Ascertaining the Governing Law of a Building Contract

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Implicit in the terms of a building contract is the question of the governing law of the contract which is the law of the particular judicial jurisdiction by which the contract is to be given effect. A contract governed by English law would operate differently in several aspects from that governed by, say, French law. The ascertainment of the governing law of a contract has traditionally been assumed to be a fairly simple task and indeed early authorities abound in both the United States and England to argue that the governing law in each instance is simply the *lex loci contractus* or the law of the place in which the contract was made. According to this view, therefore, if a building contract is entered by the parties in England, then English law shall apply to determine the operation of the contract. The fallacy of this contention could be seen clearly when one considers the situation where a contractor in England makes an offer to a client in Switzerland for works to be performed in a third country, say, Italy. Under English law, by virtue of the postal acceptance rule, a contract is made when an acceptance is posted and hence if the client in the present case posted the acceptance of the offer in Switzerland, the contract under English law is said to have been made in Switzerland. However, under Swiss law, a contract is made only when the offeror receives the acceptance so that by Swiss law the contract in this case was made in England where the English offeror received the acceptance. The question which then addresses the inquirer is "which law is the *lex loci contractus*?" There is no easy answer since both English law and Swiss law could equally claim to be the governing law. Furthermore, one could also argue that since Italy is the place where the contract is to be performed, should not Italian law receive some consideration as well? The inadequacy of the *lex loci contractus* formula is thus clear.

A second predominant approach among the early authorities on this subject is to consider the *lex loci solutionis*, that is, the law of the place where the contract is to be performed. This theory argues that if, for instance, payments of a contract are to be made in Rome, then Italian law should govern the contract; or if the goods are to be delivered and received in Paris, then French law should govern. The difficulties posed by this approach are again formidable; but suffice it to say that the theory will fall apart in situations where the contract is to be performed in various jurisdictions. Consider the typical situation in international contracting where goods are ordered in London for payment in Rome, the goods being manufactured in Munich from parts specified to be imported from Hungary and Austria. Where then is the

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contract "performed"? This second theory also suffers from the fact that the place where the contract may be performed is optional as where an international loan is secured in London and is payable at the borrower's option either in Paris or London.

The generally accepted view on this subject today is what has been commonly called the doctrine of the proper law. Briefly this doctrine stipulates that the governing law of a contract is, in the words of Lord Simonds[1], that system of law with which the contract has the closest and most real connection. The approach requires that the inquirer carefully evaluates all the facts of the given case and then determine from the process that system of law which is most appropriate to deal with the contract in question. For instance if a contract for the construction of a hotel in Saudi Arabia was made in London between an English developer and an English contractor, using a standard form of building contract which is commonly used in England (such as the JCT form), it would appear that this approach will take the governing law to be English law. The approach thus seems to make sense in that we arrive at the governing law by weighing the various pertinent factors of the situation, instead of relying on a mechanistic and arbitrary rule such as the *lex loci solutionis* or the *lex loci contractus*. Nonetheless it must be noted that the approach may not permit the inquirer to know the governing law until this very issue has been decided by the Court, that is after the event. Authorities in support of the proper law doctrine abound and several have gone as far as to suggest that the proper law need not even be that system of law intended by the parties. The most common formulation of the doctrine in fact stipulates that the proper law of a contract is that system of law which a reasonable man in the circumstances would have intended to apply to the contract in question. Denning, L J (as he then was) in 1949 stated the doctrine in the following terms:[2] "*The proper law of the contract depends not so much on the place where it is made, not even on the intention of the parties or on the place where it is to be performed, but on the place with which it has the most substantial connection.*" In *Tomkinson* v *First Pennsylvannia Banking and Trust Co.*[3] the House of Lords threw its full weight in endorsing this doctrine when it adopted Lord Simonds' formulation that the "proper law of the contract is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.

