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Introduction

It is a truism to say that choice of law is a fundamental legal tool in international financing. This applies as much to transactions involving Latin America parties as any other. The parties to the transaction will require a particular legal system by which to measure their respective obligations. When lending out of jurisdictions such as New York, London, Mexico City, or Buenos Aires, banks in practice require the selection of a law and a jurisdiction which they consider will insulate them from perceived risks emanating from the borrower's legal system, and which will ensure an enforcement process which they can control, should enforcement become necessary. Express governing law and jurisdiction clauses are, of course, always found in loan agreements and complex financings such as bond issues, and in the case of sovereign and other public debt, lenders seek to buttress them with express waivers of sovereign immunity.

The limits of an express choice of law need to be kept in mind. It will not resolve all legal issues capable of affecting a transaction. First and foremost, it is unlikely to have any place in the insolvency of borrower or bank; insolvency régimes are imposed according to the dictates of the location of offices and assets, rather than a pre-insolvency choice. Second, it is unlikely to resolve priority claims between, for example, a bank and a third party claimant to an asset held as security. Third, a mandatory choice of law is sometimes imposed by statute; an example is the UK Bills of Exchange Act 1882. Fourth, an express choice of law will be inoperative to circumvent the mandatory rules of the forum; an example is sanctions regulations enacted by the forum state or other illegality. Fifth, it will subject to the forum state's international obligations. Thus as between members of the IMF, "exchange contracts" are unenforceable regardless of choice of law if contrary to the exchange control regulations of one of them.

In a number of international banking transactions, express choice of law is either not the norm or not invariable practice. Examples include bank deposits, letters of credit and other bank obligations such as performance guarantees. In such cases, identification of the applicable law requires recourse to the conflict of law rules of the forum concerned. The purpose of this article is to examine some of these issues as they have arisen in the international banking context with particular reference to Argentina and countries in a similar position, and explain how they have been resolved. This article is written primarily from the perspective of English law.

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I. Choice of law régimes

Two comparisons may be made with the rules obtained in England and the rest of Europe. Where the issue concerns the application of the U.S. Uniform Commercial Code (which has been enacted by most if not all states in the Union), section 1-105(l) provides that:

> "... when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state."

According to the Official Comment, where a transaction has significant contacts with a state which has enacted the UCC and also with other jurisdictions, the question what relation is "appropriate", is left to judicial decision. The definition seems to have been left deliberately elastic.

In Japan, the Law on the Application of Laws (*Horei*) provides that the validity and effect of a juristic act is to be determined by the law of the parties' choice. If the choice of law by the parties is unknown, the *lex loci actus* is to be the governing law (Article 7). The choice may be express or implicit.[1]

The classic English choice of law rule was that a contract is governed by the law expressly or impliedly chosen by the party and in the absence of such choice, by the system of law with which the contract had its "closest and most real connection".[2] Contracts made after 1 April 1991 are however subject to the rules in the Rome Convention on the Law Applicable to Contractual Obligations[3] which are in many respects similar. The Rome Convention provides, in effect, a common code for determining the law governing contractual obligations in all twelve (soon to be sixteen) member states of the European Union. It may be noted that the Convention applies to *all* governing law questions, not merely those as between member states. Not all contractual matters fall within the ambit of the Convention. Exclusions include questions of status or legal capacity, wills and succession, negotiable instruments, arbitration agreements, questions governed by company law including insolvency, agency, trusts and settlements, evidence and procedure and (in some respects) contracts of insurance.

Freedom of choice is the fundamental rule enshrined in the Rome Convention. Article 3(l) provides that "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." Freedom of choice is not untrammelled. Where all relevant elements are connected with one country only, the choice of a foreign law is not to prejudice the application of the "mandatory rules" of that country (Article 3(3)). And nothing in the Convention restricts the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract

1. Hiroshi Oda, Japanese Law, (London, Butterworths, 1991), 416-7.
2. *See e.g. Amin Rasheed Shipping Corp v Kuwait Insurance Co*, AC 50, HL (1984).
3. Incorporated into the law of the UK by the Contracts (Applicable Law) Act 1990.

