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CONTRACTS IN ENGLISH PRIVATE INTERNATIONAL LAW*

By P. B. CARTER[1]

THIS article is primarily a commentary upon the way in which various problems of choice of law relating to transnational commercial contracts generally are dealt with in the English courts. Choice of law and jurisdiction cannot, however, be sensibly treated in complete isolation from each other in this area. First, therefore, something should be said about the latter—partly because often in practice the problem of identifying the applicable or 'proper' law arises in a jurisdictional context. This tendency is largely due to the fact that one of the grounds upon which leave may be sought in an action on contract to serve a defendant, who is outside the jurisdiction, is that the contract 'is by its terms, or by implication, governed by English law'.[2] Moreover, although it has been established that a choice of jurisdiction clause in a contract, that is to say a clause providing that any dispute between the parties is to be referred to the exclusive jurisdiction of a particular court, does not always denote as well choice of the application of its law,[3] it will very often be treated as being strongly indicative of this.[4] Also, a question can arise as to the circumstances in which such a clause, although valid, may nevertheless be disregarded. The issue of its validity is then a matter to be decided by reference to the law which would be the applicable or 'proper' law.[5] Of course the clause, to be effective, must also not contravene any statutory prohibition against the ousting of the jurisdiction of the English court, which statutory prohibition either by its terms or by established principles of interpretation applies to the contract. Finally, in the various jurisdictional contexts in which a court is called upon to exercise a discretion, the identity of the applicable law will often be a factor to which regard may, or should, be had.

I

The general common law rule regulating the assumption of jurisdiction by an English court to entertain any action *in personam* requires that the

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[2] RSC, Ord. 11, r. 1 (1) (d) (iii), formerly r. 1 (1) (f) (iii).

[3] *Compagnie Tunisienne de Navigation SA* v. *Compagnie d'Armement Maritime SA*, [1971] AC 572.

[4] See, e.g., Lloyd J in *Atlantic Underwriting Agencies Ltd.* v. *Compagnia di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240.

[5] For a neat illustration of this see the judgment of Bingham J in *Dubai Electricity Co.* v. *Islamic Republic of Iran Shipping Lines*, [1984] 2 Lloyd's Rep. 380.

defendant be served personally[6] within the law district constituted by England and Wales with a writ or originating summons, or that he submit to the jurisdiction of the court. The rigidity of the common law position was first very substantially modified by the Common Law Procedure Act 1852, and there are now many situations in which leave may be sought to serve process upon a defendant abroad even though he has not submitted to the court's jurisdiction. The principal sets of circumstances in which the court, on leave being sought, has the discretionary power to allow such service are set out in the Rules of the Supreme Court, Order 11, Rule 1. These include important circumstances of general scope, such as that the person against whom relief is sought is domiciled within the jurisdiction.[7] Without prejudice to this generality Rule 1 (1) (d) and (e) (formerly Rule 1 (1) (f) and (g) and Rule 2) of Order 11 set out circumstances in which leave may be sought in contract cases.[8] Rule 1 (1) (d) permits a court to grant leave if the contract '(i) was made within the jurisdiction, or (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) is by its terms, or by implication, governed by English law, or (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract'. Lord Wilberforce has recently reaffirmed that the formula used in paragraph (d) (iii) above is equivalent to a requirement that the proper law of the contract should be English law. This involves treating the words 'by implication' as covering both the situation where the parties' mutual intention can be inferred and the situation where, no such inference being possible, it is necessary to seek the system of law with which the contract has its closest and most real connection.[9] Rule 1 (1) (e) permits the grant of leave if the action is 'in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction'.

Consequent upon the coming into force on 1 January 1987 of the Civil Jurisdiction and Judgments Act 1982[10] the position relating to jurisdiction

[6] A company registered in England is now deemed to be present by virtue of its incorporation. A company registered in Scotland carrying on business in England may be served at its principal place of business in England. A similar general principle, although the rules are more complex, applies in the case of a foreign corporation.

[7] RSC, Ord. 11, r. 1 (1) (a), formerly r. 1 (1) (c). Domicile in this context means domicile as defined in the Civil Jurisdiction and Judgments Act 1982, Part V: see below.

