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The classification as proprietary or contractual one of different business transactions in terms of determining the applicable law

The classification as proprietary or contractual one of different business transactions in terms of determining the applicable law

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Discuss the importance of the classification of issues as proprietary or contractual for the purposes of determining the applicable law. Illustrate your answer with examples from cases decided by the English courts in relation to contractual debts and bonds, bank accounts, and letters of credit.

Contractual rights and property interest are difficult and it is hard to distinguish them from one another.[1] The distinction between both is important to be drawn and to be determined from the court in a case of litigation since it will be the ground concept from which the decision will arise and taken. In this essay, first of all, the differences between contract and property will be determined. Then, each of them will be analysed independently. Thirdly, under which category fall contractual debts and bonds, bank accounts and letters of credits will be determined.

Differences between contract and property

Firstly, the most important point is what draws the difference between these two concepts. It should be bore in mind that there are two parties in

[1] Trevor C. Hartley, International Commercial Litigation, Cambridge University Press, p.720

a contract, who are bound and connected to it. On the other hand, when dealing with property, in addition to that two parties, a third party comes into play and assumes rights in relation to that contract. The similar perception will be dealt even in the case of classifying an obligation with an ownership. The former takes place when a debtor and the one who owns the ownership have a relationship with each other. The latter takes place when a third party comes into the picture.

Contract

When two parties are bound to a contract they have a right known as party autonomy. This means that parties decide themselves, which law will be applicable to the contact they are part of. As Article 3 of the Rome I Regulation states: "the law chosen by the parties shall govern a contract".

In other instances, there may be parties who have not chosen the applicable law. In such case, a first option is that Article 4 of the Rome I Regulation will come into action; the Lex causae. This means that the law of the country, which the contract seems to be more connected, will govern it.[2] To decide that, where the characteristic performer has its habitual residence, needs to be taken into account.[3]

A second option is Lex fori, which takes into account the place of performance. Article 9 of the Rome I Regulation will be applied and more precisely what it is called overriding mandatory rule, that relates with the place of performance. This rule will apply when two parties are bound to a contract but the provision of a third country may be applicable if the contract and obligations that arise from it are performed (part of it or in whole) in this country. This rule goes beyond this description in article 9.3, by stating that it will be applied so, only if the acts of the contract that is to be performed in that country are unlawful and illegal under the law of that country.[4]

Property

In a litigation case, when dealing with a property right, it is arguably easy for rules to be applied. In this scenario the addition of a third party is included in the contract. In the property cases the main characteristic noticeable is the fact that there is no party autonomy. This means that

[2] ibid, p.581
[3] ibid, p.582
[4] ibid, p.607

parties have not conferred and agreed upon the applicable law.

The applicable law in a case of a possible debt will be the law of the country in which the debtor resides; this is called the lex situs and it means: the location of the debtor, despite the fact that payment can be made in another place. In a complicated case, where the debtor has two or more countries of residence, as for example multinational corporations, then the place of payment will become the place of deciding the applicable law.

Contractual Debts and Bonds

Helbert Wagg & Co.Ltd[5] is the leading case in contractual debts that helps distinguish between contract and property. Upjohn J considered important determining whether the case should be considered as proper law of the contract or should refer to the situation of the debt. From the relevant facts it was noticeable that the two parties had a contract, where they had determined the applicable law, which would be the German one. According to the same judge the situs of the debt is of relevant consideration. In any instance, even if this would not be perceived as a proper law of the contract but being referred to as a debt, the general rule stipulates that the situs is where the debtor resides (in our case the German Law will still be applicable). It does not really matter if the case will be treated as contractual one or a debt as long as the debt would be extinguished. Dicey states,[6] the general rule will not apply if the rule itself is changed when determining the terms of the contract and conclude that the place of payment of debt will be agreed to be the applicable law of the property right in case of a claim.

Furthermore, in New York Life Insurance Co.,[7] all of the judges of the Court of Appeal jumped to the conclusion that the debt should be sued in the place where it is payable. If this was a case of a creditor in a contract relation, he might have had the right to sue the debtor in another place for breach of contract and not any longer for debt. Additionally, the court of Appeal concluded that the place of payment would become the situs of the debt in case where the debtor had more than one place of residence and such a conclusion could be found in Disconto Gesellschaft case.[8]

[5] Helbert Wagg & Co. LTD, High Court (Chancery Division), [1956] Ch 323; [1956] 2 WLR 183; [1956] 1AII ER 129
[6] Sixth edition of Dicey's Conflict of laws, p.304
[7] New York Life Insurance Co. v. Public Trustee
[8] Deutsche Bank und Disconto Gesellschaft case v. Banque des Marchands de Moscou.

Romer LJ held here that despite the fact that the contract was a debt payable in England, the single locality of the residence of the debtor was in Germany, so the German law should be applied.

In Commissioner of Stamps v. Hope,[9] Lord Field said that the place of the debtor's residence is chosen as the situs of the debt because a debt could not have other local existence than the personal residence of the debtor.[10] Dicey and Morris[11] held at Kwok[12] case, that wherever debtor is resident, the courts of that place would have jurisdiction to enforce the debt.[13]

Lex fori will be used for the purpose of characterization where the choice of law is contract or property. In case of amalgamation, the personal law of the company is the law of the country in which it is incorporated. In the Metliss case[14] the amalgamation law provided that the new bank was the universal successor to all assets and liabilities of the old banks. The new bank because of doing business in England was subject to the jurisdiction of the English courts. The old bank had no place of business in London, so Metliss could not have sued the former in London before the amalgamation law. In this case, the appellant was held liable for the bonds issued and guaranteed from the old company. The National Bank of Greece and Athens had to honour the bonds.[15] Common Law relies in the idea that the law, which controls the status, is the law of the country in which it is incorporated.