(Article 7(2)).[4] And the English courts will doubtless continue to apply the rule that a contract will not be enforced "if the real object and intention of the parties necessitates then joining in an endeavor to perform in a foreign and friendly country some act which is illegal by the law of that country."[5]

In the absence of choice, the Convention provides that the contract is governed by the law of the country with which it is most closely connected (Article 4), a formulation almost identical to that previously prevailing under English law. There is, however, an important and controversial "presumption" which appears to derive from Swiss doctrine[6] and the effect of which is uncertain, not least in the context of banking contracts. Article 5(2) provides:

> ... it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in 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.

A number of aspects of this "presumption" will be noted. First, it requires the identification of the "characteristic performance" of the contract. The meaning of this term is obscure. Where performance by one of the parties takes the form of the payment of money, the Giuliano-Lagarde Report[7] states that it is not such payment which is the characteristic performance of the contract, but rather the performance for which the payment is *due.* It had been frequently pointed out that contracts of a financial nature do not easily fit into this concept. Second, it is not the law of the *place* of performance that governs, but rather the law of the place of residence of the party who is to perform. Translated into corporate terms, that means the place of the central administration of the party concerned, or, in the case of a contract entered into in the course of that party's trade, the country in which its principal place of business is situated. Third, and this is significant in the context of branch banking, where under the terms of the contract performance is to be effected through a place of business other than the principal place of business, the law of the country in which that other place of business is situated will govern. Thus where a banking transaction is entered into through a branch, it is likely to be the law of the place of the branch that governs. In case of difficulty, Article 4(5) provides that the presumption does not apply at all if characteristic performance cannot be determined, and is to be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. This imports a degree of judicial discretion.

4. Article 7(1) does not apply in the United Kingdom.
5. *Foster v Driscoll,* 1 KB 470 at 521 (1929); *Regazzoni v K C Sethia Limited,* 2 OB 490 (1956).
6. Dicey & Morris, The Conflict of Laws, 12th edn, 1233.
7. Which was published with the Convention and has a special status in the interpretation of the Convention.

Once ascertained, the applicable law governs questions of interpretation, performance, damages and limitation (Article 10). Separate provisions deal with material validity, formal validity and incapacity. Article 15 excludes the doctrine of renvoi, by providing that the application of the law of any country specified by the Convention means the application of the rules of law in force in that country other than its rules of private international law. It may be concluded that, despite obscurities, the Rome Convention provides a welcome bench mark which should result in uniform choice of law rules developing throughout the European Union. The interpretative difficulties will be resolved by decisions of the courts over time.

II. Identifying the applicable law

Two examples from the English case law neatly illustrate the significance of identifying the applicable law. In 1933, the U.S. Congress abrogated the rights of obligees of dollar obligations to require payment in gold. The court[8] held that this had the effect of extinguishing the contractual right of bond holders to payment in gold, because the contract concerned was governed by U.S. law. By contrast, in 1949, the Greek government declared a moratorium on payment of certain Greek bank bonds. It was held[9] that since English law was the governing law of the bonds concerned, the nature of the obligation could not be varied by the Greek legislation.

It does not follow that the law of the place of performance is without significance. In the case of financial obligations, that law may dictate the manner in which the obligation is to be discharged (as opposed to the scope of the obligation). For example, the requirements of a valid "tender" (by which a debtor makes a binding offer to discharge an obligation) are likely for practical reasons to be governed by the law of the place of performance. Where performance of a foreign currency obligation is to be made in England, the rule is that if payment in the foreign currency is impossible, the debtor must pay in sterling.[10] And more generally, the courts will not require an act to be done which is illegal in the place of performance (see below).

III. Express choice of law clauses

As has been seen, the Rome Convention recognises the principle of "party autonomy" or freedom of choice, long applicable under English law.[11] Express choice of law clauses call for little comment here. In English practice, formulae frequently found include such phrases as the contract is "governed by", or "to be construed in accordance with", or "subject to" the law concerned.[12] By Article 3(1), the parties can select the law applicable to the whole or a part only of the contract. Thus, in principle, it appears open to parties to select different laws to govern different parts of the contract. It may be noted that the terms of Article 3 do

8. *R v International Trustee for the Protection of Bond Holders*, AC 501, HL (1937).
9. *National Bank of Greece v Mediss*, AC 509, HL (1958).
10. *Libyan Arab Foreign Bank v Bankers' Trust Co*, QB 728 (1989).
11. *Vita Food Products Inc v Unus Shipping Co*, AC 277, HL (1939).
12. Dicey & Morris, *supra* note 6, at 1217.

not require the choice of law clause to appear in the particular contract concerned. So where the series of transactions are governed by a master contract, it will be sufficient if the choice of law clause appears in that contract, as in Section 13 of the International Swap Dealers' Association Master Agreement. To take a further example, if a contract incorporates standard terms which include a governing law provision (such as the ICC Uniform Rules for Demand Guarantees) this will amount to an express choice of law within the meaning of Article 3 of the Convention. The parties are free to vary the applicable law, though without prejudice to the rights of third parties (Article 3(2)).