[8] See, too, Rule 1 (1) (g), formerly Rule 1 (1) (b), in which additional provision is made in relation to land situated within the jurisdiction.

[9] *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.*, [1984] AC 50, 69.

[10] This Act *inter alia* brings into force the rules of jurisdiction provided for in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended by the 1978 Accession Convention. For a detailed analysis of the provisions and effects of this Act, see Collins, *The Civil Jurisdiction and Judgments Act 1982* (1983).

has been radically changed in cases coming within its scope in point of subject-matter and, in particular, in cases in which the defendant is 'domiciled' in a Contracting State.[11] In respect of matters coming within the scope of the Brussels Convention, although the English court now has jurisdiction as of right on the basis of the domicile of the defendant, it is generally precluded from taking jurisdiction in respect of such matters if the defendant is domiciled in another Contracting State.[12] In this context 'domicile' for the purposes of the laws of the United Kingdom broadly speaking denotes, in the case of an individual, residence which is characterized by a substantial connection,[13] and in the case of a corporate defendant, incorporation or place of central management or control.[14]

It can be seen that, although jurisdiction will be restricted in cases which fall within the terms of the Civil Jurisdiction and Judgments Act, generally speaking an English court's assumption of jurisdiction in contract actions can be wide-ranging.[15] However, two important limitations upon the actual assumption of jurisdiction in practice are to be noted.

First, although in cases in which a defendant has been served with process within the jurisdiction or in which he has submitted to the jurisdiction, the plaintiff is entitled as of right to demand that jurisdiction be taken, the defendant may in appropriate circumstances seek a stay of the proceedings. As a result of striking developments that have taken place in the course of little more than a decade the task facing a defendant, who seeks a stay of the proceedings of a jurisdictionally competent English court, is markedly less daunting than it was previously. Three of the four landmark House of Lords cases[16] in this development were not in fact contract actions *in personam*, but there can be little doubt that their liberalizing effect is general. In *MacShannon* v. *Rockware Glass Ltd.* Lord Diplock said:

> In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.[17]

It has subsequently become clear that the onus of proof is upon the

[11] At the time of writing, the Contracting States are all the European Community States except Eire, Spain, Portugal and Greece.

[12] Exceptional cases in which by virtue of Article 16 of the Convention courts will have exclusive jurisdiction regardless of domicile will seldom be relevant in contract actions.

[13] Section 41. [14] Section 42.

[15] The revised Ord. 11, r. 1 (1), omits the previous provisions for defendants domiciled or ordinarily resident in Scotland or Northern Ireland as they are covered by Schedule 4 to the 1982 Act.

[16] *The Atlantic Star*, [1974] AC 436; *MacShannon* v. *Rockware Glass Ltd.*, [1978] AC 795; *The Abidin Daver*, [1984] AC 398; *Spiliada Maritime Corporation* v. *Cansulex Ltd.*, [1986] 3 WLR 972.

[17] [1978] AC 795, 812. For comments on the most recent of the four landmark cases, *Spiliada Maritime Corporation* v. *Cansulex Ltd.*, [1986] 3 WLR 972, see 'Decisions of British Courts during 1985-6', pp. 429 ff. below.

plaintiff so far as the latter requirement is concerned. The burden is initially upon the defendant seeking to avoid suit in England and it is still a heavy one; but, if he discharges it, and if then the plaintiff is unable to discharge the burden which consequently falls upon him, or, the plaintiff having discharged that burden, the court in its discretion resolves the balance of conflicting interests in the defendant's favour, the English proceedings will be stayed.

Secondly, it is to be remembered that the availability of leave to serve an absent defendant is never (except in a few specific statutory cases) available as of right.[18] It has been emphasized that the plaintiff seeking leave 'must show that the case comes clearly within one of the heads of R.S.C., O.11; and further that the case comes not merely within the letter but also within the spirit of the rule'.[19] Moreover, as the application for leave is made *ex parte* he should make a full and fair disclosure of all relevant facts, and he must show that he has a good arguable case on the merits. The effect of satisfaction of these requirements is no more than to ground the court's discretion to allow service upon the absent defendant; and, as has been frequently emphasized, caution is to be exercised before granting leave.

