerned could be accused of having applied the previous conflict rules of their respective countries under the guise of the Rome Convention. He also points out, however, that the Dutch decision does not indicate whether its guidelines apply to guarantees. In that respect he refers to the decision of the French Court of Appeal at Versailles in *Bloch v Lima*, 6 February 1991, relating to a contract of guarantee. There, the court (like the judge in this case) applied art 4(5), treating as decisive the law governing the debts guaranteed. That decision has in turn been the subject of criticism by those who take the view that art 4 may have precluded the presumption of "accessory allocation" (or "infection": see *Wahda Bank v Arab Bank*) on the basis that the law applicable to the contract under consideration must in principle be determined on its own without reference to any greater transaction of which it forms part or with which it is connected. However, the view last stated does not appear to be generally accepted. Writing in the *Virginia Journal of International Law* Vol 22 1982, Lagarde at pp 97-8, observes:

"But the presumption based on characteristic performance is not absolute... the presumption shall even be disregarded when it appears from all of the circumstances that the contract is more closely connected with a country other than the one in which the party who is to supply the characteristic performance has his place of business. A subcontractor, for example, might be governed by the same law governing the principal contact between the contractor and the employer rather than by the law of the country in which the subcontractor has his place of business."

[43] Further, Dicey & Morris (supra) assume at para 32-124 p 1240-1 that:

"... the presumption may most easily be rebutted in those cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract. It has already been seen that the presumption is designed to lead to the country of the residence or place of business of the party whose performance characteristic, and that usually that country will coincide with the place of performance, because normally contracts are performed in the country of that party's place of business. The situations in which they are performed elsewhere may (but by no means inevitably) provide material to rebut the presumption."

## CONCLUSION

[44] In the light of that lengthy preamble, I approach the grounds stated by the Judge in her decision in this case. It seems plain to me that, having accepted the position that the choice of (English) law under art 3 was not established, the judge erred in treating the choice of law clause in the distributorship contract as largely determinative under art 4. In so doing, she appears to have overlooked the change of focus required when moving from one to the other. In this respect I am bound to say that she does not appear to have had the assistance of a full citation of authority which we have received on this appeal. Indeed, before us, the skeleton argument originally lodged for Samcrete conceded that the existence of the choice of law clause in the distributorship contract was a factor to be considered by the court; it merely attacked the weight which the judge had attached to that factor. However, following a request by the court for further

argument on the question in the light of the Credit Lyonnais case, Mr Tolley's position shifted to that propounded by Hobhouse LJ when considering the effect of the Insurance Companies Act 1982 and the Second Council Directive which give rise to analogous questions of interpretation:

".. the question of choice and absence of choice becomes irrelevant to the question of ascertaining with what State the contract is most closely connected. Similarly, to refer to contemplation by one party or another that certain local laws may or may not be relevant is to be influenced by considerations of inferred choice and connection with legal system and not with questions of performance and the location of the performing parties."

[45] In the case of a guarantee, as it seems to me, in the absence of an express or inferred choice of law under art 3, the art 4(2) presumption falls to be applied in a situation where the obligation of payment is the characteristic obligation of the contract, and indeed its principal concern. It should therefore only be disregarded in circumstances which clearly demonstrate the existence of connecting factors justifying the disregarding of the presumption in art 4(2).

[46] In this particular case, the judge referred to the fact that the guarantee was written in English. That in itself seems to me of little consequence, given the general use of English as a language of international commerce. She also relied upon the fact that Land Rover, as one of the parties to the guarantee, was situated in England. Again, that fact, taken on its own, lacks substance given that the very issue under consideration by the court (in the sense of the very question which art 4 is designed to resolve) arises when there is a dispute between two parties to a contract as to whose law of domicile should be regarded as the governing law. The presumption in 4(2) is designed to resolve the issue in favour of the party performing the characteristic obligation.

[47] The facts identified by the judge which appear to me to be of greater significance in connecting the contract with England are that the obligation of payment under the guarantee was to be performed in England so that any breach of the guarantee by failure to pay in accordance with a valid demand would similarly take place in England and there give rise to the cause of action under the guarantee. It has been argued by Mr Tolley that, in an international trading contract of this kind, the place of payment is a technical accounting matter rather than one of commercial significance. Nonetheless, from the point of view of the enforcement of the guarantee, it is a matter of considerable importance to the creditor.

[48] In addition, although this matter was not the subject of argument before the judge, it seems to me pertinent to have regard to the consideration stated in the guarantee namely the obligation of Land Rover to continue to supply Rover Group products to Samcrete under the distributorship agreement. Reference to the agreement for the purpose of elucidating the place for performance of that obligation shows that such supply was 'delivery ex UK works' and payable in Sterling unless otherwise specified by Land Rover. Thus, not only was Samcrete's obligation that of payment in England under the guarantee without set off or counterclaim, but Land Rover's obligation to supply the product for which payment was to be made was similarly to be performed in England. Accordingly, if looked at autonomously, what might be called the centre of gravity of the guarantee was located squarely in England.

[49] In those circumstances, it seems to me that, viewing the contract of guarantee autonomously and without regard to the provisions of the underlying contract save for the purpose of identifying the location of Land Rover's obligations under the guarantee, there is sufficient material before the court to justify disregard of the art 4(2) presumption. It is therefore not necessary to decide whether and to what extent the existence of a choice of law clause in a contract the subject of a guarantee, if ineffective to give rise to a tacit choice of law under art 3 in respect of the guarantee itself, may nonetheless, be regarded as a connecting factor in the sense required by art 4. My inclination would be to say that it may not, for the reasons adumbrated by Hobhouse LJ in the Credit Lyonnais case. However, it is not necessary so to decide and the variety of circumstances and contexts in which such a question may arise make it undesirable to do so.

[50] While I am satisfied that the judge was wrong in her approach, which failed to distinguish between the potential role of a choice of law clause in the underlying contract as between art 3 and art 4, I would uphold her

(Transcript: Smith Bernal)

conclusion that, in respect of the contract of guarantee before the court, the presumption contained in art 4(2) should be disregarded pursuant to the proviso in art 4(5).

[51] Because the argument has proceeded before us (as was apparently the case below) on the basis that the governing law issue should be determinative of the outcome of Samcrete's application for a stay, I would dismiss this appeal.

**DISPOSITION:**

Appeal dismissed.

**SOLICITORS:**

Wragge, Birmingham; Shadbolt, Surrey

---- End of Request ----

Print Request: Current Document: 2

Time Of Request: Friday, October 22, 2010 13:43:37