Hence the present situation is that it matters little if a contract is made in say, England and performed there, if, in all materials particular, it has the "closest and most real connection" with another system of law, say Scottish law. This formulation was applied in the House of Lords decision of *Miller and Partners Ltd.* v *Whitworth Street Estates Ltd.* [4]. In that case, a Scottish contractor agreed to undertake renovation works to a factory in Scotland which belonged to an English company. The contract was made in Scotland and was in the RIBA standard form. It was held that although the contract was made to be performed in Scotland and that the subject matter was land in Scotland, nevertheless it has its closest and most real connection with English law, and that accordingly English law should govern the contract.

For some time it has been supposed that the ascertainment of the governing law of a contract via the proper law doctrine could be facilitated by the use of certain presumptions in favour of the *lex loci contractus*, the *lex loci solutionis* or even the *lex situs* (the law of the place where the subject matter of the contract is located). The consensus of opinion among textbook writers presently is that such presumptions are, at best, of little value. Cheshire,[5] for instance, remarked: "*To enter upon the search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer.*" Nevertheless, it appears quite common to assume, particularly in relation to building contracts, that there is presumption in favour of the law of the place whereat the arbitration of any disputes arising from the contract shall be held. Morris[6] thus states: "*If the parties agree that the courts of a given country shall have exclusive jurisdiction over the contract, and especially if they agree that arbitration shall*

take place in a given country this usually permits the inference that the law of that country is the proper law of the contract." It is not easy to support this proposition from an examination of decided cases on this point: many of the decisions are extremely difficult to reconcile. In *Tzortis* v *Monark Line A/B*[7] a contract was made between a Swedish firm and a Greek firm, to be performed in Sweden. Although it has no connection with English law except that it provides for London as the place of arbitration, the Court of Appeal was prepared to hold that the proper law in the circumstances was English law. This may be contrasted with the case of *Compagnie d'Armement Maritime SA* v *Compagnie Tunisienne de Navigation SA*[8] where a contract had no connection with any other system of law except French law other than a clause providing for arbitration in London. The House of Lords had no hesitation in rejecting the suggestion that the governing law of the contract in question should be English law simply on account of the fact that London was stipulated as the place of arbitration. The House proceeded to hold that French law was the proper law and that the arbitration clause was merely one of the factors to be considered in determinig the proper law. Lord Reid stated the position adopted by the House as follows: "*It would be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract.*" Lord Wilberforce elaborated further: "*An arbitration clause must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts . . . . it must give way where other indications are clear.*"

What happens if there is an express selection of the governing law in the contract? This situation is commonly encountered in international standard forms such as the FIDIC conditions[9] where the parties are required to state in the contract document the law of the country or state which is to apply to the contract in question. Lord Reid seems to think that where the parties to a contract express their choice of the proper law so clearly, the law so selected should be taken as the proper law of the contract. In the case of *Miller and Partners Ltd.* v *Whitworth Street Estates Ltd.*[10], quoted earlier, he remarked by way of *obiter* that: "*Parties are entitled to agree what is to be the proper law of their contract . . . . There have been from time to time suggestions that parties ought not to be so 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.*" Morris[11] in his book suggested that this position may have been supported on the ground that it will inject some certainty into the proper law doctrine. This view seems to have been endorsed by the Privy Council in the classic case of *Vita FoodProducts Inc.* v *Unus Shipping Co. Ltd.*[12] The facts of the case were as follows: A Nova Scotia company entered into a contract with a New York company in Newfoundland for the shipment of herring to New York. A Newfoundland statute provided that the Hague Rules should govern any contract of carriage from that country and that every contract should stipulate the incorporation of these rules. The contract in this instance instead, expressly provided that it should be governed by English law. The question then arises as to whether Newfoundland law or English law should apply as the proper law. Apart from the express selection of English law as the governing law, there was, otherwise, no factual connection with England whatsoever. Nonetheless the Privy Council ruled that the selection of English law to govern the contract was effective, and proceeded to decide the case on this basis. What struck many commentators as surprsing was that English law was not pleaded by either of the parties and Morris[13] rightfully remarked: "*It seems odd that the Privy Council should have said that English law was the proper law when both parties had pleaded that the proper law was the law of Newfoundland.*" The decision has never been regarded as satisfactory by many authorities, In *Re Claim by Helbert Wagg & Co. Ltd.*,[14] a case heard nearly twenty years later, it was laid down that the court will not necessarily regard the intention expressed by the parties "*as being the governing consideration where a system of law is chosen which had no real or substantial connection with the contract looked upon as a whole.*" Denning, L J in *Boissevain* v *Weil*[15] was more explicit: "*I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account.*" Cheshire concurred: "*The courts should, and do, have a residual power to strike down, for good reason, choice of law clauses totally unconnected with the contract.*" Moreover, the decision may invite problems on the practical plane for as Morris[17] pointed out, the ruling seems to suggest that parties can select a governing law to give validity to the entire contract when it would be void or illegal under the proper law objectively ascertained. It is suggested that the true position of the subject today is that exemplified by the Australian case of *Golden Acres Ltd.* v *Queensland Estates Ltd.*[18] in which it was held that under a contract made in Queensland for the sale of land in Queensland, the parties could not evade a Queensland statute by stipulating in the contract that the contract should be deemed to be entered in Hong Kong and thus governed by Hong Kong law.