These manifestations of jurisdictional restraint are to some extent to be contrasted with the way in which, at least until recently, and at least in practice, English courts have sometimes allowed the institution of proceedings in England in breach of contractual foreign exclusive jurisdiction clauses. The burden upon a plaintiff who seeks to bring an action in England on a contract, one of the terms of which is that all disputes between the parties arising out of that contract are to be submitted to the exclusive jurisdiction of a foreign tribunal, has been said always to be a heavy one, and moreover to be especially heavy in the case of the plaintiff who is applying for leave to serve a foreign defendant abroad, as distinct from the plaintiff who is seeking to institute proceedings in England against a defendant who is present there. Nevertheless the matter is ultimately one of discretion.[20] Guidance in the exercise of this discretion is to be found in the oft-quoted words of Brandon J in *The Eleftheria*.[21] His Lordship emphasized that 'the discretion [to stay the English proceedings] should be exercised by granting a stay unless strong cause for not doing so is shown'. It is submitted that considerations of the general appropriateness of a *forum* and of the convenience and expense of the parties, although often decisively relevant in more general contexts, should in this particular context always be seen against the additional factor that here the court is being asked to countenance, and indeed to

[18] See RSC, Ord. 11, r. 4 (2).

[19] *Atlantic Underwriting Agencies Ltd.* v. *Compagnie di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240, *per* Lloyd J at p. 245.

[20] It is to be noted, however, that by virtue of the Civil Jurisdiction and Judgments Act 1982, Article 17 of the Convention, which deals with exclusive jurisdiction clauses, removes the element of discretion in cases to which it applies.

[21] [1970] P 94, 99.

facilitate, a deliberate breach of a term of a valid contract. There is room for the view that English courts have in the past sometimes been too ready to discover a 'strong cause' for refusing to stay proceedings brought in breach of a foreign exclusive jurisdiction clause.[22] However, the decision of the Court of Appeal in *The El Amria and El Minia*[23] is perhaps indicative of a currently emerging approach. There a shipper agreed to carry onions from Egypt to Europe on two ships. This agreement contained no exclusive jurisdiction clause; but the bills of lading issued pursuant to it did incorporate such a clause in relation to the courts of Egypt. The cargo owner sued the shipper in England for damage to the cargo. At first instance the shipper was refused an application for a stay, but the Court of Appeal, allowing the defendant's appeal, granted a stay. In a sense the court had to prejudge the question of choice of law in that it referred to the law of Egypt in order to decide that the contract between the parties was embodied in the bills of lading and thus that the jurisdiction clause was operative.

An important aspect of the interaction of jurisdiction and choice of law is to be seen in three jurisdictional contexts in which the court is called upon to exercise a discretion. First, when exercising its general discretion to stay English proceedings in accordance with the principles which have emerged in the *MacShannon* v. *Rockware Glass Ltd.*[24] line of cases referred to above, the identity of the proper law can be a factor—occasionally it seems an important factor—to be taken into account. For example in *The Hidi Maru*[25] this factor—there that the applicable law was English law—seems to have played a major role in leading the Court of Appeal to the conclusion that English proceedings should not be stayed even though most other relevant factors pointed clearly to Kuwait. Secondly, when a court is considering whether to grant leave to serve an absent defendant, the likelihood of an English court, if jurisdiction is taken, applying English law may influence the court in exercising its discretion. In a contract action, therefore, the fact that English law would be the *lex causae* is not only a circumstance that by virtue of Order 11, Rule 1 (1) (d) (iii), grounds the power to grant leave, but it can also operate as a factor making for the exercise of that power. Thirdly, Brandon J in *The Eleftheria*,[26] when listing factors which a court should particularly take into account when considering whether 'strong cause' had been made out to allow proceedings in England in breach of a foreign exclusive jurisdiction clause, included 'Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects'.[27]

[22] See, e.g., *The Fehmarn*, [1958] 1 WLR 159, and *The Vishra Prabha*, [1979] 2 Lloyd's Rep. 286; but contrast *Trendtex Trading Corporation* v. *Crédit Suisse*, [1982] AC 679; *The Kislovodsk*, [1980] 1 Lloyd's Rep. 183; *The Star of Luxor*, [1981] 1 Lloyd's Rep. 139; *The Biskra*, [1983] 2 Lloyd's Rep 59; *The Sennar* (*No. 2*), [1985] 1 WLR 490.