IV. Applicable law in the absence of an express choice

The governing law rules applicable to a number of international banking transactions which are not, or not invariably, the subject of an express choice of law, will now be considered.

A. *Bank deposits.* In law, a bank deposit is a debt owed by the bank to the depositor. As such, it is a species of property that can be transferred voluntarily (by assignment) or compulsorily (*e.g.* by expropriation). In English law,[13] and in some of the American cases, the debt is regarded as localized at the branch at which the account is kept. Where the country in which the branch is situated and the currency of the deposit coincide, it is plain that the law of that country will govern the deposit. More difficult issues arise in the case of a "eurocurrency" deposit; i.e., a deposit in the currency of a country other than that of the place of the deposit. In an important series of cases concerning the effect of U.S. sanctions against Libya, the English courts have held that eurodollar deposits in London are subject to the same governing law rules as apply to sterling deposits. It was held that as a general rule, the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary.[14] Solid grounds are needed for holding that the general rule does not apply, since there is a risk of difficulty and confusion if the law of some other place was held to govern the deposit.[15]

In reaching this conclusion, the courts rejected the contention advanced by the U.S. banks holding the deposits to the effect that a term was to be implied by custom and usage that dollar deposits are invariably cleared through New York. It was held that the depositor was entitled, if necessary, to demand repayment in cash, as in the case of a deposit in domestic currency. The significance of the decision (which is sometimes overlooked) is that a eurocurrency obligation was correctly treated as a *monetary* obligation equivalent to a deposit in domestic currency and not, as the banks had argued, merely as an account entry.[16] It is not believed that the result of these cases has been changed by the coming into force of the Rome Convention. Applying the presumption in Article 4(2), "characteristic performance" should be regarded as the repayment of the deposit. The party which is to effect that performance is the bank. Under the terms of the contract, performance is to be effected through the branch where the account is kept. It is the law of the country where the

13. *Joachimson v Swiss Bank Corporation*, 3 KB 110, CA (1921).
14. *Libyan Arab Foreign Bank v Bankers' Trust Co*, QB 728 (1989).
15. *Libyan Arab Foreign Bank v Manufacturers' Hanover Trust Co (No 2)*, 1 Lloyd's Rep 608 (1989).
16. For a fresh perspective *see* Kwaw, Towards the Creation of a Legal Régime for the Operation of Euro Currency Deposits, 43 ICLJ 317.

branch is situated therefore which should govern the deposit regardless of the currency of the deposit. This view appears to be consistent with that expressed in the Giuliano-Lagarde Report which states (admittedly somewhat opaquely) that "in a banking contract the law of the country of the banking establishment with which a transaction is made will normally govern the contract."

B. *Letters of credit.* A letter of credit transaction involves a number of separate contracts. The buyer contracts with his own bank to open the credit. The buyer's bank instructs its correspondent bank to advise and/or confirm the credit to the seller. This gives rise to four separate contracts each of which is (theoretically) capable of having a different governing law. It may be noted that the Uniform Customs and Practice (UCP) which is invariably incorporated into credits[17] does not contain any governing law provisions. The issue has had to be resolved by the courts. Prior to the coming into effect of the Rome Convention, the English courts had held that the contract between the issuing bank and the beneficiary is governed by the law of the place where payment is to be made against documents.[18] In a post- Rome Convention case, it has similarly been held that the focus of performance is the branch of the confirming bank where the documents are to be presented, and that the applicable law governing the issuing/confirming bank contract and the confirming bank/beneficiary contract is that of the country where the branch was situated. The court also expressed the view that this law governed the contract between the *issuing* bank and the beneficiary. The policy ground of maintaining consistency between the contracts involved justified the court in using Article 4(5) of the Convention to ignore the characteristic performance test required by Article 4(2).[19]