What then are the implications of the foregoing discussion on international building contracts? Firstly it is clear that the law governing a building contract cannot be rigidly taken to be either the law of the place where the contract was made or the law of the place where the site is located. Hence if one were to employ one of the domestic standard forms such as the JCT form for a project in, say, Singapore, it does not automatically follow that Singapore law is the governing law.[19] Secondly, there is some doubt as to the strength of the presumption that the law of the place of arbitration is automatically the governing law. In the light of recent development in the proper law doctrine, and particularly from the House of Lords decision in *Compagnie d'Armement Maritime SA* v *Compagnie Tunisienne de Navigation SA*[20] it is suggested that the true position is that the place of arbitration is, at best, merely another factor to be taken into account in determining the governing law. Thirdly, where there is an express selection of the governing law in the contract terms, such a choice will generally be effective, unless the system of law chosen is so arbitrary that it bears "no real or substantial connection with the contract looked upon as a whole".

The doctrine of the proper law is well settled in English law. It serves as an all encompassing rule which can apply to all types of contract and ensures that the obligations of both parties are governed by the same law. To take the example posed at the beginning of this paper, in the contract between the English offeror and the Swiss offeree, a solution such as the *lex loci contractus* would mean that there are two different systems of law governing each and every issue of the case. The proper law doctrine thus obviates this anomaly.

Nevertheless, the present state of the law on this subject does present problems. Foremost of these is that if the parties do not expressly stipulate a governing law in circumstances in which such stipulation would be effective, then it may, as Morris[21] pointed out, take a lawsuit to determine the governing law. One could not therefore be certain at all as to whether the choice of the governing law is legally effective, perhaps until the matter has been decided by the House of Lords. Secondly, as pointed out in an Austrailan decision[22] it is possible that the parties may have deliberately expressed a choice of the governing law for the purpose of evading the operation of the laws of a particular jurisdiction—and the question is whether this possibility could turn the doctrine into a sham?

The doctrine of the proper law is thus by no means an ideal formula, and the question as to whether English law is richer for it is debatable. As the doctrine presently stands, legal advisers involved in the drafting of international contracts must ensure that the intended governing law of a contract is clearly stipulated and must satisfy themselves that the choice is compatible with the circumstances with which the contract form is designed to deal. To do less could confront the parties with a set of legal consequences which is entirely different from that originally contemplated.