[23] [1982] 2 Lloyd's Rep. 28.

[24] [1978] AC 795.

[25] [1981] 2 Lloyd's Rep. 511.

[26] [1970] P 94. See above.

[27] [1970] P 94, 100.

In almost every branch of private international law it is only in a crudely formalistic sense that questions of jurisdiction and questions of choice of law are to be regarded as being totally separate. Their interaction in the English private international law relating to commercial contracts is particularly marked. That this is so stems largely from the nature of the circumstances in which an English court may, and in practice will, take jurisdiction to determine contractual issues. This makes it important to realize that, when considering and assessing the merits of the choice of law rule in this branch of private international law, one is considering and assessing, not only the appropriateness of the application of the law indicated by that choice of law rule by a jurisdictionally competent court, but also in significant measure the appropriateness of its influence on the question of the court's jurisdictional competence.

II

The formulation of choice of law rules of *general* applicability to contracts in transnational fact situations must unavoidably be especially difficult. The main reasons for this are several. First, the concept of contract is itself broad and loose. Economically and otherwise it is a concept that embraces a wide and diverse range of transactions. In this it can be contrasted with, for example, the concept of marriage or that of succession to immovable property. Secondly, the legal issues to which contract litigation can give rise differ widely in category and in character: most systems of domestic law provide for many differing forms of relief in such cases. Thirdly, there is an exceptionally wide range of possible geographic spread. That is to say, there may be many potential or possible connecting factors in a single fact situation: the nationalities, domicils and residences of the parties (of whom there may be several), their places of business (which may be several), the place in which the contract was made, the place or places of contemplated performance, the place of alleged breach, the use of the form and legal terminology of a particular country, the fact that the parties have evinced an intention that any dispute arising out of the contract is to be determined by the courts of a particular country and/or that the law of a particular country should determine the rights and obligations of the parties, the *locus* of the subject-matter of the contract, etc. Again, this contrasts with, for example, a case of marriage, where the only obviously possible connecting factors are the place of celebration and the pre-marriage, or intended or actual post-marriage, nationalities, domicils or residences of the two parties; or with a problem of succession to immovables where the only obviously possible connecting factors could be the *situs* and the nationality, domicil or residence of the deceased.

Two alternative lines of approach could be taken to the attempted accommodation of these various diversities. One would involve the formulation of a detailed and complex pattern of choice of law rules. The

other would take the form of one single, but highly flexible, rule. Various forms of compromise between these two approaches could be possible, but the English common law, and indeed most legal systems, have adopted the latter general approach. A limited number of specialized (but important) classes of contract are accorded individual treatment. For example, a contract for the carriage of persons or of goods by land, sea or air, which is within the scope of a relevant international convention on transport, will be governed by the provisions of that convention in so far as they have been incorporated into English law; or, again, transnational questions relating to bills of exchange or promissory notes must be determined in accordance with the Bills of Exchange Act 1882 to the extent that it is applicable.[28] But, these special categories of contract apart, the response of the common law to the problem of choice of law has basically been in terms of a generally applicable law—generally applicable in the sense that it applies to most types of contract and in the sense that it applies to most types of contractual issue. This pre-eminent governing law is dubbed in common law jurisdictions 'the proper law' of the contract. It is what is referred to in the EEC Convention on the Law Applicable to Contractual Obligations as 'the applicable law'.[29] It is the law that is generally dominant, but it can be modified, supplemented or dethroned as it applies to different aspects of the contract. A threshold and fundamental question is as to how the proper law of a contract is to be determined. The other basic question is as to the extent of its role: in other words the question as to what part is to be played by laws other than the proper law.