In Adams case,[16] the proper law according to the background is the English one. It should be accepted that principles of private international law are applied when an obligation should be complied. This case is a matter of characterization (classification)[17], meaning that Greek law is to be applied since it is the law of the country of incorporation. This case should be decided by the lex fori, which means the law of the country, which the litigation take place. Relying on this, English court are not constrained to use the characterization given by the new law[18], that has

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[9] Stamps[1891] A.C.476 at 219-220

[10] P.J. Rogerson, 'The situs of debts in the conflict of laws. Illogical, Unnecessary and Misleading', The Cambridge Law Journal, Vol.49, No.3(Nov., 1990), p. 442

[11] Dicey & Morris, the Conflict of Laws, op. cit., at p.907

[12] Kwok v. Estate Duty Commissioners {1998} 1 W.L.R. 1035

[13] P.J. Rogerson, 'The situs of debts in the conflict of laws. Illogical, Unnecessary and Misleading', The Cambridge Law Journal, Vol.49, No.3(Nov., 1990), p. 443

[14] National Bank of Greece and Athens v. Metliss, House of Lords, [1958] AC 509; [1957] 3 WLR 1056; [1957] 3AII ER 608

[15] Trevor C. Hartley, International Commercial Litigation, Cambidge University Press, p.730

[16] Adams v. National Bank of Greece House of Lords [1961] AC 255; [1960] 3 WLR 8; [1960] 2 AII ER 421

[17] Trevor C. Hartley, International Commercial Litigation, Cambridge University Press, p.733

[18] In this case (Act 3504)

the intention to discharge the new bank, The Bank of Greece, from liability under the contract. In this case as well the National Bank of Greece must honor the bonds. Its nature is contractual.

Bank accounts

The rule of lex situs is of a great importance in the case of bank accounts where the locations of the branch, in which they are held, determine the applicable law of the cases. In the leading case[19] Libyan Arab Foreign Bank v. Bankers Trust Co.,[20] the High Court decided that no matter if the case is regarded as a contract or as a property, in the case of bank accounts the applicable law will be the one of the country in which the account is held, so the lex situs of the account will be in that country[21]. Regarding this case, the applicable law is English law since the bank account was located in the England at the moment of the claim. Nevertheless, this case has its own difficulties in terms of deciding the applicable law. The arguments stated by Staughton J are worth considered on behalf of Bankers Trust. New York law governed the London account but even if it were the case that English law was to be applicable still it would be impossible for the Bankers Trust to give to the Libyan bank money without doing something in New York that was illegal by US law. This case will theoretically belong to the contract category.

As a general rule, if it is not agreed otherwise, the law of the place, where the account is kept, governs the contract between a bank and its costumer. Staughton J stated the principle that should be applied in case of a banking arrangement and pointed out that branches of banks should be treated separately from the head office.

Letters of credit

The leading case of Power Cuber International[22] shows the result to be the same as in the case of Bank of Baroda.[23] In the latter case, the law of

[19] Libyan Arab Foreign Bank v. Bankers Trust Co., High Court, [1989] QB 728; [1989] 3 AII ER 252; [1988] 1 Lloyd's Rep 259

[20] In the case below because there was only one contract (govern partly from English Law and New york one) the right and obligations of the parties in respect of London account were governed by English Law

[21] Trevor C. Hartley, International Commercial Litigation, Cambridge University Press, p.740

[22] Power Curber International Ltd v. National Bank of Kuwait, Court of Appeal [1981] 3 AII ER 607; [1981] 2 Lloyd's Rep 394

[23] Bank of Baroda v. Vysya Bank

payment will apply since the performance is to be done in London. In the case of Power Curber the trial court held for it. This decision was sustained from the Court of Appeal with judges reaching the conclusion that Bank of Kuwait must pay instantly. There were some arguments sustaining the defence of Kuwaiti in terms of the fact that proper law of the contract was Kuwaiti law. Furthermore, even the location of the debt was Kuwait, so it is the governing law (lex causae). The proper law of the contract in this case is the law where payment is to be made, in this case, the North Carolina one, which has even a closer connection with the contract. Lord Denning MR expressed his opinion in terms of lex situs, whereby a debt under a letter of credit is different from ordinary debts,[24] and as its lex situs is the place where it is payable, so where the actual performance is to be done. Griffiths LJ and Waterhouse J supported this view about the lex situs as well. Letters of credit are considered an exception from the general rule of the situs of the debts. Despite the decision made it must be bore in mind that the judges had not stated rather it was contract or property but it seems that after including the Kuwaiti order of provisional attachment a new party thereafter is involved so after the issuing of the contract between parties it had become a property matter. It is noticeable that the location is not always based on the effectiveness. The letter of credit in the end of the day serves to benefit the seller, which is the beneficiary by including him as a third party.

Conclusion

There are differences between a contact and a property and this will need to be pointed out in order to find under which category intangible property fells. According to the cases; if dealing with debts the law of the country in which the debtor resides, lex situs will apply; and just in case of more than one residences the law of place of payment shall govern. Bonds have a contractual nature and the law of the country of incorporation, referring to lex fori, will apply. At bank accounts, the applicable law will be the lex situs of the country in which the account is held, regardless if it is a contract or property. Letters of credit will be pointed as a property matter according to the cases.

[24] Trevor C. Hartley, International Commercial Litigation, Cambridge University Press, p.741

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