C. *Bonds and guarantees.* In a typical bond transaction, the party required to provide the bond (for example a building contractor providing a performance bond in respect of a construction contract) instructs its bank which in turn instructs its correspondent in the beneficiary's country to issue a bond against its own counterguarantee. Again, there are four separate contracts concerned. There is also a close link to the underlying construction contract, since the bond is intended to be callable in the event of failure to perform. In the absence of an express choice of law, one difficult question is how the governing law of the various contracts concerned inter-relate. In one case it was said:

> "Almost every letter of credit or performance bond is issued pursuant to some underlying commercial transaction. Yet we were referred to no case where it had even been argued that one was affected by the proper law of the other. Seeing that the letter of credit or performance bond is intended to be a separate transaction, I would hold it is not so affected, and is ordinarily governed by the law of the place where payment is to be made under it. This is in general accord with the rule applicable to the banker/customer relationship arising from a current or deposit account, which is ordinarily governed by the law of the place where the account is kept."[20]

But the difficulty in equating governing law with the place of payment in the case of a credit

17. The current edition, UCP 500, came into effect on 1 January 1994.
18. *Offshore International SA v Banco Centrale SA*, 1 WLR 399 (1977).
19. *Bank of Baroda v Vysya Bank Limited*, Lloyd's List, 29 Jan 1994.
20. *Attock Cement Co v Romanian Bank*, 1 WLR 1147, CA (1989).

or guarantee is that the place of payment may bear no relation to the transaction concerned. For example, in a dollar denominated transaction payment may be designated to an account in New York. If New York is otherwise unconnected with the transaction, it seems anomalous that its law should govern. In more recent cases concerning the governing law of *counter-guarantees* the inter-relationship of the instruments has been emphasised, it being held that the law of the counter-guarantee should follow that the bond,[21] and this is also the result that may follow under the Rome Convention. Unlike its counterpart, the UCP, the ICC Uniform Rules for Demand Guarantees (April 1992) does contain a governing law and jurisdiction clause. (The rules, of course, only apply if specifically incorporated in the instrument concerned). Article 27 provides:

> "Unless otherwise provided in the Guarantee or Counter-Guarantee, its governing law shall be that of the place of the Guarantor or Instructing Party (as the case may be), or, if the Guarantor or Instructing Party has more than one place of business, that of the branch that issued the Guarantee or Counter Guarantee."

D. *Negotiable instruments.* The Rome Convention does not apply to obligations arising under negotiable instruments to the extent that the obligations arise out of their negotiable character.[22] The English choice of law rules applying to negotiable instruments are partly contained in statutory rules[23] to the effect that formal requirements are governed by the law of the place of issue, and the interpretation of the drawing, endorsement or acceptance is determined by the law of the place where such contract is made. The holder's duties with respect to protest and notice of dishonour are determined by the law of the place where the instrument is dishonoured. These rules seem to be mandatory, and cannot be contracted out of. The better view is that there is no objection to an express choice of law clause which will take effect subject to the mandatory statutory provisions, and Eurobond issues do contain such clauses.[24]

V. *The impact of choice of law*

As the bond issue cases show, governing law can have a decisive impact on a financial transaction. Five factual situations are now briefly considered.

A. *Expropriation.* Financial assets such as bank deposits are, in principle, as vulnerable to expropriation as other forms of property. The United States courts in particular, have had to consider the effect of such expropriations most recently in relation to Cuba[25] and

21. *Turkiye Is Bankasi v Bank of China*, 3 Bank LR 34 (1994); *Wahda Bank v Arab Bank Plc*, 3 Bank LR 70 (1994), (the latter case is at the time of writing under appeal).
22. Art 2(l)(c).
23. Bills of Exchange Act 1882, Section 72; the Act only applies to bills, notes and cheques.
24. See the discussion in Tennekoon, The Law & Regulation of International Finance (London, Butterworths, 1991), 165-9.
25. *Garcia v Chase Manhattan Bank*, 735 F.2d 645 (2d Cir., 1984); *Perez v Chase Manhattan Bank*, 61 N.Y. 2d 460, 463 N.Y.2d 5, 474 N.Y.S.2d 689 (1984).