III

Dicey and Morris in Rule 180 define the proper law of a contract as 'the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection'.[30] It is clear that initial focus is upon the implementation of the intention of the parties. Historically this largely derives from the words of Willes J pronounced in the Court of Exchequer Chamber in 1865 in *Lloyd* v. *Guibert*: 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter . . .'.[31] In these oft-quoted words lie the seeds of two pregnant ambiguities. One is as to the import of the words 'or rather'. Is what follows these words to be seen as an improved reformulation of

[28] For the position relating to international sales of goods, see the UN Convention on Contracts for the International Sale of Goods (1980), should the UK subscribe to it.

[29] See, e.g., Article 10 of the Convention.

[30] *The Conflict of Laws* (11th edn., 1987), pp. 1161–2.

[31] (1865) LR 1 QB 115, 120–1.

what has preceded them? Or do they introduce a different rule to which resort is to be had only in the case in which it is impossible to discover the intention (if any) of the parties? The other ambiguity is as to the meaning of the phrase 'it is just to presume': does this refer only to the situation in which the parties' intention, although not expressed, can nevertheless be realistically deduced from the circumstances, or does it refer more widely to a power (or duty) on the part of the court to impute to the parties an intention to make a choice in accordance with some external criteria of justice?

In 1896 Dicey wrote in the first edition of his treatise that '. . . the term "proper law of a contract" means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves'.[32] 'Or rather' was replaced by 'or', and 'is just to presume' was replaced by 'may fairly be presumed': but the basic ambiguities remained. Regarded more generally this original *Dicey* formulation, like that of Willes J, is entirely in terms of the intention of the parties, express, implied or imputed. To the extent that it purports to denote actual intention it clearly embodies a fiction in cases in which no actual intention can realistically, or perhaps even plausibly, be inferred from the circumstances. In the current *Dicey and Morris* formulation this fiction has been jettisoned: where the intention of the parties 'is neither expressed nor to be inferred from the circumstances' resort is had to 'the system of law with which the transaction has its closest and most real connection'.[33] Moreover, the current *Dicey and Morris* formulation appears to resolve both the ambiguities inherent in their original source, the words of Willes J in *Lloyd* v. *Guibert*, once castigated by the late Dr Cheshire as *fons et origo mali*.[34] The second part of the Willes proposition is not treated as a reformulation of the first part, but as merely denoting a fall-back position. What emerges then is a rule of first resort in terms of the actual intention of the parties. Again, the elimination of any reference to what it is 'just to presume' would seem to preclude explicit reference to external criteria of justice or fairness. The substituted fall-back position is in factual terms of 'closest and most real connection'.

The progeny of the doubly ambiguous words of Willes J is a rule which (1) appears to confer upon parties to a contract an unfettered freedom to choose the governing law, but which (2) in the absence of a discernible express or implied (but actual) exercise of that choice, provides for resort to a purely 'objectively' determined proper law.

Lord Wilberforce, in the course of his judgment in the recent case of *Amin Rasheed Corporation* v. *Kuwait Insurance Co.*,[35] having differentiated

[32] Dicey, *Conflict of Laws*, Rule 143.
[33] Dicey and Morris, *The Conflict of Laws* (11th edn., 1987), Rule 180.
[34] Cheshire, *International Contracts* (Glasgow, 1948).
[35] [1984] AC 50.