References

1. Bonython v Commonwealth of Australia (1951) AC 210
2. Boissevain v Weil (1949) 1 KB 482
3. (1961) AC 1007
4. (1970) AC 583
5. Cheshire, G. C. Private International Law (ed P M North), 9th edition 1974 at p 218
6. Morris, J. H. C. The Conflict of Laws, 1st edition, revised with supplement, 1975 at p 227
7. (1968) 1 WLR 406
8. (1970) 3 WLR 389

9. Clause 5, sub-clause 1, para (b) which requires that parties should state in Part II of the FIDIC form "the country or state, the law of which is to apply to the Contract and according to which the Contract is to be construed".
10. (1970) AC 583, 603
11. Ibid at p 228
12. (1939) AC 277; (1939) 1 All ER 513
13. Ibid at p 229, 230; see also criticism by Cheshire in his 9th edition at p 206
14. (1956) Ch 323 at p 341
15. (1949) 1 KB 482 at p 491
16. Ibid at p 208
17. Ibid at p 231
18. (1969) at St R Qd 378, commented in JRLD (1970) 44 Aust LD 80.
19. Miller and Partners Ltd. v Whitworth Street Estates Ltd. (1970) AC 583
20. (1970) 3 WLR 389
21. Ibid at p 234
22. McClelland v Trustees Executors and Agency Co Ltd (1936) 55 CLR 483, 491 ff.

Regulations for Notification of Accidents and Dangerous Occurrences at Work laid before Parliament

Regulations* simplifying and extending the law on notification of accidents and dangerous occurrences at work have been laid before Parliament today by Mr. Patrick Mayhew, Joint Parliamentary Under Secretary of State for Employment. They are due to come into force on 1st January 1981.

Mr. Bill Simpson, Chairman of the Health and Safety Commission (HSC) commented "These regulations will greatly help us to make Britain's industry safer and healthier. The information we obtain and process by computer is going to give us much more up-to-date statistics on reportable accidents at work. Also, for the first time in our history, we will have an accurate picture of accidents and acute occupational ill-health among the seven to eight million "new entrants" who were first given protection by the Health and Safety at Work Act. This is because there will be a statutory requirement to notify these incidents. We shall also, for the first time, have figures on fatal and serious accidents to members of the public arising from work activities. Greater knowledge of the problems we are tackling will help us plan our resources for the future".

The regulations, drawn up by the Commission after extensive consultation, apply to virtually all work activities. It will therefore be possible to draw valid comparisons between occupational groups, which was not previously possible because of different reporting requirements. The information collected will help HSC to measure more accurately safety performance, judge trends and formulate policy. The Health and Safety Executive (HSE) will publish guidance on the new regulations later this year.

The effect of the new regulations, as far as the general run of accidents goes, will be the elimination of the present costly and time consuming system whereby accidents are required to be notified twice, to different departments on different forms at different times. Notification of accidents which result in employees being absent from work for more than three days will no longer be directly notifiable to HSE; instead, HSE will receive copies of accident reports from the Department of Health and Social Security (DHSS) to whom claims for industrial injury benefit are made. The reporting form has been revised to meet the joint needs of HSE and DHSS.

However, notification in the case of fatal and major injury accidents (major injury is defined in the regulations) will have to be given by the quickest practicable means (the telephone in most cases) to HSE or appropriate enforcing authority. This will enable any investigation that may be necessary to begin promptly. Written confirmation of such accidents will have to be given within seven days on a separate direct reporting form which will be introduced.

Employers will have to keep records of notifiable accidents and dangerous occurrences and also records of DHSS enquiries about prescribed diseases (including pneumoconiosis and byssinosis) under the Social Security Act 1975.

The direct reporting of fatal and major injury accidents will not be required in the case of the self-employed who are not working under the control of another person; in the case of patients undergoing treatment in a hospital or in the surgery of a doctor or dentist; nor in the case of members of the armed forces (including visiting armed forces) who were on duty at the time of the accident.

Road traffic accidents, in the main, will remain reportable to the police but certain types of accidents arising from work activities on or adjacent to the road will be reportable to HSE.

The regulations will apply to certain defined activities within territorial waters, but they will not apply to offshore installations, nor to pipelines within territorial waters.