Vietnam.[26] The ultimate issue in such cases is that generally whether the depositor can require repayment by the bank's head office in New York. Amongst the considerations used by the U.S. courts to determine the issue have been (1) the identification of the situs of the debt concerned and (2) the act of state doctrine by which the acts of a foreign sovereign which come to fruition within that sovereign's territorial control are held to be outside the purview of the American courts. Although in the result the home office has frequently been held liable for the debts of its branches, no generally applicable rule has been established.[27] Situs has been treated as decisive in the English case-law. The leading case arose out of the establishment of the State of Israel in 1948, when under Israeli law a bank deposit held by the plaintiff at the Jerusalem branch of an English bank was vested in the Custodian of the Property of Absentees. The depositor sued the bank in England, but it was held that since the deposit was situated in Israel, it became subject to the legislation of that State and was validly vested in the Custodian.[28]

B. *Moratorium.* Bank debts may, of course, be affected by governmental acts short of expropriation. Again, the U.S. courts have tended to stress the importance of situs on the effect of such acts. In a series of cases, it was eventually held that U.S. bank loans were unaffected by a moratorium imposed by Costa Rica, because the loans were payable in New York and therefore the situs of the debts was outside the territory of the foreign sovereign.[29] The most recent U.S. case concerns the effect of a 1983 Philippine Government restriction on the repayment of foreign currency deposits in the Philippines. The ultimate result of the case[30] was that the depositor could recover in full from the U.S. parent bank. However in the process (the case went all the way to the Supreme Court)[31] what has been described as a "sterile distinction"[32] emerged between the place of payment, being the place where the acts constituting payment are intended to be carried out, and the place of collection being the place where the creditor is entitled to obtain satisfaction in the event of the debtor failing to pay at the place of payment. The case was ultimately decided on the basis that there was no restriction in the party's deposit agreement on the situs of collection. The English courts take what, it is submitted, is a simpler and more satisfactory approach to this sort of problem. A foreign moratorium or similar measure will only effect a debt if (a) the foreign law governs the contract, or (b) performance is required under the contractual terms to be made in the state concerned. The latter is an example of the principle that an English court will not enforce a contract which is illegal in the place where performance is required.[33]

C. *Third party freeze.* The operation of the English principles is neatly illustrated by the

26. *Vishipco Line v Chase Manhattan Bank*, 660 F.2d 854 (2d Cir., 1981); *Trinh v Citibank NA*, 850 F.2d 1164 (6th Cir., 1988).
27. *See* Telanoff, American Parent Bank Liability for Foreign Branch Deposits, 18 Pepp. L. Rev. 561 (1991).
28. *Arab Bank Ltd v Barclays Bank*, (DC0) AC 495, HL (1954).
29. *Libra Bank v Banco Nationale de Costa Rica*, 570 F Supp 870 (SDNY, 1983); *Allied Bank International v Banco Credito Agricola v Cartago*, 757 F.2d 516 (2d Cir., 1985).
30. *Wells Fargo Asia v Citibank*, 936 F.2d 723 (2nd Cir., 1991).
31. *Citibank v Wells Fargo Asia Ltd*, 109 L.Ed.2d 677 (1990).
32. Mann, The Legal Aspect of Money, 5th edn, 220.
33. *Ralli Bros v Companía Naviera Sota y Aznar*, 1 KB 614 (1920). The precise nature of the principle, and the effect of the Rome Convention on it is discussed in Dicey, *supra* note 6, at 1343-47.

litigation caused by economic sanctions unilaterally imposed by the US during the 1980s on Iran and Libya. Presidential decrees froze dollar balances, including those held at foreign branches of U.S. banks. Though the Iranian freeze was ultimately resolved politically, the Libyan freeze was not and in a series of cases, the English courts ruled that the U.S. measures did not affect the depositor's right to repayment in England. The reasoning was that the deposits were governed by English law, so that illegality under U.S. law was irrelevant. As to the place of performance, it was held that though under normal conditions clearance of the balances would have been in New York through CHIPS (the Clearing House Interbank Payments System) there was no term of the contract that *required* payment to be made in New York by this method.[34]