between cases where the parties' 'mutual intention can be inferred' and cases where 'no such inference being possible, it is necessary to seek the system of law with which the contract has its closest and most real connection', observed that 'these situations merge into each other'.[36] It is suggested with respect that conceptually they clearly do not merge into each other, but that in practice they may often appear to do so. The explanation of this latter is largely twofold. First, the determination of the fact of intention (let alone a commonly held intention) is notoriously difficult. It has to be achieved by assessing the significance of external phenomena, and this is unavoidably a subjective process, different judges reaching differing conclusions concerning the same facts. For instance in *Whitworth Street Estates Ltd.* v. *Miller*[37] Lord Hodson said: 'the question is, to my mind, determined by the use of the English language, the selection of which shows the intention of the parties to be bound by English law'.[38] So, too, Lord Dilhorne said: 'in my opinion, the conduct of the parties at the time the contract was entered into shows that despite the fact that the work was to be done in Scotland both parties intended that the contract should be governed by the law of England'.[39] On the other hand, Lord Guest, who, like Lords Hodson and Dilhorne, reached the conclusion that the proper law was English law, did so although he had 'no doubt that the parties never chose English law as the proper law of the contract or evinced any intention to be bound by this law'.[40] So, too, Lord Reid could not 'find any agreement as to what should be the proper law of the contract'.[41] The second reason underlying the tendency of these two conceptually separate situations to appear to merge in practice is to be found in some uncertainty as to the object of the intention being sought in the former situation, and in some uncertainty as to the object of the 'connection' in the latter situation. The former of these doubts would be resolved if one were to accept (as is in fact implicit in Lord Wilberforce's judgment in *Amin Rasheed Corporation* v. *Kuwait Insurance Co.*)[42] that in the search for the parties' intention, the focus must be upon their intention with regard to the formation and validity of their contract and only incidentally (although sometimes importantly) with regard to matters of interpretation or construction of the words and legal terminology used. The later source of uncertainty crystallizes into the question as to whether what has to be identified is the closest and most real connection with a legal system or the closest and most real connection with a country (or fact situation). Reference will be made to these two problems in broader contexts later in this article.

The 'two tier' approach to the methodology of determination of the

[36] Ibid. 69.

[37] [1970] AC 583; see, too, *Compagnie Tunisienne de Navigation SA* v. *Compagnie d'Armement Maritime SA*, [1971] AC 572.

[38] [1970] AC 583, 606.

[39] Ibid. 611.

[40] Ibid. 607–8.

[41] Ibid. 603.

[42] Ibid., and see below.

proper law, implicit in the current *Dicey and Morris* formulation and generally accepted in contemporary English private international law, may be seen as provoking two questions of basic policy. First, ought parties to a commercial contract to be allowed an unfettered freedom to choose the governing law and what ought the nature of that choice to be? Secondly, if effect is not, or cannot, be given to the parties' choice, what law ought then to govern?

An English court will not, of course, apply a foreign law, even if its application is indicated by the parties' choice, if such application would be contrary to public policy as understood in private international law.[43] Nor will a foreign law be applied to the extent that this would involve contravention of an English statute, which by its terms or by established principles of interpretation would be otherwise applicable. The range of a statute's operation will, in the absence of clear indications to the contrary, be assumed to be limited to domestic law. However, exceptionally a statute may by its terms have some private international law effect.[44] Sometimes the statute may, indeed, spell out in some detail and complexity the extent to which it operates so as to dethrone private international law doctrine. An example of this latter is provided by section 27 of the Unfair Contract Terms Act 1977. The general purpose of that Act is to lay down a set of controls over exemption clauses in many types of contract in English domestic law. Section 27 (1), however, provides that

> Where the proper law of a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) [the controls of] this Act do not operate as part of the proper law.

Conversely section 27 (2) provides:

> This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or (b) in making the contract one or more of the

[43] For example, a contract for the sale of slaves would not be enforced in England even if valid by the proper law chosen by the parties. On the scope of public policy in private international law generally, see this *Year Book*, 55 (1984), pp. 111, 122–31. See, too, the EEC Convention on the Law Applicable to Contractual Obligations, Article 16: 'The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

[44] See, e.g., the Law Reform (Miscellaneous Provisions) Act 1970, section 1 (1): 'An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement *whatever the law applicable to the agreement*' (italics supplied).

See, too, the EEC Convention on the Law Applicable to Contractual Obligations, Article 7 (2): 'Nothing in this Convention shall restrict the application of the rules of the law of a forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.'

parties dealt as a consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

In some other instances, even in the absence of an explicit provision of this sort, a statute will be construed so as to limit the operation of the proper law of a contract and thus limit the parties' freedom to choose. The Schedule to the Carriage of Goods by Sea Act 1971 sets out the Hague–Visby Rules relating to the carriage of goods by sea. Section 1 (2) of the Act provides that these Rules as set out in the Schedule 'shall have the force of law'. In *The Hollandia*[45] the House of Lords held that this made the Rules applicable to a contract the proper law of which, as chosen by the parties, was Dutch law.