Fourteen scheduled dangerous occurrences will require to be reported to the HSE wherever they occur. They include the overturning of cranes; boiler explosions; serious fires involving electrical failure or ignitions of process materials; escape of significant quantities of highly flammable liquids or toxic substances; gassing accidents; scaffold collapses; building or falsework collapses; cases of anthrax and other cases of acute ill health arising from exposure to dangerous pathogens or infected material; accidental explosions of explosives; freight container collapses; pipeline explosions and the overturning of road tankers containing dangerous chemicals. Additional dangerous occurrences in mines, quarries, tips and railways are separately scheduled.

* Notification of Accident and Dangerous Occurrences Regulations 1980 (SI 1980: No. 804), available from HM Stationery Office, £1.25 plus postage.

BSI—New Prices, but Better Discounts to Subscribers

An improvement in the discount which the British Standards Institution allows its Subscribing Members has considerably ameliorated a rise in the prices of its publications. BSI has increased the discount from 40% to 50%, so that a 38% rise in the face price of British Standards on 1st July has meant an actual increase of only 15% to subscribers.

Half of BSI's standards-making income is provided by sales. The other half comes from a comparatively small number of Subscribing Members' contributions, matched £ for £ by a government grant. The improved discount to them is recognition of their vital support, which is often technical as well as financial. In fact the largest part of the real cost of British Standards is in the time and expenditure given without reimbursement by individuals and firms who involve themselves directly with the standards making process. It would be a pity if the machinery to serve their discussions and working groups were allowed to falter for the sake of the comparatively small sums which BSI needs to maintain it. The price rise is unavoidable, but BSI feels that its members' backing should be recognised, and points out that more new subscribers would provide the most encouraging support for existing members and for BSI.

Discount on prices is the foundation of BSI's subscriber service, which includes credit facilities, provision of regular information and the complete catalogue (Yearbook), as well as access to microfilm sets of standards and the use of BSI library. The Institution is looking at other aspects of its arrangements for subscribers and will be announcing new benefits. It is hoped to extend the microfilm and microfiche services, and the possibility of Standing Orders for standards is being considered.

The London Building Products and Services Exhibition

An increase in attendance of 60% on last year's figures has been achieved by the London Building Products and Services Exhibition.

The Exhibition, which closed on Thursday, 19th June at Olympia, attracted a total of 13,368 visitors during its five day run, with a higher than previous contingent of overseas buyers.

Commenting on attendance levels, Colin Wigan, the Exhibition's organising director said, "The Exhibition, without doubt, has been one of the most successful we as organisers have mounted this year. Its success is not only based around the number of visitors, the high quality of enquiries and the useful contacts, but on the fact that it has now, after only two years, well and truly achieved a status of importance in the building industry's calendar".

The 1980 London Building Products and Services Exhibition was more than triple the size of the previous year. Plans for the 1981 show are aimed at a further increase in size and also widening its scope to encompass international markets.

Addendum to Professional Liability Today

Page 99 June issue 1980 *The Quantity Surveyor* (to be read after para. 7 ending in "context of quality arbitrations").

Moreover, the views of Lord Kilbrandon in the *Arenson* case should be noted. His Lordship said: "I have come to be of opinion that it is a necessary conclusion to be drawn from *Sutcliffe* v *Thackrah* and from the instant decision that an arbitrator at common law or under the Acts is, indeed, a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skill in the exercise thereof and that if he is negligent in that exercise he will be liable in damages." This is, of course, a mere *obiter dictum*, but his Lordship's observations were most strongly put.

The learned editor of Russell on *Arbitration** states that "the law relating to the liability of an arbitrator to a suit for negligence cannot be regarded as settled" and, after considering the recent decisions, concludes "and whilst at the moment it can be said that up to the level of the Court of Appeal an arbitrator acting judicially can still successfully claim that he is immune from suit for negligence, it is clearly open to the House of Lords to find in future cases that he is not, and at least in the case of an arbitrator acting in an investigatory capacity, there are indications that the House of Lords will find that he is not immune".

* 19th edition, 1979. The passages cited are to be found at pp. 125 and 128 respectively.