D. *Extra-territorial orders.* The tendency of the U.S. courts to make extra-territorial orders requiring banks to disclose information held outside the U.S. has given rise to jurisdictional clashes in a number of countries. Where the accounts concerned are held in England, the courts have decided that English law rules of confidentiality preclude compliance with the U.S. orders.[35] The banks concerned have frequently found themselves in impossible positions, which the U.S. courts have sought to resolve by requiring "good faith" efforts to comply with the orders concerned.[36]

E. *The fraud exception.* In practice, the rigour of the approach of national laws to prohibiting payment of a letter of credit or bank guarantee varies. English law takes a particularly tough stance, on the basis that bank obligations must be honoured short of "established fraud".[37] Where a law other than English law applies to the instrument concerned, a different and lesser standard may apply.[38]

VI. Law governing third party claims

Choice of law issues in the banking context normally arise as between contracting parties, but it is sometimes necessary to identify the law governing relations with third parties. This was graphically illustrated by litigation following the death of Robert Maxwell, who pledged shares in Berlitz belonging to the New York publishers, Macmillan (then part of the Maxwell Group), to various banks. The pledges were in support of lending to unrelated companies. Following Maxwell's death, Macmillan brought proceedings in the English courts to recover the Berlitz shares. The banks resisted the claim on the basis that they had taken the shares for value in good faith without notice. The shares had passed to the banks through the DTC (Depository Trust Company), the paperless clearing system in New York. The court held[39] that questions of priority between the holders of competing interests in the shares of a corporation depend on the effect of the transfer which created the later interest on the transferor and the persons claiming under him and are governed by the *lex*

34. *Libyan Arab Foreign Bank v Bankers' Trust*, QB 728 (1989); *Libyan Arab Foreign Bank v Manufacturers' Hanover Trust Co (No 2)*, 1 Lloyd's Rep 608 (1989).
35. *X AG v A Bank*, 2 All ER 464 (1983).
36. There are many U.S. cases; *see e.g.*, *Société Internationale v Rogers*, 357 US 197 (1958).
37. *United City Merchants v Royal Bank of Canada*, 1 AC 168, HL (1983).
38. See for example, *Wahda Bank v Arab Bank Plc*, 3 Bank LR 70 (1994).
39. *Macmillan Inc v Bishopsgate Investment Trust*, unreported, 10 Dec. 1993; the decision is under appeal.

loci actus, that is to say the law of the place where the later transfer took place. Where, therefore, the banks relied for the creation of their security on book entries made in the DTC in New York the effect of those entries on Macmillan's prior interest had to be determined by the law of New York. Where the banks had derived title from the deposit of the certificates by way of security in England and that security was later perfected by book entries in New York, the effect of those transactions on Macmillan's prior interest again had to be determined in accordance with the law of New York.[40] Competing claims to intangibles such as shares do, of course, involve special considerations, but in the case of goods and land, third party claims would for practical reasons generally be resolved by the law of the place where the property is situated.[41]

VII. Jurisdiction

Choice of jurisdiction and choice of law are in practice closely allied. Under the common law, the English courts took jurisdiction over a defendant who could be *served* in England (subject to forum non conveniens considerations). The courts exercised powers to serve out of the jurisdiction in respect, for example, of contracts made in England or governed by English law.[42] In most west European countries including England questions as to jurisdiction and the enforcement of judgement in civil and commercial matters are now subject to the 1968 Brussels Convention (applicable to members of the European Union) and the almost identical 1988 Lugano Convention (applicable to EFTA members, *e.g.* Switzerland). The Conventions apply where an action is brought against a defendant domiciled in a Contracting State. The concept of domicile is not defined in the Conventions, but means broadly (as regards an individual) residence in a particular state, and as regards a corporation, the state where it has its seat. The fundamental principle is that persons domiciled in a Contracting State are to be sued in the courts of that State (Article 2). There are a number of exceptions. In matters relating to a contract, a person domiciled in a Contracting State may be sued in the courts for the place of performance of the obligation in question (Article 5(1)). In matters relating to tort, delict or quasi-delict, suit may be brought in the courts for the place where the harmful event occurred (Article 5(3)). And as regards a dispute arising out of the operations of a branch, agency or other establishment, suit may be brought in the courts for the place in which the branch, agency or other establishment is situated (Article 5(5)).[43] There are also provisions applying to co-defendants, including guarantors (Article 6(2)). The philosophy underlying the Conventions is the opposite of the U.S. "long-arm" jurisdiction which sometimes seems to proceed on the assumption that the U.S. courts are uniquely well suited to try disputes - even where the link is tenuous. The