Limitations upon the freedom of the parties to choose the governing law imposed by considerations of public policy or by the overriding effect of a statute are, of course, merely particular manifestations of the impact of principles of *forum* control operating throughout the whole of private international law. Such limitations apart, should parties to a commercial contract be completely free to choose the law governing the formation, validity and/or interpretation of their contract? Doubt and controversy as to the correct answer to this question must in some measure reflect deep-seated differences of economic and political philosophy. Contract is essentially consensual; contractual obligations are voluntarily undertaken; why should the parties not be free to agree upon the law which will create and define those obligations? On the other hand, why should parties be permitted to evade the rules of the 'naturally' applicable legal system? More specifically, why should they be allowed greater freedom in this regard merely because there is a foreign element in the fact situation? If facts are purely domestic to a *forum* parties will not be allowed to evade a mandatory rule of its law by the simple expedient of indicating that some more generous foreign law should govern their contract. Why should the mere circumstance that, for example, the contract was signed in country X confer upon the parties a freedom to select the law of any country in the world as the governing law?

So far as English case law is concerned there can be no doubt that, at least at the verbal level, the parties to a contract do have very great, indeed sometimes it would appear (public policy and statutory control apart) virtually unlimited, freedom of choice. It is only necessary to cite three relatively recent House of Lords cases, *Whitworth Street Estates (Manchester) Ltd.* v. *James Miller and Partners Ltd.*,[46] *Compagnie Tunisienne de Navigation SA* v. *Compagnie d'Armement Maritime SA*[47] and *Amin Rasheed Corporation* v. *Kuwait Insurance*,[48] in order to illustrate this. In the first of these cases Lord Reid said:

[45] [1983] 1 AC 565. [46] [1970] AC 583.
[47] [1971] AC 572. [48] [1984] AC 50.

The general principle is not in doubt. Parties are entitled to agree what is to be the proper law of their contract, and if they do not make any such agreement then the law will determine what is the proper law. There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled. But it must be a contractual agreement. It need not be in express words. Like any other agreement it may be inferred from reading their contract as a whole in [the] light of relevant circumstances known to both parties when they made their contract. The question is not what the parties thought or intended but what they agreed.[49]

In the *Compagnie d'Armement Maritime* case Lord Morris (who had not sat in the *Whitworth Street Estates* case) said:

The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined . . . Parties may agree, either in express terms or in terms which can be inferred, to submit themselves to a particular system of law.[50]

In the *Amin Rasheed Corporation* case Lord Diplock cited with approval the words of Lord Atkin uttered nearly half a century earlier in *R* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*:

The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.[51]

In all three cases all their Lordships either asserted or assumed that the basic rule is that effect is to be given to any choice (express or implied) by the parties of the law to govern their contract.

However, such consistent judicial unanimity as to the basic principle of party autonomy notwithstanding, there is still, it is submitted, room for doubt as to whether this autonomy is absolute.

First, it is to be noted that in the *Whitworth Street Estates* case Lord Reid did concede (although without elaboration) that the parties' entitlement to choose is 'subject it may be to some limitations'. Again, in the *Compagnie d'Armement Maritime* case Lord Morris referred to a 'general' rule enabling the parties to choose. In a previous Court of Appeal case, *Mackender* v. *Feldia*,[52] Diplock LJ had referred to it as a 'prima facie' rule. Much earlier in *Vita Food Products Inc.* v. *Unus Shipping Co.*[53] Lord Wright, giving the opinion of the Privy Council, an opinion once regarded

[49] [1970] AC 583, 603. [50] [1971] AC 572, 587.
[51] [1937] AC 500, 529, cited by Lord Diplock [1984] AC 50, 61.
[52] [1967] 2 QB 590, 602. [53] [1939] AC 277.