40. New York law was favorable to the banks because it contains a "actual knowledge" test; NY-UCC s-304 (4). On the facts of the case, it was held that the banks would in any event have succeeded under the English law test.
41. *See generally*, Dicey, *supra* note 6, chaps. 22-25.
42. Rules of the Supreme Court, Order 11(l).
43. Though the scope of this provision is in doubt; some case law appears to limit the jurisdiction to cases where performance is to take place in the same state as the branch; *Somafer SA v Saar-Ferngas AG*, Case 33/78 ECR 2183 (1978). This construction appears to be doubtful.

Conventions proceed on the basis that a proper hearing may be obtained in all courts in the Contracting States.

Where the Conventions are applicable, forum non conveniens considerations do not apply; in other words the designated court must take the case. The Conventions are however intended to regulate jurisdiction only as between the Contracting States; the English courts have recently stayed proceedings against an English-domiciled party (which under the Conventions would have had to be sued in England) on the grounds that Argentina was the more appropriate forum for the trial of the issues.[44] Argentina is not, of course a party to the Conventions.

VIII. Choice of jurisdiction clauses

In common with other courts, the English courts give effect to choice of jurisdiction clauses. Where England is the selected forum, it is desirable to provide in the clause for the appointment of an agent to accept service (which otherwise has to be effected according to the rules for service abroad). Jurisdiction clauses are fully recognized under the Brussels and Lugano Conventions which provide in Article 17 that where parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Where such an agreement is concluded by parties none of whom is domiciled in a Contracting State, the courts of other Contracting States have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction. Article 17 also provides that if an agreement conferring jurisdiction was conferred for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction under the Convention rules. Loan agreements sometimes state that the jurisdiction clause is for the benefit only of the lender in order to take advantage of this last provision.

It is common for jurisdiction clauses to be drafted in "non-exclusive" terms, so as not to restrict the lenders' enforcement options, and the precise status of such clauses under the Conventions was in some doubt. In *Kurz v Stella Musical GmbH*[45] it was argued that a non-exclusive submission by an English plaintiff and a German defendant to the jurisdiction of the English courts was not sufficient to confer jurisdiction on the English court over the German defendant because Article 17 contemplated only *exclusive* jurisdiction clauses. The court rejected this argument and held that the non-exclusive choice was valid. The provision in Article 17 that the chosen jurisdiction was to be "exclusive" meant that the choice took effect to the exclusion of the jurisdiction which would otherwise be available under the Convention: but the choice could be of more than one jurisdiction, expressly or impliedly. The choice of English jurisdiction was valid; and it follows from the judgment that the defendant could also have been sued in Germany.[46]

It may be mentioned that arbitration clauses are sometimes substituted for jurisdiction clauses, particularly as regards sovereign debt. However, it is believed the consensus

44. *Re Harrods (Buenos Aires) Ltd*, Ch 72, CA (1992).
45. (1992) Ch 196; and see *Meeth v Glacetal* Case 23/78 ECR 2133 (1978).
46. *See* Dicey & Morris, *supra* note 6, at 431.

amongst lenders remains that arbitration is generally inapt to resolve disputes under loan agreements. Arbitration clauses may have gained popularity in the U.S. because of fear of excessive jury awards; under English procedures juries are not involved in civil litigation.

IX. Sovereign immunity

Along with choice of law and jurisdiction clauses, immunity waivers may be necessary to give full effect to the lenders' rights of action. This subject is outside the scope of the present discussion, though it will be noted that sovereign immunity in the context of international finance was the subject of an important U.S. Supreme Court decision in 1992.[47] It was held that an Argentinian bond issue was a "commercial activity" within the meaning of the Foreign Sovereign Immunities Act, and accordingly not within the immunity from jurisdiction. A similar exception to immunity exists as regards "commercial transactions" under the UK legislation (section 3(1) of the State Immunity Act 1978). There are also important immunities from execution. For example for policy reasons, under the UK legislation, the property of a state's central bank is effectively immune from execution.[48]

47. *Republic of Argentina v Weltover Inc*, 112 S.Ct. 2160 (1992).
48. State Immunity Act 1978, s14(4).